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## Consumer Protection after a Global Financial Crisis

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# ARTICLES

## Consumer Protection After the Global Financial Crisis

EDWARD J. BALLEISEN\* & MELISSA B. JACOBY\*\*

*Like other major events, the Global Financial Crisis generated a large and diffuse body of academic analysis. As part of a broader call for operationalizing the study of crises as policy shocks and resulting responses, which inevitably derail from elegant theories, we examine how regulatory protagonists approached consumer protection after the GFC, guided by six elements that should be considered in any policy shock context. After reviewing the introduction and philosophy of the Bureau of Consumer Financial Protection, created as part of the Dodd–Frank Act of 2010, we consider four examples of how consumer protection unfolded in the crises’ aftermath that have received less attention. Our case studies investigate a common set of queries. We sought to identify the parties who cared sufficiently about a given issue to engage with it and try to shape policy, as well as the evolving nature of the relevant policy agenda. We also looked for key changes in policy, which could be reflected in various forms—whether establishing an entirely new regulatory agency, formulating novel enforcement strategies, or deflecting policy reforms.*

*The first of our case studies focuses on operations of the Federal Trade Commission in the GFC’s aftermath. Although the Dodd–Frank Act shifted some obligations toward the CFPB, we find that the FTC continued to worry about and seek to address fraud against consumers. But it tended to focus on shady practices that arose in response to the GFC rather than those that facilitated it. Our second case study examines the Congressional adoption of a carveout from CFPB authority for auto dealers, which resulted from strong lobbying by car companies worried about a cratering sales environment, and the aftermath of the policy. Here, we observe that this carveout allowed a significant amount of troubling auto lending activity to continue and expand, with potentially systemic consequences. Loan servicer misbehavior, particularly in the form of robo-signing, is the focus of our third case study. Although Dodd–*

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*Frank did not explicitly address robo-signing, the new agency it created, the CFPB, was able to draw on its broad authority to address this newly arising problem. And, because the CFPB had authority over student loan servicers, the agency could pivot relatively quickly from the mortgage context to the student loan context. Our fourth and final case study is the rise and fall of Operation Choke Point, an understandably controversial interagency program, convened by the U.S. Department of Justice, which, with the GFC fresh in mind, attempted to curtail fraudulent activities by cutting off access to online payment mechanisms. Here, we see an anti-fraud effort that was particularly vulnerable to a change in presidential administration and political climate because its designers had invested little effort in building public awareness and support for the program.*

*The Article concludes with an overall assessment and suggestions for other focal points for which our approach would be useful. The examples span a range of other domestic and global policy contexts.*

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#### INTRODUCTION

A full decade has passed since the Global Financial Crisis (GFC) triggered a flood of foreclosures, crushed real estate and stock market valuations, and destroyed a number of leading financial service corporations. Freezing credit flows throughout North America and beyond, the GFC prompted a sharp economic slowdown, with the unemployment rate in the United States ticking up over ten percent.

Crisis events that generate such substantial economic harms and attendant social pain typically prompt wide-ranging policy responses from legislators,

regulators, and other governmental officials. The GFC was no exception. In the parlance of political science, the GFC represents a “focusing event” or a “policy shock,” as described by one of us in a recent volume, along with Lori Benneer, Kim Krawiec, and Jonathan Wiener.<sup>1</sup> Attracting attention from the press, experts, politicians, and voters, a policy shock prompts “policy autopsies,” governmental explanations of what went wrong. Official investigations are undertaken by legislative committees, administrative agencies, interagency task forces, and/or independent commissions of inquiry, supplemented by the work of nongovernmental organizations and academics. Often, such endeavors involve extensive fact-finding and pursue careful analysis; always, they bear the mark of prior beliefs and political calculations.<sup>2</sup> In some cases, policy autopsies lead policymakers to adjust their views about the nature of risks and revise their sense of how to balance conflicting policy goals. In others, decisionmakers perceive the benefits of attempts to prevent future reoccurrences to be outweighed by the costs associated with proposed reforms. Crises, and the policy autopsies they produce, may also generate significant shifts in public opinion and influence stakeholders’ understanding of their longer term interests. All such aftershocks contribute to the nature of post-crisis policy responses.

Few policy responses happen instantaneously. Disentangling the influences on the impact of a given policy shock takes some temporal perspective. Legislative responses may call for administrative rulemaking to flesh out statutory directives, in turn requiring fact-finding, initial policy drafting, public comment, higher level review, and then revision and refinement. Although shifts in enforcement priorities may percolate quickly through government agencies, full implementation of policy innovations often unfolds over months or years. Complicating matters further, new events, including political elections, inevitably reshuffle political and policy calculations.

This Article offers a methodology for studying policy responses following a large-scale crisis, whether financial or otherwise. Such efforts should take account of the following elements:

1. the degree of consensus about crisis causes (narrative construction and uptake);
2. the extent to which key institutions come to view the crisis as requiring fundamental shifts in policy priorities, either because of the perceived magnitude of harms, or adjusted estimations of the probabilities associated with prevailing socio-economic risks;

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1. See generally POLICY SHOCK: RECALIBRATING RISK AND REGULATION AFTER OIL SPILLS, NUCLEAR ACCIDENTS AND FINANCIAL CRISES (Edward J. Balleisen, Lori S. Benneer, Kimberly D. Krawiec & Jonathan B. Wiener eds., 2017) [hereinafter POLICY SHOCK]. To say that crises often generate policy responses by no means suggests that policy shifts must, or even typically, occur because of crisis events.

2. See generally Thomas A. Birkland & Megan K. Warnement, *Focusing Events, Risk, and Regulation*, in POLICY SHOCK, *supra* note 1, at 107–28.

3. the degree to which officials can draw on existing policy proposals that plausibly respond to the concerns raised by the crisis;
4. the degree to which reformers have to grapple with conflicting policy objectives;
5. the capacity of interest groups to flex their political muscles amid post-crisis deliberations; and
6. when sufficient time has passed, the degree to which reforms are short-lived or withstand the test of time.

In this Article, we apply this methodology to aspects of post-GFC American consumer protection policy.<sup>3</sup> In addition to fitting our scholarly interests,<sup>4</sup> consumer protection was a key post-crisis issue that highlights the competing trade-offs and dueling social policies that inevitably characterize regulatory responses to a shock.

In the aftermath of the GFC, policymakers identified deceptive and unfair practices as significant contributors to the eventual instability in the American mortgage market and wider financial markets. But extensive reconfiguration of rules and more stringent enforcement postures did not uniformly follow. This Article explores four case studies of policy responses to the GFC that demonstrate the importance of carefully tracing the policy fallout from any large-scale crisis event. The wide-ranging policy ramifications of the GFC presented no shortage of potential topics to examine. Our analytical framework could be applied to policy problems across institutions, including the legislative process, agency rule-making, and adjustments to both enforcement priorities and strategies that draw on longstanding laws or discretionary pockets of authority.<sup>5</sup>

Our case studies reflect this range of institutional contexts. With respect to agencies, it is natural to select some topics that involve the Consumer Financial Protection Bureau (CFPB), given its central role in post-GFC consumer protection. Accordingly, the Article begins with a brief discussion of the CFPB's creation through the 2010 Dodd–Frank Act, emphasizing how key elements of

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3. Consumer protection includes efforts to combat fraud and misrepresentation. We refer to consumer protection, rather than fraud exclusively, because practices extracting value from consumers, rather than providing a square deal, operate on a spectrum that includes situations in which it would be difficult to substantiate the traditional tort law elements of fraud, but nonetheless have “tricks and traps” elements to them. The term “consumer” signals transactions primarily for personal, family, or household use.

4. See, e.g., EDWARD J. BALLEISEN, *FRAUD: AN AMERICAN HISTORY FROM BARNUM TO MADOFF* (2017); Melissa B. Jacoby, *Dodd-Frank, Regulatory Innovation, and the Safety of Consumer Financial Products*, 15 N.C. BANKING INST. 99 (2011) [hereinafter Jacoby, *Dodd-Frank*]; Melissa B. Jacoby, *The Legal Infrastructure of Ex Post Consumer Debtor Protections*, 38 FORDHAM URB. L.J. 751 (2011); Melissa B. Jacoby, *The Value(s) of Foreclosure Law Reform*, 37 PEPP. L. REV. 511 (2010); Melissa B. Jacoby, *Home Ownership Risk Beyond a Subprime Crisis: The Role of Delinquency Management*, 76 FORDHAM L. REV. 2261 (2008).

5. Our analysis does not, however, seek to predict where in this chain of possible intervention Congress will choose to allocate authority. For a study of that allocation in securities law, including after the GFC, see Usha R. Rodrigues, *Dictation and Delegation in Securities Regulation*, 92 IND. L.J. 435 (2017).

the new agency's design reflected widely shared perceptions of institutional shortcomings—some longstanding, some sharpened by features of the GFC. Because the basic design and early operations of the CFPB have received extensive attention, we focus on less-studied aspects of the CFPB's scope, along with two case studies primarily involving other agencies.

Dodd–Frank and the birth of the CFPB affected the responsibilities of an agency of much longer standing: the Federal Trade Commission (FTC). Thus, another of our case studies focuses on a series of FTC enforcement campaigns in the form of named “operations,” in response to deception. Here, one sees an agency reconfiguring its antifraud priorities, but more with respect to deceptive practices related to the widespread economic distress triggered by the GFC than to the frauds that contributed to the crisis in the first place.

For our CFPB-related case studies, we focus first on the carveout of automobile dealers from the CFPB's jurisdiction and second on robo-signing as it moved from mortgages to student loans. The automobile dealer carveout demonstrates two key themes: the significance of policy trade-offs among competing post-crisis goals, and the capacity of cohesive and highly-connected interest groups to shape post-crisis policymaking. By contrast, our examination of robo-signing shows how regulators can pivot quickly to apply crisis-related lessons to seemingly analogous situations if they are given sufficient running room to do so.

A final case study examines an expansive, economy-wide policy innovation by federal agencies outside the glare of either legislative action or formal rulemaking: Operation Choke Point (OCP), an interagency initiative coordinated by the United States Department of Justice. OCP aimed to deny fraudulent firms and other businesses engaging in illegal activities access to online payment mechanisms, but that ultimately had a farther, and more controversial, reach. One sees here an example of a hyper-aggressive expansion of regulatory power, following regulatory inaction in the run-up to the GFC.

Each case study investigates a standard set of queries. We sought to identify the parties who cared sufficiently about a given issue to engage with it and try to shape policy, as well as the evolving nature of the relevant policy agenda. We also looked for key changes in policy, which could be reflected in various forms—whether establishing an entirely new regulatory agency, formulating novel enforcement strategies, or deflecting policy reforms, as in the example of the auto dealer carveout.

This Article proceeds as follows. Part I situates the more detailed post-GFC policy arenas that we have chosen to examine within the circumstances that led to creation of the CFPB. Part II presents our four case studies, contrasting moments of more modest post-crisis consumer protection efforts with those that demonstrated a greater willingness to flex regulatory muscles. Part III discusses the implications of our analysis for post-GFC consumer protection regulation and identifies directions for additional research.

## I. THE CREATION OF THE CFPB

The creation of the Bureau of Consumer Financial Protection, typically short-handed as the CFPB, reflected widespread perceptions that failures in the market for consumer financial products contributed to the GFC. Congressional architects modeled the CFPB on an existing academic proposal principally developed by now-Senator Elizabeth Warren, who argued that appropriate regulation of consumer financial products and providers depended on the dedicated focus of a new, independent federal agency.<sup>6</sup> A single regulatory body, Warren contended, would curb financial institutions' forum shopping of regulators while allowing for more effective priority-setting and a holistic, cross-sector approach to consumer financial protection.<sup>7</sup>

The CFPB inherited oversight authority over units previously spread between seven separate federal agencies, but also received new powers and responsibilities. By deliberate design, the CFPB took a consolidated, instead of a fragmented and siloed, approach to consumer protection, making it a primary rather than incidental or residual mission as it was for other agencies before the GFC. The regulatory toolbox that Congress allocated to the CFPB was flexible; although the enabling legislation offered some specific product or practice prohibitions, it also relied on discretionary authority to fight against unfair, deceptive, or abusive practices.<sup>8</sup> Alongside rulemaking, marketplace monitoring, and articulation of best practices for firms and education for consumers, Dodd–Frank authorized the CFPB to engage in extensive enforcement efforts independently or together with other federal agencies and state attorneys general.<sup>9</sup> One of the CFPB's first tasks was to define the specific markets over which it had authority, including

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6. See Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY J., Summer 2007, at 16–18. The behavioral economics case for the concept is presented in greater detail in Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008). See also Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TUL. L. REV. 1057, 1060–61 (2016) (tying CFPB's creation to Warren's policy proposal).

7. See Elizabeth Warren, *Redesigning Regulation: A Case Study from the Consumer Credit Market*, reprinted in GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION 391, 392 (Edward J. Balleisen & David A. Moss eds., 2010) (arguing for “a unitary regulatory authority with respect to financial products” to address “the fractured oversight” of the current regulatory regime, which allows for “financial institutions that do not like the regulations imposed by one agency [to] reincorporate under a new charter – and a new regulator”).

