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# TECHNOLOGY REGULATION BY DEFAULT: PLATFORMS, PRIVACY, AND THE CFPB

Rory Van Loo\*

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## INTRODUCTION

In the absence of a technology-focused regulator, diverse administrative agencies have been forced to develop regulatory models for governing their sphere of the data economy. These largely uncoordinated efforts offer a laboratory of regulatory experimentation on governance architecture. This symposium essay explores what the Consumer Financial Protection Bureau (CFPB) has done in its first several years to regulate financial technology (“fintech”), in the context of broader technology-related concerns identified in the literature.

The CFPB offers an example of an agency that avoids some of the major potential institutional challenges that other regulators might face: susceptibility to capture, a lack of technological sophistication, and insufficient authority. Launched in 2011 with a “technocratic impulse,” the CFPB embraced its identity as a 21<sup>st</sup> century agency from the outset.<sup>1</sup> It opened a Twitter account and hired a large number of computer engineers before becoming operational, and has developed a suite of online digital tools for consumers. Compared to the Federal Trade Commission (FTC), the CFPB has more authority to write rules, impose civil penalties, and monitor what businesses are doing with algorithms. Its funding is independent of congressional appropriations, and its director can only be fired for cause. Granted, the CFPB has its own relative limitations, including a long list of important, post-financial-crisis needs waiting at its inception; strong political and industry resistance; and a

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<sup>1</sup> K. Sabeel Rahman, *Envisioning the Regulatory State: Technocracy, Democracy, and Institutional Experimentation in the 2010 Financial Reform and Oil Spill Statutes*, 48 HARV. J. LEGIS. 555, 557 (2011).

mission focused only on finance. The agency nonetheless offers a window into how a powerful, independent, and technologically savvy agency might regulate the data economy.

The body of this essay begins with a survey of what the CFPB has undertaken using more traditional administrative agency tools—enforcement and rulemaking—in areas such as privacy, consumer control over data, and regulatory sandboxes. It then looks at how the CFPB has used technology to protect consumers, through Twitter and online advisory tools. The essay closes by considering open questions, including the possibility of the CFPB’s privacy activities extending its oversight of tech giants like Facebook and Amazon, and the extent to which the CFPB might exercise additional authority to inspect financial algorithms. More systematic study of the agency’s activities is needed, but the CFPB’s early experiences both provide examples that other agencies might follow and indicate the difficulty of relying on industry-specific regulators to govern the data economy, rather than an agency focused on technology.

## I. CFPB ENFORCEMENT AND POLICYMAKING FOCUSED ON TECHNOLOGY

In advancing its core consumer finance mission through enforcement and rulemaking, the CFPB has engaged with the data economy in a number of ways. Its enforcement actions have required it to look at how financial entities are using social media and algorithms to sell to consumers. The agency has become active in enforcing privacy matters. It has also taken steps toward improving data portability principles and building a regulatory sandbox.

### A. Traditional Consumer Finance Violations

The CFPB has pursued enforcement actions against fintech companies with innovative business models, ranging from Paypal to small startups. It issued a consent decree against one online lender, Think Finance, whose computer system had automatically debited borrowers’ accounts for payments that they did not legally owe and issued debt collection emails urging similar payments.<sup>2</sup> In a separate action, the CFPB

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<sup>2</sup> Complaint at 12-13, *Consumer Fin. Prot. Bureau v. Think Fin., LLC*, 2018 U.S. Dist. LEXIS 19480 (D. Mont. Nov. 15, 2017) (No. 4:17-cv-00127-BMM) [hereinafter *Think Fin. Complaint*].

fined LendUp \$3.6 million for deceptive practices including understating the annual percentage rate (APR).<sup>3</sup>

Several inferences can be made from these cases. First, the CFPB is paying attention to social media. In its case against LendUp, the agency took issue with Facebook ads. LendUp had paid for “slider bars” on Facebook pages that users could move horizontally to gauge how payment terms would change at varying amounts and times. The CFPB found that those slider bars did not disclose the full APR and how the loan terms might change later.<sup>4</sup> Exactly how the CFPB learned of this type of violation is unclear, but the agency has shown some willingness to hold new digital forms of advertisement to traditional standards.

