

Creating Compliance Climates

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Relatively few regulated entities are the targets of enforcement activity or otherwise have direct contact with regulators. Given that absence of direct contact, this Article posits that regulators influence behavior by creating “compliance climates” that project regulators’ priorities into the market. These climates are what drive participants’ behavior. This Article begins by defining compliance climates and describing, as examples, two diametrically opposed climates created by Directors of the Consumer Financial Protection Bureau (“CFPB”). It then identifies constraints on the creation of compliance climates. In particular, the Article demonstrates significant limitations on using new enforcement actions or rulemakings to set compliance climates. The Article concludes by showing that effective regulators generate compliance climates efficiently and quickly by: (1) using their “bully pulpits;” (2) making creative use of enforcement and rulemaking activities they inherited from their predecessors; and (3) taking quick actions like guidance or amicus briefs that require relatively little staff time or resources. Although every regulator has different powers and mandates, the lessons derived from the CFPB’s experience are broadly applicable. Regulators cannot rely simply on bringing new enforcement actions or promulgating new rules to enforce compliance with their regulatory agendas; they must use all the available tools to effectively and efficiently generate a compliance climate that reinforces their agendas.

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INTRODUCTION

Relatively few regulated entities are the targets of enforcement activity or otherwise have direct contact with regulators. Given this reality, what tools can regulators use to influence the behavior of all market participants? More pointedly, after a political transition, how does an effective regulator signal their priorities so that market participants change their behavior in line with the new regulator's agenda?

This Article posits that regulators influence behavior by creating “compliance climates.” Compliance climates are projections of regulators' priorities and concerns that create perceptions in the “minds” of market participants regarding how those regulators will act. These climates—rather than any direct contacts—drive participants' behavior, affecting what resources they devote to compliance, how they decide close legal questions, and how they expect their competitors to act. Previous work has focused on how regulators use two important powers given to them—enforcement and rulemaking¹—and the impact of those powers on participants' behavior.² This Article builds on that work but demonstrates that effective regulators create compliance climates through a wide variety of actions and not primarily by starting new enforcement or rulemaking activities. In the long run, enforcement or rules can be the “stick” that cements a compliance climate; however, both processes generally take years and exert minimal influence on the behavior of regulated entities during most of that time.³ A new regulator cannot rely on new enforcement or rulemakings to establish a compliance climate.

1. See, e.g., Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853 (2014); Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129 (2016); Amy Widman & Prentiss Cox, *State Attorneys General's Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws*, 33 CARDOZO L. REV. 53 (2011); Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TUL. L. REV. 1057 (2016); Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEGIS. 37 (2018); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012); Craig Cowie, *Putting Money Back Into Consumers' Pockets: An Empirical Study of the CFPB's Civil Penalty Fund*, 2021 U. ILL. L. REV. 1417 (2021); Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471 (2011); Sidney A. Shapiro, *Rulemaking Inaction and the Failure of Administrative Law*, 68 DUKE L.J. 1805 (2019); Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65 (2015); Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889 (2008) [hereinafter O'Connell, *Political Cycles*].

2. See e.g., Barkow, *supra* note 1, at 1158 (noting that requiring guidelines on enforcement decisions may lessen the deterrence value of enforcement activity); Lemos & Minzner, *supra* note 1, at 897 (noting that failing to collect penalties from defendants with limited resources can minimize any deterrent effect from those actions); Cowie, *supra* note 1, at 1467 (noting deterrent effect of receiving civil money penalties in enforcement actions); see Prentiss Cox, *Public Enforcement Compensation and Private Rights*, 100 MINN. L. REV. 2313, 2350, 2350 n.190 (2016) (noting that deterrence is a “core goal of civil law enforcement” and citing others); Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 359 (2015) (“The primary purpose of the SEC's enforcement activity is deterrence.”).

3. See *infra* Part II.C.2.

Instead, as this Article shows through an analysis of the first five directors of the Consumer Financial Protection Bureau (“CFPB”), effective regulators generate compliance climates efficiently and quickly by: (1) using their “bully pulpits;”⁴ (2) making creative use of enforcement and rulemaking activities they inherited from their predecessors; and (3) taking quick actions like guidance or amicus briefs that require relatively little staff time or resources. For example, a regulator may establish their climate in part by publicly terminating predecessors’ rulemakings and using their bully pulpit to explain why. Similarly, a new regulator may inherit an enforcement matter started under a predecessor, but the new regulator decides the terms on which that matter resolves. They can use their power to set those terms to establish their own compliance climate. They can demand particular relief, decide whom to name as defendants, and ultimately decide to litigate rather than settle if the defendants will not agree to terms that reflect their priorities. At their bully pulpit, the new regulator can announce those terms in a way that clarifies their priorities in the minds of market participants.

Part I introduces the concept of compliance climates and provides two illustrative examples of building compliance climates at the CFPB. Next, Part II examines how new regulators operate under constraints imposed by limits on their tenure, their existing staff, and that staff’s current workload. Part III demonstrates how effective regulators efficiently create compliance climates given those constraints and why starting new enforcement matters or rulemaking are not the best methods for changing existing climates.⁵

To conduct this analysis, the Article examines the actions of the first five directors of the CFPB.⁶ President Obama appointed Richard Cordray to be the first Director of the CFPB on January 4, 2012.⁷ Cordray remained Director for

4. A “bully pulpit,” a phrase coined by President Teddy Roosevelt, is a platform that allows its holder to “shape public sentiment and mobilize action” simply by speaking. DORIS KEARNS GOODWIN, *THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM* xi-xiv (2013) (noting Roosevelt’s effective use of his pulpit and Taft’s inability to do the same).

5. *Cf.* Lemos & Mitzner, *supra* note 1, at 877, 907 (noting problems with using enforcement activity as a signal for other market participants).

6. Although the Article uses examples from the CFPB, which has a singular director, the principles generally apply to other agency heads as well (*e.g.*, the Chair and Commissioners for the Federal Trade Commission or the Securities and Exchange Commission). The CFPB is a federal agency designed to protect consumers and to regulate the consumer financial markets. Congress created the CFPB in response to the 2008 financial crisis after determining that financial regulators’ lack of focus on consumer issues contributed to the crisis. S. REP. NO. 111-176, at 2, 9 (2010). It has more than 1450 employees. CFPB, *FINANCIAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU* 10 fig.1 (2021) [hereinafter *CFPB 2021 FINANCIAL REPORT*] (noting a range of approximately 1450 to 1678 employees over fiscal years 2016 to 2021). It also has extensive enforcement and rulemaking authorities. *See, e.g.*, Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 *REV. BANKING & FIN. L.* 321, 343–58 (2013) (describing the CFPB’s authorities).

7. Barack Obama, President of the United States, Remarks by the President on the Economy (Jan. 4, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/01/04/remarks-president-economy> (appointing Cordray through a recess appointment). After the appointment was held unconstitutional, the Senate confirmed Cordray on July 16, 2013. Danielle Douglas, *Senate Confirms Cordray to Head Consumer Financial*

almost six years, until he resigned November 24, 2017. President Trump appointed Mick Mulvaney⁸ as Acting Director starting the next day, and Mulvaney served for just over a year (while simultaneously serving as the head of the Office of Management and Budget).⁹ Trump nominated Kathleen Kraninger to be Director, and after Senate confirmation, she took office on December 11, 2018.¹⁰ Kraninger served for just over two years, resigning on the day of President Biden's inauguration. Biden appointed David Uejio as Acting Director effective that same day.¹¹ Uejio served for just under over eight and a half months pending confirmation of Biden's nominee for Director, Rohit Chopra.¹² Chopra took office on October 12, 2021.¹³ The Article considers Chopra's tenure through September 2022, the end of the CFPB's 2022 fiscal year, at which time Chopra had been Director for just under a year.

I. COMPLIANCE CLIMATES

Effective regulators efficiently establish compliance climates to change market participants' decision making to conform with the regulators' agendas. Because they do not have direct contact with their regulator, most market participants base their decisions on perceived risks and benefits: How proactive will they be in ensuring their compliance with the law? Will they view themselves as being put at a competitive disadvantage (or advantage) vis-à-vis their competitors if their competitors make different choices? Will they assess risks to other participants (for example, consumers or workers) in delivering products and services? Their answers will depend, in part, on their understanding of the compliance climates set by their regulators.

Regulators create compliance climates through a wide variety of actions beyond enforcement and rulemaking, including, *inter alia*, statements, informal guidance, administrative actions, and amicus briefs. Compliance climates are not created solely by individual actions; they are a product of all of a regulator's

Protection Bureau, WASH. POST (July 16, 2013, 5:51 PM), https://www.washingtonpost.com/business/economy/senate-confirms-consumer-watchdog-nominee-richard-cordray/2013/07/16/965d82c2-ee2b-11e2-a1f9-ea873b7e0424_story.html.

8. The author worked at the CFPB under both Cordray and Mulvaney and left to teach law while Mulvaney was the acting director.

9. Cowie, *supra* note 1, at 1430 n.68; Press Release, The White House, Statement on President Donald J. Trump's Designation of OMB Director Mick Mulvaney as Acting Director of the Consumer Financial Protection Bureau (Nov. 24, 2017), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-donald-j-trumps-designation-omb-director-mick-mulvaney-acting-director-consumer-financial-protection-bureau>.

10. Cowie, *supra* note 1, at 1430 n.68.

11. Craig Cowie, *Is the CFPB Still on the Beat? The CFPB's (Non)Response to the COVID-19 Pandemic*, 82 MONT. L. REV. 41, 43 n.10 (2021).

12. Evan Weinberger, *Chopra to Tackle Stacked CFPB Agenda After Winning Confirmation*, BLOOMBERG L. (Sept. 30, 2021, 1:56 PM), <https://news.bloomberglaw.com/banking-law/chopra-to-tackle-stacked-cfpb-agenda-after-winning-confirmation>.

13. Jon Hill, *Chopra Officially Takes Reins as CFPB's Next Director*, LAW360 (Oct. 12, 2021, 5:52 PM), <https://www.law360.com/articles/1430389/chopra-officially-takes-reins-as-cfpb-s-next-director>.

actions. Even a regulator who espouses a generally deregulatory climate may take isolated actions that would support a regulatory climate (for example, a public enforcement action with a large penalty)¹⁴ or may create a climate that deregulates some participants or products while increasingly regulating others.¹⁵ The concept of a compliance climate attempts to capture this nuance.

A regulator's compliance climate also affects agency staff, and these effects can spill over into the compliance climate. Staff perceptions of how their work fits within the regulator's agenda may energize or demoralize them. Further, the climate sets the overall level of urgency within the agency, and staff likely will adjust the pace of their work (either slower or faster) to match. Thus, the internal impact of the compliance climate likely will lead to external actions—or nonactions—that further reinforce the climate's effect on the behavior of market participants.

A. ESTABLISHING COMPLIANCE CLIMATES

Mick Mulvaney and Rohit Chopra stand as examples of how two CFPB Directors efficiently—and quickly—established compliance climates that furthered diametrically opposed agendas. Each used many different tools, but these examples demonstrate that the most important tool is the regulator's "bully pulpit." Regulators can use their platform to state their agenda, and they then use those statements to tie other actions directly to their agendas. At first glance, this "power" may seem relatively weak compared to rulemaking or enforcement, but it is not. Market participants' perceptions of their regulators drive their decisions.¹⁶ Regulators can directly shape those perceptions because their status qua regulators gives them platforms—their bully pulpits—that allow them simply to speak their priorities in a way that will be heard by the market's participants. Even when taking other actions, regulators can use their pulpits to publicize those actions and to connect them expressly to their agenda. In this way, their use of the bully pulpit shapes their compliance climates.

Effective regulators generally do not rely on new enforcement and rulemaking to establish their climates at the beginning of their tenures. New regulators can, however, seize on enforcement and rulemaking activity already in progress as opportunities. They can adjust these ongoing efforts to reflect their priorities and can use their bully pulpits to drive home how those efforts support

14. The CFPB's largest order, by far, until recently came while Mulvaney was director, although he created an extremely deregulatory climate. *See* discussion *infra* Part I.B.

15. For example, Kraninger's CFPB filed cases primarily against small, judgment proof defendants rather than against banks or other large entities.

16. Sarah Wheeler, *Despite What Some Lenders Think, It's a Bad Time to Get Lax on Compliance*, HOUSINGWIRE (Mar. 20, 2018, 11:41 PM), <https://www.housingwire.com/articles/42801-despite-what-some-lenders-think-its-a-bad-time-to-get-lax-on-compliance> (discussing lenders' reactions to Mulvaney's appointment as director of the CFPB); Alistair Gray, *Trump Pick Plans Radical Shake-Up of Consumer Protection Agency*, FIN. TIMES (Dec. 5, 2017), <https://www.ft.com/content/306c34c6-d71b-11e7-8c9a-d9c0a5c8d5c9> (stating that companies "are preparing for a lightening of their compliance burden" after Mulvaney's appointment).

their priorities in the minds of market participants—in other words, to create a compliance climate that reflects their priorities.

Enforcement and rulemaking do play a role in creating compliance climates, but there are significant constraints on using them for this purpose.¹⁷ Regulators must initiate new enforcement and rulemaking actions that support the climate they have created. Otherwise, their climate will seem like a paper tiger. But new rulemaking and enforcement activities require tremendous resources (such as staff time) over extended periods during which the activities will have minimal influences on participants' behavior. Thus, a new regulator cannot use them effectively to establish a compliance climate at the start of their tenure. Moreover, the career staff have full workloads when the regulator arrives. New regulators cannot simply throw out this preexisting environment and start fresh to create their compliance climate.

B. MULVANEY'S DEREGULATORY COMPLIANCE CLIMATE

CFPB Acting Director Mulvaney's tenure demonstrates how a director who is hostile to the mission of an agency can hamstring that agency not only through enforcement and rulemaking decisions but also by creating a deregulatory compliance climate.¹⁸ Prior to becoming the Director,¹⁹ Mulvaney publicly and repeatedly expressed an extreme antipathy towards the CFPB. In a widely publicized video interview with the Credit Union Times, he described

17. See discussion *infra* Part II.

18. The question of whether agencies with a commission structure (*e.g.*, the Federal Trade Commission ("FTC") or the Securities Exchange Commission ("SEC")) could suffer from similar problems is beyond the scope of this Article. Commentators have hypothesized that a commission structure would moderate extreme actions by the chair due to the influence of the other commissioners. See, *e.g.*, Adam J. Levitin, *What the CFPB 'Commission' Debate Is Really About*, AM. BANKER (Dec. 29, 2016, 8:30 AM PST), <https://www.americanbanker.com/opinion/what-the-cfpb-commission-debate-is-really-about> (critiquing arguments in favor of a commission structure for the CFPB). There have not been any empirical analyses of commissions' actions testing this question or examining whether a commission head could implement changes similar to those made by Mulvaney. As a note, however, commissions can be subject to deadlock (*e.g.*, the Federal Election Commission), partisan splits (*e.g.*, three commissioners from one party, including the head, and two from the other), or periods where the commission is not fully staffed. *Id.* For example, during the Trump Administration, between February 10, 2017, and May 2, 2019—a period of just over two years—the FTC had only two sitting Commissioners out of five commissioner seats (and only one for a few days), one appointed by a Democrat, and one by a Republican. (data on file with author). Moreover, commissioners can create mismatches between the climates desired by presidents and the ones implemented by commissions. For example, when a new president is elected who is from a different party from their predecessor, the new president usually must deal with an FTC that has a majority of members from the opposite political party for a significant amount of time. Since the election of President Kennedy, it has taken on average just over 1.5 years, and a median of 1.44 years, before a president from a different party has an FTC with a majority of members from their party. *Id.* For President Clinton, it took almost 4.7 years, the longest period of any president since Kennedy. *Id.* Interestingly, as a congressperson, Mulvaney co-sponsored legislation to change the CFPB's structure so that it would be headed by a commission rather than a director, perhaps because he considered a commission structure to be more deregulatory than a single director. H.R. 2446, 113th Cong. § 2 (2014).

19. Because acting directors and confirmed directors after Cordray have the same powers, this Article uses "Director" for both.

the CFPB as a “joke . . . in a sick, sad kind of way.”²⁰ In that same interview, he said “some of us would like to get rid of [the CFPB].”²¹ As a congressperson, he introduced or co-sponsored numerous bills to weaken the CFPB, including: (1) eliminating the agency entirely;²² (2) restricting the agency’s ability to regulate short-term, high-cost loans (including payday loans);²³ (3) eliminating the CFPB’s ability to regulate abusive conduct;²⁴ (4) eliminating the CFPB’s funding from the Federal Reserve Board of Governors and replacing it with congressional appropriations;²⁵ (5) eliminating the Consumer Financial Civil Penalty Fund;²⁶ and (6) lowering the pay of CFPB employees.²⁷ Thus, as Mulvaney came into the Director’s role, the market already understood that he intended to create a significantly more deregulatory compliance climate than his predecessor.

Once he became Director, and despite his protestations otherwise,²⁸ Mulvaney rapidly used his bully pulpit and his general power as Director to reinforce—and even heighten—that initial impression.²⁹ In so doing, Mulvaney created an extremely strong deregulatory compliance climate that focused on protecting the entities providing financial products and services rather than the consumers of those products and services.³⁰ For example, he announced that enforcement should be done “‘only reluctantly’ . . . [and as] the most final of last

20. See, e.g., Emily Stewart, *Mick Mulvaney Once Called the CFPB a “Sick, Sad” Joke. Now He Might be in Charge of It.*, VOX (Nov. 16, 2017, 4:50 PM), <https://www.vox.com/policy-and-politics/2017/11/16/16667266/mick-mulvaney-cfpb-cordray-omb-joke> (embedding video of the interview); Patrick Rucker, *Rival Sides Square Off Over Succession at U.S. Consumer Finance Agency*, REUTERS (Nov. 26, 2017, 10:05 PM), <https://www.reuters.com/article/us-usa-trump-cfpb/rival-sides-square-off-over-succession-at-u-s-consumer-finance-agency-idUSKBN1DR014>; Ian McKendry, *Mulvaney as CFPB Head? Five Things to Know*, AM. BANKER (Nov. 26, 2017, 8:00 PM), <https://www.americanbanker.com/slideshow/mulvaney-as-cfpb-head-five-things-to-know>; Nicholas Confessore, *Mick Mulvaney’s Master Class in Destroying a Bureaucracy from Within*, N.Y. TIMES (Apr. 16, 2019), <https://www.nytimes.com/2019/04/16/magazine/consumer-financial-protection-bureau-trump.html>.

21. Stewart, *supra* note 20.

22. *Id.*; H.R. 3118, 114th Cong. § 1 (2015) (repealing the Consumer Financial Protection Act of 2010 in its entirety) (co-sponsor).

23. H.R. 4737, 114th Cong. §§ 3–4 (2016) (introduced).

24. H.R. 5112, 114th Cong. § 2 (2016) (co-sponsor).

25. H.R. 2913, 114th Cong. § 702 (2015) (co-sponsor); H.R. 4371, 114th Cong. § 301 (2016) (co-sponsor); H.R. 1174, 113th Cong. § 702 (2013) (co-sponsor).

26. H.R. 6688, 112th Cong. § 2331 (2012) (co-sponsoring legislation to eliminate the Consumer Financial Civil Penalty Fund and alter the CFPB’s funding to require congressional appropriations).

27. H.R. 2385, 113th Cong. § 2 (2013) (co-sponsor).

28. Andrew Restuccia, *Mulvaney Imposes Temporary Hiring, Regulations Freeze on CFPB*, POLITICO (Nov. 27, 2017, 5:19 PM), <https://www.politico.com/story/2017/11/27/mulvaney-hiring-freeze-consumer-protections-192306> (“Rumors that I’m going to set the place on fire or blow it up or lock the doors are completely false[.]”).

29. Even as acting director, Mulvaney stated that he thought the agency should not exist. *Id.* (“If the law allowed this place not to exist, I’d sit down with the president to try to make the case that other agencies can do this job well if not more effectively.”).

30. See also Patricia A. McCoy, *Inside Job: The Assault on the Structure of the Consumer Financial Protection Bureau*, 103 MINN. L. REV. 2543, 2579–2600 (2019) (describing in great detail some of Mulvaney’s myriad attempts to restructure the CFPB and change the way it operated and discussing Mulvaney’s statements about enforcement strategy).

resorts”³¹ and made clear that he felt the agency had not done enough to protect the rights of companies being investigated for illegal conduct.³² In addition, he changed the agency’s strategic plan in line with his agenda, eliminating the goal of preventing financial harm to consumers and focusing instead on access to financial markets and “consistent” enforcement of the law.³³ Further, he signaled a lack of interest in hearing from consumer advocates by canceling two meetings with the CFPB’s Consumer Advisory Board,³⁴ and then the CFPB effectively terminated all of the Advisory Board’s members.³⁵ Instead of discussing threats to consumers from predatory business practices, he raised concerns about the CFPB itself harming consumers and “destroy[ing] businesses.”³⁶ He asked Congress to limit the CFPB’s powers and independence by, *inter alia*, funding the CFPB through congressional appropriations rather than through the Federal Reserve System³⁷ and requiring congressional approval of all major rules promulgated by the CFPB.³⁸ In his first quarterly funding request to the Board of Governors of the Federal Reserve System, Mulvaney requested “\$0.”³⁹

31. Renae Merle, *Trump Administration Strips Consumer Watchdog Office of Enforcement Powers in Lending Discrimination Cases*, WASH. POST (Feb. 1, 2018, 5:40 PM), <https://www.washingtonpost.com/news/business/wp/2018/02/01/trump-administration-strips-consumer-watchdog-office-of-enforcement-powers-against-financial-firms-in-lending-discrimination-cases/>.

32. Memorandum from Mick Mulvaney on New CFPB Governing Philosophy to CFPB Staff (Jan. 23, 2018, 2:00 PM) (“Subject: To Everybody from the Acting Director”); *see also* Press Release, Mick Mulvaney, Acting Director, CFPB, Written Testimony Before the House Committee on Financial Services (Apr. 10, 2018), <https://www.consumerfinance.gov/about-us/newsroom/written-testimony-mick-mulvaney-acting-director-before-house-committee-financial-services> [hereinafter Mulvaney HCFS Testimony] (stating that as part of its “new mission . . . the Bureau will protect the legal rights of all, equally”).

33. *Compare* CFPB, BUREAU OF CONSUMER FINANCIAL PROTECTION STRATEGIC PLAN: FY 2013-2017 8 (2017) (“Goal 1: Prevent financial harm to consumers while promoting good practices that benefit them.”), *with* CFPB, BUREAU OF CONSUMER FINANCIAL PROTECTION STRATEGIC PLAN: FY 2018-2022, at 5 (2018) (listing goals). Mulvaney’s plan still made a passing reference to protecting consumers from unfair, deceptive, abusive, and discriminatory practices as an objective of his second goal of consistent enforcement, but it was no longer a high-level goal itself and that reference focused only on access to credit and elder exploitation rather than harm to consumers generally. *Id.* at 10–11; *see also* Mulvaney HCFS Testimony, *supra* note 32 (stating that the “Bureau’s new strategic priorities are to recognize free markets and consumer choice and to take a prudent, consistent, and humble approach to enforcing the law”).

34. Katy O’Donnell, *Mulvaney Guts Consumer Bureau’s Advisory Board*, POLITICO (June 6, 2018, 5:06 PM), <https://www.politico.com/story/2018/06/06/mulvaney-guts-cfpb-consumer-advisory-board-599608>. The CFPB Director is statutorily required to meet with the Consumer Advisory Board at least twice each year to learn about emerging trends and regional practices in the consumer financial products and services industry. 12 U.S.C. § 5494(a), (c). The board is composed of, *inter alia*, “experts in consumer protection, financial services, community development, fair lending, and civil rights . . .” *Id.* § 5494(b).

35. O’Donnell, *supra* note 34 (characterizing Mulvaney’s changes at the CFPB as “more closely align[ing] the bureau with business interests”).

36. Mulvaney HCFS Testimony, *supra* note 32.

37. *Id.* The CFPB is funded by annual (or quarterly) transfers from the Federal Reserve System’s combined earnings up to a set percentage of the total operating expenses of the Federal Reserve System. 12 U.S.C. § 5497(a).

38. CFPB, SEMI-ANNUAL REPORT OF THE BUREAU OF CONSUMER FINANCIAL PROTECTION 2 (2018).

39. Letter from Mick Mulvaney, Acting Director, CFPB, to Hon. Janet L. Yellen, Chair, Board of Governors of the Federal Reserve System, CFPB (Jan. 17, 2018), https://files.consumerfinance.gov/f/documents/cfpb_fy2018_q2_funding-request-letter-to-frb.pdf (“This letter is to inform you that for Second Quarter of Fiscal Year 2018, the Bureau is requesting \$0.”) (emphasis in original).