8. See Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1021 (b)–(c), 124 Stat. 1376, 1980 (2010) (codified at 12 U.S.C. § 5511 (2012)).

9. See Peterson, *supra* note 6, at 1096, 1106–12 (listing all public law enforcement efforts and finding that most enforcement efforts involved collaboration with other law enforcement officers); see also Memorandum of Understanding between Consumer Fin. Prot. Bureau and the U.S. Dep't of Justice Regarding Fair Lending Coordination (Dec. 6, 2012), [https://files.consumerfinance.gov/f/201212\\_cfpb\\_doj-fair-lending-mou.pdf](https://files.consumerfinance.gov/f/201212_cfpb_doj-fair-lending-mou.pdf); *Consumer Financial Protection Bureau and Justice Department Pledge to Work Together to Protect Consumers from Credit Discrimination*, CONSUMER FIN. PROT. BUREAU (Dec. 6, 2012), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-and-justice-department-pledge-to-work-together-to-protect-consumers-from-credit-discrimination/> [https://perma.cc/Z4BU-WU3S].



consumer credit reporting, the provision of consumer credit, debt collection, pre-paid credit cards, money transfers, debt collection, and debt relief services.<sup>10</sup>

As mentioned above, some distinctive features of the CFPB reflect longstanding critiques leveled at federal regulatory policy, including the weaknesses associated with diffused authority and agency designs predicated on multi-headed leadership structures.<sup>11</sup> Unlike agencies charged with writing many other kinds of rules, the CFPB's rulemaking is not subject to review by the White House Office of Information and Regulatory Affairs, although it does face scrutiny under the Small Business Regulatory Enforcement Fairness Act.<sup>12</sup> To reduce administrative bottlenecks and promote forceful decisionmaking on behalf of consumers, Congress designed the CFPB on a single-director model, with funding independent of congressional appropriations, by establishing it within the Federal Reserve System but mostly shielding it from the control of the Federal Reserve's Board of Governors.<sup>13</sup> These features reflect legislative efforts to prevent regulatory capture, foster the development of internal expertise, and ensure decisiveness.<sup>14</sup>

These design elements also aligned closely with perceptions of the specific failings of pre-GFC oversight and enforcement of consumer protection. To the advocacy coalition that favored creating the CFPB, including consumer, labor union, and civil rights groups and academics, the GFC underscored the shortcomings of fragmented regulatory authority and excessive influence of the financial sector. On this theory, an independent agency with a clear and cohesive mission was the ideal model to adopt and then enforce sensible standards around such issues as loan disclosure requirements, contractual defaults, and avenues for consumer complaints.<sup>15</sup> This point of view went hand-in-hand with attempts to "reinvigorate[] state consumer protection efforts by rejecting broad preemption arguments that regulators like the Office of the Comptroller of the Currency have asserted in the past."<sup>16</sup>

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10. See Defining Larger Participants in Certain Consumer Financial Product and Service Markets, 77 Fed. Reg. 9592 (proposed Feb. 17, 2012) (to be codified at 12 C.F.R. pt. 1090).

11. See *supra* notes 6–7 and accompanying text.

12. See *CFPB SBREFA Panels*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/category/advocacy-navigation-structure/cfpb-sbrefa-panels> [<https://perma.cc/5HPB-MN4R>] (last visited Feb. 27, 2019) (noting that under the Act, the CFPB must conduct a Small Business Advocacy Review panel). A supermajority of the Financial Stability Oversight Council, also established in Dodd–Frank, can set aside a CFPB rule, but only under circumscribed conditions relating to “the safety and soundness of the United States banking system” or “the stability of the financial system.” See 12 U.S.C. § 5513(c)(3)(B).

13. See § 5491(a).

14. See, e.g., Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 72–77 (2010) (describing goals underlying the CFPB's creation and the “compromise” it struck between two competing views).

15. See Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 25, 35–43 (2012) (discussing Bureau's independence and justifications thereof).

16. Jacoby, *Dodd-Frank*, *supra* note 4, at 106.



## II. CASE STUDIES

The case studies we explore in this Part took place in the shadow of Congress's post-GFC determination, explained in Part I, that the CFPB should be a vigorous, independent consumer financial protection watchdog. We begin with the impact of that development on the FTC. After almost a century of sole responsibility for policing deceptive practices in interstate commerce, the FTC had to share that authority with a new agency. We then turn to two significant issues that helped to define the CFPB's regulatory scope: first, a legislative carveout that insulated the country's largest durable goods market—automobiles—from CFPB oversight; and second, the CFPB's willingness to respond robustly to the issues posed by robo-signing, first in home mortgages—ground zero for the GFC—and then in student loans. Our fourth case study examines an interagency enforcement campaign, Operation Choke Point, which pressed the limits of legitimate regulatory authority in the hopes of constraining the sort of predatory behavior in online commerce that had occurred in the pre-GFC mortgage markets.

### A. FTC'S ANTI-DECEPTION OPERATIONS

The FTC's antifraud responses to the GFC mostly involved its basic enforcement powers over deceptive marketing, which it has possessed since its inception in 1913. Although much has been made of the FTC's loss of responsibilities under the Dodd-Frank Act, the FTC retained significant authority: monitoring interstate advertising and other marketing practices; administrative rulemaking of unfair or deceptive marketing in specific industries;<sup>17</sup> and investigating allegations of deceptive marketing and bringing enforcement actions, which could lead to cease and desist orders, fines, and disgorgement orders.<sup>18</sup> Over the last quarter-century, moreover, the FTC has deepened its links with other federal agencies and state attorneys general. Since 1997, FTC enforcement staff has compiled consumer fraud-related complaints into a national database available to federal, state, and local authorities, known as the Consumer Sentinel Network (CSN).<sup>19</sup> The CSN made it possible to identify patterns in the complaint data for use in shaping enforcement priorities, often in conjunction with other agencies.<sup>20</sup> Beginning in the mid-1990s, the FTC has periodically dubbed specific antifraud sweeps as "Operations," each tagged with a code name conveying its subject matter.<sup>21</sup>

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17. Congress delegated this power to the FTC in 1975. See FED. TRADE COMM'N, OPERATING MANUAL, ch. 7.2.2, <https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch07rulemaking.pdf>.

18. *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FED. TRADE COMM'N (July 2008), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [<https://perma.cc/RYU3-KDJE>].

19. See *Consumer Sentinel Network*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/consumer-sentinel-network> [<https://perma.cc/QYJ4-97BK>] (last visited Mar. 9, 2019).

20. See *id.* (describing the basic purpose and functionality of the CSN).

21. See, e.g., *infra* notes 24–25, 32–34 and accompanying text (providing examples of subject matter code names).

With this background in mind, we apply our framework to fraud-related operations of the FTC. Since 2008, the FTC has participated in or led at least seven fraud-related campaigns, framed in press releases as responses to the financial crisis.<sup>22</sup> Only one, however—Operation Stolen Dreams, spearheaded by the FBI to address the fraudulent origination of mortgages—related to events that *precipitated* the crisis.<sup>23</sup> The other six, explained below, represented efforts to curb deception of individuals in financial distress, often due to secondary impacts of the GFC, including four campaigns aimed at schemes falsely promising job placements or self-employment opportunities.<sup>24</sup> The other two focused on offers to help distressed homeowners, usually by dangling phony promises to assist in foreclosure forbearance negotiations or to refinance mortgages for lower interest rates and monthly payments.<sup>25</sup>

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22. See, e.g., Press Release, Fed. Trade Comm'n, FTC and Federal, State and Local Law Enforcement Partners Announce Nationwide Crackdown Against Abusive Debt Collectors (Nov. 4, 2015), <https://www.ftc.gov/news-events/press-releases/2015/11/ftc-federal-state-local-law-enforcement-partners-announce> [<https://perma.cc/R2ZC-R3CC>]; see also Lesley Fair, *Operation Collection Protection Puts the Heat on Illegal Debt Collection Tactics*, FED. TRADE COMM'N (Nov. 4, 2015, 12:45 PM), <https://www.ftc.gov/news-events/blogs/business-blog/2015/11/operation-collection-protection-puts-heat-illegal-debt> [<https://perma.cc/27Q8-HEZR>].

23. See Press Release, Dep't of Justice, Financial Fraud Enforcement Task Force Announces Results of Broadest Mortgage Fraud Sweep in History (June 17, 2010), <https://www.justice.gov/opa/pr/financial-fraud-enforcement-task-force-announces-results-broadest-mortgage-fraud-sweep> [<https://perma.cc/Z6QP-UA36>].

24. Those four campaigns were Operation Short Change (2009), Operation Empty Promises (2011), Operation Bottom Dollar (2012), and Operation Lost Opportunity (2012).

For more on Operation Short Change, see Press Release, Fed. Trade Comm'n, FTC Cracks Down on Scammers Trying to Take Advantage of the Economic Downturn (July 1, 2009), <https://www.ftc.gov/news-events/press-releases/2009/07/ftc-cracks-down-scammers-trying-take-advantage-economic-downturn> [<https://perma.cc/CP66-Y3FW>]; see also *FTC Goes After Recession Scammers with Operation Short Change*, CONSUMER REPORTS (July 16, 2009, 9:42 AM), <https://www.consumerreports.org/cro/news/2009/07/ftc-goes-after-recession-scammers-with-operation-short-change/index.htm> [<https://perma.cc/7HDT-MYKH>]; Jennifer Kerr & Associated Press Writer, 'Operation Short Change' Cracks Down on Scammers, ABC NEWS, <http://abcnews.go.com/Business/story?id=7979894&page=1> [<https://perma.cc/VM6K-Z5QY>] (last visited Mar. 8, 2019).

For more on Operation Empty Promises, see Press Release, Fed. Trade Comm'n, FTC Steps Up Efforts Against Scams that Target Financially-Strapped Consumers (Mar. 2, 2011), <https://www.ftc.gov/news-events/press-releases/2011/03/ftc-steps-efforts-against-scams-target-financially-strapped> [<https://perma.cc/C8DR-CDUQ>]; FTC videos, *Operation Empty Promises: Job and Business Opportunity Scams*, YOUTUBE (Mar. 2, 2011), <https://www.youtube.com/watch?v=r15Ur9e-FxA&feature=youtu.be> [<https://perma.cc/C6PR-GYGK>].

For more on Operation Bottom Dollar, see Press Release, Fed. Trade Comm'n, FTC Cracks Down on Con Artists who Target Jobless Americans (Feb. 17, 2010), <https://www.ftc.gov/news-events/press-releases/2010/02/ftc-cracks-down-con-artists-who-target-jobless-americans> [<https://perma.cc/AB74-NVDP>]; E4 Health, *Bottom Dollar Job Scams*, VIMEO (2015), <https://vimeo.com/146441935> [<https://perma.cc/8W2F-5GYF>].

For more on Operation Lost Opportunity, see Press Release, Fed. Trade Comm'n, FTC Expands Fight Against Deceptive Business Opportunity Schemes (Nov. 15, 2012) [hereinafter Press Release, Fed. Trade Comm'n, FTC Expands Fight], <https://www.ftc.gov/news-events/press-releases/2012/11/ftc-expands-fight-against-deceptive-business-opportunity-schemes> [<https://perma.cc/B5SF-29H6>].

25. Those two campaigns were Operation Stolen Hope (2009) and Operation Mis-Modification (2014).

Two of these enforcement campaigns related specifically to FTC rulemaking. Operation Lost Opportunity sought to give practical effect to a 2011 update to the FTC's Business Opportunity Rule, which mandated a one-page disclosure a full week before the signing of any contract related to a self-employment scheme.<sup>26</sup> Operation Mis-Modification aimed to enforce an entirely new 2011 FTC regulation, the Mortgage Assistance Relief Services (MARS) Rule, which more sharply defined the responsibilities of mortgage brokers, real estate agencies, and other firms when they offered "help" to heavily-indebted homeowners.<sup>27</sup>

The mix of institutional participants varied across the seven enforcement operations. Almost all involved the U.S. Post Office Inspection Service, which had developed expertise in fraud investigations in previous decades.<sup>28</sup> U.S. Department of Justice prosecutors and state attorneys general were also frequent partners. One campaign, Operation Mis-Modification, was undertaken in conjunction with the new CFPB.<sup>29</sup> In most instances, to complement administrative enforcement proceedings and criminal prosecutions, the FTC developed new public education campaigns, increasingly through social media channels and online resources.<sup>30</sup>

Evaluating the full set of consequences of these antifraud efforts would require assessing the deterrent effects of enforcement and the degree to which consumers have learned important lessons from educational campaigns, each of which present significant evidentiary challenges. The vast majority of news coverage related to FTC anti-consumer fraud undertakings simply summarizes information

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For more on Operation Stolen Hope, see Press Release, Fed. Trade Comm'n, Federal and State Agencies Target Mortgage Relief Scams (Nov. 24, 2009), <https://www.ftc.gov/news-events/press-releases/2009/11/federal-state-agencies-target-mortgage-relief-scams> [<https://perma.cc/3FFN-SLYU>].

