Extending the Consumer Safety Net:

How the Consumer Financial Protection Bureau Can Use Its Authority to Protect Vulnerable Consumers

REPORT BY **GRAHAM STEELE**

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ABOUT THE AUTHOR

Graham Steele is the director of the Corporations and Society Initiative at Stanford Graduate School of Business (GSB). Prior to joining Stanford GSB, Graham was a member of the staff of the Federal Reserve Bank of San Francisco. From 2015 to 2017, Graham was the Minority Chief Counsel for the Senate Committee on Banking, Housing & Urban Affairs. From 2010 to 2015, he was a Legislative Assistant for United States Senator Sherrod Brown (D-OH), handling the Senator's work as a member of the Senate Banking Committee. He also spent four years as the staff director of the Subcommittee on Financial Institutions & Consumer Protection. Prior to joining Senator Brown's staff, Graham was a policy counsel at Public Citizen's Congress Watch in Washington, D.C.

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Introduction

The COVID-19 pandemic has been a wake-up call to Americans on many fronts. It has provided stark illustrations of the hollowing out of certain government functions, such as unemployment insurance and payments systems, as well as revealing the fragility of the health care system and the fraying of the social safety net. Its impact has, unsurprisingly, fallen hardest on workers and communities of color, which has been exacerbated by the underlying financial and health disparities in the United States.[1]

The COVID-19 crisis has also brought back to light a set of consumer issues that were exposed after the mortgage crisis of 2008, and has highlighted the ongoing vulnerability of consumers to sudden shocks. This, in turn, has been a poignant reminder of the shortcomings regarding regulation of specific sectors of the consumer finance industry, shortcomings that were left un-addressed in the reform effort that followed the 2008 crisis. Even during normal, non-pandemic times, millions of Americans experience a variety of shocks each year and are then left to navigate the problematic credit ecosystem with few substantive protections. It is still too hard for people to get their lenders to be responsive to them; they have too few options to create breathing room to manage fraught circumstances; and they have too little leverage to ensure accountability. This system is broken.[2]

Congress enacted legislation to address some of these issues specifically for consumers affected by COVID-19, providing temporary relief on mortgages and credit reporting, and suspending payments for almost 83 percent of federal student loan borrowers.[3] Unfortunately, the value of some of these protections is debatable.[4] Furthermore, these protections merely apply during the current emergency and do not provide relief

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1 See Kilolo Kijakazi, *COVID-19 Racial Health Disparities Highlight Why We Need to Address Structural Racism*, Urban Inst., Apr. 1, 2020, https://www.urban.org/urban-wire/covid-19-racial-health-disparities-highlight-why-we-need-address-structural-racism; see also Elise Gould & Valerie Wilson, *Black Workers Face Two of the Most Lethal Preexisting Conditions for Coronavirus—Racism and Economic Inequality*, Econ. Pol'y Inst., June 1, 2020, https://files.epi.org/pdf/193246.pdf.

2 See Dalié Jimenez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41, 43-44 (2015)(the Federal Trade Commission "has referred to debt buying and debt collection as a 'broken system.'")

3 See H.R. 748, 116th Cong. §§ 3513, 4021, 4022 (2020). According to the group Americans for Financial Reform, the CARES Act provides student loan suspension to those with federally held federal student loans, meaning approximately 43 million borrowers were eligible, while nine million federal student borrowers were left out of the suspension. See Press Release, The CARES Act Fails to Provide Sufficient Relief to Federal Student Loan Borrowers, Americans for Financial Reform, Mar. 26, 2020, https://ourfinancialsecurity.org/2020/03/news-release-cares-act-fails-provide-sufficient-relief-federal-student-loan-borrowers/.

4 See Press Release, *Senate COVID-19 Stimulus Bill is a Start but Falls Far Short for Families, Students, and the Nation's Most Vulnerable*, Nat'l Consumer L. Ctr., March 26, 2020, https://www.nclc.org/media-center/senate-covid-19-stimulus-bill-is-a-start-but-falls-far-short-for-families-students-and-the-nations-most-vulnerable.html. (Describing the CARES Act's credit reporting provisions as "meaningless" and "weaker than the current industry standard for disaster victims.")

from debt collection.[5] In fact, the debt collection industry has made clear that it has no intention of stopping until policymakers force it to do so.[6] More needs to be done to reform the structures of consumer finance industries. In particular, the set of industries where consumers themselves constitute the product—such as servicing and credit reporting—remain under-regulated, and consumers are still without a basic safety net of protections for those inevitable moments when events outside of their control suddenly change their personal finances.

These problems are not new; they were acute in the post-2008-crisis period, but they date back even further than that. Nevertheless, their urgency seemed to dissipate in the years that followed the crisis. This was due to a mixture of factors, including the influence of lobbying by special interests in the financial industry,[7] the difficulty of prioritizing within a packed regulatory agenda that sought to rebuild a financial oversight framework that had been hollowed out over the course of decades with limited time and resources,[8] and a general sense of complacency that set in as the US drifted further away from the crisis and other issues moved to the forefront. This was also due in no small part to encouraging topline economic statistics like GDP growth and unemployment rate that obscured the structural inequalities underlying the US economy. Now, in the wake of COVID-19, the precarious nature of Americans' personal finances is returning to prominence in public policy as we see the consequences of the failure to reform these problematic consumer practices play out in real time.

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[5] See Michael Sainato, *'I Have No Money': Debt Collection Continues Despite Pandemic*, The Guardian, Mar. 28, 2020, https://www.theguardian.com/money/2020/mar/28/us-debt-collection-wage-garnishment-coronavirus. In response, lawmakers must resort to lobbying agencies such as the Treasury Department that do not specialize in consumer protection to help guard Americans' stimulus checks from garnishment by debt collectors. See Evan Weinberger, *Pressure Mounts to Protect Virus Stimulus From Debt Collectors*, Bloomberg Law, Apr. 13, 2020, https://news.bloomberglaw.com/banking-law/pressure-mounts-to-protect-virus-stimulus-from-debt-collectors.

[6] See Danielle Douglas-Gabriel, *As Americans Faced Layoffs and Lost Wages, Student Loan Companies Kept Going to Court to Collect*, Wash. Post, Apr. 3, 2020, https://www.washingtonpost.com/education/2020/04/03/student-loans-collection-lawsuits-coronavirus/ (quoting a debt collection industry lobbyist saying: "To make a wave-of-the-hand statement that an industry should be shut down because 8 percent of the population would perhaps have a difficult time meeting obligations right now seems like too much of an attempt to make a wave-of-the-hand statement that everybody is in dire financial straights. Everybody is not in dire financial straights.") See also Weinberger, supra (citing debt collection industry arguments that "calls to stop garnishments of CARES Act payments, and broader calls to cancel all private debt collection made by some more liberal lawmakers, miss out on the vital support the industry is providing during the crisis"). The Treasury Department, meanwhile, has signaled a willingness to defer to banks on the question of whether they will seize CARES Act payments to satisfy previously owed debts. See David Dayen, *Your Coronavirus Check Is Coming. Your Bank Can Grab It*, AM. PROSPECT, Apr. 14, 2020, https://prospect.org/coronavirus/banks-can-grab-stimulus-check-pay-debts/.

[7] See Ryan Grim, *Dick Durbin: Banks "Frankly Own the Place*," Huffington Post, May 30, 2009, https://www.huffpost.com/entry/dick-durbin-banks-frankly_n_193010.

[8] See, e.g., Haley Sweetland Edwards, *He Who Makes the Rules*, Wash. Monthly, Mar/Apr. 2013 https://washingtonmonthly.com/magazine/marchapril-2013/he-who-makes-the-rules/, (referring to the Dodd-Frank rulemaking process as "the seventh circle of bureaucratic hell").

Consumer finance cries out for comprehensive overhaul, including transformative ideas like creating a public credit reporting agency,[9] allowing for student debt to be cancelled and discharged in bankruptcy,[10] and allowing for automatic mortgage principal write-down.[11] But the Consumer Financial Protection Bureau (CFPB) does not have to wait for Congress to deliver a meaningful set of basic protections—a safety net—to consumers. While the Trump Administration's CFPB leadership has shown little inclination to provide significant assistance to consumers beyond financial education[12] (including during this pandemic), a CFPB under new leadership would have the authority to do much more.

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A fundamental problem with consumer financial regulation is the fact that, despite broad evidence of the tight linkage between the impacts of devastating personal events and devastating financial events on peoples' lives,[13] consumer protections often do not reflect this broader truth. This is in large part the product of a decades-long campaign by creditors to reframe financial issues not as a matter of innocent individuals experiencing misfortunes beyond their control, but as a matter of willful "deadbeats" who are unworthy of support.[14] The structure of this system disproportionately harms Black and Brown people, exacerbating the racial wealth gap.[15] It's time for our consumer finance policy to reflect the lived experiences of millions of Americans.

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9 See Amy Traub, *Establish a Public Credit Registry*, Demos (Apr. 3, 2019), https://www.demos.org/sites/default/files/2019-03/Credit%20Report_Full.pdf.

10 See Cody Hounanian & Natalia Abrams, *Now Is the Time to Cancel Student Debt*, The Nation.com, Mar. 18, 2020, https://www.thenation.com/article/society/now-is-the-time-to-cancel-student-debt/.

11 See Amir Sufi & Atif Mian, *Shared Responsibility Mortgages*, Wash. Ctr. for Equitable Growth, Oct. 31, 2016, https://equitablegrowth.org/shared-responsibility-mortgages/.

12 See Yuka Hayashi, *Financial Watchdog Shifts From Enforcer to Educator*, Wall St. J., July 12, 2019, https://www.wsj.com/articles/financial-watchdog-shifts-from-enforcer-to-educator-11562922005.

13 See, e.g., Janet L. Yellen Vice Chair Board of Governors of the Federal Reserve System, *A Painfully Slow Recovery for America's Workers: Causes, Implications, and the Federal Reserve's Response*, at 10, Remarks at A Trans-Atlantic Agenda for Shared Prosperity, Conference Sponsored by the AFL-CIO, Friedrich Ebert Stiftung, and the IMK Macroeconomic Policy Institute, Feb. 11, 2013 (noting that "long-term unemployment is devastating to workers and their families," including that the "toll is simply terrible on the mental and physical health of workers, on their marriages, and on their children").