Lastly, he even changed the name of the CFPB to remove “consumer” as the first word,⁴⁰ a decision that was reversed by his Trump-appointed successor, Kathleen Kraninger, after internal analysis estimated that changing the CFPB’s name could cost the regulated entities \$300 million.⁴¹ Although these statements did not actually change the structure or powers of the agency, they changed the market’s perceptions of how Mulvaney would deploy those powers and created a deregulatory compliance climate.

Mulvaney also made a series of administrative changes that reinforced his deregulatory compliance climate. He virtually stopped public enforcement actions during the first seven months of his tenure⁴² and made a series of changes that decreased staffing.⁴³ These changes included instituting a hiring freeze that initially was supposed to last thirty days but ultimately lasted for almost two years.⁴⁴ The freeze resulted in a 14.27 percent drop (almost two hundred forty full-time career staff) between September 30, 2017⁴⁵ and September 30, 2019.⁴⁶ At the same, he created and filled a series of positions for political appointees (the “Policy Associate Directors”) to oversee critical areas traditionally led by career staff, including the Research, Markets, & Regulations (“RMR”) and the Supervision, Enforcement, and Fair Lending (“SEFL”) divisions.⁴⁷

40. *Introducing Our New Bureau Seal*, CFPB (Mar. 30, 2018), <https://www.consumerfinance.gov/about-us/blog/introducing-our-new-bureau-seal> (announcing the creation of a seal for the Bureau of Consumer Financial Protection); Julia Horowitz, *CFPB Chief is Tired of People Calling His Agency by the Wrong Name*, CNN MONEY (Apr. 11, 2018, 6:02 PM), <https://money.cnn.com/2018/04/11/news/cfpb-new-seal-name-change/index.html#:~:text=%22I%20don't%20know%20why,established%20the%20agency%2C%20Mulvaney%20explained> (quoting Mulvaney as saying “I don’t know why we call it the CFPB, but that is not the name of the organization The organization is the Bureau of Consumer Financial Protection.”).

41. Alan Rappaport, *Under New Leadership, the C.F.P.B. Lives On*, N.Y. TIMES (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/us/politics/new-leadership-cfpb-name.html#:~:text=Lives%20On,-Share%20full%20article&text=WASHINGTON%20%E2%80%94%20The%20Consumer%20Financial%20Protection,to%20keep%20its%20old%20name> (noting Kraninger’s reversal and arguments that Mulvaney’s change was “simply a way to further neuter the agency’s stature” and “to undermine the bureau’s hard-won reputation as a champion for consumers”).

42. See *infra* notes 63-70 and accompanying text.

43. CFPB, FINANCIAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 9 (2018) [hereinafter CFPB 2018 FINANCIAL REPORT] (“Acting Director Mulvaney implemented various changes within the Bureau to reflect his thoughts on a more exacting implementation of the Dodd-Frank Act that are consistent with the law’s provisions which have resulted in a reduced level of employment and funding levels.”).

44. Olivia L. Kratzke, *CFPB Lifts Nearly Two-Year Hiring Freeze*, CONSUMER FIN. MONITOR (Sept. 3, 2019), <https://www.consumerfinancemonitor.com/2019/09/03/cfpb-lifts-nearly-two-year-hiring-freeze>; CFPB 2021 FINANCIAL REPORT, *supra* note 6, at 9; Restuccia, *supra* note 28 (announcing a thirty-day hiring freeze).

45. This date is the end of the CFPB’s 2017 fiscal year, which is the last full fiscal year of Cordray’s tenure. CFPB, FINANCIAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 4 (2017) [hereinafter CFPB 2017 FINANCIAL REPORT]. Cordray resigned approximately 15% of the way through fiscal year 2018. Kevin McCoy, *Richard Cordray Resigns as Director of Consumer Financial Protection Bureau*, USA TODAY (Nov. 24, 2017, 8:29 PM), <https://www.usatoday.com/story/money/2017/11/24/richard-cordray-resigns-director-consumer-financial-protection-bureau/893489001>.

46. CFPB 2021 FINANCIAL REPORT, *supra* note 6, at 10 fig.1.

47. Compare CFPB 2017 FINANCIAL REPORT, *supra* note 45, at 10 (organization chart), with CFPB 2018 FINANCIAL REPORT, *supra* note 43, at 8 (organization chart adding Policy Associate Director positions to five of the six divisions of the CFPB that existed at that time—all but the Operations division).

Mulvaney also moved the Office of Fair Lending and Equal Opportunity (“OFLEO”) out of SEFL—the division tasked with enforcing the laws—and into the Director’s Office.⁴⁸ As a result of this move, OFLEO lost its powers to enforce discrimination laws.⁴⁹ Although SEFL retained the authority to pursue violations of these laws, the CFPB no longer had an office dedicated to their enforcement. As feared by observers at the time, the CFPB did not file another enforcement action relating to credit discrimination for almost two and a half years.⁵⁰ The CFPB also announced in the first month of Mulvaney’s tenure that it would not assess penalties for failure to comply with changes to an important fair-lending law, the Home Mortgage Disclosure Act,⁵¹ that were to become effective on January 1, 2018, and that the CFPB intended to “engage in a rulemaking to reconsider various aspects of the 2015 HMDA Rule.”⁵²

Although Mulvaney did not use the creation of new rules to set his climate per se, he did take actions related to rulemaking that created a deregulatory compliance climate.⁵³ In his first month, he announced that the CFPB would reconsider the Payday Rule (finalized just prior to Cordray’s resignation), and effectively stayed implementation of the rule.⁵⁴ Early in his tenure, he also effectively terminated a number of significant rulemakings that had been initiated under Cordray.⁵⁵ Additionally, he issued a “call for evidence regarding

48. CFPB, FINANCIAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 6 (2019). *See also* Diane E. Thompson, *Pay Attention! Marginalized Communities, the Consumer Financial Protection Bureau, and Regulatory Advocacy*, 82 MONT. L.R. 343, 377–78 (2021) (discussing Mulvaney’s changes with respect to fair lending issues).

49. Merle, *supra* note 31; *see also* Mulvaney HCFS Testimony, *supra* note 32 (stating that after the reorganization, the “Office of Fair Lending will continue to focus on advocacy, coordination, and education”).

50. McCoy, *supra* note 30, at 2592 (discussing the move of the fair lending office out of the enforcement division and raising concerns that it would lead to reduced fair lending enforcement); Complaint at 1, 15–16, CFPB v. Townstone Fin., Inc., No. 1:20-cv-04176 (N.D. Ill. July 15, 2020) (alleging, *inter alia*, violations of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f). This filing also was three-quarters of the way through Kraninger’s tenure. The CFPB had filed a matter earlier in her tenure to enforce the Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801–2810. Consent Ord. at 6–8, *in re* Freedom Mortgage Corp., CFPB No. 2019-BCFP-0007 (June 5, 2019) (finding that Freedom Mortgage overreported applicants as non-Hispanic, white). By contrast, the CFPB under Uejio and Chopra filed two credit discrimination cases in roughly the first year and a half after Kraninger’s resignation. Complaint at 1, United States & CFPB v. Trustmark Nat’l Bank, No. 2:221-cv-02664 (W.D. Tenn. Oct. 22, 2021); CFPB v. Trident Mortgage Co. LP, No. 2:22-cv-02936 (E.D. Pa. July 27, 2022).

51. *See* 12 U.S.C. §§ 2801–2810. HMDA requires lenders to report a variety of data about mortgage application and lending, including the location and type of the property, as well as the applicants’ race, ethnicity, sex, and age. *See, e.g.*, CFPB, REPORTABLE HMDA DATA: A REGULATORY AND REPORTING OVERVIEW REFERENCE CHART FOR HMDA DATA COLLECTED IN 2022 16–17 (Jan. 1, 2022).

52. CFPB, *Statement with Respect to HMDA Implementation* (Dec. 21, 2017), https://files.consumerfinance.gov/f/documents/cfpb_statement-with-respect-to-hmda-implementation_122017.pdf.

53. *See generally* Shapiro, *supra* note 1, at 1809 (noting ways rulemaking can be used to implement a deregulatory agenda).

54. *See* discussion *infra* Part III.C.1.b (discussing the Payday Rule).

55. *See* discussion *infra* Part III.C.1.e (discussing Mulvaney’s effective termination of other significant rulemakings begun under Cordray); *see also* McCoy, *supra* note 30, at 2583–84 (noting that Mulvaney froze regulations for thirty days and then delayed several rules finalized under Cordray).

Consumer Financial Protection Bureau functions.”⁵⁶ He framed the effort as increasing consumer choice, creating efficient markets, and guaranteeing due process during enforcement rather than increasing protections for consumers from illegal activities.⁵⁷ As part of this effort, over the course of eight months, Mulvaney approved thirteen requests for information (“RFIs”)⁵⁸ focusing primarily on the CFPB’s previous efforts to enforce the law,⁵⁹ enact rules,⁶⁰ and provide information to the public.⁶¹ Market participants widely regarded these calls for evidence as signals that the CFPB was shifting from a consumer protection climate to a more industry-friendly, deregulatory climate.⁶²

Mulvaney’s enforcement agenda also helped create his deregulatory compliance climate. Mulvaney virtually stopped public enforcement in the first seven months of his tenure.⁶³ In fact, his first public enforcement action as Director was voluntarily dismissing a payday lending case filed under Cordray.⁶⁴ The CFPB dismissed this case despite the fact that it had not lost any rulings on

56. Press Release, CFPB, Acting Director Mulvaney Announces Call for Evidence Regarding Consumer Financial Protection Bureau Functions (Jan. 17, 2018), <https://www.consumerfinance.gov/about-us/newsroom/acting-director-mulvaney-announces-call-evidence-regarding-consumer-financial-protection-bureau-functions>.

57. *Id.*

58. (data on file with author); *see also infra* notes 59-61.

59. *See, e.g.*, Request for Information Regarding Bureau Enforcement Processes, 83 Fed. Reg. 5999 (Feb. 12, 2018) (processes for uncovering and enforcing violations of the law); Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes, 83 Fed. Reg. 3686 (Jan. 26, 2018) (issuance of civil investigative demands, which is a method by which the CFPB forces entities to provide information about their operations so that the CFPB can determine if they are violating the law); Request for Information Regarding Bureau Rules of Practice for Adjudication Proceedings, 83 Fed. Reg. 5055 (Feb. 5, 2018) (rules for adjudicative proceedings to enforce the law); Request for Information Regarding the Bureau’s Supervision Program, 83 Fed. Reg. 7166 (Feb. 20, 2018) (processes for supervising entities to ensure compliance with the law); Request for Information Regarding the Bureau’s Consumer Complaint and Consumer Inquiry Handling Processes, 83 Fed. Reg. 16839 (Apr. 17, 2018) (processes for handling consumer complaints about potential illegal acts).

60. *See, e.g.*, Request for Information Regarding Bureau Rulemaking Processes, 83 Fed. Reg. 10437 (Mar. 9, 2018) (processes for rulemaking); Request for Information Regarding the Bureau’s Adopted Regulations and New Rulemaking Authorities, 83 Fed. Reg. 12286 (Mar. 21, 2018) (whether to amend existing rules); 83 Fed. Reg. 12881, 83 Fed. Reg. 12881 (Mar. 26, 2018) (whether to amend rules inherited from other agencies).

61. *See, e.g.*, Request for Information Regarding Bureau Guidance and Implementation Support, 83 Fed. Reg. 13959 (Apr. 2, 2018) (processes for providing guidance on the law and the CFPB’s enforcement thereof); Request for Information Regarding Bureau External Engagements, 83 Fed. Reg. 8247 (Feb. 26, 2018) (engaging with the public); Request for Information Regarding Bureau Public Reporting Practices of Consumer Complaint Information, 83 Fed. Reg. 9499 (Mar. 6, 2018) (publicizing data on consumer complaints of companies’ actions); Request for Information Regarding Bureau Financial Education Programs, 83 Fed. Reg. 15131 (Apr. 9, 2018) (consumer education programs).

62. *See, e.g.*, Ed Mierzewski, *Mulvaney Lobs One Last Softball to Industry Opponents of CFPB*, PIRG (Dec. 31, 2018), <https://pirg.org/articles/mulvaney-lobb-one-last-softball-to-industry-opponents-of-cfpb> (characterizing the request as “yet another opportunity for industry opponents of the CFPB to attack the Bureau’s consumer protection mission”).

63. *See also* McCoy, *supra* note 30, at 2594–95 (discussing the freeze on data collection and enforcement during the first five months of Mulvaney’s tenure); *cf.* Shapiro, *supra* note 1, at 1812, 1816 (noting the efficacy of inaction in implementing a deregulatory rulemaking agenda).

64. Notice of Voluntary Dismissal Pursuant to F.R.C.P. 41(a)(1)(A)(i) at 1, CFPB v. Golden Valley Lending, Inc., No. 2:17-cv-02521-JAR-JPO (D. Kan. Jan. 18, 2018).

the merits of its claims and that a motion to dismiss was pending.⁶⁵ The CFPB filed no cases in the first four months of Mulvaney’s tenure and resolved only one pending case by settling for \$75,000 against essentially judgment-proof defendants.⁶⁶ The CFPB filed one case in the fifth month,⁶⁷ received a default judgment in a case filed under Cordray in the sixth month,⁶⁸ and in the seventh month, filed one more case⁶⁹ and voluntarily dismissed another case.⁷⁰

As a result, as is shown in Table 1, the CFPB’s public enforcement activity during the first seven months of Mulvaney’s tenure is considerably lower than those for any of his successors.

	Number of New Matters Filed⁷¹	Final Orders Received in Inherited Matters⁷²
Mulvaney	2	2
Average under Mulvaney’s successors	10	9.3
Median under Mulvaney’s successors	10	10

Table 1: Number of Enforcement Actions in First 7 Months of a Director’s Tenure

65. Docket, CFPB v. Golden Valley Lending, Inc., No. 2:17-cv-02521 (D. Kan. complaint filed in N.D. Ill. Apr. 27, 2017).

66. Stipulated Final Judgment & Order at 3, CFPB v. Top Notch Funding II, LLC, No. 1:17-cv-07114-GHW (S.D.N.Y. Jan. 30, 2018) (taking into account defendants’ “limited financial resources” in setting penalty amounts).

67. Consent Ord., *in re* Wells Fargo Bank, N.A., CFPB No. 2018-BCFP-0001 (Apr. 20, 2018).

68. Default Judgment & Order, CFPB v. Fed. Debt Assistance Ass’n, LLC, No. 1:17-cv-02997-GLR (D. Md. May 22, 2018).

69. Consent Ord., *in re* Sec. Grp., Inc., CFPB No. 2018-BCFP-0002 (June 13, 2018).

70. Order Dismissing the Notice of Charges, *in re* PHH Corp., CFPB No. 2014-CFPB-0002 (June 7, 2018).

71. Because different Directors started on different dates, for the purposes of this comparison, this Article counted all cases filed in the first 213 days of each Director’s tenure. The figures for Kraninger, Uejio, and Chopra are all very close, 11, 10, and 9 respectively. This table does not include Cordray’s tenure, as he had to build the enforcement infrastructure from scratch; therefore, a comparison to his first seven months in office would not be probative. The cases were collected from a review of the CFPB’s Enforcement Actions website (<https://www.consumerfinance.gov/enforcement/actions>) and its Administrative Adjudication Docket (<https://www.consumerfinance.gov/administrative-adjudication-proceedings/administrative-adjudication-docket>) and cross-referenced against its press releases and financial reports. If Mulvaney’s numbers are included in the average and median, those figures drop slightly to an average of 8 and median of 9.5 new cases.

72. These figures include all final orders received in active cases (defined as those filed prior to the Director’s start except for those orders where the CFPB voluntarily dismissed an action) in the same 213-day period at the start of each Director’s tenure. Here, Kraninger’s figure (at 4) is significantly lower than Uejio’s or Chopra’s (at 14 and 10 respectively), but, as is discussed *infra* at Parts I.C and I.C.1, Kraninger inherited significantly fewer active matters than Mulvaney, Uejio, or Chopra. Even so, the rate under Kraninger is more than twice the rate under Mulvaney. Including the orders from Mulvaney’s tenure lowers the average to 7.5 and the median to 7.

Mulvaney's enforcement activity increased after the first seven months of his tenure, but his overall activity still remained lower than any other director.⁷³ On average, the CFPB filed roughly half the number of cases per year under Mulvaney compared to the next lowest director (10.6 per year versus 18.6) and roughly one-third of the overall average number of cases per year (10.6 versus 32.5). Moreover, Mulvaney litigated far fewer cases on average (9 percent, which was only one case, versus 30 percent overall). The number of active⁷⁴ cases in a given month also dropped more than 20% across Mulvaney's tenure from twenty-eight to twenty-two per month.⁷⁵ As a result, under Mulvaney the CFPB had amongst the lowest number of active cases—averaging 20.62 active public cases per month, only slightly more than the average of 20.00 under Kraninger.⁷⁶

C. CLIMATE CHANGE: CHOPRA'S REGULATORY COMPLIANCE CLIMATE

Kathleen Kraninger succeeded Mulvaney as Director and maintained a number of Mulvaney's policies (including the hiring freeze and a low pace of enforcement activity) for the first half of her tenure. However, at the end of her tenure, there was a surge in public enforcement activity.⁷⁷ Thus, when Kraninger was replaced by Dave Uejio, whom President Biden appointed as Acting Director pending Senate confirmation of Biden's nominee for Director, Rohit Chopra,⁷⁸ she left a relatively full pipeline.⁷⁹

Consequently, Uejio and Chopra filed fewer new enforcement actions per month than Kraninger, but they had a higher average number of active cases each month than she did.⁸⁰ Despite filing fewer cases on average, Chopra and Uejio set much stronger, pro-consumer, regulatory compliance climates when compared with the climates set by Mulvaney and continued by Kraninger.

73. See *infra* tbl.5.

74. "Active" is a measure of ongoing litigation. Thus, it includes only cases that were pending for more than sixty days after filing (including those pending as of the beginning of the month and those filed in the month). When the CFPB resolves a matter by filing a public consent order in its administrative forum, the matter usually is filed and settled on the same day. See Cowie, *supra* note 11, at 65 n.124. When the CFPB attempts to do the same thing in federal court, it must file a complaint and a proposed stipulated judgment with the federal district court; however, the settlement does not become final unless and until the federal district court enters an order. This rarely happens on the day of filing, although the matter is in essence over. In the vast majority of cases, it happens within sixty days of filing. (data on file with author) (finding that the CFPB filed forty-eight cases in federal court through the end of the 2022 fiscal year where the CFPB filed a stipulated judgment with the complaint and that in only two cases did the judgment become final more than sixty days after filing).

75. These figures include cases that were effectively or expressly stayed (*e.g.*, because they were on appeal or because of pending challenges to the CFPB's constitutionality in other cases). If one considers only active matters, the drop is more extreme, from 25 to 17 cases, over 30%. The drop is due to the combination of filing fewer cases as a whole and immediately settling almost all of them.

76. See *infra* tbl.4.

77. See discussion *infra* Part III.B.4.

78. See discussion *supra* Introduction.

79. It is also possible that Kraninger's surge also depleted the number of non-public investigations that were in the pipeline, leaving fewer cases that were close to being ready to file.

80. See *infra* tbls.4-5.

Just one month after Uejio became Acting Director, he took several actions to set a new compliance climate. He used an enforcement action to warn mortgage servicers that “unprepared is unacceptable” with respect to a predicted wave of foreclosures related to the pandemic.⁸¹ He also rescinded guidance issued under Kraninger that stated that the CFPB would not prosecute companies for certain violations during the pandemic.⁸² He had the CFPB issue an interim final rule requiring debt collectors to provide notice of COVID-related eviction protections. In his public remarks on that interim final rule, he expressly tied the rule to his priorities of protecting consumers from pandemic-related economic harm and combatting racial inequities.⁸³ Lastly, he terminated several rulemakings that were not in line with his priorities.⁸⁴

Market participants presumed that Chopra, when he became Director, would establish a strong, regulatory compliance climate given his prior experience, including as an FTC Commissioner. His stated agenda included being a much more aggressive enforcer, focusing on prosecuting repeat offenders,⁸⁵ providing full relief for consumers’ harms, ensuring fair lending and racial equity,⁸⁶ and protecting consumers’ data.⁸⁷ He quickly used his bully pulpit, the terms of enforcement actions, and guidance on the law to reinforce

81. Press Release, CFPB, CFPB Compliance Bulletin Warns Mortgage Servicers: Unprepared is Unacceptable (Apr. 1, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-compliance-bulletin-warns-mortgage-servicers-unprepared-is-unacceptable>.

82. Press Release, CFPB, CFPB Rescinds Series of Policy Statements to Ensure Industry Complies with Consumer Protection Laws (Mar. 31, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-rescinds-series-of-policy-statements-to-ensure-industry-complies-with-consumer-protection-laws>.

83. Press Release, CFPB, Prepared Remarks of Acting Director Dave Uejio for the Interim Final Rule on CDC Eviction Moratorium Rights Under the Fair Debt Collection Practices Act (Apr. 19, 2021), <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-acting-director-dave-uejio-for-the-interim-final-rule-on-cdc-eviction-moratorium-rights-under-fair-debt-collection-practices-act>. The CFPB also issued guidance that discriminating on sexual orientation or gender identity violated fair-lending laws. Equal Credit Opportunity Act (Regulation B), 12 C.F.R. § 1002 (2021); Discrimination on the Bases of Sexual Orientation and Gender Identity, 86 Fed. Reg. 14363–66 (Mar. 16, 2021) (to be codified at 12 C.F.R. pt. 1002).

84. See discussion *infra* Part III.C.1.e.

85. Press Release, CFPB, Written Testimony of Director Rohit Chopra Before the Senate Committee on Banking, Housing, and Urban Affairs (Oct. 28, 2021), <https://www.consumerfinance.gov/about-us/newsroom/written-testimony-director-rohit-chopra-before-senate-committee-banking-housing-urban-affairs> (stating that the CFPB would “sharpen its focus” on repeat offenders).

86. Evan Weinberger, *Chopra Vows to Revive Enforcement at Consumer Finance Watchdog*, BLOOMBERG L. (Mar. 2, 2021, 12:03 PM), <https://news.bloomberglaw.com/banking-law/chopra-vows-to-revive-enforcement-at-consumer-finance-watchdog>; see also Press Release, Rohit Chopra, Director, CFPB, Statement Regarding the Advisory Opinion to Curb False Identity Matching (Nov. 4, 2021), <https://www.consumerfinance.gov/about-us/newsroom/statement-regarding-the-advisory-opinion-to-curb-false-identity-matching> (stating that the CFPB will seek redress for the “full range of harms” to consumers from illegal practices).

87. See, e.g., Press Release, CFPB, CFPB Issues Advisory to Protect Privacy When Companies Compile Personal Data (July 7, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-advisory-to-protect-privacy-when-companies-compile-personal-data> (quoting Chopra, “Americans are now subject to round-the-clock surveillance by large commercial firms seeking to monetize their personal data . . . the CFPB will be taking steps to use the Fair Credit Reporting Act to combat misuse and abuse of personal data . . .”).

that initial presumption and to create a compliance climate reflecting these priorities.

First, Chopra used three enforcement actions early in his tenure to highlight his priority of prosecuting repeat offenders. Those actions were against: (1) FirstCash and Cash America West (pawn shop lenders who made thousands of loans to military servicemembers and their dependents);⁸⁸ (2) TransUnion (the parent of one of the three largest credit reporting agencies with annual revenues in 2021 of nearly \$3 billion), two of its subsidiaries, and its former president;⁸⁹ and (3) MoneyGram International and MoneyGram Payment Systems (two companies that collectively operate “one of the largest remittance transfer providers in the United States”) (collectively “MoneyGram”).⁹⁰ Given the relatively short amount of time between Chopra taking office and the filing of these cases, it seems extremely likely that the cases were already in the enforcement pipeline when Chopra arrived. Nonetheless, Chopra seized on these cases as an opportunity to create his compliance climate.

Roughly one month into his tenure, the CFPB filed a complaint against FirstCash and Cash America West, characterizing FirstCash as a “repeat offender” that “cheated military families over and over again.”⁹¹ Less than six months later, the CFPB filed two high-profile actions against well-known companies TransUnion and MoneyGram.⁹² Chopra called TransUnion “an out-of-control repeat offender that believes it is above the law” because it, *inter alia*, allegedly tricked consumers into buying products in violation of a prior order.⁹³ When the CFPB filed the MoneyGram case, Chopra stated, “[f]or years,

88. Press Release, CFPB, CFPB Sues Pawn Lenders for Cheating Military Families (Nov. 12, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-pawn-lenders-for-cheating-military-families>.

89. Complaint, CFPB v. TransUnion, No. 1:22-cv-01880 (N.D. Ill. Apr. 12, 2022).

90. Complaint at 1–6, CFPB v. MoneyGram Int’l, Inc., No. 1:22-cv-03256 (S.D.N.Y. Apr. 21, 2022).

91. Press Release, CFPB, CFPB Sues Pawn Lenders for Cheating Military Families (Nov. 12, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-pawn-lenders-for-cheating-military-families>.