Operation Mis-Modification was the combined effort of the CFPB, fifteen state attorneys general, and other state agencies that resulted in charges against three mortgage relief operations and thirty-two similar actions. See Press Release, Fed. Trade Comm'n, Federal and State Agencies Stop Phony Mortgage Relief Schemes (July 23, 2014) [hereinafter Press Release, Fed. Trade Comm'n, Federal and State Agencies Stop], <https://www.ftc.gov/news-events/press-releases/2014/07/federal-state-agencies-stop-phony-mortgage-relief-schemes> [<https://perma.cc/QYH9-9T7F>].

26. See Press Release, Fed. Trade Comm'n, FTC Expands Fight, *supra* note 24.

27. See Press Release, Fed. Trade Comm'n, Federal and State Agencies Stop, *supra* note 25. Under the MARS Rule, covered businesses are prohibited from charging advanced fees, advising clients to cease communication with their lenders, and making misleading claims in marketing or advice tailored to individuals. See FED. TRADE COMM'N, THE MORTGAGE ASSISTANCE RELIEF SERVICES RULE: A COMPLIANCE GUIDE FOR BUSINESS (2011), <https://www.ftc.gov/system/files/documents/plain-language/bus76-mortgage-assistance-relief-services-rule.pdf>. In addition, covered businesses are required to make certain disclosures, including a clear indication of all fees, a declaration that they are not connected to any government program, a comparison of the full financial implications of any proposed new loan as compared to current mortgage obligations, a specification of the consequences of a failure to make monthly mortgage payments, and a note that clients have the capacity to walk away. See *id.* Finally, businesses must also keep records of advertising and client communications. See *id.*

28. See BALLEISEN, *supra* note 4, at 271–75.

29. See *supra* note 25.

30. See Press Release, Fed. Trade Comm'n, FTC Chairman Issues Commissions 2011 Annual Report (Apr. 1, 2011), <https://www.ftc.gov/news-events/press-releases/2011/04/ftc-chairman-issues-commissions-2011-annual-report> [<https://perma.cc/5J6R-BMU4>] (describing FTC education efforts, including on social media and other Internet platforms).

provided in FTC news releases—in some instances, only one news release occurred for a given sweep—rather than in-depth journalistic reporting. As such, it is not obvious whether a given campaign reflected strategic deployment of scarce investigative and prosecutorial resources, or a summing up of enforcement actions that had a similar character.

As noted, almost all of the FTC's post-GFC operations focused on secondary impacts of the financial crisis. The collapse in home values and steep rise in unemployment and underemployment expanded the number of individuals vulnerable to classic advance-fee scams promising loan relief, business opportunities, or employment. The FTC's enforcement campaigns, as well as its forays into rulemaking, were triggered by increased consumer complaints resulting from the post-crisis climate for profiting from socio-economic distress.<sup>31</sup> Since 2014, the FTC's enforcement priorities have shifted in line with dominant consumer complaints, targeting duplicitous marketing of automobile loans,<sup>32</sup> student loan relief,<sup>33</sup> and computer security protection services.<sup>34</sup>

The shock of the GFC, then, redirected FTC actions without significant expansion of statutory authority. The FTC took on a more aggressive enforcement posture, while deepening its long-developing engagement with companion antifraud agencies at the federal, state, and local levels. At the same time, its antifraud efforts, as reflected in enforcement operations, were overall less proactive and more reactive than those of the new, post-GFC consumer watchdog in

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31. Indeed, one FTC Commissioner explicitly connected the agency's increased "consumer protection efforts" to "fall-out from the financial crisis," while another described herself as "particularly interested in ensuring that the Commission addresses scams designed to take advantage of consumers' economic insecurity." FED. TRADE COMM'N, *THE FTC IN 2010*, at 8, 27 (2010).

32. See, e.g., Press Release, Fed. Trade Comm'n, FTC, Multiple Law Enforcement Partners Announce Crackdown on Deception, Fraud in Auto Sales, Financing and Leasing (Mar. 26, 2015), <https://www.ftc.gov/news-events/press-releases/2015/03/ftc-multiple-law-enforcement-partners-announce-crackdown> [https://perma.cc/82XS-UDCW] (providing an example of FTC enforcement of Operation Ruse Control (2015)); see also Lesley Fair, *Operation Ruse Control: 6 Tips If Cars Are Up Your Alley*, FED. TRADE COMM'N: BUS. BLOG (Mar. 26, 2015, 11:00 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2015/03/operation-ruse-control-6-tips-if-cars-are-your-alley> [https://perma.cc/24UF-2XTK] (same); Jim Henry, *FTC "Operation Ruse Control" Strikes Again at Fine Print in Auto Ads*, FORBES (June 30, 2015, 10:19 PM), <https://www.forbes.com/sites/jimhenry/2015/06/30/ftc-operation-ruse-control-strikes-again-at-fine-print-in-auto-ads/#1468dbe516f4> [https://perma.cc/B3A3-9WLM] (same); Colleen Tressler, *Operation Ruse Control*, FED. TRADE COMM'N: CONSUMER INFO. (Mar. 26, 2015), <https://www.consumer.ftc.gov/blog/2015/03/operation-ruse-control> [https://perma.cc/4Q5M-89MP] (same).

33. See, e.g., Press Release, Fed. Trade Comm'n, FTC, State Law Enforcement Partners Announce Nationwide Crackdown on Student Loan Debt Relief Scams (Oct. 13, 2017), <https://www.ftc.gov/news-events/press-releases/2017/10/ftc-state-law-enforcement-partners-announce-nationwide-crackdown>, [https://perma.cc/S5JG-6KAJ] (describing an example of FTC enforcement of Operation Game of Loans (2017)); see also Ari Lazarus, *Got Student Loan Debt? Don't Be Scammed*, FED. TRADE COMM'N: CONSUMER INFO. (Oct. 13, 2017), <https://www.consumer.ftc.gov/blog/2017/10/got-student-loan-debt-dont-be-scammed> [https://perma.cc/B7FS-VKKH] (same).

34. See, e.g., Lesley Fair, *Operation Tech Trap Targets Tech Support Scams – and Offers Insights for Business*, FED. TRADE COMM'N: BUS. BLOG (May 12, 2017, 12:43 PM), <https://www.ftc.gov/news-events/blogs/business-blog/2017/05/operation-tech-trap-targets-tech-support-scams-offers> [https://perma.cc/W3GR-JB24] (exemplifying FTC enforcement of Operation Tech Trap (2017)).

Washington, D.C.—the CFPB. Although the FTC characterized its efforts as prompted by the GFC, the agency consistently stressed the need to respond to the socioeconomic harms unleashed by that event, not an imperative to act based on an analysis of what caused it.

#### B. AUTOMOBILE DEALER CARVEOUT

The first of our two case studies involving the CFPB considers a post-GFC regulatory path *not* taken in legislative politics. As Part I suggested, Congress designed the CFPB in accordance with a distinctive vision of maximizing consumer protection while minimizing regulatory capture and other roadblocks experienced by other agencies. However, there is a significant gap in the CFPB's authority: it "may not exercise any rulemaking, supervisory, enforcement or any other authority" over automobile dealers that are "predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both."<sup>35</sup> This carveout thus insulates car dealers from the reach of the federal agency created to address practices found in a variety of consumer loan contexts, including the credit sale of automobiles.<sup>36</sup>

The carveout might not be significant if car dealers had little to do with the financing of purchases. Dealers often originate the loans to buy the cars they are selling, however.<sup>37</sup> Even when car dealers sell loans to third-party financial institutions shortly after origination, financing is the most profitable attribute of the car dealership business, more so than sales of cars, parts, or service.<sup>38</sup> Although

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35. Dodd–Frank Act § 1029(a), 12 U.S.C. § 5519(a) (2012); Susan Block-Lieb & Edward J. Janger, *Reforming Regulation in the Markets for Home Loans*, 38 *FORDHAM URB. L.J.* 681, 704–05 (2011). The carveout itself contains a carveout for dealers that routinely engage in "buy here, pay here" financing. See 12 U.S.C. § 5519(b)(2)(B). "Buy Here, Pay Here" dealers, which offer older used cars to subprime borrowers, "typically make, hold, and service *all* of the loans they finance in-house." *On Predatory Practices in Subprime Auto Lending: Hearing Before the N.Y. S. Banks Comm.*, 2015 Leg., 201st Sess. 6 (N.Y. 2015) [hereinafter Stifler Testimony] (statement of Lisa Stifler, Policy Counsel, Center for Responsible Lending) (emphasis added).

36. In 2013, the CFPB issued a guidance document explaining how it would address discrimination against non-dealer lenders that acquire the loans. CONSUMER FIN. PROT. BUREAU, CFPB BULL. NO. 2013-02, *INDIRECT AUTO LENDING AND COMPLIANCE WITH THE EQUAL CREDIT OPPORTUNITY ACT* (2013); see Press Release, CFPB to Hold Auto Lenders Accountable for Illegal Discriminatory Markup (Mar. 21, 2013), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-to-hold-auto-lenders-accountable-for-illegal-discriminatory-markup/> [<https://perma.cc/R822-295A>]. *But see* S.J. Res. 57, 115th Cong. (2018) (invalidating CFPB's 2013 indirect lending guidance under Congressional Review Act).

37. See DELVIN DAVIS, *CTR. FOR RESPONSIBLE LENDING, NON-NEGOTIABLE: NEGOTIATION DOESN'T HELP AFRICAN-AMERICANS AND LATINOS ON DEALER-FINANCED CAR LOANS* 9 (2014), <http://www.responsiblelending.org/other-consumer-loans/auto-financing/research-analysis/CRL-Auto-Non-Neg-Report.pdf> (relaying that approximately fifty-six percent of car buyers who use financing to buy a car execute a retail financing contract with a car dealer); see also Arthur Delaney & Ryan Grim, *How Congress Gave Auto Dealers a Pass*, *HUFFINGTON POST* (July 23, 2014, 2:15 PM), [https://www.huffingtonpost.com/2014/07/23/car-sales-subprime\\_n\\_5614047.html](https://www.huffingtonpost.com/2014/07/23/car-sales-subprime_n_5614047.html) [<https://perma.cc/S2UP-2K82>] (quoting observation of lawyer for Center for Responsible Lending that lenders and dealers are "inextricably linked in the auto finance world").

38. See Christopher Kukla, Exec. Vice President, Ctr. for Responsible Lending, *Overview: Emerging Issues and Trends in Auto Lending*, Presentation at the 27th Annual Festival of Legal Learning



not representative of all auto dealers in the United States, common forms of deception practiced by less reputable dealers include interest rate mark-ups and “loan packing.”<sup>39</sup> The exclusion of dealers from the CFPB’s jurisdiction thus constitutes more of a regulatory crater than a modest carveout.<sup>40</sup>

How did this exclusion find its way into the Dodd–Frank Act? The legislative maneuver was led by Representative John Campbell (owner of car dealerships prior to joining Congress) who proposed an amendment to the House bill in the House Financial Services Committee.<sup>41</sup> Once it became clear that the amendment would pass, some committee members quickly sought to switch their votes to support the carveout.<sup>42</sup> Congressman Mel Watt later proposed, but then

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Sponsored by UNC School of Law 4–5 (Feb. 11, 2017) (on file with author) (citing 2015 data from the National Automobile Dealers Association indicating that “41.9% of dealership gross profit came from [finance and insurance]”). Dealers are also central to the “yo-yo sale,” described by the FTC as “using deception or other unlawful pressure tactics to coerce consumers who have signed contracts and driven off the dealership lots into accepting a different deal,” such as a higher interest rate on financing. Press Release, Fed. Trade Comm’n, FTC Charges Los Angeles-Based Sage Auto Group with Using Deceptive and Unfair Sales and Financing Tactics (Sept. 29, 2016), <https://www.ftc.gov/news-events/press-releases/2016/09/ftc-charges-los-angeles-based-sage-auto-group-using-deceptive> [<https://perma.cc/7GWV-5P6P>].

39. *Consumer Protection in the Used and Subprime Car Market: Hearing Before the H. Subcomm. on Commerce, Trade & Consumer Protection*, 111th Cong. (2009) (statement of John W. Van Alst, Staff Att’y, National Consumer Law Center). Loan packing involves the addition of warranties, upgrades, and the like, often bundled and marketed in terms of overall monthly payments rather than their impact on the cost of the car. See Stifler Testimony, *supra* note 35, at 5. According to data from the Center for Responsible Lending, African-American car buyers are disproportionately likely to have packed loans. See Kukla, *supra* note 38, at 9.

40. The FTC retains some authority over the practices of car dealers. See Press Release, Fed. Trade Comm’n, FTC Announces Sweep Against 10 Auto Dealers (Jan. 9, 2014), <https://www.ftc.gov/news-events/press-releases/2014/01/ftc-announces-sweep-against-10-auto-dealers> [<https://perma.cc/498R-SZ6P>] (detailing “Operation Steer Clear,” FTC’s latest sweep against ten auto dealers and settlements with dealerships in California, Georgia, Illinois, North Carolina, Michigan, and Texas); see also *FTC Approves Final Consent Orders Involving Auto Dealers’ Deceptive Ads*, N.C. CONSUMERS COUNCIL (May 6, 2014), <https://www.nconsumer.org/news-articles/ftc-approves-final-consent-orders-involving-auto-dealers-deceptive-ads.html> [<https://perma.cc/EZU7-5ZWA>] (same); *Soldiers as Consumers: Predatory and Unfair Business Practices Harming the Military Community: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 113th Cong. 35–41 (2013) (statement of Charles A. Harwood, Deputy Director, Bureau of Consumer Protection, Federal Trade Commission) (reporting various efforts to protect service members from auto-dealer practices targeting them). In addition, in 2015, the DOJ announced the settlement of its “first-ever” discrimination lawsuit against a “Buy Here, Pay Here” dealership after the dispute survived a motion to dismiss. See Press Release, U.S. Dep’t of Justice, U.S. Justice Department and North Carolina Attorney General Reach Settlement to Resolve Allegations of Auto Lending Discrimination by “Buy Here, Pay Here” Used-Car Dealerships (Feb. 10, 2015), <https://www.justice.gov/opa/pr/us-justice-department-and-north-carolina-attorney-general-reach-settlement-resolve> [<https://perma.cc/F2KW-4WQY>].