14 See David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032, 2058 (2004) (describing the evolution of rationales and arguments surrounding U.S. bankruptcy laws).

15 See generally Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093 (2019).

Consumers should not have to petition Congress every time they experience a crisis that requires them to be treated fairly and reasonably by the credit ecosystem. In this paper, I will argue that the CFPB should use its authority under Title X of the Dodd-Frank Act to create a permanent and durable "safety net" for consumers by placing them in control of their own financial well-being. Specifically, the CFPB should issue rules declaring arrangements with servicers, debt collectors, and credit reporting companies as per se abusive, absent the provision of certain specific rights that would constitute the consumer safety net. Much as workers have a set of public benefits that constitute a "social" safety net when they experience certain life events—unemployment insurance, Social Security disability payments, and the like—consumers should also have universal protections from private financial service providers in certain circumstances.

> **The CFPB should use its authority under Title X of the Dodd-Frank Act to create a permanent and durable "safety net" for consumers by placing them in control of their own financial well-being.**

The CFPB has authority over an entire swath of consumer products and services, including loan servicing, credit reporting, and debt collection services that are "delivered, offered, or provided *in connection* with a consumer financial product or service" that is offered and provided directly to consumers.[16] This category is where persistent problems and dysfunctions largely originate, because these products, though connected to products that are provided to consumers, are not directly offered to consumers. Indeed, in certain cases the consumers themselves *are* the product. In relationships like servicing or debt collection, the contract is between the creditor and the servicer or collector. Consumers thus have no ability to select loan servicing, credit reporting, or debt collection services.[17] They are not parties to the contracts that involve those services and therefore can neither negotiate with service providers for more favorable terms, nor avoid service providers that engage in unfavorable practices.[18]

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[16] 12 U.S.C. § 5481(5)(B), 15(A) (emphasis added). For the purposes of this discussion, I am omitting other ancillary authorities that the CFPB has, for example, over third parties like "service providers" that offer services to those that, in turn, offer consumer financial products. See 12 U.S.C. § 5481(26)(A). They do appear, however, in some of the discussion surrounding debt collection.

[17] Similarly, while the recent CARES Act granted suspension to federal student loan borrowers with federally held loans, borrowers have no say in whether their federal loan was commercially held or not.

[18] See Jimenez, supra, at 112 (noting, for the purposes of the unfairness test, that in the debt collection context "[c]onsumers cannot reasonably avoid the harm caused by the manner in which their accounts are bought and sold. Consumers are not a party to the sale transaction. Consumers also do not choose their debt buyer or their debt collector.")

Because servicers, debt collectors, and credit reporting companies work for lenders rather than for consumers,[19] they lack the proper incentives to help consumers.[20]

Congress included these products in the definition of consumer financial products to be regulated by the CFPB because, although the consumer doesn't directly contract with these businesses, the actions of these service providers nonetheless have an "obvious impact on consumers."[21] This is the category of financial product that requires a set of rights to empower consumers to protect their own interests.

This paper proposes using the CFPB's existing legal authority to create a safety net of automatic rights for consumers that experience financial disruptions. Specifically, the CFPB could provide consumers with the right to:

1. Receive automatic forbearance for loans being serviced, collected, or otherwise reported in certain life events;
2. Hire or fire any servicer, collector, or credit reporting company that handles their consumer financial accounts; and
3. Purchase and settle any consumer account before it is sold, on the same terms that are available to industry participants.

These protections would constitute both a basic safety net for consumers experiencing challenging times, as well as a set of mechanisms for consumers to enforce those rights by realigning their relationship with these three types of companies. It is critical that these rights be easy for consumers to use, to avoid the phenomenon of "bureaucratic disentitlement" that can accompany—and hamper—some social safety net programs. They must also be structured in a manner that both puts consumers in control and balances enforcement between individuals and the CFPB in a manner that ensures consumers have recourse that is not subject to the arbitration process.[23]

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19 After the financial crisis, consumer law experts described "principal-agent problems" in certain consumer markets, and that is what is fundamentally at play here. The discussion was in the context of mortgage servicing specifically, which will be discussed more below. The essence of the argument was that the servicing model is broken because mortgage servicers do not have the same financial incentives as the mortgage investors for whom they work. *See* Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1 (2011). Here, the problem is slightly different, in that the agents—servicers, collectors, and credit reporting agencies—do not have the proper incentive to work on behalf of consumers as principals.

20 See Jimenez, supra, at 45 (arguing that "without regulatory intervention, these issues will continue, because no one player in the debt collection ecosystem—not creditors, debt buyers, or even consumers—has the incentive to change their behavior and internalize the cost of these changes.")

21 The Restoring American Financial Stability Act of 2010, S. Rep. No. 111-176, at 159-160 (2010).

22 See generally Michael Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 SOC. SERV. REV. 3 (1984).

23 Ideally, pre-dispute binding consumer arbitration would be invalidated by the CFPB by rule, empowering consumers to pursue recourse themselves. See 12 U.S.C. § 5518. Short of that goal, the rights proposed in this paper are structured so that they can also be enforced by the CFPB itself, which is not bound by private arbitration clauses.

The CFPB was conceived as a different kind of government agency in that it has broad tools to address market failures and to "eliminate some of the most egregious tricks and traps in the credit industry."[24] A good deal of the CFPB's focus during its first decade of existence has been on consumer-facing products and their features, instituting protections such as better disclosures and requirements to document a consumer's ability to repay their loans. When it comes to servicing, collection, and credit reporting, these protections are inapplicable—customers are caught in a trap that they cannot escape. Ensuring that consumers have a basic set of minimum protections is an important step towards fulfilling the agency's original promise.

[24] Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY, Summer 2007.

I. The CFPB Should Create A Consumer Safety Net

The CFPB currently interprets its mandate too narrowly. Its director recently stated that the Bureau's job is merely to provide "clear rules of the road," ensure a "culture of compliance," enforce the law, and provide consumer education.[25] These tools are ill-suited to regulate consumer finance industries where individual consumers have no leverage because they are not responsible for initiating the relationship and have no power to terminate it. Even where some "rules of the road" have been instituted, they have fallen short of robust protection.[26] The only way to realign the flawed incentives in servicing, credit reporting, and debt collection is for the government to provide consumers with certain rights to protect themselves. This is why the CFPB must step in to provide consumers with basic protections when they are at their most vulnerable.

The only way to realign the flawed incentives in servicing, credit reporting, and debt collection is for the government to provide consumers with certain rights to protect themselves.

The root of the CFPB's authority to protect vulnerable consumers lies in its grant of authority to prevent "unfair, deceptive, or abusive act[s] or practice[s]" in any financial product or service.[27] In particular, an act or practice that is connected to the provision of a consumer financial product or service is abusive if it "takes unreasonable advantage of … the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service[.]"[28] These rights are also consistent with the spirit behind other provisions of the law that, for example, provide consumers with greater autonomy and control over their own personal financial information.[29]

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[25] See Kathleen L. Kraninger, Director, Consumer Financial Protection Bureau, *Written Testimony Before the House Committee on Financial Services*, at 11, Oct. 16, 2019, https://financialservices.house.gov/uploadedfiles/hhrg-116-ba00-wstate-kraningerk-20191016.pdf.

[26] For example, in May 2019, the CFPB proposed the first significant updates to debt collection rules since the Fair Debt Collection Practices Act (FDCPA) was passed in 1977. See 84 Fed. Reg., at 23,274. Though the rule provides consumers with some minimum protections, for example from collectors seeking to collect debt beyond the statute of limitations, it largely serves the purpose of establishing permissive standards for debt collectors to repeatedly contact consumers and to do so using modern forms of communications like cellular telephones and email. See id.

[27] 12 U.S.C. § 5531.

[28] 12 U.S.C. § 5531(d)(2); see also S. Rep. 111-176, at 172.

[29] See 12 U.S.C. § 5533(a) (A consumer financial service provider "shall make available to a consumer, upon request, information in the control or possession of the covered person concerning the consumer financial product or service that the consumer obtained from such covered person, including information relating to any transaction, series of transactions, or to the account including costs, charges and usage data").

The CFPB should use its abusiveness authority to issue rules declaring that any contract governing the provision of servicing, credit reporting, and debt collection services is abusive unless it provides consumers with three basic rights.[30] These specific remedies are appropriate because the right to forbearance, the rights to hire and fire, and the right to repurchase would offer consumers greater ability to protect their interests and avoid being taken advantage of when selecting and/or using these services.[31] In the absence of these rights, consumers are unable to shop for or otherwise contract with companies that service, report, or collect on their loans, rendering them highly vulnerable to abuse.

A. THE RIGHT TO FORBEARANCE

Consumers should have the right to automatic forbearance for a certain period of time, limited to a certain number of times in a given period. Congress has sought to provide consumers with assorted rights, including to forbearance, in times of particular economic strain. They have recognized the importance of protections during the mortgage crisis and the national emergency created by the COVID-19 pandemic. The common thread between these events is that they coincided with developments beyond the control of individual borrowers. There is a general sense that it is unjust for people to suffer through events and circumstances that are "no fault of their own."[32]

This logic should apply to other life events that are likewise outside of people's control and have been shown to cause financial distress but have not garnered special relief.[33]

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30 Indeed, the CFPB's examination manual for identifying unfair, deceptive, or abusive acts and practices (UDAAP) says that one potential indicia of a UDAAP in servicing or debt collection is whether the providers "only charge customers for products and services…that are specifically agreed to[.]" Consumer Fin. Protection Bureau, *UDAAP Manual: Examination Procedures*, at 7 (Oct. 2012).

The CFPB also has "far-reaching" authority under organic statutes like the FDCPA, which, when combined with the Dodd-Frank Act, allows the CFPB to "supervise creditors as well as the largest debt buyers, collection agencies, and collection law firms," and "enforce the FDCPA against collectors and the [Dodd-Frank Act] against creditors and collectors." Jimenez, supra, at 107.