92. Complaint, CFPB v. TransUnion, No. 1:22-cv-01880 (N.D. Ill. Apr. 12, 2022); Complaint, CFPB v. MoneyGram Int’l, Inc., No. 1:22-cv-03256 (S.D.N.Y. Apr. 21, 2022). Less than three months later, the CFPB filed another case against another alleged repeat offender. Complaint, CFPB v. Populus Fin. Grp., Inc., d/b/a Ace Cash Express, Inc., No. 3:22-cv-01494-G (N.D. Tex. July 12, 2022).

93. Press Release, CFPB, CFPB Charges TransUnion and Senior Executive John Danaher with Violating Law Enforcement Order (Apr. 12, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-charges-transunion-and-senior-executive-john-danaher-with-violating-law-enforcement-order>; Press Release, CFPB, Prepared Remarks of Director Rohit Chopra on the Repeat Offender Lawsuit Against TransUnion and John Danaher (Apr. 12, 2022), <https://www.consumerfinance.gov/about-us/newsroom/director-chopras-prepared-remarks-on-the-repeat-offender-lawsuit-against-transunion-and-john-danaher> (repeatedly calling defendants repeat offenders and stating that “it [is] crystal clear that the company is an out-of-control repeat offender”). Since filing this suit, the CFPB has filed two more suits against TransUnion and various of its subsidiaries and again noted “TransUnion’s [p]attern of [m]isconduct.” Press Release, CFPB, CFPB and FTC Take Actions Against TransUnion for Illegal Rental Background Check and Credit Reporting Practices (Oct. 12, 2023), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-ftc-take-actions-against-transunion-illegal-rental-background-check-and-credit-reporting-practices>; *see also* Press Release, CFPB, Prepared Remarks of CFPB Enforcement Director Eric Halperin on the TransUnion Enforcement Actions (Oct. 12, 2023), <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-enforcement-director-eric-halperin-transunion-enforcement-actions> (noting prior actions against TransUnion).

MoneyGram has been leaving families high and dry while they wait for their money.”⁹⁴ He also referred to MoneyGram’s “long pattern of misconduct” in the CFPB press release, which also said “MoneyGram is no stranger to financial crime.”⁹⁵

Chopra heightened the impact of these cases on the compliance climate through his authority to control the CFPB’s litigation. Although most cases filed by the CFPB settle immediately,⁹⁶ Chopra authorized litigating each of these cases rather than settling. He also authorized naming—for the first time ever—a high-ranking corporate official of a well-known company as a defendant,⁹⁷ alleging that the former president of TransUnion failed to ensure that the company complied with a prior consent order.⁹⁸ The press picked up on Chopra’s concerns, amplifying the impact of his statements on his compliance climate.⁹⁹ Chopra increased his enforcement capacity to further support his

94. Press Release, CFPB, Director Rohit Chopra’s Prepared Remarks on the Lawsuit Against MoneyGram (Apr. 21, 2022), <https://www.consumerfinance.gov/about-us/newsroom/director-chopras-prepared-remarks-on-the-lawsuit-against-moneygram>.

95. Press Release, CFPB, CFPB and NY Attorney General Sue Repeat Offender MoneyGram for Leaving Families High and Dry (Apr. 12, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-ny-attorney-general-sue-repeat-offender-moneygram-for-leaving-families-high-and-dry>.

96. See discussion *infra* Part II.C.1 (noting that only 30% of cases are litigated).

97. Through the end of the 2022 fiscal year, the CFPB had filed eighty-nine cases against individuals. None of those cases were against an executive at a large, well-known company. Instead, they were primarily against small companies that provided payday loans, credit repair services, or debt relief services. (data on file with author). See also, e.g., Notice of Charges, *in re* Integrity Advance, LLC & James R. Carnes, CFPB No. 2015-CFPB-0029 (Nov. 18, 2015) (payday lender and its CEO); Complaint, CFPB v. Commonwealth Equity Grp., LLC (d/b/a Key Credit Repair) & Nikitas Tsoukales, No. 1:20-cv-10991 (D. Mass. May 22, 2020) (action by CFPB and Massachusetts against credit repair service and its president); Consent Ord., *in re* Student Aid Inst., Inc. & Steven Lamont, CFPB No. 2016-CFPB-0008 (Mar. 30, 2016) (debt relief company and CEO).

98. Complaint at 2, CFPB v. TransUnion, TransUnion Interactive, Inc., and John T. Danaher, No. 1:22-cv-01880 (N.D. Ill. Apr. 12, 2022).

99. See, e.g., Jon Hill, *CFPB, NY Sue MoneyGram Over Alleged Remittance Lapses*, LAW360 (Apr. 21, 2022, 1:26 PM), <https://www-law360-com.uclawsf.idm.oclc.org/articles/1486128/cfpb-ny-sue-moneygram-over-alleged-remittance-lapses> (noting that Chopra “kicked his campaign against so-called corporate recidivists into high gear last week by suing TransUnion”); Thomas Burke, *CFPB Files Lawsuit Against TransUnion and Former Executive Alleging Violations of 2017 Consent Order*, CONSUMER FIN. MONITOR (Apr. 20, 2022), <https://www.consumerfinancemonitor.com/2022/04/20/cfpb-files-lawsuit-against-transunion-and-former-executive-alleging-violations-of-2017-consent-order> (noting that the suit against the individual “appears intended to demonstrate that Director Chopra’s recent statement regarding [] his intent to impose liability on officers and directors of repeat offenders was not an idle threat”); Katherine Chiglinsky, *TransUnion Called an ‘Out-of-Control’ Offender as CFPB Sues Over Marketing*, BLOOMBERG (Apr. 12, 2022, 11:53 AM), <https://www.bloomberg.com/news/articles/2022-04-12/cfpb-calls-transunion-out-of-control-offender-sues-company?leadSource=verify%20wall> (quoting Chopra’s “out-of-control” statement); Joe Hernandez, *Credit Firm TransUnion Used Deceptive Marketing and ‘Dark Patterns,’ Lawsuit Alleges*, NPR (Apr. 12, 2022, 5:12 PM), <https://www.npr.org/2022/04/12/1092417768/credit-firm-transunion-used-deceptive-marketing-and-dark-patterns-lawsuit-allege> (quoting Chopra’s “out-of-control repeat offender” comment); Stacy Cowley, *MoneyGram Sued for Allegedly Delaying Transfers and Withholding Refunds*, N.Y. TIMES (Apr. 21, 2022), <https://www.nytimes.com/2022/04/21/business/moneygram-lawsuit-new-york-ag-cfpb.html> (noting Chopra’s “commit[ment] to stamping out misconduct by firms that break the law over and over again” and one of his prior speeches about repeat offenders); Kate Berry, *CFPB, New York AG Sue MoneyGram for Repeat Remittance Violations*, AM. BANKER (Apr. 21, 2022, 2:59 PM), <https://www.americanbanker.com/news/cfpb-ny-ag-sue-moneygram-for-repeat-remittance-violations> (quoting Chopra as stating, “MoneyGram is a repeat offender that violates formal law enforcement order.”).

climate; he announced a more than 10 percent increase in enforcement personnel “to bring on more firepower for its efforts to target repeat corporate offenders and larger market participants.”¹⁰⁰

Second, Chopra used (again likely preexisting) enforcement investigations to signal an aggressive compliance climate by ordering settlement terms that redressed a broader scope of consumer harms. The CFPB ordered Wells Fargo to pay over \$2 billion in restitution plus a \$1.7 billion penalty—its largest case ever—to provide redress for an extraordinarily broad range of consumer harm flowing from unlawful repossessions compared to the relief ordered in similar cases.¹⁰¹ Press coverage of the Wells Fargo case also emphasized Chopra’s climate with respect to repeat offenders.¹⁰² In another case earlier in his tenure, the CFPB ordered Bank of America to redress consumer harms flowing from the unlawful freezing of funds, expressly accounting for fees charged, missed utility payments, time spent on hold, and loss of housing or cars.¹⁰³ Chopra required the bank both to pay harmed consumers a lump sum and to provide an individual review process enabling consumers to demonstrate and receive compensation for additional harm caused by the violations.¹⁰⁴

Third, with respect to his fair lending priorities, Chopra began creating his climate prior to taking office by announcing that he intended to appoint a person

100. Jon Hill, *CFPB Set to Bulk Up Its Enforcement Ranks with New Hiring*, LAW360 (May 12, 2022, 8:09 PM), <https://www.law360.com/articles/1492993/cfpb-set-to-bulk-up-its-enforcement-ranks-with-new-hiring>.

101. *Compare* Consent Ord. at 20–21, *in re* Wells Fargo Bank, N.A., CFPB No. 2022-CFPB-0011 (Dec. 20, 2022) (ordering payment of all direct repossession costs paid by the consumer, \$4,000 per consumer for transportation and other types of expenses, any difference between the market price and actual sale price of the consumer’s car, refunds of any deficiency balances paid, reimbursement of any excess tax obligations, and attorney fees and costs, as well as compensation for “[l]oss of use” of the repossessed cars), *with* Consent Ord. at 21–22, *in re* Nissan Motor Acceptance Corp., CFPB No. 2020-BCFP-0017 (Oct. 13, 2020) (ordering restitution only for loss of use and fees paid); Consent Ord. at 11–12, 17–19, *in re* Wells Fargo Bank, N.A., CFPB No. 2018-CFPB-0001 (Apr. 20, 2018) (noting that illegal practices may have caused repossessions and ordering Wells Fargo to draft a remediation plan based on what Wells Fargo “identifies as . . . economic or other cognizable harm” resulting from Wells Fargo’s illegal conduct, but not identifying specific types of harm that must be included or expressly requiring that harm from repossessions be remediated). *Compare also* CFPB, SUPERVISORY HIGHLIGHTS 3 (2022) (stating under Chopra that illegal repossessions “caused substantial injury by depriving borrowers of the use of their vehicles and . . . consequences such as missed work, expenses for alternative transportation, repossession-related fees, detrimental credit reporting, and vehicle damage”), *with* CFPB, SUPERVISORY HIGHLIGHTS 6 (2017) (noting that examiners required refunding of only repossession fees in cases of unlawful repossessions).

102. *See, e.g.*, Press Release, CFPB, Prepared Remarks of CFPB Director Rohit Chopra on the Wells Fargo Law Enforcement Action (Dec. 20, 2022), <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-on-the-wells-fargo-law-enforcement-action>; Chris Arnold, *Wells Fargo to Pay \$3.7 Billion Settling Charges it Wrongfully Seized Homes and Cars*, NPR (Dec. 20, 2022, 11:30 AM), <https://www.npr.org/2022/12/20/1144331954/wells-fargo-billions-wrongful-fees-settlement> (quoting Chopra referring to “Wells Fargo’s rinse-repeat cycle of law violations”); Katy O’Donnell, *Wells Fargo Slammed with \$3.7B Penalty, in Record CFPB Settlement*, POLITICO (Dec. 20, 2022, 3:00 PM), <https://www.politico.com/news/2022/12/20/wells-fargo-cfpb-settlement-00074740> (quoting Chopra as calling Wells Fargo “one of the most problematic repeat offenders”).

103. Order at 4, 12, 14, 22–23, *in re* Bank of Am., N.A., CFPB No. 2022-CFPB-0004 (July 14, 2022).

104. *Id.* at 30–33.

with significant fair lending experience to lead enforcement.¹⁰⁵ And, just two weeks after Chopra became Director, the CFPB and the United States filed a joint complaint and proposed consent order against Trustmark National Bank, alleging various fair lending violations.¹⁰⁶ Although that case involved traditional redlining, Chopra seized on it as a platform to set a compliance climate regarding two broad concerns: fair lending and the uses of technology. These concerns included both algorithmic bias specifically (so-called “digital redlining”) and the collection and use of vast amounts of consumer data by companies generally.¹⁰⁷ He echoed those concerns a week later in his testimony before Congress.¹⁰⁸ As another example, the CFPB filed an amicus brief on the applicability of the Equal Credit Opportunity Act roughly two months after Chopra started, and its general counsel issued a statement regarding the agency’s priorities on fair lending and anti-discrimination.¹⁰⁹

Lastly, Chopra signaled a new, stronger compliance climate regarding consumers’ data through several means. Days after Chopra took office,¹¹⁰ the CFPB filed a brief regarding the applicability of consumer laws to technology companies.¹¹¹ Again, he used the filing as a warning of his priorities on the uses of technology and consumer data in general as well as the specific harms from inaccurate credit reporting.¹¹² He personally issued a statement, and the CFPB

105. Weinberger, *supra* note 86.

106. Consent Ord. at 10, 15, *United States & CFPB v. Trustmark Nat’l Bank*, No. 2:21-cv-2664-SHM-atc (W.D. Tenn. Oct. 27, 2021) (requiring Trustmark to “invest a minimum of \$3.85 million in a loan subsidy fund . . . for consumers applying for loans” in the redlined area and to pay a \$1 million civil money penalty to the CFPB).

107. Press Release, CFPB, Remarks of Director Rohit Chopra at a Joint DOJ, CFPB, and OCC Press Conference on the Trustmark National Bank Enforcement Action (Oct. 22, 2021), <https://www.consumerfinance.gov/about-us/newsroom/remarks-of-director-rohit-chopra-at-a-joint-doj-cfpb-and-occ-press-conference-on-the-trustmark-national-bank-enforcement-action>.

108. Press Release, CFPB, Written Testimony of Director Rohit Chopra Before the Senate Committee on Banking, Housing, and Urban Affairs (Oct. 28, 2021), <https://www.consumerfinance.gov/about-us/newsroom/written-testimony-director-rohit-chopra-before-senate-committee-banking-housing-urban-affairs> (noting concerns that automation and algorithms “can unwittingly reinforce biases and discrimination, undermining racial equity”).

109. Seth Frotman, *CFPB Is Standing Up for Civil Rights Protections*, CFPB (Dec. 17, 2021), <https://www.consumerfinance.gov/about-us/blog/cfpb-standing-up-civil-rights-protections>. The brief was filed by the CFPB, Department of Justice, the Board of Governors of the Federal Reserve System, and the Federal Trade Commission. Brief for the CFPB et al. as Amici Curiae Supporting Petitioner, *Fralish v. Bank of Am.*, N.A., Nos. 21-2846 (L), 21-2999 (7th Cir. Dec. 16, 2021).

110. Presumably Chopra had to authorize its filing, and it is possible he was consulted after his nomination was confirmed but before he took office.

111. Brief for the Fed. Trade Comm’n, Consumer Fin. Prot. Bureau, and North Carolina as Amici Curiae Supporting Reversal, *Henderson v. The Source for Public Data, L.P.*, 53 F.4th 110 (2022) (No. 21-1678).

112. *See, e.g.*, Press Release, CFPB, CFPB Issues Advisory to Protect Privacy When Companies Compile Personal Data (July 7, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-advisory-to-protect-privacy-when-companies-compile-personal-data> (announcing issuance of an advisory opinion on the production and use of credit reports and quoting Chopra, “Americans are now subject to round-the-clock surveillance by large commercial firms seeking to monetize their personal data . . . [and] the CFPB will be taking steps to use the Fair Credit Reporting Act to combat misuse and abuse of personal data . . .”); Press Release,

issued a press release.¹¹³ In addition to the redlining case mentioned above, the CFPB filed three other amicus briefs in Chopra's first year involving the Fair Credit Reporting Act ("FCRA") and the harms that can arise from the collection and use of consumers' data.¹¹⁴ Chopra also required several tech companies that provide payments services to produce information about those services, noting a concern about how consumers' data might be used against them.¹¹⁵

II. CONSTRAINTS ON NEW REGULATORS

Any new regulator faces constraints on the actions they can take to set the climate quickly. First, a new regulator should assume that they have only a limited time in which they can change market participants' behavior.¹¹⁶ Second, many efforts—especially efforts like enforcement and rulemaking—can only happen through a regulator's career staff. The regulator's capacity (or "pipeline") for additional such work is a function of both the number of personnel and their current workload. New regulators are constrained to an extent by the work already in the pipeline that they inherit from their predecessors.¹¹⁷

CFPB, CFPB Release Report Detailing Consumer Complaint Response Deficiencies of the Big Three Credit Bureaus (Jan. 5, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-releases-report-detailing-consumer-complaint-response-deficiencies-of-the-big-three-credit-bureaus> (quoting Chopra on the "serious harms" arising from the entities "faulty financial surveillance business model"); Press Release, CFPB, CFPB Affirms Ability for States to Police Credit Reporting Markets (June 28, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-affirms-ability-for-states-to-police-credit-reporting-markets> (discussing issuance of an interpretive rule clarifying that FCRA does not generally preempt more protective state laws, quoting Chopra on the "intrusive surveillance" faced by consumers, and highlighting the harm from inaccurate credit reporting).

113. Press Release, Rohit Chopra & Lina M. Khan, CFPB, Statement of CFPB Director Rohit Chopra and FTC Chair Lina M. Khan on Amicus Brief filed in *Henderson v. The Source for Public Data, L.P.* (Oct. 14, 2021), <https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-and-ftc-chair-lina-m-khan-on-amicus-brief-filed-in-henderson-v-the-source-for-public-data-lp> (stating that as "tech companies expand into a range of markets, they will need to follow the same laws that apply to other market participants" and that the FCRA was enacted to prevent consumers from being harmed by inaccurate data and "an undue invasion of the individual's right of privacy"); Press Release, CFPB, CFPB, FTC and North Carolina Department of Justice File Amicus Brief in *Henderson v. The Source for Public Data, L.P.* (Oct. 14, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-ftc-and-north-carolina-department-of-justice-file-amicus-brief-in-henderson-v-the-source-for-public-data-lp> (echoing concerns raised in Chopra and Khan's statement).

114. (data on file with author). The CFPB's general counsel issued blog statements about the other three briefs. *Id.* All told, the CFPB issued a statement, usually a blog by the general counsel, for all but one of the amicus briefs filed during Chopra's tenure. *See* discussion *infra* Part III.D (discussing the use of amicus briefs to set compliance climates).

115. Press Release, Rohit Chopra, CFPB, Statement Regarding the CFPB's Inquiry into Big Tech Payment Platforms (Oct. 21, 2021), <https://www.consumerfinance.gov/about-us/newsroom/statement-regarding-the-cfpbs-inquiry-into-big-tech-payment-platforms>.

116. *See, e.g.,* Paul M. Igasaki, *Doing the Best with What We Had: Building a More Effective Equal Employment Opportunity Commission During the Clinton-Gore Administration*, 17 LAB. L. 261, 264 (2001) (noting the "limited windows" for "institutional change" given the length of one's term in office and the need for "new political leadership . . . to move quickly").

117. *See* discussion *infra* Part II.C.

A. TIME IN OFFICE

Agency heads must assume that they will be removed at the next possible presidential transition (at the latest).¹¹⁸ As a practical matter, this means that a regulator will have at most three to three and a half years before the next possible transition,¹¹⁹ with even less time to conduct rulemaking.¹²⁰ Even if a new President were to nominate a new regulator immediately,¹²¹ that regulator still must be confirmed by the Senate—which typically takes at least six months¹²² and could take much longer.¹²³ An acting director typically will have significantly less time, likely only six months to a year.¹²⁴ Nonetheless, as shown above, an effective acting director can transform the compliance climate significantly in that time.

118. Although CFPB directors are appointed to five-year terms, 12 U.S.C. § 5491(c)(1), they may be removed by the president at will. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020); *see also* discussion *infra* Part III.B.4.

119. By the time Chopra took office, just over 3.25 years (39.3 months) remained until the next possible transition. Had Cordray not taken office until his confirmation and had he resigned (or been fired) on the first day of Trump's administration, he would have spent only 3.5 years as director.

120. *See* discussion *infra* Part III.B.4.

121. Trump took more than six months after Cordray's resignation to nominate Kraninger, and her confirmation took just under six months. Ordinarily, Kraninger would have had roughly three years, but because Cordray remained in office for just over ten months of the Trump administration, she had just over two years. *See* discussion *supra* Introduction and notes 11, 13–17.

122. *See, e.g.*, Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 957 tbl.2 (2009) (finding that on average it took more than six months for agency heads to assume their offices in the Clinton and George W. Bush presidencies). Similarly, it took almost six months for Kraninger to take office after she had been nominated. Katy O'Donnell, *Senate Confirms Trump Nominee Kraninger to Lead Consumer Bureau*, POLITICO (Dec. 6, 2018, 2:42 PM), <https://www.politico.com/story/2018/12/06/senate-confirms-kraninger-cfpb-1006095>.

123. Chopra's confirmation took just over eight months despite Biden having announced his nomination a few days before Biden's inauguration. *See* Tyler Pager, Zachary Warmbrodt, Katy O'Donnell & Leah Nysten, *Biden Taps Warren Ally Chopra to Lead Consumer Bureau*, POLITICO (Jan. 17, 2021, 7:51 PM), <https://www.politico.com/news/2021/01/17/biden-rohit-chopra-consumer-bureau-460086>; ASSOCIATED PRESS, *Senate Confirms Rohit Chopra to Lead the Consumer Financial Protection Bureau*, NPR (Oct. 1, 2021, 10:45 AM), <https://www.npr.org/2021/10/01/1042310553/cfpb-senate-confirms-rohit-chopra-watchdog-consumer-financial-protection-bureau>. Further, he did not take office at the CFPB until approximately two weeks later. Hill, *supra* note 13. Cordray's confirmation took almost exactly two years, but he took office through a recess appointment just under six months after his nomination. *See* discussion *supra* note 7; Press Release, White House, President Obama Nominates Richard Cordray to Lead Consumer Financial Protection Bureau (July 18, 2011), <https://obamawhitehouse.archives.gov/blog/2011/07/18/president-obama-nominates-richard-cordray-lead-consumer-financial-protection-bureau>. Although the United States Supreme Court later held that recess appointments made on the same day as Cordray's were unconstitutional, *NLRB v. Noel Canning*, 573 U.S. 513, 557 (2014) (finding the recess appointment of three National Labor Relations Board members, who were appointed on the same day as Cordray, were not constitutional), Cordray was confirmed by the Senate prior to the decision in *Noel Canning*. Alan S. Kaplinsky, *Hensarling and CFPB Disagree on Impact of Supreme Court's Canning Decision*, CONSUMER FIN. MONITOR (June 30, 2014), <https://www.consumerfinancemonitor.com/2014/06/30/hensarling-and-cfpb-disagree-on-impact-of-supreme-courts-canning-decision>.

124. Mulvaney was acting director for just over a year, and Uejio was acting director for nine months. If Trump had nominated Kraninger immediately, Mulvaney's tenure likely would have been shorter than six months.

B. STAFFING

The number of staff also constrains a new regulator's ability to change the compliance climate. The CFPB is a large agency, but the number of personnel has fluctuated dramatically over the last six fiscal years (2016-2021).¹²⁵ The CFPB grew steadily from its creation until at least the end of fiscal year 2017. A couple of months before Mulvaney took office, staffing topped out at approximately 1668 employees. However, staffing dropped precipitously when Mulvaney froze hiring and Kraninger kept that freeze in place. Over the two years of the freeze, staffing dropped 14 percent (roughly two hundred forty employees) to a low of one thousand four hundred thirty employees. Levels started recovering after Kraninger lifted the freeze, but more than three years after the two-year freeze ended, the agency was still below where it was prior to the freeze.

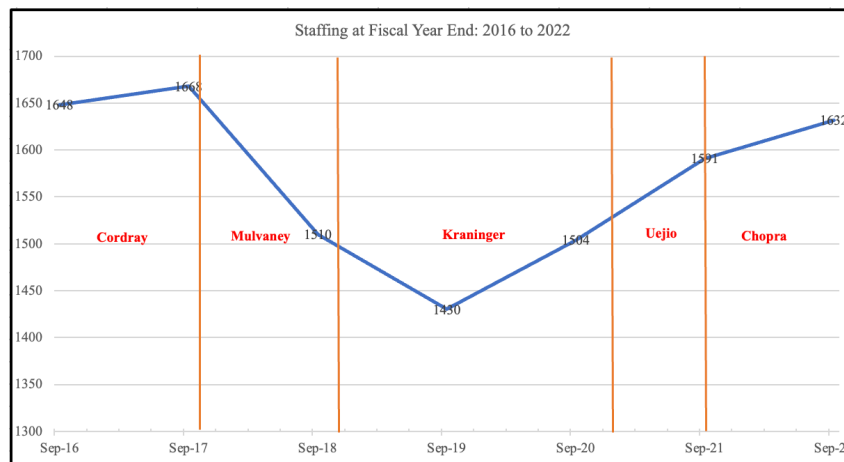


Figure 1: Staffing at Fiscal Year End¹²⁶

125. See CFPB 2021 FINANCIAL REPORT, *supra* note 6, at 10 fig.1.

126. *Id.*; CONSUMER FIN. PROT. BUREAU, FINANCIAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU: FISCAL YEAR 2022 8 fig.1 (2022) [hereinafter CFPB 2022 FINANCIAL REPORT].