At a more theoretical level, the CFPB’s activities show the importance of code in the regulatory analysis. Think Finance, for instance, was selling loans online that had been originated by three other businesses, collectively referred to in the legal complaint as “Tribal lenders.”<sup>5</sup> The Tribal lenders provided key data inputs for the algorithm that Think Finance used to assign risk scores to consumers and to decide what risk score (the output) it would accept. The CFPB nonetheless decided that Think Finance’s control of the algorithm meant that it “controlled the Tribal lenders and ran the business.”<sup>6</sup>

Part of the reasoning was that Think Finance refused to share the inner workings of the algorithm with the Tribal lenders. For the CFPB, it was not enough that another entity supplied the base product and made key decisions about the inputs and outputs. Even in finance, an industry defined by money, it is not necessarily the party owning the funds that has the power in a business partnership, but may instead be the party that controls the algorithmic “black box.”<sup>7</sup>

## B. Data Security

The CFPB took its first serious enforcement step into data security in 2016. The agency found that Dwolla, a money transfer platform like Venmo, had engaged in deceptive practices when Dwolla told its

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<sup>3</sup> Consent Order at 7, *Flurish, Inc d/b/a LendUp*, CFPB No. 2016-CFPB-0023 (Sept. 27, 2016).

<sup>4</sup> *Id.*

<sup>5</sup> Think Fin. Complaint, *supra* note 2, at 9.

<sup>6</sup> *Id.*

<sup>7</sup> See generally FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* (Harv. Univ. Press ed., 2015).

customers that its data security protocol “surpass[ed] industry security standards.”<sup>8</sup> In reality, as stated in the consent order, Dwolla “failed to employ reasonable and appropriate measures to protect data obtained from consumers from unauthorized access.”<sup>9</sup>

It is difficult to know how far the CFPB will take its data security operations. It is worth noting, however, that the FTC today “is viewed as the de facto federal data protection authority.”<sup>10</sup> It began paying close attention to this area in the 1990s.<sup>11</sup> But the FTC did not need to receive any additional authority from Congress to ramp up its privacy enforcement significantly.<sup>12</sup> Instead, it mostly used its basic unfair and deceptive acts authority it had received in the early 1900s.<sup>13</sup> In other words, in becoming the de facto federal data protection authority, the FTC used authority that the CFPB has in consumer finance. Particularly given the political pressures on the CFPB and the broader political support for data security (a politically safe area of enforcement), it is possible that the CFPB will pay greater attention to this area in the future.

### C. Data Portability

Congress has mandated that the CFPB study how best to regulate the sharing of information between financial institutions and third parties when consumers authorize access. The issue is particularly important in light of the potential next generation of fintech platforms. Platforms such as Mint and Credit Karma have sought to analyze all credit card, bank account, and loan offerings to tell consumers when they should switch. Since credit is so personalized—dependent on spending patterns and FICO scores and other customer-specific features—advisory fintechs must have access to consumers’ private data to provide the best advice. Banks have put up obstacles to third-party access, thereby threatening to enfeeble fintech advisors.<sup>14</sup>

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<sup>8</sup> Consent Order at 5, Dwolla, Inc., CFPB No. 2016-CFPB-0007 (Mar. 2, 2016) [hereinafter Dwolla Consent Order].

<sup>9</sup> *Id.* at 6.

<sup>10</sup> Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 600 (2014).

<sup>11</sup> *See id.* at 598-600.

<sup>12</sup> *See id.* at 604-05 (noting that the FTC gained increasing regulatory power by slowly acquiring enforcement authority over federal privacy statutes).

<sup>13</sup> *Id.* at 599.

<sup>14</sup> *See* Rory Van Loo, *Rise of the Digital Regulator*, 66 DUKE L. J. 1267, 1286 (2017).

