FINANCIAL REGULATORY AGENCY BEHAVIOR: OSCILLATING PRIORITIES

*Youkyung Huh**

ABSTRACT

Gleaning from political science and economic theories of organizational performance, I propose a theoretical framework positing that financial regulators have multiple, competing goals whose priorities legislators leave ambiguous. Left with organizational goal ambiguity, financial regulatory agencies become information processors that engage in intra-agency coordination and have the broad discretion to transpose these priorities onto their internal agency structure. Precisely which goal the regulator will prioritize hinges on the constraint factors of path dependency, political control, and economic turbulence. We can observe an agency's goal priorities through its internal organizational choices and its allocation of resources. Through the lens of this theoretical framework, I have analyzed the annual reports of the United States' prudential regulators (the Fed, the OCC, and the FDIC) from the 1960s to 2006; specifically, I collected data on their internal organization and the examination frequency of prudential regulation vis-à-vis consumer compliance. I show empirically that over the decades, the regulators' consumer compliance priorities oscillated in response to the internal and external constraints of the agencies' own history, the political environment, and any financial crises. I argue that these three constraint factors are the critical determinants of prudential regulators' performance of consumer mandates. The constraint factors' persistent influence and the agencies' own ability to shape their internal agency structure challenges the view that regulatory structure has been an important determinant of regulatory failure. During the first stage of my analysis, covering the 1960s to the late 1970s, the prudential regulators first resisted, then accepted, their legislatively assigned roles regarding consumer protection (the "Institution Building Period"). During the 1980s, legislative changes forced the prudential regulators to dismantle some of their consumer-focused functions as the deregulatory political environment and the banking crisis of the 1980s led to radical changes in the U.S. banking industry (the "Deregulation and Banking Crisis Period"). With the conclusion of the banking crisis

**S.J.D., 2020, University of Virginia School of Law; LL.M. 2013, Harvard Law School; LL.M., 2014 Georgetown University Law Center; Former Post-Doctoral Global Fellow, NYU School of Law Hauser Global Law School Program (2021-22).* *This Article is an edited and updated part of the author's S.J.D. dissertation at the University of Virginia School of Law. The author would like to thank Professors Pierre-Hugues Verdier, Rich Hynes, and Michael A. Livermore for their comments on prior drafts.*

in the early 1990s, and until 2006, the prudential regulators briefly re-built consumer functions, then slowly de-prioritized them in the years leading up to the subprime mortgage crisis (the "Inter-crisis Period").

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INTRODUCTION

"Why, in the face of all that, did you not act to contain abusive, deceptive subprime lending? . . . . [M]y view is . . . . you could have, you should have, and you didn't."
- Phil Angelides, Chairman, Financial Crisis Inquiry Commission, Question to Alan Greenspan, Chairman of the Federal Reserve Board in 2010.[1]

Why did the Federal Reserve and other bank regulators fail to rein in the predatory subprime lending that ultimately led to the Global Financial Crisis of 2008? One answer, among many, that Congress came up with was that the overall *regulatory infrastructure* of consumer finance was flawed. President Obama echoed this view in his 2009 statement in support of the Dodd-Frank Act, that "It is an indisputable fact that one of the most significant contributors to our economic downturn was an unraveling of major financial institutions and the *lack of adequate regulatory structures* to prevent abuse and excess."[2]

This argument arises from the fact that prior to the Dodd-Frank Act, Congress imposed on bank regulators a two-fold

[1] *The Financial Crisis Inquiry Commission Hearing* 21, 25, 26 (2010) (statement of Commissioner Chairman Phil Angelides).
[2] President Barack Obama, Remarks on Financial Regulatory Reform (June 17, 2009) (transcript available at https://www.presidency.ucsb.edu/documents/remarks-financial-regulatory reform [https://perma.cc/WV63-UD48]).

regulatory mandate, the first, *prudential* – to conduct safety and soundness regulation with the goal of ensuring that banks maintain financial health and avoid failure; and the second, *consumer-focused* – to ensure that banks comply with applicable consumer protection, fair lending laws, and community reinvestment requirements.[3] When these multiple regulatory goals conflicted with each other, the regulators *prioritized* prudential regulation – that is, regulating the risk of banks – over consumer-focused regulation.[4] Critics argued that this structural flaw allowed predatory and deceptive mortgage practices to flourish, fueling the crisis.[5] In response, Congress created the Consumer Financial Protection Bureau (CFPB), which is a consumer-centric regulator, separate from the generalist bank regulators, but with consolidated regulatory powers akin to those of the bank regulators.[6]

On the face of it, creating a new agency for a new problem seems like an effective, quick- fix response. Separating and extracting the poorest performing goal from an overwhelmed agency that had "too many things to do,"[7] and assigning it to a single-goal agency seems promising. This simple logic makes the phenomenon of agency reorganization a popular, salient, and symbolic political response to a catastrophic failure such as a financial crisis.[8] In fact, Congress created almost all bank regulators in response to crises. The Federal Reserve, 1913, was a reaction to the bank panic of 1907; the FDIC, 1933, to the Great Depression; and the CFPB, 2010, after the latest financial crisis, in 2008.[9]

In reality, however, most government agencies have, to some degree, multiple goals that at times can compete or conflict with each other.[10] Agencies have wide discretion in determining which one(s) to emphasize, while their interconnectedness renders splitting up an agency costly or impossible.[11] Moreover, crisis-driven structural fixes obscure the root cause of a problem that might not stem from the agencies' own organizational dysfunction. If

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[3] *See* CONG. RSCH. SERV., R41350, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 16 (2017).
[4] *See id.* at 15.
[5] *See id.*
[6] CHRISTOPHER CARRIGAN, STRUCTURED TO FAIL?: REGULATORY PERFORMANCE UNDER COMPETING MANDATES 6 (2017).
[7] Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV ENV'T L. REV. 1 (2009) (owning the term "too many things to do" in the context of multiple-goal agencies).
[8] CARRIGAN, *supra* note 6 at 170.
[9] *See* CONG. RSCH. SERV., R44918, WHO REGULATES WHOM? AN OVERVIEW OF THE U.S. FINANCIAL REGULATORY FRAMEWORK 14-15 (2020).
[10] *See* Biber, *supra* note 7 at 7-8.
[11] *Id.* at 32, 33-34.

failure to properly protect consumers contributed to the crisis, that could also be a symptom of a wider policy failure on the part of the political principals. Any restructuring done without an understanding of the agency's behavior in the context of history, politics, and crises, cannot be a remedy for regulatory failure, and risks creating more problems than it solves.

With this in mind, this Article seeks to understand the following questions: What constrains financial regulators as they determine goal priority among multiple mandates? How do agencies coordinate priorities internally in the face of political pressure or catastrophic events? Does a wholesale agency reorganization achieve something that the agencies themselves cannot do internally?

Political scientists, public administration scholars, and economists have wrestled with the phenomena of multiple goal agencies and the institutional design of administrative agencies.[12] Legal scholars too have recently begun to recognize that agency design and specifically, the performance of multiple-goal agencies, is one of the defining issues in a regulatory system.[13] Building on scholarly work in these fields, this Article proposes a theoretical framework through which to analyze situations when financial regulators have multiple, competing goals whose priorities legislators have left ambiguous.[14] It posits that when left with *organizational goal ambiguity,* the regulators become information processors that engage in *intra-agency coordination*, and have the broad discretion to transpose these priorities onto their *internal agency structure*.[15] An agency's internal organizational choices and its allocation of resources will reflect these priorities. Precisely *which* goal a given regulator will prioritize hinges on the constraint factors of path dependency, economic turbulence, and political control through legislation and various oversight mechanisms.[16]

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[12] *See generally* Mathias Dewatripont, Ian Jewitt & Jean Tirole, *Multitask Agency Problems: Focus and Task Clustering*, 44 EUR. ECON. REV. 875 (2000); Jean Tirole, *The Internal Organization of Government*, 46 OXFORD ECON. PAPERS 1, 3-4 (1994); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 34 (1989) (stating that "public agencies rarely have single, clear goals").

[13] *See* Biber, *supra* note 7 at 13.

[14] *See* Larry D. Wall & Robert A. Eisenbeis, *Financial Regulatory Structure and the Resolution of Conflicting Goals*, 16 J. FIN. SERVS. RSCH. 133, 133 (1999).

[15] Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 453 (2015).

[16] *See, e.g.*, Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 100 (1992); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 244 (1987); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast*, Structure and Process,*

This Article shows empirically that over the decades, the prudential regulators' consumer mandate priorities oscillated in response to the internal and external constraints of the agencies' own history, the political environment, and financial crises.

This Article conducts case studies of the three primary bank agencies – the Board of Governors of the Federal Reserve (the Fed), the Federal Deposit Insurance Corporation (the FDIC), and the Office of the Comptroller of Currency (the OCC). The Fed, the OCC, and the FDIC are, collectively, "prudential regulators," and have both prudential and consumer oversight mandates for the depository institutions under their purview.[17] During the first stage of this analysis, covering the 1960s to the late 1970s, the prudential regulators first resisted, then reluctantly accepted, their legislatively assigned consumer mandates (the *Institution Building Period)*. During the 1980s, the deregulatory political environment and the banking crisis of the 1980s brought the prudential regulators close to abandoning their consumer mandates (the *Deregulation and Banking Crisis Period*). With the conclusion of the banking crisis and the election of President Clinton, between early 1990s to 2006, the prudential regulators briefly re- built their consumer functions, then slowly dismantled them again in the years leading up to the subprime mortgage crisis (the *Inter-crisis Period*).

The case studies demonstrate that the prudential regulators have historically struggled to build and maintain internal structures and mechanisms for consumer mandates, especially in periods of deregulation and banking crises. When political preferences for consumer mandates surged, however, the agencies intensified their organizational focus on them. The flexibility and variability that the agencies show in altering their internal institutions to mitigate goal priority ambiguity and resolve conflicts between prudential and consumer mandates suggest that there are alternatives to a wholesale reorganization. A long-term disinterest in consumer issues in the deregulatory environment since the 1990s slowly eroded the internal institutions of the past, which ultimately may have led to blind spots that contributed to the 2008 crisis. But it is unclear how much of the regulatory failure we can attribute to the multiple goal agencies' own organizational dysfunction. An alternative explanation is that the agencies were deprioritizing consumer mandates in response to a

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Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 VA. L. REV. 431, 436, 440 (1989); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 172 (1984).

[17] 7 U.S.C. § 1a(39).

deregulatory political environment, and it was these political preferences that ultimately led to the crisis. The constraint factors' persistent influence challenges the view that regulatory structure is an important determinant of an agency's policies, suggesting instead that regulatory structure has a limited ability to orient the agency's trajectory.

In terms of methodology, I collected original empirical data primarily from the annual reports of the prudential regulators from the 1960s to 2006, focusing specifically on information that spoke to their *internal organization* and the *examination frequency* of prudential versus consumer regulation. These two indices are consistent and visible proxies by which we can measure an agency's priorities in its managing of multiple mandates. Where annual reporting data was lacking, I supplemented such empirical data with the speeches of the agency heads or senior members, congressional reports and hearings, and contemporary secondary material that spoke to agency priority.

Although the CFPB has been active for more than ten years, the "generalist" prudential regulators are still struggling with multiple regulatory goals. The first reason for this is that even in the post-Dodd Frank world, all of the prudential regulators in this study continue to have both prudential mandates and consumer mandates. When Congress created the CFPB, it transferred many of the prudential regulators' consumer-focused mandates to the new agency, giving it rulemaking authority regarding consumer financial laws. But the prudential regulators still have the supervisory and enforcement authority of these mandates with regard to their financial institutions. This leaves open the possibility that they will drop the ball on consumer-focused mandates.

The rest of this Article proceeds as follows: Part I lays out the theoretical model of financial regulators as multiple-goal agencies, describing how and why they prioritize certain goals. I first explain the concept of organizational goal ambiguity and the conflicting nature of financial regulatory goals. I then identify the three constraint factors that have the most impact on prudential regulators' decisions – path dependency, economic turbulence, and political control. Next, I examine the internal coordination processes and mechanisms by which agencies mitigate goal priority ambiguity and manifest their goal priorities. Parts II, III, and IV present case studies analyzing how each of the prudential regulators – the Fed, the OCC, and the FDIC – oscillated between prudential and consumer mandates as they accepted, prioritized, or deprioritized their consumer mandate over the years.

I. Prudential Regulators as Multiple-Goal Agencies

A. The Multiple Goal Agency Conundrum

1. Organizational Goal Ambiguity in Multiple Goal Agencies

It is rare for a government agency to have a single clear goal. More commonly, Congress piles many goals that can be general, vague, and inconsistent onto a single agency, which can create an internal disagreement over the relative importance of each goal.[18] Compared to the goals of private businesses, public policy goals are often ambiguous, allowing their various stakeholders to attribute conflicting implications to them.[19] Scholars of public administration have termed this "organizational goal ambiguity," which refers to the extent to which organizational goals allow leeway for interpretation. Observers of bureaucracy, therefore, have argued that for an agency to achieve its mandate effectively, its staff needs clarification of each goal, and a well-defined, consistent, and simple way to achieve it.[20] Successful agencies, as the theory goes, are those that have operationalized their "grand-but-vague" objectives into more specific functions and tasks.[21]

To illustrate, the Federal Reserve System (of which the FRB is a part), states that its mission is "to foster the stability, integrity, and efficiency of the nation's monetary, financial, and payment systems so as to promote optimal macroeconomic performance."[22]

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[18] *See generally* Dewatripont, *supra* note 12 at 875; Tirole, *supra* note 12 at 3-4; Biber, *supra* note 7; Wilson, *supra* note 12 at 34 (stating that "public agencies rarely have single, clear goals" and might be internally divided over the relative importance of multiple goals).

[19] *See* CHAN SU JUNG, PERFORMANCE GOALS IN PUBLIC MANAGEMENT AND POLICIES: THE NATURE AND IMPLICATIONS OF GOAL AMBIGUITY 8-9 (2018). Ambiguity here means that "there are many ways of think about the same circumstances of phenomena." Young Han Chun & Hal G. Rainey, *Goal Ambiguity in U.S. Federal Agencies*, 15 J. PUB. ADMIN. RSCH. THEORY 1, 2 (2005).

[20] Wilson, *supra* note 12 at 26; Carrigan, *supra* note 6 at 17.

[21] Dewatripont, *supra* note 12 at 875.

[22] BD. OF GOVERNORS OF THE FED. RSRV. SYS., GOVERNMENT PERFORMANCE AND RESULTS PLANNING DOCUMENT 1997-2002 9 (2019), https://www.federalreserve.gov/boarddocs/rptcongress/98frgpra.pdf [https://perma.cc/6YJV- ARBG]. All the prudential regulators examined in this Article have multiple and ambiguous goals. The FDIC's mission statement in its 2018-2022 Strategic Plan is "to maintain stability and public confidence in the nation's financial system by: insuring deposits, examining and supervising financial institutions for safety and soundness and consumer protection, making large and complex financial institutions resolvable and managing receiverships." *FDIC 2022-2026 Strategic Plan*, FED. DEPOSIT INS. CORP. (Feb. 8, 2022),

"Stability," "integrity," "efficiency" and "optimal" are all vague terms that need to be interpreted and operationalized into specific actions. Furthermore, finance, being integral to the overall economy, is "social and political, and is non-stationary."[23] Thus, fulfilling the objectives of financial regulation often involves a significant degree of normative social and political judgment.[24]

Prudential regulators' consumer mandates are equally vague, especially when one accounts for the social and political role of finance. Take, for example the CRA, which Congress enacted in 1977 with the stated purpose of encouraging banks and thrift institutions to "meet the credit needs of the communities in which they are chartered."[25] Assessing a bank's performance in this context has proved to be difficult, as the congressional mandate lacked both specific standards for determining whether a bank is meeting the local community's credit needs, and clarity regarding the process by which the regulators would enforce the CRA.[26]

Goal ambiguity makes it difficult for the agencies to perform well while balancing their multiple goals because the extent of a government agency's success on any given goal is usually costly or impossible to measure.[27] This leaves great latitude in measuring an agencies' progress toward a goal, or the relative advance of one goal over another, because relative performance evaluation is

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https://www.fdic.gov/about/strategic- plans/strategic/mission.html [https://perma.cc/8GV3-YJV3]. The mission statement of the OCC is, "[t]o ensure that national banks and federal savings associations operate in a safe and sound manner, provide fair access to financial services, treat customers fairly, and comply with applicable laws and regulations." *About Us*, OCC, https://www.occ.gov/about/index-about.html [https://perma.cc/ZBZ9-GVAJ] (last visited Sep. 9, 2023).

[23] *See* John C. Coates, IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 882 (2015).

[24] Even non-finance missions like that of the Department of Defense, which is to "deter war and protect the security of our nation," cannot be easily measured. U.S. DEP'T OF DEFENSE, SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 1 (2018), https://dod.defense.gov/Portals/1/Documents/pubs/2018- National-Defense-Strategy-Summary.pdf [https://perma.cc/TJ8Q-T2QY].

[25] The Community Reinvestment Act of 1977, 12 U.S.C. § 2901 (Findings and Purpose).

[26] Richard Marsico, *A Guide to Enforcing the Community Reinvestment Act*, 20 FORDHAM URB. L.J. 165, 171 (1993).

[27] Public administrative scholars have dubbed this as "evaluative goal ambiguity." Young Han Chun & Hal G. Rainey, *Goal Ambiguity in U.S. Federal Agencies*, 15 J. PUB. ADMIN. RSCH. THEORY 1, 4 (2005); *see generally* Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 453 (2015).

exceedingly difficult.[28] This is partly due to the fact that government agencies lack the profit motive that private firms have, to implement mechanisms to ensure that the incentives of the workers match the incentives of the firm owners.[29] Agencies have only blunt and ineffective performance measurements in which staff incentives might not align with political principals, or even agency heads.[30]

The *multiplicity* of financial regulatory goals further complicates the performance of financial regulatory agencies. As I discuss in the next section, the prudential regulators in this study have conflicting prudential regulation and consumer mandates, in addition to other non- regulatory mandates such as conducting monetary policy, managing deposit insurance, and resolving failing banks. Thus, they suffer from yet another dimension of ambiguity that public administration scholars call "priority goal ambiguity." This means that the agencies have discretion in determining the priority among goals. Public administration scholars have found that priority goal ambiguity generally impedes agency performance because juggling competing, incoherent, or conflicting goals deters the development of a sense of mission, reduces staff morale, and makes it difficult to motivate staff or take action in new situations.[31]

With the multiplicity and ambiguity of agency goals and non-monetary incentives structures built in, regulatory agencies often struggle to find the optimal balance of their multiple goals, sometimes underperforming on some or overperforming on others.

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[28] Jean Tirole, *The Internal Organization of Government*, 46 OXFORD ECON. PAPERS 1, 4 (1994); *see generally* Wall & Eisenbeis, *supra* note 14 at 233.

[29] The difficulties in measuring performance and incentivizing workers are a problem in the private sector as well as the public sector. *See, e.g.*, Bengt Holmstrom & Paul Milgrom, *Multitask Principal-Agent Analyses: Incentive Contracts, Asset Ownership, and Job Design*, 7 J.L. ECON. & ORG. (SPECIAL ISSUE) 24, 32-33 (1991). However, incentivizing government employees may be more difficult, as the public sector lacks some of the devices that are available in the private sector (i.e., employee stock ownership programs).

[30] Tirole, *supra* note 28 at 3-4. For example, a study in the 1970s showed that FTC lawyers typically work at the FTC for only two to three years. Their preferences on cases that the FTC takes during that time depend on the expertise they wish to gain in light of their expected post-government employment. *See* KENNETH W. CLARKSON & TIMOTHY J. MURIS, COMMISSION, PERFORMANCE, INCENTIVES, AND BEHAVIOR, IN THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR 299-300 (Kenneth W. Clarkson & Timothy J. Muris eds., 1981).

[31] Christopher Carrigan, Structured to Fail? Explaining Regulatory Performance under Competing Mandates 58-61 (2012) (Ph.D. dissertation, Harvard University) (on file with Harvard Library, Harvard University).

In fact, remedies for agencies suffering from goal ambiguity often involve narrowing their focus or deliberately prioritizing certain goals to the detriment of others.[32]

Economists and political scientists have set forth theories that attempt to predict the behavior of multiple-goal agencies. One theory posits that an agency is more likely to pursue missions when they are clearly defined and when the principals can easily monitor the agency's performance of them.[33] In other words, if Mission 1 is more measurable and observable to the political principals than Mission 2, agencies will devote attention to the first and neglect the second.[34] It follows that if *differences* in the degree of measurability and observability of goals exist, agencies will overperform those that are easier to measure and observe.[35] Remedies for priority goal ambiguity would then be to increase measurability and observability through heightened political oversight, a concept that I discuss in the following section. If political oversight focuses on Mission 1, then neglecting Mission 2 can be understood as a function of political accountability; the agency is simply observing its political mandate.[36]

Other theories posit that the nature and correlation of the tasks can affect the behavior of multiple-goal agencies.[37] The theories first categorize multiple goals into complements (where the performance of one makes another easier to achieve) or substitutes (where the performance of one makes it more difficult to achieve another).[38] Based on these distinctions, they predict that, to maximize performance, agencies must focus their energy on goals that are "complements" rather than "substitutes,"[39] and that agencies might give too much priority to those goals that

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[32] *Id.* at 63.

[33] Tirole, *supra* note 28 at 8, 10, 12. Holmstrom's model regarding performance and career concerns in the government shows that for monitoring to be effective, the principals should be able to observe the performance of the relevant tasks. For example, the goal of "pay[ing] benefits on time and accurately," which is the main task of the U.S. Social Security Administration, is easy to measure. Holmstom, *supra* note 29.

[34] *See* Tirole, *supra* note 28 at 10. For example, if teachers' pay is tied to "students' test scores in standardized exams" (a performance goal that we can easily measure), teachers will sacrifice activities that "promote curiosity and creative thinking" (a goal that we cannot measure). Holmstrom, *supra* note 29 at 25.

[35] *See* Holmstrom, *supra* note 29 at 26-28; Biber, *supra* note 7 at 11.

[36] *See* Carrigan, *supra* note 31 at 156-60 (describing political preferences as a source of goal subversion).

[37] *See* Biber, *supra* note 7 at 11.

[38] *See id.*

[39] *Id.* These primary missions also usually are aligned with the dominant professional norms. *See* Tirole, *supra* note 28 at 12.

complement their primary missions.

It follows that multiple goal agencies with priority goal ambiguity might prioritize goals that *are more clearly defined, more observable, and thus easier to measure, as well as goals that complement their primary mission*.[40] What makes a goal more defined, observable, or measurable depends on the internal and external constraints, which I discuss in Part I.B. But first, I explore the nature of financial regulatory mandates in order to understand how they conflict with each other.

2. Conflicting Financial Regulatory Goals and Tasks

Prudential regulators are multiple-goal agencies that have two conflicting regulatory mandates – prudential regulation and consumer-focused regulation. This section shows that each of these mandates are built on a different rationale that requires unique intervention tools and resources, thus creating multiple internal conflict points within regulators.

This section further analyzes which characteristics set consumer-focused regulation apart from prudential regulation. Specifically, it examines the various points of friction that might arise between consumer and prudential regulation, and the resulting implications for multiple goal agencies with goal ambiguity.

a. Rationale or Goals of Regulation

The first, and most important, reason for supervising and regulating banks is for financial stability.[41] The Fed, for example, states that its mandate is to promote a safe, sound, and efficient

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[40] *See* Biber, *supra* note 7 at 11; Holmstrom, *supra* note 29 at 32-33.

[41] Some economists further categorize "financial stability" goals into mitigating and managing systemic risk (macro- prudential regulation) and ensuring the safety and soundness of individual financial institutions (micro-prudential regulation). *See, e.g.*, JEROEN KREMERS & DIRK SCHOENMAKER, INSTITUTIONAL STRUCTURE OF FINANCIAL REGULATION THEORIES AND INTERNATIONAL EXPERIENCES 29-39 (Robin Hui Huang & Dirk Schoenmaker eds., 2015). Some commentators do not explicitly recognize the overarching goal of financial stability and categorize "safety and soundness of financial institutions" and "mitigation of systemic risk" or "to sustain systemic stability" into separate items. *See, e.g.*, GROUP OF THIRTY, THE STRUCTURE OF FINANCIAL SUPERVISION APPROACHES AND CHALLENGES IN A GLOBAL MARKETPLACE 21-22 (2008); David Llewellyn, *The Economic Rationale for Financial Regulation*, FSA OCCASIONAL PAPER SERIES 1, 9 (1999).

banking and financial system, and to that end, it supervises the activities of financial institutions.[42] Safety and soundness regulation, otherwise known as prudential regulation, concerns a financial institutions' assets and the effectiveness of its operations, policies, and management. The traditional rationale behind bank regulation, stemming from an economic theory of financial regulation, is to correct market failure and enhance the efficiency of markets.[43] Banks are unique because their functions have systemic importance, and their failures can create unique and significant externalities.[44] Relying primarily on an economic rationale — and not on political and social rationales — sets prudential regulation apart from consumer regulation. Unlike consumer mandates, the norm is that prudential regulation should *avoid* politicization or the consideration of distributive or other social rationales.[45]

The second mandate of prudential regulators is the consumer-focused regulation that aims at the protection of consumers by ensuring fairness and equality through the regulation of various facets of consumer financial transactions. Consumer-focused regulation includes consumer protection, fair lending, fair housing, and community reinvestment laws.[46] Unlike prudential regulation, consumer-focused regulation finds its roots in diverse social and political contexts. Traditional economic theory finds justification for consumer laws in correcting market failures and

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[42] FRB ANN. REP. 1 (2020), https://www.federalreserve.gov/publications/2020-ar-supervision-and- regulation.htm#xsubsection-14-b1a19a42 [https://perma.cc/C8ET-4WZR].

[43] *See, e.g.*, Joseph Stiglitz, *The Role of the State in Financial Markets,* 7 THE WORLD BANK ECON. REV. 19, 23-24 (1994); ARMOUR ET AL., PRINCIPLES OF FINANCIAL REGULATION 53 (2016) ("The design of financial regulation is thus ultimately an exercise in economics—applying the analytical tools of economics to determine the legal and regulatory framework best suited to correcting the failures of a financial system.").

[44] *See* E. Gerald Corrigan, *Are Banks Special?,* FED. RSRV. BANK OF MINNEAPOLIS (Jan. 1, 1983) https://www.minneapolisfed.org/article/1983/are-banks-special [https://perma.cc/SX6R-HKWR].

[45] *See* JOHN F. BOVENZI, INSIDE THE FDIC: THIRTY YEARS OF BANK FAILURES, BAILOUTS, AND REGULATORY BATTLES 154 (2015) (FDIC memoir discussing regret in considering political aspects in resolving bank closures); Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CALIF. L. REV. 121, 383 (2013) (in determining a bailout for a financial institution, "[p]oliticians might pursue multifaceted objectives that have very little to do with the financial institution's creditworthiness or the societal implications of a systemic collapse"); *see also* Randall S. Kroszner, *Is the Financial System Politically Independent? Perspectives on the Political Economy of Banking and Financial Regulation* 2 (U. Chi. Booth Sch. of Bus. Working Paper, No. 151, 1999).

[46] *See, e.g.*, Llewellyn, *supra* note 41 at 9.

inefficiencies.[47] Imperfect or asymmetrical information problems, where the consumer has a deficit of information about the status of the financial institution or the nature and value of the financial product, are an important economic justification for consumer protection.[48] Traditional consumer protections, intended to correct information failure, focus on disclosure regulation.[49] Consumer-focused regulation also relies on non-market rationales,[50] for example, they might involve distributive justice[51] or shared community values.[52] Furthermore, Congress has often used consumer finance as a policy tool to give special protection to the society's most vulnerable – those in poverty, the elderly, and minorities.[53] It has also invoked other policy or social goals (i.e., promoting homeownership, advancing higher education, and protecting members of the military) for consumer-related functions.[54]

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[47] PETER CARTWRIGHT, CONSUMER PROTECTION IN FINANCIAL SERVICES: PUTTING THE LAW IN CONTEXT 8 (Peter Cartwright ed., 1999); Iain Ramsay, *Framework for Regulation of the Consumer Marketplace*, 8 J. CONSUMER POL. 353, 354 (1985).

[48] *See, e.g.*, John Y. Campbell, Howell E. Jackson, Brigitte C. Madrian & Peter Tufano, *The Regulation of Consumer Financial Products: An Introductory Essay with Four Case Studie*s 8 (Harv. Kennedy Sch. Faculty Research Working Paper Series RWP10-040, 2010); Ramsay, *supra* note 47 at 359; Richard Hynes & Eric A. Posner, *The Law and Economics of Consumer Finance*, 4 AM. L. & ECON. REV. 168, 172 (2002).

[49] *See, e.g.*, Dee Pridgen, *Sea Changes in Consumer Financial Protection: Stronger Bureau and Stronger Laws*, 13 WYO. L. REV. 416, 416 (2013); Cartwright, *supra* note 47 at 10; Hynes, *supra* note 48 at 168.

[50] I use this as a broad category that includes rationales for consumer protection that cannot be attributed to market failures. Other authors categorize and use different terms for non-market rationales. *See, e.g.*, Ramsay, *supra* note 47 at 366 (citing "equity rationales" which include distributive justice, corrective justice, and public values).

[51] *See* Campbell, *supra* note 48 at 6 ("Consumer advocates often make the case for consumer financial regulation on distributional grounds, arguing that unregulated markets disadvantage lower income households. This is an important consideration.").

[52] *See* Cartwright, *supra* note 47 at 12; Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1463, 1466-67 (1994).

[53] *See* Ramsay, *supra* note 47 at 366; Campbell, *supra* note 48 at 11; IAIN RAMSAY & TONI WILLIAMS, SOCIAL AND GENDER EQUALITY IN MARKETS FOR FINANCIAL SERVICES 269 (Peter Cartwright ed., 1999); *see, e.g.*, Brooke Overby, *Community Reinvestment Act Reconsidered*, 143 U. PA. L. REV. 1431, 1459 (1995) (asserting that "distributive justice goals most frequently are invoked when transactions involving poorer consumers are at issue.").

[54] *See* CHRISTOPHER PAYNE, THE CONSUMER, CREDIT AND NEOLIBERALISM, GOVERNING THE MODERN ECONOMY 152-74 (Routledge, 2012) (describing how the politics of home ownership and the regulation of mortgage finance are intertwined. For example, The Military Lending Act of 2006, which protects service members from predatory loans by creating a military annual percentage

Examples of consumer-focused regulation are the Equal Credit Opportunity Act (ECOA, 1974)[55] and the Fair Housing Act (FHA, 1968),[56] which Congress enacted as a way to resolve "redlining," a practice that makes goods or services unavailable or available under less favorable terms, to a specific area because of its racial or ethnic composition.[57] Another is the Community Reinvestment Act (CRA, 1977),[58] which requires banks to serve the credit needs of low- and moderate-income borrowers.[59] The FDIC too has studied "unbanked" and "underbanked" individuals, with a view toward ensuring that all Americans have access to "safe, secure, and affordable banking."[60]

This panoply of rationales behind the consumer mandate risks creating friction with prudential mandates and heightens the priority goal ambiguity of the multiple goal prudential regulator.

b. Regulatory Interventions and Necessary Resources

Traditionally, a central tool of prudential regulation is the capital adequacy requirements intended to ensure a bank's financial health.[61] Capital adequacy, which is the extent to which a banks'

rate over 36%, with some exceptions, to some extent furthers national defense goals. Regulating student loan programs is an attempt to achieve the social goal of promoting higher education); *see also* The Military Lending Act of 2006, 10 U.S.C. § 987.

[55] The Equal Credit Opportunity Act of 1974, 15 U.S.C. § 1691.

[56] The Fair Housing Act of 1968, 42 U.S.C. § 3601.

[57] ECOA prohibits price discrimination based on race and various other individual characteristics. *See Fair Lending*, OCC, https://www.occ.treas.gov/topics/consumers-and-communities/consumer-protection/fair-lending/index-fair- lending.html [https://perma.cc/U7T4-CNB5] (last visited Sept. 12, 2023).

[58] The Community Reinvestment Act of 1977, 12 U.S.C. § 2901.

[59] The CRA sets community development goals designed to "help local institutions broaden access to loans by bringing together lenders, government agencies, nonprofit corporations, and community development groups." *See Federal Reserve Consumer Protection*, FED. RSRV. BANK OF ST. LOUIS (Apr. 27, 2021), https://www.stlouisfed.org/in-plain-english/consumer-protection [https://perma.cc/6NA7-83TE].

[60] FED. DEPOSIT INS. CORP., 2011 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 8 (Sept. 2012), https://www.fdic.gov/analysis/household-survey/2011/2011-unbankedreport.pdf [https://perma.cc/26ZG-V8YB]. Unbanked individuals are those who do not have a checking or savings account, while underbanked individuals are those who have these accounts, but use nonbanks for financial services such as check cashing, remittance, and borrowing.

[61] *See, e.g.*, Carl-Johan Lindgren & David Folkerts-Landau, *Toward a Framework for Financial Stability,* INT'L MONETARY FUND 32, 36-37 (1998);

assets exceed its liabilities, is an important measurement of the amount of financial loss a bank can tolerate. The focus of prudential regulation is thus on the bank and not its relationships with its customers. Prudential interventions also include limiting a bank's exposure to risk, such as liquidity requirements that concern the bank's ability to withstand a sudden withdrawal of short-term funds;[62] loan concentration limits;[63] insider lending prohibitions;[64] affiliate transaction limits;[65] and prohibitions or limits on certain categories of investments such as real estate[66] and stocks.[67] The overall goal of these interventions is to ensure that banks are soundly and prudently managed, and that they do not take on excessive risk, which loops back to the economic rationale for prudential regulation of banks.[68]

The implementation of prudential interventions is a two-step process that comprises of first: the regulator setting certain standards, typically through a rulemaking process, and second: monitoring the regulated entity according to those standards.[69]

Eric A. Posner, *How Do Bank Regulators Determine Capital Adequacy Requirements?*, 82 U. CHI. L. REV. 1853, 1853-54 (2015); Armour, *supra* note 43 at 290-91 ("'leverage' – the ratio of the bank's debt funding to its funding through equity or capital – is always a central issue in banking regulation.").