Fiscal Year End	Director During Fiscal Year	Staffing As of End of FY
Sept. 30, 2016	Cordray	1,648
Sept. 30, 2017	Cordray	1,668
Sept. 30, 2018	Cordray 15% Mulvaney 85%	1,510
Sept. 30, 2019	Mulvaney 20% Kraninger 80%	1,430
Sept. 30, 2020	Kraninger	1,504
Sept. 30, 2021	Kraninger 31% Uejio 69%	1,591
Sept. 30, 2022	Uejio 3% Chopra 97%	1,632

Table 2: Staffing at Fiscal Year End¹²⁷

Although the CFPB does not publish detailed accounts of its staffing throughout the fiscal year, nor does it detail the exact headcounts in various offices, it is clear that Uejio and Chopra inherited an agency with somewhere between 5 percent and 9 percent fewer employees than the agency had before Mulvaney took over.

C. THE INHERITED “PIPELINE”

New regulators inherit a “pipeline” of work, meaning existing projects begun under a prior leader that have not been completed when the new leader begins. Staff likely are spending all their time on these projects, many of which may take years to complete. A new regulator cannot act on a blank slate. They must take the existing pipeline into account in deciding how best to implement their priorities. There may be projects that they cannot end, and they should weigh the resources already expended before transferring resources from others. Thus, the pipeline will constrain their ability to create their desired climate.

Two examples, enforcement actions and rulemaking, are important activities that can drive the compliance climate.¹²⁸ Indeed, the CFPB spends the highest percentage of its budget—roughly 36 percent—on enforcing consumer

127. See CFPB 2021 FINANCIAL REPORT, *supra* note 6, at 10 fig.1; CFPB 2022 FINANCIAL REPORT, *supra* note 126, at 8 fig.1.

128. See, e.g., Igasaki, *supra* note 116, at 274–78 (discussing the importance of a robust, strategic enforcement docket in deterring unlawful conduct). Rulemaking implements public policy by creating affirmative obligations with which regulated entities must comply or face possible sanctions. See, e.g., CON. RSCH. SERV., RL32240, THE FEDERAL RULE MAKING PROCESS: AN OVERVIEW 1 (June 17, 2013) (noting that rulemaking is “one of the basic tools of government used to implement public policy”).

financial laws, through both non-public supervisory exams¹²⁹ and public enforcement actions.¹³⁰ But for a given enforcement matter or rulemaking, the process usually takes years once it is started. Based on available staffing and the nature of the projects in the existing pipeline, the relevant offices can handle only so many cases or regulations at a given time.¹³¹

1. Enforcement

The Office of Enforcement (“Enforcement”) handles enforcement activity for the CFPB. As shown in Tables 3 and 4, at any given time, Enforcement personnel typically are investigating over one hundred matters and publicly litigating between fifteen and thirty matters.¹³² These matters often last more than two years and can take much longer if the matter results in contested litigation. Matters begin as non-public investigations.¹³³ Many, but not all,¹³⁴ of

129. The Office of Supervision (“Supervision”) conducts a tremendous number of non-public, supervisory examinations of covered entities. CFPB, ANNUAL PERFORMANCE PLAN AND REPORT, AND BUDGET OVERVIEW 25 (Feb. 2023) (noting that the CFPB had 587 supervisory events with significant onsite activity in fiscal year 2022 and that the number of supervisory events is expected to increase over time). While these efforts undoubtedly influence the compliance climate, there are two issues that limit that influence. First, they are for the most part nonpublic. On average, fewer than nine exams are referred to enforcement for public action each year. (data on file with author) (covering fiscal years 2012 through 2021 and derived from a series of Freedom of Information Act requests made by Ori Lev at Mayer Brown) [hereinafter *Lev Data*]. The CFPB also issues two to three supervisory highlights per year, but these reports discuss issues only at a very high level and without identifying the offender. See Cowie, *supra* note 11, at 82 n.194 (discussing lack of signaling from nonpublic supervisory activity). Aside from those actions, there is no way for the public at large to know what the CFPB has done at other entities. Second, Supervision’s authority extends only to a much more limited set of entities than Enforcement’s. See Levitin, *supra* note 6, at 355–58.

130. CFPB, ANNUAL PERFORMANCE PLAN AND REPORT, AND BUDGET OVERVIEW 13 (2022) [hereinafter 2022 PERFORMANCE PLAN].

131. Numerous scholars and agency leaders have noted agencies’ concerns with limited resources. See, e.g., Igasaki, *supra* note 116, at 266–67 (noting the effect of limited resources on enforcement strategy at the EEOC); Cox, Widman & Totten, *supra* note 1, at 103 (raising concern with how agencies should exercise enforcement discretion given their limited resources); Raso, *supra* note 1, at 71 (hypothesizing that “agencies prefer to avoid rulemaking procedures to increase their policymaking autonomy and to preserve their scarce resources”); Barkow, *supra* note 1, at 1160 (noting “every agency faces resource constraints”); Shapiro, *supra* note 1, at 1827 (noting that given resource constraints agencies should engage in strategic rulemaking so as to increase their chance of successfully implementing their mandates).

132. These figures are for fiscal years 2016 through 2022. The average number of publicly litigated matters (“active” matters) in a given month during that period is twenty-two and the median is twenty-three. These figures exclude cases that are stayed in the trial courts during the month in question. The Office of Enforcement only handles enforcement actions in the federal district courts or the CFPB’s administrative forum. When matters are appealed, the appeals are handled by the Office of General Counsel. In considering the CFPB’s enforcement capacity, it is the workload for the Office of Enforcement that matters. Thus, matters on appeal or otherwise stayed in the trial court are excluded. Of course, in gauging its capacity for bringing new contested actions, the CFPB also must consider the fact that matters currently on appeal or stayed may become active again without warning. On average, there have been almost four cases stayed every month in fiscal years 2016 through 2022, although the highest number of cases stayed in a month is nine. If those cases are included, the maximum number of pending cases in a month increases only to thirty-four.

133. See Cowie, *supra* note 11, at 80–82 (discussing the nonpublic investigatory phase and the advantages of developing a case through the nonpublic investigation rather than filing a public action immediately).

134. In fiscal years 2014 through 2021, the CFPB closed an average of about fifty investigations per year without public enforcement action. Lev Data, *supra* note 129.

these investigations ultimately become public enforcement actions. The CFPB aims to take a public enforcement action within two years of opening a non-public investigation,¹³⁵ but it often takes longer.¹³⁶

Fiscal Year	Director	Investigations Opened	Investigations Pending
2016	Cordray	70	153
2017	Cordray	63	145
2018	Cordray 15% Mulvaney 85%	15	106
2019	Mulvaney 20% Kraninger 80%	20	118
2020	Kraninger	54	129
2021	Kraninger 31% Uejio 69%	64	135

*Table 3: Investigations Opened and Pending by Fiscal Year*¹³⁷

The CFPB has significantly fewer public enforcement actions pending at any given time.

135. CFPB, THE CFPB STRATEGIC PLAN, BUDGET, AND PERFORMANCE PLAN AND REPORT 44 (2016); Cowie, *supra* note 11, at 64 n.123.

136. CFPB, FINANCIAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU: FISCAL YEAR 2020 19 tbl.4 (2020) [hereinafter FY 2020 FINANCIAL REPORT] (stating that the CFPB took on average twenty-six, thirty-two, and twenty-nine months to take public action on investigations in fiscal years 2018, 2019, and 2020, respectively).

137. *Lev Data*, *supra* note 129.

Director	Average	Median
Cordray	22.12	23.5
Mulvaney	20.62	21
Kraninger	20.00	19
Uejio	26.78	27
Chopra	23.82	24

Table 4: Average Number of Active¹³⁸ Public Cases in a Month Fiscal Years 2016 through 2022

The number of active cases in a given month is a mix of mostly preexisting cases and a smaller number of cases filed in that month that did not settle within sixty days of filing. Generally, the CFPB files a few cases (one to three) per month.

Director	Average	Median	Maximum
Cordray	3.5	3	12
Mulvaney	.85	1	2
Kraninger	2.84	2	11
Uejio	1.78	1	4
Chopra	1.45	1	5

Table 5: Average Number of Cases Filed in a Month Fiscal Years 2016 through 2022¹³⁹

Most of these—70 percent—either settled immediately or within sixty days. However, the 30 percent of cases that did not settle immediately litigated on average for 1.4 years, with the longest resolved case taking almost 5.5 years to end. Moreover, as of September 30, 2022, the longest case still pending had

138. “Active” cases exclude cases that were stayed in the trial courts. *See* discussion *supra* note 74 (defining “active”).

139. In cases where there was a change in tenure during a month, all of the filings in that transitional month are attributed to the director in office as of the first of the month. The figures are not pro-rated, as that would distort the monthly figure. In all cases except for the transition between Uejio and Chopra, the director in office on the first of the month was the director in office when all of the filings in that month happened. In the Uejio-Chopra transfer, one case was filed while Uejio was the Director, and two others were filed within a week and a half of Uejio stepping down. Although there would be error either way, it seems more accurate to attribute those two filings to Uejio rather than Chopra when analyzing the pace of enforcement activity.

been pending for more than 8.5 years—although it has been on appeal or otherwise stayed for more than 4.5 of those years.¹⁴⁰

Although there are fewer public actions in a given month than there are nonpublic investigations, the public enforcement actions present a more significant constraint on a new director’s options. Non-public investigations are completely within the CFPB’s control, and the director can shift personnel between those projects at will. By contrast, during public enforcement actions, the CFPB must comply with court-imposed deadlines and respond to actions by the opposing party (including discovery requests, motions, etc.). It is harder to change the staffing on active litigation.

The extent to which a new director is constrained by the enforcement pipeline (meaning the number of active and filed cases) varies considerably over time. Because most matters settle immediately after filing, there were few active cases in the early months of CFPB enforcement activity, but the number grew slowly over Cordray’s tenure. Thus, when Mulvaney became Acting Director, the CFPB had twenty-five active enforcement matters.

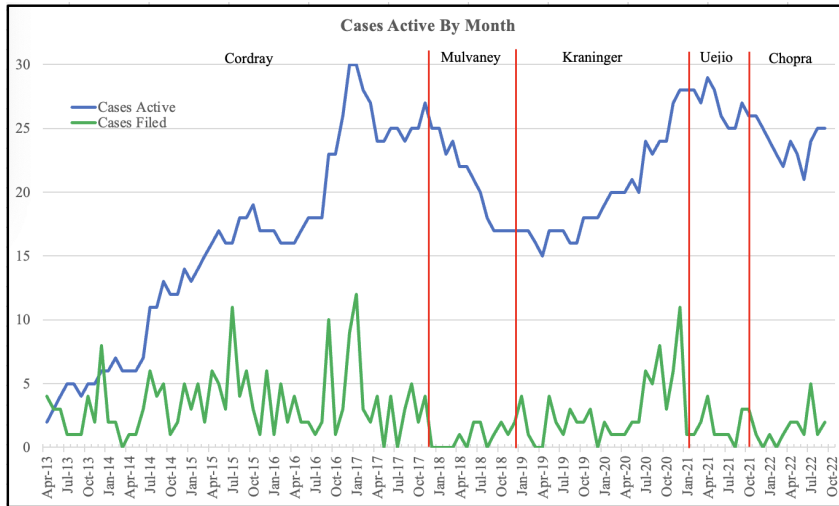


Figure 2: Cases Active and Filed by Month¹⁴¹

140. (data on file with author). *Compare* Complaint, CFPB v. CashCall, Inc., No. 1:13-cv-13167 (D. Mass. Dec. 16, 2013), with *CashCall, Inc.; WS Funding, LLC; Delbert Services Corporation; and J. Paul Reddam, CFPB*, <https://www.consumerfinance.gov/enforcement/actions/cashcall-inc-ws-funding-and-delbert-services> (last visited Mar. 16, 2024) (noting the procedural history of the case and that it remains pending).

141. One month in *Figure 2* shows more matters opened than active. A matter is considered active only if it did not settle within sixty days of the first filing. Thus, filing a significant number of cases in a month that did settle immediately can push the number of cases filed above the number of cases active.

The CFPB likely had the capacity to handle additional active matters when Mulvaney became Director.¹⁴² However, Mulvaney virtually ceased filing new cases to create his deregulatory compliance climate. Active cases declined precipitously throughout his tenure, dropping to seventeen active cases by the end.

As a result, Kraninger inherited a pipeline with the capacity to increase the number of active cases. Despite that fact, the CFPB kept the average number of active cases more or less the same during Kraninger's first year,¹⁴³ although the CFPB more than doubled the average rate of monthly filings from the admittedly low level during Mulvaney's tenure (from an average of 0.85 to 1.83 cases filed per month). During the next six months, CFPB enforcement activity remained relatively stable with a slight increase in the number of active cases to an average of twenty. However, Kraninger jammed the pipeline in the last seven months of her tenure; enforcement activity surged, leading to a dramatic increase in the number of active cases.¹⁴⁴ By the time Kraninger left office, there were twenty-eight active cases, close to the high during Cordray's tenure. Still, staffing remained well below where it was at the end of Cordray's tenure.

As a result, both Uejio and Chopra inherited busy pipelines that may have constrained their ability to move staff to implement their priorities. The CFPB filed fewer cases on average under both Uejio and Chopra than it did under Kraninger, but it litigated a higher percentage of those cases,¹⁴⁵ putting a greater strain on the CFPB's enforcement capacity. The CFPB also closed slightly more active cases under Uejio and Chopra than it did under Kraninger. Overall, active cases dropped slightly under Uejio (from twenty-eight to twenty-six)¹⁴⁶ and Chopra (from twenty-six to twenty-five).¹⁴⁷

One might argue that changes in the enforcement pipeline may have been due solely to the changes in staffing that were happening around the same time (dropping under Mulvaney and the first half of Kraninger's tenure and then increasing thereafter).¹⁴⁸ However, while staffing levels may have played a role

142. The CFPB had more active matters earlier when it had fewer personnel.

143. There were seventeen active cases when Kraninger took over, and the average number of active cases during her first year was 16.83, ranging between fifteen and eighteen per month. (data on file with author).

144. See discussion *infra* Part III.B.4. This reflects only the pace of activity and not a qualitative evaluation of the merits of that activity.

145. The CFPB litigated 30% of the cases it filed under Kraninger (equivalent to the overall average), but the CFPB litigated a higher percentage of the cases filed under Uejio and Chopra, 44% and 38% respectively. (data on file with author).

146. Similar drops happened after similar surges. See discussion *infra* Part III.B.4. Thus, it is possible that the drops are a result of the unsustainability of the surges.

147. (data on file with author). Changes in the number of active cases are a result of a mix of three factors: filing new cases that do not resolve within sixty days, resolving preexisting cases, and staying (or lifting stays on) cases. *Id.*

148. The CFPB does not publish numbers on staffing by office, so we do not know whether staffing in Enforcement dropped proportionately with the drop across the CFPB or at the same time as the drop in active cases. Although some attorneys clearly left Enforcement during this period, Mulvaney's reorganization of

in the CFPB's ability to bring new cases,¹⁴⁹ the data indicates that changes in staffing were not the sole driver. Indeed, several facts suggest that the more likely explanation for the drop was the directors' deregulatory agendas and possibly a concomitant impact on staff morale. First, the number of cases—both active and filed—does not map neatly onto the number of employees. For example, the CFPB had its highest rates of both active cases and cases filed around the end of the first quarter of fiscal year 2017 although staffing was higher at the end of fiscal year 2017.¹⁵⁰ Similarly, the number of active cases dropped from a local high at the end of fiscal year 2015 through April 2016, even as the CFPB grew significantly during fiscal year 2016. It was only in the last month of fiscal year 2016 that a huge spike in filings pushed the number of active cases up.

Second, one-third of the drop in active cases happened immediately in Mulvaney's first two months, and at the same time, new filings completely ceased. As there was no reported mass exodus from the CFPB upon Mulvaney's arrival, the decrease in enforcement activity seems too sudden to connect to a drop in staffing.¹⁵¹

Third, in addition to filing fewer cases on average, Mulvaney litigated a much smaller percentage of the cases that were filed.¹⁵² Thus, as the CFPB resolved active cases filed under Cordray (or they were stayed), the overall number of active cases dropped.

2. Rulemaking

Rulemaking typically takes years.¹⁵³ It usually involves several broad steps: (1) initial research; (2) issuance of a notice of proposed rulemaking

OFLEO also transferred a number of attorneys into Enforcement. David Dayen, *After Boasting About Lowering Black Unemployment, Donald Trump Undermines the Federal Unit Defending Against Housing Discrimination*, INTERCEPT (Feb. 1, 2018 7:38 AM), <https://theintercept.com/2018/02/01/cfpb-mick-mulvaney-lending-housing-discrimination>.

149. It is impossible to know exactly what role staffing limitations may have played. Enforcement activity did increase in Kraninger's second year, but the proportion of cases filed that were litigated rather than settled immediately was only slightly higher (27.3% versus 30.6%) in the two periods. And as is noted in Part III.B.4 *infra*, there is a serious spike in activity in the last seven months of her tenure.

150. In December 2016 and January 2017, the CFPB filed an unprecedented (and unrepeated) twenty-one cases with thirty active cases in each of those months. (data on file with author). By comparison in August and September 2017 (the end of the 2017 fiscal year), the CFPB had more employees but fewer filings (eight) and active cases (twenty-four and twenty-five, respectively). *Id.*

151. Mulvaney's enforcement activity actually increased significantly (approaching the level of Chopra's first year when staffing was much higher) in the second part of his tenure as staffing was dropping. *Id.* However, that increase could be a result of work that accumulated during the period when virtually no new cases were being filed.

152. Only 9% of the cases filed under Mulvaney were litigated actively. *Id.* By contrast, at least 30% of the cases filed under every other director were litigated actively. *Id.*

153. Different agencies are subject to different requirements on their rulemaking processes. *See, e.g.*, Levitin, *supra* note 6, at 343 tbl.1, 348–55 (noting different review requirements for various agencies, including the CFPB, and describing particular requirements for CFPB rulemaking). These differences can affect the

(“NPRM”) or an advance notice of proposed rulemaking (“ANPRM”); (3) solicitation and review of comments from the public on the proposed rule; and (4) ultimately issuance of a final rule.¹⁵⁴ In some cases, there are multiple comment periods or rules issued.¹⁵⁵ In addition, many agencies’ rules must be approved by the Office of Information and Regulatory Affairs (“OIRA”) at various stages of the process prior to the issuance of a rule,¹⁵⁶ which can add significant time to the process.¹⁵⁷

CFPB rulemaking follows this general process.¹⁵⁸ The initial research stage can take years by itself,¹⁵⁹ and it often takes the CFPB more than nine months to finalize a rule after receiving the final public comments.¹⁶⁰ As one particularly lengthy example of CFPB rulemaking, the CFPB’s Debt Collection Rule took more than seven years from the first advanced notice of proposed rulemaking in November 2013¹⁶¹ to issuance of the second final rule in January 2021.¹⁶²

The CFPB does not require OIRA approval of economically significant regulations, which can shorten the rulemaking process somewhat when

amount of time it takes to promulgate a regulation. *Id.* at 350. As can other factors like whether the regulation has a “significant” impact—meaning an effect on the economy of more than \$100 million or that is materially adverse. Jacob E. Gersen & Anne Joseph O’Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 941 n.61, 945 (2008). Although there are differences between agencies, data indicate that rulemaking often takes more than a year or two. *See, e.g., id.* at 988 tbl.12 (finding that rulemaking at four agencies required, on average, over nineteen months and that the individual agencies averaged between thirteen and twenty-five months); Levitin, *supra* note 6, at 350, 351 n.178 (noting an average of eighteen months); O’Connell, *Political Cycles*, *supra* note 1, at 958–59 & n.180 (noting an average range of roughly eight months to twenty-five months for a group of ten agencies to issue final rules after the publication of notices of proposed rulemaking); *id.* at 959 n.182 (collecting studies). These periods may understate the actual time spent if, for example, the agency spent significant time researching the proposed rule before providing public notice of the possibility of a regulation. O’Connell, *Agency Rulemaking*, *supra* note 1, at 478.

154. O’Connell, *Agency Rulemaking*, *supra* note 1, at 476–77. Some regulations go through the process but ultimately are “withdrawn,” and there is no final regulation. *Id.* at 477–78.

155. *Id.* at 476–77.

156. *Id.* at 476, 476 n.17; Todd Phillips, *A Change of Policy: Promoting Agency Policymaking by Adjudication*, 73 ADMIN. L. REV. 495, 533–34 (2021).

157. Phillips, *supra* note 156, at 533–34; *Id.* at 533–34 nn.222, 231–32 (noting delays of more than a year or two caused by OIRA review and that more than 20% of the rules reviewed by OIRA in 2019 were delayed by more than four months).

158. Levitin, *supra* note 6, at 348–55 (describing the CFPB’s rulemaking process and various constraints on that process).

159. For example, the Consumer Access to Financial Records rulemaking took almost four years to proceed from the RFI stage to the ANPRM stage and the rule on data collection under the Equal Credit Opportunity Act for loan applications made by women-owned, minority-owned and small businesses took almost four and a half years to move from an RFI to a proposed rule. Request for Information Regarding Consumer Access to Financial Records, 81 Fed. Reg. 83806 (Nov. 22, 2016); Consumer Access to Financial Records, 85 Fed. Reg. 71003 (Nov. 6, 2020) (to be codified at 12 C.F.R. ch. X) (ANPRM); Request for Information Regarding the Small Business Lending Market, 82 Fed. Reg. 22318 (May 15, 2017); Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B), 86 Fed. Reg. 56356 (Oct. 8, 2021) (to be codified at 12 C.F.R. pt. 1002) (notice of proposed rule).

160. *See* CFPB 2021 FINANCIAL REPORT, *supra* note 6, at 18 & tbl.2.

161. Debt Collection (Regulation F), 78 Fed. Reg. 67848 (Nov. 12, 2013).

162. Debt Collection Practices (Regulation F), 86 Fed. Reg. 5766 (Jan. 19, 2021) (to be codified at 12 C.F.R. pt. 1006).

compared to agencies who must receive such approval from OIRA.¹⁶³ However, the CFPB must conduct a cost-benefit analysis, which many agencies do not have to do.¹⁶⁴ Its regulations also must go through a Small Business Regulatory Enforcement Fairness Act (“SBREFA”) review with OIRA that typically increases the duration of the rulemaking by a few months.¹⁶⁵

Lastly, the CFPB has another constraint on its rulemaking capacity: it is statutorily required to engage in specific rulemakings.¹⁶⁶ For example, the CFPB adjusts a number of rules for inflation every year.¹⁶⁷ In addition, the CFPB must revisit every “significant” rule that it promulgates within five years of the rule’s effective date.¹⁶⁸ In so doing, the CFPB must solicit “public comment on recommendations for modifying, expanding, or eliminating” the rule in question,¹⁶⁹ and it must assess the rule’s effectiveness in meeting the goals and objectives of both the CFPB and the Consumer Financial Protection Act of 2010.¹⁷⁰ The CFPB must then publish a report on its assessment.¹⁷¹

Thus, while a new director may cancel some preexisting rulemaking efforts to shift resources to their priorities,¹⁷² a new director cannot simply cancel all existing work. Some rulemaking will be required by law. In other cases, the new director may elect not to terminate rulemakings given their benefits and the resources already expended even if the subjects are not the director’s key priorities.

III. EFFICIENTLY CREATING A COMPLIANCE CLIMATE

Despite these constraints, a new regulator must act quickly and effectively if they wish to influence the compliance climate. In deciding what actions to

163. Levitin, *supra* note 6, at 343 tbl.1. Historically, economically significant has meant “an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.” Exec. Ord. 12,866, § 3(f)(1), 58 Fed. Reg. 51753 (Sept. 30, 1993). The Biden administration recently increased that amount to \$200 million. Exec. Ord. 14,094, § 1(b), 88 Fed. Reg. 21879, 21,879 (Apr. 11, 2023).

164. Levitin, *supra* note 6, at 343 tbl.1, 352.

165. *Id.* at 351.

166. Gersen & O’Connell, *supra* note 153, at 939–40, 981 tbl.2 (noting statutory deadlines for various agencies).

167. *See, e.g.*, Civil Penalty Inflation Adjustments, 89 Fed. Reg. 1787 (Jan. 11, 2024); Truth in Lending Act (Regulation Z) Adjustment to Asset-Size Exemption Threshold, 88 Fed. Reg. 88223 (Dec. 21, 2023).

168. 12 U.S.C. § 5512(d)(1)–(2).