The CFPB, after studying the matter, issued a set of principles to serve as guidelines for the sharing of data, including that financial institutions should generally not prevent consumers from granting access to account information.<sup>15</sup> When sharing happens, the regulated entity is advised to ensure that the data transfer is secure.

The CFPB's approach to data protection did not go as far as it could have because it declined to write formal rules. The extent to which its principles serve as *de facto* rules can be debated, but the agency emphasized that the principles were not interpretations and did not reflect future enforcement priorities.<sup>16</sup>

The risk here is that banks and other financial institutions have too much leverage. With voluntary principles, banks have more leeway to erect barriers to data access. As a general matter, financial institutions serving customers have an incentive to limit third-party access, which makes their data more valuable. The CFPB's decision to opt for voluntary compliance also means that fintechs must negotiate with banks to obtain the data access they need to help consumers. Although in theory banks should treat all third parties similarly, they have an incentive only to work with third parties that are not driving banks' customers away. Fintechs that are dependent on financial institutions' voluntary cooperation are presumably less likely to recommend that consumers move to other banks and credit card companies, even if doing so would be in the consumers' best interests. Stated otherwise, the CFPB's approach increases the chances that fintechs must serve banks rather than only consumers.

By way of contrast, European authorities have required banks to give third parties far-reaching access to data upon consumer authorization.<sup>17</sup> Fintech advisors in Europe will thus have greater ability to analyze consumers' spending habits and credit profiles to provide helpful recommendations.

In the Bureau's defense, it was an odd choice by Congress to task the CFPB with studying the issue of data access. In Europe, the issue of

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<sup>15</sup> See CONSUMER FIN. PROT. BUREAU, CONSUMER PROTECTION PRINCIPLES: CONSUMER-AUTHORIZED FINANCIAL DATA SHARING AND AGGREGATION (2017), [http://files.consumerfinance.gov/f/documents/cfpb\\_consumer-protection-principles\\_data-aggregation.pdf](http://files.consumerfinance.gov/f/documents/cfpb_consumer-protection-principles_data-aggregation.pdf) [<https://perma.cc/YE9Q-P79E>].

<sup>16</sup> See *id.*

<sup>17</sup> EUROPEAN BANKING AUTH., REPORT ON INNOVATIVE USES OF CONSUMER DATA BY FINANCIAL INSTITUTIONS 6 (2017), <https://www.eba.europa.eu/documents/10180/1720738/Report+on+Innovative+uses+of+data+2017.pdf> [<https://perma.cc/DY98-FF2U>].

data access was put in the hands of a regulator with competition authority. The CFPB does not have a traditional competition mandate.

The choice of the CFPB, and its reluctance to push further, arguably reflects a design flaw in the financial regulatory architecture. As I have argued elsewhere, no agency has the right motivation, expertise, and authority to advance competition policy in consumer finance.<sup>18</sup> The DOJ's antitrust division has some responsibility for competition enforcement in finance, but lacks rulemaking authority, has no real finance-specific expertise, and defers to banking regulators. The banking regulators, such as the Office of the Comptroller of the Currency (OCC), have as their primary mission ensuring that big banks do not fail. That mission is in tension with helping fintechs advise consumers that better deals may lie elsewhere.<sup>19</sup>

The CFPB was perhaps the best choice available in a regulatory structure that has a glaring hole for competition enforcement. Its handling of the data portability issue further underscores the importance of data economy regulators committed to promoting not just consumer protection, but also competition.<sup>20</sup>

#### D. Regulatory Sandbox

Regulatory sandboxes aim to support innovation by enabling businesses to test new ideas in close communication with a regulator. To support fintech innovation, the CFPB launched Project Catalyst in 2016. This program's goal is to ease concerns among startups that the CFPB might take enforcement actions in response to some new product or practice. To ease such potentially innovation-detering concerns, the CFPB allows companies to ask for a no-action letter. Under this program, the CFPB would review a proposed technology and issue a letter stating its intent not to take an enforcement action.<sup>21</sup>

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<sup>18</sup> See Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. REV. 1 (2017).

<sup>19</sup> See *id.*

<sup>20</sup> This is a project attracting the attention of many scholars. See, e.g., Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 710 (2017); K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards A Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1347 (2016).

