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Is the CFPB Still on the Beat? The CFPB'S (Non)Response to the COVID-19 Pandemic

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I. Introduction

The United States is in the middle of a historic and unfolding economic crisis driven by the COVID-19 pandemic. Long term, our response needs to create a path out of the crisis for consumers and businesses.[1] But such a solution takes time. In the meantime, the scope and scale of the crisis is devastating people: there is historic unemployment, loss of income, and expected future losses of income.[2]

And from that chaos arises the threat of widespread consumer harm. Millions of people are seeking forbearances or deferments on their debts.[3] Consumer complaints to the Consumer Financial Protection Bureau ("CFPB") have reached historic levels.[4] Hundreds of thousands have complained to the CFPB and the Federal Trade Commission specifically about problems related directly to the pandemic.[5]

During this crisis, the CFPB should ensure stability for both consumers and the marketplace by carefully—and publicly—patrolling abuses. Doing

1. *See generally, e.g.*, Pamela Foohey, Dalié Jiménez & Christopher K. Odinet, *CARES Act Gimmicks: How not to Give People Money During a Pandemic and What to Do Instead*, 2020 U. Ill. L. Rev. Online 81 (Apr. 22, 2020); Letter from Letitia James, Attorney General, State of New York, et al., to Steven Mnuchin, Secretary, U.S. Dep't of Treasury, *Treasury Action to Prevent Garnishment of CARES Act Emergency Monetary Relief* (Apr. 13, 2020), https://perma.cc/6JV6-NZFM (copy on file with author) (request from 25 Attorneys General and the Hawaii Office of Consumer Protection that Secretary Mnuchin issue regulations or guidance prohibiting garnishment of CARES Act payments); Jeff Sovern & Norman I. Silber, *Unsanitized: Placing Consumers at the Forefront of Relief Efforts*, Amer. Prospect (Apr. 5, 2020), https://perma.cc/PEK7-RX28; Pamela Foohey, Dalié Jiménez & Christopher K. Odinet, *The Folly of Credit as Pandemic Relief*, 68 UCLA L. Rev. Discourse 126 (June 23, 2020); Jeff Sovern, *A Better Way to Protect the Credit Records of Those Who Have Pandemic-Caused Defaults*, Consumer Law & Policy Blog (Apr. 19, 2020), https://perma.cc/RZR2-QTRQ; Pamela Foohey, Dalié Jiménez & Christopher K. Odinet, *The Debt Collection Pandemic*, 11 Calif. L. Rev. Online 222 (May 2020); U.S. Public Interest Research Group, Analysis: CFPB Complaints Surge During Pandemic, Led By Credit Report Complaints 3 (Aug. 13, 2020) [hereinafter CFPB Complaints Surge] (recommending banning negative credit reporting and debt collection during the pandemic).

2. *See* discussion *infra* Section II.

3. Megan Leonhardt, *26% of Americans have taken advantage of some type of payment deferral plan*, CNBC.com: make it (Sep. 15, 2020); CFPB, Supervisory Highlights COVID-19 Prioritized Assessments Special Edition: Issue 23, Winter 2021 5 & n.4 (Jan. 2021) (stating that as of December 2020 an estimated 2.7 million mortgage borrowers were in a forbearance plan) [hereinafter COVID Supervisory Highlights].

4. *See, e.g.*, CFPB, Complaint Bulletin: Complaints mentioning coronavirus keywords 5 (May 2020) [hereinafter CFPB Complaint Bulletin] (stating that complaint volume in March and April 2020 were the "highest monthly complaint volumes in the Bureau's history"); CFPB Complaints Surge, *supra* note 1, at 1 (noting five consecutive months of record high complaints as of July 2020).

5. FTC, FTC COVID-19 and Stimulus Reports (last visited on Jan. 22, 2021) (reporting more than 325,000 complaints between Jan. 1, 2020, and Jan. 21, 2021 related to COVID). CFPB, Consumer Complaint Database, (reporting more than 12,000 complaints between Jan. 1, 2020, and Jan. 21, 2021, containing one of the following terms: pandemic, epidemic, covid, corona!, or "CARES Act") (enter the terms in "Search Within All data" field and from the "Map" tab, set the date from 1/1/2020 through 1/21/2021).

so means taking active steps to ensure that consumers are protected, assessing unfair and abusive conduct in the context of the pandemic, and examining the financial impact from the pandemic on both consumers and the companies that provide them with goods and services. The CFPB must pivot from its typical enforcement strategy, where investigations take years before becoming public, and take public enforcement action *now* to signal the marketplace that the cop is still on the beat.