169. *Id.* § 5512(d)(3). Request for Information Regarding Remittance Rule Assessment, 82 Fed. Reg. 15009 (Mar. 24, 2017) (to be codified at 12 C.F.R. pt. 1005). The CFPB also has engaged in this type of review even when not required by § 5512(d). *See, e.g.*, Request for Information Regarding the HMDA Rule Assessment, 86 Fed. Reg. 66220, 66220 (Nov. 22, 2021) (to be codified at 12 C.F.R. pt. 1003) (following voluntarily the procedures required by 12 U.S.C. § 5512(d) for assessing the effectiveness of the Home Mortgage Disclosure Act rule, Regulation C, despite finding that the rule was not “significant” within the meaning of § 5512(d)).

170. 12 U.S.C. § 5512(d)(1).

171. *Id.* § 5512(d)(3). *See generally* CFPB, REMITTANCE RULE ASSESSMENT REPORT (rev. Apr. 2019) (assessing the rule and responding to comments on it).

172. In fact, the directors taking office after a political transition have done exactly that. *See* discussion *infra* Parts III.C.1.b & e (discussing examples of withdrawing and amending rules).

take, an efficient regulator will weigh the costs (in resources that could be devoted to other tasks) against the benefits of taking particular actions.¹⁷³ Despite their importance generally,¹⁷⁴ opening an enforcement case or initiating a rulemaking will not establish a compliance climate efficiently due to the time and resources required.¹⁷⁵ Rulemaking carries an additional risk that, after spending considerable time and resources, the effort will fail. Instead, to shape the compliance climate in the short amount of time available to them, new regulators must use their bully pulpit, make creative use of existing enforcement and rulemaking efforts, and take quick actions, including issuing interim final rules, amicus briefs, and other guidance.

A. THE BULLY PULPIT

Due entirely to their position, regulators can change compliance climates simply by speaking. Using the bully pulpit to state an agenda is the most efficient way to create a compliance climate.¹⁷⁶ Effective regulators seize opportunities presented by other types of actions to create their climates,¹⁷⁷ but they can also just state their agendas. For example, Mulvaney simply said that enforcement would be a last resort and that Congress should hobble the agency,¹⁷⁸ and Chopra said that he would hire an enforcement director with fair lending experience.¹⁷⁹ The fact that these were *mere* statements did not lessen their impact on their respective compliance climates.

Similarly, Uejio prioritized providing consumers relief during the pandemic and addressing racial inequities.¹⁸⁰ He effectively created a compliance climate to further those priorities using his pulpit. He warned companies that they must respond to consumer complaints related to the

173. Cf. O'Connell, *Agency Rulemaking*, *supra* note 1, at 487 (noting that agencies must weigh administrative costs and benefits in deciding whether to conduct rulemaking); Cowie, *supra* note 11, at 80 (noting that agencies must weigh costs and benefits against available resources in determining which enforcement actions to bring).

174. See generally Barkow, *supra* note 1 (noting that “enforcement is typically a core part of successfully achieving [an agency’s] statutory mission”).

175. The author has argued elsewhere that in the context of an emergency like COVID-19, the CFPB can and should use enforcement actions to, in effect, set the compliance climate by quickly investigating and filing targeted actions; however, the downsides of this approach are only outweighed by the benefits in the context of a true unfolding emergency. In the normal course, the CFPB’s more deliberate approach to enforcement makes more sense. Cowie, *supra* note 11, at 81.

176. See discussion *supra* Part I.A.

177. See discussion *infra* Part III.B–E.

178. See discussion *supra* Part I.B.

179. See discussion *supra* Part I.C.

180. See, e.g., Press Release, CFPB, Prepared Remarks of Acting Director Uejio at the National Association of Attorneys General Spring Consumer Protection Conference (May 11, 2021), <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-acting-director-dave-uejio-at-the-national-association-of-attorneys-general-spring-consumer-protection-conference>.

pandemic;¹⁸¹ warned the “nation’s largest apartment landlords” that debt collectors working for them must comply with laws providing eviction protections during the pandemic;¹⁸² and warned companies to report rental and eviction information accurately.¹⁸³ He also explicitly highlighted the racial inequities exacerbated by the pandemic.¹⁸⁴

Moreover, similar to the use of their bully pulpit, regulators can order administrative changes simply because they are in charge. Mulvaney received zero dollars in funding when he requested it, and he froze both hiring and enforcement.¹⁸⁵ Chopra hired an enforcement director in line with his prior statement and increased enforcement staffing.¹⁸⁶ These internal actions also set compliance climates.

B. ENFORCEMENT

1. *Using Enforcement Actions Already in the Pipeline*

An effective regulator makes use of cases already in the pipeline to create their desired compliance climate. During the lifecycle of an enforcement action at the CFPB, directors make two key decisions: first, they decide whether the CFPB should take public action;¹⁸⁷ and second, they decide how to resolve actions.¹⁸⁸ If there is an investigation already in the pipeline that reflects the director’s priorities, the director can use it to establish a compliance climate. For example, just one month after taking office, Uejio used a case against a company that scammed immigrants to create a compliance climate reflecting his priority

181. Press Release, CFPB, CFPB Annual Complaint Report Highlights More Than a Half-Million Complaints Received in 2020 (Mar. 24, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-annual-complaint-report-highlights-more-than-a-half-million-complaints-received-in-2020>.

182. Press Release, CFPB, Consumer Financial Protection Bureau and Federal Trade Commission Put Nation’s Largest Landlords on Notice About Tenants’ Pandemic Protections (May 3, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-federal-trade-commission-put-nations-largest-landlords-on-notice-about-tenants-pandemic-protections>.

183. Press Release, CFPB, As Federal Eviction Protections Come to an End, CFPB Warns Landlords and Consumer Reporting Agencies to Report Rental Information Accurately (July 1, 2021), <https://www.consumerfinance.gov/about-us/newsroom/as-federal-eviction-protections-come-to-an-end-cfpb-warns-landlords-and-consumer-reporting-agencies-to-report-rental-information-accurately>.

184. *See, e.g.*, Press Release, CFPB, New Report From Consumer Financial Protection Bureau Finds Over 11 Million Families At Risk of Losing Housing (Mar. 1, 2021), <https://www.consumerfinance.gov/about-us/newsroom/new-report-from-consumer-financial-protection-bureau-finds-over-11-million-families-at-risk-of-losing-housing>.

185. *See* discussion *supra* Part I.B.

186. *See* discussion *supra* Part I.C.

187. The director must authorize any public enforcement action. *Life Cycle of an Enforcement Action*, CFPB <https://www.consumerfinance.gov/enforcement/life-cycle-of-enforcement-action> (last visited Dec. 14, 2023).

188. The head of the Office of Enforcement has the authority to open non-public investigations, but Enforcement needs permission from the director on the terms on which a matter may resolve. OFF. OF ENF’T, CFPB, POLICIES AND PROCEDURES MANUAL 37, 95 (2021), https://files.consumerfinance.gov/f/documents/cfpb_enforcement-policies-and-procedures-memo_version-3.2_2022-02.pdf.

on racial equity, stating that the action gave “notice to the entire market that financial scams targeting communities of color will not be tolerated.”¹⁸⁹

Similarly, Mulvaney voluntarily dismissed a payday lending case in his first month as Director as part of establishing a compliance climate reflecting his priorities of limiting enforcement generally and deregulating payday lending in particular. The case had been filed approximately eight months before; the CFPB had not lost any substantive rulings; and a motion to dismiss was pending.¹⁹⁰ Nonetheless, Mulvaney ordered the case to be dismissed. This is the only time a CFPB director has dismissed a pending matter as the result of a political transition rather than a loss or change in circumstances in the litigation. Market participants received Mulvaney’s communicated compliance climate loud and clear.¹⁹¹

As mentioned above, Chopra used four cases already in the pipeline to quickly create a new compliance climate regarding his crackdown on entities that repeatedly violate consumer financial protections. In addition to highlighting the fact that they were repeat offenders in public statements, he chose to litigate three of the four cases rather than settling. Presumably, he decided to sue rather than settle because he wanted more relief for consumers than the entities were willing to provide. He also made the groundbreaking decision to sue a high-level executive personally in one of the cases. In the fourth case, which settled immediately, the CFPB ordered Wells Fargo to pay the highest amount to date in restitution and penalties (\$3.7 billion). Furthermore, Chopra used two cases against banks (including the Wells Fargo case) to create his compliance climate about making harmed consumers whole. In each of those cases, the CFPB ordered the banks to redress an unusually broad scope of harms resulting from their violations.¹⁹²

189. Press Release, CFPB, Prepared Remarks of Acting Director Dave Uejio for the Libre Enforcement Action Press Call (Feb. 22, 2021), <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-acting-director-dave-uejio-for-the-libre-enforcement-action-press-call>.

190. See discussion *supra* Part I.B (discussing *Golden Valley* litigation).

191. See, e.g., Jim Puzanghera, *Mulvaney Requests Zero Funding for the Consumer Financial Protection Bureau*, L.A. TIMES (Jan. 18, 2018, 10:57 AM), <https://www.latimes.com/business/la-fi-cfpb-mulvaney-funding-20180118-story.html> (citing dismissal of enforcement action by Mulvaney as evidence of an attempt to reduce enforcement); Chris Arnold, *Trump Administration Plans to Defang Consumer Protection Watchdog*, NPR (Feb. 12, 2018, 5:11 AM), <https://www.npr.org/2018/02/12/584980698/trump-administration-to-defang-consumer-protection-watchdog> (discussing effect of dismissal on consumers); Ian McKendry, *Payback: Dems Give CFPB’s Mulvaney the Cordray Treatment*, AM. BANKER (Feb. 13, 2018, 2:40 PM), <https://www.americanbanker.com/news/payback-dems-give-cfpbs-mulvaney-the-cordray-treatment> (describing questioning by senators regarding dismissal of case); Nicholas Confessore, *Mick Mulvaney’s Master Class in Destroying a Bureaucracy From Within*, N.Y. TIMES (Apr. 16, 2019), <https://www.nytimes.com/2019/04/16/magazine/consumer-financial-protection-bureau-trump.html> (describing enforcement attorneys as “mystified and worried” about the “implications” of dismissing the case).

192. See generally discussion *supra* Part I.C.

2. *Using Publicity from Cases Already in the Pipeline*

Even if a public enforcement action does not dovetail neatly with their agenda, a new director still may be able to use the action to signal a shift in climate by issuing separate remarks raising the director's priorities.¹⁹³ Chopra did this with a fair lending case that was issued just two weeks into his tenure. Although that case did not involve algorithmic bias or issues with the use of consumers' data, Chopra used it to highlight his priorities in those areas.¹⁹⁴

3. *Putting Enforcement Actions into the Pipeline*

A new director can direct the CFPB to develop cases that reinforce their compliance climate. Indeed, successful directors will bring enforcement actions that reinforce their climates. Failing to do so undermines the effectiveness of their climates, as they will be seen as all hat and no cattle.

For example, one of Cordray's priorities was short-term, small-dollar, high-cost lending (so-called "payday" and auto title loans). Cordray quickly established a compliance climate that reflected his concerns with these loans. Just one day after Obama appointed Cordray through a recess appointment, Cordray used his bully pulpit to set his climate on these types of loans. He gave a speech about how the CFPB would "begin dealing face-to-face with payday lenders" and other nonbank lenders.¹⁹⁵ Two weeks later, the CFPB held its first field hearing, which was also about payday lending.¹⁹⁶ Over the next year and a half or so, the CFPB continued to take various actions highlighting concerns with payday lending.¹⁹⁷ Then, roughly two years after Cordray first announced

193. Virtually all of the CFPB's first public actions in enforcement matters are accompanied with a press release, often with a quote from the director.

194. See discussion *supra* Part I.C.

195. Press Release, Richard Cordray, CFPB, Remarks by Richard Cordray at The Brookings Institution (Jan. 5, 2012), <https://www.consumerfinance.gov/about-us/newsroom/remarks-by-richard-cordray-at-the-brookings-institution>.

196. Press Release, CFPB, CFPB Convenes Field Hearing in Birmingham, Alabama on Payday Lending (Jan. 18, 2012), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-convenes-field-hearing-in-birmingham-alabama-on-payday-lending>; Press Release, Richard Cordray, CFPB, Remarks by Richard Cordray at the Payday Loan Field Hearing in Birmingham, AL (Jan. 19, 2012), <https://www.consumerfinance.gov/about-us/newsroom/remarks-by-richard-cordray-at-the-payday-loan-field-hearing-in-birmingham-al>.

197. See, e.g., Press Release, CFPB, CFPB Begins Accepting Payday Loan Complaints (Nov. 6, 2013), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-begins-accepting-payday-loan-complaints> (noting that the CFPB's consumer complaint process would begin accepting complaints about payday loans); Press Release, CFPB, CFPB Lays Out Guidelines for Protecting Servicemembers in the Payday Lending Market (Sept. 17, 2013), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-lays-out-guidelines-for-protecting-servicemembers-in-the-payday-lending-market> (noting release of examination guidance on Military Lending Act compliance by payday lenders); Press Release, CFPB, The CFPB Finds Payday and Deposit Advance Loans Can Trap Consumers in Debt (Apr. 24, 2013), <https://www.consumerfinance.gov/about-us/newsroom/the-cfpb-finds-payday-and-deposit-advance-loans-can-trap-consumers-in-debt> (noting issuance of CFPB study on payday loans); Press Release, CFPB, CFPB Examines Payday Lending (Jan. 19, 2012), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-examines-payday-lending> (announcing that the CFPB would begin conducting supervisory examinations of payday lenders).

his concern, the CFPB filed its first enforcement action against a payday lender.¹⁹⁸ Over the remainder of Cordray's tenure, the CFPB filed another thirteen cases against payday lenders that remediated hundreds of millions of dollars in consumer harm,¹⁹⁹ thereby cementing his compliance climate on this issue.

4. *Using Surges in Enforcement Activity*

Because of the length of time required to develop new matters before public action can be taken, new regulators are not likely to engage in dramatic increases in filing immediately after they assume office. Nonetheless, the data demonstrates that directors have dramatically increased enforcement activity—filing new cases, resolving active cases, and prosecuting cases—prior to possible political transitions.²⁰⁰ To date, the Director of the CFPB has faced the possibility of replacement by a president from the opposing party twice. Kraninger faced almost certain replacement by Biden, and Cordray faced the possibility of being fired by Trump. In both instances, enforcement activity spiked in connection with these possible transitions, accelerating dramatically over the average and median pace of enforcement activity for those directors.²⁰¹

From the outside, it is difficult to know why these spikes occurred, but there are a number of possible explanations. A director might be concerned with how a successor will handle certain cases, either because they might demand

198. Consent Ord., Cash Am. Int'l Inc., CFPB No. 2013-CFPB-0008 (Nov. 20, 2013) (finding violations of the Military Lending Act and illegal collection activities). The enforcement action developed out of a supervisory examination of the payday lender. Press Release, CFPB, Consumer Financial Protection Bureau Takes Action Against Payday Lender For Robo-Signing (Nov. 20, 2013), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-takes-action-against-payday-lender-for-robo-signing>.

199. Complaint, CFPB v. Think Finance, LLC, No. 4:17-cv-00127-BMM (D. Mont. Nov. 15, 2017); Complaint, CFPB v. Golden Valley Lending, Inc., No. 1:17-cv-03155 (N.D. Ill. Apr. 27, 2017); Consent Ord., *in re* Moneytree, Inc., CFPB No. 2016-CFPB-0028 (Dec. 16, 2016); Consent Ord., *in re* Flurish, Inc., d/b/a LendUp, CFPB No. 2016-CFPB-0023 (Sept. 27, 2016); Consent Ord., TMX Finance LLC, CFPB No. 2016-CFPB-0022 (Sept. 26, 2016); Complaint, CFPB v. All American Check Cashing, Inc., No. 3:16-cv-00356-WBH-JCG (S.D. Miss. May 11, 2016); Consent Ord., EZCORP, Inc., CFPB No. 2015-CFPB-0031 (Dec. 16, 2015); Notice of Charges, *in re* Integrity Advance, LLC & James R. Carnes, CFPB No. 2015-CFPB-0029 (Nov. 18, 2015); Complaint, CFPB v. NDG Fin. Corp., No. 1:15-cv-05211-CM (S.D.N.Y. July 31, 2015) (NDG Enterprise); Complaint, CFPB v. Richard F. Moseley, Sr., No. 4:14-cv-00789-DW (W.D. Mo. Sept. 8, 2014) (Hydra Group); Consent Ord., *in re* ACE Cash Express, Inc., CFPB No. 2014-CFPB-0008 (July 10, 2014); Complaint, CFPB v. CashCall, Inc., No. 1:13-cv-13167 (D. Mass. Dec. 16, 2013). The CFPB also sued companies that provided leads to payday lenders (so-called lead aggregators). Consent Ord., Zero Parallel, LLC, CFPB No. 2017-CFPB-0017 (Sept. 6, 2017) (Zero Parallel's owner was sued in a separate action for related conduct).

200. This refers to the possibility that a president from a different political party might take office and remove the agency head. In other contexts, evidence has demonstrated increased rulemaking activity around political transitions. *See, e.g.,* O'Connell, *Agency Rulemaking*, *supra* note 1, at 499.

201. (data on file with author). The fact that these events were both predictable and of a short duration likely made these bursts of activity possible. By contrast, a constitutional challenge like the one in *Seila Law*, takes years, and it seems unlikely that such dramatic increases could be maintained over that length of time.

more or less in settlement or even refuse to bring a public action at all.²⁰² Therefore, directors might push to file or settle those cases before leaving office. Directors may feel more invested in resolving cases they initiated, and to the extent they do, they may want to insulate the cases from interference by their successors. Even in cases at the complaint stage, successors will have to handle the matter publicly, either by litigating or dismissing it. In addition, or in the alternative, directors might want to burnish their own reputations before entering the job market, or if they had been limiting enforcement activity (for example, as Mulvaney did at the start of his tenure), they might be simply lifting that limit.²⁰³ They may also wish to jam the pipeline with enforcement matters in an attempt to interfere with their successor's enforcement agenda. For Uejio, and to a slightly lesser extent Chopra, Kraninger's surge at the end of her tenure filled the enforcement pipeline, leaving them with some of the highest numbers of active cases in the CFPB's history and constraining their ability to file new matters. Regardless of the reasons, the data suggest that—despite the long non-public and public duration of enforcement matters—directors can have a significant influence on the pace of enforcement activity over the short term and may use these surges to limit their successors' ability to change climates.

Heading into the Biden administration, commentators expected that Biden would fire Kraninger if she refused to resign.²⁰⁴ As it turned out, she resigned at Biden's request on the day of his inauguration.²⁰⁵ But in the ninety days leading up to Biden's inauguration, enforcement activity surged dramatically. First, the CFPB filed twenty enforcement actions, the most of any ninety-day period during Kraninger's two-year tenure,²⁰⁶ accounting for more than 25 percent of the total number of cases filed during her tenure. The filing rate during this

202. Of course, a director can dismiss a case that has been filed, as Mulvaney did in the *Golden Valley* matter. See discussion *supra* Part I.B & notes 65-66. But unlike a non-public decision to stop an investigation, publicly dismissing an action can generate significant public comment. *But cf.* Alan Rappeport, *Payday Rules Relax on Trump's Watch After Lobbying by Lenders*, N.Y. TIMES (Feb. 2, 2018), <https://www.nytimes.com/2018/02/02/us/politics/payday-lenders-lobbying-regulations.html> (noting Mulvaney's dismissal of a nonpublic payday investigation).

203. This likely is the cause of the increase, to the extent there was one, in the few months of Mulvaney's tenure after he ended the freeze on enforcement activity.

204. Evan Weinberger, *CFPB Director Kraninger Resigns at Biden's Request*, BLOOMBERG L. (Jan. 20, 2021, 10:52 AM), <https://news.bloomberglaw.com/banking-law/kraninger-resigns-from-cfpb-allowing-bidens-team-to-take-over>. In June 2020, the U.S. Supreme Court held that it was unconstitutional to limit the president's ability to remove the director of the CFPB to situations of "inefficiency, neglect, or malfeasance," meaning presidents could fire directors at will. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020); see also Courtney Dankworth, Alexandra Mogul & David Imamura, *Anticipating CFPB Changes Under the Biden Administration*, LAW360 (Nov. 16, 2020, 4:44 PM) ("Because of the U.S. Supreme Court's June decision in *Seila Law LLC v. CFPB*, President-elect Joe Biden will be able to appoint immediately a new CFPB director.").

205. Letter from Kathleen L. Kraninger, Dir., CFPB, to President Joseph R. Biden, Jr. (Jan. 20, 2021) ("As requested, I hereby tender my resignation as Director of the Bureau of Consumer Financial Protection . . . effective January 20, 2021.") (on file with author).

206. (data on file with author). For purposes of this analysis, the Article calculates the number of cases filed in the ninety days prior to the first of each month, starting ninety days into the director's tenure. Using three months instead of ninety days would have led to periods with different numbers of days.

period is 157 percent higher than the average rate of 7.7 per ninety days, and 264 percent higher than the median of 5.5 per ninety days. Similarly, the CFPB settled²⁰⁷ more than twice as many²⁰⁸ pending²⁰⁹ cases during those ninety days than average.²¹⁰ The surge also led to the highest numbers of active cases during Kraninger's tenure.

Cordray also oversaw a significant spike in enforcement activity around Trump's inauguration. Unlike with Kraninger, the spike did not peak right before the inauguration because, until the decision in *Seila Law*,²¹¹ it was not clear whether a President could remove the director on the President's first day of office. Indeed, for most of Cordray's tenure it was thought that the director could only be fired "for cause." But in October 2016, the D.C. Circuit created significant doubt about this proposition when it held that the President must be able to remove the director at will.²¹² Thus, while it was clear coming into Biden's inauguration that Biden could fire Kraninger, there was some question as to whether Trump could fire Cordray at the start of his administration.²¹³ Nonetheless, there was a significant amount of concern that Trump might try to fire Cordray shortly after the inauguration and pressure on Trump to do so.²¹⁴

207. This includes default judgments. Although the CFPB cannot control when the court grants a default judgment, the CFPB must move for the default judgment.

208. The rate was 144% over the average for ninety days and 133% over the median. (data on file with author).

209. "Pending" refers to cases that did not resolve within sixty days of their filing. See discussion *supra* note 72.

210. The only ninety-day period during Kraninger's tenure with more such orders was the period ending January 1, 2021, which was only nineteen days before her resignation. (data on file with author).

211. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020).

212. In creating the CFPB, Congress provided that the director would serve a five-year term, removable only "for inefficiency, neglect of duty, or malfeasance." Consumer Financial Protection Act of 2010, Pub. L. 111-203, tit. X, § 1011(c)(1),(3), 124 Stat. 1376, 1964 (2010) (codified at 12 U.S.C. § 5491(c)(1),(3)). The U.S. Supreme Court previously had approved of so-called "for-cause" removal limitations in other, similar situations. See, e.g., *Humphrey's Ex'r v. United States*, 295 U.S. 602, 621-26 (1935) (Federal Trade Commission); *Wiener v. United States*, 357 U.S. 349, 356 (1958) (War Claims Commission); *Morrison v. Olson*, 487 U.S. 654, 691-93 (1988) (independent counsel). In October 2016, the D.C. Circuit held that the for-cause removal provision was unconstitutional; the CFPB then petitioned for rehearing en banc on November 18, 2016, and on February 16, 2017, the court granted rehearing en banc and vacated the prior order. *PHH Corp. v. CFPB*, 839 F.3d 1, 39 (D.C. Cir. 2016) (severing the for-cause limitation on the president's ability to fire the CFPB's director), *reh'g en banc granted, order vacated*, 88 F.3d 75 (D.C. Cir. 2018).

213. See, e.g., Kate Berry, *Trump vs. Cordray: The Battle Ahead*, AM. BANKER (Dec. 6, 2016, 1:45 PM), <https://www.americanbanker.com/law-regulation/trump-vs-cordray-the-battle-ahead-10927201.html?zkPrintable=1&nopagination=1> (noting "[m]any legal experts said there's sufficient wiggle room for Trump to fire Cordray . . . [but u]p until recently, the prevailing analysis was that Cordray couldn't be removed until his term expired in 2018 unless he was fired 'for cause'"); Evan Weinberger, *Trump Will Struggle to Fire Cordray During DC Circ. Review*, LAW360 (Feb. 16, 2017, 9:20 PM), <https://plus.lexis.com/newsstand/law360/article/893140> ("Any plans President Donald Trump had of firing Consumer Financial Protection Bureau Richard Cordray became more complicated when the D.C. Circuit vacated and elected to review a court decision giving the president the power to fire Cordray at will rather than for cause, experts say.").