41. See Delaney & Grim, *supra* note 37. There is no amendment number because this exemption was added with the initial passing of the Act in committee.

42. See House Fin. Servs. Comm., *Financial Services Legislation Markup*, C-SPAN, at 40:10–41:15 (Oct. 22, 2009), <https://www.c-span.org/video/?289596-1/financial-services-legislation-markup&start=2413> [<https://perma.cc/3QE4-JZEK?type=image>].

withdrew, an amendment to limit the exemption.<sup>43</sup> The bill containing the carve-out passed in the House on December 11, 2009.<sup>44</sup>

Senator Chris Dodd introduced a companion bill in April 2010.<sup>45</sup> It passed in May.<sup>46</sup> That bill did not contain the auto dealer carveout, creating the need to resolve the matter in conference committee. Without much discussion, the Senate voted in favor of submitting an instruction to senators on the conference committee to accept the House bill's car-dealer carveout.<sup>47</sup> The exception thus made it into the legislation that President Obama signed in July 2010.

Two associations of automobile dealers took the lead in securing and then protecting the carveout throughout this process. One was the National Auto Dealers Association (NADA). After the Senate instructed retention of the Campbell Amendment in the conference committee, an industry trade journal described the outcome as reflecting "a hard-fought victory for NADA over a powerful coalition that included President Barack Obama, the Pentagon, senior Democratic lawmakers, military families, consumer advocates and civil-rights activists."<sup>48</sup> The National Independent Automobile Dealers Association (NIADA), an industry group representing about 20,000 used car vendors throughout the United States, also prioritized the carveout, with much of the work undertaken by the lobbying

43. See 155 CONG. REC. 31,364–65 (2009) (statement of Rep. Watt). Under this amendment, the dealer exemption would not have applied to:

- (A) any motor vehicle dealer to the extent that such motor vehicle dealer engages in any financial activity other than extending credit or leasing exclusively for the purpose of enabling a consumer to purchase, lease, rent, repair, refurbish, maintain, or service a motor vehicle from that motor vehicle dealer; or
- (B) any credit transaction involving a person who operates a line of business that involves the extension of retail credit or retail leases involving motor vehicles, and in which—
  - (i) the extension of retail credit or retail leases is provided directly to consumers; and
  - (ii) the contracts governing such extensions of retail credit or retail leases are not assigned to a third party finance or leasing source, except on a de minimis basis.

*Id.* For competing theories about the rationale for Watt's withdrawal, see Susan Crabtree & Bob Cusack, *Office of Congressional Ethics Focuses on Auto Amendment Offered by Rep. Watt*, HILL (June 16, 2010, 12:41 AM), <https://thehill.com/homenews/house/103449-ethics-office-focuses-on-watts-auto-amendment> [<https://perma.cc/H4QZ-9P26>].

44. Dodd–Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2009) (introduced by Rep. Barney Frank).

45. S. REP. NO. 111-176 (2010).

46. 156 CONG. REC. S4078 (daily ed. May 20, 2010); see Block-Lieb & Janger, *supra* note 35, at 695–97 (providing overall legislative history of the Dodd Bill, including distinctions between the initial Frank bill and the initial Dodd bill).

47. The vote was 60–30. 156 CONG. REC. S4138 (daily ed. May 24, 2010); see Letter from Sante Esposito & Michael Esposito, Fed. Advocates, Inc., to Mike Linn & Keith Whann, Nat'l Indep. Auto Dealers Ass'n (May 28, 2010), <http://www.niada.com/PDFs/Information/Legislative/FederalAdvocateReports/2010/May2010.pdf>.

48. Neil Roland, *Dealers Exempted from More Oversight as Finance-Reform Deal Is Reached*, AUTO. NEWS (June 25, 2010, 5:02 PM), <http://www.autonews.com/apps/pbcs.dll/article?AID=/20100625/RETAIL07/100629912/1128> [<https://perma.cc/M38V-3U5KJ>].



firm Federal Advocates.<sup>49</sup> A Federal Advocates update from October 2009 highlighted its efforts from just that month:

- Met with Congressional staff to key swing vote members to educate them on the bill and its effects on the Auto Industry and NIADA members in particular
- Reached out to all [House Financial Services] Committee members['] offices and key staff to alert them to the upcoming vote and NIADA's position
- Worked with NIADA staff and consultants to develop an ongoing approach to [Dodd–Frank]
- Identified Democratic members that should be targeted for calls by NIADA members
- Worked with staff members from Rep. Adler and Rep. Kosmas' office to secure their vote for the amendment.<sup>50</sup>

Barney Frank, Chair of the House Financial Services Committee, recognized the political power of car dealer trade groups, noting that “[t]he local auto dealers are very popular in their districts.”<sup>51</sup> Car dealers have characterized themselves as “pillar[s] of the community, an important donor to the town’s nonprofits, and the archetypical family business.”<sup>52</sup> Although another trade group, the National Association of Minority Auto Dealers (NAMAD), expressed support for CFPB initiatives to enforce anti-discrimination law in car sales and lending much later,<sup>53</sup> NAMAD was typically aligned with NADA on CFPB issues during the development of Dodd–Frank. In that time window, NAMAD focused its

49. Federal Advocates provided monthly legislative updates to NIADA from 2009 to 2010 detailing its lobbying efforts. See *Legislative Archive*, NAT’L INDEP. AUTO. DEALERS ASS’N, [https://www.niada.com/legislative\\_archive.php](https://www.niada.com/legislative_archive.php) [<https://perma.cc/3AJF-SBQS>] (last visited Mar. 9, 2019). Federal Advocates received about \$100,000 from NIADA in 2009–2010. *Lobbying Database*, OPEN SECRETS, <https://www.opensecrets.org/lobby/index.php> [<https://perma.cc/4JNN-ZNY8>] (select “Search database by lobbying firm” and then search for “Federal Advocates”; then follow the “Federal Advocates” link; then select 2009 and then 2010 from the “Year” drop-down menu).

50. Letter from Fed. Advocates to Mike Linn & Keith Whann on October 2009 Monthly Report (Oct. 27, 2009), <https://www.niada.com/PDFs/Information/Legislative/FederalAdvocateReports/2009/Oct2009.pdf>.

51. Ryan Grim & Arthur Delaney, *The Cash Committee: How Wall Street Wins on the Hill*, HUFFINGTON POST (July 11, 2013), [https://www.huffingtonpost.com/2009/12/29/the-cash-committee-how-wa\\_n\\_402373.html](https://www.huffingtonpost.com/2009/12/29/the-cash-committee-how-wa_n_402373.html) [<https://perma.cc/6SL8-AV9V>]; see also *Auto Dealers Near Financial Reform Exemption*, CBS NEWS (June 23, 2010, 11:30 AM), <https://www.cbsnews.com/news/auto-dealers-near-financial-reform-exemption/> [<https://perma.cc/X3M4-AKEV>] (“[T]he political clout of 18,000 auto dealers scattered nationwide was too much even for President Barack Obama.”).

52. See Francine Lafontaine & Fiona Scott Morton, *State Franchise Laws, Dealer Terminations, and the Auto Crisis*, 24 J. ECON. PERSP. 233, 241 (2010).

53. See Letter from Damon Lester, President of Nat’l Ass’n of Minority Auto. Dealers, to Hon. Maxine Waters (Apr. 23, 2018) (writing that Congressional override of CFPB’s indirect lending guidance “will set a horrible precedent, sending a message that our government is not supportive of diversity, nor willing to take action that will prevent conscious and unconscious bias”).

advocacy (although without significant lobbying expenditures) on ensuring that manufacturer winnowing of dealerships did not disproportionately affect minority-owned businesses and those seeking financial assistance.<sup>54</sup>

Consumer protection and civil rights advocates mobilized in favor of the establishment of the CFPB after the financial crisis, and also opposed the auto dealer carveout. For example, the Center for Responsible Lending took a leading role in these debates,<sup>55</sup> joined by the Consumer Federation of America.<sup>56</sup> Several dozen partner organizations signed onto letters asking Congress “to ensure that *all activities* of auto dealers related to the financing of cars are fully included under the jurisdiction of the Consumer Financial Protection Agency.”<sup>57</sup> Supporters of a standalone consumer protection bureau did not want to sacrifice the proposed agency over a standoff on auto dealers, however. Tradeoffs were inevitable—the

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54. See *Ramifications of Auto Industry Bankruptcies: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 14–15 (2009) (statement of Damon Lester, President, National Association of Minority Automobile Dealers). Many minority dealerships folded or were at risk of folding in 2009, and NAMAD’s focus at that time seems to have been stemming that tide. NAMAD lobbied for federal financial assistance for small minority-owned dealerships through direct lending from the Small Business Administration, drawing on practices from the 1979 Chrysler intervention. See Avis Thomas-Lester, *How Damon Lester Is Leveling the Auto Dealer Playing Field*, EBONY (Aug. 12, 2016), <http://www.ebony.com/career-finance/damon-lester-namad> [<https://perma.cc/Y4ZK-QPML>].

55. See *Regulatory Restructuring: Enhancing Consumer Financial Products Regulation: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 94 (2009) (testimony of Kathleen E. Keest, Senior Policy Counsel, Center for Responsible Lending). The Center for Responsible Lending (CRL) is the research and policy affiliate of a community development financial institution, the Center for Community Self-Help. *Id.* at 2. CRL takes the position that federal oversight should be a floor, not a ceiling, on consumer protection, leaving a role for state law enforcement. See *id.* at 13. A CRL policy brief, for example, claimed “[t]here is widespread agreement that there should be no carveout for auto dealers.” CTR. FOR RESPONSIBLE LENDING, *AUTO DEALERS SHOULD PLAY BY THE SAME RULES AS EVERYONE ELSE* (2010), <http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/auto-dealers-should-play-by-rules.pdf> (naming U.S. Department of Defense, Military Coalition, Credit Union National Association, and Independent Community Bankers Association as opposed to giving “auto dealers a free ride from CFPB’s consumer protection rules”).

56. See, e.g., Press Release, Consumer Fed’n of Am., Military Groups and the Department of Defense Agree—Consumer Financial Protection Agency Should Cover Auto Dealers (Apr. 22, 2010), [https://consumerfed.org/press\\_release/military-groups-and-the-department-of-defense-agree-consumer-financial-protection-agency-should-cover-auto-dealers/](https://consumerfed.org/press_release/military-groups-and-the-department-of-defense-agree-consumer-financial-protection-agency-should-cover-auto-dealers/) [<https://perma.cc/3T4A-L76J>]; see also *Overview*, CONSUMER FED’N OF AM., <https://consumerfed.org/overview/> [<https://perma.cc/QP2F-DQDZ>] (last visited Mar. 9, 2019) (“As an advocacy organization, CFA works to advance pro-consumer policies on a variety of issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts. We communicate and work with public officials to promote beneficial policies, oppose harmful ones, and ensure a balance debate on issues important to consumers.”). CFA is an approximately fifty-year old association of about 300 non-profit consumer organizations with the expressed goal of advancing consumer interests through research, advocacy, and education. *Id.*

57. Letter from A New Way Forward et al. to Hon. Barney Frank, Chairman, U.S. House of Reps. Comm. on Fin. Servs., et al., on H.R. 3126 Consumer Financial Protection Agency: Auto Dealer Exception (Oct. 7, 2009). Signatories included the NAACP, Leadership Conference on Civil Rights, National Council of La Raza, DEMOS, National Consumer Law Center Consumers Union, PIRG, and Public Citizen. *Id.*; see also Letter from Consumer Fed’n of Am. to Hon. Barney Frank, Chairman, U.S. House of Reps. Comm. on Fin. Servs., & Members of Comm. on Fin. Servs. (Oct. 21, 2009) (urging Members of the Committee to vote “No” on the Campbell amendment).

price of getting a consumer protection agency with teeth against Wall Street actors might lie in exclusions for supposed Main Street actors.<sup>58</sup>

In other fights, such as over bankruptcy reform, unions such as the United Auto Workers (UAW) have shared positions with consumer advocates.<sup>59</sup> Not here. The post-crisis period was marked by fear of collapse of the American automobile industry and the loss of thousands of dealerships.<sup>60</sup> Under such conditions, we are not surprised that the UAW would decline to take positions counter to those of the distressed auto industry.