Unfortunately, the CFPB has failed to do this, acting for the most part as if there were no crisis and taking its eye off misconduct exactly when consumers need its protection the most. More than ten months into a historic pandemic, many regulators have taken actions directed at abuses arising from the crisis,[6] but the CFPB—the federal agency created specifically to protect consumers in direct response to the last economic crisis—had not filed a *single* enforcement action[7] under Director Kraninger regarding unlawful conduct related to the pandemic. Worse, the cases it did file generally have been smaller: less consumer harm, lower amounts of consumer redress, and lower penalties.[8] Moreover, the non-enforcement action the CFPB has taken in response to the pandemic primarily told companies that it would not prosecute them for violating laws designed to protect consumers.[9]

When faced with a historic pandemic, the CFPB should have altered—and importantly *still can* alter—its enforcement strategy in several key ways.[10] The CFPB has said that it is taking steps to enforce the law during the pandemic,[11] but the CFPB has not actually done anything publicly to demonstrate those steps. The CFPB was created specifically to address the failures in protecting consumers that led to the 2008 financial crisis,[12] and as Secretary Geithner noted at the time, the CFPB was created with "only

6. *See* discussion *infra* Section III.A.

7. *Id.*

8. *See* discussion *infra* Section III.B.

9. *See* discussion *infra* Section III.A.

10. As this Article was in the publishing process, Joseph R. Biden won the presidential election, and he became President on January 20, 2021. Kathy Kraninger resigned as Director of the CFPB on that same day. Letter from Kathleen Kraninger, Director, CFPB, to Joseph R. Biden, President of the United States (Jan. 20, 2021) (on file with author). President Biden appointed David Uejio to be Acting Director on the same day. Press Release, The White House, *President Joe Biden Announces Acting Federal Agency Leadership* (Jan. 20, 2021) (on file with author). Acting Director Uejio has announced that he plans to change the CFPB's enforcement strategy in ways that would align with the recommendations of this Article and would address the COVID-19 crisis directly." David Uejio, *The Bureau is taking much-needed action to protect consumers, particularly the most economically vulnerable*, CFPB: Blog (Jan. 28, 2021). This action is a necessary, and welcome, change.

11. *See, e.g.*, Eleanor Laise, *Financial Watchdog Under Fire Amid Pandemic*, Barron's (Nov. 2, 2020) ("The CFPB said in a statement to *Barron's* that it has launched numerous new investigations in 2020, 'some of which directly concern Covid-19.' ").

12. S. Rep. No. 111-176, 111th Cong., 2d Sess. 9 (2010) [hereinafter Senate Report].

one mission – to protect consumers."[13] The CFPB's lack of public enforcement action sends a strong signal to consumers and the market – but unfortunately it is exactly the wrong signal, a signal that once again no one is protecting consumers.

Rather than handling violations confidentially, outside the public eye, or taking years to investigate claims before taking public action, the CFPB needs to identify violations and take public action quickly, even if those complaints allege relatively few violations. Doing so provides valuable signals—both to consumers and to law-abiding companies—about what conduct is unlawful during the pandemic, and will put wrongdoers on notice that the CFPB is still on the beat during the crisis. By demonstrating that it will prosecute offenders, the CFPB also shows law-abiding companies that they will not be at a competitive disadvantage from competitors who skirt the law. In response to these filings, other companies and consumers also can takes steps now to prevent or mitigate future harm from similar conduct. This deterrent effect could be especially important for consumers who are already pushed to the edge by the pandemic.

The CFPB also should work with states to bring cases alleging violations of federal law that reinforce state pandemic protections. Further, the CFPB must tell companies the pandemic will not excuse unlawful behavior and indeed that companies must consider the specific impacts of the pandemic to ensure their practices are fair and do not cause a disparate impact. These actions send the signal that consumer harm will not be tolerated, even during a pandemic.