31 Specifically, the right to repurchase would allow consumers to protect themselves from abuse when selecting services; the right to forbearance would allow consumers to protect themselves from abuse when using services; and the right to hire and fire would allow consumers to protect themselves from abuse both when they select services and when they use them.

32 See e.g., Phillip Robinson, *For Fairness in Foreclosure*, The Baltimore Sun, Dec. 14, 2007 ("When a foreclosure appears not to be the fault of the homeowner but solely the fault of the lender and its agents, something is seriously wrong—and our legal system needs to offer a solution to the problem"); see also John Leland, *The Rent Is All Paid Up, but Eviction Still Looms*, N.Y. Times, May 1, 2009 ("Renters like Mr. Letriz and Ms. Barnes have long been unsuspecting casualties in the foreclosure crisis, facing eviction through no fault of their own, often with little warning"); see also Press Release, *Maloney Leads Request for Moratorium on Foreclosures and Evictions on Federally-Backed & GSE Mortgages*, Mar. 18, 2020 ("This is a national emergency, and many occupants of federally assisted housing will not be able to afford rent or mortgage payments through no fault of their own, as a direct result of emergency limitations put in place to safeguard public health"), https://maloney.house.gov/media-center/press-releases/maloney-leads-request-for-moratorium-on-foreclosures-and-evictions-on.

33 See Kevin T. Leicht, *Borrowing to the Brink: Consumer Debt in America*, in Broke: How Debt Bankrupts the Middle Class 215 (K. Porter 1st ed. 2012) (arguing that "[w]e should turn a deaf ear to policymakers who cite a lack of personal responsibility or moral failure for families' credit problems" because it is often the case that "[i]ll health, layoffs at work, or a need to help family members may have strained their finances past the breaking point.")

In truth, policy frequently holds people who are largely powerless accountable for "choices" that were not really choices at all.[34] People cannot decide when they have a serious illness, when they lose their job, when they experience a death in their family, or when they get divorced. No one chooses for these things to happen to them, and yet they do. These are the types of circumstances in which consumers deserve automatic protections—ones that are appropriately generous.[35]

To avoid excessive use of this right to automatic forbearance, the number of months of forbearance could be capped over a certain period of time to prevent consumers from simply re-using this option in perpetuity in non-emergency cases. For example, a consumer could be eligible for one year of forbearance during any five-year period. Think of this option as akin to the period of time after which workers are no longer eligible for unemployment insurance.

There is precedent for this type of consumer protection. For example, bank supervisory agencies already allow banks to offer forbearance related to private student loans.[36] Federal student loans entitle borrowers to up to one year of forbearance in certain circumstances, including periods of financial hardship.[37] With the passage of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, meant to provide relief during the coronavirus pandemic, more that 82 percent of federal student borrowers were granted six months of administrative forbearance.[38] These existing forbearance arrangements serve as a useful benchmark for establishing a basic right to up to one year of forbearance on servicing, debt collection, and credit reporting during times of personal emergency—though with some modifications.

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34 See Super, supra, at 2059 n.80.

35 In fact, consumer distress and mistreatment can actually cause the type of life problems that then further exacerbate financial distress. See Jimenez, supra, at 87 (the FDCPA was passed because abusive debt collections "contribute to…marital instability [and] to the loss of jobs[.]" (quoting 15 U.S.C. § 1692)).

36 See S. Hrg. 113–59, at 36 (OCC-supervised national banks are allowed to offer two-to-three month loan extensions to a borrower experiencing short-term hardship); see also id., at 11 (FDIC-supervised banks are permitted to offer troubled borrowers forbearance for periods ranging from three to nine months).

37 Contrary to other forms of forbearance, this right should not be accompanied by onerous documentation requirements. It should be available with a simple attestation.

38 See Americans for Financial Reform, *The CARES Act fails to provide sufficient relief to federal student loan borrowers*, Mar. 26, 2020, https://ourfinancialsecurity.org/2020/03/news-release-cares-act-fails-provide-sufficient-relief-federal-student-loan-borrowers/ ("The bill includes a six-month suspension on payments for federally held loans, six months that will still count towards loan forgiveness or rehabilitation programs, and will not create any negative credit reporting. But the nearly 2 million borrowers with Perkins loans and over 7 million borrowers with commercially held FFEL loans will be unfairly left out.") By contrast, the Heroes Act proposed extending this forbearance to September 2021, a full 18 months, and to cover all federal student loan borrowers. See The Health and Economic Recovery Omnibus Emergency Solutions Act, H.R. 6800, 116th Cong., Title V (2020).

This forbearance right cannot be accompanied by a sudden accumulation of interest—that would effectively make the length of the loan longer and/or the payments less sustainable. Forbearance is only effective if it means a full tolling of all costs for a reasonable period that allows consumers the space to get back on their feet. Further, any resumption of payments must be governed by reasonable repayment options; hitting consumers with a large balloon payment does nothing to address their financial distress. There is proposed legislation that provides a useful roadmap for what a consumer-friendly repayment period could look like.[39]

For credit reporting, forbearance would mean no negative credit reporting for the covered period of time until the statutory period expires or the consumer requests that the forbearance be lifted. Once lifted, credit reporting companies would not retroactively report any derogatory information that is furnished to them during that period. The recent CARES Act provides relief for consumers from the typical credit reporting rules if they receive a workout from their lenders during the COVID-19 pandemic.[40] This reform should also be incorporated, as it shows that some accommodations are not only possible, but desirable in certain situations.[41]

This means not only a delay on debt collection activities, payments, and penalties; the right should also extend to practices like collection lawsuits and wage garnishment. As with servicing, the resumption of payments should not include fines, fees, and other penalties. Continuing these practices has been deeply problematic in the context of COVID-19, making people's financial situations even more precarious and threatening to undermine the effectiveness of congressionally enacted financial support programs.[42]

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[39] See Small Business and Consumer Debt Collection Emergency Relief Act of 2020, S. 3565, 116th Cong., § 3 (2020) (limiting fees and interest and extending payment periods for past due balances).

[40] See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 4201 (2020).

[41] Still, the CFPB has issued a bulletin that it will not necessarily punish institutions for failing to comply with those requirements, undermining the effectiveness of this relief. See Consumer Fin. Protection Bureau, Statement on Supervisory and Enforcement Practices Regarding the Fair Credit Reporting Act and Regulation V in Light of the CARES Act, Apr. 1, 2020.

[42] See Michael Sainato, *'I Have No Money': Debt Collection Continues Despite Pandemic*, The Guardian, Mar. 28, 2020, https://www.theguardian.com/money/2020/mar/28/us-debt-collection-wage-garnishment-coronavirus; see also Danielle Douglas-Gabriel, *As Americans Faced Layoffs and Lost Wages, Student Loan Companies Kept Going to Court to Collect*, Wash. Post, Apr. 3, 2020, https://www.washingtonpost.com/education/2020/04/03/student-loans-collection-lawsuits-coronavirus/.

B. THE RIGHT TO HIRE AND FIRE

Protections are important, but they are only as effective as their enforcement mechanisms. Consumers are, by definition, unable to protect their interests in industries where they do not select their own service providers.[43] Accompanying a set of basic protections with a grant of authority for consumers to approve or select their servicer and credit bureau as well as request a transfer of services would be the first step toward putting consumers in control of their own credit lives.

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The main protections for mortgage borrowers are the Real Estate Settlement Procedures Act (RESPA) and the Truth in Lending Act (TILA). These laws provide mortgage borrowers with few rights to exercise against their servicer. Homeowners have the right to be notified regarding the transfer of their loan and its servicing, and also have some billing error resolution rights.[44] However, they do not have the right to consistent minimum servicing standards and procedures.[45] Most importantly for our purposes, "RESPA does not allow borrowers to choose their servicer or have any say in how the servicer handles their loan beyond complaining of errors."[46] As a result, "[i]f a borrower is dissatisfied with a servicer, the borrower can sue the servicer for specific acts, but has no ability to switch servicers[.]"[47]

The mortgage servicing rules issued by the CFPB under RESPA in 2013 largely deal with disclosures and communications through things like statements and regular contact, as well as preventing foreclosures unless certain loss mitigation options (i.e., payment modification) terms have been considered.[48] There is no right to a modification, only a

[43] In light of this rationale, it might be worth considering limiting this right to only third-party servicers, not companies that service their own loans, since consumers have greater ability to shop for, or avoid, certain servicers when they service their own loans. Examples here include auto loans and credit cards.

[44] *See* Levitin & Twomey, supra, at 7-8; *see also id.*, at 52 ("The consumer protection regime gives homeowners the right to know that servicing and ownership of their mortgage loan can be transferred, the right to receive notice of the transfer and contact information for the servicer and owner, and some error resolution rights.")

[45] *See id.*, at 8.

[46] *Id.*, at 53.

[47] *Id.*

[48] See Bureau of Consumer Financial Protection, Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696 (Feb. 14, 2013).

requirement that a borrower must either be denied, reject a modification, or fail to meet the terms of the modification.

That said, under RESPA mortgage servicers send borrowers a letter notifying them that servicing has been transferred from the original lender to a new servicer, and when servicing rights have been purchased by a new servicer. The timing of this process could be modified to provide consumers with notice that there are servicers interested in servicing their loans. These offer letters could include a set of terms and commitments that each servicer will make, so that a borrower can evaluate which one would be most consumer-friendly.[49]

The same should be true of credit reporting companies. While consumers will need to use the services of at least one credit reporting company, they do not necessarily need the services of all three. The use of all three credit bureaus is an industry-established practice, not a legally mandated one.[50] For any given credit decision, a lender typically feeds a variety of summary credit factors into a proprietary algorithm developed either by the lender or a credit bureau.[51] The underwriting process is generally an attempt to capture a "snapshot" of credit information about a consumer, including but not limited to their credit report, and then to construct a formula that extrapolates for lending purposes.[52] There are some coordination and implementation issues to consider, such as new mechanisms like providing a line on every credit application for consumers to report which credit bureau they use, but these should not be difficult to standardize and therefore should not present meaningful obstacles. In addition, consumers may enjoy additional benefits like better services from a smaller or specialty credit reporting company, and being able to pick and choose one's credit reporting company would significantly increase competition in an industry that is highly concentrated.