The car dealer carveout was not the industry's first success in obtaining an exemption from significant national legislation. Dealers also have an exemption from the Federal Arbitration Act; automobile manufacturers cannot enforce pre-dispute arbitration clauses against dealers.<sup>61</sup> Widely dispersed and politically active, car dealers have been effective lobbyists at the state level as well.<sup>62</sup> In the aftermath of the GFC, car dealers successfully pushed for new legal protections in about two-thirds of states.<sup>63</sup> Dealers' trade groups, coupled with the financial services industry, are positioned to respond quickly to proposed state and local regulations if they view those bills as harmful to their interests.<sup>64</sup> This facility reduces the odds that states will fill gaps in oversight of car dealer deceptive practices left by the CFPB carveout.

The auto dealer carveout takes on special significance in light of parallels between car lending and pre-crisis home mortgages.<sup>65</sup> The volume of car loans

58. As another example of a Wall Street–Main Street tradeoff, see Jacoby, *Dodd-Frank*, *supra* note 4, at 108–09 (discussing the complex exclusion for doctors and dentists provided in section 1027 of the Dodd–Frank Act).

59. See, e.g., Melissa B. Jacoby, *Collecting Debts from the Ill and Injured: The Rhetorical Significance, but Practical Irrelevance, of Culpability and Ability to Pay*, 51 AM. U. L. REV. 229, 268 n.167 (2001) (citing congressional testimony of both the United Auto Workers and the National Association of Consumer Bankruptcy Attorneys about the difficult problems individuals face that lead them to bankruptcy); Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, AM. BANKR. L.J. 485, 498 n.73 (2005) (reporting that the United Auto Workers testified in hearings on consumer bankruptcy); Elizabeth Warren, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, 2002 WISC. L. REV. 1, 9 n.22 (reporting involvement of United Auto Workers, along with the Consumer Federation of America and Consumers Union, in providing a perspective on bankruptcy reform distinct from the consumer credit industry).

60. See Lafontaine & Morton, *supra* note 52, at 233. Many of these dealerships were terminated notwithstanding the government intervention. See *id.* at 236 (listing number of dealerships by brand and year).

61. See S. REP. NO. 107-266 (2002) (applying to franchise contracts).

62. See Lafontaine & Morton, *supra* note 52, at 234 (explaining that “car dealerships, and especially local or state car dealership associations, have been able to exert influence over local legislatures,” increasing costs and prices, particularly for Detroit’s “Big Three” car manufacturers).

63. See *id.* at 248.

64. See Letter from Danielle Fagre Arlowe, Senior Vice President, State Gov’t Affairs Am. Fin. Servs. Ass’n, to Casey Adams, Deputy Dir. of City Legislative Affairs, N.Y.C. Dep’t of Consumer Affairs (Feb. 28, 2018), <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2018/03/AFSA-comment-letter-NYC-secondhand-auto-rules.pdf> (“[W]e believe the proposed disclosures would confuse consumers and provide little additional consumer benefit.”).

65. See Andrew Haughwout et al., *Just Released: Who Is Driving the Auto Lending Recovery?*, LIBERTY ST. ECON. (Aug. 14, 2013), <http://libertystreeteconomics.newyorkfed.org/2013/08/just->

exceeds the volume of mortgage loans,<sup>66</sup> which, as is now well known, contributed significantly to the GFC. Lisa Stifler, Deputy Director of State Policy at the Center for Responsible Lending, testified in 2015:

We are also seeing practices in the auto lending market that mirror those in the mortgage market prior to the housing crisis. Risk layering—combining several practices that increase the risk of delinquency or default—is increasing. The size and length of loans continues to grow. Delinquency and default rates are climbing in auto lending while falling for other forms of credit. One lesson we hopefully learned from the crisis is to take heed of troubling data and act to prevent needless losses and harms to consumers, not wait for them to occur.<sup>67</sup>

Much auto lending growth since the GFC has been subprime,<sup>68</sup> and underwriting standards have eroded in the last decade.<sup>69</sup> Features of subprime and “Deep Subprime” loans include longer repayment schedules, higher average loan-to-value ratios, and higher interest rates than other auto loans.<sup>70</sup>

Finally, it is worth noting that some of Dodd–Frank’s substantive reforms that might have been useful in many loan contexts, including car loans, applied only to residential mortgages, in light of Dodd–Frank’s heightened post-crisis focus on that particular financial product. For example, Dodd–Frank amended the Truth in Lending Act to require verification of income in most mortgage loan circumstances, thus prohibiting “stated-income” home mortgage loans.<sup>71</sup> The prohibition does not apply to car loans, where the practice has become common.

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released-who-is-driving-the-auto-lending-recovery.html [https://perma.cc/6SYE-WKMH] (providing a recounting of this analogy by researchers at the Federal Reserve Bank of New York); see also Jessica Silver-Greenberg & Michael Corkery, *In a Subprime Bubble for Used Cars, Borrowers Pay Sky-High Rates*, N.Y. TIMES: DEALBOOK (July 19, 2014, 12:36 PM), <https://dealbook.nytimes.com/2014/07/19/in-a-subprime-bubble-for-used-cars-unfit-borrowers-pay-sky-high-rates/> [https://nyti.ms/2kgGr4] (drawing same analogy).

66. Stifler Testimony, *supra* note 35 (citing U.S. Census Bureau data). More than eight out of ten people in the U.S. workforce use cars to get to their jobs. See *id.* (citing Federal Reserve Bank of New York data); see also Gunjan Banerji, *When Does Consumer Debt Become a Systemic Risk?*, WALL ST. J. MONEYBEAT (Oct. 30, 2017, 12:18 PM), <https://blogs.wsj.com/moneybeat/2017/10/30/when-does-consumer-debt-become-a-systemic-risk/> [https://perma.cc/YH35-4ZYL] (reporting that U.S. consumer loans “make up almost half of the global consumer debt growth” in the past decade, prompting notice by ratings agencies and major U.S. banks); Stijn Claessens & Laura Kodres, *The Regulatory Responses to the Global Financial Crisis: Some Uncomfortable Questions*, in POLICY SHOCK, *supra* note 1, at 435, 439 (discussing difficulties when rising household leverage and high levels of consumer debt defaults are contributors to systemic financial crisis).

67. Stifler Testimony, *supra* note 35. According to CRL, the fact that cars can and do get repossessed on much shorter timelines than residential home foreclosures increases the salience for overall systemic risk. See CTR. FOR RESPONSIBLE LENDING, “RECKLESS DRIVING”: IMPLICATIONS OF RECENT SUBPRIME AUTO FINANCE GROWTH 5 (2015), [https://www.responsiblelending.org/other-consumer-loans/auto-financing/research-analysis/recklessdriving\\_implications\\_subprime autofinance\\_growth.pdf](https://www.responsiblelending.org/other-consumer-loans/auto-financing/research-analysis/recklessdriving_implications_subprime autofinance_growth.pdf).

68. See Stifler Testimony, *supra* note 35, at 2 (citing Experian Automotive data).

69. See CTR. FOR RESPONSIBLE LENDING, *supra* note 67, at 3.

70. See *id.* (reporting Experian Automotive data).

71. See Dodd–Frank § 1411, 15 U.S.C. § 1639c (2012) (amending the Truth in Lending Act, 15 U.S.C. § 1631 (2006)). Stated-income loans are loans in which a lender or facilitator takes the borrower’s assertion of income at face value without verification, and sometimes inflates the income of

C. “ROBOSIGNING 2.0”<sup>72</sup>

Our second case study, also focusing on the CFPB’s anti-deception efforts, looks at the CFPB’s actions in response to robo-signing in the residential mortgage market, a flashpoint during and after the GFC, and the student debt market.<sup>73</sup> With respect to robo-signing, we find that the open-ended nature of CFPB authority facilitates robust regulatory action for an agency ready, willing, and able to use that authority. Indeed, Congress’s delegation of power, without a carveout of key parties, enabled the CFPB to extend its regulatory efforts beyond the immediate crisis-related concerns that prompted policy responses.

Coined in the aftermath of the mortgage servicing crisis, the term “robo-signing” has been used to describe various illegal practices in the mortgage industry. We use it in this Article to refer to the systemic practice of signing mortgage documents that attest to the validity of a company’s ownership of a mortgage debt without actual knowledge or confirmation of the loan’s chain of title and status. At the peak of the foreclosure crisis, a series of legal cases revealed that some robo-signers executed unsubstantiated affidavits for the purposes of pursuing debt collection and foreclosure even though they could not prove they had the legal right to take those actions. For example, one robo-signer later admitted in a sworn deposition that “she [had] signed off on thousands of foreclosures in a month for JPMorgan Chase even though she did not verify the accuracy of the information.”<sup>74</sup>

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the borrower (potentially without the borrower’s knowledge) to obtain financing. These practices made consumers legally responsible for loans stripping their ability to repay, increasing default risk. *See, e.g.,* A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership Is Not Always a Good Thing*, 84 *IND. L.J.* 189, 200 (2009) (identifying alternative nicknames for stated-income loans, defining the terms, and how lenders shielded themselves from the rising risk); Deborah Goldstein & Matthew Brinegar, *Policy and Litigation Barriers to Fighting Predatory Lending*, 2 *N.E. U. L.J.* 167, 184 (2010) (describing stated-income loans and associated foreclosure risk). *See generally* Diane M. Standaert & Sara K. Weed, *Secure Transactions: Restoring Our Communities with Responsible Lending*, 19 *J. AFFORDABLE HOUSING & COMMUNITY DEV. L.* 71 (2009) (analyzing the origins of “the foreclosure crisis” and suggesting “state-level policy solutions” to predatory mortgage market practices).

72. Natalie Kitroeff, *The Student Debt Collection Mess*, *BLOOMBERG BUSINESSWEEK*, June 8–14, 2015, at 45 (quoting Robyn Smith of the National Consumer Law Center).

73. Although we focus here on the comparison of mortgages and student loans, the CFPB has brought a considerable number of robo-signing-related cases against credit card issuers and general debt buyers. *See, e.g.,* CFPB, *47 States and D.C. Take Action Against JPMorgan Chase for Selling Bad Credit Card Debt and Robo-Signing Court Documents*, *CONSUMER FIN. PROT. BUREAU* (July 8, 2015), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-47-states-and-d-c-take-action-against-jpmorgan-chase-for-selling-bad-credit-card-debt-and-robo-signing-court-documents/> [<https://perma.cc/HJ94-M9AZ>] (discussing CFPB action against credit card company JPMorgan Chase); CFPB *Takes Action Against the Two Largest Buyers for Using Deceptive Tactics to Collect Bad Debts*, *CONSUMER FIN. PROT. BUREAU* (Sept. 9, 2015), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-the-two-largest-debt-buyers-for-using-deceptive-tactics-to-collect-bad-debts/> [<https://perma.cc/D59S-NV9Q>] (discussing CFPB action against debt-buying companies Encore Capital Corporation and Portfolio Recovery Associates).

74. Ariana Eunjung Cha & Brady Dennis, *Amid Mountain of Paperwork, Shortcuts and Forgeries Mar Foreclosure Process*, *WASH. POST* (Sept. 23, 2010, 2:36 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/22/AR2010092206132.html> [<https://perma.cc/8HU8-Q9XT>].



Although we now know that mortgage robo-signing was commonplace before the GFC, Dodd–Frank did not address the practice explicitly because it received little or no publicity until after the bill’s enactment.<sup>75</sup> Federal Deposit Insurance Corporation (FDIC) Chair Sheila C. Bair remarked in October 2010 that federal bank regulators only recently had become aware of robo-signing.<sup>76</sup> Although an FBI investigation into the practice had begun in Florida before Dodd–Frank’s enactment, the local office did not receive authorization from the Washington office to accelerate its inquiry until later.<sup>77</sup>

In 2012, the National Mortgage Settlement imposed new foreclosure document verification obligations, at least among the signatories to those consent decrees.<sup>78</sup> These new foreclosure document verification obligations included numerous requirements meant to ensure that affiants of foreclosure documents verified the chain of title of the underlying debt.<sup>79</sup> The Settlement also required that mortgage servicers take steps to ensure the veracity (and presence) of all documentation needed to prove existence and ownership of the borrower’s underlying debt when seeking to foreclose on a mortgage.<sup>80</sup>

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75. See, e.g., Robbie Whelan, *Niche Lawyers Spawned Housing Fracas*, WALL ST. J. (Oct. 21, 2010, 12:01 AM), <https://www.wsj.com/articles/SB10001424052702304410504575560072576527604> [<https://perma.cc/X8SW-MU29>] (reporting on 2006 discovery by attorney that mortgage company employee who signed off on his clients’ mortgage documents did not review the underlying loan documents and routinely signed off on mortgages without required verification of documents); Debra Cassens Weiss, *How 2 Pro Bono Lawyers Uncovered ‘Robo-Signer,’ Halting Foreclosures in 23 States*, ABA J. (Sept. 23, 2010, 1:20 PM), [http://www.abajournal.com/news/article/how\\_2\\_pro\\_bono\\_lawyers\\_uncovered\\_robo-signer\\_halting\\_foreclosures\\_in\\_23\\_sta](http://www.abajournal.com/news/article/how_2_pro_bono_lawyers_uncovered_robo-signer_halting_foreclosures_in_23_sta) [<https://perma.cc/PP2B-9BFE>]; Cha & Dennis, *supra* note 74 (reporting on sworn deposition of JPMorgan Chase employee that she signed off on thousands of foreclosures a month even though she did not verify the accuracy of the information).