214. E.g., Matt Egan, *Trump Should Fire CFPB Director Richard Cordray: GOP*, CNNBUS. (Jan. 10, 2017, 3:49 PM), <https://money.cnn.com/2017/01/10/investing/trump-fire-cfpb-cordray/index.html> (citing a letter from two Republican senators requesting that Trump fire Cordray "promptly"); Cass R. Sunstein, *Why Trump Can't*

Enforcement activity under Cordray increased significantly leading up to the inauguration and peaked shortly thereafter. The CFPB filed the most cases of any ninety-day period during Cordray's almost six-year tenure in the ninety days ending roughly one month after Trump's inauguration—a rate more than double his average and median.²¹⁵ Additionally, the CFPB settled approximately four times as many cases in the ninety-day period ending two months after the inauguration as Cordray's average.²¹⁶ As with Kraninger, this surge corresponded with the highest number of active cases during Cordray's tenure—and indeed, the highest in the CFPB's existence.²¹⁷

5. *Benefitting From the Use of Enforcement to Set the Climate*

Using orders in enforcement actions to cement a compliance climate has two very significant advantages over other methods. First, final orders are hard to reverse. Unlike almost all other methods of setting a compliance climate, a final order in an enforcement action is just that—final. A subsequent director can choose not to enforce cases along similar legal theories or seek different relief, but they cannot simply negate the existence of the order.²¹⁸ Furthermore, to the extent that a subsequent director elects to take different public action, they may open themselves to criticism or demands for an explanation of the different treatment.²¹⁹ Thus, the order may act as a sort of anchor on future, similar cases.

Second, orders can generate further enforcement along the same lines. They can lead other regulators or harmed consumers to pursue similar claims, thereby leveraging the impact of the regulator's actions. For example, in 2013,

Just Say 'You're Fired' to This Official, BLOOMBERG L. (Jan. 13, 2017, 11:15 AM), <https://news.bloomberglaw.com/business-and-practice/why-trump-cant-just-say-youre-fired-to-this-official> (noting “a great deal of pressure on President-elect Donald Trump to fire Richard Cordray”). As it turns out, Cordray remained director for just over ten months into Trump's presidency despite continued calls for Trump to fire him. *E.g.*, Kate Bery, *Why Hasn't Trump Fired CFPB's Cordray*, AM. BANKER (Feb. 8, 2017, 3:17 PM), <https://www.americanbanker.com/news/why-hasnt-trump-fired-cfpbs-cordray> (noting “mounting pressure by congressional Republicans” for Trump to fire Cordray); Sarah N. Lynch & Susan Cornwell, *Outside Advisor to Trump Calls for Firing of CFPB Head Cordray*, REUTERS (July 30, 2017, 11:18 AM), <https://www.reuters.com/article/idUSKBN1AFOSK>.

215. (data on file with author). The rate during this period was a 132% increase over the average and 140% over the median rates during his tenure. *Id.*

216. *Id.* The CFPB settled nine cases in this period which is 291% over the average and 350% over the median for ninety days. These figures consider only the cases filed after April 1, 2013. Prior to that date, the CFPB was ramping up its enforcement efforts for the first time. Including the period prior to that date only increases the differences. *Id.*

217. *Id.* There were thirty active cases in December 2016 and January 2017, the highest in any month through fiscal year 2022. *Id.* The period from November 2016 through March 2017 had at least twenty-seven active cases. *Id.* The only other month during Cordray's tenure where there were that many pending cases was November 2017, the month he resigned. *Id.*

218. *Id.* This is true regardless of the type of final order (*e.g.*, consent order, stipulated judgment, or an order on the merits by a federal court).

219. *See, e.g.*, Cowie, *supra* note 11, at 68–70 (criticizing the CFPB's enforcement activity during the COVID-19 pandemic under Kraninger in part by comparing the relief provided in cases under her to the relief provided in a similar case under Cordray); *see also* discussion Part III.B. (discussing reaction to dismissal of Golden Valley matter).

the CFPB filed a case against CashCall, Inc. and other defendants who originated, collected, and serviced short-term, high-cost loans over the internet.²²⁰ The CFPB alleged that some of these loans were void under the consumers' states' laws despite contractual choice-of-law provisions that arguably provided otherwise.²²¹ The district court ultimately agreed in 2016, granting partial summary judgment in the CFPB's favor.²²²

In subsequent cases against both these defendants and other companies with similar business models, numerous other courts agreed with the district court's analysis or noted its persuasiveness.²²³ Plaintiffs in *Hengle v. Asner* cited the CashCall decision in their own complaint bringing similar claims.²²⁴ They even included an exhibit of a discussion amongst industry lawyers about the ramifications of the CFPB's enforcement action against CashCall (in other words, the compliance climate set by the filing of the case).²²⁵ *Hengle* involved some of the same defendants and similar legal theories as the Golden Valley enforcement action dismissed by Mulvaney.²²⁶ The plaintiffs in *Hengle* recently received preliminary approval to settle a class action for \$489 million in relief for consumers.²²⁷

One cannot know for certain why Mulvaney, despite his deregulatory payday agenda, did not end the CashCall case as he did the Golden Valley case. However, unlike Golden Valley, the CFPB had litigated the CashCall case for years, and just days before Mulvaney arrived, the CFPB filed its post-trial brief.

220. Complaint at 2–3, CFPB v. CashCall, Inc., No. 1:13-cv-13167 (D. Mass. Dec. 16, 2013).

221. *Id.* at 11–13.

222. CFPB v. CashCall, Inc., No. CV 15-7522-JFW (RAOx), 2016 WL 4820635, at *5–10 (C.D. Cal. Aug. 31, 2016) (finding that loans offered over the internet to consumers in states that prohibited them were unlawful and void). The Ninth Circuit affirmed the determination that the loans in question were void. CFPB v. CashCall, Inc., 35 F.4th 734, 744 (9th Cir. 2022) (affirming the district court's holding that the law chosen in the contracts did not have a substantial relationship to the parties or transaction, and thus applying the law of the consumers' states to the transactions, but not addressing the question of whether the application of the law chosen in the contracts contravened fundamental public policies of the consumers' states).

223. See MacDonal v. CashCall, Inc., No. 16-2781, 2017 WL 1536427, *9–10, 12 (D.N.J. Apr. 28, 2017) (citing court's analysis in the CFPB case against CashCall); Solomon v. Am. Web Loan, No. 4:147cv145, 2019 WL 1320790, *15–16 (E.D. Va. Mar. 22, 2019) (same); Western Sky Fin., LLC v. State ex rel. Olens, 793 S.E.2d 357, 366–67 (Ga. 2016) (finding the court's analysis in CFPB v. CashCall to be "instructive"); see also CFPB v. Think Finance, LLC, No. CV-17-127-GF-BMM, 2018 WL 3707911, at *3 (D. Mont. Aug. 3, 2018) (agreeing with the courts' analyses in the CashCall matter); Brice v. Plain Green, LLC, 372 F. Supp. 3d 955, 982 n.23 (noting that the court's analysis in CFPB v. CashCall was "persuasive," although not reaching the issue), *appeal en banc dismissed as moot*, No. 19-5707, 2022 WL 19688129 (9th Cir. Sept. 8, 2022).

224. Complaint at 9–10, *Hengle v. Asner*, No. 3:19-250 (E.D. Va. Apr. 9, 2019) (citing the court's decision in CashCall on the development of the lending model in question). The plaintiffs also cited to the CFPB's complaint. *Id.* at 16.

225. *Id.* Ex. 12, at 5 (speculating, *inter alia*, that the CFPB would sue Think Finance on the same legal theory raised in CashCall). The CFPB ultimately did sue Think Finance, albeit several years later. Complaint, CFPB v. Think Finance, LLC, No. 4:17-cv-00127 (D. Mont. Nov. 15, 2017).

226. See discussion *supra* Part I.B. The theories are not identical, as Virginia is not one of the states whose laws the CFPB alleged voided ab initio some or all of the alleged debt from the loans in question.

227. Memorandum in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement at 2, *Hengle v. Asner*, No. 3:19-cv-00250-DJN (E.D. Va. Apr. 25, 2022); Ord. at 2, *Hengle v. Asner*, No. 3:19-cv-00250-DJN (E.D. Va. May 12, 2022) (granting preliminary approval of proposed terms).

The court's subsequent order awarded more than \$10 million in penalties but no consumer relief, and both parties appealed. After the appeal ended in 2022, the district court ultimately awarded more than \$33 million in penalties and more than \$134 million in relief to consumers.²²⁸

C. RULEMAKING

Like enforcement, rulemaking is an important function of an agency like the CFPB and is absolutely necessary to implement certain affirmative requirements to protect consumers or set industry standards.²²⁹ However, notice-and-comment rulemaking is not generally an effective means of creating a compliance climate. As noted above,²³⁰ existing constraints and the time required limit a director's ability to use rulemaking to set the compliance climate. However, rulemaking faces another significant risk—the risk of failure. Therefore, in allocating resources, a new director must consider both the benefit from improving regulatory requirements and from ensuring that companies adhere to the already existing regulations. Moreover, if a director decides to devote resources to complex rulemaking, the rulemaking must be conducted in a way that minimizes the risk of failure. Nonetheless, there are several ways in which new regulators can generate their desired compliance climate effectively using rulemaking, including dismantling a predecessor's rulemaking efforts and promulgating rapid rulemaking (for example, interim final rules).

1. *Using Rulemaking Risks Failure*

Rulemaking obviously can affect the compliance climate. However, while the threat of rulemaking and even the process itself (for example, publishing a request for comment on the possibility of a rule or on the text of a proposed rule) may raise flags for potentially affected market participants, those participants likely will change their behavior significantly only once the rule has become final and the compliance date draws near. There are simply too many variables for a rational market participant to alter their behavior early in the process. Rulemaking takes considerable time; participants may try to change the rule during the process; and the rulemaking may ultimately fail (even if the regulator issues its desired rule) or produce very different results than the regulator intended when it began the process. Even assuming a final rule issues, significant rules often allow entities a year or more after the final rule becomes effective to

228. Amended Judgment at 1, CFPB v. CashCall, Inc., No. 2:15-cv-07522-JFW-RAO (C.D. Cal. Feb. 21, 2023). The judgment is stayed pending appeal. Ord. Staying Execution on the Amended Judgment Pending Appeal, CFPB v. CashCall, Inc., No. 2:15-cv-07522-JFW-RAO (C.D. Cal. July 19, 2023).

229. See, e.g., 12 C.F.R. § 1026.18(e) (requiring disclosure of annual percentage rate); Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 94 (2018) (noting the power of rulemaking to create binding “legal instrument[s]”).

230. See discussion *supra* Part II (discussing constraints).

come into compliance with the new rule's requirements.²³¹ As such, it generally will take a very long time for a rulemaking to have a substantial impact on a regulator's compliance climate.

In short, using rulemaking to establish a compliance climate is risky. Moreover, if the rulemaking ultimately fails, not only will the director have failed to change the climate, but the director will have wasted considerable resources used in the rulemaking—resources that could have been put to different, and more effective, uses.

A new regulator must assume that they will have relatively little time—likely less than three years—in which to complete significant or controversial²³² rules and have them take effect. As discussed above, a new regulator will have approximately three and a half years until the next possible political transition. But the window for effective rulemaking is even shorter for two reasons. First, there appears to be a lag in rulemaking after political transitions.²³³ The exact cause of this lag is not clear. It likely is related to the time necessary to craft a regulatory agenda given the constraints on staffing and the existing pipeline of work combined with the time necessary to come up to speed on the agency's existing work.²³⁴

Second, notice-and-comment rulemaking that is not completed at least six months before a possible political transition runs a serious risk of failing in at least two ways: through nullification or termination. If a rule is completed too close to a possible political transition, political opponents, including a successor, may be able to nullify the rule even if it is finalized before the transition. Regulations can be nullified before they become effective in at least four ways: (1) litigation; (2) delay and amendment by a successor; (3) the Congressional Review Act (“CRA”); and (4) for the CFPB specifically, Financial Stability Oversight Council (“FSOC”) oversight.²³⁵ Furthermore, given the amount of time rulemaking takes, there is always a risk that a rule simply will not be completed before a political transition. If it is not, a succeeding director can terminate the rulemaking.²³⁶ In either case, the rulemaking will have failed.

231. See, e.g., Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472, (Nov. 17, 2017) [hereinafter Payday Rule I] (setting the compliance date for most provisions more than twenty-one months after the rule became final) (to be codified at 12 C.F.R. pt. 1041).

232. “Controversial” is used here to denote policies that political opponents may oppose. Many rulemakings are administrative or non-controversial.

233. O’Connell, *Political Cycles*, *supra* note 1, at 896 (noting that Presidents typically start fewer notice-and-comment rulemakings in their first year as compared to later years).

234. See discussion *supra* Part II.C.2 (discussing constraints on new rulemakings).

235. See, e.g., Levitin, *supra* note 6, at 342, 343 tbl.1, 353–54 (discussing the CRA and FSOC processes).

236. If a regulation is started but not completed when a new director takes office, the new director can withdraw “[the] proposed regulation without a similar formal process” as that which is required for rescinding or amending a completed regulation. O’Connell, *Agency Rulemaking*, *supra* note 1, at 477 (noting that rescinding a rule typically requires “the notice-and-comment process”). Going through the entire rulemaking process again, as noted above, likely will take more than a year and must “examine the relevant data and articulate a satisfactory explanation” for changing positions. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (quoting

a. *Nullifying by litigation*

Affected parties may file a lawsuit under the Administrative Procedures Act challenging any final rule promulgated by a federal agency.²³⁷ Because these plaintiffs typically are government outsiders, they are unaffected by political transitions and will file suit whenever the rule is finalized. Increasingly, agencies face even higher litigation risks to rulemaking efforts as the courts increasingly use the major questions doctrine to invalidate agencies' actions.²³⁸ Furthermore, even if the agency ultimately wins the litigation, the litigation may stay the rule pending resolution of the litigation.²³⁹

b. *Nullifying by successors*

If a final rule either has not become effective prior to a transition or has just become effective but has a compliance date significantly farther out, a successor can, in effect, nullify the rule by delaying the effective or compliance dates and instituting a new rulemaking to amend the rule before anyone has to comply with it.²⁴⁰

If a director issues the rule too close to a possible political transition, a successor might stay the effective date and engage in new rulemaking to substantially change the rule.²⁴¹ For example, the CFPB issued the Payday Rule²⁴² at the end of Cordray's tenure, but that version of the rule never took effect. The CFPB published the rule in the Federal Register on November 17, 2017,²⁴³ just days before Cordray resigned and Mulvaney took over.²⁴⁴ The rule

Motor Vehicle Mfr. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). As a result, a director should assume that they may only get a single regulatory cycle for any significant regulations. Cf. O'Donnell, *Agency Rulemaking*, *supra* note 1, at 480 (noting that "one-term presidents generally manage only one major regulatory cycle").

237. 5 U.S.C. § 701 *et seq.*

238. See, e.g., *Biden v. Nebraska*, 143 S. Ct. 2355, 2372–76 (2023) (invalidating a student loan relief program under the major questions doctrine); *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (invalidating the EPA rule under the major questions doctrine); *Nat'l Fed. of Indep. Bus. v. Dep't of Lab.*, 595 U.S. 109, 117–20 (2022) (*per curiam*) (staying OSHA COVID-19 vaccine rule under the major questions doctrine); *Ala. Ass'n of Realtors v. Dep't Health & Hum. Servs.*, 141 S. Ct. 2485, 2489–90 (2021) (*per curiam*) (vacating stay of invalidation of COVID-19 eviction moratorium under major questions doctrine); *Brown v. U.S. Dep't of Educ.*, 640 F. Supp. 3d 644, 667 (N.D. Tex. 2022) (invalidating the student loan relief program under major questions doctrine), *rev'd sub nom*, *Dep't of Educ. v. Brown*, 600 U.S. 551, 565–69 (2023) (reversing and holding that plaintiffs lacked standing).

239. See, e.g., *Ord.*, *West Virginia v. EPA*, No. 15A773 (Feb. 9, 2016) (ordering a stay of EPA rule pending appeal); *Cnty. Fin. Servs. Ass'n of Am. v. CFPB*, No. A-18-CV-0295-LY, 2018 WL 6252409, at *2 (W.D. Tex. Nov. 6, 2018) (staying compliance date of CFPB rule "pending further order of the court" during challenge to rule).

240. A director always can engage in a new rulemaking to amend existing rules, but amending them prior to their being effective is easier.

241. See O'Connell, *Political Cycles*, *supra* note 1, at 972 (noting that after political transitions agencies "often do not hesitate to freeze or suspend the effective dates of rules promulgated before the transition, or to withdraw the unfinished rules") (footnotes omitted); *id.* at 944 n.152 (collecting examples of same).

242. See Payday Rule I, *supra* note 231.

243. *Id.*

244. See discussion *supra* Part I.

had an initial effective date of January 16, 2018, but the compliance date for all but one of the significant provisions was much further out, on August 19, 2019.²⁴⁵ On January 16, 2018, the CFPB under Mulvaney issued a statement that it intended to reconsider the rulemaking and that it would “entertain waiver requests from any potential applicant” regarding the one deadline that was prior to August 19, 2019.²⁴⁶ In February 2019, the CFPB then issued two proposed rules: one to rescind the mandatory underwriting requirements of the 2017 rule²⁴⁷ and one to push the compliance date for all significant provisions from August 2019 to November 2020.²⁴⁸ In July 2020, the CFPB finalized the revocation of the mandatory underwriting requirements from the 2017 rule.²⁴⁹ The amended rule has been described by consumer advocates as ““gutting”” the 2017 rule.²⁵⁰ Thus, simply issuing the rule during one’s tenure was not sufficient to ensure that the rule actually took effect as issued.

c. *Nullifying by Congress*

Congress can disapprove of any regulation. Under the CRA,²⁵¹ Congress has many months after the issuance of any final regulation during which it may disapprove the regulation—in other words, prevent the regulation from taking effect (or continuing in effect)—by the passage of a joint resolution. If disapproved, a subsequent regulation that is substantially the same as the disapproved regulation may not take effect until Congress specifically so authorizes.²⁵² The joint resolution must be presented to the President, who may veto it, although Congress also can override the veto.

245. Payday Rule I, *supra* note 231.

246. Press Release, CFPB, Statement on Payday Rule (Jan. 16, 2018), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule>.

247. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. 4252, 4252 (Feb. 14, 2019) (to be codified at 12 C.F.R. pt. 1041).

248. Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance Date, 84 Fed. Reg. 4298, 4298 (Feb. 14, 2019) (to be codified at 12 C.F.R. pt. 1041).

249. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 85 Fed. Reg. 44382, 44382 (July 22, 2020) (to be codified at 12 C.F.R. pt. 1041).

250. Kelly Anne Smith, *CFPB Revokes Payday Lending Restrictions Meant to Protect Borrowers*, FORBES (July 7, 2020, 3:13 PM), <https://www.forbes.com/sites/advisor/2020/07/07/cfpb-revokes-payday-lending-restrictions-meant-to-protect-borrowers/?sh=19d1a69f32be> (quoting Lauren Sanders from the National Consumer Law Center and Alex Horowitz from the Pew Charitable Trusts that the consumer lending market had been becoming safer, but the amended rule “puts all of that at risk”). See Adam J. Levitin, *Dual Insulation? The Fifth Circuit’s Factual Misunderstanding of CFPB Funding*, CREDIT SLIPS (Oct. 21, 2022, 1:33 PM), <https://www.creditslips.org/creditslips/2022/10/dual-insulation-the-fifth-circuits-factual-misunderstanding-of-cfpb-funding.html> (stating that the “CFPB repealed the most significant part of the [Payday] rule”); see also Stephanie C. Robinson & Kris D. Kully, *CFPB Announces Proposal to Revoke (Most of) the Payday/Small Dollar Lending Rule*, CONSUMER FIN. SERVS. REV. (Feb. 7, 2019), <https://www.cfsreview.com/2019/02/cfpb-announces-proposal-to-revoke-most-of-the-payday-small-dollar-lending-rule> (noting that only the “payment provisions and a few other provisions relating to maintaining written policies and procedures” survived the proposed amendment).

251. 5 U.S.C. §§ 801–808.

252. *Id.* § 801(b).

While the CRA theoretically operates to disapprove any rule, as a practical matter, it seems likely to be successful only in situations where there has been a change in the political party of the President between issuance of the final rule and the expiration of the CRA sixty-day review period;²⁵³ otherwise, one would expect the President, who appointed the agency head in question and presumably supports their policy goals, to veto any joint resolution of disapproval.²⁵⁴ Indeed, every use of the CRA to disapprove a final rule occurred when the rule issued during one administration and was disapproved after a change in the party of the presidency.²⁵⁵ The Arbitration Rule,²⁵⁶ discussed below, arguably is an exception as the rule was issued and disapproved during the same administration; but that example still fits the mold, because in that case the director issuing the rule had been appointed by the prior President, who was from a different party than the President who signed the disapproval.²⁵⁷

For example, the CFPB spent years working on a rule regulating the use of mandatory pre-dispute arbitration clauses in contracts for consumer financial products and services (the Arbitration Rule), but the rule was disapproved using the CRA.²⁵⁸ In passing the Dodd-Frank Act, Congress directed the CFPB to

253. As is discussed in detail *infra* note 293, this 60-day period typically is much longer than 60 calendar days.

254. See CON. RSCH. SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 6 (Nov. 12, 2021) [hereinafter CRA FAQ]; CON. RSCH. SERV., R46690, CONGRESSIONAL REVIEW ACT ISSUES FOR THE 117TH CONGRESS: THE LOOKBACK MECHANISM AND EFFECTS OF DISAPPROVAL 5 (Feb. 19, 2021) [hereinafter CRA LOOKBACK]. To date, Congress has never passed a joint resolution under the CRA in such circumstances. However, if Congress did present a joint resolution that was vetoed by the President, Congress could theoretically override that veto with a two-thirds vote in each House. *Id.* at 12. But given the razor thin margins in both the House and the Senate in recent years, such a veto seems extremely unlikely.

255. (data on file with author). See CRA FAQ, *supra* note 254, at 6. The CRA was used for the first time during the George W. Bush administration, sixteen times during the Trump administration, and to date, three times in the Biden administration. *Id.* at 6. There has only been one instance of a “rule” being disapproved that was not sent to Congress as a final rule. CRA LOOKBACK, *supra* note 254, at 8, 8 n.31 (discussing disapproval in 2018 of the CFPB’s indirect auto lending guidance bulletin, which had been issued in 2013 but not been presented to Congress as a rule). See also CRA FAQ, *supra* note 254, at App. A (listing all disapprovals); *Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act*, CFPB (Mar. 21, 2013), https://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf.

256. Arbitration Agreements, 82 Fed. Reg. 33210, 33210 (July 19, 2017) (Arbitration Rule).

257. The rule issued during the Republican Trump administration while Cordray, who was appointed by Obama, a Democrat, was still its director even though the presidency had changed parties. Cordray likely was the last CFPB director to continue in office after a change in the political party of the president. See discussion *supra* Part III.B.4, notes 203, 210-212 and accompanying text. For the current and future directors, if a controversial rule is not completed prior to the election, there is a good chance that it simply will not issue—or at least not in substantially the same form—if there is a political transition. See, e.g., discussion *infra* Part III.C.1.b (discussing the Payday Rule).

258. Disapproval of CFPB Rule Relating to Arbitration Agreements, Pub. L. No. 115-74, 131 Stat. 1243 (2017); Arbitration Agreements, 82 Fed. Reg. 55500, 55500 (Nov. 22, 2017) The CFPB also issued the final Prepaid Rule during the CRA sixty-day window, and several resolutions were introduced in both Houses to disapprove of that rule, but none of them were passed by either House. Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and The Truth In Lending Act (Regulation Z), 81 Fed. Reg. 83934, 83934 (Nov. 22, 2016) (to be codified at 12 C.F.R. pts. 1005 & 1026); Ashlee Kieler, *Congressional Efforts to Remove Protections for Prepaid Cards Falls Short*, CONSUMERIST (May 11, 2017, 1:05 PM),

study the use of these clauses²⁵⁹ and gave the CFPB the express authority to “prohibit or impose conditions or limitations on the use” of such agreements.²⁶⁰ Beginning at least as early as 2012, the CFPB began preparing to conduct the study.²⁶¹ In 2015, the CFPB published the over seven hundred page arbitration study.²⁶² Roughly one year later, the CFPB proposed the regulation to address concerns found in the study.²⁶³ After considering approximately six thousand five hundred comments on the proposed rule,²⁶⁴ the CFPB issued a final regulation in 2017.²⁶⁵ Between issuance of the proposed and final regulations, Republicans gained control of the White House and maintained control of both Houses of Congress. Congress passed a joint resolution disapproving the rule, and on November 1, 2017—just over three months after the final rule had been published—Trump signed the joint resolution of disapproval into law,²⁶⁶ thereby nullifying the rule and preventing the future promulgation of any rule that is “substantially the same” as the Arbitration Rule unless and until “specifically authorized” by law.²⁶⁷

d. *Nullifying by the Financial Stability Oversight Council*

The Financial Stability Oversight Council (“FSOC”) also can set aside certain CFPB regulations.²⁶⁸ Unlike the use of the CRA, however, a petition to set aside must be filed shortly after the rule’s publication in the Federal Register.²⁶⁹ To date, the FSOC has not set aside any of the CFPB’s

<https://consumerist.com/2017/05/11/congressional-efforts-to-remove-protections-for-prepaid-debit-cards-fall-short/>; S.J. Res. 19, 115th Cong. (introduced Feb. 1, 2017); H.R.J. Res. 62, 115th Cong. (introduced Feb. 3, 2017); H.R.J. Res. 73, 115th Cong. (introduced Feb. 14, 2017).