<sup>21</sup> Policy on No-Action Letters; Information Collection, 81 Fed. Reg. 8,686, 8,692-93 (Feb. 22, 2016).

In its two years of existence, the program has only led to one no-action letter.<sup>22</sup> It is difficult to know how to interpret this lack of industry interest in the no-action letters. One possible explanation for these results could be a poorly designed program. For example, some have argued that the no-action letter provides insufficient legal protections and imposes burdensome information sharing.<sup>23</sup> Another possible explanation is simply that startups are not worried about CFPB action against their new products.<sup>24</sup> Still, the CFPB's initiation of the program is a potential first step toward a broader experimentalist framework with stakeholder involvement from the technology sector.<sup>25</sup>

## II. CFPB USE OF TECHNOLOGY TOOLS

The CFPB has used technologies to interface with consumers in a number of ways. It has built a suite of online tools that help consumers to make decisions. Consumers can also go to the CFPB's website to submit complaints about financial institutions, and the agency has regularly tweeted to consumers, sometimes even in response to particular financial institutions' behavior.

### A. Online Decision Tools

The CFPB has begun to offer a suite of online decision assistants. At the agency's mortgage calculator website, for instance, people can enter a zip code, loan amount, and credit score to learn the interest rates that similarly situated borrowers paid for their mortgages. Through this mortgage calculator, the CFPB is offering services close to what a fintech startup might. It purchases the data it uses from private parties. For-profit companies, such as Quicken Loans, offer a variety of mortgage calculator-type tools.<sup>26</sup> Many of the private sector tools go further by listing actual products available and seeking to complete the purchase. But even the

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<sup>22</sup> Eric Mogilniki & Michael Nonaka, *CFPB Has Opportunity to Reinvent Approach to Innovation*, AMERICAN BANKER (Feb. 21, 2018, 9:30 AM), <https://www.americanbanker.com/opinion/cfpb-has-opportunity-to-reinvent-approach-to-innovation> [https://perma.cc/9ZG9-ZURR].

<sup>23</sup> See, e.g., *id.*

<sup>24</sup> This possibility is consistent with the CFPB's reluctance to pursue new types of digital harm. See *infra* Part III.A.

<sup>25</sup> On the broader role of sandboxes in fintech, see, e.g., Christopher G. Bradley, *Fintech's Double Edges*, 93 CHI.-KENT L. REV. 61, 85-86 (2018).

<sup>26</sup> See *id.*



basic step of providing price information before the purchase is unusual for a government entity.

Another way of conceptualizing the CFPB's online offerings is as creating a digital regulator. These tools aim to help consumers protect themselves by making better decisions. Markets with informed consumers are, in theory, better able to self-regulate.

As I have described in greater depth elsewhere, the CFPB's entrance into the realm of Internet intermediaries raises questions about the evolving role of the regulatory state in the information age.<sup>27</sup> How effective can the tools be given that the CFPB puts a tiny fraction of the resources into its mortgage calculator compared to private mortgage calculators? Should the writing of these tools' computer code count as a kind of legal rulemaking, and thus go through notice and comment processes as some agencies have done with their online tools?<sup>28</sup>

## B. The Complaint Database

The CFPB hosts an online complaint database through which consumers can submit problems they have encountered with financial institutions.<sup>29</sup> A consumer complaint database is not new. The FTC, for instance, has had its own consumer complaint tool for years. Both agencies use the complaints to detect violations. But the CFPB has gone farther than the FTC by forwarding complaints to the relevant institutions, and tracking whether a complaint was dealt with. The CFPB follows a model closer to that of the OCC, which contacts the institution on the complainer's behalf and later sends a summary report of the results.<sup>30</sup>

The one way in which the CFPB appears to have gone farther than its peer regulators is by publishing complaint data online. Anyone can view which companies have been subjected to CFPB complaints, read the complaint language, and even download complaint data for analysis. Industry fought this publication strenuously, but lost. As a result, the database arguably has a shaming component, or at least provides some

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<sup>27</sup> See Van Loo, *supra* note 18.