[62] Post-crisis prudential regulation typically covers both capital and liquidity requirements. Basel III now includes constraints on liquidity; the Liquidity Coverage Ratio (LCR) and Net Stable Funding Ratio (NSFR). *See* CONG. RSCH. SERV., IF10208, THE LIQUIDITY COVERAGE RATIO AND THE NET STABLE FUNDING RATIO 1-2 (2022).

[63] Loan concentration limits refer to limits of loans to a single borrower, and it is aimed to reduce the risk that the failure of any one borrower will bring down the bank. *See* RICHARD SCOTT CARNELL ET AL., THE LAW OF FINANCIAL INSTITUTIONS 258 (Wolters Kluwer, 5th ed. 2013).

[64] *Id.* at 292-95 (lending to executive officers or principal shareholders is prohibited to prevent "imprudent favoritism").

[65] Transactions between depository institutions, such as banks and their affiliates, are limited to protect the bank from undue financial risk by favoring affiliates. *See* 12 U.S.C. § 371(c) (regulating collateral for certain transactions with affiliates); Carnell, *supra* note 63 at 295.

[66] 12 U.S.C. § 29 (stating that national banks cannot own real property, with some exceptions such as loan collateral or bank premises).

[67] 12 U.S.C. § 24.

[68] *See* FREDERIC S. MISHKIN, PRUDENTIAL SUPERVISION: WHAT WORKS AND WHAT DOESN'T 8 (Frederic S. Mishkin ed., Univ. of Chi. Press 2002) (introducing nine basic forms of prudential supervision as follows: (a) restrictions on asset holdings and activities; (b) separation of the banking and other financial service industries such as securities, insurance, or real estate; (c) restrictions on competition; (d) capital requirements; (e) risk-based deposit insurance premiums; (f) disclosure requirements; (g) bank chartering; (h) bank examination; and (i) a supervisory versus a regulatory approach).

[69] Conceptually, finance literature distinguishes the first step, the rulemaking or standard setting process (*regulation*), from the second step, monitoring the firms for compliance and enforcement of the standard (*supervision*). This Article uses

Ongoing *supervision* is a unique characteristic of the financial industry, which it achieves through bank examination, the core methodology of prudential regulation. Regulators subject each bank to routine examinations in order to assess its financial conditions and compliance with regulatory requirements.[70] Examinations involve physical visits or analyzing data electronically.[71] When regulators find irregularities through examinations, they have broad discretion to determine the more effective type of response, corresponding to the perceived risk, and the nature and severity of the identified problems.[72] Regulators are banned by the law from disclosing to the public a safety and soundness measurement known as CAMEL (capital adequacy, asset quality, management, earnings, liquidity, and sensitivity) ratings.

Due to the confidential and market-sensitive nature of the information required for a bank examination, discretion and confidentiality are the "central paradigm" of bank supervision.[73] Prominent administrative law scholar, Kenneth Culp Davis, succinctly pointed out that "[t]he banking agencies of the federal government have long maintained systems of secret evidence, secret law, and secret policy."[74] Candidness and the free flow of communication, as well as a high- level of trust, is necessary for all bank examinations,[75] while public disclosure of troubled banks

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the term "regulation" in a broader sense, including both *regulation* (i.e., rulemaking) and *supervision* (i.e., monitoring and enforcement) unless otherwise stated.

[70] *See* FED. DEPOSIT INS. CORP., BASIC EXAMINATION CONCEPTS AND GUIDELINES 1.1-4, 1.1-6 (2022). The examination staffing of the three banking agencies in the United States and the frequency of their examinations fluctuate depending on factors such as the administration's policy on the size of the government (i.e., President Reagan wanted a small government) and the number of problem banks (i.e., in the early- to mid-eighties the number or problem banks increased significantly). *See also* FED. DEPOSIT INS. CORP., HISTORY OF THE 80S, VOL. 1: AN EXAMINATION OF THE BANKING CRISES OF THE 1980S AND THE EARLY 1990S 426 (1997).

[71] *See, e.g., The Prudential Regulation Authority's Approach to Banking Supervision* BANK OF ENG. 28, 29 (2018).

[72] Fernando Restoy, Chairman, Fin. Stability Inst., Bank for Int'l Settlements, Speech at the FSI-IADI Meeting on Early Supervisory Intervention, Resolution, and Deposit Insurance: Early Intervention Regimes: The Balance Between Rules vs. Discretion (Sept. 12, 2017) (transcript available at https://www.bis.org/speeches/sp170912.htm [https://perma.cc/CQ8U-FSJL]).

[73] Margaret E. Tahyar, *Are Bank Regulators Special?* BANKING PERSPS., Quarter 1, 24 (2018). However, this does not mean that regulators enjoy unlimited confidentiality. Regulators must balance the tension between confidentiality and transparency because the law holds them accountable for their actions, and transparency and disclosure are prerequisites for accountability.

[74] *Id.*

[75] *Id.*; *cf.* Mark D. Flood, Jonathan Katz, Stephen J. Ong & Adam Smith, *Cryptography and the Economics of Supervisory Information: Balancing*

could exacerbate a given problem.[76]

The main intervention tools for the consumer-focused mandate, conversely, deal mainly with disclosure. The most common type of consumer protection involves an information-based approach (i.e., disclosure- and transparency-related), which aims to remedy information imperfections and behavioral biases.[77] These disclosure rules typically require that the agency provide the relevant information in a specific format (i.e., font requirements, standardized forms, written statements) intended to facilitate the consumers' understanding and allow them to compare products.[78]

Agencies implement consumer mandates, like their prudential counterparts, primarily through the use of supervisory tools such as market monitoring, onsite and offsite examinations, and enforcement actions. As I will discuss in Part II, when Congress first assigned consumer mandates, the prudential regulators modified the prudential-focused "safety and soundness examinations" to include consumer-focused "compliance examinations" as a way to accommodate new consumer goals.[79] But given the individual, transaction-focused nature of consumer mandates, routine examinations have proved ineffective. In contrast, the Federal Trade Commission (FTC), the U.S.'s primary generalist consumer protection agency, uses enforcement as their primary tool. The Securities and Exchange Commission (SEC), also an enforcement-focused agency, uses "tough cop" enforcement as their primary tool.[80] They have found that naming and shaming, and public disclosure of violations to be successful deterrence tools. Even the nature of consumer compliance examinations differs from prudential examinations, in that, in some instances, the law mandates the public disclosure of examination ratings (i.e., CRA ratings). For example, the Home Mortgage Disclosure Act (HMDA), requires financial institutions

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Transparency and Confidentiality, 9, 12 (Fed. Rsrv. Bank of Cleveland, Working Paper No. 13-12, 2013).

[76] *See* Restoy, *supra* note 72.

[77] *See, e.g.*, Cartwright, *supra* note 47 at 11; Armour, *supra* note 43 at 258; Campbell, *supra* note 48 at 44; WORLD BANK GROUP, GOOD PRACTICES FOR FINANCIAL CONSUMER PROTECTION 23-25 (2d ed. 2017).

[78] For example, The Truth in Lending Act of 1968 requires the disclosure of the terms and costs of consumer borrowing in a standardized manner (i.e., the Annual Percentage Rate). *See* Armour, *supra* note 43 at 259.

[79] John R. Walter, *The Fair Lending Laws and Their Enforcement*, 81 FED. RSRV. BANK OF RICHMOND ECON. Q. 61, 69 (1995).

[80] *See, e.g.*, Brian Mahoney, *SEC Taking The 'Tough Cop' Approach, Mary Jo White Says*, LAW360 (Oct. 9, 2013, 5:04 PM), https://www.law360.com/banking/articles/479464/sec-taking-the-tough-cop-approach-mary-jo-white-says [https://perma.cc/XX4T-LYSR].

to maintain, report, and publicly disclose loan-level information about mortgages.

Complementary activities that directly or indirectly support or inform the implementation of the consumer mandate include monitoring and handling complaints, operating dispute resolution or consumer redress mechanisms, the promotion of financial literacy and consumer education programs, and providing information to the general public through community outreach or public affairs programs.[81] Thus, the mantra of consumer-mandates involves the disclosure of information and the publicity of regulatory activity, whereas the prudential mandate generally requires confidentiality.

Prudential and consumer mandates require different kinds of regulatory tools. Thus, prudential regulators must draw from a diverse pool of human resources, professional skills, and network relationships for each type of regulatory intervention. Bank examination, the primary fact- finding supervisory tool for financial regulation, is labor-intensive.[82] Many facets of the consumer mandate, such as complaint management, dispute resolution, market surveillance, and investigation of violations are also fact-finding activities that require manual and qualitative work. This creates intra-agency competition for budget and human resources,[83] because the skills needed for prudential and consumer mandates are fundamentally different, but both require long-term investment before a regulator can perform each mandate skillfully. Prudential supervision focuses more on quantitative skills, so it calls for staff with degrees in economics, statistics, and finance. Consumer mandates typically focus more on the kind of qualitative analysis that lawyers provide, and on communications specialists for outreach and education programs.

c. Sources of Conflict and Goal Ambiguity

Thus, we can see that there is an intra-agency competition

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[81] For example, as discussed in Part II, the Fed's "Division of Consumer and Community Affairs" started as a public affairs office, and a large part of activities in the division involves community outreach (i.e., organizing speeches and meetings). The OCC and the FDIC similarly emphasized public affair programs. *See infra* Part II.

[82] *See* Carnell, *supra* note 63 at 432; Walter, *supra* note 79 at 74.

[83] *See* C.A.E. Goodhart, *The Organisational Structure of Banking Supervision,* 1 FSI OCCASIONAL PAPER SERIES 1, 20 (2000) (in the context of conflicts between monetary policy and financial stability, "[m]anagerial time is limited. Supervisory issues are time-consuming, and in the midst of a financial crisis can distract attention from virtually anything else.").

between the regulatory rationales (i.e., why regulation is needed), and among the intervention tools and the required skills and resources (i.e., how regulation is done). Because political principals typically do not give specific directives regarding which goal an agency should prioritize and how to do so in the face of conflict, the prudential regulators must determine for themselves which goals to prioritize and how to achieve those goals. A few concrete examples of how conflicts can play out are as follows.

One source of conflict concerns the *incentives* of the regulator. These are conflicts at the conceptual level.[84] One of these relates to *policy or rulemaking that might hurt bank profitability.* For example, some forms of consumer protection (i.e., banning the sales of lucrative but abusive products) inevitably cut into banks' profits,[85] and because bank profitability is the bedrock of financial soundness, following the consumer mandate can be at odds with the relevant prudential mandate.[86] The second incentive-related example is that *enforcement causes the depletion of assets.* In other words, consumer and prudential mandates can conflict because aggressive consumer protection through "deterrence and financial sanctions could deplete assets" and ultimately threaten the stability of a financial institution.[87]

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[84] Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Rsrv. Sys., Speech at the Allied Social Science Association Annual Meeting: Central Banking and Bank Supervision of the United States (Jan. 5, 2007) (uses the terms "at a conceptual level" or in terms of "incentives").

[85] Elizabeth Warren, *Redesigning Regulation: A Case Study from the Consumer Credit Market*, *in* GOV'T & MARKETS: TOWARD A NEW THEORY OF REGUL. 391, 410 (Edward Balleisen & David Moss eds., 2010) ("[The existing bank regulators'] main mission is to protect the financial stability of banks and other financial institutions, not to protect consumers. As a result, they focus intently on bank profitability and the maintenance of sufficient capital reserves relative to outstanding loans, and far less on the financial impact that many of the products sold by the banks will have on consumers. [F]ederal agencies face an inherent conflict. Each product that boosts profits for a financial institution helps the regulator meet its primary goal of assuring the safety and soundness of the financial institutions."); *see also* Adam J. Levitin, *Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 331 (2013); Clive Briault, *Revisiting the Rationale for a Single National Financial Services Regulator*, 16 FSI OCCASIONAL PAPER SERIES 5, 18-19 (2002) ("compensating" some consumers might "damage the overall soundness of the firm," or where disclosing adverse information causes consumers to take their "business elsewhere, . . . such conflicts are . . . difficult to resolve").

[86] A similar argument can be made regarding the profitability of CRA loans. *See* BD. OF GOVERNORS OF THE FED. RSRV. SYS., THE PERFORMANCE AND PROFITABILITY OF CRA-RELATED LENDING 89 (2000) (discussing the arguments on the profitability of CRA loans).

[87] *See, e.g.*, John C. Coffee, Jr. & Hillary A. Sale, *Redesigning the SEC: Does the Treasury Have a Better Idea?*, 95 VA. L. REV. 707, 724-25 (2009); Eric J. Pan,

Another type of conflict relates to the *procedures* by which regulators conduct regulation. Effective prudential regulation entails an amicable and cooperative relationship between the regulator and the bank in order to enhance the free flow of information. The regulator's role is to assist the financial firm's compliance through a process that is similar to a private consultation.[88] For consumer mandates, however, the regulatory process involves more disclosure to the public, and often, the regulator is at an adversarial position relative to the financial firms, as it imposes sanctions for violations.[89]

These examples demonstrate that ambiguity is embedded not only in which mandate and to what degree the agency prioritizes that mandate, but also in the processes that the agencies use to achieve them. Thus, an agency prioritizing prudential goals might use the power of persuasion instead of public enforcement actions and allocate more resources to prudential examinations. Because agencies typically do not explicitly rationalize and make public a decision to prioritize or subvert a particular mandate, some conflicts are less observable; sometimes the agencies themselves might not recognize the conflict. For example, the results of neglecting regulatory mandates may be obscured because they are "low probability but extreme events," such as financial crises or environmental disasters.[90] In Part I. C below I discuss how to observe agencies' "unobservable" priorities.

B. Internal and External Constraints on Financial Regulatory Agencies

In the previous sections, I established that financial regulators face priority goal ambiguity, and in particular, that prudential mandates and consumer mandates can conflict with each other. In general, scholars have argued that when an agency faces multiple goals, the observability of each goal and the nature of the relationship of those goals affect which goal the regulator will prioritize.[91] As some scholars have noted, however, multiple goal scholarship has not made clear precisely what drives an agency's

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Structural Reform of Financial Regulation, 19 TRANSNAT'L L. & CONTEMP. PROBS. 796, 821 (2011).

[88] *See* Pan, *supra* note 87 at 820.

[89] *Id.*

[90] Carrigan, *supra* note 6 at 140.

[91] *Id.* at 131 (first citing Biber, *supra* note 7 at 4; and then citing Wilson, *supra* note 12 at 367).

priorities.[92] In this section, I address this lacuna by identifying the three constraint factors that have the most impact on prudential regulators' decisions – path dependency, economic turbulence, and political control. Multiple goal agencies' priorities are dynamic and depend on the variables that I detail below.[93]

1. Regulatory Agencies as Carriers of History

What constraints do multiple goal agencies face? Building on institutional economics and organization theory, I first point to the phenomenon of path dependency, or historical inertia, which limits the agencies' ability to accept and adopt new mandates. The differences and potential conflicts between the consumer and the prudential mandate exacerbate this path dependency. Due to path dependence, the agencies whose original mission was prudential oversight will initially resist taking on the new consumer mandate. Further, the process of institution building and resource allocation for consumer-focused tasks will be slow and incremental.

Historical path dependence is the idea that the initial design of institutions can constrain their further development and hinder their efficient adaptation to shifting circumstances.[94] According to Douglass North, a pioneer in institutional economics, "path dependence means that history matters" and argues that in order to understand today's choices, we must uncover "the incremental evolution of institutions."[95] In his view, "[institutions] evolve

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[92] Carrigan, *supra* note 6 at 131-32.

[93] *See, e.g.*, Tirole, *supra* note 28 at 4 ("[T]he multiplicity of goals raises the issue of their weights . . . what is meant to be 'optimal' [pollution levels] depends on what the EPA perceives to be its constituency.").

[94] Pierre-Hugues Verdier, *The Political Economy of International Financial Regulation*, 88 IND. L.J. 1405, 1426 (2013); *see also* Jörg Sydow et al., *Organizational Path Dependence: Opening the Black Box*, 34 ACAD. MGMT. REV. 689 (2009) (discussing path dependencies in organizations); Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000) (discussing path dependencies in political institutions); Paul A. David, *Why Are Institutions the "Carriers of History"? Path Dependence and the Evolution of Conventions, Organizations and Institutions*, 5 STRUCTURAL CHANGES & ECON. DYNAMICS 205, 205 (1994); BRIAN W. ARTHUR, INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY 25 (1994) (discussing path dependence in the context of economics); DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 100 (1990) (discussing path dependence in the context of institutions).

[95] North, *supra* note 94 at 100.

incrementally, connecting the past with the present and the future; history in consequence is largely a story of institutional evolution in which the historical performance of economies can only be understood as a part of a sequential story."[96] Likewise, Paul David recognizes that "history matters… vitally to form the functioning of human organizations and institutions," and as such, organizations and institutions are "carriers of history."[97]

Path dependence involves two interrelated concepts. One is the theory of "increasing returns," which means that the cost of shifting from one alternative to another will increase over time. History matters because critical decisions made at formative moments tend to be self- reinforcing. Thus, once one has "started down a track, the costs of reversal are very high," because "the entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice."[98] The second concept is the importance of "timing and sequence," that is, "when a particular event in a sequence occurs will make a big difference."[99] The effects of "small" events early in the process can take on greater importance, while "large" events that happen at a later stage have less influence.[100] Thus, recognizing temporal ordering – what comes first and what its effects are – is a critical aspect of path dependence.[101] The most intuitive and often-cited applications of path dependence are those related to technological development. The QWERTY typewriter keyboard, for example, which might have been a sound choice originally, locked in the users, shutting out possibly superior or more efficient alternatives.[102]

Scholars in the field of management and organization have also developed theories of "organizational path dependence." They argue that within organizations the processes, routines, and practices utilized in that context are more complex and ambiguous and are entrenched in the organization's heritage, rules, and

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[96] Douglass C. North, *Institutions*, 5 J. ECON. PERSPS. 97, 97 (1991).
[97] Paul A. David, *supra* note 94 at 205 (laying out the condition when "history matters").
[98] Margaret Levi, *A Model, a Method, and a Map: Rational Choice in Comparative and Historical Analysis*, *in* COMPARATIVE POLITICS: RATIONALITY, CULTURE, AND STRUCTURE 28, 28 (Mark I. Lichbach and Alan S. Zuckerman eds., 1997); *see also* Pierson, *supra* note 94 at 260.
[99] Paul Pierson, *Not Just What but When: Timing and Sequence in Political Processes*, 14 STUD. AM. POL. DEV. 72, 75 (2000).
[100] *Id.*
[101] *See* Dan Breznitz, *Slipper Paths of (Mis)Understanding? Historically Based Explanations in Social Science*, *in* THE HIDDEN DYNAMICS OF PATH DEPENDENCE INSTITUTIONS AND ORGANIZATIONS 23 (Georg Schreyögg & Jörg Sydow eds., 2010).
[102] *See* Arthur, *supra* note 94 at 25.

culture.[103] Resource allocation, including financial resources (i.e., how budgets are allocated in an organization) as well as relational resources (i.e., formal and informal contacts with external or political actors), also has path dependent qualities.[104] Other softer (less formal) components include built-in incentive systems, beliefs, attitudes and skills, reputation, and the support of stakeholders.[105]

Regulatory goals evolve in response to developments in society such as changing social norms, the introduction of new technology, and exogenous shocks and crises. Governments need to update the mandates and the structure of departments and agencies to deal with these new challenges. In the modern age, however, even if there is a "new" goal, distinct from existing "old" goals, it is likely that it will, at least temporarily, be assigned to a preexisting old agency, generally one charged with preexisting mandates that are related to the new goal.[106] High administrative costs and uncertainty about the appropriate level of time and human resources associated with this new goal discourage governments from immediately creating new agencies for new goals.[107]

Here, we can observe that there is a sequential nature to the multiple goals assigned to an agency. Through the lens of path dependence theory, historically speaking, prudential regulators have evolved as "old" agencies with "new" goals.

As I discuss in Part II of this Article, all of the prudential regulators whose primary mandate is prudential oversight over depository institutions received consumer mandates *after* having firmly established their primary mandates.[108] For example, when Congress created the Fed, in 1913, its initial focus was on monetary policy and the resilience of the reserve banking system – in other words, the prudential mandate. But since the 1960s, Congress has expanded its regulatory portfolio to include various consumer

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[103] Sydow, *supra* note 94 at 692-94. A wider view of organizational path dependence-causing factors could include institutional design, problem definition, appropriate policy instruments, and agency professionalization.
[104] *See* Wilson, *supra* note 12 at 181.
[105] *See* Jan Siedentopp & Albrecht Söllner, *Path Dependence through Corporate Political Activity*, *in* THE HIDDEN DYNAMICS OF PATH DEPENDENCE INSTITUTIONS AND ORGANIZATIONS 71, 74 (Georg Schreyögg & Jörg Sydow eds., 2010).
[106] *See, e.g.*, THE WORLD BANK, ESTABLISHING A FINANCIAL CONSUMER PROTECTION SUPERVISION DEPARTMENT, KEY OBSERVATIONS AND LESSONS LEARNED IN FIVE CASE STUDY COUNTRIES 10 (2014).
[107] *Id.*
[108] *See infra* Part II.

mandates.[109]

As we saw above, there are substantial differences between the "paths" of consumer and prudential mandates. These "paths" manifest themselves both in the overall mission and culture that agency members share, and in the specific regulatory methodology, techniques, and resources necessary to achieve their goals. Given the agencies' organizational path dependence, we can predict that the prudential regulators will initially give more weight to the prudential mandate that is their original or primary mission.[110] In order to be implemented properly, the newly-allocated consumer mandate requires independent and self-supporting institutions.[111] Path dependence theory, however, predicts that old agencies with new mandates will struggle to implement new mandates due to the dominance of their original mission. The case studies in the latter parts of this Article explore this phenomenon further.

2. The Influence of Political Principals and Interest Groups

It is not only their own history that constrains agencies. They are also subject to the contemporaneous influence of political principals and interest groups. Drawing on political science theories and administrative law literature examining principal-agent relationships, this section lays out the instruments that political actors use to advance or push back on consumer mandates. Political principals generate responses from prudential regulators by, for example, enacting substantive laws, exercising congressional oversight, presenting presidential agendas, controlling budgets, and appointing agency heads or senior officials. Interest groups, representing either the financial industry or the consumers –

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[109] *See* PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE 159-61 (2016). This is not to say that there were no consumer laws prior to the 1960s. The FTC, as the general consumer protection agency and the state agencies (in the case of the U.S.), had mandates for implementing consumer protection laws (i.e., fraud) that may (or may not) have explicit reference to financial services. Usury laws, for example, which are "arguably, the oldest form of financial regulation," being mentioned in the Bible and the Koran, were regulated by the states at least by the mid-1600s. Efraim Benmelech & Tobias J. Moskowitz, *The Political Economy of Financial Regulation: Evidence from the U.S. State Usury Laws in the 19th Century* 1, 8 (Nat'l Bureau of Econ. Rsch., Working Paper No. 12851, 2007).

[110] The original mission can come externally (i.e., from the agencies' organic acts that instruct the agency to focus on an original mission) or can be self-imposed (i.e., when the overall mission is vague, agency officials themselves sometimes pick a clear mission).

[111] *See* Wilson, *supra* note 12 at 103.

directly, or indirectly via the political principals – also influence agency behavior and decisions. I argue that depending on the policy preferences of the dominant coalition, which can be a combination of political principals and interest groups, agencies adjust their priorities, *oscillating between consumer and prudential mandates.*

a. Congressional Control

The most straightforward way to keep agencies in line is to enact substantive legislation.[112] The Constitution requires that agencies follow legislative mandates regardless of whether they agree with the substance of the laws. New legislation, or even the threat of new legislation, will affect agency behavior.[113] New laws will also have significant impact on the budgets, programs, personnel, and jurisdiction of an agency. Precise, specific legislation will decrease the discretion of administrative agencies, reducing goal ambiguity.[114]

Legislation as a means of administrative control, however, is a blunt and cumbersome tool. New legislation is possible only after a coalition has mobilized support for the new policy.[115] Legislators often lack technical information, which renders detailed legislation "flawed, cumbersome, and costly."[116]

To ensure that agencies execute their legislative mandates properly, Congress engages in various forms of "centralized, active, and direct" oversight through surveillance activities, such as holding congressional hearings, conducting investigations, surveying documents describing agency activities, and engaging in

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[112] *See* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 71 (2006).
[113] *See* Terry M. Moe, *An Assessment of the Positive Theory of 'Congressional Dominance'*, 12 LEGIS. STUD. Q. 475, 488 (1987) ("Legislators displeased with agency performance can threaten to abolish or transfer programs. . . . [T]he very potential for new legislation is itself a mechanism of control.").
[114] U.S. CONST. art. I, § 1; *id.* art. I, § 8; Jack M. Beermann, *supra* note 112 at 71-73, 77-78 ("A key formal method Congress employs to control executive discretion is to nip discretion in the bud by legislating with precision. . . . [T]here are few, if any, situations in which Congress's choice to be very precise concerning the substance of a regulatory program would be subject to challenge on constitutional or other grounds.").
[115] *See* Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 441 (1989).
[116] Terry Moe, *The Politics of Structural Choice: Toward a Theory of Public Bureaucracy*, *in* ORGANIZATION THEORY FROM CHESTER BARNARD TO THE PRESENT AND BEYOND 116, 136 (Oliver E. Williamson ed., 1995).

research.[117] At the request of members or Congressional committees, Congress can use the Government Accountability Office (GAO) as a "watchdog" to monitor agency performance.[118]

Political scientists dub these surveillance activities "police patrol oversight."[119] They consider them costly and time consuming, as the activities require legislators to "waste[]" their time on agency activities that are *not* in violation of legislative goals.[120] This incurs opportunity costs for legislators who could gain more credit for, and thus gain political support for, engaging in other types of activities.[121] When Congress first enacted federal consumer laws, it activated several oversight devices for consumer mandates, including the requirement that the prudential regulators report certain matters to Congress through annual reports,[122] and subjecting the agencies to oversight hearings and GAO inquiries regarding the implementation of consumer laws. The following sections show that the intensity and the direction of such congressional oversight, however, vary in accordance with changes in the political coalitions.

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[117] Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL SCI. 165, 166 (1984); *see also* Matthew D. McCubbins et al., *supra* note 115 at 434.

[118] Matthew D. McCubbins et al., *supra* note 115 at 434; *see also Security and Privacy for GAO Web Survey Respondents*, GAO, https://www.gao.gov/surveys [https://perma.cc/SV6M-KJPM] (last visited Sept. 10, 2023) (stating that "[t]he [GAO] is an independent, nonpartisan agency that works for Congress. Often called the 'congressional watchdog' . . . ."). Requests for GAO reports that come from congressional committees, subcommittees, or Members of Congress are prioritized and written by a Member. *See Reports*, GAO, https://www.gao.gov/for-congress/reports [https://perma.cc/E67X-GTFB] (last visited Sept. 10, 2023).

[119] Matthew D. McCubbins & Thomas Schwartz, *supra* note 117 at 165, 171 (arguing that fire alarm type of oversight is likely to be more effective and Congress prefers fire alarm oversight to police patrol oversight, given opportunity costs, available technology, and human cognitive limits).

[120] *Id.* at 168.

[121] *See id.* at 167-68 (1984); *see also* Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 249-51 (1987). Thus, political scientists have argued that Congress built, and prefers, a system of structure and process, which they describe as a "fire alarm" oversight. Under the system of "fire alarm oversight" individual citizens and organized interest groups can examine and participate in an agency's decision-making process. Congress's role, then, is to respond to complaints – or "fire alarms" – that these individuals and groups raise. Matthew D. McCubbins & Thomas Schwartz, *supra* note 117 at 166.

[122] Accordingly, agencies' annual reports have faithfully documented agencies' activities in consumer protection. Either separate reports on consumer protection laws were given or incorporated in annual reports also reporting matters such as monetary policies.

b. Presidential Control

Presidents have independent constitutional authority to "make policy 'with the stroke of a pen' and effectively avoid the many institutional obstacles . . . . that plague the legislative process."[123] However, the agenda of the president is so broad that doing this effectively requires "nearly superhuman levels of mental endurance."[124] Therefore, presidents maintain control over agencies primarily by appointing people who share the president's policy preferences,[125] putting appointment and removal powers among the president's most important control methods.[126] Other methods of control include the president's ability to shape the federal workforce strategically, determine the size of the workforce through budget controls, choose senior personnel, and reform the civil service.[127]

Over the past few decades, legal and political science scholars have noted the expansion of presidential authority. They point to President Reagan's control over agency rulemaking through the Office of Information and Regulatory Affairs' (OIRA) review for a "regulatory impact analysis."[128] President Clinton used

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[123] William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095, 1099-100 (2002); *see also* Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 L. & CONTEMP. PROBS. 1, 15-16 (1994) (arguing that Congress has a collective action problem, whereas the President can act unilaterally).

[124] Michael A. Livermore, *Political Parties and Presidential Oversight*, 67 ALA. L. REV. 45, 69 (2015).

[125] *See id.* at 69-70.

[126] *See* Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 804 (1991) ("The key mechanism of executive control is the appointment and removal power.").

[127] *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 770, 770 (2013); Livermore, *supra* note 124 at 54 (on the control of the budget); Alex Bolton, Personnel Politics 2 (June 30, 2014) (unpublished manuscript) (on file with author). "[W]e sought to test the proposition that agency design facilitates the control of the bureaucracy by the Congress and the President. Our main results demonstrate that one prominent structural feature of agency design—namely, the extent of high-level personnel politicization, or *packing*—actually affects the degree of political responsiveness by the agency." Christopher R. Berry & Jacob E. Gersen, *Agency Design and Political Control*, 126 YALE L.J. 1002, 1038-39 (2017); Terry M. Moe & Scott A. Wilson, *supra* note 123 at 29; Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 805 (1991).

[128] *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277-78, 2281-82 (2010). President Ronald Reagan established the Presidential Task Force on Regulatory Relief on January 22, 1981, as one of his first acts after moving into the Oval Office. The effect of OIRA review has differed per

directives to instruct agency heads to take certain administrative actions. For example, he used memoranda as a tool to claim ownership of the outcomes.[129] President Clinton gave "marching orders" on consumer directives to financial regulators.[130] The agencies, on their part, responded positively to Clinton's initiatives.[131]

c. Interest Group Influence

Public policy surrounding banks and access to credit has always been a political process. The financial industry, one of the wealthiest in the nation, has a long history of lobbying against the tightening of regulations through the imposition of, for example, lending standards and anti- predatory-lending legislation.[132] Interest groups representing the financial industry directly lobby politicians, providing them with information, supplying money, and promising votes.[133] Regarding highly technical policymaking that requires information and expertise, the financial industry often provides the most abundant and detailed comments in agency decision-making process.[134] Industry representatives also offer

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presidents. The Reagan administration was known for using the OIRA review with mostly deregulatory effects, while the Clinton administration used it to advance presidential initiatives. *See* Livermore, *supra* note 124 at 55-56.

[129] *See* Kagan, *supra* note 128 at 2290-302.

[130] Brooke Overby, *The Community Reinvestment Act Reconsidered,* 143 U. PA. L. REV. 1431, 1432 n.10 (noting that the directive to improve the CRA was accompanied by a related legislative bill and was included in Clinton's presidential campaign).

[131] *See infra* Part IV.

[132] *See* CHARLES W. CALOMIRIS & STEPHEN H. HABER, FRAGILE BY DESIGN: THE POLITICAL ORIGINS OF BANKING CRISES AND SCARCE CREDIT 182 (2014); Deniz Igan, Prachi Mishra & Thierry Tressel, *A Fistful of Dollars: Lobbying and the Financial Crisis,* 26 NBER MACROECONOMICS ANN. 195, 199 (2012); *see, e.g.*, Verdier, *supra* note 94 at 1440 (in the context of international financial regulation). For similar industry group dominance theories, *see* James Kwak, *Cultural Capture and the Financial Crisis*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 77 (Daniel Carpenter & David A. Moss eds., 2014); JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER – AND TURNED ITS BACK ON THE MIDDLE CLASS 63-65, 122-25 (2010); SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 5, 6 (2010).

[133] *See* DENNIS C. MUELLER, PUBLIC CHOICE III 475, 488 (Cambridge Univ. Press 3d. ed., 2003).

[134] The financial industry can influence the rulemaking process, such as through the notice and comment procedures of the Administrative Procedure Act. *See* Verdier, *supra* note 94 at 1432 ("On major financial regulation proposals virtually all comments come from major industry participants, with only a handful from smaller firms, consumer groups, or the public."); *see also* Kimberly D. Krawiec, *Don't "Screw Joe The Plummer": The Sausage-Making*

information through informal contact, such as supervisory meetings with regulators.[135] Prudential banking regulators, in particular, have a close connection to their regulated banks due to the discreet and ongoing nature of the supervision.[136]

The financial industry is not the only political actor capable of forming interest groups and influencing policy. Financial consumers have their own means as well. Through various forms of consumer advocacy, consumers can create interest groups that prove, at times, to be influential in shaping financial regulatory policy.[137] Consumer associations and other nonprofit entities leverage political entrepreneurs,[138] make direct lobbying efforts (i.e., issue letters or statements, give testimony in Congress),[139] submit comments on APA rulemaking,[140] conduct investigations, research consumer issues, and circulate research and publications

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of Financial Reform 55 ARIZ. L. REV. 53, 58 (2013) ("[A] consortium of PIGs—Americans for Financial Reform, Public Citizen, and U.S. PIRG—managed to generate a surprising level of Volcker Rule interest among private citizens, who sent in letters by the thousands. But, 7,316 (or 91%) of those comments are a virtually identical form letter." In contrast to that, the letters from the financial industry were "meticulously drafted, argued, and researched – though far less numerous" when compared to the citizen letters which were "short and provide little evidence that citizen commenters even understand, or care, what proprietary or fund investment is, much less the ways in which agency interpretation of the Volcker Rule's complex and ambiguous provisions might govern such activities."); s*ee also* Wendy Wagner, *Administrative Law, Filter Failure and Information Capture,* 59 DUKE L.J. 1321, 1328 (2010) (discussing the concept of "information capture" as interest groups might overload the system, which puts the regulatory system at risk of information capture, thereby allowing some parties to control or at least dominate regulatory outcomes using information).