259. 12 U.S.C. § 5518(a).

260. *Id.* § 5518(b).

261. *See, e.g.*, Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, 77 Fed. Reg. 25148, 25148 (Apr. 27, 2012) (requesting public comment on how to conduct the required study).

262. *See generally* CFPB, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) (2015).

263. Arbitration Agreements, 81 Fed. Reg. 32830, 32830 (May 24, 2016).

264. *Arbitration Agreements Rulemaking Docket*, <https://www.regulations.gov/docket/CFPB-2016-0020> (last visited Mar. 16, 2024). According to regulations.gov, the CFPB received more than 100,000 comments on the proposed rule, although only 6460 of those comments are posted publicly on regulations.gov. *Id.* Comments may not be posted for a number of reasons, including that they are near duplicates of posted comments or that they contain confidential information. *Frequently Asked Questions*, <https://www.regulations.gov/faq?anchor=find> (last visited Mar. 14, 2024) (answering “How are comments counted and posted to Regulations.gov?”). Thus, it seems reasonable to presume that the CFPB considered at least 6460 substantively different comments in promulgating the final rule.

265. Arbitration Agreements, 82 Fed. Reg. 33210, 33210 (July 19, 2017).

266. Disapproval of CFPB Rule Relating to Arbitration Agreements, Pub. L. No. 115-74, 131 Stat. 1243 (2017).

267. 5 U.S.C. § 801(b).

268. *See* 12 U.S.C. § 5321(a), (b) (establishing the Council and detailing its members); 12 U.S.C. § 5513(a) (providing that the Council may set aside CFPB regulations that cause systemic risk to the United States’ economy).

269. *Id.* § 5513(b)(1)(B) (requiring that a petition to set aside be filed within ten days of publication in the Federal Register).

regulations.²⁷⁰ Because the FSOC is composed of political appointees²⁷¹ it seems likely that, similar to the use of the CRA, the FSOC would only set aside regulations after a political transition. Given the very short window to file a petition to set aside, it is not clear whether the FSOC ever would set aside a CFPB regulation.²⁷²

e. *Terminating rulemaking*

If, on the other hand, a rule has not been finalized when a political transition happens, a new agency head often can end the rulemaking.²⁷³ The federal government publishes its Unified Agenda of Regulatory and Deregulatory Actions every six months in the spring and fall. The Unified Agenda lists “the actions administrative agencies [including the CFPB] plan to issue in the near and long term,”²⁷⁴ including “all regulations under development or review.”²⁷⁵ Generally, the actions are those that “will have a regulatory action within the

270. Searching the Federal Register for these actions produces no results, and the FSOC website has no news of a petition. Using the advanced search on the Federal Register website (<https://www.federalregister.gov>), and limiting the search to documents issued by the FSOC, the search produces 33 documents, none of which contain the term “set aside” or refer to 12 U.S.C. § 5513, the provision that allows FSOC review of CFPB regulations. See also CONG. RSCH. SERV., R45052, FINANCIAL STABILITY OVERSIGHT COUNCIL (FSOC): STRUCTURE AND ACTIVITIES 8, 12 (Feb. 12, 2018) (noting that no CFPB rules had been set aside as of the date of publication and that the CFPB is the only agency subject to set aside by FSOC).

271. 12 U.S.C. § 5321(b)(1) (listing voting members). The independent member of the FSOC is appointed to a six-year term, which theoretically could stretch across a political transition. *Id.* § 5321(b)(1)(J), (c)(1). However, the United States Supreme Court has rejected limitations on the president’s ability to remove appointees. See, e.g., *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 484 (2010). But see *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 626 (1935) (allowing for-cause removal on a commission). And, in any case, many of the voting members are presidential appointees who can be removed at will. See, e.g., 12 U.S.C. § 5321(b)(1) (including the Secretary of the Treasury, Comptroller of the Currency, Director of the CFPB as members).

272. Of course, if the CFPB issued a regulation that posed a significant threat to the stability of the economy in the eyes of the FSOC voting members, the FSOC could vote to set it aside. Indeed, that would seem to be the purpose of the provision, but it seems likely that if the CFPB did anything so extreme, the President also would replace the Director.

273. See O’Connell, *Political Cycles*, *supra* note 1, at 959–60 (“A proposed but unfinished rule usually can be withdrawn for any reason, without an opportunity for comment on the withdrawal.”); O’Connell, *Agency Rulemaking*, *supra* note 1, at 523 (finding that rulemakings are more likely to be withdrawn after a political transition).

274. *Spring 2022 Unified Agenda of Regulatory and Deregulatory Actions*, GSA & OMB, [<https://web.archive.org/web/20221117164349/https://www.reginfo.gov/public/do/eAgendaMain>] (last visited Nov. 13, 2022).

275. Regulatory Planning and Review, Exec. Order No. 12,866, § 4(b), 58 Fed. Reg. 51735, 51738 (Sept. 30, 1993). The CFPB does not have to list “certain routine, frequent, or administrative matters” in the agenda. See *Semiannual Regulatory Agenda*, 82 Fed. Reg. 40386, 40386 n.1 (Aug. 24, 2017). For example, the CFPB annually promulgates a series of final rules that adjust thresholds and other amounts in a variety of regulations in line with increases in the Consumer Price Index or inflation, but these rules are not included in the Unified Agenda. Compare *Consumer Leasing (Regulation M)*, 82 Fed. Reg. 51975 (Nov. 9, 2017) (to be codified at 12 C.F.R. pts. 213 & 1013) (adjusting thresholds for exempt consumer leases), with *2017 Fall Unified Agenda of Regulatory and Deregulatory Actions*, GSA & OMB, [https://www.reginfo.gov/public/do/eAgendaHistory?operation=OPERATION_GET_PUBLICATION&showStage=longterm¤tPubId=201710] (from the drop-down menu “Select Agency,” select “Consumer Financial Protection Bureau”) (listing rulemakings but not the Reg. M rulemaking).

next 12 months,” but one of the five stages, “Long-Term Actions,” includes rulemakings “under development but for which the agency does not expect to have a regulatory action within the [next] 12 months.”²⁷⁶ The federal government also maintains a list of rulemakings that are no longer active (the “Inactive List”).²⁷⁷

For purposes of this discussion, an agency can end rulemakings in three ways: formally withdrawing them, changing them to inactive, or moving them to the list of long-term actions. In all three circumstances, work on the rulemakings generally ceases completely. Analyzing the Unified Agenda and rules promulgated by the CFPB demonstrates that CFPB directors have in fact terminated rulemakings after both political transitions using all three methods.

From the outside, it is hard to discern how active these rulemakings were. Four terminated rulemakings were classified as “significant”²⁷⁸ and the other three as “substantive.”²⁷⁹ The CFPB had not issued a proposed rule in any of the seven active rulemakings that were ended by successors. However, the CFPB did substantial work over a period of years on many of them.

For example, in addition to delaying the Payday Rule,²⁸⁰ Mulvaney terminated four of the thirteen active Cordray rulemaking efforts when he took office. Mulvaney moved the Supervision of Larger Participants in Markets for Personal Loans rulemaking to the Inactive List.²⁸¹ Payday lending was a priority for Cordray, and the resulting rule would have allowed the CFPB to supervise

276. Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions, 87 Fed. Reg. 48236, 48237–38 (Aug. 8, 2022) [hereinafter Introduction to the Unified Agenda]. There are five rulemaking stages. (1) Prerule includes those where the actions in the next 12 months will be prior to issuing a notice of proposed rulemaking (“NPRM”), including the issuance of an advanced notice of proposed rulemaking (“ANPRM”) if any; (2) Proposed Rule includes those where the agency anticipates issuing an NPRM or closing the NPRM comment period as the next step of the process; (3) Final Rule includes actions where the next action to be taken is final (*e.g.*, issuing an interim or final rule); (4) Long-term Actions include rules under development but where no regulatory action is expected in the next twelve months; and (5) Completed Actions includes rules that were withdrawn or completed since publication of the last Unified Agenda, including any rules that may have started and completed between agendas. *Id.* at 48238.

277. These are rules where the agency wishes to keep the “regulatory identification number (RIN) and title for possible future use.” *Inactive List*, GSA & OMB, <https://www.reginfo.gov/public/do/eAgendaInactive> (inactive rules are searchable by selecting from the “Current and Historical Inactive List by Corresponding Unified Agenda Cycle” and then “Select Agency” drop-down menus) (last visited Mar. 16, 2024).

278. Rulemakings are identified as “Other Significant” in the Unified Agenda when they are considered “Significant” by the agency, including specifically those rulemakings that are a priority for the director, although the resulting rules do not meet the definition of economically significant for purposes of the Unified Agenda. Introduction to Unified Agenda, *supra* note 276, at 48238–39 (defining “Other Significant” rules).

279. “Substantive, Nonsignificant” rules are those that have “substantive impacts” but are neither “Significant” nor routine or administrative. *Id.* at 48239.

280. See discussion *supra* Part III.C.1.b.

281. GSA & OMG, *supra* note 277 (under the “Current and Historical Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions” drop-down menu, select “Spring 2018 Unified Agenda of Federal Regulatory and Deregulatory Actions”; and then select “Consumer Financial Protection Bureau” as the agency) (showing the rule, RIN 3170-AA07, as inactive); see also *Unified Agenda and Regulatory Plan Search Results: RIN 3170:AA07*, GSA & OMG, <https://www.reginfo.gov/public/Forward?SearchTarget=Agenda&textfield=3170-AA07&Image61.x=0&Image61.y=0> (showing history of rule up through Fall 2017 Unified Agenda) [hereinafter *Search Results: RIN 3170:AA07*].

certain payday loan markets.²⁸² The CFPB began the rulemaking in 2015,²⁸³ and although the CFPB had not yet issued a proposed rule when Mulvaney took office, it had moved the rulemaking from the prerule investigation stage to the proposed rule stage.²⁸⁴ Mulvaney also moved the Overdraft Services rulemaking to the Inactive List. Cordray began the rulemaking in 2013, and over the course of the rulemaking, the CFPB had conducted a significant amount of work related to the rulemaking.²⁸⁵ Mulvaney withdrew the third and moved the last to the Long-Term Action list.²⁸⁶

Similarly, shortly after taking office, Uejio ended three of the eight²⁸⁷ active rulemakings begun under Mulvaney or Kraninger. Uejio withdrew two rulemakings begun under Kraninger that would have changed, *inter alia*, a rule

282. The CFPB has the authority to supervise nonbanks, *inter alia*, if they have been designated as “larger participant[s]” of their markets in a rulemaking. 12 U.S.C. § 5514(a)(1)(B), (a)(2). *See, e.g.*, Defining Larger Participants of the Automobile Financing Market and Defining Certain Automobile Leasing Activity as a Financial Product or Service, 80 Fed. Reg. 37496, 37496 (June 30, 2015) (to be codified at 12 C.F.R. pts. 1001 & 1090).

283. The CFPB had previously done prerule investigation on possible additional larger participant rules, but identified the installment and title loan markets specifically for the first time in Spring 2015. Defining Larger Participants of the Automobile Financing Market, 80 Fed. Reg. at 37496.

284. *Search Results: RIN 3170-AA07*, *supra* note 281.

285. *Id.*; *Overdraft: RIN 3170-AA42 (Fall 2013)*, GSA & OMB, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201310&RIN=3170-AA42> (noting concerns with opt-in practices, coverage limits, the order in which transactions posted, fees, and involuntary account closures); CFPB, CFPB STUDY OF OVERDRAFT PROGRAMS 60–63 (2013) (same); *Overdraft Services: RIN 3170-AA42 (Fall 2017)*, GSA & OMB, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=3170-AA42> (noting two additional reports); CFPB: CHECKING ACCOUNT OVERDRAFT (2014); CFPB, DATA POINT: FREQUENT OVERDRAFTERS (2017); *see also* CFPB, CONSUMER VOICES ON OVERDRAFT PROGRAMS 3–4 (2017) (discussing, *inter alia*, consumer surprise and confusion relating to overdraft fees and the order in which transactions were posted); Press Release, CFPB, CFPB Unveils Prototypes of “Know Before You Owe” Overdraft Disclosure Designed to Make Costs and Risks Easier to Understand (Aug. 4, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-unveils-prototypes-know-you-owe-overdraft-disclosure-designed-make-costs-and-risks-easier-understand>.

286. Mulvaney withdrew the Submission of Credit Card Agreements Under the Truth in Lending Act (Regulation Z) rulemaking that had been in the prerule stage since Spring 2017. *See Submission of Credit Card Agreements Under the Truth in Lending Act (Regulation Z): RIN 3170-AA70 (Spring 2018)*, GSA & OMB, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=3170-AA70>. Mulvaney also moved the Review of Inherited Regulations rulemaking that also had been in the prerule stage since Spring 2017 to the Long-Term Actions list (where no regulatory actions are expected in the next 12 months). *See Unified Agenda and Regulatory Plan Search Results: RIN 3170-AA73*, GSA & OMB, <https://www.reginfo.gov/public/Forward?SearchTarget=Agenda&textfield=3170-aa73&Image61.x=0&Image61.y=0>.

287. There were thirteen rulemakings listed in the Fall 2020 Unified Agenda. Two were completed prior to the transition, and three others began under Cordray. In addition, in two others the final rules issued less than a month after Uejio’s appointment. Thus, there were only eight (or arguably six) rulemakings started under Mulvaney or Kraninger that carried over into Uejio’s tenure. (data on file with author); *see also Agency Rule List – Fall 2020*, GSA & OMB, https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPubId=202010&showStage=active&agencyCd=3170&csrf_token=4B10311A0F09EE0F12011430DAE3202DC1F39120F0BD4ABCC335409B809E398F330FCD6524056069F272A9F59C0B06C96CD7.

finalized under Cordray regarding Home Mortgage Disclosure Act data.²⁸⁸ In both cases, the CFPB had expected to issue proposed rules in early 2021.²⁸⁹ Uejio also ended a rulemaking²⁹⁰ and a long-term action²⁹¹ that Kraninger had just started.

2. *Avoiding Failures*

To minimize the chances of failure, agency heads should ensure that rules do not issue close to possible transitions. Both the Payday and Arbitration Rules discussed above were effectively if not completely scuttled after the final rules had issued. In both cases, the CFPB had invested significant resources over a period of years in developing the rules and ultimately issued final rules during Cordray's tenure. But, in both cases, the rules issued close to or after a political transition, and the rules ultimately had little to no effect on the targeted industries or the compliance climate.

To secure the success of rules, an agency must issue them at least six months prior to a possible political transition.²⁹² The CRA gives Congress sixty days to issue the joint resolution from the transmission of the rule and other required information to Congress and its publication in the Federal Register.²⁹³ However, the period typically is much longer than sixty calendar days.²⁹⁴ As a

288. *Public Release of Home Mortgage Disclosure Act Data: RIN 3170-AA85 (Spring 2021)*, GSA & OMG, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=3170-AA85>; *Home Mortgage Disclosure Act (Regulation C): RIN 3170-AA97 (Spring 2021)*, GSA & OMG, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=3170-AA97>; Home Mortgage Disclosure (Regulation C) Data Points and Coverage, 84 Fed. Reg. 20049, 20051–52 (May 8, 2019) (to be codified at 12 C.F.R. pt. 1003); see also *Home Mortgage Disclosure Act (Regulation C): RIN 3170-AA97 (Fall 2020)*, GSA & OMG, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202010&RIN=3170-AA97> [hereinafter HMDA, Fall 2020]; Disclosure of Loan-Level HMDA Data, 84 Fed. Reg. 649, 649 (Jan. 31, 2019).

289. HMDA, Fall 2020, *supra* note 288, *Public Release of Home Mortgage Disclosure Act Data: RIN 3170-AA85 (Fall 2020)*, GSA & OMG, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202010&RIN=3170-AA85>.

290. *Compare Unified Agenda and Regulatory Plan Search Results: RIN 3170:AB04*, GSA & OMG, <https://www.reginfo.gov/public/Forward?SearchTarget=Agenda&textfield=3170-AB04&Image61.x=0&Image61.y=0> (showing movement of rulemaking, 3170-AB04, to Long-Term Actions in Spring 2021) *with id.*, <https://www.reginfo.gov/public/do/eAgendaInactiveSearchResult?viewall=y> (select “Inactive Actions” from Unified Agenda tab, select Spring 2022 agency cycle, select Consumer Financial Protection Bureau as agency) (showing rule 3170-AB04 as Inactive in Spring 2022).

291. *Payday Disclosure Rule: RIN 3170-AB06 (Spring 2021)*, GSA & OMG, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=3170-AB06> (showing withdrawal of long-term action on the Payday Disclosure rule).

292. The Payday Rule issued after a political transition, but while Cordray, who was appointed prior to that transition, remained Director. Because Cordray was a holdover from a prior administration, the rule faced a similar possibility of disapproval under the CRA from the new Congress. Indeed, some members of Congress tried to disapprove the rule; however, those efforts were not successful, as neither version was voted out of its respective chamber. H.R.J. Res. 122, 115th Cong. (introduced Dec. 1, 2017); S.J. Res. 56, 115th Cong. (introduced Mar. 22, 2018).

293. 5 U.S.C. § 802(a); CRA FAQ, *supra* note 254, at 14 & nn.79–80.

294. First, the sixty days does not include days when “either House of Congress is adjourned for more than 3 days.” 5 U.S.C. § 802(a). Second, if Congress adjourns *sine die* its annual session within sixty legislative days

result, the CFPB likely would have had to have issued the above rules no later than early July 2016 to ensure that they could not be disapproved using the CRA if there were a political transition in the 2016 election.²⁹⁵ Had the CFPB been able to issue the final rules by July 2016, it seems likely that Obama, who had appointed Cordray, would have vetoed any joint resolution and that Congress could not have overridden that veto.²⁹⁶ Thus the rules at least would have taken effect.²⁹⁷

Another advantage of issuing the rules no later than early July in a year prior to a possible political transition is that it gives the rules time to go into effect before any transition. For a final rule that substantively alters the compliance framework,²⁹⁸ affected companies will need time to develop and implement processes to comply with the new rule, which is why these rules have compliance dates significantly later than their effective dates.²⁹⁹ For these types of rules, there seem to be three phases of implementation: (1) a pre-effective-date phase; (2) a liminal phase, wherein the rule has become effective but affected entities in the industries in question have not yet invested heavily or uniformly in compliance; and (3) a settled phase, wherein the industries are more or less operating within the rule's framework. During the pre-effective phase when few (if any) entities have begun trying to comply with the rule, it appears relatively easy to delay the rule and conduct additional rulemaking to amend the rule, as happened with the Payday Rule. However, once a rule has become effective, that equation likely changes.

Businesses value certainty. Absent a delay or some other signal that they will not have to comply with the rule, they likely will not start investing time and resources in developing and implementing compliance processes until the

(for the House) or sixty session days (for the Senate) of the rule's transmittal and publication, the sixty-day period restarts on the fifteenth day of the next session. *Id.* § 801(d); CONG. RSCH. SERV., R46690, CONGRESSIONAL REVIEW ACT ISSUES FOR THE 117TH CONGRESS: THE LOOKBACK MECHANISM AND EFFECTS OF DISAPPROVAL 5 (2021); CRA FAQ, *supra* note 254, at 17–18, nn.96–99.

295. In 2017, Congress used the CRA, with Trump's signature, to set aside a final rule that was published on July 27, 2016 (in addition to disapproving several rules issued in August). CRA FAQ, *supra* note 254, at App. A; Disclosure of Payments by Resource Extraction Issuers, 81 Fed. Reg. 49360, 49360 (July 27, 2016); Disclosure of Payments by Resource Extraction Issuers, Pub. L. No. 115-4, 131 Stat. 9 (Feb. 16, 2017). Similarly, the Congressional Research Service estimated that for the first session of the 117th Congress, a rule had to be submitted before August 21, 2020, to avoid CRA set aside. CRA LOOKBACK, *supra* note 254, at 6.

296. Of course, Congress theoretically could have overridden the veto, but doing so would have required a substantial number of Democratic lawmakers to vote against the President of their own party.

297. For example, the CFPB under Kraninger issued the rule revoking the mandatory underwriting requirements of Cordray's Payday Rule on July 22, 2020, just outside the window for CRA disapproval based on the Congressional Research Service's estimates. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 85 Fed. Reg. 44382, 44382 (July 22, 2020) (to be codified at 12 C.F.R. pt. 1041); CRA LOOKBACK, *supra* note 254, at 6 (estimating August 21, 2020, as the cut-off date for CRA disapproval).

298. Purely administrative rules (*e.g.*, adjusting amounts for inflation) and noncontroversial, relatively minor changes (*e.g.*, changing a model form) likely would not generate challenges.

299. *See, e.g.*, Debt Collection Practices (Regulation F), 85 Fed. Reg. 76734, 76734 (Nov. 30, 2020) (to be codified at 12 C.F.R. pt. 1006) (setting effective date one year after publication of the final rule).

rule becomes effective or shortly before.³⁰⁰ The exact boundary between the latter two phases is not well-defined. At a certain point, however, enough businesses will have invested sufficient resources that there may be industry resistance to amending the rule.³⁰¹ Entities that move on compliance early (so-called “first movers”) will not want to have wasted their efforts and will not want to be put at a competitive disadvantage vis-à-vis their competitors who have not done so. Announcing a rulemaking to reverse the prior rule at this point would create significant uncertainty and costs for the affected entities. While not a guarantee, giving the rule time to settle prior to a political transition at least reduces the risk that a subsequent director will reverse the rule simply because they disagreed with the rule as a policy matter.³⁰² Thus, with enough lead time, a regulator’s rule may become settled such that it is more likely to survive the political transition.

3. *Effectively Using Rulemaking*

a. *Dismantling predecessors’ rulemakings*

Although it is difficult to use affirmative rulemaking to set the compliance climate, especially early in a regulator’s tenure, defensively dismantling a predecessor’s rulemaking efforts can have a dramatic impact on the compliance climate virtually overnight.³⁰³ If a rule has been issued, but is not yet effective or is still in the liminal phase, a regulator can stay the effective or compliance date pending reconsideration of the rule and then conduct rulemaking to alter the rule, as happened with the Payday Rule.³⁰⁴ Doing so sends a very strong compliance climate message that can highlight differences between the former and current regulators and their respective climates. For example, despite the

300. This position makes economic sense given the relative uncertainty of the regulatory requirements prior to the rule becoming effective and the ease with which they might change prior to that date compared with the more stringent procedural requirements of amending a final rule (the so-called “stickiness” of final rules). Nielson, *supra* note 229, at 91–93, 117–19 (noting that regulated entities will invest less when they are uncertain of the permanence of regulations).

301. *Cf.* Brief of the Mort. Bankers Ass’n, Nat’l Ass’n of Home Builders & Nat’l Ass’n of Realtors as Amici Curiae Supporting Neither Party at 4, 6, 12–13, CFPB v. Cmty. Fin. Servs. Ass’n, 143 S. Ct. 978 (2023) (No. 22-448) (noting investment of billions of dollars by industries in complying with CFPB regulations and urging the Court not to invalidate regulations beyond the specific regulation at issue in the case lest the “mortgage market could quickly descend into shambles” and “chaos would ensue”).

302. This is by no means a guarantee. Even if the period for using the CRA has passed and a rule has gone into effect, Congress always has the power to pass new legislation effectively or expressly eliminating a regulation, and a subsequent director always has the power to institute new rulemaking. A rule may be so controversial that affected businesses want it changed regardless of their prior investments in compliance, and they may lobby either Congress or the new director to do so.

303. *See* O’Connell, *Political Cycles*, *supra* note 1, at 972 (noting that agencies “often do not hesitate to freeze or suspend the effective dates of rules promulgated before the transition, or to withdraw unfinished rules”) (footnotes omitted); *cf.* O’Connell, *Agency Rulemaking*, *supra* note 1, at 485 (noting that agency heads coming in after a political transition want to stop actions, if they can, of prior directors while also implementing their own agenda).

304. *See* discussion *supra* Part III.C.1.b.