Consumers should also be empowered to approve or reject debt collectors. This suggestion may seem counterintuitive, but debt collection need not be a hostile endeavor.

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49 To ensure that all interests are represented, the set of eligible servicers could first be approved by investors in securities backed by such mortgages, for example, by the trustees that act on investors' behalf.

50 While the use of multiple credit reporting agencies is theoretically to improve the accuracy of credit decisions, it also increases the likelihood that a consumer could have inaccurate information in their file.

51 See Consumer Fin. Protection Bureau, *The Impact of Differences Between Consumer- and Creditor-Purchased Credit Scores* (July 2011). Credit reporting agencies can contract with lenders to build credit scoring models customized for their purposes, but credit scores are primarily sold as "educational scores" to consumers and can vary greatly from the actual criteria that lenders use to make credit decisions. See id., at 7; see also Consumer Fin. Protection Bureau, *Analysis of Differences between Consumer- and Creditor-Purchased Credit Scores*, at 20 (Sept. 2012).

52 See Consumer Fin. Protection Bureau, *The Impact of Differences Between Consumer- and Creditor-Purchased Credit Scores*, at 19-20.

Making collection agencies subject to influence by consumers could transform the business from one based upon coercion and hardball tactics, to one that seeks to provide repayment plans that are truly sustainable for consumers based upon their financial positions. There is evidence from tax collections that a model not based solely on profit motive can be both more humane and more effective.[53] In a 2013 study on the outsourcing of Internal Revenue Service (IRS) debt collection cases pursuant to a 2004 law, caseworkers from the IRS were found to have higher recovery rates than private debt collectors.[54]

The transfer of a service provider could be triggered by a consumer complaint against a servicer, credit reporting company, or debt collector using the CFPB's established complaint process. Financial institutions would then be required to solicit new servicing for a loan, a new collector for a debt, or a new credit bureau. The lender, trustee, or other applicable entity would then allow the competing companies to advertise to consumers, who could then comparison shop. After a consumer notified their lender, the old servicer, collector, or credit reporting company would transfer a consumer's file to a new company of the consumer's choosing.[55] There would need to be rules around disclosure practices and a safe harbor for consumer payments as the services were transferred from one provider to another, but there are models for how these protections could work; for example, one legislative proposal would give consumers a safe harbor from any late fees for mistakenly sending a payment to the wrong servicer within 60 days of a loan transfer.[56]

There are various existing legal authorities that the CFPB has for sharing consumer complaints with creditors and requiring financial institutions to be responsive. For example, the Bureau is directed to collect and transmit credit reporting complaints to individual credit bureaus, require the credit bureaus to act on those complaints,[57] and require credit bureaus to keep information on their responses to consumer complaints.[58]

53 See Adam Chodorow, *The IRS Is Using Private Debt Collectors Again*, Slate.com, Apr. 14, 2017, https://slate.com/business/2017/04/the-irs-is-using-private-debt-collectors-again-thats-a-problem.html.

54 Ofc. of the Taxpayer Advocate, *The IRS Private Debt Collection Program — A Comparison of Private Sector and IRS Collections While Working Private Collection Agency Inventory* (2013), https://taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/The-IRS-Private-Debt-Collection-Program-A-Comparison-of-Private-Sector-and-IRS.pdf. The same study also found that the numbers for private collectors may even have been partially inflated, since private collectors had the first opportunity to work the "easy" cases. See id.

55 The CFPB should include contractual standards and compensation rules in special cases like distressed loans, to establish a new "mandatory special servicer" model. See Foreclosure Fraud and Homeowner Abuse Prevention Act, S. 824, 112th Cong. §§ 4, 6 (2011).

56 See S. 824, 112th Cong., at § 7 (providing a safe harbor from late fees for any mistaken payments made within 60 days of a servicing transfer date).

57 *See* 15 U.S.C. § 1681i(e)(3). The Bureau also has authority to write rules requiring timely responses from large financial institutions to both regulators and consumers. See 12 U.S.C. § 5534.

58 See 15 U.S.C. § 1681i(e)(3).

While the CFPB theoretically uses these complaints to inform its supervisory process and its efforts to identify companies engaging in unfair, deceptive, and abusive acts and practices, its other uses of these complaints are generally limited to posting anonymized complaints to its website and overseeing a process for lenders to respond to and resolve complaints.[59]

These reforms would create meaningful incentives to revise a broken business model that has not been sufficiently reformed in the wake of the 2008 financial crisis.

Building on this structure, the CFPB could improve upon the status quo that leaves consumers stuck with service providers that do not necessarily have incentives to act in their best interests. It is possible that this idea might be disruptive to incumbent business models, such as those in the mortgage servicing industry. Rather than viewing this as a drawback, it can actually be seen as an opportunity. These reforms would create meaningful incentives to revise a broken business model that has not been sufficiently reformed in the wake of the 2008 financial crisis.

C. THE RIGHT TO REPURCHASE

Consumers should also have a one-time right, post-default, to repurchase a debt on the terms that are available on the debt buying market. Consumer debts are usually sold by creditors to debt buyers at auction, with bidders basing their offered price on a variety of factors, including the age of the debt, the nature of the underlying financial product, and the amount of accompanying documentation. Debt prices vary greatly by type of debt, consumer characteristics, the age of the debt, and the number of prior attempts to collect,[60] but on average, buyers purchase debt for $0.04 on the dollar.[61] While debt buyers are able to purchase debts for pennies on the dollar, they typically require consumers to pay the balance in full, or at least to settle for an amount that is much

[59] See Consumer Fin. Protection Bureau, *Request for Information Regarding the Bureau's Consumer Complaint and Consumer Inquiry Handling Processes*, 83 Fed. Reg. 16,839 (Apr. 17, 2018).

[60] *See* Fed. Trade Comm'n, *The Structure and Practices of the Debt Buying Industry*, supra, at 25.

[61] *See id.* at 23. The highest-rated debts sell for $0.08 on the dollar. See Transcr., *Shining a Light on the Consumer Debt Industry, Subcommittee on Financial Institutions and Consumer Protection of the Committee on Banking, Housing, and Urban Affairs*, United States Senate, S. Hrg. 113-75, at 17 (July 17, 2013), https://www.govinfo.gov/content/pkg/CHRG-113shrg82718/pdf/CHRG-113shrg82718.pdf.

higher than mere pennies, with additional fees and interest tacked on. Before their debt is sold to a third party, the consumer should have a right of first refusal to buy back their debt at the average rate of consumer credit auctions.

The CFPB has been able to compile survey data of the prices at which online consumer debt auctions are conducted.[62] Likewise, the Federal Trade Commission (FTC) tracked this data when it had jurisdiction over debt collectors before the CFPB came into existence, and was able to slice the data based upon various characteristics including age, type of financial product, and amount of supporting documentation.[63] The CFPB could track these numbers annually, and then establish by rule the preceding year's average auction price as the repurchase price to be made available to consumers for the coming year.[64]

A new process could be established such that after defaulting, consumers would be sent a disclosure—essentially a "goodbye packet"—as proposed by law professor Dalié Jimenez.[65] However, it would include an additional simple disclosure in large bolded letters in a format akin to the standardized disclosure required under the Fair Debt Collection Practices Act (FDCPA) for all attempts to collect debts. The disclosure would state that a consumer has a right to purchase their debt at the specified rate determined by the CFPB, including the percentage of the outstanding balance and the total dollar amount, as well as a notice that making such one-time payment would permanently retire the debt. The packet would be accompanied by a payment coupon and a stamped, addressed envelope that the consumer would either return with a payment or use to affirmatively opt out of their repurchase option. Should the consumer fail to respond, the debt could not be sold until after a specified period had elapsed—say, one year after the notice was sent.

The right to repurchase is consistent with other efforts to address access and affordability, such as municipal proposals to provide tenants with a right of first refusal to purchase the home they are renting when their landlord puts it on the market.[66] The CFPB could justify this change on the basis that giving consumers a right to repurchase their loans allows them the option to avoid aggressive collection tactics. Without it, consumers are unable to protect themselves from the harms created by abusive collection practices.

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[62] See Consumer Fin. Protection Bureau, *Market Snapshot: Online Debt Sales* (Jan. 2017), https://files.consumerfinance.gov/f/documents/201701_cfpb_Online-Debt-Sales-Report.pdf.

[63] See Fed. Trade Comm'n, supra, at 22-24.

[64] The costs of debt purchases are quite low based upon a variety of factors, including the fact that they are sold in bulk. It is possible that the price set by CFPB could or should be slightly higher to take into account these types of factors. That said, the price should still be in the range of pennies on the dollar in relation to the face value of the consumer's debts.

[65] See Jimenez, supra, at 100-101.

[66] See Sam Lew, *Moms 4 Housing Spurs Right-to-Purchase Law in Oakland*, 48Hills.org, Jan. 30, 2020, https://48hills.org/2020/01/moms-4-housing-spurs-right-to-purchase-law-in-oakland/.

II. The New Consumer Safety Net In Three Consumer Markets

Why raise concerns with these consumer products and services now? And why have these issues not been addressed yet? It may be useful to step back and consider the structure of the servicing, credit reporting, and debt collection industries and some recent history of how consumers have been harmed by these companies.

> **People still have too few direct means of exercising their rights against these financial actors.**

COVID-19 has exposed the fact that consumers rely on the goodwill of servicers, credit bureaus, and collectors for relief from major payments like mortgages, student loans, and credit cards to get through times of hardship. People still have too few direct means of exercising their rights against these financial actors. For example, there are recent reports that mortgage servicers are reporting forbearance that has been authorized by federal legislation to credit bureaus, which is then impacting consumers' credit scores and their ability to refinance.[67] One student loan servicer allegedly incorrectly reported 4.8 million borrowers' loan statuses to credit reporting companies, potentially resulting in lower credit scores in some cases, due to a "coding error."[68]

In addition, we know that each of these services, if done poorly, can negatively impact consumers' financial lives in various ways. High levels of student debt can raise the cost of other credit services.[69] The nature of medical collections can also impact consumers' credit scores, thereby potentially impacting the cost and availability of credit.[70]

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[67] See The Capitol Forum, *Coronavirus Policy: Mortgage Servicers are Adding Forbearance Remarks on Credit Reports Even for Some Borrowers Not in Forbearance, Negatively Affects Credit Scores and Mortgage Refinancing*, Vol. 8, No. 168, May 7, 2020.