<sup>28</sup> See *id.*

<sup>29</sup> See Jean Braucher & Angela Littwin, *Examination As A Method of Consumer Protection*, 58 ARIZ. L. REV. 33, 70 (2016) (describing the CFPB's complaint database).

<sup>30</sup> Office of Comptroller of the Currency, *What You Can Expect From Us*, HELPWITHMYBANK.GOV, <https://www.helpwithmybank.gov/complaints/what-to-expect/complaints-what-to-expect.html> [<https://perma.cc/GGB7-N4H3>].

public transparency that contrasts with the confidential nature of other regulators' complaint databases.

Like with its mortgage calculator, the complaint database is another area where the CFPB is offering an online tool that, to some extent, competes with the private sector. The many websites that allow consumers to rate and complain about firms may not forward on their complaints and receive responses with the same impact. But unlike in other industries, consumers have a choice of publicly venting their finance grievances on either a private or a governmental online platform.

### C. Twitter Outreach

The CFPB, like many agencies, has used Twitter as an outreach tool. It opened an account in January of 2011, several months before the agency's official launch, and has since then tweeted over 3,000 times. Most of its tweets are educational, providing links and tips about choosing a mortgage, dealing with debt collectors, or talking to children about finance.<sup>31</sup>

The agency has not generally used the account to call out specific companies. But it has, at times, gently mentioned some by name in the process of delivering an educational message, or to inform consumers how they can seek redress. In many identity theft protection tweets following the Equifax breach, for instance, it mentioned Equifax, TransUnion, and Experian a number of times in describing how those companies share people's data.<sup>32</sup> After reaching settlements with companies, the CFPB has also tweeted links and messages to let consumers know that they may be eligible for payments.<sup>33</sup> When consumers tag the CFPB while criticizing a

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<sup>31</sup> See Consumer Fin. Prot. Bureau (@consumerfinance.gov), TWITTER, <https://twitter.com/CFPB> [<https://perma.cc/P4AD-KC4R>].

<sup>32</sup> See, e.g., Consumer Fin. Prot. Bureau (@consumerfinance.gov), TWITTER (Feb. 1, 2018, 11:00 AM), <https://twitter.com/CFPB/status/959139289031413761> (mentioning that the list of credit reporting companies goes beyond Equifax, TransUnion, and Experian) [<https://perma.cc/JB9W-GPPJ>].

<sup>33</sup> See, e.g., Consumer Fin. Prot. Bureau (@consumerfinance.gov), TWITTER (Mar. 18, 2018, 8:54 AM), <https://twitter.com/CFPB/status/973950383667195905> (tweeting to RushCard users that they may be eligible for redress payments from the company); Consumer Fin. Prot. Bureau (@consumerfinance.gov), TWITTER (Sept. 15, 2017, 7:35 AM), <https://twitter.com/CFPB/status/908700698962944000> (linking resources for participants in Morgan Drexen's illegal debt relief scheme) [<https://perma.cc/G2P8-HT7T>].

business, which happens regularly, the CFPB usually responds by referring the user to the agency's complaint database or phone hotline.<sup>34</sup>

A rare tweet that came close to confrontational, but still could be considered educational, was a CFPB response to a Super Bowl commercial by Quicken Loans. The commercial advertised a new app, Rocket Mortgage, which aimed to streamline the home-buying process. The commercial ended with a simple summary of its aspirations: "PUSH BUTTON, GET MORTGAGE."<sup>35</sup> Within minutes of the commercial, the CFPB had tweeted its advice to "know before you owe," and provided a link to the CFPB's own suite of decision-aiding mortgage tools, without mentioning any company's name. Quicken Loans shortly thereafter tweeted back: "@CFPB We agree. No better way than #RocketMortgage for full transparency into mortgage options & info needed to make the right decision."<sup>36</sup> The CFPB did not respond.