[135] Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Products: A Review Essay*, 127 HARV. L. REV. 1991, 2044 (2014); *see* Verdier, *supra* note 94 at 1433.

[136] *See* Levitin, *supra* note 135 at 2043-44.

[137] *See generally* WATCHDOGS AND WHISTLEBLOWERS: A REFERENCE GUIDE TO CONSUMER ACTIVISM (Robert N. Mayer & Stephen Brobeck eds., 2015) (listing various recognized consumer advocacy interest groups); Mark E. Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils*, 26 GA. ST. U.L. REV. 1147 (2012) (describing the efforts of one pioneering consumer advocacy group that greatly influenced policy).

[138] *See, e.g.*, John T. Woolley & J. Nicholas Ziegler, *The Two-Tiered Politics of Financial Reform in the United States* 21-23 (Inst. for Rsch. on Lab. and Employment, Working Paper No. 111-11, 2011) (depicting Elizabeth Warren as "policy entrepreneur" whose role was critical in the creation of the CFPB); LISA KASTNER, CIVIL SOCIETY AND FINANCIAL REGULATION: CONSUMER FINANCE PROTECTION AND TAXATION AFTER THE FINANCIAL CRISIS 63-64 (2018) (giving examples such as the support of U.S. Senator Elizabeth Warren in the creation of the CFPB).

[139] *See* Kastner, *supra* note 138 at 66.

[140] *Id.* at 118.

to inform the public and gather support.[141] Consumer groups sometimes succeed in forming broader cross-coalitions for the purpose of strategically furthering common goals.[142]

Political scientists have found that consumer groups suffer from collective action problems. This means that smaller, well-organized financial industry groups are likely to dominate policy.[143] Consumers are, as a group, "too large, diffuse, and heterogeneous a group to organize effectively."[144] The logic is that for consumers on the demand side seeking policy changes, when compared to the inputted time and effort, the reward for any one consumer lobby is negligible.[145]

Moreover, consumer, or public interest, groups are perennially disadvantaged relative to the finance industry and the special interest groups that represent it. Their existence is "precarious" because funding is inconsistent.[146] Consumers face a fundamental disadvantage because they are a heterogeneous group that is organizationally disjointed and not entirely clear about what they want to achieve.[147] To ameliorate the collective action problem, agencies can create structures and processes to enhance consumer interests. Early on, the Fed established the Consumer Advisory Council to elicit comments from consumers.[148] Other agencies created dedicated consumer affairs divisions or public affairs offices focused on consumer causes. Through the Fed, each reserve bank appointed a "Community Affairs Officer" to serve as a contact point.[149] Each of the agency's annual reports includes the presentation of a considerable amount of consumer outreach.

3. Financial Crises

Another factor that has great impact on the behavior of

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[141] Ralph J. Rohner, *Problems of Federalism in the Regulation of Consumer Financial Services Offered by Commercial Banks: Part I*, 29 CATH. U.L. REV. 1, 44 (1979).
[142] *See, e.g.*, Kastner, *supra* note 138 at 56-58.
[143] *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 33-36 (2d ed., 1971).
[144] Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 83 (1969).
[145] *See* MANUEL F. COHEN & GEORGE J. STIGLER, CAN REGULATORY AGENCIES PROTECT THE CONSUMER? 15 (1971).
[146] Budnitz, *supra* note 137 at 1184-85.
[147] *See* Olson, *supra* note 143 at 5-8.
[148] *See, e.g.*, FRB ANN. REP. 315 (1976).
[149] FRB ANN. REP. 148 (1981).

prudential regulators is financial crises. Prudential regulators have the responsibility of making monetary policy and managing deposit insurance, while also carrying out specialized crisis management activities. These include providing emergency liquidity as the lender of last resort, activating the deposit insurance scheme, and resolving failed banks. Urgent crisis management actions, a shifting political landscape, and the unfavorable economic conditions that accompany a crisis can lead to *agencies deprioritizing consumer-focused tasks, at least until they have contained the immediate crisis.* Resolution functions are labor-intensive, time-sensitive, and time-consuming, which puts great pressure on the prudential regulators, forcing them to divert their staff from day-to-day supervisory work. In response to a crisis, authorities must mop-up the crisis' debris – the (nearly) failed banks, which are "a fact of economic life."[150] A bank no longer viable[151] goes through a resolution process which generally includes bank closure or receivership, recapitalization, and the disbursement of deposit insurance.[152] In the U.S., the FDIC is in charge of the resolution process, which involves valuing and marketing a failing institution, soliciting and accepting bids for the sale and receivership process, and managing impaired loans and bad assets until another institution acquires them – a process that can span several years for completion.[153]

Deposit insurance disbursement is also resource-intensive and time-sensitive. The goal of deposit insurance is to prevent retail bank runs or contagion by protecting small and

[150] Adam J. Levitin, *In Defense of Bailouts*, 99 GEO. L.J. 435, 478 (2011).
[151] Dalvinder Singh & John Raymond LaBrosse, *Developing a Framework for Effective Crisis Management*, OECD J.: FIN. MKT. TRENDS 1, 16 (2011).
[152] *See generally* BASEL COMMITTEE ON BANKING SUPERVISION, GUIDELINES OF IDENTIFYING AND DEALING WITH WEAK BANKS 46 (2015).
[153] In preparation for closing a failing institution, authorities gather and assess information about the quality of the bank's balance sheets and its asset valuations, which allows them to determine the level of resources required (such as the number of people needed for a closing team). The factors considered include "(1) the asset and deposit size of the institution, (2) the number of its branches or locations, and (3) the type of resolution." FED. DEPOSIT INS. CORP., MANAGING THE CRISIS: THE FDIC AND RTC EXPERIENCE 228 (1997); *see generally* FED. DEPOSIT INS. CORP., CRISIS AND RESPONSE: AN FDIC HISTORY 2008–2013 176 (2017) (a receivership is a legal entity that handles all of a failed bank's affairs).

unsophisticated savers,[154] thus promoting financial stability.[155] Typically, after the FDIC takes control of the bank[156] it starts a determination process aimed at understanding how many of the deposits are, or are not, insured, and to whom these deposits belong. It then disburses the deposit in a timely and orderly manner which is now completed overnight due to technological development. However, the process used to be a tedious and labor-intensive manual process which included, for example, checking depositors' signatures.[157] Disorderly or a slow and insufficient amount of disbursement can cause a cascading effect in public confidence, exacerbating a crisis.[158] The implication of a financial crisis for multiple goal agencies with priority goal ambiguity is that it shifts the priorities.[159] Due to the salience and urgency of crisis

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[154] Deposit insurance has a dual goal. On the one hand, deposit insurance has a consumer protection role; it is usually limited to a preset maximum amount, which makes it a useful protection for retail customers (but not for corporate customers whose deposit amounts would exceed the insurance cap). As such, deposit insurance is treated as a "social provision," to protect the retail customers like the "widows and orphans" in the banking industry. HOUSE OF COMMONS TREASURY COMMITTEE, THE RUN ON THE ROCK*,* 2007-08, HC 56-1, at 88 (UK).

[155] While deposit insurance schemes are important in contributing to consumer confidence in the markets in times of crisis, a deposit insurance scheme is seldom designed, "on its own, to be able to deal with all potential failures of financial firms, nor to be a crisis management tool in the event of a large-scale failure." *Id.* Further, as banks are more dependent on non-retail funding rather than on retail deposits, the role of deposit insurance as a "stability function" or "crisis management function," as compared to a "consumer protection function," is diminishing. *See, e.g.*, Hyun Song Shin, *Reflections on Northern Rock: The Bank Run That Heralded the Global Financial Crisis,* 23 J. ECON. PERSPS. 101, 104, 117 (2009); BASEL COMM. ON BANKING SUPERVISION & INT'L ASS'N OF DEPOSIT INSURERS, CORE PRINCIPLES FOR EFFECTIVE DEPOSIT INS. SYS. 1 (2009) (a deposit insurance system is not intended to deal, by itself, with systemically significant bank failures or a "systemic crisis") [hereinafter "BIS Deposit Insurance"].

[156] FED. DEPOSIT INS. CORP., MANAGING THE CRISIS: THE FDIC AND RTC EXPERIENCE 211 (1997).

[157] *Id.* at 217, 230, 234. Prior to 2008, the largest FDIC insurance determination was First City Houston in 1992, with 322,983 separate deposit accounts; in sobering contrast, Bank of America currently has over 60 million separate deposit accounts. Robert DeYoung et al., *A Theory of Bank Resolution: Technological Change and Political Economics,* 9 J. FIN. STABILITY 612, 616 (2013).

[158] This was the case in Northern Rock during the 2008 financial crisis. *See, e.g.,* HOUSE OF COMMONS TREASURY COMMITTEE, *supra* note 154 at 91 ("The fact that the FSCS only guaranteed 100% up to the first £2,000, and 90% of the next £33,000 was a problem."); Hyun Song Shin, *supra* note 155 at 110.

[159] *See* Manuel Funke, *How is Politics Affected by Financial Crises?* WORLD ECON. F. (Nov. 24, 2015), https://www.weforum.org/agenda/2015/11/how-is-politics-affected-by-financial-crises/ [https://perma.cc/FH7U- FR52]; *see also* Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CAL. L. REV. 327, 332 (2013) (pointing to a marked increase in the influence of elected politicians over banking systems).

management roles, prudential regulators need to adjust their day-to-day supervisory work in immediate response to the crisis. As more banks typically face economic turbulence during crisis times, prudential mandates become more salient and complement agencies' crisis management roles. The net effect of crises is that, as the priority of prudential mandates and crisis management increases, they draw organizational focus *away* from consumer functions. The prudential regulators' idiosyncratic crisis management roles determine *how* they calibrate crisis management and day-to-day goals. As I will show in Part III, the most dramatic example is the FDIC's publicly abdicating its consumer mandate because of its limited resources during the S&L crisis.

C. Oscillating Priorities and Intra-Agency Coordination

Up to this point, this Article has established that multiple-goal agencies that face priority goal ambiguity internally juggle multiple goals that conflict with each other. Initially, they might resist adopting newer consumer mandates; political preferences can cause the agencies to oscillate between consumer and prudential mandates; and financial crises can siphon the agencies' focus and resources away from consumer mandates.

This section builds on public administration and legal scholarship that focuses on internal agency design and analyzes the ways that agencies themselves turn constraints into internal agency policy. Specifically, I examine the internal coordination processes and mechanisms by which agencies mitigate goal priority ambiguity and manifest their goal priorities.

1. Organizational Slack and Agencies as Information Processors

Political principals' imperfect monitoring and control mechanisms leave multiple-goal agencies with broad discretion – or put differently, organizational goal ambiguity – in determining priorities and managing their many goals. Agencies have

"organizational slack,"[160] or "residual decision rights,"[161] to the extent that the political principals have not specified the *internal agency designs* by which agencies are to implement their organization goals.[162] Agency heads, to amplify the capacity, expertise, and information to make decisions, either delegate decision-making or information-collection to the internal institutions of the bureaucracy.[163] By viewing agencies as *information processors*, we can understand that agency heads must create an internal structure that allows information to flow efficiently, in alignment with the agency's priorities.[164]

Agency heads seek to maximize information flow through internal reforms, particularly when the exogenous level of uncertainty increases.[165] For example, a new political appointment,[166] or new legislation will lead to changes in administrative policies, while crisis situations can contribute to increased uncertainty.[167] Given the high implementation costs associated with reorganization,[168] agency heads will resort to change only when the benefits (i.e., the projected value of such

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[160] *See* Jennifer Nou, *Intra-agency Coordination*, 129 HARV. L. REV. 421, 430-31 (2015). Nou uses the term "organization slack" as a term that connotes residual authority of the agency head to design and determine the internal institutions of an agency that are not directly dictated by the political principals. I follow her example in this Article; note, however, that in management and organization literature, the term is used in a broader sense and refers to a "a supply of uncommitted resources in an organization" – in other words, a cushion or excess capacity of resources maintained by an organization. *See* Theresa K Lant, *Modeling Organizational Slack: An Empirical Investigation* 1 (Graduate Sch. of Bus., Stanford Univ., Working Paper No. 856, 1985). Organizational slack exists in the form of excess staffing or a reserve of resources within an organization, from which the organization can draw upon in emergency situations. It can affect organizational processes as search behavior, innovation, goal conflict, political behavior, risk taking, and information processing needs. *See, e.g.*, B. Näslund, *Organizational Slack,* 66 EKONOMISK TIDSKRIFT 26, 26-27 (1964).

[161] Nou, *supra* note 160 at 426.

[162] *Id.* at 437; *see also* Glen O. Robinson, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Political Uses of Structure and Process*, 75 VA. L. REV. 483 (1989).

[163] Nou, *supra* note 160 at 441.

[164] *Id.* at 437, 451.

[165] *Id.* at 438, 490. Internal agency restructuring is costly and has constraints such as implementation costs and mandatory design requirements imposed by political principals. *Id.* at 473-76. As such, "the level of uncertainty increases whenever an exogenous political or legal change requires the agency head to gather more internal information than is currently available through existing channels." *Id.* at 436.

[166] *Id.* at 438.

[167] Nou, *supra* note 160 at 438 (citing factors that increase uncertainties).

[168] *Id.* at 473.

reorganization) exceed the implementation costs.[169] These costs include managing the notoriously change-resistant bureaucracy, and dealing with the procedural or administrative aspects of the change, as well as overcoming the entrenched priorities that previous agency heads set, and those concerns of internal and external constituencies (i.e., congressional committees).[170] An agency head's primary strategies for managing information flow are specialization or creating "silos" – separation and centralization.[171] *Specialization* here refers to a coordination strategy involving the "horizontal allocation of tasks within an agency."[172] Here, agency heads divide and allocate different information sources into units or offices.[173] Specialization enhances efficiency and lowers the cost of information. It allows agency heads to structure agencies to enhance the flow of specific types of information by increasing knowledge in the area that requires emphasis.[174] Creating "silos" or "stovepipes" between different functions can mitigate goal conflict by assigning competing missions to different divisions on the organization chart.[175] *Separation* enables independent decision-making by "dropping an imaginary curtain" between two units within the agency.[176] Doing so allows the separated unit to block the flow of information until after it has made a decision.[177] A committee or expert panel outside the agency is a common example of separation.[178] *Centralization* enables an agency to process information efficiently by enhancing coordination and lowering the cost of information transmission within a bureaucracy.[179]

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[169] *Id.* at 429-30.
[170] *Id.* at 473-75. For example, administrative procedures for a change requires compliance with the regulations of the Office of Personnel Management for U.S. government agencies.
[171] *Id.* at 452-62; *see also* Christopher Carrigan & Lindsey Poole, Structuring Regulators: The Effects of Organizational Design on Regulatory Behavior and Performance 19 (June 2015) (unpublished manuscript) (on file with Penn Program on Regulation's Best-in-Class Regulator Initiative).
[172] *Id.* at 459.
[173] Nou, *supra* note 160 at 459. Theoretically, allocation can align with the staff's area of training and disciplinary backgrounds, such as lawyers, economists, and scientists ("functional organization") or with specific substantive subject matters or policy areas ("divisional organization").
[174] *Id.* at 461.
[175] Christopher Carrigan & Lindsey Poole, *supra* note 171 at 19.
[176] Nou, *supra* note 160 at 461-62.
[177] *Id.* at 462.
[178] *Id.* at 463 (citing an empirical study that suggests that agencies seek an independent review from these external bodies when the uncertainties and risks are higher. For example, the FDA Commissioner might ask the advice of the FDA advisory committee when dealing with the most complex drugs with the most uncertain risks).
[179] *Id.* at 453.

On a related note, the *vertical location* or *hierarchy* of the centralized authority is also a critical design choice when one is seeking to control information flow.[180] To deal with important organizational goals, agency heads can place the centralized authority at the top of the agency's hierarchy.[181] On the flip side of this strategy, agencies that wish to demote the priorities of certain agency functions can consciously decentralize or disperse a previously centralized apparatus, which will result in higher information costs and delays in decision-making.[182] Agency heads also employ ancillary actions in tandem with reorganization, such as hiring or reallocating personnel or budget, and developing or intensifying programs.

Understanding how and why agencies change their internal coordination mechanisms serves an important purpose. Internal reorganization is costly, so we can assume that agency heads do it deliberately in order *to enhance or to weaken* the coordination of information. Therefore, *modifications* of internal structures are signals that the agency's goal priorities have changed. In other words, by looking at the evolution of an agency's internal mechanisms, we can infer how it is prioritizing multiple goals, at any given point. Organizational charts and the allocation of resources that reflect these reorganizations are reliable indices when goal priority is obscured.

2. Measuring and Observing Oscillating Multiple-Goal Financial Regulatory Behavior

Prudential regulators with multiple goals face priority goal ambiguity, and in particular, prudential and consumer mandates can conflict with each other. Goal prioritization, however, is not static. Agencies' original missions, as well as changing political and economic situations, affect the observability of each goal, which in turn influences how agencies prioritize them. The following case studies show that historically, agencies' priorities

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[180] *Id.* at 453-54.
[181] *Id.* at 454-55. For example, the proximity of OIRA – whose cost-benefit analysis offers the President an important control mechanism – to the President is of great importance. The location explains the significance of the role of cost-benefit analysis (CBA) in executive rulemaking. In response to the enhanced importance of CBA, many agencies that were subject to OIRA review established separate offices dedicated to economics. For example, the EPA, which had economists dispersed around the agency prior to the CBA requirements, centralized them in a single apparatus in 1982, which is today called the National Center for Environmental Economics (NCEE).
[182] Nou, *supra* note 160 at 458-59.

regarding prudential and consumer mandates have oscillated over time. A prudential regulator's initial financial stability- focused mission encourages it to prioritize prudential goals. But it will increase its emphasis on consumer mandates in response to the consumer-focused policy preferences of political principals and interest groups. An agency will respond to a financial crisis by directing its focus away from consumer mandates. These stimuli, if strong enough, can compel an agency head to modify its internal structures to adjust to the agency's changed priorities. In other words, *when the legislature assigns both prudential and consumer mandates to a single agency, that agency's leadership will prioritize or deprioritize the latter in response to external constraints that can change over time, and that will be reflected in, and therefore can be observed through, the agency's internal organization choices.*

The primary challenge to understanding agency behavior in goal prioritization is the how to observe and measure its priorities consistently and objectively over long periods of time.[183] Defining financial regulatory goals such as: the promotion of a safe, sound, and stable financial system; the enhancement of fairness; or the provision of equal credit to consumers and communities are immeasurable and difficult to observe.[184] As an alternative, we can use observable output-based indices as proxies for gauging how agencies prioritize goals. The financial regulatory agencies themselves often promote the indices of output**,** such as how many banks are under their supervision, the number and frequency of bank examinations, the type and number of enforcement actions, and the restitution or redress amount related to those actions.[185] In addition, "input-based" measurements, such as the existence of internal organizations and programs (including their creation, implementation, and dismantlement, and budget and staffing levels) can serve as objective indices. Given the significance of internal organizational design, organization charts and their revisions, specialized divisions, and the hierarchy of such structures are also important indices of goal priority.

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[183] *See* Biber, *supra* note 7 at 14 (goals can be "so subjective and value-laden" that "objective" measures of the goal are impossible to find).

[184] Political principals struggle to maintain control over administrative agencies because of the difficulties of the observability and measurability of these goals. *See also* John C. Coates, IV, *supra* note 23.

[185] *See* FRB ANN. REP. 1 (2020), *supra* note 42. Other figures that the regulators cite themselves, but I did not use in my analysis due to their inconsistencies are, the numbers of educational and advisory visits, quantities and types of educational material, consumer and community meetings, and speeches on consumer protection matters, etc.

The primary source by which I assessed the agencies' behavior for this Article was each agency's annual reports, which I supplemented with the speeches of the agencies' heads or senior members, congressional reports, and hearings. This Article primarily examines *internal (re)organizations* and the intensity of supervisory activities as represented by the *frequency of bank examinations* – both of which annual reports reliably provided a contemporary snapshot of each agency. Due to the unavailability of consistent quantitative data (i.e., budget, personnel, examination numbers allocated for each goal), the Article primarily presents a qualitative analysis, at times supplementing this with quantitative information. When the indices themselves were not clear, I interpreted the type of language that the agencies used to describe a certain activity (i.e., "increase," "focus on," "strengthen," and "maintain"), which offered another way of gauging agency priority. Due to the long-term nature of the study, where it was not possible to access primary sources easily, I relied on secondary reporting, such as agency-commissioned historical studies and the commentaries of academic journals.

II. Institution Building: Late 1960s to 1970s

This section offers the first case study applying the general theory of multiple-goal financial regulators presented in Part I. It focuses on the *institution building* period from the late 1960s to the 1970s, which marks the era during which Congress directed the prudential regulators to implement and enforce federal consumer laws, adding this to their original, non-consumer mandates. This section demonstrates that external constraints in the form of legislation and political oversight led the prudential regulators to engage in intra-agency coordination by creating dedicated organizational structures for the new consumer mandates, to develop a consumer compliance program, and to channel resources toward it. Prudential regulators, being carriers of history, however, initially resisted the consumer mandates because they perceived that these conflicted with their existing prudential mandate. Thus, the changes were slow and incremental.

A. Introduction of Federal Consumer Protection Legislation and Increased Political Control

The 1960s and 1970s saw an almost nonstop addition of consumer protection laws in the field of finance. The 1960s civil rights movements and the consumerism of the 1970s brought sea

change to various areas of social law, including consumer protection laws.[186] The prudential regulators became responsible for administering the federal consumer protection laws, a new role that expanded significantly over the decade.

The Truth in Lending Act of 1968 (TILA) was the first federal law to regulate consumer credit and impose on the federal regulators – most significantly the Fed – the responsibility for implementing the law.[187] TILA, enacted against the background of a growing consumer credit industry and a public ignorant to the workings of consumer credit, required meaningful disclosure of the terms and conditions of all consumer credit transactions.[188] The Equal Credit Opportunity Act of 1974 (ECOA) responded to evidence that bank policies had discriminated against women and certain minority groups. Other laws, like the Community Reinvestment Act of 1977 (CRA), and the Home Mortgage Disclosure Act of 1975 (HMDA), encouraged lenders to help meet the credit needs of their local communities.[189] These are just a few representative consumer laws that Congress enacted in the 1960s and 1970s that made the prudential regulators responsible for implementing.[190]

In addition to giving prudential regulators the legal authority to administer the laws, Congress used tight control methods to ensure that they implemented them properly. The oversight mechanisms that it employed during this period to increase consumer protection actions worked as follows: first, the legislation mandated periodic reporting to Congress on the implementation of consumer protection mechanisms.[191] To this end, the prudential regulators all

[186] The Vietnam War became a catalyst for discontent with many national institutions, including government itself. This activism fed the civil rights movement, with its call for greater social and economic justice. *See* Benjamin T. Harrison, *Impact of the Vietnam War on the Civil Rights Movement in the Midsixties*, 19 STUD. IN CONFLICT & TERRORISM 261 (1996).

[187] Griffith L. Garwood, *A Look at the Truth in Lending - Five Years After*, 14 SANTA CLARA L. REV. 491, 491-92 (1974).

[188] *Id.* at 491.

[189] EUGENE N. WHITE, THE COMPTROLLER AND THE TRANSFORMATION OF AMERICAN BANKING 1960–1990, 40 (1992).

[190] U.S. GEN. ACCOUNTABILITY OFF., GGD-81-13, EXAMINATIONS OF FINANCIAL INSTITUTIONS DO NOT ASSURE COMPLIANCE WITH CONSUMER CREDIT LAWS 44 (1981) [hereinafter "GAO 1981"] (listing thirteen titles of consumer protection legislation enacted between the period of 1968 to 1978, which the prudential regulators were responsible for their implementation). The legislation also mandated other federal agencies, such as the FTC, FHA, FHLBB, and the Department of Justice, to implement consumer finance laws.

[191] Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146. In addition to its regular Annual Report (on general matters), the TILA required the Fed to

incorporated in their annual reports their responsibilities in administering the laws.[192] Second, congressional hearings summoning the regulators increased substantially. Between the 1960s and the 1970s, the Fed saw a tenfold increase in congressional appearances of the Chairman or other Board members before various Congressional committees.[193] In addition to formal appearances before Congress, the Fed also had frequent informal meetings with Congressional groups or individual members of Congress.[194] Congress also frequently summoned other agency heads as it checked on the performance of consumer protection laws.

Third, between 1977 and 1983,[195] frequent GAO reports

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submit a report to Congress titled *Annual Report to Congress on Truth in Lending for the Year 1969.*

[192] *See, e.g.*, FTC ANN. REP. (1969). The regulators either gave separate reports on consumer protection laws or incorporated this aspect of their functions in annual reports that also presented matters such as monetary policies.

[193] Arthur F. Burns, Chair of the Fed. Rsrv. Bd., Trends in Banking Legislation: Outline of Speech to Reserve Bankers Phoenix, Arizona, 1-2 (Apr. 12, 1977) (reporting the following: (1) In 1960, the Chairman of the Federal Reserve testified on four occasions before three Congressional committees, and one other Board member testified once (total: 5 occasions; 3 different committees); (2) In 1961, the Chairman testified three times before two committees, and no other Board members testified at all; (3) In 1975, the Chairman testified 18 times before 8 committees, and other Board members testified 26 times before 9 committees (Total: 44 occasions, 9 different committees); (4) In 1976, the Chairman testified 14 times before 6 committees and other Board members testified 25 times before 9 committees (Total: 39 occasions; 12 different committees).

[194] *See* Arthur F. Burns, *supra* note 193 at 2 ("We are asked each year to comment upon literally hundreds of letters received by members of Congress from their constituents. In addition, we receive dozens of requests from the Banking Committees, and other Committees whose jurisdiction may touch aspects of our work, for reports on proposed legislation, for legislative drafting assistance, for comment upon regulatory issues of current significance and for the conduct of studies or research."). Consumer legislation is not the sole factor for increased congressional oversight since Chairman Burns also mentions innovation in the banking industry and failures of large banks as additional contributing factors. However, Burns does comment that "growing interest in 'consumerism' has given rise to many legislative proposals relating to the credit-granting process" as one factor of the Federal Reserve's increased legislative work. *See id.*

[195] The surge of GAO reports on consumer functions spans from 1977 to 1983, which is roughly a decade after Congress enacted the first consumer protection law, and a few years after the "wave" of consumer protection legislation. It seems that the GAO reports were a "police patrol type" of control (a control mechanism through which political principals keep agencies in line). A GAO report, as a method of administrative control by political principals is, by nature, retrospective and time-lagging. It evaluates *past* activities of agencies. By the time the report is published, the original coalition might have changed, and as a result, the report might be limited in its effectiveness as a control tool. It is

extracted very specific information regarding the agencies' consumer focused efforts (i.e., resources, hiring and training of consumer law examiners,[196] and complaint handling procedures),[197] which put pressure on the agencies.[198] These reports were generally critical of the agencies' lackluster implementation of consumer protection laws. Fourth, congressionally- mandated commissions continued to increase the pressure on the agencies. In 1968, Congress created the National Commission on Consumer Finance (NCCF),[199] which produced its final report at the year-end of 1972. Citing the lack of agencies' efforts and resources regarding consumer laws,[200] the report concluded that the prudential regulators should no longer have jurisdiction over consumer protection matters and recommended that Congress create a separate agency focused on consumer protection.[201] Fifth, agency heads also cited "committee reports" recommending that agencies play a greater role in consumer matters.[202]

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important to bear in mind that GAO reports only reflect *past* Congressional control efforts (and not necessarily those in place when the report is published).

[196] *See*, *e.g.*, GAO 1981, *supra* note 190 at 18-22.

[197] U.S. GEN. ACCOUNTABILITY OFF., GAO/GGD-83-31, FINANCIAL INSTITUTION REGULATORY AGENCIES CAN MAKE BETTER USE OF CONSUMER COMPLAINT INFORMATION (1983) [hereinafter "GAO 1983"].

[198] *See* FDIC ANN. REP. 176 (1976). A few reports were dedicated solely to consumer protection issues. *See*, *e.g.*, GAO 1981, *supra* note 190 at 18-22; U.S. GEN. ACCOUNTABILITY. OFF., GAO/GGO-83-3, CREDIT INSURANCE DISCLOSURE PROVISIONS OF THE TRUTH IN LENDING ACT CONSISTENTLY ENFORCED EXCEPT WHEN DECISIONS APPEALED (1982); GAO 1983, *supra* note 197); *see also* U.S. GEN. ACCOUNTABILITY OFF., OCG-77-1, FEDERAL SUPERVISION OF STATE AND NATIONAL BANKS (1977) (reporting on general supervision matters but also heavily comments on consumer protection aspects) [hereinafter "GAO 1977"].

[199] Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146.

[200] The banking agencies "appear to have adequate resources and determination to satisfy their primary responsibilities in guaranteeing a safe and sound banking system." However, "the matter of consumer protection appears largely to be neglected at the Federal level." The reports noted that the agencies did institute examination procedures to detect TILA violations, but "those violations are only the 'tip of the iceberg' in the sea of consumer protection." *National Commission on Consumer Finance* RICHARD NIXON PRESIDENTIAL LIBR. & MUSEUM, https://www.nixonlibrary.gov/finding-aids/fg-169-national-commission-consumer-finance-white-house-central- files-subject-files [https://perma.cc/B2KR-252K] (last visited Nov. 15, 2023).

[201] The name of the proposed agency was the "Federal Consumer Protection Agency" which was to have jurisdiction over financial institutions on consumer matters. *See* ROSS M. ROBERTSON & JESSE H. STILLER, THE COMPTROLLER AND BANK SUPERVISION: A HISTORICAL APPRAISAL (1995). The hearings on the report were held in 1973. *See Nat'l Comm'n on Consumer Fin.: Hearings Before the S. Subcomm. on Consumer Credit of the Comm. on Banking, Hous., and Urb. Affs.,* 93rd Cong., 1st Session (1973).

[202] FDIC ANN. REP. 178 (1976).

Consumer activism was also a vital force during this period.[203] Leading the call for these political reforms during the 1960s and '70s was Ralph Nader, America's prominent consumer advocate of the time.[204] His activities and investigations during the consumer movement spearheaded several reforms well beyond the field of banking.[205] Nader, supportive banking specialists, and organized consumer interest groups such as the Consumer Federation of America, joined hands to push through a wave of banking reforms, then monitored their implementation by the prudential regulators.[206] The consumer activists and interest groups forcefully pushed their agenda and garnered public support through appearances at congressional hearings,[207] research, and media appearances.[208]

What about the presidents during this period? Although some of the literature points to the fact that the presidents during this period contributed to the expansion of consumer mandates, it appears that their influence upon regulatory agencies was limited.

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[203] Several national consumer organizations were formed during the years of the consumer movement, including the Consumers' Research (1929), Consumers' Union (1936), Consumers International (1960), Consumer Federation of America (1967), and Public Citizen (1971). *See* CONSUMERS' RSCH., https://consumersresearch.org/ [https://perma.cc/SHC9-8Z3E] (last visited Sep. 22, 2023); *Consumers' Union*, OXFORD REFERENCE, https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095634397 [https://perma.cc/87J7-FRZV] (last visited Sep. 22, 2023); *Consumers International 60th Anniversary*, CONSUMERS INT'L, https://www.consumersinternational.org/who-we-are/60-years-of-impact/ [https://perma.cc/YZ4G-TFLU] (last visited Sep. 22, 2023); *About Us*, PUB. CITIZEN, https://www.citizen.org/about/ [https://perma.cc/2DK5-38PV] (last visited Sep. 22, 2023).

[204] *Ralph Nader and the Consumer Movement*, DIGIT. HIST., https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtid=2&psid=3351 [https://perma.cc/5QXA-29AX] (last visited Sep. 22, 2023).

[205] David Bollier, *Chapter 2 Nurturing the "Consumer-Side" Economy*, NADER, https://nader.org/2004/01/07/chapter-2-nurturing-the-consumer-side-economy/ [https://perma.cc/PU88-LVFF] (last visited Sep. 22, 2023).

[206] David Bollier, *Chapter 5 Corporate Abuses, Consumer Power,* NADER, https://nader.org/2004/01/04/chapter-5- corporate-abuses-consumer-power/ [https://perma.cc/MTQ9-57VA] (last visited Nov. 15, 2020); *see, e.g.*, David E. Rosenbaum, *Consumer Aides List Debt Deceit,* N.Y. TIMES (June 23, 1970), https://www.nytimes.com/1970/06/23/archives/consumer-aides-list-debt-deceit-nader-and-others-disclose.html [https://perma.cc/BH6C-FSB4].

[207] Witnesses called for the hearings for the National Commission on Consumer Finance, for example, shows representatives from many consumer advocacy groups, including Ralph Nader of the Center for Study of Responsive Law and William Willier of the National Consumer Law Center. *See* CONSUMER CREDIT IN THE UNITED STATES: REPORT OF THE NATIONAL COMMISSION ON CONSUMER FINANCE 267, 268 (1972).