[68] See Michael Stratford, *Emergency Relief Screw-up Hits 5 Million Student Loan Borrowers*, POLITICO, May 20, 2020, https://www.politico.com/news/2020/05/20/emergency-releif-student-loan-272334.

[69] See Student Borrower Protection Ctr., *The Secret Price of Student Debt*, at 12 (May 2020) (finding that a typical borrower with a high level of student debt stress would pay $29,066 more on a bundle of credit products including an auto loan, a mortgage, and a credit card, while a borrower with a moderate level of student debt stress would pay $11,472 more), https://protectborrowers.org/wp-content/uploads/2020/05/The-Secret-Price-of-Student-Debt.pdf.

[69] See Cons. Fin. Protection Bureau, *Data point: Medical Debt and Credit Scores* (May 2014), https://files.consumerfinance.gov/f/201405_cfpb_report_data-point_medical-debt-credit-scores.pdf.

[70] See Cons. Fin. Protection Bureau, *Data point: Medical Debt and Credit Scores* (May 2014), https://files.consumerfinance.gov/f/201405_cfpb_report_data-point_medical-debt-credit-scores.pdf.

The issues in the servicing, credit reporting, and debt collection industries brought to light by COVID-19 were not unforeseeable. Indeed, they manifested in similar ways in the global financial crisis of 2008 and the years that followed. Servicing, credit reporting, and debt collection are not unregulated industries, so why do these issues persist? Below, I will briefly describe how these businesses work, the problems that were uncovered in the global financial crisis, and some recent (but insufficient) reform efforts. This context should help develop an understanding of the structural nature of the problems with these three consumer finance markets, as well as the need for larger structural reforms.

A. THE THIRD-PARTY LOAN SERVICING BUSINESS

Third-party servicing is often associated with the two most consequential credit products used by consumers: mortgages and student loans. Servicers typically do not lend or own these loans; they are responsible for account maintenance activities such as sending monthly statements to borrowers, collecting payments, keeping track of account balances, reporting financial information to credit bureaus, and passing funds to investors in mortgage securities.[71] They are also responsible for handling defaulted loans, including administering loan workouts or overseeing processes like foreclosures, in the case of mortgages.[72]

Processing payments and sending paperwork is largely a logistical and mechanical business, but if a servicer misallocates a mortgage payment, it can result in default, foreclosure, and a lost home. In the case of private student loans, for example, defaults can follow borrowers even through a bankruptcy process.[73] In addition, the work of "loss mitigation"—the process of working with a delinquent borrower on a sustainable payment plan to stave off default—is often time-intensive and requires precision and coordination.

Mortgage servicing practices are largely established by a pooling and servicing agreement that is a contract between servicers and investors in mortgage-backed securities. Borrowers generally only shop for lenders, based on loan rates and fees; they do not shop for their servicers. The essence of the problem for mortgage borrowers is that they do not know who the eventual owner of their mortgage will be, nor who will ultimately

[71] *See* Levitin & Twomey, supra, at 23.

[72] *See id.*

[73] See Transcr., *Private Student Loans: Regulatory Perspectives*, Committee on Banking, Housing, and Urban Affairs, United States Senate, S. Hrg. 113–59, at 46 (June 25, 2013) (noting that private student loans are generally not dischargeable in bankruptcy).

service the mortgage on their behalf.[74] They also do not expect to become delinquent or default, so have no incentive to negotiate on this basis even if they could. As a result of this arrangement, "[i]mperfect information, information asymmetries, and cognitive biases mean that homeowners do not exert market pressure to correct" the problems in the third-party mortgage servicing market.[75]

The global financial crisis began with predatory mortgage lending, and was prolonged by inept foreclosure prevention programs that ran through private mortgage servicers that routinely misallocated payments, misplaced documentation for the modification process, and loaded in junk fees in the foreclosure process.[76] Mortgage servicers were also found to have engaged in a practice broadly known as "robo-signing"—failing to properly document the ownership of mortgage titles, as well as forging documents in the foreclosure process.[77] These practices harmed families of color the most, as they suffered the greatest wealth declines during the financial crisis.[78] This was due to a mix of having a higher percentage of their wealth tied up in their homes and higher debt loads, dynamics that were caused by discrimination and its legacies in employment, housing, and credit.[79]

As noted above, most of the reforms to mortgage servicing have dealt with process protections like having a single contact at one's servicer or receiving notice of loss mitigation options a certain number of days prior to a prospective default. These reforms have not dealt with the scenario that played out in 2008, when borrowers needed mass forbearance during an unprecedented economic crisis.[80] Once again, such protections are essential in the face of a pandemic, and Congress was forced to legislate in this area. Still, mortgage servicers have provided consumers with incomplete and misleading information about their rights.[81] Short of CFPB enforcement, which seems unlikely in

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[74] *See* Levitin & Twomey, supra, at 7 ("Even if homeowners were knowledgeable and concerned about management of their loan upon default, they could not know if their loan would be securitized, who would be the servicer, and what contractual provisions would govern the servicing of their loan; most loans' ultimate destination is unknown at origination.")

[75] *Id*.

[76] *See* Katherine M. Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEXAS L. REV. 121 (2009).

[77] *See* Eric Dash & Nelson D. Schwartz, *Bankers Ignored Signs of Trouble on Foreclosures*, N.Y. Times, Oct. 13, 2010.

[78] *See* William R. Emmons & Bryan J. Noeth, *Household Financial Stability: Who Suffered the Most from the Crisis?*, The Regional Economist, at 16 (July 2012), https://www.stlouisfed.org/~/media/files/pdfs/publications/pub_assets/pdf/re/2012/c/financial_stability.pdf.

[79] See id.

[80] These reforms have also failed to address central incentive problems in the servicing model, for example, that the compensation structure effectively makes it uneconomical as anything other than a high-volume, low-overhead business.

[81] See Memorandum, Ofc. of Inspector General, Dept. of Housing & Urban Development, *Some Mortgage Loan Servicers' Websites Offer Information about CARES Act Loan Forbearance That Is Incomplete, Inconsistent, Dated, and Unclear*, Apr. 27, 2020, https://www.hudoig.gov/sites/default/files/2020-04/Single%20Family%20Mortgage%20Forbearance%20Brief.pdf.

this moment, consumers are left with little recourse under the current administration. Giving consumers greater autonomy and leverage in dealing with their servicers will ensure that they can protect themselves in emergency situations, and hold their servicer accountable if it fails to perform.

B. THE CREDIT REPORTING INDUSTRY

Consumer credit reporting companies assemble or evaluate consumer credit information or other information on consumers for the purpose of furnishing reports to third parties. They collect information from various sources, including identifying information, credit history, public record, collections information, and credit inquiries. These five types of information are combined to form a credit report that estimates the likelihood that a consumer will default on a loan, for the purposes of approving or denying credit applications.[82]

There are approximately 400 credit reporting companies in the US, including large credit bureaus, consumer report resellers, specialty consumer reporting agencies, and companies that analyze consumer data.[83] The industry is highly concentrated in the three largest agencies—Experian, Equifax, and TransUnion—each of which, as of 2011, maintains files on 200 million Americans and monitors 1.3 billion credit lines per month.[84]

Many of the studies on credit reporting companies have focused on the amount of inaccurate information contained in consumers' credit files and on credit reporting companies' unwillingness or inability to correct those errors.[85] These errors are symptoms of a deeper problem that stems from misaligned incentives: credit reporting companies work for information "furnishers"—banks and other lenders—rather than for consumers.[86]

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82 Income is not included in a credit report.

83 *See* Press Release, *Consumer Financial Protection Bureau to supervise credit reporting*, July 16, 2012, http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-to-superivse-credit-reporting/.

84 *See* Consumer Financial Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System: A Review of How the Nation's Largest Bureaus Manage Consumer Data*, at 3 (Dec. 2012), http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf.

85 While the exact number of material accuracies remains uncertain, in 2012 the CFPB collected data on the number of disputes and the resolution that occurred. Approximately 8 million consumers disputed at least one piece of information in their credit file in 2011, almost 40 percent of which were linked to debt collections. Of these disputes, 15 percent were settled by the credit reporting companies themselves without the involvement of furnishers. The remaining 85 percent were sent to furnishers, who were then responsible for deciding the validity of the dispute and updating the consumer's file with the credit reporting company. See Consumer Fin. Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System*, at 4.

86 In fact an entire industry, credit repair organizations, has sprung up specifically for the purpose of marketing services to help consumers dispute credit bureaus' records, often at great expense to the consumers themselves. See Consumer Fin. Protection Bureau, *Consumer Advisory: Don't Be Misled by Companies Offering Paid Credit Repair Services*, Dec. 3, 2019, https://files.consumerfinance.gov/f/documents/092016_cfpb_ConsumerAdvisory.pdf.

Indeed, the information furnishers are the most important customers of the credit reporting companies, not the consumers themselves.[87] By contrast, consumers have no ability to pick or choose which credit reporting companies they use, either at the beginning of their credit life cycle or if they are dissatisfied with the service of one of the credit reporting companies.[88]

The credit reporting system harms Black and brown people most because it is built on the foundation of racial disparities that proliferate in our financial system.