To provide some perspective on the CFPB's Twitter usage, the Securities and Exchange Commission (SEC) has tweeted about 2.8 times per day since it joined in 2008, almost twice as much as the CFPB's rate. Moreover, the CFPB has not been particularly successful in attracting followers, with its 81,000 followers amounting to about one third as many as the SEC. As another data point, the FTC tweets considerably more than both of the others combined, at about 6.4 times per day. But the FTC has the least number of followers of these agencies, with about 55,000.<sup>37</sup>

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Of course, this snapshot of the CFPB's online tools cannot fully assess their effectiveness. It is difficult to know the extent to which the CFPB's tweets, mortgage calculator, and complaint database help cut

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<sup>34</sup> See, e.g., Consumer Fin. Prot. Bureau (@consumerfinance.gov), TWITTER (May 7, 2018, 12:28 PM) <https://twitter.com/CFPB/status/993527892339503104> [<https://perma.cc/N7G7-Z24W>].

<sup>35</sup> Quicken Loans, *Rocket Mortgage Super Bowl Ad 2016 Quicken Loans*, YOUTUBE (Feb. 8, 2016), <https://www.youtube.com/watch?v=nXW2BJixXfw> [<https://perma.cc/QG84-75EL>].

<sup>36</sup> Quicken Loans (@QuickenLoans), TWITTER (Feb. 8, 2016, 8:27 AM), <https://twitter.com/quickenloans/status/696732072761815040> [<https://perma.cc/RX5G-885E>].

<sup>37</sup> Consumer Fin. Prot. Bureau (@consumerfinance.gov), TWITTER, *supra* note 31; FTC (@FTC), TWITTER, <https://twitter.com/FTC> [<https://perma.cc/X2TY-SKQ9>]; SEC (@SEC\_Enforcement), Twitter, [https://twitter.com/sec\\_enforcement](https://twitter.com/sec_enforcement) [<https://perma.cc/X29R-BK5B>]. Note that these figures do not account for any deleted tweets.

through—rather than contribute to—the infoglut.<sup>38</sup> Still, these activities offer at least two takeaways. First, despite being unusually well positioned to regulate in the information age, the CFPB has not been particularly active, compared to other business regulators, in deploying information technologies—with the possible exception of publishing its complaint database online. Second, the CFPB’s early experiences demonstrate how regulators are increasingly utilizing their own digital tools to influence consumer decisions.

### III. OPEN QUESTIONS FOR CFPB GOVERNANCE OF FINTECH

Regulators inevitably must decide how to deploy limited resources in the face of sometimes questionable jurisdiction. The CFPB has so far demonstrated limited appetite for bringing cases and monitoring subtler digital harms. The extent of its authority over companies at the fringes of consumer finance also remains unclear.

#### A. Regulating Seduction by Algorithm

Scholars have shown how firms can exploit consumer psychology to increase the prices that consumers pay for various products, such as mortgages, credit cards, and cell phones.<sup>39</sup> Firms can strategically structure their pricing packages with a large number of variables, such as data usage, fees, and teaser rates. Due to psychological tendencies and the limits of the human brain, this complexity causes consumers to make errors in identifying the best choice for them among available options.<sup>40</sup>

Firms can engage in a similar kind of “seduction by algorithm.”<sup>41</sup> Tactics include burying the best deal low on a long list of search results; not permitting the user to order results based on unit pricing; and displaying a price in the search results that is lower than the price that most people ultimately pay for normal sizes and colors of that item.<sup>42</sup>

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<sup>38</sup> On the regulatory problem of infoglut in the information age, see Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369, 370-73 (2016).

<sup>39</sup> See OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* (Oxford Univ. Press ed., 2012).

<sup>40</sup> See *id.*

<sup>41</sup> See Van Loo, *supra* note 18, at 1272.

<sup>42</sup> See Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311, 1311 (2015) (reviewing practices used by Amazon); Van Loo, *supra* note 18 (reviewing the empirical literature).