[208] *See, e.g.*, Clinton L. Warne, *The Consumer Movement and the Labor Movement*, 7 J. ECON. ISSUES 307 (1973).

Presidents Johnson (1963-1969) and Nixon (1969-1974)[209] "at least gave the appearance of being proconsumer" and took part in activities such as selecting members of the NCCF. Other reports show that Presidents Ford (1974- 1977)[210] and Carter (1977-1981)[211] also appear to show (limited) support of the expansion of consumer protection during this period.[212] However, the agencies during this period rarely attribute their pro-consumer regulatory actions to the Presidents.[213]

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[209] *See* Terry M. Moe, *supra* note 113 at 494 ("Nixon, like most every other politician in the country, was acutely aware of the political value of consumerism. Like Kennedy and Johnson, he would offer his own packages of consumer legislation, have an office of consumer affairs in the White House, and at least give the appearance of being proconsumer rather than let Nader back him into a corner.").

[210] Ford claimed that he recognized "the legitimate public and Congressional concerns [to] be more responsive to the interests of consumers." Yet, Ford did not support the creation of a separate consumer protection agency which would add to the size of the government. *See* Letter from Gerald Ford, President, United States of America, to Congressional Committee Chairmen on Consumer Protection (Apr. 17, 1975) (on file with American Presidency Project). Ford's efforts on consumer affairs include signing the legislative bill that established the Consumer Product Safety Commission (established in 1974), signing the Truth in Leasing Act, and signing the Equal Credit Opportunity Act. Ford also directed all Federal departments and agencies to develop "Consumer Representation Plans" based on the "recognition of the need for greater consumer protection, as well as consumer input into the decision-making processes of agencies." *President Ford '76 Fact Book, Consumer Affairs,* GERALD R. FORD PRESIDENTIAL LIBR. & MUSEUM https://www.fordlibrarymuseum.gov/library/document/factbook/consumer.htm [https://perma.cc/GA88-Q6HJ] (last visited Nov. 15, 2023).

[211] Carter's support for consumer affairs included his agreement to establish the Agency for Consumer Advocacy, which was intended to expand and accelerate the consumer movement, without increasing the size or operations of the government; it would primarily gather resources scattered throughout various government agencies. JIMMY CARTER, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, 1-2 (Apr. 6, 1977).

[212] However, their support was half-hearted as they also supported the deregulatory movement that had started in the mid-1970s.

[213] Both Ford and Carter's administrations coincided with the beginning of deregulation in the United States. The economy was slowing, and the public sentiment began to support the free market and a smaller government. *See* Diya Berger, *A Tale of Two Movements: Consumer Protection in the U.S. from 1969 to 2010,* CUREJ: COLL. UNDERGRAD. RSCH. ELECTRONIC J., UNIV. PA. 52-58 (2013), http://repository.upenn.edu/curej/168 [https://perma.cc/7J3M-AMXQ]. A word search of annual reports of the Fed, the OCC, and the FDIC revealed that almost no reports attributed consumer initiatives to the Presidents between the years of 1967 to 1980. Some reports and speeches did mention that President Ford signed a consumer law when mentioning consumer protection legislation. *See, e.g.*, FRB ANN. REP. 269 (1974); FRB ANN. REP. 78 (1975). The lack of presidential influence during this period is striking, especially when compared to later periods (notably the Clinton era) when agencies decisively present their actions as direct responses to presidential initiatives. This period coincides with what legal scholars and political scientists recognize as the Congressional

B. Observed Agency Behavior

1. The Federal Reserve: Reluctantly Accepting Consumer Goals

a. Initial Reluctance Citing Lack of Expertise

The primary role of the Fed during this period of the explosion of consumer laws was to draft regulations to implement the new legislation. However, the governors of the Fed argued that the agency, with monetary policy as its primary function, lacked the expertise to deal with the consumer mandates, and that any attempt to do so would detract from its primary monetary function.

This position is evident from multiple statements and speeches of Fed governors during this period. For example, when the TILA passed in 1968, the Fed's Vice Chairman, James L. Robertson, seemed almost exasperated when stating "[t]he assignment [of the TILA] was particularly challenging, since the Federal Reserve System has no special qualifications as a consumer protection agency"[214] and argued that Congress should "vest consumer protection functions in some agency better suited to the job than is the central bank."[215] At another venue, he repeated his sentiments, stating that "the writing of this particular [TILA] Regulation did not turn the Federal Reserve Board into this country's

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dominance period (or interest group dominance period), so presidential influence might have been limited. This hypothesis is consistent with Kagan's finding that the relationship between presidents and the bureaucracy during this period was rocky. *See* Kagan, *supra* note 128 at 2272-73, 2275-76, n.113 ("Nixon entered office to discover a bureaucracy he deemed both hostile to his policies and impervious to his control.").

[214] *Hearing Before the Subcomm. on Consumer Affs. of the H. Comm. on Banking and Currency*, 91st Cong. 11-12 (1969) (statement of James L. Robertson, Vice Chairman, Bd. of Governors of the Fed. Rsrv. Sys.); *see also* KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 194 (2011) ("Robertson further argued that having to enforce TILA would distract the Board from making monetary policy.").

[215] *Id.* Robertson also give similar statements in other speeches. *See, e.g.*, *Hearing Before the Subcomm. on Fin. Insts. of the S. Comm. on Banking and Currency*, 91st Cong. 2 (1969) (statement of James L. Robertson, Vice Chairman of the Bd. of Governors of the Fed. Rsrv. Sys.) ("As introduced, S. 823 would direct the Board to prescribe implementing regulations. This is a responsibility the Board is not prepared to assume. The functions vested in the Board by the Truth in Lending Act should not be taken as a precedent for assigning to the Board wide- ranging duties in the general area of consumer protection. Such an assignment would be inconsistent with effective performance of our primary duties in the field of monetary policy.").

expert on consumer affairs."[216] He insisted that the Fed's "primary job remains that of formulating and executing monetary policy as the central bank of the nation."[217]

The Fed's staff shared this reluctance and uncertainty. According to one observer, "[w]hen the Congress handed the Fed the Truth in Lending Act for implementation there were those at the Board, high, low, and in-between, who wondered whether this was the right work for a central bank to be doing."[218] On the staff level, the diversity of the work, the altered nature of the workload, and the staff's job of reconciling prudential concerns and fair access to credit were the reasons for such reluctance.[219]

The legislation that followed the TILA, aimed at pursuing "social goals," sparked stronger opposition.[220] Commenting on the HMDA and the ECOA, the Fed staff reflected that, "the Congress has added a ticklish societal twist to the Board's responsibilities in implementing consumer credit protection laws."[221] Regarding the ECOA, Fed Governor Jeffery M. Bucher expressed strong reservations to the Act based on his belief that it would be extremely difficult to assess whether any given conduct of a creditor is discriminatory.[222] Also, in 1977, Fed Governor Arthur F. Burns

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[216] James L. Robertson, Vice Chairman of the Bd. of Governors of the Fed. Rsrv. Sys., Fed. Rsrv. Sys., Remarks before the Nat'l Installment Credit Conf. of the Am. Bankers Assoc. S.F., Cal. 9-10 (1969).
[217] *Id.* Another Fed member, Andrew F. Brimmer, echoed Robertson's statements. Brimmer stated, "assignment to the Board of wide-ranging duties in the general area of consumer protection would be inconsistent with effective performance of our primary duties in the field of monetary policy. . . . [R]esponsibility for implementing it should be vested in an agency more familiar with consumer problems and more expert in coping with them." *Hearing Before the Subcomm. on Fin. Inst. of the S. Comm. on Banking and Currency*, 91st Cong. 9 (1969) (statement of Andrew F. Brimmer, Member of the Bd. of Governors of the Fed. Rsrv. Sys.).
[218] Frank O'Brien, *Working for the Fed in the 1970s, in* WORKING AT THE BOARD 1930S–1970S 30 (1989).
[219] *Id.* at 31 ("The Board's consumer affairs staff had to master the "ins" and "outs" of each of this diverse collection of laws and businesses covered if it was to be able to write regulations that tried to reconcile the goals of nondiscriminatory and fair access to, and use of, credit by the consumer with the lender's right to distinguish among those who are, and those who are not, creditworthy"); *id.* at 29 ("Consumer credit protection . . . greatly altered the staff's and the Board's work load[sic].").
[220] *See id.* at 31. The TILA in contrast was primarily a disclosure act aimed at solving information asymmetries.
[221] *Id.*
[222] *Hearing Before the Subcomm. on Consumer Affs. of the H. Comm. on Banking and Currency*, 93d Cong. 4 (1974) (statement of Jeffrey M. Bucher, Member, Bd. of Governors of the Fed. Rsrv. Sys.) (contrasting and criticizing the Equal Credit Opportunity Act compared to the TILA: "By contrast, the Equal Credit

expressed his opposition to the Community Reinvestment Act, stating that "[i]n an unprecedented reach beyond consumer credit protection per se CRA required all federal banking supervisors to "consider," . . . whether the banks "[met] the credit needs of its community (consistent with sound banking), including low income neighborhoods."[223]

b. Institution Building for Consumer Functions (Mid- to Late 1970s)

Contrary to the wishes of Vice Chairman Robertson who, in the late 1960s, insisted that the consumer function of the Fed remain temporary, by the mid-1970s, the Fed became resigned to its consumer mandate. A series of internal organizational changes solidifying consumer functions came into effect in the late 1970s, showing acceptance of consumer goals by the Fed. The repeated organizational name-changes (which came with changes in authority) during this period closely mirror the Fed's expanding legislative mandates regarding consumer affairs, and show that the Fed was purposefully changing its internal mechanisms as a response to congressional constraints.

In August 1974, the Fed created the "Office of Saver and Consumer Affairs," charged with "the responsibility of assuring that the interests of savers and consumers are given adequate and specific attention in Board decisions."[224] By 1977, it upgraded this

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Opportunity Act seeks to eliminate from creditor behavior certain considerations that are judged to be improper. These improper considerations are often subjective and are, in an economic sense, totally irrelevant to the credit decision. We seriously question whether sanctions forbidding the use of such considerations lend themselves to specific rules. Telling creditors how to disclose their charges is straightforward in comparison to categorizing as permissible or discriminatory all of the possible types of inquiries involved in a credit application. It would appear to be extremely difficult to assess whether a given conduct is discriminatory without having a specific context in which to measure the intent of the participating parties.").

[223] O'Brien, *supra* note 218 at 31.

[224] Jeffrey M. Bucher, Member of the Bd. of Governors of the Fed. Rsrv. Sys., The Expanding Role of the Federal Reserve in Consumer Credit, Remarks before the Cal. Bankers Assoc., Consumer Lending Outlook Conf., L.A., Cal. 8 (1975); *see also Hearing Before the Subcomm. on Gov't Operations of the H. Comm. on Consumer and Monetary Affs*., 94th Cong. 6 (1975) (statement of Arthur F. Burns, Chairman, Bd. of Governors of the Fed. Rsrv. Sys.) ("In 1968, the Truth in Lending Act directed the Board to prescribe regulations for the protection of consumers in their credit transactions. Last year [1974], in anticipation of additional consumer responsibilities, the Board established an Office of Saver and Consumer Affairs. This new division, reporting directly to the Board, coordinates the System's responsibilities relating to savers and consumers.").

office to the "Division of Consumer Affairs."[225] Following the passage of the CRA in 1978, the Fed reorganized the Division of Consumer Affairs to become the Division of Consumer and Community Affairs (DCCA) in 1979.[226] The annual report that year reports that the Board "reorganized and strengthened its division of DCCA to deal effectively with the new responsibilities assigned to it by Congress."[227] The DCCA endured organizational changes over the decades and exists to this day, even after the creation of the CFPB.[228] To inform the Fed of consumer policy, in 1976 the Fed also created a Consumer Advisory Council which included consumer representatives as members.[229] This council remained part of the Fed until Congress created the CFPB, at which point the council moved to that agency.[230]

Some of these organizational changes were mandated by law. For example, the FTC Improvement Act of 1975 required each of the prudential regulators to establish a separate division of consumer affairs to receive and take appropriate action on complaints alleging unfair or deceptive acts or practices by institutions subject to their supervision.[231]

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[225] Bd. of Governors of the Fed. Rsrv. Sys., *Complying with Consumer Credit Regulations: A Challenge,* 63 FED. RSRV. BULL. 769, 770 (1977) [hereinafter "FRB Bull. 1977"]. In this separate division, the Fed handled new rulemaking responsibilities and issued interpretations regarding the cascading consumer credit legislation.

[226] *See* O'Brien, *supra* note 218 at 31 (This change was made "in a response recognizing the extraordinary demands of the CRA law.").

[227] 66 FRB ANN. REP. 216 (1979).

[228] The Dodd-Frank Act left some consumer and community functions with the Fed. *See* 108 FRB ANN. REP. 86 (2021). The Fed's website still notes that "the Board's Division of Consumer and Community Affairs conducts research not only to inform the Board's regulatory and policy development functions but also to support its consumer outreach and community development functions." *Meet the Economists*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/econres/ccastaff.htm [https://perma.cc/82MW-5J4X] (last visited Sept. 15, 2023).

[229] 1 FRB ANN. REP. 13-14 (1976). In 1975, the Fed recommended to Congress to reorganize the TILA advisory committee to become the Consumer Advisory Council to reflect the increased responsibilities of the Fed in consumer affairs. 62 FRB ANN. REP. 318 (1975).

[230] 98 FRB ANN. REP. 129 (2011); Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1974 (2010).

[231] Julie L. Williams & Michael S. Bylsma, *On the Same Page: Federal Banking* Agency *Enforcement of the FTC Act to Address Unfair and Deceptive Practices by Banks*, 58 BUS. L. 1243, 1246-47 (2003). Williams argues that Congress, to some degree dictated the organizational structure of federal banking agencies. While the FTC Improvement Act of 1975 mandated only the "complaint functions" at federal banking agencies (and not other aspects such as rulemaking, supervision, or enforcement), this legislation seems significant because after this legislation, (i) separate complaint functions became a fixture in all agencies, whether in smaller offices, or as a part of a larger consumer related

c. Developing Dedicated Consumer Examinations and Training Programs for Examiners (Late 1970s)

The Fed recognized that due to the quantity and complexity of consumer-focused requirements, it needed to separate consumer compliance examinations from safety and soundness examinations, and to create a dedicated specialized workforce for this function.[232]

In 1979, the Fed formalized the program and made a specialized consumer compliance examination for consumer laws permanent after conducting and fortifying a pilot program that started in 1976.[233] Consumer compliance examinations focus on fair lending and compliance with other consumer protection laws. They differ from safety and soundness examinations, which focus on prudential aspects, but they follow the model of periodic and onsite examination that the safety and soundness examinations use.[234]

The Fed also developed a unique training program for bank examiners, and allocated resources – a larger budget and additional personnel – for compliance examinations.[235] Whenever possible, it drew these examiners from the current ranks of safety and soundness examinations,[236] and sent them to "special schools" with a training curriculum for consumer compliance.[237] The Fed also authorized the appointment of community affairs officers at the Board and at all

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division. Due to this, (ii) the complaint-receiving function served as a nucleus for a wider variety of consumer protection-related functions in the future (even during those periods when consumer protection became less of a priority).

[232] *See generally* FRB Bull. 1997, *supra* note 225 at 771 (on the development of the consumer compliance examination).

[233] From 1976, the Fed conducted separate consumer examinations in some of its Reserve Banks and a pilot program for specialized examination for consumer protection laws, and in 1977 "expanded and strengthened" the program. FED. RSRV. BD. RULING: NOTICE, *Federal Reserve Board Announces Consumer Affairs and Civil Rights Compliance Program*, 1979 WL 484666 (1979) (In 1977, the Fed announced an expanded and strengthened program to improve compliance by member banks with consumer protection laws and regulations for which Congress has assigned responsibilities to the Board).

[234] John R. Walter, *The Fair Lending Laws and Their Enforcement*, 81 FED. RSRV. BANK RICH. ECON. Q. 61, 70 (Fall 1995).

[235] GAO 1981, *supra* note 190 at 73-74 (explaining the process by which the Fed increased resources such as an increased budget and additional personnel for consumer protection function).

[236] FRB Bull. 1997, *supra* note 225 at 769, 772.

[237] *Id.* at 771; *see also* 63 FED. RSRV. BANK OF N.Y. ANN. REP. 27 (1977) (reporting that to help meet its new responsibilities in the enforcement of consumer protection laws and regulations the Board provided extensive educational and consultation services to member banks which was coupled with special consumer compliance examinations to uncover any violations of consumer protection laws).

Federal Reserve Banks.[238]

2. OCC: Changed Leadership Overcomes Initial Skepticism

a. Disagreeing with the Consumer Protection Interventions

The National Banking Act of 1864 (NBA), gave the OCC the primary mission of ensuring the safety and soundness of the national banking system.[239] Based on this primary mission, some commentators viewed it as "perfectly appropriate, and even statutorily required," for the OCC to "promote the interests of national banks over other competing interests."[240] Like the Fed, the OCC also initially resisted congressional consumer mandates, which shows the path dependent nature of the agency behavior, rooted in the agency's primary mission and the beliefs of its leaders. The OCC's reluctance to implement consumer protection laws robustly was deeply rooted in its leaders' ideological beliefs. As a result, during this period, the OCC had acquired "an unfortunate reputation for being indifferent to consumer issues."[241]

Then Comptroller of the Currency, William B. Camp,[242] was "somewhat skeptical of its necessity of the TILA," nevertheless, he supported the Act based on the belief that the OCC's cooperation with Congress on consumer matters could lead to Congress's support for the expansion of bank powers.[243] One of Camp's chief concerns, however, was that the TILA disclosures might conflict with the confidential OCC bank examination reports.[244] Another ground for opposition for consumer protection laws rose from a general disagreement on consumer activism and government

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[238] O'Brien, *supra* note 218 at 31.
[239] Lawrence G. Baxter, *"Capture" in Financial Regulation: Can We Channel it Toward the Common Good?*, 21 CORNELL J.L. & PUB. POL'Y 175, 179 (2011) (The NBA "was enacted specifically to promote the development of a national banking system for the sake of the public interest . . . Justice Strong famously declared in a case favoring national banks over state banks, 'National banks have been National favorites.'").
[240] Robertson, *supra* note 201 at 209.
[241] *Id.*
[242] *See Previous Comptrollers of the Currency*, OCC, https://www.occ.treas.gov/about/who-we-are/history/previous-comptrollers/index-previous-comptrollers.html [https://perma.cc/3VK2-AWXW].
[243] Robertson, *supra* note 201 at 209.
[244] *Id.*

intervention.[245]

Similarly, First Deputy Comptroller Justin J. Watson stated in a congressional hearing that "[t]he Comptroller's Office does not believe that Government regulation is necessarily the best way to meet the needs of the banking public," but rather, the OCC believes that in many instances, "the simple injection of competition so that the forces of the marketplace automatically take care of many of the problems" is "far more effective."[246]

b. Institution Building: Centralization and Specialization (Mid- to Late 1970s)

From the mid-1970s, the OCC started building institutions for consumer functions through a series of centralization and specialization of internal organizations, demonstrating its growing recognition of the priority of consumer protection matters. These changes came in response to external pressure as well as changes in the leadership of the agency.

The first significant changes came with the appointment of Comptroller James E. Smith,[247] who contended that the consumer advocate's criticism was unjust and defended the banks, but nevertheless made clear that the OCC was committed to enforcing the laws.[248] Smith announced the creation of the Consumer Affairs Division in March 1974, which consolidated all of the functions of consumer protection (which had previously been scattered), and reported directly to the Comptroller.[249]

Contemporary commentators found that Comptroller John G. Heimann,[250] who had long been interested in promoting housing, turned out to be a "sincere and effective ally" for consumer activists.[251] In 1979, for example, Comptroller Heimann emphasized

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[245] For example, First Deputy Comptroller Justin J. Watson remarked that "[c]onsumer activists are running and around the country literally trying to tear down banks and business. Those activists have, for the most part, maintained complete silence on the loss of purchasing power experienced by the small saver who, by the way, also is a consumer. It seems to me that those activities define a consumer as a borrower and a saver as a capitalist." OCC ANN. REP. 282 (1974).

[246] OCC ANN. REP. 249 (1971) (quoting the remarks of Justin T. Watson, First Deputy Comptroller of the Currency, to the Nat. Comm. on Consumer Fin., June 23, 1971).

[247] *See* Previous Comptrollers of the Currency, *supra* note 242.

[248] Robertson, *supra* note 201 at 209.

[249] *Id.*; Eugene N. White, *supra* note 189 at 40.

[250] *See* Previous Comptrollers of the Currency, *supra* note 242.

[251] Robertson, *supra* note 201 at 211.

the OCC's new responsibilities under consumer law in speeches to bankers, expanded compliance examinations, and generally "elevated the prestige of consumer protection goals."[252] In 1978-1979, under Heimann's leadership, the OCC underwent a major reorganization and established the "The Office of Customer and Community Programs," headed by the Deputy Comptroller for Customer and Community Programs.[253] The Annual Report of 1979 states that "[d]uring 1979, the office undertook a number of efforts to expand and substantively improve the OCC's activities in consumer affairs, community investment and civil rights."[254]

Having distinct, specialized, and centralized divisions, as well as direct lines of report to the Comptroller showed the OCC's dedication to consumer matters during this period. However, this came at a cost; as one commentator observed, "compliance with consumer protection and community development laws while continuing to safeguard national bank safety and soundness became a major organizational challenge" for the OCC.[255]

c. Separate Compliance Examinations Create Major Organizational Challenges (Mid- to Late 1970s)

The OCC had held separate consumer compliance examinations for national banks every 12 months, starting in 1976.[256] It also formulated an intensive consumer training program for bank examiners, and developed manuals and policy guidelines for consumer protection procedures.[257] The number of consumer

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[252] *Id.*
[253] OCC ANN. REP. 31-34 (1979) (Heimann also established a "Community Development Division" as an addition to and separate from several other consumer-related divisions); *see also* Eugene N. White, *supra* note 189 at 40 (The Office of Customer and Community Programs includes the position of Special Assistant for Civil Rights as well as three divisions: Customer, Community and Fair Lending Examinations, Community Development, and Customer Programs).
[254] OCC ANN. REP. 31 (1979) (statement of John G. Heimann, Comptroller of the Currency, Jan. 26, 1979).
[255] OFF. OF THE COMPTROLLER OF THE CURRENCY, A SHORT HISTORY 25 (2011); Eugene N. White, *supra* note 189 at 41; OCC ANN. REP. 31-33 (1979).
[256] Eugene N. White, *supra* note 189 at 40. OCC Annual reports from 1977 to 1982 report separate consumer compliance examination numbers. *See* OCC ANN. REPS. (1977-1980).
[257] *See* Eugene N. White, *supra* note 189 at 40; Robertson, *supra* note 201 at 209; OCC ANN. REP. 319 (1979) (at a Congressional hearing an OCC official stated, "[t]o assure the development of a highly skilled and committed corps of examiners in the consumer protection" area the OCC "recently established a consumer examiner career path which provides for specialization in these areas by both assistant and commissioned national bank examiners, while still

examinations, which were offered separately from commercial examinations, doubled during 1978-1980, while the number of commercial examinations rose only slightly during the same period.[258]

The focus on implementing new consumer laws placed a strain on the OCC and created a conflict – especially in terms of competing resources – with its existing prudential responsibilities. Comptroller Heimann, although still an ardent advocate of consumer matters, stated in a congressional hearing that examiners required additional time to assess each banks' compliance with consumer laws, and the combination of that with the personnel ceilings (that President Reagan had imposed) meant that the OCC is "simply unable to conduct full scale, on-site commercial examinations of national banks as frequently as in the past."[259] Another commentator noted that the application of the new consumer regulations was "complicated and legalistic" and costly to monitor, as was the establishment of the procedures and the education of the examiners.[260]

3. FDIC: The Reluctant Agent

a. Reluctant Slow Starter

The FDIC, which the Banking Act of 1933 created with the goal of restoring confidence in the banking system, has the primary mission of protecting depositors in the nation's banks and restricting banks' risk, to limit the exposure of the insurance system by promoting safe and sound banking practices.[261] The FDIC was a slow starter and a reluctant, unenthusiastic agent when it came to implementing consumer protection laws.

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allowing career progression and maintenance of proficiency in commercial examining.").

[258] Eugene N. White, *supra* note 189 at 43 ("The number of consumer examinations rose quickly from 1,767 in 1978 to 3,389 in 1980, while commercial examinations climbed only from 2,432 to 3,973."). *See* OCC ANN. REPS. (1977- 1980).

[259] OCC ANN. REP. 272-73 (1979) (statement of John G. Heimann, Comptroller of the Currency).

[260] Eugene N. White, *supra* note 189 at 21.

[261] FED. DEPOSIT INS. CORP., THE FIRST FIFTY YEARS: A HISTORY OF THE FDIC 1933–1983 133 (1984); FDIC ANN. REP. 3 (1980); GAO 1977, *supra* note 198 at 111-42 ("Accordingly, the FDIC 'problem bank' definitions are based on those banks which pose the greatest degree of financial risk to the Corporation, with fine-tuning of the designations into various gradations of risk.").

The first hints that the FDIC began to acknowledge its authority regarding consumer laws appear in its 1971 annual report.[262] However, even in 1976, Chairman Robert E. Barnett[263] was still critical about the FDIC's administration of consumer legislation for several reasons. First, he disagreed about the substance of the law. Commenting on the Real Estate Settlement Procedures Act of 1974 (RESPA), he found the law "too elaborate, too complex and too cumbersome" and that Congress "no longer pays any attention" to the bankers who opposed to the legislation.[264] Regarding the TILA, Barnett argued that it is "difficult to show the actual benefits to consumers from such legislation."

Barnett was also ambivalent about the FDIC's authority over consumer matters and believed that these new roles were in conflict with its traditional prudential role. He commented that, "despite comments by Congressional Committees that we should do more in protecting consumers, we have not been given this specific legislative mandate nor, we must confess, have we specifically sought it."[265] Barnett viewed the "the crux of the difficulties" in bank regulatory agencies to enforce the consumer laws lies in the "implicit belief that the bank regulatory agencies should become consumer advocates vis-à-vis the banks those agencies regulate."[266] Most strikingly, after raising a number of issues, he came to the conclusion that the FDIC's new role that the legislation had given it "conflicts directly with the traditional role and function of the Corporation as a regulator of the safety and soundness of the banks."[267]

Barnett's statements show that, given the FDIC's traditional role, not only were there technical difficulties in implementing consumer laws, but there was also a more fundamental and ideological rejection of consumer legislation.

b. Institution Building: Organizational Changes Show Specialization and Centralization (Mid- to Late 1970s)

The FDIC, although a slow starter, followed the other

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[262] FDIC ANN. REP. 18 (1971) (the report lists the consumer protection laws as a way of acknowledging enforcement responsibility thereunder).
[263] *See List of Chairman of the FDIC*, FED. DEPOSIT INS. CORP. https://www.fdic.gov/about/history/chairmen.html [https://perma.cc/9R7B-6LKH] (last visited Nov. 15, 2023).
[264] FDIC ANN. REP. 183 (1976).
[265] *Id.* at 182.
[266] *Id.* at 177.
[267] *Id.* at 184.

prudential regulators in adopting specialization and centralization strategies in its internal structures so as to accept and enhance the significance of consumer functions. After first reporting in 1973 that TILA implementation was a part of general banking supervision,[268] in April 1975, the FDIC created the "Office of Bank Customer Affairs,"[269] which was separate from and independent of the Division of Bank Supervision, and "serve[d] as a focal point within the FDIC for protecting the legitimate interests of bank customers."[270] To ensure independence, this new Office had direct reporting lines to the Board of Directors."[271] In 1976 the FDIC started to build more institutions for consumer mandates and to increase its priority within the agency.[272] The FDIC hired new administrators to run the Office of Bank Customer Affairs, including a director and a consumer affairs specialist[273] and made efforts to coordinate complaint reviews, compliance reports, and consumer legislative proposals.[274] In 1977, to reflect the enactment of the Community Reinvestment Act, it renamed the Office of Bank Customer Affairs the "Office of Consumer Affairs and Civil Rights."[275] In 1979, the FDIC also reported an increase in resources devoted to compliance examinations. That year, they stood at $12 million, which was five times larger than that in 1976, and a 50% increase compared to 1978.

The timing of organizational changes, coupled with Barnett's speech, which is replete with complaints and reluctance (I will discuss this more in the next section), suggests that the FDIC did not

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[268] FDIC ANN. REP. 19 (1973). Before the creation of this Office, the "Consumer Affairs Unit,' which was placed within the Division of Bank Supervision, coordinated the administration of consumer protection laws and also processed inquiries and complaints. *Id.* Due to the way that the FDIC initiated its work for consumer protection, which was primarily through bank examinations, it fell to the Division of Bank Supervision, which oversaw supervision in general, to do the initial work for consumer protection.
[269] FDIC Ann. Rep. 21 (1975).
[270] *Id.* ("The Office will receive and dispose of all bank customer complaints and inquiries, and will make recommendations to the Board of Directors regarding the Corporation's policies and activities in bank customer affairs.").
[271] *Id.*
[272] FDIC ANN. REP. 24 (1976). For example, for the first time in history, the 1976 annual report dedicates a separate chapter for "enforcing consumer and investor legislation."
[273] *Id.* at 26. There were only a handful of staff at the Office, and it lacked a director in 1976. The Annual Report states that in 1976, the Division of Bank Supervision housed 2,450 of the 3,535 FDIC staff members. The Office was a part of the Executive Office which employed 57 people. *Id.* at 28. The number of new consumer affair specialists was only five. *Id.* at 26.
[274] *Id.* at 26.
[275] FDIC ANN. REP. iv (1977). Also, in the "Chairman's Statement" the annual report states that the FDIC increased enforcement. *Id.* at xi.

adopt these changes voluntarily, but only because of congressional pressure.[276] But they do show that with (enough) external constraints and passage of time, the agency was capable of adjusting its priorities to accept its consumer-related roles and accommodate these into its internal structures and processes.

c. Implementation: Examinations and Enforcement Meets Initial Resistance (Mid- to Late 1970s)

In 1975, initially the FDIC made consumer-focused examinations a part of regular safety and soundness examinations but produced a separate "Compliance Report."[277] The following year, the FDIC initiated a pilot program for separate and specialized compliance examinations, and in 1977, it officially split consumer compliance examinations from the regular safety and soundness reviews.[278] In 1976, the FDIC estimated that it was giving about 10% of its supervisory effort to consumer law issues.[279] By 1979, the FDIC was conducting these compliance examinations regularly, once every 18 months, and had created a "career specialty within the FDIC examiner corps," successfully recruiting 44 people for this position around the end of that year.[280] It was not able to meet its initial target of recruiting 114 specialists however, which led FDIC Chairman Irvine Sprague to state at a congressional hearing that the FDIC was "finding ways to make the compliance examiner career path as attractive as the one for our safety and soundness examiners."[281]

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[276] FDIC ANN. REP. 21 (1975). Barnett's 1976 speech itself was a direct response to a congressional report chiding the FDIC's lack of enforcement of consumer laws.

[277] *Id.* ("Checks for compliance with [consumer protection] laws are a routine part of the bank examination.").

[278] FDIC ANN. REP. 182 (1976); FDIC ANN. REP. 23 (1978); *Hearing Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 96th Cong. 8 (1979) (statement of Irvine H. Sprague, Chairman, Fed. Deposit Ins. Corp.).

[279] FDIC ANN. REP. 179 (1976); *cf.* FDIC ANN. REP. 10 (1974). Notably, however, the annual reports indicate separate compliance examinations in a numerical chart from 1974. FDIC ANN. REP. 11 (1975). The same exam staff worked on both the safety and soundness examinations and the consumer protection examinations because no policies precluded its existing examiners from conducting safety and soundness examinations. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO/GGD-96-23, COMMUNITY REINVESTMENT ACT: CHALLENGES REMAIN TO SUCCESSFULLY IMPLEMENT CRA 62–63 (1995) [hereinafter "GAO 1995"]; FDIC ANN. REP. 182 (1976) ("[T]here is a strong support among our examiners for a separate staff of specialists."). The FDIC did not establish an entirely separate compliance examiner work force exclusively responsible for compliance examinations until the 1990s.

[280] Statement of Irvine H. Sprague, *supra* note 278.

[281] *Id.*

However, even as it offered the specialized exams, the FDIC, at least initially, resisted adding consumer mandates to its supervisory portfolio.[282] Barnett's speech in 1976 noted both that examination styles differed, and that there were conflicts between prudential regulation and consumer regulation.[283] Barnett warned that consumer protection is adversarial and involves public disclosure, which creates a conflict for bank examiners.[284] In contrast, the traditional safety and soundness examinations involve a cooperative, private, and confidential approach that encourages the free flow of information.[285] He also noted that the FDIC's remedy for a violation of consumer laws is typically prospective – dealing with the prevention of future violations rather than taking action with regard to the individual consumer.[286] Barnett also lamented the lack of resources for consumer examinations, commenting "all of our examiners are already working full time," and "since the regulations are extremely complex," a "substantial additional training program is required."[287]

C. Findings: Path Dependence Succumbed to Political Influence

The initial resistance to the consumer mandates, which all three agencies demonstrated, reflects the agencies' path dependence on their existing primary missions. The distinct and diverse rationales of consumer-focused regulation, as opposed to prudential regulation, made the agencies view their new consumer mandates as distractions from their original prudential mandates. We can observe that *the prudential regulators, whose original mission was prudential oversight, initially resisted taking on new consumer mandates and allocating resources to them*.