The CFPB has done some useful work collecting information on credit reports, and focusing on especially problematic areas like medical debt.[89] At the height of the crisis in 2008-2009, approximately 50 million consumers saw their credit scores fall more than 20 points, including 21 million people whose scores declined more than 50 points.[90] There were indications that some consumers' credit scores suffered not just because of the financial crisis; errors in credit reporting were widespread, impacting all manner of consumers' financial and personal lives.[91] Like many other institutions in our society, the credit reporting system harms Black and brown people most because it is built on the foundation of racial disparities that proliferate in our financial system.[92]

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87 Transcr., *Making Sense of Consumer Credit Reports*, Subcommittee on Financial Institutions and Consumer Protection, Committee on Banking, Housing, and Urban Affairs, United States Senate, S. Hrg. 112–760, at 6 (Dec. 19, 2012), https://www.govinfo.gov/content/pkg/CHRG-112shrg80539/pdf/CHRG-112shrg80539.pdf (response of former CFPB official Corey Stone that it is "correct" to say that "the most important customers to the bureau are the furnishers"); see also id., at 20 (statement of one witness that unreliable furnishers are allowed to continue reporting information to credit reporting companies because "they are the customer. They pay the credit bureaus both to enter their information into the system and to pull reports. They are a subscriber. And it is the creditors and the debt collectors that are the major customers of the credit bureaus, not the consumer.")

88 See id. (statement of Chi Chi Wu of the National Consumer Law Center that, "Usually, in an industry, you have competition. A consumer has a choice. If they do not like one cell phone carrier, they can go to another. In this system, consumers do not have a choice. If you are unhappy with how Experian handles your information, you cannot say, 'I am not going to deal with Experian anymore. I am only going to deal with TransUnion,' because, you know what? If you want a mortgage, you have to go with Experian. So there are no traditional market forces to improve the services to consumers.")

89 See, e.g., *Consumer Fin. Protection Bureau, Consumer Credit Reports: A Study of Medical and Non-medical Collections* (Dec. 2014), https://files.consumerfinance.gov/f/201412_cfpb_reports_consumer-credit-medical-and-non-medical-collections.pdf.

90 See Rachel Bell, *Recession Causes FICO® Score Swings*, FICO.com, Oct. 28, 2011, http://www.fico.com/en/blogs/risk-compliance/recession-causes-fico-score-swings/.

91 See, e.g., Jill Riepenhoff & Mike Wagner, *Dispatch Investigation: Credit Scars*, Columbus Dispatch, May 6, 2012; see also Jill Riepenhoff & Mike Wagner, *Credit Scars: Mixed and Marred*, Columbus Dispatch, May 7, 2012; see also Jill Riepenhoff & Mike Wagner, *Credit Scars: Thief Stole Her Identity*, Dreams, Columbus Dispatch, May 8, 2012; see also Jill Riepenhoff & Mike Wagner, *Credit Scars: Bad Judgments*, Columbus Dispatch, May 9, 2012.

92 See Nat'l Consumer L. Ctr., *Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination*, May 2016, https://www.nclc.org/images/pdf/credit_discrimination/Past_Imperfect050616.pdf.

COVID-19 has exposed consumers to a systemic problem that requires what is essentially a pause on consumer reporting activity. However, because consumers have no direct relationship with their credit bureaus, they have little to no leverage to demand or enforce such protections. Again, Congress has had to step in to fill some of these gaps, but some still remain.[93] Even when Congress suspended federal student borrowers' payment obligations through the CARES Act, servicers illegally provided inaccurate information about millions of their customers to the credit reporting companies, who then illegally reported this information to third parties.[94]

Consumers need to be able to request broad-based relief from negative credit reporting during critical times in their life, and they need the ability to hold their credit bureau accountable. As one consumer advocate puts it, "You can vote with your feet if you don't like your bank; you can't vote with your feet if you don't like your credit report."[95]

C. THE DEBT COLLECTION INDUSTRY

Collections begin once a borrower has defaulted on their loan. Collections can be conducted by the original creditor, a third-party contractor retained by the original creditor, or a purchaser of consumer debts that collects or litigates those debts on their own behalf or contracts with others to collect or litigate. Some creditors will attempt to collect on debts and, if unsuccessful, will retain a third party for assistance or sell the debt to a debt buyer.[96] Like mortgage servicing, consumers do not shop for credit products on the basis of whether their lender offers friendly collection practices or contracts with more reasonable third-party collectors.[97]

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93 See Brendan Cole, *Credit Bureaus Resist Campaign for Clemency As Pandemic Pushes Millions Into Default and Delinquency*, Newsweek.com, Apr. 16, 2020, https://www.newsweek.com/credit-bureaus-resist-clemency-pandemic-millions-default-delinquency-experian-transunion-equifax-1494909.

94 Berger Montague, *Student Loan Giant, Consumer Reporting Agencies Broke Laws that Prohibit Reporting of Inaccurate Credit Information and Failed to Follow the CARES Act*, May 20, 2020, https://bergermontague.com/news/great-lakes-equifax-transunion-and-experian-sued-for-damaging-millions-of-student-loan-borrowers-credit/.

95 Cole, supra.

96 Debt buyers are a subset of debt collectors that purchase portfolios of debt from an original creditor. Debt buyers purchase portfolios of defaulted consumer debts for less than their face value and either attempt to collect the debt directly from the consumer or contract with third-party collectors.

97 See Jimenez, supra, at 94 ("When shopping for credit products, consumers have no incentive to care about a bank's collection practices. Optimism bias leads individual consumers to believe that they will not have to deal with a collector; default only happens to other people. . . .A bank will not gain customers by touting its punctilious collection practices because consumers are not selecting their bank based on these practices. Once they are delinquent, consumers do not have a choice in who their collector is or who their debt is sold to. It is the bank that chooses what collection agencies to use and who to sell their debt to. As a result, consumers do not exert pressure to clean up questionable practices.")

Debts are purchased at auction and subject to contractual terms, including amounts of information buyers will receive, limits on the number of supporting documents a buyer can request, ability of a buyer to resell the debt, and sellers' liabilities in case of inaccuracies.[98] Debt buyers often sell uncollected debts to subsequent debt buyers.

Following the mass mortgage irregularities uncovered by the global financial crisis, regulators also discovered documentation failures related to other consumer debts. This includes enforcements actions over banks' credit card debt collection sales wherein account records contained false information or lacked proper documentation, and where employees attested that debts were owed without proper knowledge.[99]

The debt collection industry is larger and more influential than many realize. It is a $11.5 billion industry with approximately 7,700 collection agencies in the US,[100] that have touched the lives of 71 million American consumers—almost 32 percent of consumers with a credit file.[101] More than $669 billion of consumer debt was in some stage of delinquency in the first quarter of this year.[102] This consumer debt is not enforced equitably. The debt collection system targets Black Americans in particular with aggressive collections and lawsuits.[103]

These are the dynamics that apply in "normal" times—during a global pandemic, that number is likely to skyrocket absent meaningful actions to protect consumers. COVID-19 has required added consumer debt collection protections, but Congress

98 *See* Fed. Trade Comm'n, *The Structure and Practices of the Debt Buying Industry*, Jan. 2013, available at: http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf.

99 *See* Jeff Horwitz, *JPM Chase Quietly Halts Suits Over Consumer Debts*, Am. Banker, Jan. 10, 2012, http://www.americanbanker.com/issues/177_7/jpmorgan-chase-consumer-debt-collection-1045606-1.html; *see also* Maria Aspan & Jeff Horwitz, *Chase Halts Card Debt Sales Ahead of Crackdown*, Am. Banker, July 1, 2013, http://www.americanbanker.com/issues/178_126/chase-halts-card-debt-sales-ahead-of-crackdown-1060326-1.html; *see also* Jeff Horwitz & Maria Aspan, *OCC Pressures Banks to Clean Up Card Debt Sales*, AM. BANKER, July 2, 2013, http://www.americanbanker.com/issues/178_127/occ-pressures-banks-to-clean-up-card-debt-sales-1060353-1.html; *see also* Jessica Silver-Greenberg, *Problems Riddle Moves to Collect Credit Card Debt*, N.Y. TIMES, Aug. 12, 2012, http://dealbook.nytimes.com/2012/08/12/problems-riddle-moves-to-collect-credit-card-debt/; see Jeff Horwitz, *State AGs Probing Sales of Credit Card Debt*, AM. BANKER, Sept. 17, 2012, http://www.americanbanker.com/issues/177_180/state-attorneys-general-probing-sales-of-credit-card-debt-1052724-1.html; *see also* http://www.consumerfinance.gov/newsroom/cfpb-47-states-and-d-c-take-action-against-jpmorgan-chase-for-selling-bad-credit-card-debt-and-robo-signing-court-documents/.

100 *See* Bureau of Consumer Financial Protection, Debt Collection Practices (Regulation F), 84 Fed. Reg. 23,274, 23, 276 (May 21, 2019).

101 *See* Hannah Hassani & Signe-Mary McKernan, *71 Million US Adults Have Debt in Collections*, Urban Inst., July 19, 2018, https://www.urban.org/urban-wire/71-million-us-adults-have-debt-collections; see Bureau of Consumer Fin. Prot., *Fair Debt Collection Practices Act: CFPB Annual Report 2019*, at 8 (Mar. 2019), https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2019.pdf (about 28 percent of consumers with a credit file have at least one debt in collection).

102 *See* Fed. Reserve Bank of N.Y., Quarterly Report on Household Debt and Credit, Feb. 2020, https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2019Q4.pdf.

103 See Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, ProPublica, Oct. 8, 2015, https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods.

has so far failed to oblige. As a result, practices like unfair collection, garnishment, and lawsuits are continuing in states that have not passed their own protections.[104] The debt collection machine is almost impossible to turn off, even when mandated by Congress. The nation's largest lenders continue to pursue collections and wage garnishment actions, including 1,600 lawsuits filed by the nation's largest debt buyer in April.[105] Consumer attorneys report that collectors have become more aggressive during the pandemic,[106] and employers illegally allowed wage garnishment to proceed for an estimated 54,000 federal student loan borrowers whose payments were suspended by the CARES Act.[107]

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104 See Diane Thompson & Seth Frotman, *It's Time to Ban Dangerous Debt Collection Threatening Public Health During COVID-19*, Morning Consult Apr. 30, 2020, https://morningconsult.com/opinions/its-time-to-ban-dangerous-debt-collection-threatening-public-health-during-covid-19/.