These strategies relate to a broader set of concerns about technologically mediated bias.<sup>43</sup>

Through its enforcement actions, the CFPB has yet to demonstrate a willingness to police these subtler digital tactics. It has not hesitated to look at advanced computer modeling when doing so is necessary to carrying out its mandate. One of its early enforcement actions dealt with bias in a bank's decision-making model for credit scoring.<sup>44</sup> For newer digital harms, however, the CFPB has instead stayed closer to a more cautious "consumer protection paradigm of notice and choice."<sup>45</sup>

### B. Inspection of Algorithms

One of the frequent calls in the literature on governance of platforms is for greater visibility into the inner workings of algorithms.<sup>46</sup> The CFPB has the clear statutory authority to examine financial institutions' non-public data, even without suspecting any wrongdoing, through its supervision group.<sup>47</sup> Supervision is a separate office from enforcement at the CFPB. It conducts regular audits of companies, called examinations, to check what they are doing. Examiners collect information remotely, but also spend a large amount of time onsite, sometimes for months at a time at the largest banks.<sup>48</sup>

This routine process allows the CFPB examiners to look at a large variety of information sources. Most importantly for present purposes, their examination manual specifies that examiners can review "computer program and system details."<sup>49</sup> The CFPB's examination activities are less

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<sup>43</sup> See, e.g., Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 1007-12 (2014); James Grimmelman, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 20 (2007).

<sup>44</sup> In the Matter of American Express Centurion Bank, CFPB No. 2012-CFPB-0002, (Oct. 1, 2012).

<sup>45</sup> Cf. Cohen, *supra* note 38, at 386 ("[C]urrent consumer protection paradigms framed in terms of notice and choice are ill-suited to address these issues, which are fundamentally issues of economic and social inclusion."); *supra* Part I.A.

<sup>46</sup> See, e.g., *id.* at 373 ("[P]olicymakers must devise ways of enabling regulators to evaluate algorithmically-embedded controls."); Van Loo, *supra* note 42, at 1385 (recommending that the FTC examine the results of some big data analyses).

<sup>47</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5321, 5322(a)(2), 5491(a) (2012).

<sup>48</sup> See Van Loo, *supra* note 42, at 1311 (discussing supervision and examination functions at the CFPB and contrasting them to the FTC approach).

<sup>49</sup> CONSUMER FIN. PROT. BUREAU, CFPB SUPERVISION AND EXAMINATION MANUAL (Aug. 2017),

publicly visible than its formal legal actions, but they publish summary highlights several times a year.<sup>50</sup>

A review of these highlight reports indicates that examinations sometimes unearth problems in regulated entities' source code. For instance, the agency discovered that "one or more credit card issuers" violated disclosure requirements on the forms provided at account opening. The report explains that management concluded an employee had incorrectly entered the source code used to generate the standardized forms.<sup>51</sup> In other words, once a problem is spotted the examiners rely on the company to conduct an internal review of its computer systems.<sup>52</sup>

There is less evidence that the CFPB looks at code or algorithms as a regular part of its exams, as it does with various business records. In the most recent year of highlights available, 2017, there is no mention of such activities.<sup>53</sup> It is possible that algorithmic inspections have simply not made it into the reports. Regardless, if the CFPB is not already undertaking such analyses on its own, its leadership could change that policy decision at any point.

### C. Jurisdiction Over Other Platforms

Another open question for the bureau is the breadth of institutions that it oversees. Its authorizing statute gives it broad oversight of entities selling consumer financial products, such that any business providing a consumer financial product or service, or any affiliate of such a business, is covered.<sup>54</sup> CFPB enforcement authority clearly reaches most of the fintech sector, although its supervision authority is more constrained, requiring a formal rulemaking process to examine new entities not on its original list.<sup>55</sup> Fintechs offering solely advice could try to argue that they do not fall under the agency's jurisdiction since they are only offering free

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[https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_supervision-and-examination-manual.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf) [<https://perma.cc/HP84-DUAL>].

<sup>50</sup> CONSUMER FIN. PROT. BUREAU, *Supervisory Highlights*, <https://www.consumerfinance.gov/policy-compliance/guidance/supervisory-highlights/> [<https://perma.cc/4JSM-WDCE>].