CFPB's relative silence surrounding the initial stay of the Payday Rule, there was extensive public coverage of Mulvaney's actions that often expressly highlighted differences between the climate being set by him and the climate set by Cordray.³⁰⁵

Absent significant public activity (for example, where no proposed rule has issued), terminating rulemakings will have a significant impact on the compliance climate only when regulators publicize the terminations or market participants otherwise learn of the actions. Neither Mulvaney nor Uejio made explicit references to the rulemaking changes vis-à-vis their climates. Nonetheless, although the Payday Rule was much higher profile, industry watchers did note the other rulemaking changes Mulvaney made despite the lack of public statements by the CFPB.³⁰⁶ The same was true to a lesser extent with Uejio's changes.³⁰⁷

Mulvaney's and Uejio's failure to publicize these actions is somewhat surprising given how terminating some of them advanced their priorities. In Mulvaney's case, his deregulatory priorities, especially with respect to payday lending were already well known.³⁰⁸ It is possible that he felt no further comment

305. See, e.g., Press Release, CFPB, CFPB Statement on Payday Rule (Jan. 16, 2018), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule>; Rappeport, *Payday Rules Relax*, *supra* note 202 (noting Mulvaney's actions on the payday rule, calling him a "white knight for the payday lending industry," characterizing the CFPB's actions under him as a "move to deregulate the industry," and contrasting them to the CFPB's "crackdown" on payday loans under Cordray); Chris Arnold, *Under Trump Appointee, Consumer Protection Agency Seen Helping Payday Lenders*, NPR (Jan. 24, 2018, 10:12 AM), <https://www.npr.org/2018/01/24/579961808/under-trump-appointee-consumer-protection-agency-seen-helping-payday-lenders> (noting Mulvaney's stay of the payday rule, dismissal of the Golden Valley litigation, and termination of an investigation into another payday lender); Paul Kiel, *Newly Defanged, Top Consumer Protection Agency Drops Investigation of High-Cost Lender*, PROPUBLICA (Jan. 23, 2018, 6:12 PM), <https://www.propublica.org/article/consumer-financial-protection-bureau-drops-investigation-of-high-cost-lender> (same); Donna Borak, *Consumer Protection Bureau Drops Payday Lender Lawsuit*, CNN BUS. (Jan. 18, 2018, 5:53 PM) (noting stay of rule), <https://money.cnn.com/2018/01/18/news/economy/cfpb-lawsuit-payday-lenders/index.html>; Merle, *supra* note 31, (same); Sheelah Kolhatkar, *The Steady, Alarming Destruction of the Consumer Financial Protection Bureau*, NEW YORKER (Feb. 7, 2018), <https://www.newyorker.com/news/news-desk/the-steady-alarming-destruction-of-the-consumer-financial-protection-bureau> (noting Mulvaney's announcement that the CFPB would reconsider the Payday Rule).

306. See, e.g., Kate Berry, *From Overdraft to HMDA, Rulemaking Has New Look At Mulvaney's CFPB*, AM. BANKER (May 16, 2018, 4:56 PM) <https://www.americanbanker.com/list/from-overdraft-to-hmda-rulemaking-has-new-look-at-mick-mulvaney-cfpb>; David Baumann, *CFPB Moves Overdraft Rules to Back Burner*, CREDIT UNION TIMES (May 11, 2018, 12:05 PM), <https://www.cutimes.com/2018/05/11/cfpb-moves-overdraft-rules-to-back-burner/?slreturn=20230103183700>; Press Release, Center for Responsible Lending, CFPB Turns Blind Eye To Overdraft Fee Abuses (May 16, 2018), <https://www.responsiblelending.org/media/cfpb-turns-blind-eye-overdraft-fee-abuses>.

307. Compare, e.g., Jon Hill, *New CFPB Agenda Ices More Trump-Era Regulatory Projects*, LAW 360 (June 11, 2021, 8:52 PM), <https://www.law360.com/articles/1393446/new-cfpb-agenda-ices-more-trump-era-regulatory-projects> (noting termination of rulemakings from prior directors), with Susan M. Bernard, *Spring 2021 Rulemaking Agenda*, CFPB (June 11, 2021), <https://www.consumerfinance.gov/about-us/blog/spring-2021-rulemaking-agenda> (failing to mention rulemakings that were ended).

308. As a congressperson, he introduced legislation to limit the CFPB's ability to regulate such lenders; once he became acting director, he immediately dismissed a case against a group of payday lenders, ended an investigation into another payday lender, and moved to gut the Payday Rule in addition to tabling this rulemaking. See discussion *supra* Part I.B.

was necessary when he terminated the larger participant rulemaking for payday lenders. In Uejio's case, the silence is less easy to understand. Uejio announced two main priorities when he became Acting Director: providing relief from the pandemic to consumers and addressing racial inequities.³⁰⁹ Two of the four rulemakings Uejio ended involved the Home Mortgage Disclosure Act,³¹⁰ and had clear implications for racial equity. A third rulemaking involved mortgage protections during disasters,³¹¹ an issue the CFPB later addressed in part through an interim final rule under Uejio.³¹² Uejio likely could have used his termination of these rulemakings to further cement his compliance climate.³¹³

b. *Using rapid rulemaking*

Agencies can use rapid rulemaking—as opposed to traditional notice-and-comment rulemaking—to set a compliance climate, albeit only in limited circumstances. First, when an agency finds that notice would be “impracticable, unnecessary, or contrary to the public interest,” it may issue an interim final rule without going through the notice-and-comment process first,³¹⁴ and if it finds good cause for so doing, the agency may make the rule effective immediately.³¹⁵ The speed with which an interim final rule may issue makes it possible for a regulator to use such rules to set a compliance climate; however, the limitations on their use means that they will be a realistic option in relatively few

309. Press Release, CFPB, Prepared Remarks of Acting Director Uejio at the National Association of Attorneys General Spring Consumer Protection Conference (May 11, 2021), <https://www.consumerfinance.gov/about-us/blog/spring-2021-rulemaking-agenda>.

310. See discussion *supra* Part III.C.1.e.

311. See discussion *supra* Part III.C.1.e.

312. See discussion *infra* Part III.C.3.b.

313. It is possible, however, that where there has been little public notice and no concrete rule proposed—as was the case with all eight rulemakings ended by Uejio and Mulvaney (excluding Mulvaney's actions with respect to the Payday Rule)—messaging around the termination of a rulemaking no one has heard much about is too convoluted to be useful and that the agency head is better served by setting the climate with actions related to more public matters.

314. 5 U.S.C. § 553(b)(3)(B).

315. *Id.* § 553(d)(3); see also O'Connell, *Political Cycles*, *supra* note 1, at 903 (“[A]gencies can promulgate ‘interim final rules’ that take effect immediately upon publication or shortly thereafter, and then can take comments on them after the fact.”).

situations.³¹⁶ In addition, interim final rules may be subject to increased litigation risk exactly because they are issued without notice and comment.³¹⁷

The COVID-19 pandemic provided Uejio with an opportunity to use both an interim final rule and an extremely rapid final rule with respect to both of his stated priorities: racial equity and pandemic relief. Although Uejio scrapped Kraninger's disaster rulemaking, the CFPB issued an interim final rule within three months of the start of Uejio's tenure that required, *inter alia*, debt collectors to provide tenants with notice of their rights under the Center for Disease Control and Prevention's eviction moratorium and stated that debt collectors could be sued for failing to provide such notice.³¹⁸ Uejio made public remarks about the rule that addressed both of his stated priorities. He stressed the harm from the pandemic on consumers and that the CFPB would investigate debt collectors who violated the rule while also tying the rule to his concerns about racial equity, noting that the economic harm from the pandemic had "disproportionately affected communities of color."³¹⁹

The CFPB also proposed, and finalized in less than three months, a rule to provide temporary protections from foreclosure related to the pandemic.³²⁰ Uejio again used the issuance of the rule to restate his priorities on pandemic

316. See, e.g., Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN L. REV. 703, 719–21 (1999) (stating that good cause is "narrowly construed" and will be upheld only in "compelling" or "exigent" circumstances); *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (stating that good cause "is usually invoked in emergencies" and "is to be 'narrowly construed and only reluctantly countenanced.'" (quoting *Alcaraz v. Black*, 746 F.2d 593, 612 (9th Cir. 1984))); O'Connell, *Agency Rulemaking*, *supra* note 1, at 495, 498, 502 & figs.1, 4, 6 (noting number of NPRMs, interim rules, and final actions per year by agencies across 27 years). See generally Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 ADMIN L. REV. 113 (1984) (discussing uses of interim final rules and determinations of whether good cause existed to issue them and noting that good cause should not be an "escape clause"). But see Babette E.L. Boliek, *Agencies in Crisis? An Examination of State and Federal Agency Emergency Powers*, 81 FORDHAM L. REV. 3339, 3348–49 & nn.41, 45 (2013) (noting that the number of interim final rules had risen from approximately 3% of rulemakings in 1999 to 9% in 2001 and 13% in mid-2011). Boliek argues that the administrative state "did not react en masse" to 9/11 until 2002, and therefore did not cause the jump in 2001; she does not address whether the 2008 financial crisis could have played a role. *Id.* at 3349 n.46.

317. O'Connell, *Agency Rulemaking*, *supra* note 1, at 533 & nn.214–15; see also e.g., Asimow, *supra* note 316, at 717–19 & nn.56, 57 (citing numerous challenges to good cause); Jordan, *supra* note 316, at 126–29 (same); *United States v. Valverde*, 628 F.3d 1159, 1164–68 (9th Cir. 2010) (discussing a series of challenges to the "good cause" basis for interim final rules and holding that interim final rule lacked good cause); *Azar*, 911 F.3d at 576 (same).

318. Debt Collection Practices in Connection With the Global COVID-19 Pandemic (Regulation F), 86 Fed. Reg. 21163, 21163 (Apr. 16, 2021) (to be codified at 12 C.F.R. pt. 1006) (providing that the rule would become effective two weeks after its announcement on April 19 and requiring comments to be submitted only four days after the effective date); Press Release, CFPB, CFPB Rule Clarifies Tenants Can Hold Debt Collectors Accountable for Illegal Evictions (Apr. 19, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-rule-clarifies-tenants-can-hold-debt-collectors-accountable-for-illegal-evictions>.

319. Press Release, CFPB, Prepared Remarks of Acting Director Dave Uejio for the Interim Final Rule on CDC Eviction Moratorium Rights under the Fair Debt Collection Practices Act (Apr. 19, 2021), <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-acting-director-dave-uejio-for-the-interim-final-rule-on-cdc-eviction-moratorium-rights-under-fair-debt-collection-practices-act>.

320. Protections for Borrowers Affected by the COVID-19 Emergency Under the Real Estate Settlement Procedures Act (RESPA), Regulation X, 86 Fed. Reg. 34848, 34854 (June 30, 2021) (to be codified at 12 C.F.R. pt. 1024) (issuing final rule less than three months after rule was proposed).

relief and racial equity.³²¹ However, it seems likely that such rapid rulemaking is only feasible in similar emergency situations where relatively minor changes are being proposed. The rule in question involved only temporary changes to address loss-mitigation options related to the pandemic, and even that effort took at least five months to become effective.³²²

D. AMICUS BRIEFS

Amicus briefs provide a relatively untapped method for shaping a compliance climate that is similar to—albeit more limited than—the role enforcement actions can play. Amicus briefs allow new regulators to advance legal theories that reflect their priorities without taking the time required by enforcement or rulemaking. Simply filing the brief when combined with press coverage can signal the regulator’s compliance climate. And if the court adopts the regulator’s legal theories, the brief will have cemented the regulator’s priority as legal precedent.³²³ As with final orders in enforcement actions, the result cannot be simply undone by a succeeding director and can be used by other parties to leverage further development of the law in line with the regulator’s priorities.³²⁴ Moreover, unlike an enforcement investigation and subsequent public litigation, which can take years, an agency can identify and file an amicus brief in a matter of months. Once the brief is filed, the agency does not have to invest further resources on the matter.³²⁵ In some cases,

321. Press Release, CFPB, CFPB Issues Rules to Facilitate Smooth Transition as Federal Foreclosure Protections Expire (June 28, 2021) <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rules-to-facilitate-smooth-transition-as-federal-foreclosure-protections-expire/#:~:text=The%20amendments%20will%20support%20the,modifications%20and%20selling%20their%20homes> (noting the potential impact on Black and Hispanic homeowners specifically from a possible wave of foreclosures).

322. Protections for Borrowers Affected by the COVID-19 Emergency Under the Real Estate Settlement Procedures Act (RESPA), Regulation X, 86 Fed. Reg. 18840, 18840 (Apr. 9, 2021) (to be codified at 12 C.F.R. pt. 1024) (proposing a rule and providing 30 days for comment); Protections for Borrowers Affected by the COVID-19 Emergency Under the Real Estate Settlement Procedures Act (RESPA), Regulation X, 86 Fed. Reg. 34848, 34848 (June 30, 2021) (to be codified at 12 C.F.R. pt. 1024) (promulgating final rule to be effective 60 days later).

323. For example, the United States Court of Appeals for the Fourth Circuit held that a company could be liable for violating the FCRA citing the same cases and using similar analyses as those put forth by the CFPB in its amicus brief. *Compare* Henderson v. Source for Pub. Data, L.P., 53 F.4th 110, 126–29 & n.22 (4th Cir. 2022) (finding that the defendant is an information content provider), *with* Brief of Amici Curiae FTC, CFPB, and North Carolina Supporting Reversal at 23–27, Henderson v. Source for Pub. Data, L.P., 53 F.4th 110 (4th Cir. Oct. 14, 2021) (No. 21-1678) (urging same). The holding in *Henderson* vindicated a key priority for Chopra—preventing tech companies from evading consumer protection laws. *See* discussion *supra* Part I.C & notes 105–107.

324. *See* discussion *supra* Part III.B.5.

325. Indeed, the CFPB’s ability in particular to file amicus briefs is not limited by the enforcement pipeline at all, as the briefs are drafted by the Office of the General Counsel, not by the Office of Enforcement. *See, e.g.*, Brief of Amici Curiae Consumer Financial Protection Bureau, Department of Justice, Board of Governors of the Federal Reserve System, and Federal Trade Commission as Amici Curiae in Support of Appellant and Reversal at 1–2, *Fralish v. Bank of Am., N.A.*, 2022 WL 1089194 (7th Cir. Dec. 16, 2021) (Nos. 21-2846 (L), 21-2999) (filing signed by attorneys from the general counsel’s office at the CFPB).

agencies can collaborate on such briefs, reducing the strain on resources even further.³²⁶

The CFPB has filed amicus briefs under each of its directors. Overall, directors that established consumer-oriented, regulatory climates filed more briefs, on average, than directors who set deregulatory climates.³²⁷ However, Chopra has made more use of amicus briefs to set his compliance climate than his predecessors. Through the close of fiscal year 2022, the CFPB filed more amicus briefs on average per year under Chopra than any other director.³²⁸

Apart from Chopra, the CFPB's directors have not capitalized on the opportunities to use amicus briefs to establish their compliance climates. From March 2012, when the CFPB filed its second amicus brief under Cordray, through the end of Uejio's tenure in October 2021, the CFPB filed fifty-one amicus briefs, but did not issue either a press release, prepared remarks by the director, or even a blog post for any of them.³²⁹

By contrast, Chopra has made much more effective use of amicus briefs to set his compliance climate. For all but one of the amicus briefs filed during his tenure, the CFPB issued a press statement, generally either from Chopra or his general counsel, and these statements often highlighted Chopra's priorities.³³⁰ Indeed most of the amicus briefs filed under Chopra relate directly to one or more of his expressed priorities.³³¹

E. GUIDANCE

New regulators also can use guidance on legal analysis or the enforcement process to establish their compliance climates. The CFPB has issued numerous forms of guidance in the past, including advisory opinions, compliance bulletins, and circulars. The CFPB under Chopra has issued numerous such documents (and related press statements) setting and reinforcing a number of his priorities, including credit reporting, anti-discrimination, the use of technology, and the

326. *Id.* (filing by the CFPB, the Department of Justice, the Federal Trade Commission, and the Board of Governors of the Federal Reserve System).

327. Mulvaney, who established the most deregulatory climate, filed the fewest. (data on file with author); *see also Filed Briefs*, CFPB, <https://www.consumerfinance.gov/compliance/amicus/briefs> (listing all amicus briefs filed by the CFPB) (last visited Mar. 18, 2024).

328. (data on file with author). The CFPB filed eight amicus briefs in just under a year under Chopra. *Id.* There was an average of just over 6 briefs a year under Cordray, 5.5 under Uejio, 4.7 under Kraninger, and 1.9 under Mulvaney. *Id.*

329. There were a few instances wherein the fact that the CFPB had filed an amicus brief previously was mentioned in a release devoted to another topic. *See, e.g.*, Press Release, CFPB, Consumer Financial Protection Bureau Releases Report on 2019 Administration of the Fair Debt Collection Practices Act; Announces Extension of Comment Period (Mar. 20, 2020), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-releases-2019-administration-fair-debt-collection-practices-act-report> (noting that the CFPB had filed four amicus briefs in Fair Debt Collection Practices Act cases).

330. *See* discussion *supra* Part I.C.

331. *See* discussion *supra* Part I.C.

scope of harm caused by illegal practices.³³² This guidance strengthens his compliance climate.

Much like amicus briefs, these types of documents have advantages over both enforcement and rulemaking in that they do not take long to produce, and they generally are effective immediately.³³³ However, unless enforcement actions or final rules ultimately back them up, they also can be reversed fairly easily by a successor who wishes to set a different compliance climate. For example, the CFPB under Kraninger issued eleven policy statements during the first few months of the COVID-19 pandemic stating that the CFPB would be “flexible” toward companies that violated consumer protection laws during the pandemic.³³⁴ Just over two months after he became Acting Director, Uejio

332. See, e.g., Press Release, Rohit Chopra, Director, CFPB, Statement Regarding the Advisory Opinion to Curb False Identity Matching (Nov. 4, 2021), <https://www.consumerfinance.gov/about-us/newsroom/statement-regarding-the-advisory-opinion-to-curb-false-identity-matching> (noting in a statement by Director Chopra that “false and shoddy identity matching” causes substantial harms and are “especially harmful for communities of color” and stating that the CFPB would “closely collaborat[e]” with the FTC in enforcing violations of the Fair Credit Reporting Act and would seek relief for “the full range of harms” caused by these violations); Fair Credit Reporting; Name-Only Matching Procedures, 86 Fed. Reg. 62468, 62471–72 (Nov. 10, 2021) (concluding in an advisory opinion that name-only matching does not satisfy FCRA’s requirement that companies use reasonable procedures to ensure accuracy); Bulletin 2022-01: Medical Debt Collection and Consumer Reporting Requirements in Connection With the No Surprises Act, 87 Fed. Reg. 3025, 3026 (Jan. 20, 2022) (stating that the CFPB “will closely review the practices of those engaged in . . . reporting of medical debt” and will hold companies accountable for having reasonable procedures to ensure the accurate reporting of medical debt); Press Release, CFPB, CFPB Issues Bulletin to Prevent Unlawful Medical Debt Collection and Credit Reporting (Jan. 13, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-bulletin-to-prevent-unlawful-medical-debt-collection-and-credit-reporting> (noting “coercion” from inaccurate credit reports); Equal Credit Opportunity (Regulation B); Revocations or Unfavorable Changes to the Terms of Existing Credit Arrangements, 87 Fed. Reg. 30097, 30098 (May 18, 2022) (issuing advisory opinion on same fair lending issues argued in the *Fralish* amicus brief by the CFPB); Consumer Financial Protection Circular 2022-03: Adverse Action Notification Requirements in Connection with Credit Decisions Based on Complex Algorithms, 87 Fed. Reg. 35864, 35864–65 (June 14, 2022) (stating that fair lending laws prohibit companies from using black-box algorithms in decisions to provide credit when the companies cannot identify the reasons for denials of credit); Fair Credit Reporting; Permissible Purposes for Furnishing, Using, and Obtaining Consumer Reports, 87 Fed. Reg. 41243, 41244–45 (July 12, 2022) (stating that poor processes for identifying individuals, including name-only matching, can violate FCRA and consumers’ privacy); Press Release, CFPB, CFPB Issues Advisory to Protect Privacy When Companies Compile Personal Data (July 7, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-advisory-to-protect-privacy-when-companies-compile-personal-data>.

333. See, e.g., Rescission of Statement of Policy on Bureau Supervisory and Enforcement Response to COVID-19 Pandemic, 86 Fed. Reg. 17699, 17699 (Apr. 6, 2021) (rescinding guidance issued under Kraninger effective April 1, 2021, the day after the rescission was announced); Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 85 Fed. Reg. 6733, 6733 (Feb. 6, 2020) (stating that the policy statement was effective January 24, 2020, the same day it was announced).

334. See Cowie, *supra* note 11, at 57–58 & nn.85–88 (discussing four of the first statements). See also, e.g., *Statement on Bureau Supervisory and Enforcement Response to COVID-19 Pandemic*, CFPB (Mar. 26, 2020), <https://www.consumerfinance.gov/compliance/supervisory-guidance/statement-bureau-supervisory-enforcement-response-covid-19-pandemic> (stating that CFPB “enforcement activities” will take businesses’ circumstances related to the pandemic into account); *Statement on Supervisory and Enforcement Practices Regarding Regulation Z Billing Error Resolution Timeframes in Light of the COVID-19 Pandemic*, CFPB (May 13, 2020), <https://www.consumerfinance.gov/compliance/supervisory-guidance/statement-supervisory-enforcement-practices-regulation-z-billing-error-resolution-covid-19-pandemic> (describing the CFPB’s

reversed the climate set by Kraninger to align with his own priority of providing relief from the pandemic to consumers. The CFPB rescinded virtually all Kraninger's statements.³³⁵ Additionally, Uejio stated, “[p]roviding regulatory flexibility to companies should not come at the expense of consumers.”³³⁶

Similarly, under Kraninger, the CFPB issued a policy statement that it would not cite abusive conduct if it determined that the benefits from the illegal conduct outweighed the harm.³³⁷ The CFPB analogized requiring this determination before citing abusive conduct to the cost-benefit analysis that is statutorily required before finding an act or practice unfair.³³⁸ The CFPB also stated that even if it did find conduct abusive, “[a]bsent unusual circumstances, the Bureau does not intend to seek civil penalties or disgorgement if a covered person made good-faith efforts to comply with the abusiveness standard.”³³⁹ Within Uejio's first two months, the CFPB rescinded that policy guidance, stating that a policy of failing to seek full relief for all abusive conduct limited the CFPB's ability to “protect[] consumers from abusive practices” as required by statute.³⁴⁰

CONCLUSION

All regulators are different. They have different powers and cover different markets. But they all face a similar concern—how best to ensure compliance with the law. Many regulated entities will not be prosecuted by their regulator. For the most part, these entities must choose to comply with the law. Given this fact, how can a regulator effectively and efficiently ensure compliance?

“flexible supervisory and enforcement approach” when creditors failed to investigate consumers' disputes within the required deadlines).

335. The CFPB eliminated nine of the eleven on March 31, 2021. Press Release, CFPB, CFPB Rescinds Series of Policy Statements to Ensure Industry Complies With Consumer Protection Laws (Mar. 31, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-rescinds-series-of-policy-statements-to-ensure-industry-complies-with-consumer-protection-laws> (noting rescission of seven statements and withdrawal from two others). The tenth was rescinded in November 2021, and the eleventh had ended in January 2021 of its own accord. Board of Governors of the Fed. Res. Sys., et al., Joint Statement on Supervisory and Enforcement Practices Regarding the Mortgage Servicing Rules in Response to the Continuing COVID-19 Pandemic and CARES Act 1 (Nov. 10, 2021), <https://www.occ.gov/news-issuances/bulletins/2021/bulletin-2021-53a.pdf> (rescinding guidance from an April 3, 2020, joint statement); CFPB, Statement on Supervisory and Enforcement Practices Regarding the Remittance Rule in Light of the COVID-19 Pandemic 2 (Apr. 10, 2020), https://files.consumerfinance.gov/f/documents/cfpb_policy-statement_remittances-covid-19_2020-04.pdf (stating that the CFPB would not take supervisory or enforcement action for certain violations involving transactions that occur between July 21, 2020, and January 1, 2021).

336. Press Release, CFPB, CFPB Rescinds Series of Policy Statements to Ensure Industry Complies With Consumer Protection Laws (Mar. 31, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-rescinds-series-of-policy-statements-to-ensure-industry-complies-with-consumer-protection-laws> (noting rescission of seven statements and withdrawal from two others).

337. Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 85 Fed. Reg. 6733, 6736 (Feb. 6, 2020).

338. *Id.* at 6736 n.27.

339. *Id.* at 6737.

340. Statement of Policy Regarding Prohibition on Abusive Acts or Practices; Rescission, 86 Fed. Reg. 14808, 14809 (Mar. 19, 2021).

To answer this question, this Article examines the constraints faced by new regulators and the limits on using new enforcement actions or rulemakings to enforce compliance, especially in the short term. Using the directors of the CFPB as examples, this Article describes how—despite these constraints and limits—regulators can create compliance climates that project their agendas into the marketplace. They do so by using their bully pulpits, making creative use of inherited enforcement and rulemaking activity, and taking quick actions like issuing guidance or filing amicus briefs.

Although this Article focuses specifically on the climates created and the tools used by CFPB directors, the lessons regarding how to create a climate quickly apply broadly to other regulators. Regulators cannot rely primarily on enforcement and rulemaking to ensure compliance with their regulatory agendas. Many regulators have access to the same tools used by the CFPB directors, and they should use them.