105 See Paul Kiel & Jeff Ernsthausen, *Capital One and Other Debt Collectors Are Still Coming for Millions of Americans*, ProPublica, June 8, 2020, https://www.propublica.org/article/capital-one-and-other-debt-collectors-are-still-coming-for-millions-of-americans.

106 Jonathan Walsh, *Some Debt Collectors Getting 'More Aggressive' Now Says Cleveland Collections Expert*, News5Cleveland.com, May 15, 2020, https://www.news5cleveland.com/rebound/some-debt-collectors-getting-more-aggressive-now-says-cleveland-collections-expert.

107 Michael Stratford, *DeVos Sued for Seizing Student Loan Borrowers' Wages During Pandemic*, Politico, May 1, 2020, https://www.politico.com/news/2020/05/01/devos-sued-for-seizing-student-loan-borrowers-wages-during-pandemic-228519.

III. Responses To Counter-Arguments

A. THE DODD-FRANK ACT WAS NOT MEANT TO BE READ SO EXPANSIVELY

The idea that the CFPB was meant to empower consumers with additional leverage against finance companies, and that the Bureau should have broad authority to do so, have been at the heart of the CFPB since Senator Elizabeth Warren (D-MA) first conceived of it.[108]

In a seminal law journal article, before becoming a US Senator, Warren identified a core problem with consumer financial markets: "Instead of facing informed consumers to whom they must offer the best, most competitive product, lenders can offer credit on onerous terms and compete instead by finding new ways to attract customers[.]"[109] In that context, "the ordinary discipline that drives markets toward efficiency is missing."[110] She concluded: "Ordinary market mechanisms, such as competition and expert advisers, cannot fully correct these deficiencies."[111]

Indeed, the Treasury Department echoed the need for consumer-focused competition when it proposed a new consumer agency in its blueprint for reform, saying that the goal was for financial institutions to "compete fairly on the basis of price and quality."[112] The goal for this new agency was that consumers be "empowered" and "be able to choose loans, to choose products, to choose services."[113]

Many of these concerns about consumer financial products manifested through terms and conditions that were hidden in opaque and complex contract language. This dynamic is even more applicable to financial products where the consumer has literally no power to shop whatsoever. Warren proposed that to deal with this broken market, the government needed to act.

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108 See Warren, supra, at 11 (the CFPB was supposed to "be focused on ensuring that consumers get clear and effective disclosures in plain English and in a timely fashion so that they will be empowered to shop for and choose the best consumer financial products and services for them.")

109 Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 31 (2008).

110 Id.

111 Id., at 100.

112 Transcr., *Creating a Consumer Financial Protection Agency: A Cornerstone of America's New Economic Foundation*, Hearing Before the Committee on Banking, Housing, and Urban Affairs, United States Senate, S. Hrg. 111–274, at 7 (July 14, 2009) (statement of Treasury Assistant Secretary Michael Barr).

113 Id., at 10.

In her 2008 article, Warren noted that the "main drawback of [consumer protection] statutes is their specificity."[114] Each existing consumer law "identifies specific problems to be addressed and identifies within the statutory framework what practices will be outlawed and what practices will not," which "inhibits beneficial regulatory innovations[.]"[115] The fundamental shortcoming of this approach is that "[l]egislation targeted to specific practices, with narrowly defined authority delegated to administrative agencies, is incapable of effectively responding to the high rate of innovation in consumer credit markets and the subtle ways in which creditors can exploit consumer misunderstanding."[116] The answer was to create an "agency with a broad mandate [that] could develop more institutional expertise and quicker responses to new products and practices."[117]

These ideas carried through to Dodd-Frank's drafters. The law's legislative history makes clear that CFPB should have "enough flexibility to address future problems as they arise."[118] The authors on the Senate Banking Committee believe that "[c]reating an agency that only had the authority to address the problems of the past, such as mortgages, would be too short-sighted."[119] As demonstrated below, the problems in both credit reporting and debt collection have ballooned in recent years, as the financial crisis era slowly faded away.[120] The law's drafters wanted the CFPB to be both powerful and nimble, because "[e]xperience has shown that consumer protections must adapt to new practices and new industries."[121]

In its recent ruling on the CFPB's structure, a majority of the Supreme Court described the UDAAP authority as a "broad standard";[122] indeed, it is one that the Bureau has significant latitude to interpret. For example, in February, the CFPB issued a policy statement interpreting the meaning of "abusive acts or practices."[123] As the statement

114 Bar-Gill & Warren, supra, at 84.

115 Id.

116 Id., at 99. For example, the FDCPA provides consumers with limited substantive rights against the companies collecting debts from them. See S. Rep. No. 111-176, at 19-20 ("[T]he Committee is concerned that consumers have little ability to dispute the validity of a debt that is being collected in error.")

117 Bar-Gill & Warren, supra, at 99.

118 S. Rep. 111-176, at 11.

119 Id.

120 See Section IV.2, infra.

121 Id.

122 *Selia Law LLC v. Consumer Fin. Protection Bureau*, No. 19-7, slip op. at 4 (June 29, 2020), https://www.supremecourt.gov/opinions/19pdf/19-7_new_bq7d.pdf.

123 See Bureau of Consumer Financial Protection, *Statement of Policy Regarding Prohibition on Abusive Acts or Practices*, 85 Fed. Reg. 6,733 (Feb. 6, 2020).

notes, the Dodd-Frank Act was the first statute to generally prohibit abusive acts or practices.[124] The CFPB's policy statement illustrates this point by inventing a new test that a practice is only abusive if the Bureau "concludes that the harms to consumers from the conduct outweigh its benefits to consumers[.]"[125] The CFPB has also proposed a new pilot program to issue advisory opinions to interpret laws and regulations, including providing safe harbors from legal compliance.[126] If the CFPB has the legal flexibility to impose new requirements on the statutory language out of whole cloth and to issue broad exemptions, then the CFPB may surely interpret that standard in a more expansive manner, but still wholly consistent with the CFPB's intent and mission.[127]

B. THESE CONSUMER FINANCIAL PRODUCT MARKETS ARE WORKING WELL, AND DO NOT NEED SIGNIFICANT REFORM

How have consumer financial product markets worked out for consumers? To hear the consumers themselves tell it, not very well. The CFPB has said that "complaints play a key role in the detection of unfair, deceptive, or abusive practices," especially "when numerous consumers make similar complaints about the same product or service."[128] According to data from the CFPB's consumer complaint database, credit reporting, debt collection, and mortgages are consistently the three products consumers have complained about most since 2013, the year that CFPB began collecting complaints on all of these products.

Mortgage complaints have declined over time as the global financial crisis of 2008 has abated, while debt collection and credit reporting complaints have grown. Some of these increases may be due to factors such as greater public awareness that

[124] See id., at 6,733.

[125] Id., at 6,736.

[126] See Bureau of Consumer Fin. Protection, *Advisory Opinions Pilot*, 85 Fed. Reg. 37,331 (June 22, 2020).

[127] While the broad and largely untested nature of the "abusive" authority offers the CFPB significant discretion, the financial industry may still consider seeking legal recourse to block new regulation, or at least threaten to do so. It is also worth acknowledging the debate regarding the constitutionality of certain consumer relief proposals related to the COVID-19 pandemic. The law here is not clear-cut, and generally depends upon a fact-specific analysis of the nature of the law or regulation at issue, the basis for government action, and the regulated nature of the industry or investor affected by the government action. See Gibson Dunn, *Client Alert: Constitutional Implications of Government Regulations and Actions in Response to the COVID-19 Pandemic*, Mar. 27, 2020, https://www.gibsondunn.com/constitutional-implications-of-government-regulations-and-actions-inresponse-to-the-covid-19-pandemic/. Of course, the threat of businesses suing to block all manner of regulation is ever-present. Officials that abandon their responsibility to do the right thing—in this case, protect consumers—in the face of prospective legal challenges are effectively ceding their authority to the whims of the industries that they are meant to oversee. Worse, they would be doing so without so much as a fight. Given the urgency of the economic crisis facing millions of Americans, now is time for bold, not timid, government action.

[128] See Consumer Fin. Protection Bureau, *UDAAP Manual: Laws and Regulations*, supra note 15, at 9. The Bureau also notes that "Because the perspective of a reasonable consumer is one of the tests for evaluating whether a representation, omission, act, or practice is potentially deceptive, consumer complaints alleging misrepresentations or misunderstanding may provide a window into the perspective of the reasonable consumer." Id.

TABLE 1

CFPB Consumer Complaints

Year	Number	Rank (Out of 13)
Mortgages		
2019	27,300	4th
2018	30,100	3rd
2017	37,300	3rd
2016	51,100	3rd
2015	50,700	3rd
2014	51,200	2nd
2013	59,900	1st
Total	**307,600**	**3rd**
Credit Reporting		
2019	154,500	1st
2018	126,300	1st
2017	100,000	1st
2016	53,900	2nd
2015	54,900	2nd
2014	44,800	3rd
2013	24,200	3rd
Total	**558,600**	**1st**
Debt Collection		
2019	75,200	2nd
2018	81,500	2nd
2017	84,500	2nd
2016	87,900	1st
2015	85,000	1st
2014	88,300	1st
2013	31,100	2nd
Total	**533,500**	**2nd**
Total Mortgage, Credit Reporting & Debt Collection Complaints:	**1,399,700**	

Source: CFPB, Consumer Response Annual Reports, 2013-2019

the CFPB exists as a repository for consumer dissatisfaction, the shift away from mortgages as a central area of consumer harm as time passes from the foreclosure crisis, and the growth of other forms of consumer debt over time. Still, these results are not reassuring, and are also consistent with the prior experiences of agencies like the FTC, which was responsible for overseeing these industries prior to the CFPB's creation.[129]

Bear in mind that these are just the number of complaints that we know about. There are likely many more consumers who are not even aware of the CFPB's existence, nor have the time or inclination to file a complaint with the Bureau. Nonetheless, the fact that nearly 1.4 million complaints have been filed against companies in these three industries suggests that something is very wrong, at least as measured by consumers' satisfaction with the "services" that are being provided to them.