76. Sheila C. Bair, Chairman, Fed. Deposit Ins. Corp., Remarks to Urban Land Inst. (Oct. 13, 2010), <https://www.fdic.gov/news/news/speeches/archives/2010/spoct1310.html> [<https://perma.cc/CZX5-FJLL>] (“And now we have the added concern that lenders may have been foreclosing on homes without proper documentation. The ‘robo-signing’ of foreclosure documents is a serious matter for loan servicers, homeowners, and the entire industry.”).

77. See David Dayen, *Inside the Abortive FBI Investigation of Illegal Foreclosure in Florida*, VICE (May 31, 2016, 4:30 AM), [https://www.vice.com/en\\_us/article/yvxajb/what-happened-when-the-fbi-investigated-foreclosure-fraud-in-florida](https://www.vice.com/en_us/article/yvxajb/what-happened-when-the-fbi-investigated-foreclosure-fraud-in-florida) [<https://perma.cc/Z92S-Q8EJ>] (reporting on investigation of Florida document processing services, falsification of foreclosure documents, and signatures for major banks).

78. See *Settlement Documents*, JOINT STATE-FED. NAT’L MORTG. SERVICING SETTLEMENTS, <http://www.nationalmortgagesettlement.com/settlement-documents> [<https://perma.cc/54MG-RHGU>] (last visited Mar. 9, 2019) (displaying consent decree documents that include new foreclosure documentation rules); see also Press Release, Dep’t of Justice, Federal Government and State Attorneys General Reach \$25 Billion Agreement with 5 Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses (Feb. 9, 2012), <https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest> [<https://perma.cc/5EMN-EL5U>]. The New Jersey Supreme Court issued its own rules on the matter earlier. See Administrative Order Directing Submission of Information from Residential Mortgage Foreclosure Plaintiffs Concerning Their Document Execution Practices to a Special Place, *In re Residential Mortg. Foreclosure Pleading & Document Irregularities*, No. 01-2010 (N.J. Dec. 20, 2010), <https://www.judiciary.state.nj.us/notices/2010/n101220b.pdf> (ordering all banks and companies that filed more than 200 foreclosure actions in 2010 to submit evidence that foreclosure verification practices are sufficient).

79. See, e.g., Consent Judgment Ex. A at A-1, *United States v. Bank of Am. Corp.*, No. 1:12-cv-00361-RMC (D.D.C. 2012).

80. See *id.*

Beyond the National Mortgage Settlement, the CFPB has been able to use the tools afforded by the Dodd–Frank Act to tackle robo-signing against mortgage servicers.<sup>81</sup> For instance, in September 2014, the CFPB and fifty state attorneys general entered into a consent judgment with SunTrust Bank related to a host of harmful servicing practices, including robo-signing.<sup>82</sup> Modeled on the National Mortgage Settlement, the CFPB alleged SunTrust’s inadequate loan origination, servicing and foreclosure procedures constituted violations of state and federal unfair and deceptive acts and practices laws.<sup>83</sup>

More recently, observers have drawn analogies between pre-GFC mortgage debt problems and student loan servicing.<sup>84</sup> Academics flagged the potential for similar problems in student loans as early as 2014.<sup>85</sup> Robo-signing is among those parallels, now documented in news reports and litigation. Debt collectors and debt buyers have sued student loan borrowers in state court without proper documentation to prove the right to enforce the underlying debt.<sup>86</sup>

In contrast to the insulation of auto dealers from CFPB oversight, the Dodd–Frank Act did not carve out student loan servicers, leaving the CFPB free to use its general legal and regulatory tools in response to student loan robo-signing. For example, the CFPB obtained a consent order relating to Transworld Systems Inc.’s (TSI) widespread student loan debt collection practices that involved the hallmarks of robo-signing—false affidavits and filing lawsuits without any evidence that they had the right to enforce the debt.<sup>87</sup> The CFPB’s jurisdiction over TSI is

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81. Sections 1031(a) and 1036 of Dodd–Frank empower the CFPB to take action against unfair, deceptive, or abusive acts or practices against consumers. See Dodd–Frank Act §§ 1031(a), 1036, 12 U.S.C. §§ 5531(a), 5536 (2012).

82. See Consent Judgment at 1–2, *United States v. SunTrust Mortg., Inc.*, No. 14-1028 (RMC) (D.D.C. Sept. 30, 2014).

83. See Complaint at 17, *United States v. SunTrust Mortg., Inc.*, No. 14-1028 (D.D.C. June 14, 2014).

84. See Stacy Cowley & Jessica Silver-Greenberg, *As Paperwork Goes Missing, Private Student Loan Debts May Be Wiped Away*, N.Y. TIMES: DEALBOOK (July 17, 2017), <https://www.nytimes.com/2017/07/17/business/dealbook/student-loan-debt-collection.html> [<https://nyti.ms/2vvroKs>] (“Some of the problems playing out now in the \$108 billion private student loan market are reminiscent of those that arose from the subprime mortgage crisis a decade ago, when billions of dollars in subprime mortgage loans were ruled uncollectible by courts because of missing or fake documentation.”).

85. See Jamie P. Hopkins & Katherine A. Pustizzi, *A Blast from the Past: Are the Robo-Signing Issues That Plagued the Mortgage Crisis Set to Engulf the Student Loan Industry?*, 45 U. TOLEDO L. REV. 239, 240 (2014).

86. See Natalie Kitroeff, *The Lawsuit Machine Going After Student Debtors*, BLOOMBERG BUSINESSWEEK (June 4, 2015, 7:00 AM), <https://www.bloomberg.com/news/articles/2015-06-04/the-student-debt-collection-mess> [<https://perma.cc/N2LD-N7C9>]. This practice has gone on in the general debt collection context for a lot longer. See Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 271–72 (2011); see also Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41, 44, 55 (2015).

87. See Consent Order at 2, *In re Transworld Sys., Inc.*, 2017-CFPB-0018 (Sept. 15, 2017). See generally Stacy Cowley & Jessica Silver-Greenberg, *Behind the Lucrative Assembly Line of Student Debt Lawsuits*, N.Y. TIMES: DEALBOOK (Nov. 13, 2017), <https://www.nytimes.com/2017/11/13/business/dealbook/student-debt-lawsuits.html> [<https://nyti.ms/2j1qMpZ>] (reporting that TSI has filed



not in question.<sup>88</sup>

Of course, robo-signing has not been the only allegation of trouble in consumer loan servicing. Here again, the National Mortgage Settlement played a role in addressing some problems in that context.<sup>89</sup> The Settlement imposed global servicing standards, beyond foreclosure document verification, designed to keep more borrowers out of the foreclosure process.<sup>90</sup> The Settlement required that mortgage servicers notify borrowers of “currently available loss mitigation options prior to foreclosure referral,” including loan modification options.<sup>91</sup> Servicers also had to establish a “single point of contact” for struggling borrowers, which minimized the potential for communication issues and conflicting information arising from dealing with multiple servicer representatives, while reducing the risk that debtors would turn to predatory loan modification services.<sup>92</sup>

When similar problems emerged with respect to student loans, the CFPB and state attorneys general sued Navient, the nation’s largest federal student loan servicer, for “illegally failing borrowers at every stage of repayment.”<sup>93</sup> The complaint identifies servicing issues addressed in the National Mortgage Settlement; Navient (and by all accounts, other student loan servicers) tends to steer borrowers into repayment options that are not the borrower’s best option.<sup>94</sup> Borrowers also complained of receiving conflicting information from Navient representatives,<sup>95</sup> which, like mortgage servicing problems, can lead to student loan defaults that would otherwise have been avoidable.

In summary, with regard to many consumer protection issues posed by deceptive loan servicing practices, the Global Financial Crisis cast a wider policy shadow. Even though the architects of the Dodd–Frank Act did not legislate a response to mortgage servicing problems like robo-signing, the CFPB was nonetheless able to address mortgage and student loan servicing problems as they emerged by drawing on its basic legal and regulatory toolbox.

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more than 38,000 lawsuits within three years on behalf of single clients and many cases were flawed due to robo-signing features).

88. Consent Order, *supra* note 87, at 6.

89. Although Dodd–Frank mandates income verification in mortgage lending, Dodd–Frank Act § 1411, 15 U.S.C. 1639c (2012), most mentions of mortgages in Dodd–Frank are in the context of gathering data and refinements to foreclosure prevention programs to the two foreclosure programs established by the Emergency Economic Stabilization Act of 2008, Pub. L. 110-334, §§ 101, 102, 122 Stat. 3765, 3767–70 (2008), both of which ended in 2016.

90. See, e.g., Consent Judgment, *supra* note 79, Ex. A at A-16.

91. See *id.*

92. See *id.* at A-21.

93. See *CFPB Sues Nation’s Largest Student Loan Company Navient for Failing Borrowers at Every Stage of Repayment*, CONSUMER FIN. PROT. BUREAU: NEWSROOM (Jan. 18, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-nations-largest-student-loan-company-navient-failing-borrowers-every-stage-repayment/> [<https://perma.cc/5XS4-AUBC>].

94. See Complaint ¶ 4, *CFPB v. Navient Corp.*, 3:17-cv-00101-RDM (M.D. Pa. 2017).

95. See *CFPB Monthly Snapshot Highlights Student Loan Complaints*, CONSUMER FIN. PROT. BUREAU: NEWSROOM (Apr. 25, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-monthly-snapshot-spotlights-student-loan-complaints/> [<https://perma.cc/8WYP-JXTB>]. As of June 2018, the case remained in the discovery phase.

## D. OPERATION CHOKE POINT

Our final case study, Operation Choke Point (OCP), demonstrates how a crisis can prompt especially aggressive policy experimentation, even in the absence of legislative mandates. This endeavor further demonstrates the vulnerability of such post-crisis policy innovations to political counterattacks, especially when the relevant bureaucracies do not build wider support and the initiatives run afoul of the perceived interests of well-coordinated business groups.

In contrast to intentionally publicized antifraud enforcement initiatives by the FTC and CFPB, OCP emerged outside the glare of legislative politics and press coverage.<sup>96</sup> It would not stay hidden for long, however, eventually attracting considerable public criticism from trade associations and Republican legislators, among others.<sup>97</sup> In many ways, this enforcement campaign represented a knock-on effect of the GFC. Key leaders in the Obama Administration attributed the crisis in part to a soft enforcement posture toward business fraud.<sup>98</sup> The disinclination to tackle frauds in mortgage origination, despite stark warnings from the FBI,<sup>99</sup> received especially sharp criticism from academics, members of Congress, and the majority report of the Financial Crisis Inquiry Commission.<sup>100</sup>

To shore up the government's anti-fraud efforts, President Obama established an interagency Financial Fraud Enforcement Task Force (FFETF) soon after taking office in 2009.<sup>101</sup> Convened by the U.S. Department of Justice (DOJ), the FFETF drew on representatives from twenty-two other federal cabinet departments, independent commissions, and other agencies, as well as officials from the offices of state attorneys general and local law enforcement.<sup>102</sup> According to then-Attorney General Eric Holder, this task force would not simply "hold accountable those who helped bring about the last financial meltdown."<sup>103</sup>

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96. In the Proquest database, which includes government documents and major newspapers, there is no mention of Operation Choke Point until January 2014, more than a year after federal officials began the effort.

97. See *infra* note 110 and accompanying text.

98. See Shahien Nasiripour, *Obama to Form Mortgage Fraud Task Force*, FIN. TIMES (Jan. 25, 2012), <https://www.ft.com/content/d1a34214-470a-11e1-85e2-00144feabdc0> [<https://perma.cc/QHJ6-RR9B>].

99. FED. BUREAU OF INVESTIGATION, MORTGAGE FRAUD REPORT 2006 (2007), <https://www.fbi.gov/stats-services/publications/mortgage-fraud-2006> [<https://perma.cc/T9RL-RJV9>].

100. See generally Brooksley Born, *Financial Reform and the Causes of the Financial Crisis*, Keynote Address at the 2011 Am. Univ. Bus. Law Review Symposium: Law, Finance, and Legitimacy After Financial Reform (Apr. 8, 2011), in 1 AM. U. BUS. L. REV. 1, 1–6 (2012); Ross MacDonald, Note, *Setting Examples, Not Settling: Toward a New SEC Enforcement Paradigm*, 91 TEX. L. REV. 419 (2012).

101. See Exec. Order No. 13,519, 74 Fed. Reg. 60,123, (Nov. 17, 2009); Press Release, U.S. Dep't of Justice, Att'y Gen. Eric Holder Launches Consumer Protection Working Group to Combat Consumer Fraud (Feb. 10, 2012), <https://www.justice.gov/opa/pr/attorney-general-eric-holder-launches-consumer-protection-working-group-combat-consumer-fraud> [<https://perma.cc/HL7C-5UJ2>].

102. See Exec. Order No. 13,519, 74 Fed. Reg. 60,123 (Nov. 17, 2009).

103. Sam Youngman, *President Obama Creates New Task Force to Crack Down on Financial Fraud*, HILL (Nov. 17, 2009, 5:58 PM), <http://thehill.com/homenews/administration/68123-obama-creates-new-agency-to-target-financial-fraud> [<https://perma.cc/5CEP-B434>].