The Fed, leaning on its principal role as the monetary policymaker, cited a lack of expertise on consumer matters. The OCC, whose chief mission was to ensure the safety and soundness of the national banking system, was concerned that the consumer mandates would compromise the confidentiality of bank examinations, an essential function for ensuring safety and soundness. The FDIC, whose main mission was to manage the

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[282] FDIC ANN. REP. 176 (1976) (including Robert E. Barnett's speech mentioning FDIC examiners' "frustration" with the "panoply of consumer laws").
[283] *See id.*
[284] *Id.* at 180.
[285] *Id.*
[286] *Id.* at 181.
[287] *Id.* at 179.

deposit insurance program and to conduct bank supervision for safety and soundness, also cited the conflicting roles of the two types of examinations and complained about having to stretch its resources.

Notwithstanding their path dependence, the agencies could not resist the new mandates forever because each was "a creature of Congress;" the regulators would enforce them "even [though they] might have disagreed with the creation of the law."[288] Eventually, the agencies were driven by the "pro-consumer" political environment of the 1960s-70s. A combination of several substantive pieces of consumer legislation, the strong presence of "police patrol-type" congressional oversight (i.e., congressional hearings, congressional commissions), robust consumer activism, and presidential support all played a role. Congressional oversight, in particular, demanded very specific and sometimes quantifiable information on consumer mandate implementation (i.e., number of employees, number of examination or enforcement cases). Together, these forces increased the observability and measurability of the consumer mandate.

In response, the agency heads actively, consciously, and deliberately reorganized their internal apparatuses. In building the institutions to implement consumer functions, every agency created new offices, divisions, or advisory councils to control the internal flow of information. Separating and horizontally allocating prudential examinations and compliance examinations to different groups of examiners or processes allowed the specialization of this vital channel of information. Other strategies included centralization, elevating the prestige of the new consumer apparatuses, and giving direct reporting access to the leadership of the agencies. Specialized consumer compliance examiner training and the development of separate career paths also enhanced the quality of information.

In conclusion, we can see that prudential regulators faced conflicting prudential and consumer mandates from Congress. When Congress prioritized the consumer mandates and pressured the prudential regulators regarding the implementation of those mandates, the agencies managed goal ambiguity by making deliberate internal organizational choices to reflect this increased priority.

III. Deregulation and Bank Failures: 1980s

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[288] FDIC ANN. REP. 178 (1976).

This section describes the way that the prudential regulators reformed their internal institutions and adjusted and reallocated their resources and attention as the financial sector faced deregulatory policies as well as distress in the banking system during the 1980s. The agencies' priorities turned again toward prudential regulation, and as a result, the agencies averted their attention and resources away from consumer mandates, sometimes even dismantling the consumer-focused institutions that they had built during the earlier decade.

A. Deregulation and The Banking Crisis of the 1980s

The 1980s to the early '90s was a period of significant distress in the U.S. banking system. Economic disturbances such as rising inflation, increased competition, and market volatility weakened banks of all sizes. Banks' profitability declined, and their risks increased.[289] More than 1,600 FDIC-insured institutions closed or received FDIC assistance during this period.[290] The damage was widespread among all types of depository institutions, including hundreds of Savings and Loans (S&Ls)[291] and commercial banks[292] – even very large banks that were considered "too- big-to-fail," such as the Continental Illinois National Bank and Trust Company ("Continental Illinois").[293] As I will discuss in detail in the next sections, the banking crisis occupied the attention of and put great organizational stress on the agencies through the 1980s and the early 1990s.

The political winds had changed as well. The era of consumerism and the consumer movement that it had brought had

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[289] FED. DEPOSIT INS. CORP., HISTORY OF THE EIGHTIES - LESSONS FOR THE FUTURE 5-8 (1997) [hereinafter "HISTORY OF THE EIGHTIES"].
[290] *Id.* at 3.
[291] Also known as the "S&L debacle." *See id.* at 169 (S&L failures between 1980-1988 increased from 11 in 1980 to 190 in 1988).
[292] CARNELL ET AL., THE LAW OF FINANCIAL INSTITUTIONS 28 (5th ed. 2013) (noting that in the 1970s only 79 banks failed, whereas in the 1980s 1,146 banks failed. The number of failures increased every year between 1981 to 1988, from 10 in 1981 to a peak of 280 in 1988, and then declined to 207 in 1989, 127 in 1991, and 41 in 1993).
[293] When the Continental Illinois Bank failed in 1984, it was the largest bank failure in U.S. history until the crisis of 2008. Its failure raised important questions about whether large banks should receive differential treatment in the event of failure. *See generally* HISTORY OF THE EIGHTIES, *supra* note 289 at 235-57; Renee Haltom, *Continental Illinois: A Bank that Was Too Big to Fail*, FED. RSRV. HIST. (Nov. 22, 2013) https://www.federalreservehistory.org/essays/failure_of_continental_illinois [https://perma.cc/V6GM-QNBH].

ended, and deregulatory forces were gaining the upper hand. Substantive legislation that reflected new deregulatory priorities, waning congressional oversight on consumer matters, restrictions on agency budgets, and the presidential appointment of like- minded political appointees were a few of the changes that critically influenced the agencies.

Banking legislation played an important role during this period, which saw the greatest amount of change since the 1930s.[294] However, the consumer laws that had dominated the earlier decade were no longer center stage; instead, deregulation and the modernization of the law to adapt to the new markets characterized the era.[295] The political environment during the first half of the 1980s "swung the pendulum back to deregulation and held it there."[296] A conservative Congress rolled back consumer protection laws with a significant piece of legislation, the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), which brought sea change to the banking industry,[297] but had minor effects concerning consumer laws. The DIDMCA's primary impact on consumer laws was its requirements to shorten and simplify the mandatory disclosures, and to simplify the regulations of the federal agencies.[298] Between 1982 and 1986 (the height of the banking crisis), Congress enacted relatively minor revisions of consumer protection legislation.[299]

The necessities of the banking crisis stemmed from this deregulatory wave, however. Some pieces of significant legislation in the later '80s, while intended mainly as direct responses to the banking crisis, also had the incidental effect of enhancing the implementation of consumer laws. The legislative focus was on

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[294] HISTORY OF THE EIGHTIES, *supra* note 289 at 87.
[295] *Id.* at 91-92.
[296] Robertson, *supra* note 201 at 217.
[297] Most famously, the law phased out the interest rates ceiling and authorized the Fed to set reserve requirements for monetary policy. *See* HISTORY OF THE EIGHTIES, *supra* note 289 at 92.
[298] The Truth in Lending Simplification and Reform Act of 1980 enacted as Title IV of the Depository Institutions Deregulation and Monetary Control Act of 1980 required simplification of mandated disclosures and limited the liability of creditors for noncompliance. *See* Mark E. Budnitz, *The National Consumer Law Center from Its Birth to 2013* 75 (Ga. St. Univ. Coll. of L., Legal Stud. Research Paper No. 2016-06). The Financial Regulation Simplification Act of 1980, also a part of the DIDMCA, required the agencies to implement simplification measures and report their progress regarding simplification to Congress. *See* Ch. 36, Pub. L. 96-221, 94 Stat. 192 (codified at 12 U.S.C. § 3524) (repealed 1980).
[299] *See* HISTORY OF THE EIGHTIES, *supra* note 289 at 10-11. Although the crisis was in full swing in this period, crisis-responsive legislation came later in the 1980s and 1990s, and there was only one revision of the HMDA.

crisis management and the prudential oversight roles of the agencies,[300] but the new laws affected the agencies' consumer activities as well. For example, the Financial Institutions Reform, Recovery and Enforcement Act (1989) (FIRREA)[301] strengthened the CRA and the HMDA by mandating public disclosure of CRA evaluations.[302] The Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) also had the indirect effect of increasing resources available for consumer compliance issues.[303]

As with legislation, congressional oversight during the early '80s focused on gauging agencies' deregulatory efforts. The mood in Congress had changed; now, the legislators were interested in economizing regulatory resources, rather than in the robust implementation of consumer laws.[304] Congressional testimonies and legislative recommendations on consumer legislation also waned in the early 1980s, which is clear from the lack of detail and the

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[300] *See* Jason Schimdt & Niel Willardson, *Bank Regulation: The Focus Returns to the Consumer*, FED. RSRV. BANK OF MINNEAPOLIS (June 1, 2004), https://www.minneapolisfed.org/article/2004/banking-regulation-the-focus-returns- to-the-consumer [https://perma.cc/59Y7-G4XV] (last visited Dec. 27, 2023).

[301] Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989). The FIRREA reformed, recapitalized, and consolidated the federal deposit insurance system.

[302] *Budget Law Leads to Compliance Pain*, AM. BANKING ASS'N BANKING J. 23 (1990) (reporting that "'(T)he thrift bailout has given tremendous new impetus to the societal rule area,' said Garwood. He said Congress has taken the attitude that 'the public has paid a high price, so the public is going to get something back. . . . My sense is that, given the increased emphasis on CRA, the increased training [examiners will receive], and the increased tools at our disposal under the [revised] Home Mortgage Disclosure Act, the agencies will be tougher, or more thorough, or simply looking at CRA in a way they haven't in the past.'" (alteration in original)).

[303] The FDICIA, among other things, required the creation of a risk-based deposit insurance system, increased the frequency of examinations at insured depository institutions, and put forth new capital requirements. Federal Deposit Insurance Corporation Improvement Act of 1991, 12 U.S.C. § 1817(b).

[304] For example, in a 1981 congressional hearing, Congressman Doug Barnard of Georgia asked "How much more time is it taking today for bank examiners in banks because of the Community Reinvestment Act, the Home Mortgage Disclosure Act, and the Financial Institutions Regulatory Act? How much time is that taking of bank examiners?" Daniel Stanton, the GAO deputy director responded, "Some of these are separate exams. Certainly it is taking longer to conduct the examinations. For this reason, the time between examinations has extended over the years. So, instead of visiting the bank every year, it may be every 18 months to 2 years." Stanton also noted that there could be trouble for banks, as "(t)he increased paperwork, because of the consumer compliance laws and various things like that, create problems for the banks and for the examiners. They have more things to look at." *Federal Structure for Examining Financial Institutions: Hearing Before the Subcomm. on Gen. Oversight and Renegotiation of the H. Comm. on Banking, Fin. and Urb. Affs.*, 97th Cong. 9 (1981).

shortened length of sections in the agencies' annual reports describing those matters.[305] The once numerous consumer-related congressional hearings now focused on regulatory simplification efforts and deregulation in general.[306] Unlike the previous decade, which produced several reports on the implementation of consumer laws, there was a twelve-year hiatus (1983-1991) in the GAO reports regarding consumer matters.[307] These reports instead focused on deregulation, efficiency, and cost-effectiveness,[308] as well as non-consumer issues concerning the transformations and turbulence in the broader financial market.[309]

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[305] For example, the Federal Reserve's annual reports between 1982 and 1984 allocated only one page or less to discuss consumer-related testimonies or legislative recommendations to Congress. The Fed's annual reports of 1981 and 1982 do not report *any* consumer related legislative recommendations to Congress. *See* 68 FRB ANN. REP. 161- 64 (1981); 69 FRB ANN. REP. 156-57 (1982). In 1983 and 1984, the Fed reported only one instance of testimony to Congress on consumer matters. *See* 70 FRB ANN. REP. 158 (1983); 71 FRB ANN. REP. 159 (1984). According to the annual reports, starting from 1985, the Fed increased its testimonies and recommendations to Congress on legislative matters. *See* 72 FRB ANN. REP. 157 (1985); 73 FRB ANN. REP. 173-75 (1986); 74 FRB ANN. REP. 164-65 (1987); 75 FRB ANN. REP. 156-58 (1988); 76 FRB ANN. REP. 153-56 (1989). This upward trend on consumer matters in the late 1980s reflects the increased legislative activities on consumer matters during that period.

[306] The number of Congressional hearings on consumer protection matters in general (not limited to those related to financial services) also saw a significant drop after peaking in the proconsumer-era of the mid-1970s. *See* Loree Bykerk & Ardith Maney, *Where Have All the Consumers Gone?* 106 POL. SCI. Q. 677, 682-83 (1991).

[307] The GAO issued its last consumer-related report regarding the consumer protection "flow" period of the 1960s and 1970s in 1983. Its next such report was published 12 years later. *See* GAO 1983, *supra* note 197; GAO 1995, *supra* note 279.

[308] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GGD-81-79, FEDERAL RESERVE COULD IMPROVE THE EFFICIENCY OF BANK HOLDING COMPANY INSPECTIONS (1981); U.S. GOV'T ACCOUNTABILITY OFF., GB 81-12, FEDERAL EXAMINATIONS OF FINANCIAL INSTITUTIONS: ISSUES THAT NEED TO BE RESOLVED (1981) (mentioning that consumer protection tasks require more examiner time, although consumer compliance is not the focus of report); U.S. GOV'T ACCOUNTABILITY OFF., GGD-81-21, THE FEDERAL STRUCTURE FOR EXAMINING FINANCIAL INSTITUTIONS CAN BE IMPROVED (1981) (also not consumer focused); U.S. GOV'T ACCOUNTABILITY OFF., GGD-82- 21, DESPITE RECENT IMPROVEMENTS, BANK SUPERVISION COULD BE MORE EFFECTIVE AND LESS BURDENSOME (1982).

[309] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GGD-82-36, ISSUES TO BE CONSIDERED WHILE DEBATING INTERSTATE BANK BRANCHING (1982); U.S. GOV'T ACCOUNTABILITY OFF., T-OCG-88-1, PRELIMINARY OBSERVATIONS ON THE MARKET CRASH OF OCTOBER 1987 (1988); U.S. GOV'T ACCOUNTABILITY OFF., T-GGD-88- 9, ISSUES RELATED TO REPEAL OF THE GLASS-STEAGALL ACT (1988); U.S. GOV'T ACCOUNTABILITY OFF., GGD-89-47, TROUBLED FINANCIAL INSTITUTIONS: SOLUTIONS TO THE THRIFT INDUSTRY PROBLEM (1989); U.S. GOV'T ACCOUNTABILITY OFF., AFMD-89-25, BANK

The presidents during this period concurred with the congressional deregulatory agenda.[310] President Jimmy Carter, who in earlier periods had shown limited support for pro- consumer actions, signed into law the Depository Institutions Deregulation and Monetary Control (DIDMCA), the primary deregulatory law, and his administration vowed to cooperate with congressional committees regarding deregulation in general, and specifically for the financial industry.[311] President Ronald Reagan, who believed that the major consumer problem was "too much government,"[312] pushed for the reduction of the regulatory burden or, to put it differently, for "regulatory relief."[313] The Reagan administration policies were "revolutionary" in various areas which were implemented via channels such as the OIRA regulatory review process and appointments of conservative appointees.[314] For the prudential regulators, the Reagan administration's regulatory relief agenda translated into budgetary and personnel restrictions as well as requirements to revise existing regulations.

As for interest groups, those representing businesses were mobilized and gained more significance, while consumer groups lost their visibility.[315] As the social movements of the 1960s and '70s

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FAILURES: INDEPENDENT AUDITS NEEDED TO STRENGTHEN INTERNAL CONTROL AND BANK MANAGEMENT (1989).

[310] *See* Robertson, *supra* note 201 at 217.

[311] *See id.*; *Economic Report of the President*, 1 PUB. PAPERS 12-13 (January 30, 1980), https://fraser.stlouisfed.org/title/45#8151[https://perma.cc/74QT-L2YV] ("We are now cooperating with congressional committees to complete work on fair and effective legislation that eliminates costly elements of regulation in the trucking, railroad, communications, and financial industries.").

[312] Michael D. Hinds, *The Consumer Movement: Whatever Happened?*, N.Y. TIMES, Jan. 21, 1983, at A16.

[313] *Report to Congress on the Costs and Benefits of Federal Regulations, The Role of Economic Analysis in Regulatory Reform*, OFF. OF MGMT. & BUDGET Ch. I § 2(c), https://obamawhitehouse.archives.gov/omb/inforeg_chap1#trbrp [https://perma.cc/Z2C2-ZSBK] (Reagan "specifically used the term 'regulatory relief' rather than 'regulatory reform' to emphasize his desire to cut back regulations, not just make them more cost effective."); *see* Robertson, *supra* note 201 at 217.

[314] *See* Kagan, *supra* note 128 at 2277-78; *but see* Marc A. Eisner & Kenneth J. Meier, *Presidential Control versus Bureaucratic Power: Explaining the Reagan Revolution in Antitrust*, 34 AM. J. POL. SCI. 269, 283 (1990) (arguing that "the source of change was not found in the policy agendas of presidential administrations nor in the composition of congressional committees but in the bureaucracy of the Antitrust Division. Our analysis revealed that the redefinition of policy priorities was driven by a professionalization process; economists were brought into the division and provided with a crucial position in the policy process.").

[315] *See* ROBERT J. HOBBS & STEPHEN GARDNER, THE PRACTICE OF CONSUMER LAW: SEEKING ECONOMIC JUSTICE 12 (2nd ed. 2006); Hinds, *supra* note 312

became institutionalized and became rooted as the law of the land, the agencies and Congress – not the activists – dominated the process of implementing the reforms.[316] The consumer movement went from "Nader to nadir."[317] The consumer groups also lost their funding sources because the Reagan administration removed grants, while contributions and subscriptions suffered due to the donors' economic hardships.[318] Demands to stimulate the economy outweighed the voices of consumer advocates.[319] Nader observed that the industry overpowered the consumer movement because "the new agencies and laws worked so well they spurred a corporate counter attack."[320] As such, the '80s saw a social movement primarily led by business and trade associations that rallied for freedom, accountability, efficiency, and economic growth.[321] As the general public became more aware of the cost of regulation, "regulation became a dirty word."[322] Consumer representation at congressional hearings also waned. Industry groups had always outnumbered the consumer groups, but now consumer representation became even more minimal.[323]

B. Observed Agency Behavior

1. The Federal Reserve: Regulatory Simplification Through its Rulemaking and Policymaking Role

a. Active Legislative Role and Shifting Priorities

As a part of its consumer mandate, the Fed focused on implementing simplification and deregulation policies in response to the legislation that Congress passed in the early 1980s. The Fed proposed several recommendations for the simplification of legislation, revised its regulations and interpretations with the goal of simplification, and monitored the effects of that simplification.[324]

(noting that Nader saw the reason for the demise of the consumer movement was that "the new agencies and laws worked so well they spurred a corporate counterattack"); STEPHEN BROBECK, ENCYCLOPEDIA OF THE CONSUMER MOVEMENT 436-37 (1997).

[316] Bykerk & Maney, *supra* note 306 at 678.

[317] Hinds, *supra* note 312.

[318] Hobbs & Gardner, *supra* note 315 at 12.

[319] Hinds, *supra* note 312.

[320] *Id.*

[321] Thomas O. McGarity, *Regulatory Reform in the Reagan Era*, 45 MD. L. REV. 253, 254 (1986).

[322] Hinds, *supra* note 312.

[323] *See generally* Bykerk & Maney, *supra* note 306.

[324] *See generally* 69 FRB ANN. REP. 143 (1982); 70 FRB ANN. REP. 150 (1983); 71 FRB ANN. REP. 148 (1984); 72 FRB ANN. REP. 145 (1985).

Its annual reports repeat language such as "simplify,"[325] "clarify,"[326] and "reduce the cost of compliance" while *"maintaining* the protections for consumers."[327] The tepid language regarding consumer protection contrasts with the language in the annual report sections on prudential matters, which show that the Fed implemented prudential regulation with increasing vigor, especially as the banking crisis unfolded.[328]

With expertise that it gained over the years, the Fed's opinion bore significant weight when Congress contemplated legislation. Unlike its notably ambivalent response to Congress's consumer laws of the 1960s, the Fed took the initiative in many of the reforms during this era.[329] To this end, the Fed gathered data, testified at hearings, and made legislative recommendations in its annual reports. For example, it offered full support for the 1980 Simplification Act during its drafting,[330] and wrote rules that implemented that Act.[331] The Fed reported in 1981 that it had achieved "simplification, consolidation, and reorganization" of consumer regulations."[332]

This overall pattern shows that in its capacity as a rulemaking

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[325] 67 FRB ANN. REP. 74 (1980); 69 FRB ANN. REP. 143 (1982); 70 FRB ANN. REP. 68 (1983); 71 FRB ANN. REP. 148 (1984).
[326] 69 FRB ANN. REP. 143 (1982).
[327] *Id.* (mentioning that the Fed "continued its efforts to reduce the costs of compliance with its consumer regulations while maintaining the protections for consumers"); 70 FRB ANN. REP. 150 (1983) (mentioning that the Fed "sought to reduce the costs of compliance with its consumer regulations while maintaining the protections for consumers"); 71 FRB ANN. REP. 145 (1984) (mentioning that the Fed sought to "maintain statutory protections for consumers, to ease regulatory burdens, and to increase both efficiency and effectiveness in examinations"); 72 FRB ANN. REP. 145 (1985) (mentioning that the Fed sought to "maintain the intended level of protection for consumers in their financial affairs while easing regulatory burdens"); 73 FRB ANN. REP. 161 (1986) (mentioning that the Fed sought to "maintain statutory protections for consumers while easing regulatory burdens on institutions"); 74 FRB ANN. REP. 153 (1987) (mentioning that the Fed sought to "maintain statutory protections for consumers while easing regulatory burdens").
[328] *See generally* 69 FRB ANN. REP. 171-87 (1982); 70 FRB ANN. REP. 178-94 (1983); 71 FRB ANN. REP. 173-88 (1984); 72 FRB ANN. REP. 145, 168-85 (1985); 73 FRB ANN. REP. 187-204 (1986); 74 FRB ANN. REP. 177-92 (1987).
[329] *See, e.g.*, 68 FRB ANN. REP. 147 (1981).
[330] 66 FRB ANN. REP. 221 (1979) ("The Board favors reform of Truth in Lending through legislation. If the bill is not enacted, the Board is prepared to attempt to simplify Truth in Lending through revision of Regulation Z.").
[331] 67 FRB ANN. REP. 74 (1980).
[332] 68 FRB ANN. REP. 147 (1981); *see also* 67 FRB ANN. REP. 168 (1980) ("At year-end, a new draft of a simplified Regulation Z, based on the new act, had been published for comment, and the Board expected to complete the overhaul early in the new year to meet a deadline of April 1, 1981.").

authority, the Fed was sensitive to legislative mandates and activities which occurred during this period, rather than to the direct fallout of the banking crisis of the 1980s.

b. No Organizational Changes Deprioritizing Consumer Protection

The Fed made no organizational changes that signaled that it was deprioritizing its consumer functions. It maintained its Division of Community and Consumer Affairs (DCCA) and the Consumer Advisory Council, both established in the late 1970s.[333] The lack of organizational change is unique and significant when we compare it to the OCC or the FDIC, which undertook reorganizations reflecting its changed priorities during this period.[334]

One of the reasons for the relatively permanent organizational status of the consumer functions within the Fed came from its role as a policymaker and coordinator for consumer responsibilities. Not only was the Fed deeply engaged in consumer rulemaking, but it was also responsible for coordinating and ensuring levels of compliance for itself and the other prudential regulators. Because of these roles, the Fed needed a permanent organizational function to undertake consumer functions, even when making policies that may have had deregulatory implications.[335]

c. Examination Functions Increase Focus on Prudential Supervision

Troubles in the banking system compelled the Fed to fortify its prudential regulation in response to the crisis that started in the mid-1980s. In 1985, the Fed "began a major new program" and sought to solve problems "through tighter prudential standards."[336] In contrast, in the same year, the reports used tepid language to

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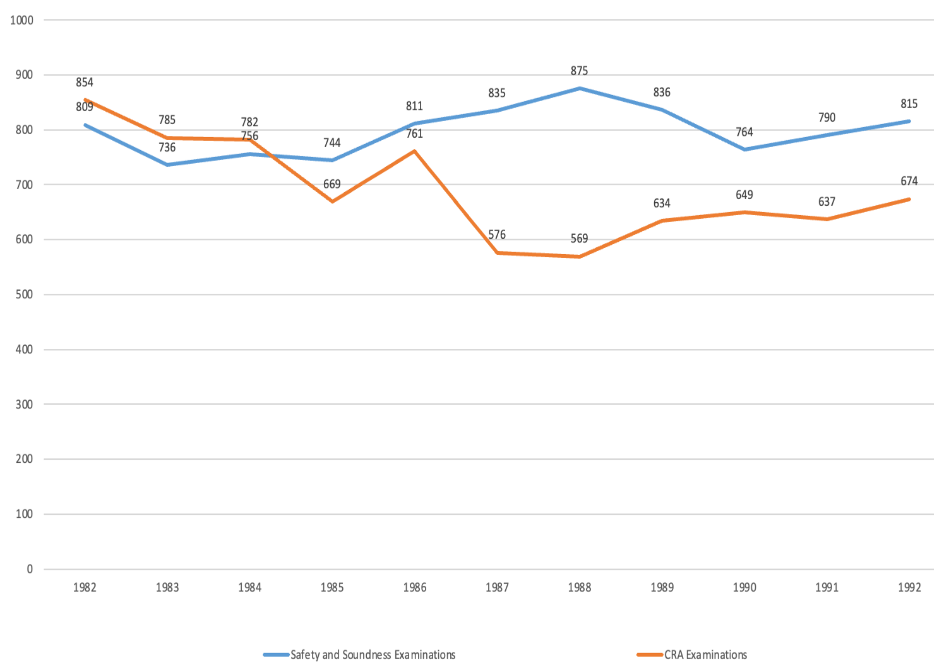
[333] 68 FRB ANN. REP. 155 (1981).
[334] FDIC ANN. REP. 7 (1982); FDIC ANN. REP. 10 (1983).
[335] One possibility of the less evident "ebb" of consumer protection functions within the Fed might stem from the fact that the Fed is less strained in terms of resources than the other prudential regulators, due to the unparalleled independence of the Fed's budget. *See infra* Section III.C.3 (discussing the fact that the Fed's independence might be one reason why consumer protection is more stable in the Fed than it is in the other prudential regulators).
[336] 72 FRB ANN. REP. 168, 172 (1985) ("The program includes greater frequency in examinations and inspections; enhanced communications with boards of directors; increased surveillance and monitoring through the use of expanded reporting requirements; and guidelines on capital adequacy, cash dividends, and large-dollar transfers.").

describe consumer and community affairs;[337] for example, "maintain the intended level of protection for consumers."

The number of examinations that the Fed conducted for the state member banks also reflects its deprioritization of consumer functions relative to prudential actions. The number of CRA compliance examinations between the years 1982 and 1988 declined from 854 to 569.[338] During the same period, the number of safety and soundness examinations that it conducted for state member banks increased from 809 to 875.[339]

FIGURE 1 NUMBER OF EXAMINATIONS FOR STATE MEMBER BANKS (1982-1992)



Source: Annual Reports of the Federal Reserve 1982-1992[340]

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[337] *Id.* at 145.

[338] CRA examinations are a type of an examination where the Fed assesses state member banks' performance of responsibilities under the Community Reinvestment Act. *See Community and Reinvestment Act (CRA) Examinations*, FED. RSRV. BANK OF RICHMOND, https://www.richmondfed.org/banking/banker_resources/supervision_regulation/consumer_affairs/cra_exams#:~:text=Examiners%20conduct%20a%20separate%20review,soundness%20of%20the%20bank's%20operations [https://perma.cc/N2MY-WNJ8].

[339] 73 FRB ANN. REP. 188 (1986). The increase in safety and soundness examinations from 1986 through 1988 was due to a change in guidelines (likely a response to the crisis), increasing the frequency of scheduled examinations for state member banks.

[340] The Fed started to report CRA examination numbers beginning in 1982, so the years 1980 and 1981 are omitted from the table. Unlike the OCC and the

Notably, despite some evidence that it was marginalizing consumer functions, the Fed still maintained the special consumer compliance examinations and continued the institution-building for consumer mandates that it had initiated in the late 70s, by establishing a separate career path and permanent staffing for specialized consumer compliance examinations.[341]

2. OCC: Deregulation, De-burdening, and Supervision in the Face of the Crisis

a. Leading Deregulation, Implementing Regulatory Simplification, Facing Budget Restraints amid the Crisis

Deregulation became the focus of attention of the OCC while consumer matters were placed on the back burner and ignored for the most part during this period. Of the three agencies, the OCC was in the forefront of deregulation.[342]

The Comptrollers governing the OCC during this period ardently supported deregulation. In 1981, just weeks before he left office, Comptroller Heimann, who had earlier been the consumer advocates' ally, sympathized with bankers' complaints about the rising cost of consumer compliance and recommended regulatory relief in that area, pledging to reduce the regulatory burden.[343] Some described Comptroller Conover,[344] who succeeded Heimann, as a "kindred spirit" to President Reagan[345] and a "committed advocate of the free market,"[346] who "aggressively promote[d] deregulation" using the office at the OCC as his "pulpit."[347] Comptroller Clark,

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FDIC, the Fed did not provide numbers for "compliance examinations" which examines compliance with consumer laws other than the CRA. The number of state member banks subject to examinations between 1982 and 1990 was relatively stable, ranging from around 1010 to 1110. After peaking at 1110 in 1986, the number of state member banks subject to the Fed's supervision steadily declined to 957 in 1992. *See* 69-79 FRB ANN. REPS. (1982-1992).

[341] *See* 77 FRB ANN. REP. 183 (1990).

[342] *See* FDIC ANN. REPS. (1984-90) (illustrating that the OCC's annual reports frequently used phrases and words like "streamline," "eliminate duplication," "improve efficiency," "reduce examination time," and "minimize the burden on banks" to describe its actions).

[343] Robertson, *supra* note 201 at 217.

[344] C. Todd Conover served from 1981-1985 as the 25th Comptroller of the Currency. *See C. Todd Conover: 25th Comptroller of the Currency*, OCC, https://www.occ.treas.gov/about/who-we-are/history/previous-comptrollers/bio-25-todd-conover.html [https://perma.cc/8UBX-7KQX].

[345] Robertson, *supra* note 201 at 218.

[346] White, *supra* note 249 at 49.

[347] Robertson, *supra* note 201 at 218.

who took over from Conover in 1985, also believed that deregulation was the key to reversing the U.S. national banking system's declining competitiveness.[348]

The deregulation wave, however, occurred against the backdrop of the banking crisis. Headline-grabbing bank failures tested the OCC's capacity to supervise banks and manage the crisis.[349] As the crisis unfolded, the OCC readjusted its policies and balanced deregulation with the need to prevent or contain failures. Conover deviated from his deregulation priorities by swiveling OCC policies toward more public disclosure and administrative sanctions.[350] Comptroller Clark carried on Conover's policies and commented that deregulation does not mean "de-supervision."[351]

The banking crisis intensified prudential oversight throughout the decade. At first, however, even as the number of problem banks rose, the budgetary and personnel constraints that the Reagan administration had imposed in the early 1980s left the OCC able to conduct only "bare bones supervision,"[352] which hampered its ability to deal with the crisis. Congress restored the budget cut in the later 1980s, and subsequent legislation (FIRREA) allowed the OCC to offer its workers a more competitive salary.[353] By the late 1980s, the budget of the OCC had increased, and the OCC had reinforced its workforce and supervisory capacity,[354] but there was little sign of a return of the deprioritized consumer functions.

b. Frequent Organizational Changes Deprioritize Consumer Protection

The OCC saw significant organizational changes reflecting a steady deterioration of the organizational priority of consumer mandates. In the 1980s, a series of changes scattered the consumer functions that the OCC had once centralized during the previous decade. The year 1982 marked a significant deterioration of consumer mandates within the OCC's organizational hierarchy.

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348 White, *supra* note 249 at 49.
349 *Id.* at 57-59 (noting bank failures such as First Pennsylvania Bank, which was rescued in 1980, Penn Square Bank which was closed in 1982, and most prominently, Continental Illinois, which was rescued after a bank run in 1984).
350 Robertson, *supra* note 201 at 227.
351 *Id.* at 227-28; ("Clarke's term became an exercise in crisis management"); *see Robert L. Clarke: 26th Comptroller of the Currency*, OCC, https://www.occ.treas.gov/about/who-we-are/history/previous-comptrollers/bio-26-robert-clarke.html [https://perma.cc/BGB5-BWEZ].
352 White, *supra* note 249 at 61-62.
353 *Id.* at 62.
354 *Id.*

In May of that year, the OCC created the "*Industry* and Public Affairs Department." Within this apparatus, sat a smaller organizational unit responsible for consumer matters.[355] As the name of the Department suggests, it no longer gave undivided attention to consumer and community matters, but now divided its attention between industry interests and consumer matters. That same year, the "Consumer Supervisory Analysis Division" was folded into the "Consumer Examinations Division"[356] to ensure that "national banks comply with consumer protection and fair lending laws while *reducing the regulatory burden.*"[357] In 1986, as the OCC abolished the separate program for consumer compliance examinations it renamed the "Consumer Examinations Division" as the "Consumer Activities Division."[358]

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[355] COMPTROLLER'S REP. OF OPERATIONS, 2 Q.J. 13, 13 (1982). The 1982 reports called this unit the "Community and Consumer Affairs Division." But in 1983, they referred to it as a "Community Development Division" and was renamed the "Customer and Industry Affairs Division." Accompanying the name change, the OCC gave the division "added responsibility for providing liaison[s] between the OCC and bank customer groups, as well as insurance, real estate, securities, and other non-bank financial industries. The division continued to be responsible for the OCC's community development and consumer affairs functions." COMPTROLLER'S REP. OF OPERATIONS, 3 Q.J. 17, 38 (1983). These organizational changes, as well as the confusing and inaccurate account of the name change in the annual reports, attest to the low priority of consumer matters within the OCC at that time.

[356] COMPTROLLER'S REP. OF OPERATIONS, 2 Q.J. 13, 16 (1982).

[357] *Id.* at 16 (1982) (emphasis added). Merging and consolidating separate divisions can, at times, signal prioritizing related functions because consolidation is one strategy for enhancing organizational effectiveness. However, in light of the accompanying text in the annual reports and the abolishment of the separate consumer examinations, I do not interpret this as an action that reflects an increase of organizational priority for consumer protection.