[129] See, e.g., S. Rep. No. 111-176, at 19 ("The FTC receives more complaints from consumers about debt collectors than any other industry.")

C. THE PROPOSAL TO ALLOW DEBT REPURCHASING WILL RAISE THE COST AND AVAILABILITY OF CREDIT

Some argue that efforts to pursue repayment of legitimate debts reduce risks for lenders, which in turn lower the cost of credit for future borrowers. However, others argue that poor collection practices and documentation can actually increase cost and inefficiency, and result in significant consumer harm.

While the assertion that allowing debts to be collected and recovered has a beneficial impact on the cost of credit may be true, it is not clear exactly how much of an impact it actually has. For example, according to one rough estimate by a banking regulatory agency, the amount of charged-off debt sold by banks is a tiny fraction of the overall size of their lending portfolios.[130]

Regardless, the economic proposition for lenders in this proposal should be financially neutral, as consumers would have access to terms that are equivalent to those available to market participants. Allowing consumers the right to purchase their outstanding debts at the bargain basement prices offered to collection agencies should have no impact on the cost of credit, as the original extender of credit ends up in the same financial position in either situation.

D. THESE CONDITIONS WOULD BE UNDULY BURDENSOME AND COSTLY FOR COMPANIES

The administrative burden here should actually be relatively small. As mentioned above, lenders and servicers are already able to offer forbearance on certain loans. In addition, credit bureaus are able to offer credit freezes to consumers.

Requiring companies to be more responsive to consumers would not be unduly burdensome and costly for those companies. As discussed above, companies are already expected to be responsive to consumer complaints through processes established by the CFPB. The CFPB's mortgage servicing rules also require basic staffing and contact requirements that the industry has absorbed.[131]

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[130] See S. Hrg. 113-75, at 36 (statement by the Comptroller of the Currency that, over the course of a few years, the 19 largest banks sold off $37 billion in debt, or about 1.5 percent of the size of their total combined consumer lending portfolios).

[131] See, e.g., 12 C.F.R. § 1024.40.

In another example, when the CFPB, 47 states, and the District of Columbia took action against JPMorgan Chase for selling bad credit card debt and robo-signing court documents, the bank was required to undertake a number of steps. These included prohibiting debt buyers from reselling the accounts that JPMorgan sold them, confirming the validation of debts before selling them to debt buyers, and notifying consumers that their debt had been sold and making their account information available to them.[132] This demonstrates that more communication with, and deference to, consumers is possible. One of the greatest barriers to these reforms is likely the fact that many of these industries would simply prefer not to provide them.

It's important to remember that most of these actors are multi-million or multi-billion dollar corporations that can afford to establish basic protections for consumers like answering their requests and abiding by their wishes.

E. THESE PROTECTIONS WOULD ENCOURAGE BAD BEHAVIOR BY CONSUMERS

There is often an argument that providing generous consumer benefits and flexibility will encourage "moral hazard"—namely, that borrowers will have an incentive to borrow money and then default on their obligations. First, as discussed above, the rights comprising this safety net would generally be triggered by life events outside of a borrower's control but which have a substantial impact on their finances. Therefore, as Professors Atif Mian and Amir Sufi have argued, for events that occur outside of a person's control, "the argument doesn't hold water."[133] For example, a student cannot control what a labor market will look like when they graduate from high school or college.[134] Nor can a mortgage borrower control if a global pandemic will require them to shutter the small business that is their primary source of income. Structuring rights and protections this way would provide consumer protections while avoiding a

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[132] See Press Release, CFPB, 47 States and D.C. Take Action Against JPMorgan Chase for Selling Bad Credit Card Debt and Robo-Signing Court Documents, Consumer Fin. Protection Bureau, July 8, 2015, http://www.consumerfinance.gov/newsroom/cfpb-47-states-and-d-c-take-action-against-jpmorgan-chase-for-selling-bad-credit-card-debt-and-robo-signing-court-documents/. The Office of the Comptroller of the Currency (OCC) also fined JPMorgan Chase $30 million for unsafe or unsound practices related to the bank's debt collection litigation practices and to Servicemembers Civil Relief Act compliance. See Press Release, OCC Fines JPMorgan Chase $30 Million for Deficiencies in Debt Collection Practices and Servicemembers Civil Relief Act Compliance Ofc. of the Comptroller of the Currency, July 8, 2015, http://www.occ.gov/news-issuances/news-releases/2015/nr-occ-2015-98.html.

[133] ATIF MIAN & AMIR SUFI, *HOUSE OF DEBT*, AT 183 (1st ed. 2014) (discussing the idea of "shared responsibility mortgages").

[134] See id.

potential moral hazard problem.[135] In addition, remember that the number of months of forbearance would be capped over a certain period of time, to avoid overuse.

In terms of the right to repurchase, this payment option would not encourage default—thereby creating moral hazard for borrowers—because repurchasing would not undo the act of defaulting. The consumer's default would still be reported to credit reporting agencies and reflected in their credit score. Consumers would merely have the opportunity to retire the debt at the same rate available to the market, thereby eliminating the need for them to settle it later, without the additional junk fees and interest typically added by debt collectors. This option may not be available to all consumers, but it would save some years of stress and anguish that come with running through the debt collection process.

[135] See id.

Conclusion

In the wake of the widespread economic distress caused by the financial crisis and the Great Recession that followed, Jacob Hacker called for "a twenty-first century social contract that protects families against the most severe risks they face, including the financial problems that push families into overwhelming debt and bankruptcy."[136] To do so requires recognizing that there is a "deep mismatch between today's economic and social realities and America's strained framework for providing economic security."[137]

Hacker suggests that Americans need an "improved safety net" that provides them with the "basic security they need to reach for the future as workers, as parents, and as citizens."[138] His proposed 21st century social contract would cover a broad range of life events that create financial shocks, including "taking care of personal sickness, raising children, caring for aging parents, retraining for a job[.]"[139]

Consumer financial protections have an important role to play in constructing this improved safety net, which would require three things: First, a basic understanding that consumers have very little responsibility for the financial challenges that befall them. Second, greater consumer protections from, and reforms to, the business models of servicing, credit reporting, and collection companies. Finally, a CFPB that is willing to use its existing legal authorities aggressively.

Many administrative agencies may be loath to test the legal limits of their authority based upon cautionary tales of the political backlash that can follow.[140] The experience with the outlandish criticisms of CFPB's abusive authority and the opposition to the agency's existence in general demonstrate that there will be critics of robust authorities whether or not they are used.

Neglecting available legal tools would be a form of unilateral disarmament regarding a significant component of the CFPB's consumer protection mission. It is also inconsistent with Senator Warren's view that it is better to have no agency at all than a weak consumer

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136 Jacob S. Hacker, *The Middle Class at Risk*, in Broke: How Debt Bankrupts the Middle Class 219 (K. Porter 1st ed. 2012).

137 Id.

138 Id.

139 Id., at 233.

140 See J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, https://www.ftc.gov/publicstatements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection (speech given at the Marketing and Public Policy Conference, May 30, 2003, documenting Congress's response to the FTC's use of its unfairness authority).

agency.[141] That is not to say that it will be an easy task. The CFPB is subject to a number of procedural requirements like a cost-benefit analysis.[142] Rather than being an obstacle, it is an opportunity for the CFPB to demonstrate the savings to millions of consumers from any proposal. The CFPB will certainly face hostility from a judiciary that has been significantly remade under the Trump Administration.[143] Still, it is an opportunity to make consumer financial issues a front line in the fight for a more just economy.

> **Neglecting available legal tools would be a form of unilateral disarmament regarding a significant component of the CFPB's consumer protection mission.**

To be clear, the consumer safety net provisions outlined here are by no means a panacea. They would constitute a set of basic protections as we build toward more transformative reforms.[144] Nonetheless, they would provide real, tangible relief to struggling consumers. Because the racial wealth gap makes Black communities more vulnerable to predatory servicing, collections, and credit reporting, this proposal is a small step toward greater financial equity. Protections against aggressive lending and collection tactics would also make existing benefits programs, as well as emergency stimulus programs, more effective by protecting the wages and benefits of low-income people and communities from wealth stripping.[145] Policymakers should not let the current crisis go to waste, nor should they wait for yet another crisis to befall millions of Americans before taking action.

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[141] See Shahien Nasiripour, *Fight For The CFPA is 'A Dispute Between Families and Banks,' Says Elizabeth Warren*, Huffington Post, May 3, 2010, https://www.huffpost.com/entry/fight-for-the-cfpa-is-a-d_n_483707 (quoting then-professor Warren that her "first choice is a strong consumer agency," her "second choice is no agency at all and plenty of blood and teeth left on the floor[,]" and her "99th choice is some mouthful of mush that doesn't get the job done[.]")

[142] See 12 U.S.C. § 5512(b)(2)(A)(i) (the CFPB must consider the costs and benefits of any rule for consumers and financial companies).

[143] See Jordain Carney, *McConnell, Senate Confirm Trump's 200th Judicial Nominee*, The Hill, June 24, 2020, https://thehill.com/homenews/senate/504314-mcconnell-senate-confirm-trumps-200th-judicial-nominee (noting that there are now no judicial vacancies at any US circuit court of appeals).

[144] The consumer safety net must be viewed as a floor, not a ceiling, as the CFPB was meant to enact minimum standards and then empower states to go further. See S. Rep 111-176, at 174 ("Federal consumer financial laws have historically established only minimum standards and have not precluded the States from enacting more protective standards"); see also S. Hrg. 111-274, at 17 (statement of Assistant Secretary Barr that "if a State wanted to have higher standards than exist under Federal law, they would be able to apply those standards.")

[145] See Atkinson, supra, at 1153 ("credit dependency is especially treacherous for the working poor, as it opens a channel for regressive interpersonal redistribution"); see id., at 1154 (describing some forms of consumer credit as a "channel for wealth to leave economically vulnerable communities and travel upward toward the more affluent[,]" as well as an "interpersonal, regressive redistribution [that] has grave consequences for low-income borrowers and, more broadly, for other communities whose economic prospects are consistently dim.")

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