Reflecting lessons learned from the GFC, the task force would “prevent another meltdown from happening.”<sup>104</sup>

The FFETF assessed the threats posed by all manners of financial fraud during the Obama Administration’s first term. This review led lawyers in the DOJ’s Consumer Protection Branch to focus on the extent to which, as American commerce had come to rely on online commerce, fraudulent businesses greatly depended on third-party processors to transmit customer funds.<sup>105</sup> In doing so, DOJ lawyers followed the lead of an Assistant United States Attorney in the Philadelphia office, Joel Sweet, who had brought a series of criminal fraud cases against payment processors.<sup>106</sup> DOJ lawyers also observed that a relatively small number of banks and credit card processors were responsible for a large fraction of cyberspace transactions, including those involving consumer fraud. By 2012, officials in the DOJ’s Consumer Protection Branch accordingly sought to prevent deceptive practices by targeting the online payment mechanism rather than just prosecuting consumer frauds after the fact.<sup>107</sup> In essence, they saw the payment mechanism as a “choke point” for access to consumer expenditures.

The resulting anti-fraud campaign, OCP, had two primary prongs. The first involved tough-minded enforcement actions against a relatively small number of specific financial institutions connected to fraudulent businesses, often triggered by extraordinarily high consumer rejection rates for commercial banking transactions.<sup>108</sup> A typical rejection rate ranges between 0.5% and 1.5%.<sup>109</sup> When financial intermediaries reported return rates “exceed[ing] 30%, 40%, 50%, and even 85%,” anti-fraud officials viewed such data as not just “glaring red flags indicative of fraud,” but as “ambulance sirens, screaming out for attention.”<sup>110</sup> Such scrutiny took the form of vigorous investigations through subpoenas and other means, and a smaller number of criminal and civil fraud proceedings, such as the one that the DOJ brought against the First Bank of Delaware, which resulted in a \$15 million fine and forced the bank to close.<sup>111</sup>

The second prong took advantage of the shift in the regulatory environment created by selective enforcement actions and relied heavily on moral suasion.

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104. *Id.*

105. See Michael J. Bresnick, Exec. Dir., Fin. Fraud Enf’t Task Force, Office of the Deputy Att’y Gen., Dep’t of State, Remarks to the Exchequer Club of Washington, D.C. (Mar. 20, 2013), <https://www.justice.gov/opa/speech/financial-fraud-enforcement-task-force-executive-director-michael-j-bresnick-exchequer> [<https://perma.cc/BEQ2-CW2P>].

106. See Jeri Leigh McDowell, Comment, *Insidious Design or Instrument of Progress: The Multi-Agency Initiative to Choke Off Undesirable Businesses’ Access to the Financial World*, 47 TEX. TECH. L. REV. 803, 809 (2015) (describing Sweet’s career and relationship to the origins of Operation Choke Point).

107. Kevin Wack, *Five Takeaways from Internal DOJ Documents on Operation Choke Point*, AM. BANKER (May 30, 2014, 4:51 PM), <https://www.americanbanker.com/news/five-takeaways-from-internal-doj-documents-on-operation-choke-point> [<https://perma.cc/AY32-ELWK>].

108. See Bresnick, *supra* note 105.

109. See *id.*

110. See *id.*

111. See Jessica Silver-Greenberg, *Banks Faulted as Taking Role in Web Fraud*, N.Y. TIMES, June 11, 2013, at A1.

Working closely with regulators at the Office of the Comptroller of the Currency and the Federal Depository Insurance Corporation, lawyers at the DOJ's Consumer Protection Branch disseminated information about the warning signs that should alert banks to fraudulent marketing by the firms that relied on them for payment processing.<sup>112</sup> Regulators also circulated an FDIC-created list of economic sectors characterized by a relatively high incidence of fraudulent marketing.<sup>113</sup> After DOJ lawyers identified firms engaging in apparently deceptive business practices or, in some cases, operating in industries likely to have high incidences of fraud, banking regulators recommended that banks shun those firms, out of concern for their own reputational capital.<sup>114</sup> The presumption was that "banks should endeavor not only to know their customers, but also to know their customers' customers."<sup>115</sup> Without such due diligence into the backgrounds of those firms who used their payment platforms, banks ran a considerable risk of "allowing some unscrupulous scam artist to be taking the last dollars of a senior citizen who fell prey to another fraud scheme, and hundreds of millions of dollars of additional proceeds of fraud to flow through their institutions."<sup>116</sup> Careful vetting by banks, FFETF leaders hoped, would significantly curb predatory behavior, including the type that had helped to cause the GFC, without excessive expenditure of public resources.<sup>117</sup>

The activities associated with OCP continued through the remainder of the Obama Administration. OCP-related investigations led the DOJ and other federal agencies to issue more than fifty subpoenas to financial institutions and pursue a handful of fraud cases against individual banks alleging they had systematically facilitated consumer scams.<sup>118</sup> As with the investigation into the First Bank of Delaware, these cases also resulted in consent decrees that mandated multimillion

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112. See Michael B. Benardo et al., *Managing Risks in Third-Party Payment Processor Relationships*, FDIC: SUPERVISORY INSIGHTS - SUMMER 2011 (2011), <https://www.fdic.gov/regulations/examinations/supervisory/insights/sisum11/managing.html> [<https://perma.cc/U276-CCZJ>] (last updated July 14, 2014).

113. The FDIC lists business types it considers at "high risk" of fraud, including providers of: payday loans, pornography, escort services, firearms, home-based charities, credit repair services, credit card schemes, pyramid schemes, surveillance equipment, lottery sales, lifetime memberships, travel clubs, and money transfer networks. OFFICE OF INSPECTOR GEN., REPORT NO. AUD-15-008, *THE FDIC'S ROLE IN OPERATION CHOKE POINT AND SUPERVISORY APPROACH TO INSTITUTIONS THAT CONDUCTED BUSINESS WITH MERCHANTS ASSOCIATED WITH HIGH-RISK ACTIVITIES* 7 tbl. (2015), <https://www.fdicig.gov/sites/default/files/publications/15-008AUD.pdf>.

114. See Bresnick, *supra* note 105.

115. *Id.*

116. *Id.*

117. See, e.g., Jeremy Kidd, *The Economics of Workplace Drug Testing*, 50 U.C. DAVIS L. REV. 707, 734–35 (2016); Jessica Silver-Greenberg, *Justice Department Inquiry Takes Aim at Banks' Business With Payday Lenders*, N.Y. TIMES: DEALBOOK (Jan. 26, 2014, 9:59 PM), <https://dealbook.nytimes.com/2014/01/26/justice-dept-inquiry-takes-aim-at-banks-business-with-payday-lenders/> [<https://nyti.ms/2lKfauE>].

118. See Richard P. Eckman et al., *Update on the Short-Term Lending Industry: Government Investigations and Enforcement Actions*, 70 BUS. LAW. 657, 658 (2015); Silver-Greenberg, *supra* note 111.

dollar settlements and revamped business practices.<sup>119</sup> More generally, officials pressured financial service providers to investigate their business customers more closely. The resulting scrutiny caused scores of firms to lose access to online payment systems, including some that may not have been engaging in wrongful activity, significantly compromising their abilities to conduct business.<sup>120</sup>

As a post-crisis regulatory initiative, OCP bears some key hallmarks of bureaucratic entrepreneurship: policy innovation developed by unelected federal officials, drawing creatively on existing grants of authority and redeploying them, with an experimental mindset, to address a thorny problem.<sup>121</sup> OCP also mirrored prior efforts to tackle business fraud. In the 1970s, for example, the Division of Enforcement at the Securities and Exchange Commission (SEC) began to target law and accounting firms that provided services to corporations that they suspected of violating the securities laws.<sup>122</sup> This approach, SEC officials concluded, would maximize the impact of scarce enforcement resources.<sup>123</sup> Through governmental pressure, the SEC hoped to enlist these private gatekeepers in snuffing out dodgy corporate practices before they harmed investors.<sup>124</sup> A full century earlier, officials in the Post Office Department had similarly fashioned the administrative fraud order to combat deception in the mail order sector.<sup>125</sup> Once issued, a fraud order denied a firm access to the mails.<sup>126</sup> These antifraud initiatives acted as de facto de-licensing regimes, closing off access to some key channel of commerce.

OCP shared another feature with the postal fraud order regime, at least in the latter's early decades—a lack of due process. Before the early twentieth century, the Post Office frequently issued fraud orders without hearings or notice, simply on the basis of evidence supplied by postal inspectors.<sup>127</sup> Similarly, businesses confronting heightened scrutiny from banks or payment processors as a result of

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119. See generally Sarah Jane Hughes & Stephen T. Middlebrook, *Developments in the Law Affecting Electronic Payments and Financial Services*, 71 BUS. LAW. 361 (2015) (reviewing OCP-related enforcement actions and outcomes). Other financial institutions that faced OCP-related legal action include Four Oaks Bank & Trust of North Carolina, Plaza Bank, and CommerceWest. *Id.* at 370–71.

120. For an example of a harmed business, see McDowell, *supra* note 106, at 828–29.

121. See generally DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, at 1862–1928* (Ira Katznelson et al. eds., 2001). The Director of the DOJ's Consumer Protection Branch described OCP as “born of experimentation and based on collaboration,” and as “continually being refined and developed as we implement it.” Michael Blume, Dir., Consumer Prot. Branch, Civil Div., U.S. Dep't of Justice, Plenary Address to the National Consumer Law Center's 22nd Annual Consumer Rights Litigation Conference (Nov. 8, 2013), *reprinted in* STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 113TH CONG., *THE DEPARTMENT OF JUSTICE'S “OPERATION CHOKEPOINT”: ILLEGALLY CHOKING OFF LEGITIMATE BUSINESSES?* app.1, at 473 (2014), [<http://perma.cc/F2SM-9SES>].

122. See BALLEISEN, *supra* note 4, at 324–25.

123. *Id.* at 325.

124. *Id.*

125. See *id.* at 128–39.

126. See *id.* at 131.

127. *Id.* at 213.

OCP did so as a result of informal judgments rather than formal administrative process.<sup>128</sup>

Due process concerns about both initiatives prompted stinging criticism from affected businesses as inconsistent with democratic norms and the rule of law, and as representing an instance of poorly designed regulatory overreach.<sup>129</sup> With regard to OCP, financial service firms and businesses in “high risk” sectors wasted little time in lambasting the enforcement campaign. Third-party processors formed a trade association to offer guidance to members on avoiding regulatory scrutiny, but also to lobby Congress against OCP.<sup>130</sup> Other groups that represented business sectors singled out by the OCP as having heightened risks of fraud, including gun dealers and payday lenders, joined the fray.<sup>131</sup> The opponents of OCP found ready allies among conservative think tanks such as the Heritage Foundation, and champions among congressional Republicans, who called hearings to highlight what they viewed as OCP’s regulatory overreach.<sup>132</sup> The House of Representatives also sought to literally choke OCP by cutting off funding to the FDIC that could be used for this operation.<sup>133</sup> Although some consumer organizations and the occasional elected Democratic politician defended

128. See Eckman et al., *supra* note 118, at 659–60.

129. For more on the critique of the fraud order process as ignoring requirements imposed by the rule of law, see BALLEISEN, *supra* note 4, at 209–24.

130. See *ATMIA Capitol Hill Meetings Focus on “Operation Choke Point,”* BUS. WIRE (Feb. 9, 2016, 7:05 AM), <https://www.businesswire.com/news/home/20160209005338/en/ATMIA-Capitol-Hill-Meetings-Focus-Operation-Choke> [<https://perma.cc/3XUV-FHSH>].

131. See Jonathan Shorman, *Gun Industry to Kansas Lawmakers: Protect Us from Discrimination*, TOPEKA CAP.-J. (Jan. 28, 2016, 11:32 AM), <https://www.cjonline.com/2016-04-06/stub-1275> [<https://perma.cc/T5D8-NDZE>]; *Justice Dept. Tries to Quell Bank, Processor Concerns About Online Lending Probe*, AM. BANKER (Jan. 23, 2014, 4:06 PM), <https://www.americanbanker.com/news/justice-dept-tries-to-quell-bank-processor-concerns-about-online-lending-probe> [<https://perma.cc/SMB5-43NX>].

132. See, e.g., *The Federal Deposit Insurance Corporation’s Role in Operation Choke Point: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 114th Cong. 2 (2015) (statement of Rep. Duffy, Chairman, Subcomm. on Oversight & Investigations) (describing the FDIC’s purpose through the OCP as “to choke off the business they don’t like from the banking system”); *Who’s in Your Wallet: Examining How Washington Red Tape Impairs Economic Freedom: Hearing Before the H. Comm. on Fin. Servs.*, 113th Cong. 56 (2014) (statement of Rep. Stivers) (“The Operation Choke Point really has me worried about the overreach of government and government shutting down properly licensed State businesses with which they just don’t agree.”); *The Department of Justice’s “Operation Choke Point”: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 113th Cong. 2 (2014) (statement of Rep. McHenry, Chairman, Subcomm. on Oversight & Investigations) (criticizing OCP as “employing an axe rather than a scalpel” as part of a grander “game plan to circumvent the rule of law and Congress to achieve ideological objectives”); *Guilty until Proven Innocent? A Study of the Propriety and Legal Authority for the Justice Department’s Operation Choke Point: Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 2 (2014) (statement of Rep. Bachus, Chairman, Subcomm. on Regulatory Reform, Commercial & Antitrust Law) (describing the businesses targeted by OCP as comprising a “very wide net” suggestive of “agency overreach”).