[358] *Compare* COMPTROLLER'S REP. OF OPERATIONS, 6 Q.J. 5, 10 (1986) *with* COMPTROLLER'S REP. OF OPERATIONS, 7 Q.J. 21, 26 (1987). Within this apparatus are the Special Assistant for Fair Lending, and the Customer and Industry Affairs Division. The Consumer Activities Division also handled complaints. COMPTROLLER'S REP. OF OPERATIONS, 6 Q.J. 5, 28 (1986). In 1987, the OCC reported that "The Consumer Activities Division is responsible for developing policies and procedures for supervision of national bank compliance with consumer protection laws and regulations. It also assists in consumer compliance training for examiners and bankers." COMPTROLLER'S REP. OF OPERATIONS, 7 Q.J. 21, 26 (1987).

In comparison to the deprioritization of consumer functions, prudential supervision for problem banks and closing of failed banks gained priority. In 1986, the OCC reorganized and renamed the former "Special Projects Division," making it the "Bank Supervision Policy Division," responsible for dealing with the "rising number of problem bank situations."[359] The Division was in charge of "managing most critical bank situations" as well as the "supervis[ion] of closing of 48 national banks."[360]

c. Compliance Examinations are Merged and Weakened to Minimize Regulatory Burden

In 1982, the OCC terminated the program of specialized consumer examinations that it had conducted regularly since the late 1970s. The OCC's examination division integrated the specialized consumer examinations into its commercial examinations, and marginalized the former, in an "effort to reduce examination time and minimize the regulatory burden on banks."[361] It also ceased to hold separate CRA examinations for small rural banks, performing them instead as a part of its consumer examinations.[362] 1982 was also the last year in which the OCC reported a separate number for consumer examinations conducted. By 1987, it no longer performed any compliance examinations regularly (every 12 months), but rather, conducted those examinations based on random sampling.[363] The revised consumer examination schedule resulted in a reduced examination time of 25%.[364]

TABLE 1. THE NUMBER OF EXAMINATIONS FOR NATIONAL BANKS (1980-1990)

	1980	1981	1982	1983-1990
Safety and Soundness[365]	Not Reported	4000+[366]	Not Reported	Not Reported
Consumer Compliance	3120[367]	3670[368]	3180	Not Reported

[365] Safety and soundness examinations are included in in the OCC's full scope, on-site reviews of bank examinations. *See Examinations Overview*, OCC, https://www.occ.treas.gov/topics/supervision-and-examination/examinations/examinations-overview/index-examinations-overview.html [https://perma.cc/CBX5- LDKE] (last visited Sept. 12, 2023). The OCC classified bank examinations under "Commercial Examinations" in 1981. COMPTROLLER'S REP. OF OPERATIONS, 1 Q.J. 11, 13 (1981).
[366] The annual report does not give a specific number for safety and soundness examinations. COMPTROLLER'S REP. OF OPERATIONS, 1 Q.J. 11, 13 (1981)

Source: Reports of Operations (Quarterly Journals) of the OCC 1980-1990
* CRA examinations were performed during all consumer compliance examinations. (1981, 1982)

President Reagan's budgetary and personnel restrictions and deregulatory policies affected the overall capacity of OCC supervision. The agency favored off-site examinations over on-site ones,[369] and from a high of 3,282 employees, of whom 2,282 were examiners in 1979, the OCC shrank to 2,702 employees and 1,835 examiners by 1982.[370] Its staff turnover rate was also high, reaching 15% in 1984.[371] These facts suggest that the lack of resources brought a general decline in the quality of supervision, in both its prudential and its consumer aspects.

("Commercial reports of examination of over 4,000 banks are sampled and reviewed by the division.").

[361] COMPTROLLER'S REP. OF OPERATIONS, 2 Q.J. 13, 17 (1982). Due to the consolidation done in that year, the reports from 1983 and thereafter no longer give figures. Also, in 1987, the OCC reported that there were no consumer compliance examinations, but only a "consumer portion" of the compliance program examinations. COMPTROLLER'S REP. OF OPERATIONS, 7 Q.J. 21, 26 (1987).

[362] COMPTROLLER'S REP. OF OPERATIONS, 2 Q.J. 13, 17 (1982).

[363] The 1987 report states that the OCC's compliance program is based on bank examinations of "a randomly selected sample of national banks." COMPTROLLER'S REP. OF OPERATIONS, 7 Q.J. 21, 26 (1987).

[364] COMPTROLLER'S REP. OF OPERATIONS, 2 Q.J. 13, 16 (1982).

[365] Safety and soundness examinations are included in in the OCC's full scope, on-site reviews of bank examinations. *See Examinations Overview*, OCC, https://www.occ.treas.gov/topics/supervision-and-examination/examinations/examinations-overview/index-examinations-overview.html [https://perma.cc/CBX5- LDKE] (last visited Sept. 12, 2023). The OCC classified bank examinations under "Commercial Examinations" in 1981. COMPTROLLER'S REP. OF OPERATIONS, 1 Q.J. 11, 13 (1981).

[366] The annual report does not give a specific number for safety and soundness examinations. COMPTROLLER'S REP. OF OPERATIONS, 1 Q.J. 11, 13 (1981) ("Commercial reports of examination of over 4,000 banks are sampled and reviewed by the division.").

[367] OCC ANN. REP. 12 (1980) (including "approximately" 520 general and 2,600 specialized consumer examinations).

[368] COMPTROLLER'S REP. OF OPERATIONS 1 Q.J. 11, 16 (1981) (including "approximately" 440 general and 3,230 specialized consumer examinations).

[369] HISTORY OF THE EIGHTIES, *supra* note 289 at 426.

[370] White, *supra* note 249 at 61. From 1979 to 1984 the OCC's field examination staff declined 20 percent, from 2,151 to 1,722. HISTORY OF THE EIGHTIES, *supra* note 289 at 426.

[371] White, *supra* note 249 at 81.

3. FDIC: The Banking Crisis Hits Hard

a. The Banking Crisis Leads to Abdication of Consumer Protection

The banking crisis of the '80s struck the FDIC particularly hard as its annual reports hint that the FDIC cut back its consumer compliance resources in order to focus on those functions related to bank crisis management. From 1982 to 1986, the number of failed banks increased from 42 to 138,[372] breaking "post-Depression record[s]."[373] The failures included several large banks. Notably, the failure of Continental Illinois, the largest-ever bank to fail as of 1984, which "grabbed the headlines" that year, also drew massive financial assistance from the FDIC.[374] The FDIC, with its main mission of managing deposit insurance and bank resolution, struggled to keep up with its responsibilities.

The FDIC described 1982 as "A Watershed Year." That year's annual report shows a great deal of confidence in the fact that the FDIC's primary task of dealing with (nearly) failed banks had come to the forefront of public attention.[375] Further, the FDIC brazenly recommended that it should give its consumer affairs responsibilities to the Department of Justice, as a part of a proposed "functional" reorganization that would consolidate the FDIC's regulatory functions, the Fed, and the OCC into a single independent agency.[376] The 1983 report reiterated this position, stating that the FDIC would withdraw from consumer protection activities as a part of its strategic plan,[377] and propose legislation to that effect. When discussing consumer matters, it clearly considered its primary role to be a manager of a sound deposit insurance system that would protect the consumers.

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[372] FDIC ANN. REP. 53 (1986).
[373] *See, e.g.*, FDIC ANN. REP. xiv (1984); FDIC ANN. REP. 8 (1986).
[374] FDIC ANN. REP. xiv (1984).
[375] FDIC ANN. REP. 2 (1982).
[376] *Id.* at ix.
[377] FDIC ANN. REP. xi (1983) ("[T]he broad framework of the strategic plan being developed by the Division of Bank Supervision envisions movement from "general purpose" regulation to focusing more on safety and soundness issues. As legislative reform permits, *the FDIC will withdraw from activities such as consumer and investor protection and antitrust determinations.* These functions will be reassigned to other appropriate agencies and the *FDIC will concentrate on its central mission of promoting safety and soundness in the banking system.*" (emphasis added)). The 1983 report mentions the word "consumer" only three times: once to renounce the function, once to report about compliance examinations, and once to discuss the consumer protection aspect of deposit insurance. *Id.*

Likewise, its 1984 annual report mentioned consumer matters just once, while the FDIC's handling the banking crisis dominated the content. It reported that "[t]he headline-grabbing event of the year" was Continental Illinois National Bank, and that despite the "new post-Depression record" of bank failures, in that year the "FDIC insurance fund emerged stronger and more liquid."[378]

The appointment of a new director and additional funding, however, allowed the FDIC to make an organizational change to pick up its abandoned consumer responsibilities. Chairman L. William Seidman ushered in this change when he took office in 1985.[379] In a 1988 congressional hearing, Seidman stated that the FDIC's "consumer compliance effort has not been as comprehensive as it should be." He attributed such inadequacy to "the dramatic increase in the number of failed and problem banks in recent years," which compelled the FDIC to devote significantly increased resources to problems involving safety and soundness.[380]

In essence, during the banking crisis of the 1980s, the FDIC was eager to focus on its crisis management mission and to relinquish its supervisory functions, especially its responsibilities related to consumer laws.[381] But later in the decade, as the FDIC overcame the first shocks of the crisis, and with additional funding and new leadership, it refocused on its consumer-focused mandates.

b. Consumer Protection is Initially Deprioritized as a Result of Organizational Change, but is Quick to Rebound

As the crisis unfolded, the FDIC revamped and elevated its crisis-related functions, such as those related to liquidation and deposit insurance.[382] At the same time, however, the agency took

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[378] FDIC ANN. REP. xiv, 8 (1984).
[379] L. William Seidman served as FDIC Chairman from October 21, 1985, to October 16, 1991. *List of Chairmen of the FDIC* FDIC, https://www.fdic.gov/about/history/chairmen.html [https://perma.cc/3ZBC-TNFK] (last visited Nov. 15, 2020).
[380] *Community Reinvestment Act: Hearing Before the S. Comm. on Banking, Hous. and Urb. Affs.*, 100th Cong. 222 (1988) (statement of William Seidman, Chairman, FDIC) [hereinafter "Seidman Statement"].
[381] FDIC ANN. REP. xi (1983).
[382] For example, in 1982 it approved a reorganization of its Division of Liquidation to "improve efficiency and management of an expanding liquidation workload by moving supervision of bank liquidations to several centralized locations." FDIC ANN. REP. 7 (1982). In 1983, the FDIC staffed a new "Area Liquidation Offices." FDIC ANN. REP. x (1983). In 1985, the FDIC embarked a "fundamental restructuring of its budget process" in anticipation of the high costs of bank closings. The FDIC stated that "the budget will allocate all

several measures that generally demoted its consumer protection functions.[383] Those functions made a quick comeback, however, once the most severe impact of the crisis had passed.[384]

In 1980 the FDIC folded the Office of Consumer and Compliance Programs into the Division of Bank Supervision.[385] The reorganization was a demotion of the FDIC's consumer apparatus, as there was no longer a "director" position for the Office – instead, the Director of Bank Supervision would oversee the consumer functions. The FDIC's annual report hinted that the reason for this reorganization was to "lessen the regulatory burden on banks and improve service to the public through a coordinated series of initiatives to share resources and reduce duplication."[386] Between 1981 and 1985, the FDIC disregarded its consumer mandate to the extent that the agency's annual reports did not mention the Office of Consumer and Compliance at all. The FDIC resumed reporting consumer examinations in 1987, when consumer functions once again became a priority for the agency.

Beginning in 1986 and 1987, the agency re-focused on consumer matters, starting with a restructuring of its internal organization. The agency underwent a reorganization in December 1986, which separated the Office of Consumer Affairs (OCA) from the Division of Bank Supervision.[387] The office, after the separation, became an "independent component of the FDIC," whose director would report directly to the chairman.[388] The restructuring reflected the FDIC's own acknowledgment of its lack of adequate focus on consumer mandates in the previous years.[389] A budget approval from the FDIC board of directors also allowed the agency to refocus.[390]

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resources according to the projected needs of functional programs, such as bank examination or liquidation." FDIC ANN. REP. xiv (1985).
[383] FDIC ANN. REP. xi (1983).
[384] *See* Seidman Statement, *supra* note 380 at 222.
[385] FDIC ANN. REP. vi (1980).
[386] *Id.* at 5.
[387] FDIC ANN. REP. 23 (1987) (describing the agency as responsible for consumer and civil rights protection efforts and notes that its primary mission is to respond to consumer complaints and inquiries).
[388] Seidman Statement, *supra* note 380.
[389] *Id.*
[390] *Id.* It is likely that both the deregulatory congressional influence and limited resources played a role in the FDIC's decision to reorganize. However, the quick bounce back of the consumer function in 1986-1987 (which is when the banking crisis peaked but when the FDIC received additional Congressional funding) suggests that the lack of resources (and the replenishment of those resources) was a pivotal factor in the FDIC's decision to prioritize or deprioritize its consumer protection functions.

c. Implementation Fluctuations: Separate Compliance Examinations Largely Reduced, Complaint Numbers Dropped from Report

Before the financial crisis of the '80s, the FDIC described its examination function as "the backbone" of its supervisory operations, with its tasks accounting for 70% of its annual budget and staff.[391] As such, the primary focus of the FDIC's consumer function was on compliance examinations, which we see from its report of a separate consumer compliance examination early on.

However, as the banking crisis unfolded, a "burgeoning workload and increased statutory responsibilities in an era of employment ceilings and limited resources" strained the FDIC.[392] Moreover, as the number of failed banks increased, the agency deployed bank examiners to support bank resolution activities.[393] This forced the agency to revise the examination function, mainly to decrease the number of consumer compliance examinations.

In 1980, at the beginning of the crisis, the FDIC devoted more resources to compliance examinations than it had in the previous year.[394] As the crisis unfolded, however, the workload for bank liquidations increased, so the agency siphoned much of the resources into the liquidation division. For example, in 1983, it substantially reduced the number of examinations (both consumer protection and safety and soundness examinations), due to a redirection of resources from well-operated banks, and a threefold increase in examiners' assistance liquidation of a record number of failed banks.[395]

The number of consumer compliance examinations continued to decline sharply until 1986, when the FDIC rebounded from the

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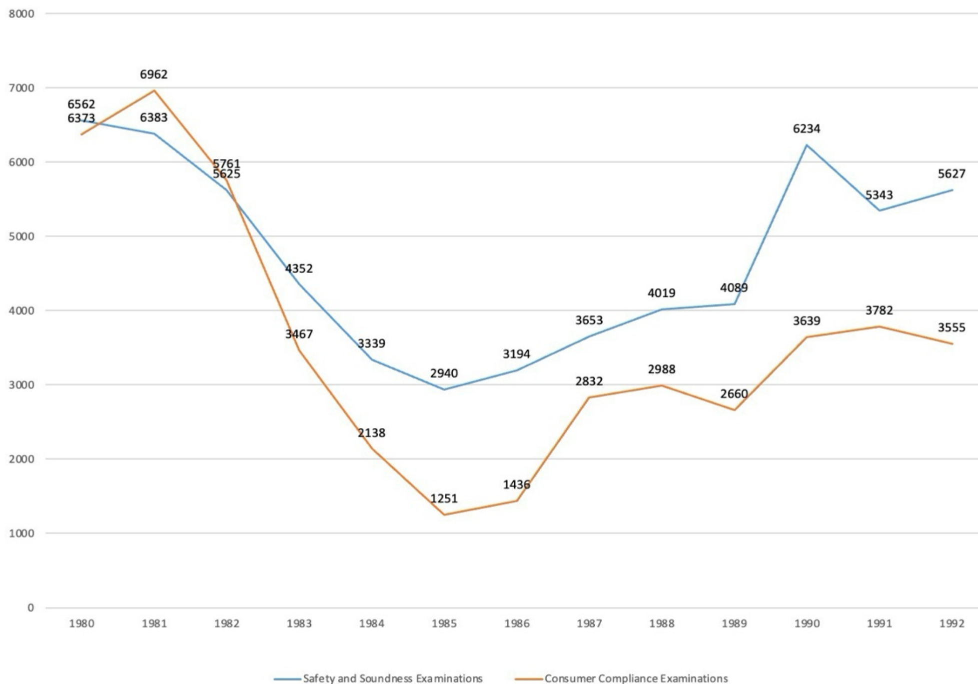
[391] FDIC ANN. REP. 6 (1980).
[392] *Id.* From 1979 through 1984, the FDIC's field examination staff declined 19 percent, from 1,713 to 1,389, mainly due to hiring freezes imposed by the Carter and Reagan administrations. *See* HISTORY OF THE EIGHTIES, *supra* note 289 at 426.
[393] *See* HISTORY OF THE EIGHTIES, *supra* note 289 at 427.
[394] FDIC ANN. REP. 9 (1980) ("This was the third full year in which the FDIC conducted compliance examinations separately from safety and soundness examinations, and the resources devoted to such examinations have increased each year. The 6,373 compliance examinations conducted in 1980 each averaged [sixty-seven] hours, compared to 4,809 examinations and an average of [fifty-six] hours each in 1979.").
[395] FDIC ANN. REP. 4-5 (1983); FDIC ANN. REP. 8 (1984) ("The Division [of Bank Supervision] also continued to devote more of its resources to assisting the Division of Liquidation in handling the record [seventy-nine] bank failures in 1984.").

crisis.[396] The rebound from the low period in 1986 applied to both safety and soundness examinations and can be attributed to a number of reasons, including legislation that mandated more frequent examinations and allocated more resources to the FDIC's examination function in general.[397] In addition to that, as Seidman noted in his speeches, the FDIC also corrected that lack of attention to consumer compliance, by 1988, the FDIC nearly doubled the number of compliance examinations conducted in 1986.[398]

FIGURE 2. THE NUMBER OF EXAMINATIONS FOR FDIC-SUPERVISED BANKS (1980-1992)[399]



[396] *See infra*, Figure 2.

[397] The FIRREA of 1989 assigned to the FDIC a new role as insurer of savings associations with accompanying back-up supervisor responsibilities. As such, in exercising these authorities, the FDIC either independently examined or participated in the examination of every savings institution insured by the Savings Association Insurance Fund (SAIF) in the first year or so after FIRREA. The FDICIA of 1991 required increased supervision to reduce risk to the insurance funds and among other things, increased examination frequency. FDIC ANN. REP. 26 (1994).

[398] Seidman Statement, *supra* note 380 ("Under the budget approved recently by the FDIC board of directors, the number of compliance examinations during 1988 is projected to increase again by approximately 60 percent.").

[399] FDIC ANN. REP. 7 (1980); FDIC ANN. REP. 3 (1981); FDIC ANN. REP. 8 (1982); FDIC ANN. REP. 17 (1983); FDIC ANN. REP. 8 (1984); FDIC ANN. REP. 15 (1985); FDIC ANN. REP. 3 (1986); FDIC ANN. REP. 2 (1987); FDIC ANN. REP. 4 (1988); FDIC ANN. REP. 8 (1989); FDIC ANN. REP. 18 (1990); FDIC ANN. REP. 14 (1991); FDIC ANN. REP. 23 (1992). The 1990-1991 Consumer Compliance Examination numbers include "examinations and visitations."

Another sign of the deprioritization of consumer mandates during this period was that the FDIC ceased to report the matters of consumer complaint processing in its annual reports, despite a mandate from the FTC Act.[400] From 1981 to 1986 the annual reports did not mention consumer complaints, which was an abrupt change, because as late as 1980, the FDIC considered "resolving consumer complaints and inquiries involving FDIC-supervised banks" to be an "important" function.[401] The FDIC's complete omission of the statutorily mandated consumer complaint response activities shows the extent to which the FDIC neglected consumer functions during this period.[402]

C. Findings: The Winds of Political Change and the Financial Crisis Blew Away Internally Built Consumer-Focused Agency Functions

The combined effect of deregulatory legislation, waning congressional oversight of consumer issues, restrictions on agency budgets, and President Reagan's appointment of like-minded political appointees constrained the prudential regulators' ability to *oscillate away from their consumer mandates* in accordance with the changed policy preferences of the dominant coalition. The Fed had to re-write the consumer rules that it had promulgated in the previous pro-consumer era in order to enhance efficiency and to alleviate burden on financial institutions. For the OCC, the presidential appointment of the Comptrollers had particular importance, as the Reagan-appointed Comptrollers took Reagan's deregulatory policies to heart.[403] These changes were largely in response to changed political and public preferences on consumer matters. "Police patrol type" congressional oversight measures, such as GAO reports and congressional hearings that functioned to check the agencies' resources allocated to consumer functions, ceased. Public support of consumer advocacy groups also waned.

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[400] *See* FDIC ANN. REPS. (1980-1992). The FTC Act requires the FDIC to respond to consumer complaints (and report the results to Congress). Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41-58.

[401] FDIC ANN. REP. 14 (1980).

[402] FDIC ANN. REP. 23 (1987). The 1987 annual report states that handling the complaints and inquiries that it received from consumers and others is one of the OCA's primary functions. The 1987 annual report gives details on complaint and inquiry numbers showing a steady increase from 1983 to 1987. From this we learn that even in periods when the FDIC neglected to reporting complaint function, the FDIC did perform this work.

[403] U.S. GEN. ACCOUNTABILITY OFF., GGD-97-96, FINANCIAL CRISIS MANAGEMENT: FOUR FINANCIAL CRISES IN THE 1980S 14 (1997) [hereinafter "GAO 1997"]. This finding is consistent with claims that the OCC is arguably the least independent of the three agencies because it is a part of the Treasury.

On top of the changed political winds, another major force was the banking crisis that unfolded throughout the decade. All three of the agencies reported that the increase in problem banks called for more intensive prudential supervision – increased frequency of scheduled examinations, more on-site management and corrective measures, and enforcement actions[404] – all of which demanded more resources. As a result, every one of the three agencies saw some degree of decline in consumer compliance examinations.

The degree to which the crisis affected each of the agencies varied, however, depending on each one's unique primary mission and crisis management role. The Fed's crisis role is to act as the lender of last resort and perform discount window lending.[405] The FDIC had multiple roles of protecting deposit insurance funds, mitigating bank runs,[406] and managing the bank resolution and receivership process.[407] Among the three agencies, the Fed had the least strain on its resources because it had the expertise and the resources as the lender of last resort (LOLR) for the problem banks.[408] The crisis struck the FDIC particularly hard because it had dual crisis management roles, both of which were labor-intensive and time-sensitive.[409] The OCC, although it did not have any crisis

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[404] *See, e.g., id.* at 35.
[405] *Id.* at 13. The founding of the Federal Reserve System in 1914 established the first official U.S. lender of last resort.
[406] *Id.* at 14. The primary purposes of the FDIC are (1) to insure the deposits, (2) to protect the depositors of insured banks through its bank supervision and examination function, and (3) to resolve failed banks.
[407] The FDIC's main responsibilities in a banking crisis are "to maintain stability and public confidence in the nation's financial system." FDIC, RESOLUTIONS HANDBOOK 5 (2019). The closure of failed FDIC-insured depository institutions, including the liquidation of the failed banks' assets, triggers these responsibilities. The first of these is the *resolution process*, which involves valuing and marketing a failing institution, and soliciting and accepting bids for the sale and receivership process. The second is the *receivership process*, in which the FDIC, appointed as the failing institution's receiver, closes and liquidates the failed institution. *See* FDIC, MANAGING THE CRISIS: THE FDIC AND RTC EXPERIENCE, VOLUME ONE: HISTORY, 231 (1997) (describing the bank failures in the 1980s: "[T]he FDIC's personnel were required to be available on 24-hour notice to travel from their existing failed bank receivership sites to any geographic location of the United States or its Commonwealth states.") [hereinafter "MANAGING THE CRISIS"].
[408] GAO 1997, *supra* note 403 at 1 (the Fed had the expertise, as well as the "critical mechanisms and resources for providing temporary liquidity" because it could lend at the discount window and conduct open market operations).
[409] MANAGING THE CRISIS, *supra* note 407 at 5-6, 46. In its own words, its primary mission is to "maintain financial stability and public confidence in the banking system;" thus, "[w]henever a bank failed, the FDIC's primary focus was to ensure that the depositors received the use of their insured funds as soon as possible." Notably during this period, the FDIC showed a decline in the number of prudential examinations as well as of compliance examinations. The consumer

management role, needed to initiate additional supervisory actions to deal with problem banks. Notably, the OCC has no crisis management role beyond its primary role as the prudential regulator of national banks.

The combined effect of external constraints of deregulatory politics and the banking crisis was a decrease in the observability and measurability of the consumer mandate.[410] Newly appointed agency heads who supported deregulation, and who needed to respond to the crisis, actively engaged in internal agency reorganization and the reallocation of resources, reflecting a deprioritization of consumer mandates. The agencies tore down or substantially weakened the internal walls between consumer and prudential functions. Agencies combined consumer functions with prudential functions or with industry affairs, abolished or decreased the number of separate consumer examinations, and ceased to report consumer complaints. Some even moved to cede consumer functions altogether to other agencies.

These moves collectively show how transient *internal* organizations, structures and programs can be for agencies that have priority goal ambiguity in the face of external changes and resource limitations. In other words, with no legislative barrier to prevent the agencies from doing so, they can abolish internal programs with one stroke of the pen. Frequent underreporting and omissions of consumer matters from the annual reports during this period further reflect the waning political oversight. When an organization's goals became unimportant, they then become invisible or unobservable in the public records.

IV. Between One Crisis and Another: 1990s – 2006

This section presents the final case study for the inter-crisis period, which started from the end of the S&L crisis and continued through the years leading up to the subprime mortgage crisis. As the crisis of the earlier decade subsided, the election of President Clinton and a Democratic majority in Congress briefly returned consumer mandates to the forefront of agency priorities. The consumer-oriented forces, however, quickly dissipated with the broader effects of deregulation. A change of congressional and

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compliance numbers hit bottom in 1986-1987, but prudential examinations also declined in these years (although not as sharply as the compliance examinations). This suggests that for the FDIC, crisis management functions competed with the day-to-day supervisory roles (including both prudential and consumer examination) for resources.

[410] *See infra* Part IV.C.

presidential political orientation led to a prolonged period of deregulation and a steady erosion of consumer mandates. We can characterize this period as a long road of deregulation that started with a blip of mainly CRA-related compliance reforms. As had been the case in previous decades, the agencies responded to these political forces by adjusting their goal priorities, this time oscillating away from their consumer mandates by reorganizing and changing the intensity with which they implemented consumer functions. Decades of institutionalizing consumer mandates, however, made the readjustment of priorities less salient, creating blind spots for political principals and for the agencies themselves.

A. President Clinton's CRA Reforms Followed by Deregulation

The most visible political presence in the area of consumer financial regulation during this period was President William Clinton, who took office in 1993. That year, the Clinton administration imposed CRA reform initiatives by issuing directives to regulators to revise the CRA rules to make regulations more effective but also less burdensome for the banks.[411] As I will describe in the next sections, between 1993 and 1995 the agencies, in numerous speeches and annual reports, repeatedly attribute their consumer-focused activities as responses to Clinton's direct presidential mandate.[412] Unlike the Democratic Clinton administration, the Republican presidents' support of consumer issues was generally narrow. President George H.W. Bush, who took office as the '80s banking crisis wrapped up, did not promote consumer initiatives. Rather, his "Presidential Regulatory Initiative," which began on January 28, 1992, was aimed only at reducing the regulatory burden.[413] He asked bank regulators to work together to this end.[414] After the Clinton presidency, President George W. Bush and a Republican Congress also conducted a "regulatory rollback" in various areas, and encouraged the mood for

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[411] *See Remarks Announcing the Community Development Banking and Finance Initiative*, 1 PUB. PAPERS 1086 (July 15, 1993); *Message to Congress Transmitting Community Development Banking and Finance Legislation*, 1 PUB. PAPERS 1087 (July 15, 1993); *President Clinton's Community Reinvestment Act Reform Initiative and Enforcement of Federal Fair Lending Laws: Hearing Before the Subcomm. on Consumer Credit and Ins. of the H. Comm. on Banking, Fin., and Urb. Affs.*, 103d Cong. 3-4 (1993) ("These changes will replace the paperwork with performance-oriented standards and will include tougher measures for non-compliance."); Kagan, *supra* note 128 at 2257.

[412] *See, e.g.*, 83 FRB ANN. REP. 112 (1996); FINAL REGUL. ON CMTY. REINVESTMENT ACT, 104th Cong. 2 (1995)
(statement by Eugene A. Ludwig, Comptroller of the Currency) [hereinafter "Ludwig Statement"].

[413] OCC 11 Q.J. 21, 29 (1991).

[414] *See* Ludwig Statement, *supra* note 412.

deregulation in the financial sector.[415] Further, President Bush signed major deregulatory laws, such as the Financial Services Regulatory Relief Act on October 13, 2006.[416]

As for legislative activities, a Democratic majority in both chambers of Congress in the late '80s brought a handful of consumer protection laws.[417] Beginning in the early 1990s, as the banking crisis of the previous decade demanded less attention, and energized by Clinton's election in 1992, Congress shifted its focus to consumer legislation.[418] Congress held many hearings about the agencies' efforts to implement the consumer protection laws – particularly those related to the CRA reforms.[419] At these hearings, the banking agency officials frequently testified on these matters.[420] While some

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[415] John Harwood & Kathy Chen, *Regulatory Rollback Under Bush Has a Major Impact on Economy*, WALL ST. J. (Aug. 3, 2001, 12:01 AM), https://www.wsj.com/articles/SB996784092217452045 [https://perma.cc/Y2UB-7KD4].

[416] This legislation included provisions that contributed to the reduction of unnecessary regulatory burdens for national banks, including provisions that alleviated full-scope, on-site examination requirements. Specifically, it increased the asset-size threshold from $250 million to $500 million, and allowed banks that were well capitalized, well managed, and satisfied certain other requirements to be examined every eighteen months, rather than every twelve. Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, § 605, 120 Stat. 1966, 2009-2010; *see also Hearing Before the H. Comm. on Banking, Hous., and Urb. Affs.*, 109th Cong. 10 (2006) (statement of Julie L. Williams, First Sen. Deputy Comptroller and Chief Counsel, Off. of the Comptroller of the Currency) (supporting the reduction of regulatory burden).

[417] Between 1987 and 1989, Congress passed three consumer protection laws, namely the Fair Credit and Charge Card Disclosure Act of 1988, the Home Equity Loan Consumer Protection Act of 1988, and the Housing and Community Development Act of 1987. The Community Reinvestment Act (CRA) was also amended to require regulatory agencies to make certain additional disclosures, and the Home Mortgage Disclosure Act was also revised to expand required disclosures. *See* HISTORY OF THE EIGHTIES, *supra* note 289 at 97; Jo Ann S. Barefoot, *Watch Out for Number One*, AM. BANKING ASS'N BANKING J. 73 (May 1990) ("New Democratic chairmen head not only both the Senate and House banking committees, but also the consumer affairs subcommittees on both sides. . . . Congress cares about consumer compliance. . . . These members are clearly interested in consumer protection issues and have already begun to make their marks.").

[418] For example, the Truth in Savings Act of 1968 established uniform disclosure on terms and conditions with regard to interest and fees, and the Home Ownership and Equity Protection Act of 1994 (amendment to TILA) required lenders to disclose and comply with limits on home-equity loans. 12 U.S.C. § 4301(a-b); 15 U.S.C. § 1601(a).

[419] *See* HISTORY OF THE EIGHTIES, *supra* note 289 at 91.

[420] *See, e.g.*, *Plans and Progress to Date of Interagency CRA Regulatory Reform Effort: Hearing Before the Subcomm. On Gen. Oversight, Investigations, and the Resol. of Failed Fin. Insts. of the H. Comm. on Banking, Fin., and Urb. Affs.*, 103d Cong. 12 (1993) (statement of Larry Lindsey, Governor, Bd. of Governors of the Fed. Rsrv. Sys.) ("Finally, you have asked for information on the present

congressional oversight reports still dealt with the post-crisis autopsies of the 1980s banking crisis,[421] the forward-looking focus was on consumer protection functions, specifically the extent of the resources that the agencies set aside for that purpose.[422]

The consumer-focused rebound that the Clinton administration sparked, however, was both limited and short-lived. In 1995, Clinton lost his Democratic majority in both houses, and soon Congress began to pass legislation with deregulatory effects.[423] In 1995, almost as soon as the regulators had completed the CRA reforms, Congress imposed cost reduction initiatives, which had far-reaching impacts on many consumer laws, and significant

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status of the Federal Reserve System, CRA examination, and enforcement efforts." Lindsey then described the status of the CRA program); *President Clinton's Community Reinvestment Act Reform Initiative and Enforcement of Federal Fair Lending Laws: Hearing Before the Subcomm. on Consumer Credit and Ins. of the H. Comm. on Banking, Fin., and Urb. Affs.*, 103d Cong. 81 (1993); FDIC ANN. REP. 39 (1993) ("The Senate and House Banking Committees shifted attention in 1993 to issues of banks' lending to small businesses and to serving the needs of low- and moderate-income neighborhoods. On numerous occasions, FDIC officials testified on lending discrimination, fair lending enforcement, and enforcement and reform of the Community Reinvestment Act."); *Interagency Efforts to Revise Regulations Implementing the Community Reinvestment Act: Hearing Before the Subcomm. on Fin. Insts. and Consumer Credit of the H. Comm. on Banking and Fin. Servs.*, 104th Cong. 4 (1995) (statement of Ricki Tigert Helfer, Chairman, Fed. Deposit Ins. Corp.). The OCC speeches also show an increased ratio of consumer matters. *See* News Release, Eugene A. Ludwig, Comptroller of the Currency, Final Regulation on Community Reinvestment Act, 1995-40 (April 19, 1995), https://www.occ.gov/news-issuances/news-releases/1995/nr-occ-1995-40.html [https://perma.cc/4YR5-E3LX].