<sup>51</sup> CFPB, SUPERVISORY HIGHLIGHTS ISSUE 16, SUMMER 2017, [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201709\\_cfpb\\_Supervisory-Highlights\\_Issue-16.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201709_cfpb_Supervisory-Highlights_Issue-16.pdf) [<https://perma.cc/CRK5-MCRC>].

<sup>52</sup> *Id.*

<sup>53</sup> See CFPB, *supra* note 51.

<sup>54</sup> 12 U.S.C. § 5481(6) (2012).

<sup>55</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5514 (defining the scope of the CFPB's supervisory and enforcement powers).

information, although that argument is unlikely to persuade given the broad statutory language.

The CFPB's authority may even reach parts of major companies who have developed payment systems, such as Apple, Amazon, and Facebook. CFPB jurisdiction over these companies would not immediately extend to non-financial matters, such as how platforms censor online content or advertise deceptively. Given the CFPB's recent entrance into data security, however, it is possible that in at least some areas the CFPB's ability to monitor could extend into non-financial parts of online platforms. Once a platform has taken in consumer financial data, the company's overall data security practices would arguably be relevant to any determination of whether Apple, Amazon, or Facebook sufficiently safeguard the financial data they collect. Given the FTC's role in privacy, the CFPB would be faced with a potential jurisdiction clash along the lines of what some scholars predict will become increasingly common in a world in which software infuses most everything.<sup>56</sup> Additionally, if fintechs sell customer information to third parties, the CFPB could impose requirements on how those third parties use that information indirectly, by holding the entity that the CFPB regulates—the fintech or bank—accountable for what the third party does with the information.

#### CONCLUSION

The CFPB is a rare agency that can inspect important algorithms in the information age—those in the consumer financial realm. It has already undertaken enforcement actions against online consumer financial platforms in data security and deceptive practices. And it has analyzed an early generation of algorithmic offline harms—bias from credit scoring models. At the same time, the CFPB has not yet used its authority to pursue the next generation of platform issues that legal scholars have been writing about for years, nor does it appear to inspect source code on a regular basis.

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<sup>56</sup> Paul Ohm & Blake Reid, *Regulating Software When Everything Has Software*, 84 GEO. WASH. L. REV. 1672, 1695 (2016) (“[R]egulators will engage in new forms of turf warfare with other regulators. Without statutory amendment, the boundaries of each agency’s jurisdiction will creep outward. This will exacerbate competition and tension between agencies that already compete. . . . Perhaps a single agency—already in existence or yet to be created—can track and coordinate the regulation of code across the government as well as confront the new challenges posed by the transition of regulating software-based objects.”).

The CFPB's early technology activities may look quite different from its future. The agency began with a full slate of new rules that it was required by statute to write. It also had to build a new program for supervising a vast sea of financial institutions, some of which the federal government had never supervised. These responsibilities may simply have left the agency with insufficient capacity to push further in digital oversight. The CFPB's early activities could mark the first steps in a larger evolution needed to address the "existential challenges for regulatory models and constructs developed in the context of the industrial economy."<sup>57</sup>

On the other hand, the task of regulating consumer financial firms, ranging from dispersed payday lenders to the world's largest banks, may prove too consuming for the agency to develop cutting-edge algorithmic oversight simultaneously. The CFPB's light treading so far may have been wise, keeping it from overbearing regulatory mistakes that would have harmed innovation and consumers. Without evidence that avoidance of cutting-edge issues was the result of a deliberate analysis, however, the agency's record indicates the potential value of a technology-focused regulator, a kind of meta-agency that would help other agencies, such as the CFPB and FTC, to adapt to subtler algorithmic and platform challenges.<sup>58</sup> Regardless, the agency's early activities contribute to the laboratory of administrative experiments, worthy of study for lessons learned and elements of a working blueprint for a broader information age regulatory architecture.

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<sup>57</sup> Cohen, *supra* note 38, at 369.

<sup>58</sup> For examples of such proposals, see, e.g., Ohm & Reid, *supra* note 56 (exploring models and existing proposals for software regulation); Van Loo, *supra* note 14, at 1267, 1328.