133. 161 CONG. REC. H3805–07 (daily ed. June 3, 2015) (approving amendment to defund OCP); see Hughes & Middlebrook, *supra* note 119, at 371 (reviewing legislation relevant to OCP).



the program, the anti-OCP advocacy coalition principally shaped public discussion of the initiative during that period.<sup>134</sup>

By creating a clear narrative of regulatory overreach through congressional hearings and a series of research reports, the critics laid the groundwork for the Trump Administration's decision to end OCP in the fall of 2017.<sup>135</sup> This termination, perhaps, was made easier by their ability to write on a mostly blank public slate; OCP's designers had invested little time and effort in building public awareness and support for the program.<sup>136</sup>

### III. IMPLICATIONS

The responses to consumer protection problems in the wake of the Global Financial Crisis highlighted in our four case studies underscore the complex dynamics of crisis-driven regulatory policy, which defy simple theories of policy reaction. We offer the following observations.<sup>137</sup>

The crisis radiated from an epicenter of residential mortgage finance, a dynamic appreciated by key legislators and other policymakers. As such, the most vigorous anti-deception policy responses focused on mortgages. This observation is borne out in statutory reform (creation of the CFPB and mortgage-

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134. For a prominent Democrat's rare effort to make the case for OCP, see Joe Sestak, *Make Banks Ask, Tell*, TIMES-TRIBUNE (July 25, 2014), <http://www.thetimes-tribune.com/opinion/make-banks-ask-tell-1.1724503> [<https://perma.cc/QB5E-2E3V>]. Coverage and discussion of OCP in *The Washington Post* was typical: news stories from Danielle Douglas stressed Republican concerns and criticisms; Todd Zywicki devoted a series of blogposts to covering attacks on OCP by conservative organizations. See, e.g., Danielle Douglas, *Republicans to Justice Dept.: Stop Targeting Legal Businesses in 'Operation Choke Point'*, WASH. POST (July 17, 2014), [https://www.washingtonpost.com/business/economy/republicans-to-justice-dept-stop-targeting-legal-businesses-in-operation-choke-point/2014/07/17/94cf6b9a-0dc0-11e4-8c9a-923ecc0c7d23\\_story.html?utm\\_term=.4fd1b8714afa](https://www.washingtonpost.com/business/economy/republicans-to-justice-dept-stop-targeting-legal-businesses-in-operation-choke-point/2014/07/17/94cf6b9a-0dc0-11e4-8c9a-923ecc0c7d23_story.html?utm_term=.4fd1b8714afa) [<https://perma.cc/3YPB-SSPZ>]; Danielle Douglas-Gabriel, *Operation Choke Point: The Battle Over Financial Data Between the Government and Banks*, WASH. POST: WONKBLOG (Apr. 16, 2014), [https://www.washingtonpost.com/news/wonk/wp/2014/04/16/operation-choke-point-the-battle-over-financial-data-between-the-government-and-banks/?utm\\_term=.96674b66ea10](https://www.washingtonpost.com/news/wonk/wp/2014/04/16/operation-choke-point-the-battle-over-financial-data-between-the-government-and-banks/?utm_term=.96674b66ea10) [<https://perma.cc/7C6M-BDFC>]; Todd Zywicki, *FDIC Retreats on Operation Choke Point?*, WASH. POST: THE VOLOKH CONSPIRACY (Jan. 29, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/29/fdic-retreats-on-operation-choke-point/?noredirect=on&utm\\_term=.cf18f6de7534](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/29/fdic-retreats-on-operation-choke-point/?noredirect=on&utm_term=.cf18f6de7534) [<https://perma.cc/9ZLF-VU8D>]; Todd Zywicki, *Federalist Society Teleforum on Operation Choke Point*, WASH. POST: THE VOLOKH CONSPIRACY (June 16, 2014), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/16/teleforum-on-operation-choke-point/?utm\\_term=.47dbd851700f](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/16/teleforum-on-operation-choke-point/?utm_term=.47dbd851700f) [<https://perma.cc/43CT-9DBV>]; Todd Zywicki, "Operation Choke Point," WASH. POST: THE VOLOKH CONSPIRACY (May 24, 2014), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/24/operation-choke-point/?utm\\_term=.cd5abe18e65d](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/24/operation-choke-point/?utm_term=.cd5abe18e65d) [<https://perma.cc/FE7E-XNKL>].

135. See Letter from Stephen E. Boyd, Assistant U.S. Att'y Gen., U.S. Dep't of Justice, to Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary 1 (Aug. 16, 2017) (calling OCP a "misguided initiative" and stating that "[w]e share your view that law abiding businesses should not be targeted simply for operating in an industry that a particular administration might disfavor").

136. The financial press did not cover OCP before the summer of 2013, and mainstream newspapers did not follow suit until 2014. Eventual press coverage overwhelmingly stressed Republican complaints. See, e.g., Peter Weinstock, *Regulators Gang Up on Banks, Third-Party Payment Processors*, AM. BANKER: BANKTHINK (Aug. 22, 2013, 9:44 PM), <https://www.americanbanker.com/opinion/regulators-gang-up-on-banks-third-party-payment-processors> [<https://perma.cc/E999-GGVP>].

137. For references to parallel analytical points, see POLICY SHOCK, *supra* note 1, at 540–57.



specific prohibitions and requirements in Dodd–Frank), the CFPB’s agenda-setting through rulemaking and other means, and FTC enforcement campaigns such as Operation Stolen Dreams. Nonetheless, subsequent actions by regulators demonstrate recognition that deception arises, and requires redress, in a wider array of consumer financial markets and circumstances.<sup>138</sup> Despite the concentration on reforming markets for mortgage origination distribution and enforcement, the GFC cast a much wider shadow over anti-deception efforts in the federal government. Thus, political appointees at regulatory agencies made fraud monitoring and enforcement a bigger priority. They deepened interagency cooperation and networks, especially through the work of the FFETF, and were thus more readily able to recognize emerging patterns of marketplace deception. As a result, they could move relatively quickly to address post-crisis loan modification scams and robo-signing, which were directly connected to mortgage markets, business opportunity, and employment scams, which exploited widespread post-crisis financial distress, and emerging problems in markets such as student loans, which resemble practices prevalent in the pre-crisis mortgage arena. Given sufficient discretion and resources, post-crisis regulators had a greater ability to address newly discovered problems and prevent regulating only in the rear-view mirror.<sup>139</sup>

Directly in the aftermath of the GFC, the same congressional leaders and the Obama Administration who viewed mortgage finance as rife with bad corporate actors associated the GFC with fragmented and ineffective regulatory authority, which diffused responsibility and stimulated forum shopping for sympathetic regulators. At the same time, those policymakers drew the lesson that regulation had to pay more attention to consumer protection and systemic risk. Although these narratives were not universally endorsed and skeptics continue to criticize them, this framing of consumer protection issues encouraged a more vigorous and comprehensive policy response, particularly in the CFPB, which was premised on institutional consolidation.

In the face of that strong policy preference for regulatory consolidation, industries seeking to deflect stringent regulatory oversight were incentivized to emphasize other priorities of crisis response. For example, the auto dealer carveout gained bipartisan political support because it could be seen as supporting the domestic automobile industry, which had cratered amid the economic downturn, as well as the wider imperative of stabilizing employment and laying the groundwork for economic recovery.

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138. See Peterson, *supra* note 6, at 1091–92 (“Deception was by far the most common legal violation asserted in CFPB public enforcement actions to date. . . . Cases pleading deception generated . . . about 93% of all consumer relief awarded in public Bureau actions.”). Anti-deception actions included a significant number enforcing the FTC Telemarketing Sales Rule. *Id.* at 1092 tbl.8.

139. See Claessens & Kodres, *supra* note 66, at 436 (“The outcome should be that policy-making takes a more ‘Bayesian’ approach where reforms are implemented in areas where knowledge is greater, while in other areas both a more ‘experimental’ approach is taken and more resources – data, analyses – are invested to clarify the best approach.”).

Although the CFPB has ordinarily been cautious in exercising its authority (notwithstanding critics' claims otherwise),<sup>140</sup> attention to business fraud and heightened appreciation for regulatory discretion prompted other aggressive bureaucratic innovation, most notably Operation Choke Point. That innovation sometimes undermined key policy values like procedural protections for regulated entities, a key element in the eventually successful effort to end OCP.

A further point worth emphasis involves the contested nature of post-crisis policy autopsies, and their susceptibility to revision with subsequent political outcomes. However an objective third party might characterize the GFC's policy autopsies along an ideological spectrum, they have become the subject of partisan battle, culminating in sharp reversals of policy undertaken by the Trump Administration. Republican members of Congress have contested many elements of the causal narratives identified above. The most aggressive antifraud policy extensions of the post-GFC period, such as Operation Choke Point, have been particularly susceptible to critique.

The GFC presents many other opportunities to investigate patterns of post-crisis regulatory policymaking. Other consumer protection topics to be explored through the policy shock lens include home mortgage origination and so-called fringe lending products such as payday loans, check cashing, and pawn shops. The domain of investor protection in the United States beckons as a terrain to explore—not least because policy responses there reflected notably contradictory impulses. On the one hand, the Dodd–Frank Act tightened structures of investor protection in a host of ways. The legislation greatly expanded the enforcement powers available to the Securities and Exchange Commission (SEC), including enhanced investigative authority, new incentives for whistleblowers, clarification of the SEC's ability to sanction professionals who abet securities violations, and heightened penalties for transgressions of administrative rules.<sup>141</sup> Dodd–Frank also dramatically extended antifraud authority at the Commodity Futures Trading Commission (CFTC), removing the requirement that fraud cases demonstrate intentional deception, extending prohibitions against market manipulation, and expanding CFTC jurisdiction to include a wider range of derivative financial instruments, such as credit default swaps.<sup>142</sup> On the other hand, the JOBS Act, passed by the same Congress with large bipartisan majorities, *reduced* disclosure

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140. See Peterson, *supra* note 6, at 1096 (countering CFPB's "rogue agency" critiques with evidence of its collaboration with other law enforcement "in 9 out of 11 cases with consumer relief awards in excess of \$100 million").

141. See generally MARK JICKLING, CONG. RESEARCH SERV., R41503, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: TITLE IX, INVESTOR PROTECTION (2010) (outlining major changes under Title IX and their background and purpose); Bennett Rawicki, *The Dodd-Frank Act and SEC Enforcement—The Significant Expansions and Remaining Limitations on the SEC's Enforcement Scope and Arsenal*, 41 SEC. REG. L.J. 35 (2013) (analyzing the evolution of securities law and enforcement and impact of Dodd–Frank).

142. See Vasu B. Muthyala & Laura L. Conn, *The CFTC's New Era of Aggressive Enforcement*, 13 CRIM. LITIG. 9, 9–10 (2013).

requirements on many new initial public offerings.<sup>143</sup> Explaining such cross-currents will likely require attention to post-crisis policy autopsies, coalition-building, and construction of political narratives that we offer in this Article, as well as the sort of political and policy counterattacks that have constrained the activities of the CFPB and, more understandably, brought an end to Operation Choke Point.

The post-GFC period also offers rich possibilities for comparing American policy responses to those in other industrialized and industrializing countries. How did high-income countries in Europe and Asia, or emerging economies in the Global South, make sense of the GFC's implications for consumer protection, investor protection, or other crisis-related issues? To what extent did legislators and regulatory officials in these other nations follow the lead of American policy-makers, or rather, chart different paths on the basis of distinctive assessment of local conditions or by questioning American wisdom in the face of a worldwide crisis that originated in the United States? How important were policy intermediaries such as the Organization for Cooperation and Economic Development in diffusing, or forestalling, policy ideas and strategies? Answering such queries will depend on a collective effort from social scientists with detailed knowledge of relevant languages and societal contexts. But the pay-off from a parallel set of investigations would be significant, greatly improving our understanding of more general patterns and tendencies in crisis-driven regulatory change.

#### CONCLUSION

Major crises usually generate a large volume of academic commentary as well as regulatory reactions. We call for a deeper scholarly enterprise: to operationalize the study of crises and the responses that follow them, which inevitably defy the predictions of the most elegant theories. Treating the Global Financial Crisis as a policy shock, this Article has presented four case studies on topics and using methods that have received short-shrift in the literature relative to other GFC issues. We offer these studies and commentaries as a template for evaluating the next big crisis when it comes, as it inevitably will—whether in the form of financial meltdown, environmental catastrophe, or other profound societal challenge.

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143. See Michael D. Guttentag, *Patching a Hole in the JOBS Act: How and Why to Rewrite the Rules that Require Firms to Make Periodic Disclosures*, 88 IND. L.J. 151, 169–70 (2013). See generally Colleen Honigsberg, Robert J. Jackson, Jr. & Yu-Ting Forester Wong, *Mandatory Disclosure and Individual Investors: Evidence from the JOBS Act*, 93 WASH. U. L. REV. 293 (2015).