[421] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO/AFMD-93-14, BANK EXAMINATION QUALITY: OCC EXAMINATIONS DO NOT FULLY ASSESS BANK SAFETY AND SOUNDNESS (1993); U.S. GOV'T ACCOUNTABILITY OFF., GAO/AFMD-93-12, BANK EXAMINATION QUALITY: FDIC EXAMINATIONS DO NOT FULLY ASSESS BANK SAFETY AND SOUNDNESS (1993); U.S. GOV'T ACCOUNTABILITY OFF., GAO/AFMD-93-1, BANK EXAMINATION QUALITY: FRB EXAMINATIONS DO NOT FULLY ASSESS BANK SAFETY AND SOUNDNESS (1993); U.S. GEN. ACCOUNTABILITY OFF., GAO/AFMD-93-11, THRIFT EXAMINATION QUALITY: OTS EXAMINATIONS DO NOT FULLY ASSESS THRIFT SAFETY AND SOUNDNESS (1993).

[422] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO/GGD-96-145, FAIR LENDING: FEDERAL OVERSIGHT AND ENFORCEMENT IMPROVED BUT SOME CHALLENGES REMAIN 2, 96 (1996); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO/GGD-96-23, COMMUNITY REINVESTMENT ACT: CHALLENGES REMAIN TO SUCCESSFULLY IMPLEMENT CRA 20 (1995).

[423] *See, e.g.*, 12 U.S.C. § 3311 (requiring select federal agencies to conduct regular reviews "to identify outdated or otherwise unnecessary regulatory requirements imposed on insured depository institutions.").

implications for the functions of the prudential regulators.[424] The Republicans in Congress also pressured agencies to reduce the "regulatory burden," by submitting bills requiring them to do so and holding hearings to pressure agencies to give "regulatory relief" to the agencies.[425]

More significant legislative activity in the 1990s, however, dealt with non-consumer law issues, such as adjusting the powers of banks, and changing the structure of the financial industry.[426] This was part of a shift from protecting the rights of consumers to dealing with developments in the broader financial markets and the economy.[427] Significant pieces of legislation were either deregulatory in nature or of little consequence for consumer issues.[428] Likewise, in the 2000s, although Congress passed a few consumer-related laws, they were either limited in scope,[429] or drew concern from consumer advocates, who claimed that the

[424] On September 30, 1996, the President signed into law the Economic Growth and Regulatory Paperwork Reduction Act of 1996. Pub. L. No. 104-208, 110 Stat. 3009-394 (1996). *See also* 83 FRB ANN. REP. 217-23 (1996).

[425] *See, e.g.*, *The Financial Regulatory Relief and Economic Efficiency Act: Hearing on S.1405 Before the S. Comm. on Banking, Hous., and Urb. Affs*., 105th Cong. 185 (1998) (statement of Eugene A. Ludwig, Comptroller of the Currency, OCC) (emphasizing the OCC's efforts to reduce the regulatory burden).

[426] *See* 93 FRB ANN. REP. 139-41 (2006).

[427] *See* Schimdt & Willardson, *supra* note 300; *see generally* HISTORY OF THE EIGHTIES, *supra* note 289 at 97-105 (describing the legislation during this period).

[428] For example, significant legislation that passed this decade included the Reigle-Neal Interstate Banking and Branching Efficiency Act of 1994, which permitted banks to expand geographically without regard to the barriers that previous federal and state laws had imposed. Pub. L. No. 103-328, § 101, 108 Stat. 2338, 2339 (1994) (codified as amended at 12 U.S.C. § 1842(d)). The Gramm-Leach Bliley Act of 1999 (GLB Act) was also a significant deregulatory law that famously tore down the barriers between banking and investment firms and had the further deregulatory effect of extending the length of time between CRA examinations for some financial institutions. Pub. L. No. 106-102, 113 Stat. 1338 (1999). The GLB Act also imposed new privacy requirements on financial institutions. *Id.* at 113 Stat. 1436.

[429] For example, the Fair and Accurate Credit Transactions Act of 2003 was enacted to assist consumers and businesses in combating identity theft. Pub. L. No. 108-159, 117 Stat. 1952 (2003); *see Fair and Accurate Credit Transactions Act of 2003*, FED. TRADE COMM'N, https://www.ftc.gov/legal-library/browse/statutes/fair-accurate- credit-transactions-act-2003 [https://perma.cc/H53S-AML3] (last visited Sept. 18, 2023) ("The Act also adds provisions designed to prevent and mitigate identity theft, including a section that enables consumers to place fraud alerts in their credit files, as well as other enhancements to the Fair Credit Reporting Act.").

requirements were "not sufficiently extensive,"[430] and considered them to be "major setbacks"[431] for the consumers.[432] Legislative oversight in forms of congressional hearings and reports reflected the shift in legislation and focused on non-consumer issues.[433]

Economic and banking conditions improved significantly during this period, which strengthened the political inclination toward deregulation. Until the early 1990s, the banking industry suffered from the effects of and the recovery from the banking crisis.[434] But from the mid- 1990s into the early 2000s, the industry

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[430] Andrea McGlinn, *Check Clearing for the 21st Century Act: The Impact on Consumers*, 9 N.C. BANKING INST. 179, 195 (2005) (examining the effects of the Check Clearing for the 21st Century Act upon consumers).

[431] Mark Elliott Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils*, 26 GA. ST. U.L. REV. 1147, 1169 (2010) (referring to the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005).

[432] Consumer advocacy groups believed that the BAPCPA would "harm families hit by genuine financial misfortune" because it made it more difficult and costly for individuals to declare a bankruptcy. Press Release, Consumer Fed'n of Am., CFA Statement Regarding the Signing of the Bankruptcy Bill into Law (Apr. 20, 2005), https://consumerfed.org/press_release/cfa-statement-regarding-the-signing-of-the-bankruptcy-bill-into-law/ [https://perma.cc/BB44-6EW4]. Consumer groups also claimed that the "special interests that literally wrote it" were the "big winners under the new law." *Id.*; Jean Braucher, *A Guide to Interpretation of the 2005 Bankruptcy Law*, 16 AM. BANKR. INST. L. REV. 349 (2008) ("[T]he 2005 law has at least temporarily reduced access to bankruptcy because of increased costs due to new uncertainty, paperwork and hoop-jumping.").

[433] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO/GGD-96-128, FEDERAL RESERVE SYSTEM CURRENT AND FUTURE CHALLENGES REQUIRE SYSTEMWIDE ATTENTION (1996) (analyzing Federal Reserve finances, including levels of spending, Federal Reserve finances in the future, and mechanisms used to control the cost of taxpayers); U.S. GOV'T ACCOUNTABILITY OFF., GAO/T-GGD-96-117, BANK OVERSIGHT AND FUNDAMENTAL PRINCIPLES FOR MODERNIZING THE U.S. STRUCTURE (1996) (recommending simplification of bank oversight through structural reform); U.S. GOV'T ACCOUNTABILITY OFF., GAO/GGD-00-48, RISK-FOCUSED BANK EXAMINATIONS AND REGULATORS OF LARGE BANKING ORGANIZATIONS FACE CHALLENGES (2000) (reviewing the risk-focused examination approaches to large complex banking organizations done by the Fed and the OCC); *Current and Future Bank Examination and Supervision Systems: Hearing Before the Subcomm. on Fin. Insts. and Consumer Credit of the H. Comm. on Banking and Fin. Servs.*, 105th Cong. (1997) (hearing on whether supervisory practices accurately assess risks in financial institutions); *Recent Bank Failures and Regulatory Initiatives: Hearing Before the H. Comm. on Banking and Fin. Servs.*, 106th Cong. (2000) (discussing bank failures and regulatory responses).

[434] *See, e.g.*, 81 FRB ANN. REP. 249 (1994) ("During 1994 the U.S. commercial banking system reported record earnings for the third consecutive year, as general economic conditions continued to improve both domestically and abroad."); 82 FRB ANN. REP. 231 (1995) ("The U.S. commercial banking industry in 1995 booked its fourth consecutive year of record profits. Earnings growth was fueled in part by a continued strong expansion in lending activity and by increases in fee income and trading revenue.").

enjoyed record profits. Meanwhile deregulation and loose monetary policy, combined with the novel forms of mortgage lending and financial innovation (such as securitization) laid the ground for the next financial crisis.[435]

After the "golden age" of consumer advocacy during the 1970s, consumer interest groups lost their relative influence on policy.[436] Although they continued to participate in congressional hearings, industry voices outnumbered them, as by this time, it had established a formidable grip upon legislators and regulators.[437] The influence of the industry became stronger yet in the '90s, as evidenced by the post-crisis autopsies of the 2008 financial crisis, often describing the rising political power of banks, which would propel the financial system and the economy into crisis.[438]

B. (Un)Observed Agency Behavior

1. The Federal Reserve

a. CRA Reform Followed by Failure to Act

The years from 1993 to 1995 were the peak years of the Fed's implementation of consumer mandates. In 1993, it reported that "a new process to reform the Community Reinvestment Act dominated Board and interagency activities." The report also noted that the "CRA initiative was a response to a directive from President Clinton to the regulatory agencies to reform the law by developing new regulations, supervisory procedures, and standards."[439] In 1995, the Fed reported that it had completed the CRA rulemaking process,[440] and in 1996, the Fed further described its implementation of the

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[435] *See, e.g.*, Matthew Sherman, *A Short History of Financial Deregulation in the United States*, CTR. FOR ECON. & POL'Y RSCH. 14-15 (July 2009), https://cepr.net/documents/publications/dereg-timeline-2009-07.pdf/ [https://perma.cc/84HQ-7SZ3].

[436] Bykerk & Maney, *supra* note 306 at 681.

[437] *See, e.g.*, Johnson & Kwak, *supra* note 132 at 153-55 (stating that during the Clinton administration, under the influence of Treasury Secretary Robert Rubin, Wall Street (and not the consumer advocates) had influence over the Democratic policy establishment).

[438] *See id.* at 157.

[439] 82 FRB ANN. REP. 199-200 (1995) (The Fed noted that the process had begun in 1993 "at the direction of President Clinton.").

[440] President Clinton had "directed the agencies to consult with community groups and the banking and thrift industries," so the Fed, in making the new regulation, took into account "an extensive outpouring of public views at hearings and in comment letters as well as the agencies' own experience with the original assessment system." *Id.* at 200.

CRA reforms.[441]

From the annual reports alone it is difficult to discern if, and the extent to which, the Fed prioritized consumer protection issues entirely. The Fed's annual reports reveal that from the late 1990s through the first half of the 2000s, the agency worked fastidiously on well-trodden topics that ranged from the disclosure of transactions,[442] to fair lending issues,[443] and to curbing abusive practices.[444] But many believed that this fell short of the efforts needed to deal with the new problems that began to develop during this decade.[445] The Fed itself did not consider that consumer protection matters were its "core mission," nor did it view these as "an integral part of [its] overall mission."[446] After the brief Clinton-CRA period, the Annual Reports devote relatively little space to describing consumer activities, and cease to reflect any major changes or initiatives.[447] For example, the reports do not emphasize any particular consumer issues[448] and they copy the same introductory language from one year to the next.[449] Such language shows that the Fed placed low priority to consumer issues during those years.

Post-crisis commentators claim that it was Alan Greenspan's domination of the Fed's policy that was most notable during this

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441 83 FRB ANN. REP. 187 (1996).
442 84 FRB ANN. REP. 177 (1997).
443 85 FRB ANN. REP. 214 (1998).
444 88 FRB ANN. REP. 121 (2001).
445 *See, e.g.*, Engel & McCoy, *supra* note 214 at 194.
446 *Regulatory Restructuring: Safeguarding Consumer Protection and the Role of the Federal Reserve: Hearing Before the Subcomm. on Domestic Monetary Pol'y and Tech. of the H. Comm. on Fin. Servs.*, 111th Cong. 8 (2009) (statement of Hon. Elizabeth A. Duke, Governor, Fed. Rsrv. Bd.).
447 Many of these reports present a section titled "Implementation of Statutes Designed to Inform and Protect Consumers." Under this is a long list, with descriptions, of the existing programs and their implementation. *See, e.g.*, 89-93 FRB ANN. REPS. (2002-2006).
448 By way of comparison, the Annual Report of 1993 stated that a new process to reform the Community Reinvestment Act dominated the Board's activities. 80 FRB ANN. REP. 199 (1993). Similarly, in 1994, the Fed reports it "continued to devote considerable resources to community development." 81 FRB ANN. REP. 213 (1994). In 2007, the Fed reports, the "[Fed's] consumer protection and community development functions were the subject of great interest in 2007." 94 FRB ANN. REP. 113 (2007).
449 From 2002 to 2006, the annual report uses much of the same language in the introductory sections on consumer and community affairs. 89 FRB ANN. REP. 69 (2002); 90 FRB ANN. REP. 61 (2003); 91 FRB ANN. REP. 55 (2004); 92 FRB ANN. REP. 87 (2005); 93 FRB ANN. REP. 91 (2006).

period,[450] and from that we can see that it is the Fed's (unobservable) inactions, rather than its actions, during this period that deserve attention. Greenspan's ideological beliefs generally leaned against regulation, which led the agencies to neglect consumer mandates.[451] He did not believe in the social regulation that many of the consumer laws embodied; he stated critically that banks had become the "prime candidates for lawmakers to select as vehicles to achieve desired social and economic objectives."[452]

The most salient example of Greenspan's influence was the Fed's failure to enact rules prohibiting predatory loans pursuant to its rulemaking authority under the Homeownership and Equity Protection Act of 1994 (HOEPA).[453] Even while acknowledging that there was a predatory lending problem brewing, the Fed emphasized consumer education over rulemaking (and enforcement).[454] Michael Barr, assistant Treasury Secretary for financial institutions, said of the Fed at a Senate hearing that "its inability to move quickly on consumer protection blocked reform in the mortgage market that could have helped avert this crisis."[455] Even when Fed Governor Edward M. Gramlich – who led the Fed's Committee on Consumer

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[450] *See, e.g.*, Johnson & Kwak, *supra* note 132 at 103 ("Greenspan dominated the Fed during his tenure, and his views became close to dogma on the Board of Governors.").

[451] Alan Greenspan, Chairman, Federal Reserve Board, Remarks at the 2003 Conference on Bank Structure and Competition (May 8, 2003) ("Private regulation generally is far better at constraining excessive risk-taking than is government regulation.").

[452] Alan Greenspan, Chairman, Federal Reserve Board, Remarks at the Independent Community Bankers of America National Convention (Mar. 11, 2005).

[453] Congress gave the Fed the power to enact rules to protect consumers from unscrupulous mortgage lending under the Homeownership and Equity Protection Act of 1994 (HOEPA). *See Predatory Lending Practices; Hearing Before the H. Comm. on Banking and Fin. Servs.*, 106th Cong. 259-66 (2000) (statements of the Fed. Rsrv. Bd. Staff on Rulemaking Auth. Under the Home Ownership and Equity Protection Act of 1994 (HOEPA)).

[454] *See, e.g.*, Edward M. Gramlich, Governor, Fed. Rsrv. Bd., Remarks at the Federal Reserve Bank of Philadelphia, Community and Consumer Affairs Department Conference on Predatory Lending (Dec. 6, 2000) ("At this point we have plenty of anecdotes about predatory lending but not much hard information. Increased HMDA data collection is the first step in gaining broader understanding of the business practices of subprime lenders and in helping us distinguish appropriate from inappropriate lending practices. Beyond this, we should all recognize that the best defense against predatory lending is a thorough knowledge on the part of consumers of their credit options and resources. Educated borrowers who understand their rights under lending contracts and know how to exercise those rights can thwart predatory lenders.").

[455] Jim Puzzanghera, *Rethinking Consumer Protection*, L.A. TIMES (Aug. 10, 2009), https://www.latimes.com/archives/la-xpm-2009-aug-10-fi-consumers10-story.html [https://perma.cc/X939-EXUR].

Affairs – approached Greenspan privately regarding the problematic subprime mortgage market, Greenspan refused to increase the scrutiny of subprime lenders.[456]

Later in a post-crisis analysis, the Fed was blamed for following the deregulatory politics of the time. The Fed focused on less intrusive ways of implementing consumer policies, using speeches, consumer literacy initiatives, bank examinations, and guidance without binding effect to address subprime abuses.[457] In a 2002 speech, Greenspan linked deregulation to education, emphasizing the importance of ensuring that individual consumers were informed market participants in the deregulatory environment.[458] Similarly, in 2005, Gramlich emphasized that enhanced financial literacy must accompany disclosure, stating that "consumers' level of financial literacy has not kept pace with the increasingly complex consumer financial marketplace and the expansion of financial service providers and products."[459] The annual reports also highlight the Fed's active work on both disclosure and education programs for consumers.[460] The Fed prescribed education and counseling as solutions by which consumers could protect themselves against predatory lending.[461]

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[456] Greg Ip, *Did Greenspan Add to Subprime Woes?*, WALL ST. J. (June 9, 2007), https://www.wsj.com/articles/SB118134111823129555 [https://perma.cc/KNX2-M8QX]; *see also* BETHANY MCLEAN & JOE NOCERA, ALL THE DEVILS ARE HERE: THE HIDDEN HISTORY OF THE FINANCIAL CRISIS 90-91 (Penguin Group, 2010). Governor Gramlich also gave public speeches on related topics such as predatory lending. *See, e.g.*, *Predatory Lending Practices: Hearing Before the H. Comm. on Banking and Fin. Servs.*, 106th Cong. (2000) (statement of Edward M. Gramlich, Governor, Fed. Rsrv. Bd.).

[457] Engel & McCoy, *supra* note 214 at 196.

[458] *See The State of Financial Literacy and Education in America: Hearing Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 107th Cong. 54-55 (2002) (statement of Alan Greenspan, Chairman, Bd. Of Governors of the Fed. Rsrv.); *see also The Changing Nature of the Economy: The Critical Roles of Education and Innovation in Creating Jobs & Opportunity in a Knowledge Economy: Hearing Before the H. Comm. on Educ. and the Workforce*, 108th Cong. 10-11 (2004) (statement of Alan Greenspan, Chairman, Bd. of Governors of the Fed. Rsrv.); Roger W. Ferguson, Jr., Vice Chairman, Fed. Rsrv. Bd., Financial Education: The Next Chapter in Community Development, Remarks Before the Pittsburgh Community Reinvestment Group (Oct. 19, 2000).

[459] *Regulatory Requirements and Industry Practices of Credit Card Issuers: Hearing Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 109th Cong. 58 (2005) (statement of Edward M. Gramlich, Governor, Fed. Rsrv. Bd.).

[460] *See* FRB ANN. REP. 177 (1997); FRB ANN. REP. 91 (2000).

[461] A GAO report, however, found that the Fed's solutions lacked effectiveness. U.S. GEN. ACCOUNTABILITY OFF., GAO-04-280, CONSUMER PROTECTION FEDERAL AND STATE AGENCIES FACE CHALLENGES IN PREDATORY LENDING 88 (2004).

b. No Organizational Changes

As we have seen in the previous sections, the organizational apparatus of the consumer mandate at the Fed (DCCA and Consumer Advisory Council) was stable.[462] The Fed maintained separate specialized compliance examinations for consumer laws (established in 1977),[463] as well as a specialized separate workforce (established in 1981), to handle that examination, and training sessions for specialized examinations for consumer compliance. As such, in terms of the internal organizational and institutional framework, it is difficult to observe any significant changes.

However, some of Fed Governor LaWare's statements during this period do show that the Fed considered combining or conducting simultaneously, examinations for consumer compliance and those for safety and soundness issues, in the belief that this would bring "less disruption to the institution."[464]

In terms of resources, the Fed responded to Clinton's initiatives by increasing the priority of consumer protection. In particular, it added resources (i.e., number of examiners) devoted to consumer and community affairs.[465]

c. Greenspan Renders Bank Examination "Obsolete"

In his eagerness to promote deregulation, Greenspan rendered the examination process – the Fed's preferred tool for dealing with consumer issues – "obsolete," as he believed that"sophisticated private market discipline" was the "most effective

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[462] *See* FRB ANN. REPS. (1990-2000). The Fed's support of consumer functions did not decline dramatically during the 1980s deregulation era, nor was there a notable upsurge during the Clinton-CRA era. The DCCA and the Consumer Advisory Council, established in the 1970s, remained in place.

[463] FRB ANN. REP. 81 (1994). ("The Federal Reserve System has maintained a program of specialized examinations of state member banks for compliance with consumer protection laws since 1977.").

[464] *Hearing Before the Subcomm. on Fin. Insts. Supervision, Reg., and Deposit Ins. of the H. Comm. on Banking, Fin., and Urb. Affs.*, 103d Cong. (1993) (statement of John P. LaWare, Member, Bd. of Governors of the Fed. Rrsv. Sys.).

[465] GAO 1995, *supra* note 279 at 22 (reporting that the number of examiners dedicated to consumer matters had increased from 116 in 1988 to 246 in 1994); FRB ANN. REP. 80 (1993) ("Increased resources devoted by the Board and the Reserve Banks enabled the System to respond to public concerns about possible discrimination in lending and bank participation in community development and reinvestment."); FRB ANN. REP. 81 (1994) ("In 1994 the Division of Consumer and Community Affairs continued to devote considerable resources to concerns about community development and rein-vestment.").

form of regulation."[466] Under his leadership, during Clinton's CRA drive, the Fed briefly increased its supervisory efforts for CRA and fair lending activities.[467] In general, however, examination intensity waned, reflecting deregulatory policies aimed at alleviating the burden on financial institutions. Notably, compared to safety and soundness examinations, which remained stable throughout that period,[468] the number of consumer compliance examinations, which peaked at 711 during the Clinton-CRA era, dropped sharply in 1999 to 344, and remained at that low level throughout the 2000s.[469] The number of CRA examinations (which the Fed reports separately from the compliance examinations) also dropped significantly in 2000, falling to 260, from 338 in 1999.[470]

FIGURE 3. THE NUMBER OF EXAMINATIONS FOR STATE MEMBER BANKS (1991-2006)

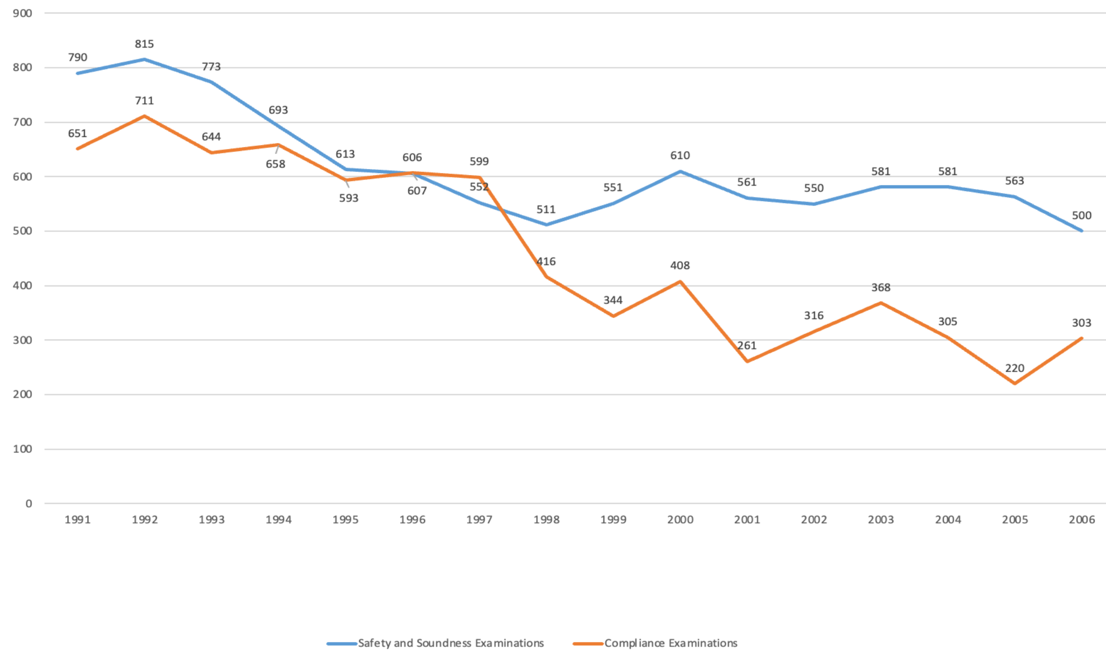
[466] Alan Greenspan, Chairman, Bd. of Governors of Fed. Rsrv., Banking Supervision*,* Remarks Before the Am. Bankers Ass'n (Sept. 18, 2000) ("[I]n recent years rapidly changing technology has begun to render obsolete much of the bank examination regime established in earlier decades. Bank regulators are perforce being pressed to depend increasingly on greater and more sophisticated private market discipline, the still most effective form of regulation. Indeed, these developments reinforce the truth of a key lesson from our banking history—that private counterparty supervision remains the first line of regulatory defense.").

[467] FRB ANN. REP. 80 (1993). Another example of the Fed's growing consumer law responsibility was the passing of the FDICIA of 1991, which expanded the Fed's authority to enforce consumer laws beyond state member banks to include certain types of foreign banking organizations. *See* FRB ANN. REP. 81 (1994).

[468] FRB ANN. REPS. (1991-2000). Safety and soundness examinations generally stay in line with the slightly decreased number of state member banks under the Fed's oversight. From 1991 to 2000 the number of state member banks remained steady at about 1000, while from 2000 to 2007 the reports show a minor steady decline from about 1000 to 900.

[469] FRB ANN. REP. 85 (1999).

[470] FRB ANN. REP. 86 (2000); FRB ANN. REP. 85 (1999); FRB ANN. REP. 85 (1998). The drop was because the GLB Act extended the length of time between CRA examinations for financial institutions with assets of less than $250 million.



*Source: Annual Reports of the Federal Reserve 1991-2006.
*Unlike the Figure 1 in Part III, this Figure shows the number of compliance examinations instead of CRA examinations. The reason for this is because beginning in 1993, the Fed Annual Reports cease to report numbers for CRA examinations, instead, they report numbers of compliance examinations for state member banks. For the years of 1991 and 1992, the Fed reports separate figures for both CRA examinations and compliance examinations.

2. The OCC

a. Appointees Conform to Political Initiatives, Promote Federal Preemption

The OCC's organizational attention to consumer matters increased during the early '90s, particularly after President Clinton named Eugene A. Ludwig as its Comptroller in 1993.[471] Some dubbed Ludwig the "President's Pointman," because he repeatedly referred to and prioritized the President's initiatives on consumer mandates in his speeches.[472] In a 1997 statement, Ludwig counted

[471] Eugene A. Ludwig served as the 27th Comptroller from 1993 to 1998. *See* Jennifer Ruhlen, *The President's Pointman*, INDEP. CMTY. BANKERS OF AM. (1998) ("Ludwig pressed hard for regulatory relief, encouraged interstate banking and branching, and expanded national bank powers.").
[472] *Nomination to Become the Comptroller of the Currency: Hearing Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 103d Cong. 10 (1993) (statement of Eugene A. Ludwig, Comptroller, OCC) ("First, I will devote a great deal of time and energy to eliminating discrimination in our financial services

his work on CRA matters as "one of the accomplishments" of which he was "most proud" during his tenure.[473] With bank failures in 1996 at a 20-year low, favorable economic conditions also enabled the OCC to increase enforcement of fair lending laws.[474]

The tide, however, turned with the end of Ludwig's term. Comptrollers John Hawke[475] and John Dugan,[476] who succeeded Ludwig in turn, and who were at the helm of the OCC throughout the late 90s-2000s, staunchly opposed consumer regulation, and "revered financial innovation and unfettered consumer choice as articles of faith."[477] Comptroller Hawke repeatedly sympathized with the banks regarding the burden of consumer-oriented legislation and was skeptical that the cost of consumer legislation justified the benefits that the consumers derived from it.[478] He also opposed state anti-predatory lending laws, claiming that they harmed the banks' business.[479] Comptroller Dugan, a former bank lobbyist,

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system."); *see Credit Availability: Hearing Before the H. Comm. on Small Bus.,* 103d Cong. 53 (1993) (statement of Eugene A. Ludwig, Comptroller, OCC) ("President's program of regulatory changes to improve credit availability for small- and medium-sized businesses, farms, and low-income and minority borrowers and communities."); *Reverse Redlining: Hearing Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 103d Cong. 4 (1993) (statement of Eugene A. Ludwig, Comptroller, OCC) (commenting on "reverse redlining," that is "the targeting of low-income communities for loans secured by the borrower's home that have unfair terms and conditions."); *President Clinton's Community Reinvestment Act Reform Initiative and Enforcement of Federal Fair Lending Laws: Hearing Before the Subcomm. on Consumer Credit and Ins. of the H. Comm. on Banking, Fin., and Urb. Affs*., 103d Cong. 35 (1993) (statement of Eugene A. Ludwig, Comptroller, OCC) ("[President Clinton] gave us a short deadline for getting the job done, the end of the year, and he gave us a clear objective: to make CRA work. Meeting the challenge set by the President is not easy.").

[473] *Hearing Before U.S. Congresswoman Maxine Waters' Forum on Community Reinvestment and Access to Credit: California's Challenge*, 105th Cong. (1998) (statement of Eugene A. Ludwig, Comptroller of the Currency, OCC) (reprinted in 2 OCC Q.J. 25, 27 (1998)).

[474] *Office of the Comptroller of the Currency's Recent Regulatory Actions: Hearing Before the Subcomm. on Fin. Insts. and Regul. Relief of the S. Comm. on Banking, Hous., and Urb. Affs.*, 105th Cong. 35 (1997).

[475] *John D. Hawke Jr., 28th Comptroller of the Currency 1998 – 2004*, OCC, https://www.occ.treas.gov/about/who- we-are/history/previous-comptrollers/bio-28-john-hawke.html [https://perma.cc/QNP2-K8A8].

[476] *John C. Dugan, 29th Comptroller of the Currency 2005 – 2010*, OCC, https://www.occ.gov/about/who-we- are/history/previous-comptrollers/bio-29-john-dugan.html [https://perma.cc/YLF8-69U3].

[477] Engel & McCoy, *supra* note 214 at 173.

[478] John D. Hawke, Jr., Comptroller of the Currency, OCC, Remarks Before the Am. Bankers Ass'n (Oct. 4, 2004).

[479] John D. Hawke, Jr., 22 OCC Q.J. 44 (2003) ("Banking today continues to operate under multiple layers of regulation that, while undoubtedly providing

whom President George W. Bush appointed in 2005, also had a reputation of siding with the national banks and opposing state efforts to stop predatory consumer lending practices.[480] From the beginning of his tenure, Dugan stated that the "safety and soundness of the national banking system must be a fundamental priority of the OCC," making it clear that the consumer mandate was, at best, the agency's secondary goal.[481] Perhaps the most hotly debated action of the OCC was its preemption of state consumer laws. In 2004, the OCC promulgated preemption rules that articulated a general preemption standard according to which "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its federally-authorized" powers do not apply to national banks except "where made applicable by Federal law."[482] Many commentators harshly criticized these as "sweeping" rules that favored the banks over consumers,[483] criticism that the OCC claimed was overly simplistic.[484]

b. Frequent Organizational Changes: Difficult to Analyze Prioritization, Confusing and Fluctuating Priorities

In direct response to the Clinton-driven CRA and consumer-focused reforms, in the early- to mid-1990s the OCC made incremental changes in organizational structure that, together with

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some protections to consumers, can be extremely burdensome and costly – indeed suffocating – to small banks.").

[480] Andrew Martin, *Does This Bank Watchdog Have a Bite?*, N.Y. TIMES (Mar. 27, 2010), https://www.nytimes.com/2010/03/28/business/28dugan.html [https://perma.cc/9B6S-SW5H].

[481] OCC ANN. REP. (2005). This is not to say that the OCC wholly abdicated its consumer mandate. There were some instances when the OCC worked at the forefront of consumer protection. For example, in 2002 it issued an Advisory Letter on Unfair and Deceptive Acts and Practices. *See, e.g.*, Julie L. Williams, Senior Deputy Comptroller and Chief Counsel, OCC, Remarks Before the Mid-Atlantic Bank Compliance Conf., on Compliance and Section 5 of the Federal Trade Commission Act, (Mar. 22, 2002) *in* 21 OCC Q.J. 50-53 (2002).

[482] Bank Activities and Operations; Preemption, 68 Fed. Reg. 1917 (Jan. 13, 2004) (codified at 12 C.F.R. pt. 7.4009); Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed. Reg. 1911 (Jan. 13, 2004) (codified at 12 C.F.R. pt. 34.4(a)).

[483] *See, e.g.*, Engel & McCoy, *supra* note 214 at 158.

[484] John D. Hawke, Jr., Comptroller of the Currency, OCC, Remarks Before the Women in Hous. and Fin., on Fed. Preemption and the Relationship Between the U.S. Const. and State Laws (Feb. 12, 2002) *in* 21 OCC Q.J. 26 (2002) ("Even if one were to view all state enactments in this area as 'pro-consumer,' and all OCC support for preemption as 'anti-consumer,' that simplistic view of life ignores the fact that the overwhelming volume of consumer protections for bank customers have come from federal laws that are clearly applicable to national banks. We conscientiously enforce all of those laws. In fact, we have more than 300 examiners who spend all or part of their time on consumer protection compliance.").

the accompanying descriptions, suggest the increased priority of consumer compliance functions. During this period, the OCC underwent several major reorganizations of its internal structure, each aimed at ensuring agency commitment to consumer mandates. To name a few, in 1992, the "Customer and Industry Affairs Division" became the "Community Development Division (CDD),"[485] and in 1994, the OCC's general law department created a new consumer-centric division to serve as a focal point.[486] During 1995, the OCC implemented a number of consumer- oriented organizational changes, which included the expansion of consumer specialized compliance,[487] the establishment of a centralized complaint process center,[488] and the creation of the community-specialized division for public affairs.[489]

After the Clinton-driven reforms, and throughout the 2000s, the OCC reshuffled and relabeled its internal organization almost every year. Most of the changes came as part of a larger scheme, such as transitions into a risk-based supervision program.[490] The OCC rarely explained the rationale of these changes, but there are some indications that the agency took steps to deprioritize its consumer mandate within its internal structure. Although the agency maintained some of its specialized consumer functions,[491] the agency did, for example, in 2001, abolish the consumer policy division for compliance supervision, while maintaining specialty

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[485] 12 OCC Q.J. 17 (1993) (This was done to reflect "the division's increased commitment to providing policy guidance on community development issues.").

[486] *Office of the Comptroller of the Currency's Recent Regulatory Actions: Hearing Before the Subcomm. on Fin. Insts. and Reg. Relief of the S. Comm. on Banking, Hous., and Urb. Affs.*, 105th Cong. 474 (1997) (statement of Eugene A. Ludwig, Comptroller of the Currency, OCC) ("To solidify the OCC's commitment to fair access, we made certain organizational changes [such as the] Community and Consumer Law Division.").

[487] That year, it expanded the "Compliance Management Department" – an internal division that until 1990 had been called the "Consumer Activities Division" – to include two specialized consumer functions, the "Community Development Division" and a new "Customer Assistance Unit." *See* 15 OCC Q.J. 33 (1996).

[488] To improve its handling of complaints, the agency established a centralized complaint process center, called the "Customer Assistance Unit." *See id.* at 34.

[489] The OCC created the "Community Relations Division" within its "Public Affairs Department." The division was responsible for the agency's relations with consumer and community organizations, particularly national public interest organizations. *See* 16 OCC Q.J. 35 (1997).

[490] *See, e.g.*, 22 OCC Q.J. 85 (2003).

[491] From 1996 to about the mid-2000s, specialized consumer functions existed in four major functional areas under various names, but tracing the changes and linking them with each predecessor and successor's offices and divisions was impossible. The OCC maintained numerous consumer-oriented functions within broader categories of public affairs, legal, bank supervision, and consumer complaints. *See* 21 OCC Q.J. 47, 58, 64 (2002).

divisions to support safety and soundness supervision.[492] Also that year, mirroring this organizational change, the OCC replaced the position of "Deputy Comptroller of Community and Consumer Policy," which had existed throughout the 1990s, with a "Deputy Comptroller of Compliance."[493]

In sum, due to the lack of explanation and continuity in the annual reports,[494] it is difficult to conclude from the organization's structure alone that in the late 1990s and 2000s, the OCC was significantly deprioritizing consumer mandates. But the changes in internal structure, together with the way that each of the programs implemented consumer protection actions, suggests that the OCC came to see itself as the defender of the safety and soundness of national banks, rather than as the watchdog of consumer regulations.

c. Examination Intensity Declines After Clinton-Sparked Surge

In alignment with organizational changes, the OCC increased its implementation of consumer compliance functions in the early- to mid-1990s in various ways. From 1993, it reinstated its regular compliance examinations for national banks, which it had done irregularly and at a reduced rate during the crisis-stricken 1980s.[495] Under the direction of Comptroller Ludwig, the OCC developed a separate and "dedicated cadre" of consumer compliance examiners, for which a career advancement program was developed.[496]

After the Clinton-CRA period, there are, however, hints that the OCC had adopted a "light- touch approach to supervision."[497]

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[492] *See id.* at 64.
[493] *See id.* at 74; 20 OCC Q.J. 77 (2001).
[494] Starting in 2003, the OCC changed the format of its annual reports, so a detailed breakdown of its internal organizations is unavailable. *See* OCC ANN. REP. 42 (2003).
[495] The annual report of 1993 stated that the OCC had instituted a "new compliance program that calls for more frequent compliance examinations" under which it would examine all national banks for consumer compliance "at least once every other year." 13 OCC Q.J. 14 (1994).
[496] *Id.* at 76 (Comptroller Ludwig stated that in 1993, the OCC "expanded training and career development program for examiners wishing to specialize in compliance work." The speech also notes that compliance examiners "will have similar opportunities for advancement in their specialization as those following the traditional commercial examination career path.").
[497] Post-crisis literature blames this approach as contributing to the subsequent financial crisis. *See, e.g.*, Engel & McCoy, *supra* note 214 at 173; Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream,* 26 YALE J. ON REGUL. 143, 153-54 (2009).

Around 2003, the agency started using the term "examination" interchangeably with "consultation,"[498] suggesting that it would employ less rigorous forms of supervision, and in 2004, it initiated a new program called "supervisory strategy," which integrated safety and soundness with compliance examinations.[499] The OCC assessed good customer service standards for examination activities using surveys that "bank officials" rated and completed; this suggests that the OCC's view that the "customers" were the banks themselves, not the retail consumers of banks.[500]

The OCC's efforts regarding consumer matters measured through the intensity of examination is difficult to observe because, unlike the Fed and the FDIC, its annual reports did not consistently give the number of safety and soundness and compliance/CRA examinations (Table 2).[501] Moreover, because the OCC conducted "continuous on site supervision," rather than periodic examinations, for "large" banks, the examination numbers are an inadequate index of intensity of supervision.[502]

TABLE 2. THE NUMBER OF EXAMINATIONS FOR NATIONAL BANKS (1991-2007)

	1991	1992	1993	1994	1995	1996	1997	1998
Safety and Soundness	-	-	-	-	-	-	-	1723
Compliance	-	-	-[503]	-	-	-	-	-

[498] The annual reports for 2003 through 2005 used this term. *See, e.g.*, OCC ANN. REP. (2003); OCC ANN. REP. (2004); OCC ANN. REP. (2005).
[499] OCC ANN. REP. 12 (2004) (the OCC described this program as an examination activity that included "safety and soundness, consumer compliance, information technology, and asset management examinations." Based on this description, the program integrated safety and soundness examinations and compliance examinations).
[500] OCC ANN. REP. 15 (2005) (emphasis added).
[501] For some years all categories were unavailable, for others, only some appear. The non-reporting of examination numbers does not suggest that the OCC did not conduct examinations altogether, because the federal law required bank examinations to be performed once every twelve to eighteen months. *See* 12 U.S.C. § 1820(d)(4); *see generally Hearing Before the S. Comm. on Banking, Hous., and Urb. Affs.,* 108th Cong. 11 (2004) (testimony of John D. Hawke, Jr., Comptroller, OCC) [hereinafter "Hawke Testimony"].
[502] The OCC organized the day-to-day supervisory operations into two tracks: one for large banks for which "continuous supervision" was necessary, and another for non-large banks (mid-sized or community banks) which required only periodic examinations. The OCC provided examination numbers only for mid-sized or community banks. *See generally* Hawke Testimony, *supra* note 501 at 11; *see also* OCC ANN. REP. (2001).
[503] In 1993, the OCC began a new program of compliance examinations every two years. *See* 13 OCC Q.J. 14 (1994).

CRA	789	759	979	1/3 of banks	1/3 of banks	-	-	-

(continued)

1999	2000	2001	2002	2003	2004	2005	2006	2007
1691	1659	1615	1609	1161	1642	1287	-	1287
-	762	685	767	835			-	897
-	144	242	459	565	486	427	300	

* Source: Quarterly Journals/Annual Reports of the OCC 1991-2007.
* ' – ' indicates the years that the OCC did not report the numbers for the examinations in its Quarterly Journals or Annual Reports.
* In 2004 and 2005, the agency reported numbers of "supervisory strategies" instead of the number of examinations.

3. The FDIC

a. Rebounded from the Banking Crisis, but Faced Agency Downsizing and Deregulation Soon After

Starting in the late 1980s, the FDIC was able to increase its attention to its consumer functions, as it had recovered from the initial shock of the banking crisis. The Chairman of the FDIC described 1991 as "a watershed year" in the agency's history, stating that it was still cleaning up from the banking crisis.[504] The following year, Congress appropriated funding that the FDIC had requested, "to implement consumer legislation enacted in FDICIA…."[505] With the additional congressional funding, fewer bank failures,[506] but most importantly with President Clinton's CRA initiatives as a major catalyst, the FDIC refocused on its consumer mandates in 1993 and 1994.[507]

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[504] The number of failed banks was still at its highest level historically, and "[t]he agency, its personnel, and the deposit insurance system itself were severely tested by the combined effect of a continued high level of bank failures and the precipitous decline of the Bank Insurance Fund (BIF)." FDIC ANN. REP. 1 (1991).

[505] FDIC ANN. REP. 73 (1992).

[506] FDIC ANN. REP. 2 (1993) ("Thanks in part to the downturn in bank failure activity during the year, we were able to devote even more time and resources to these efforts, and we think we are having an impact.").

[507] *Id.* ("At the request of President Clinton, the federal regulators of banks and savings associations began searching for ways to improve the Community Reinvestment Act (CRA) and thereby improve credit conditions, especially in low- and moderate-income neighborhoods."); *see also* FDIC ANN. REP. 28 (1994) ("The FDIC continued working with the other federal bank and thrift regulatory agencies on proposed revisions to the Community Reinvestment Act (CRA), which encourages banks and thrifts to meet the credit needs of their

The surge in consumer initiatives at the FDIC was short-lived; the tide began to turn in the mid-1990s. Even as the agency was working on the ongoing CRA reforms, it reported that it had "intensified its efforts to eliminate excess regulatory burden" to reduce costs.[508] In 1995, the FDIC tested consumer regulations "as to whether they are necessary to . . . implement public policy."[509] The agency also faced drastic downsizing after the residual work force crisis management diminished sharply throughout the 1990s.[510] The staffing at the FDIC had declined from a historical high of 15,585 employees in 1993[511] to about 5,300 at the end of 2003.[512]

The deregulatory legislation and political environment decreased the agency's workforce and ushered in administrative changes that deprioritized consumer mandates, as I will discuss below.

communities. The agencies received more than 6,700 written comments . . . with the FDIC alone receiving nearly 2,400.").

[508] FDIC ANN. REP. 21 (1995).

[509] *Id.* The FDIC made efforts to conform to new legislation, such as the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA), which modified numerous consumer-oriented regulatory requirements. FDIC ANN. REP. (1997). The EGRPRA requires that the FFIEC, OCC, FDIC, and the Fed review their relevant regulations at least once every ten years. *See* 12 U.S.C. § 3311(a). The goal of this law was to reduce the regulatory burden under a number of consumer laws, such as HMDA, TILA, RESPA, ECOA, and FHA, Fed. Fin. Inst. Examination Council, and the Economic Growth and Regulatory Paperwork Reduction Act of 1996. "As part of that effort, the FDIC reviewed 120 rules and policy statements to determine whether they were necessary to ensure the safety and soundness of the banking system or to protect consumers," FDIC ANN. REP. (1996). Similarly, "[t]he Riegle Community Development and Regulatory Improvement Act of 1994 (CDRI) require[d] an interagency effort to reduce the cost and burden of regulations on the banking industry." *Id.*

[510] After peaking in 1993, the FDIC's staff decreased in response to workload, with the exception of a temporary increase in 1996 when the FDIC absorbed the staff of the Resolution Trust Corporation (with its residual work and operations). FDIC ANN. REP. 5, 116, 125 (2002); *see also* Jonathan D. Glater, *After a Wait, a Whirlwind at the FDIC*, WASH. POST (Jan. 26, 1995), https://www.washingtonpost.com/archive/business/1995/01/26/after-a-wait-a-whirlwind-at-fdic/2ec0f28d-e2c5-4b26-8c95-eb19bf525bd7/ [https://perma.cc/2PWW-7YGE].

[511] FDIC ANN. REP. 2 (1994).

[512] FDIC ANN. REP. 19 (2003). These figures included staff assigned to the Resolution Trust Corporation which the FDIC absorbed.

b. Organizational Changes: Enhancement of Consumer Mandates, Followed by their Deterioration, and a Diminishing Workforce

Starting from the late 1980s, the FDIC continued to reinforce consumer-focused institutions throughout the early 1990s.[513] Notably it created the Division of Compliance and Consumer Affairs (DCA) in 1994.[514] The FDIC's rationale for this restructuring was to expand the agency's "long-standing commitment to consumer, civil rights and fair housing laws,"[515] and its community affairs activities.[516] This reorganization included the establishment of a directorship position that reported to the FDIC's Board of Directors directly, and not through a division head that also oversaw safety and soundness matters.[517] The DCA also had a cadre of managers and examiners to conduct consumer compliance examinations, separate from safety and soundness examiners.[518]

The FDIC maintained the organizational divide between consumer and prudential mandates by keeping the DCA intact while Clinton-appointed chairpersons were in office.[519] In 2001, however, Chairman Donald E. Powell – President Bush's chosen chairman – thoroughly reviewed the agency's organizational structure, with the aim of decreasing the burden on the financial institutions.[520] As a

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[513] Earlier in the 1980s, in response to the crisis, the FDIC had folded its specialist consumer protection function into (and then separated it from) the generalist supervision apparatus: the Division of Supervision (DOS).

[514] In August 1994, the agency created the DCA by removing the compliance examination function from the Division of Supervision (DOS) and combining it with the duties of the former Office of Consumer Affairs (OCA). Earlier in 1986, the FDIC had reinstated a separate OCA after its own admission that it had inadequate consumer focus during the '80s banking crisis. *See* Memorandum to Ronald F. Bieker, Acting Director, Div. of Compliance and Consumer Affs., from David H. Lowenstein, Assistant Inspector Gen. (Mar. 15, 1999) [hereinafter "Memorandum"].

[515] FDIC ANN. REP. 18 (1994).

[516] *Id.* at 27.

[517] *See* Memorandum, *supra* note 514; FDIC ANN. REP. 27 (1994).

[518] FDIC ANN. REP. 26 (1994).

[519] The Clinton-appointed Chairmen were Ricki R. Tigert (in office Oct. 7, 1994 - June 1, 1997) and Donna A. Tanoue (in office May 26, 1998 - July 11, 2001). *List of Chairmen of the FDIC*, FDIC, https://www.fdic.gov/about/history/chairmen/ [https://perma.cc/8UN8-8QN3].

[520] As soon as Donald E. Powell came in office in 2001, he "began a comprehensive review of the Corporation from top to bottom" and "scrutinized" the FDIC's organizational chart, staffing levels, and culture "all with an eye toward [making it] a more efficient, effective and relevant organization." FDIC ANN. REP. 2 (2001). He vowed that the FDIC should "impose as little burden as possible on the institutions" and ensure that the supervision structure "breaks down the old cultural barriers between safety and soundness and compliance" so

result, in 2002, the agency once again merged consumer and prudential functions into a new division that was responsible for overseeing both types of examinations.[521] The restructuring signaled the agency's decreasing focus on consumer matters.[522]

The number of staff allocated to consumer supervision (i.e., DCA staff) peaked in 1998 and decreased steadily thereafter, until the office was merged with the prudential supervision in 2002. These trends generally reflect the organizational priority of consumer mandate during the period. Meanwhile, the numbers for the prudential arm of supervision (i.e., DOS staff) generally follows the wave of deregulation and post-crisis staff reduction throughout the late 1990s.[523] Notably, the agency reported a separate number of consumer-focused staff (i.e., DCA employees) only between 1994 and 2001 (Table 3).

TABLE 3. THE NUMBER OF STAFF AT THE FDIC 1992-2003

	1992	1993	1994*	1995	1996	1997
DCA	0	0	396	463	588	618
DOS		3,971	3,369	3055	2572	2550
FDIC Total Staff (RTC)	22,459 (7,409)	20,994 (6,775)	17,526 (5,899)	11,856 (2,043)	9,151 (**)	7,793

(continued)

1998	1999	2000	2001	2002	2003
646	636	593	570	0	-
2655	2693	2,589	2,532	2,811 ***	2,797
7,359	7,266	6,452	6167	5430	5300

Source: FDIC Annual Reports 1992-2003
*1994 marks the year of the establishment of the DCA, and thus the first year the agency reports DCA staff numbers.
**From 1996, the Annual Reports no longer reported numbers for RTC because the FDIC absorbed RCT staff.

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it is "responsive to the needs of the industry and the demands of the economy." *Id.* at 3.

521 Specifically, the agency merged the DOC and the DCA to create the new Division of Supervision and Consumer Protection. FDIC ANN. REP. 18 (2002). The new division remained until the FDIC once again prioritized its consumer mandates functions after the 2008 financial crisis. *See* FDIC ANN. REP. 163 (2010).

522 The FDIC Annual Report of 2001 only allocates about one page to describe consumer-related matters. *See* FDIC ANN. REP. 10-13 (2001).

523 *See Woman Is Nominated to be Head of F.D.I.C.*, N.Y. TIMES (Nov. 18, 1993), https://www.nytimes.com/1993/11/18/business/woman-is-nominated-to-be-head-of-fdic.html [https://nyti.ms/45YosHl] ("The agency already had announced it was laying off 3,330 employees involved in selling the assets of failed banks and it probably would face pressure to further consolidate its operations.").

*** On June 30, 2002, the Division of Supervision and the Division of Compliance and Consumer Affairs were merged into the new Division of Supervision and Consumer Protection. (FDIC AR 2002 at 126)
"-" means not reported, "0" means reported as 0 (zero)

c. Implementation

As was the case with the OCC, the FDIC also increased its implementation of consumer compliance functions in the early- to mid-1990s in ways that coordinated with the organizational changes discussed above.[524] The redirection of resources to consumer mandates was possible with improved financial industry conditions in the early 1990s.[525] Notably, the FDIC created a separate and specialized compliance examiner workforce, which it reported for the first time in 1992.[526] This was followed by a separate hiring program[527] and a new organizational division (DCA) for consumer compliance.[528]

The FDIC continued to conduct and report consumer compliance examinations separately from safety and soundness examinations.[529] Figure 4 shows that both types of examinations were at a higher level in 1993,[530] and then started to drop at a similar rate and then level out – a trend that generally follows the decline in institutions under the agency's supervision.[531]

FIGURE 4. THE NUMBER OF EXAMINATIONS FOR FDIC-SUPERVISED BANKS (1991-2006)

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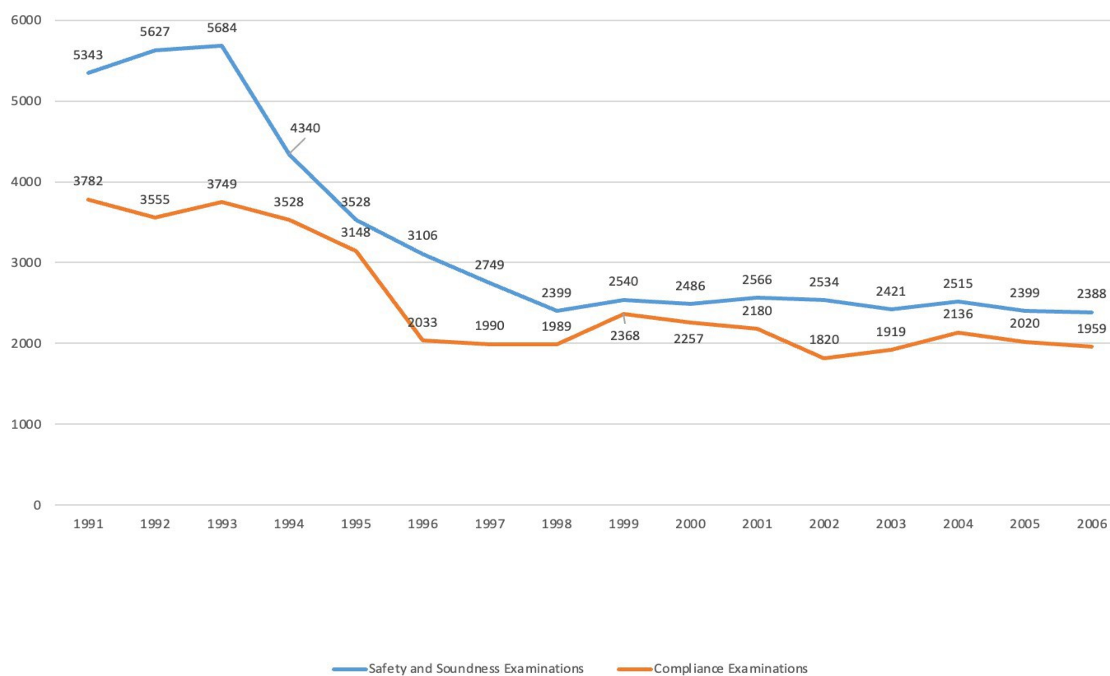
[524] FDIC ANN. REP. 16 (1993).
[525] *Id.*
[526] GAO 1995, *supra* note 279 at 20 ("FDIC did not establish an entirely separate compliance examiner workforce exclusively responsible for compliance examinations until 1990."); FDIC ANN. REP. 61 (1992) ("DOS field examiner staff in the safety and soundness area totaled approximately 3,000 at year-end 1992. Another 149 field examiners specialized in monitoring compliance with consumer and civil rights regulations. Their numbers increased by 41 during the year.").
[527] FDIC ANN. REP. 16 (1993).
[528] FDIC ANN. REP. 61 (1992); GAO 1995, *supra* note 279 at 20.
[529] It did so throughout the crisis of the 1980s and throughout the 1990s. *See, e.g.*, FDIC ANN. REP. 29 (1999).
[530] The FDIC noted that improving conditions in the banking industry led to higher capital levels, which in turn allowed the agency to "direct its resources toward the mandate to regularly examine all state nonmember banks." FDIC ANN. REP. 16 (1993).
[531] The FDIC's additional role as a back-up regulator for national banks significantly decreased in 1993 and the number of state nonmember banks and savings banks also dropped steadily throughout the 1990s. FDIC ANN. REP. 16 (1993).



Source: Annual Reports of the FDIC 1991-2006.

C. Findings: Political Winds Can Still Change Internal Structures and Programs, but Agencies' Oscillations Become Less Salient

We saw in earlier sections that during the 1960s and the 1970s, when the pro-consumer coalition was strong, the agencies prioritized consumer mandates by engaging in inter-agency coordination strategies – separation and specialization – for those tasks. These internally built structures quickly gave way under the influence of the deregulatory trend and the banking crisis of the 1980s. In this section, we saw that the agencies, once again, rebuilt their *internal* mechanisms during the Clinton-CRA era, and then rolled them back during the deregulatory period that followed. Although decades had passed since the enactment of major consumer legislation, agency heads still had sufficient leeway to respond to dominant deregulatory political forces by deprioritizing consumer mandates through their internal organization choices.

During this period, however, the agencies' oscillation regarding consumer mandates became less salient and more difficult to observe. One reason for this is that the agencies had fully institutionalized internal structures and programs for the consumer mandates, thus creating new "paths." Another possible reason is that

the agencies simply ceased to report their consumer work separately from prudential mandate because Congress rarely required them to do so. In other words, the lowered level of political attention led to a lower observability of agencies' work on consumer mandates. Therefore, it became challenging to observe and follow the indices, such as examination frequency, that signaled the agencies' (changing) priorities.

Another reason for the lowered visibility of oscillation of priorities was the changed nature of the conflict. During the banking crisis of the 1980s, the agencies' main challenge was their inability to stretch their resources to cover a broader range of responsibilities. During the deregulatory trend of the 1990s and 2000s, however, the conflict concerned the incentives, and sometimes the ideologies, of the regulators. The inaction of the Fed regarding HOEPA rules, or the OCC's preemption of state consumer protection laws, were more of a matter of conflicting ideologies and skewed incentives (i.e., protecting banks' interests over consumers'), which are more difficult to observe. The changed nature of the conflict and the lack of quantitative indices to evaluate incentives and ideologies obscured the oscillation of priorities.[532]

Notably, all the prudential regulators of this study are considered "independent agencies," deliberately designed to be shielded from politicians. Yet, as the case studies showed, Congress and the presidents wielded significant power to shape agencies' priorities through legislation, oversight, appointment, and budget controls.[533] The different degree of agency responses, however, differed across the agencies. The Fed, due to its constant role in consumer rulemaking and coordination responsibilities, and perhaps

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[532] In some cases, they became more apparent after the 2008 financial crisis, through post-crisis analysis and reports that exposed the internal conflict between the goals. For example, the disagreement between Fed Governors Gramlich and Greenspan on implementing provisions to deal with the risky subprime mortgage market was revealed only after the 2008 financial crisis. *See* Engel & McCoy, *supra* note 214 at 195-96.

[533] The Trump presidency, through appointment powers, significantly redefined the roles and views of financial regulators, as Trump appointees at the OCC and the CFPB have reversed the actions of their Obama-appointed predecessors. *See* Phil McCausland, *Trump Administration will Roll Back Obama-Era Restrictions on Payday Lenders*, NBC NEWS (Feb. 6, 2019, 3:47 PM), https://www.nbcnews.com/news/us-news/cfpb-announces-it-will-roll- back-obama-era-restrictions-payday-n968471 [https://perma.cc/4Y34-ZEZC]; Ryan Tracey, *Trump's Bank Regulator Flips Obama's Script*, WALL ST. J. (June 8, 2018, 5:30 AM), https://www.wsj.com/articles/trumps-bank- regulator-flips-obamas-script-1528450206 [https://perma.cc/Z4YV-J3FA]; *see also Trump's Chance to Redefine the Regulators,* WALL ST. J. (Jan. 18, 2017, 2:30 PM), [https://perma.cc/3MQJ-WD4E].

because it was the most insulated "archetype" of an independent agency[534] showed the most stable consumer mandate at least in terms of internal organization. In contrast, the OCC and the FDIC easily bowed to political pressure – either to increase or decrease focus on consumer mandates – which suggests that these agencies had less independence than the Fed.[535] This observation is consistent with political science and legal literature.[536]

Conclusion: Beyond Agency Restructuring

This Article conducted case studies of three prudential regulators – the Fed, the OCC, and the FDIC – and showed how they accepted and implemented consumer mandates over time. These regulators were never meant to have consumer mandates, but the 1960s consumer and civil rights movements led Congress to expand their regulatory portfolios to include a wide variety of consumer mandates. The agencies accepted and accommodated these new mandates, even if they did so reluctantly. Over the decades, however, the priority that they afforded consumer compliance oscillated in response to the banking crisis of the 1980s and decades of the deregulatory policy preferences of political coalitions.

These findings challenge the belief that regulatory structure was a significant contributor to regulatory failure in two ways. First, the case studies show that prudential regulators do not exist in a vacuum. They respond to the effects of their own histories, changes in political power, and the economic situation. In this dynamic space, the regulators actively engage in internal coordination to manage organizational ambiguity, using the strategies of separation, specialization, and centralization – the same approaches that the

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[534] *See* Gillian E. Metzger, *Through the Looking Glass to a Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, 78 L. & CONTEMP. PROBS., 129, 130-32 (2015); *see also id.* at 134 ("The Fed, meanwhile, represents the apogee of independence that is the traditional hallmark of financial regulation.").

[535] *See* HENRY B. HOGUE ET AL., CONG. RSCH. SERV., R43391, INDEPENDENCE OF FEDERAL FINANCIAL REGULATORS: STRUCTURE, FUNDING, AND OTHER ISSUES, 28 (2017); 12 U.S.C. § 1. Unlike other financial regulatory agency heads, the OCC's Comptroller of the Currency is not protected by "for-cause" removal but can be removed "at will." 12 U.S.C. § 2. Yet another explanation is that the lack of organizational change is more likely a product of the Fed's conservative approach. *See* ANNE M. KHADEMIAN , CHECKING ON BANKS: AUTONOMY AND ACCOUNTABILITY IN THREE FEDERAL AGENCIES 66 (Brookings Inst. Press, 1996) (an examiner who worked both at the Fed and the OCC commented that the OCC's organization chart changes frequently, but the Fed's would not change even after five years, because changing at the Fed as a "draconian process," while the OCC is "always doing something new.").

[536] *See, e.g.,* Metzger *supra* note 534 at 134.

designers of the CFPB deployed during post- crisis restructuring. Whether the agencies deployed these ameliorative tools, and the vigor with which they did so, often hinged upon the preferences of the political coalition and degree of external pressure it imposed. The role of politics in financial regulation is neither a surprising nor a novel finding, but this study sheds new light specifically on how financial regulators as multiple goal agencies internalize these political swings. The findings suggests that the institutional deprioritization of consumer mandates, especially in the decades leading up to the recent global financial crisis, was not an organizational dysfunction of the regulators, but rather, a symptom of a wider policy failure on the part of the political principals.

Second, a post-crisis focus on *external* regulatory structures dismisses the agencies' remarkable flexibility in the ways that they altered their *internal* institutions to avoid or resolve conflicts between prudential and consumer mandates. In the face of conflicting goals, there are *alternatives other than wholesale institutional reform* (i.e., splitting the agency into a prudential- and consumer-focused "Twin Peaks" structure). Proponents of agency restructuring are generally silent about the *internal* organizational apparatuses of the agencies. However, this Article shows that the agencies were active, conscious of, and deliberate in the ways that they reorganized their internal apparatuses in response to external constraints. This challenges the common belief that the regulators themselves are unable to resolve goal ambiguity or goal conflict in order to avoid organizational dysfunction.[537]

The case studies also show how transient these *internally*-built apparatuses can be in the face of external pressure. We saw that incoming presidents appointed new, like-minded agency heads who immediately conducted makeovers of their agencies' internal structures. We saw how quickly agencies abandoned consumer functions when the banking crisis siphoned agency resources for the sake of crisis management functions. We also saw that an overall deregulatory laissez-faire approach to consumer financial markets and long-term disinterest in consumer mandates can slowly erode the protective institutions of the past.

Perhaps the final question to ask then is, what can an external agency reorganization achieve that the agencies themselves cannot achieve internally? Unlike internal coordination, which agencies can do at their own discretion without political oversight, we can understand an *external* agency reorganization as the "ultimate"

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[537] *See, e.g.*, Biber, *supra* note 7 at 14-17 (stating the agencies' inability to solve the multiple-goal problem themselves).

structural intervention by political principals looking for a more potent and durable ex ante control.[538] Structural control can transcend the limited capacity of the political principals who seek to perform ex post "police patrol type" controls.[539] When political actors determine agency structure, they are making policy choices by engaging in a "political tug-of-war," using a variety of agency design elements.[540] By designing a consumer-focused agency, the enacting coalition is responding to this flexibility by striving to limit agency discretion on goal priority and ensure that under-represented political interests keep a foothold even when the political landscape changes.[541] I leave to future studies the questions of how the CFPB and the post-Dodd Frank regulatory structure will respond to the constraints that this Article has identified; how the performance of the regulatory agencies post-crisis structure compares to their pre-crisis structures; and especially, how the agencies respond to future political coalitions. It suffices to note here that splitting a multiple-goal agency to remove an underperforming goal is a quick fix that deals with just one aspect of many design elements that define an agency's relationship with its political principals.

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[538] Macey also observes that "the most powerful device available to politicians and interest groups who wish to endow a particular legislative enactment with durability against both legislative and bureaucratic drift: [is] the ability to structure the initial design of an agency." Macey, *supra* note 16 at 100. *See, e.g.*, *id.* at 93 (recognizing that "the structure and design of administrative agencies can be explained as mechanisms for controlling the principal-agent problem that exists between the political actors who delegate regulatory authority to administrative agencies and the bureaucrats within those agencies."); *id.* at 109 (arguing that "controlling agency structure and design probably is the single most important mechanism for ameliorating the negotiating problem that plagues interest groups and lawmakers.").

[539] Gersen and Berry argue that "[t]he canonical answer in administrative law, constitutional law, and political science" to the question of how to hold accountable the fourth branch of government is "agency design." *See* Christopher R. Berry & Jacob E. Gersen, *Agency Design and Political Control*, 126 YALE L.J. 1002, 1005 (2017). Political scientists generally view agency design as a function of maximizing political control or political credit. *See, e.g.*, Jacob E. Gersen, *Designing Agencies, in* RSCH. HANDBOOK ON PUB. CHOICE & PUB. L. 334 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

[540] *See* Terry Moe, *The Politics of Bureaucratic Structure*, *in* CAN THE GOVERNMENT GOVERN 267, 268 (John E. Chubb & Paul E. Peterson eds., 1989) ("Structural choices have important consequences for the content and direction of policy, and political actors know it. When they make choices about structure, they are implicitly making choices about policy. And precisely because this is so, issues of structure are inevitably caught up in the larger political struggle. Any notion that political actors might confine their attention to policymaking and turn organizational design over to neutral criteria or efficiency experts denies the realities of politics.").

[541] *See* Macey, *supra* note 16 at 100. Many scholars, however, argue the limitations of ex ante *procedural* controls in producing specific results. *See also* Biber, *supra* note 7 at 33-34.

Addendum

	1995	1994	1993	1992	1991	1990	1989	1988	1987	1986	1985
Compliance examination and visitation	-	-	4291	3993	3782	3639	3901	4282	-	-	-
Compliance examination (excluding visitation)	3148	3528	3749	3555	-	-	2660	2988	2832	1436	1251

Note: The FDIC 1995 Annual Report no longer mentioned visitation numbers.

The above table, and Figures 2 and 4, were generated by gathering information from FDIC Annual Reports (for the above table, Annual Reports between 1985 and 1995), but the numbers indicated here are not necessarily from the annual report published in the corresponding year. This is because the FDIC was inconsistent in reporting their compliance examination/visitation numbers. Between 1988 and 1993, the Annual Reports of the FDIC reported the numbers of "compliance examinations and visitations." In some years, the reports indicated separate figures for "compliance examinations *including* visitations" or "compliance examinations *excluding* visitations." In some cases, numbers were reported retroactively. For example, the 1992 and 1993 compliance examination (excluding visitation) numbers were reported in the 1994 Annual Report. Likewise, compliance examination (excluding visitation) numbers for 1988 were reported in the 1989 Annual Report. For consistency, when generating the graphs in Figures 2 and 4, we used figures for compliance examination (excluding visitation). However, for years 1990 and 1991, there was no information for compliance examination (excluding visitation) so for these years figures for compliance examination and visitation were used. This may have resulted in an inaccurate overrepresentation of compliance examination numbers during 1990- 1991, given the trends before and after those two years.