II. The Economic Impact of the Pandemic to Date

The pandemic caused the U.S. economy to fall off a proverbial cliff, leading to widespread economic distress and uncertainty. In the first six weeks of the crisis more than 30 million Americans filed for unemployment,[14] "representing roughly 18.6% of the US labor force."[15] Further, estimates indicate that millions more, perhaps as many as 8.9 to 13.9 million in the first five weeks, needed benefits but could not apply, either because they could not get through to the unemployment office or because the pro-

13. Press Release, U.S. Dep't of the Treasury, *Administration's Regulatory Reform Agenda Moves Forward: Legislation for Strengthening Consumer Protection Delivered to Capitol Hill* (June 30, 2009) [hereinafter Treasury Presser on CFPB], *available at* https://perma.cc/Z4UY-ZRZT.

14. Andrew Soergel, *Record 30 Million Americans File for Unemployment in Six Weeks Amid Coronavirus Outbreak*, U.S. News & World Report (Apr. 30, 2020), https://perma.cc/5FYZ-BU94.

15. Anneken Tappe, *30 Million Americans Have Filed Initial Unemployment Claims Since Mid-March*, CNN Business (Apr. 30, 2020), https://perma.cc/4ANX-3EZY.

cess was too difficult.[16] In the first quarter, the economy had contracted by an annual rate of almost 5%, the largest drop since the fourth quarter of 2008, and consumer spending dropped the most since 1980.[17] In the second quarter, the gross domestic product fell an astounding 31% on an annual basis.[18] A nationwide poll conducted in July and early August found that 46% of Americans said someone in their household had either lost a job or lost hours because of the pandemic. Seventeen percent of those households also reported that they had to miss or delay paying a major bill to ensure they had enough food.[19]

While deaths from the coronavirus hopefully will not reach the heights of past pandemics, the economic devastation—especially for ordinary Americans—will be widespread and long-lasting. The United States Census Bureau collaborated with five federal agencies to develop a survey (the Household Pulse Survey) to measure the "social and economic effects of COVID-19 on American households."[20] The Census Bureau surveyed an average of more than 90,000 individuals each week for the first 12 weeks of the survey.[21] For the week ending July 21, the last week of phase 1 of the survey, more than *fifty percent* of individuals surveyed lived in households where someone in the household had a loss of employment income since the President's declaration of an emergency on March 13, 2020.[22] To put this figure in context, the Census Bureau estimated that more than 126.6 *million* adults lived in households where a household member had lost employment income since March 13.[23] Moreover, in the last week of phase 1

16. Ben Zipperer & Elise Gould, *Unemployment Filing Failures*, ECONOMIC POLICY INSTITUTE: WORKING ECONOMICS BLOG (Apr. 28, 2020), https://perma.cc/NGA6-SDGM; *see also* Tami Luhby, *Countless Americans Cannot Complete Unemployment Applications*, CNN (Apr. 4, 2020) https://perma.cc/R4LV-BWFK (reporting that one person spent over 8 hours and another called more than 5,000 times trying to reach their unemployment office); Nelson D. Schwartz, Tiffany Hsu & Patricia Cohen, *Stymied in Seeking Benefits, Millions of Unemployed Go Uncounted*, N.Y. TIMES (Apr. 30, 2020, updated June 11, 2020)), https://perma.cc/DR4T-QER5 (noting problems with applying for benefits and that in two weeks at the start of the pandemic six million people a week applied for unemployment benefits, compared with slightly more than 200,000 a week before the pandemic).

17. Scott Horsley & Avie Schneider, *'Tip of the Iceberg': Economy Shrinks At 4.8% Pace, But Worst Is Yet to Come*, NPR (Apr. 29, 2020), https://perma.cc/YJ67-KQTW.

18. Jerome Powell, Chair, Bd. of Governors of the Fed. Reserve Sys., Recent Economic Developments and the Challenges Ahead (Oct. 6, 2020) (transcript at https://perma.cc/LR4P-DYBT) [hereinafter Powell Speech].

19. *Id.*

20. JF Fields, et al., 2020 HOUSEHOLD PULSE SURVEY: INTERAGENCY FEDERAL STATISTICAL RAPID RESPONSE SURVEY TO MEASURE EFFECTS OF THE CORONAVIRUS (COVID-19) PANDEMIC ON THE UNITED STATES HOUSEHOLD POPULATION 5 (forthcoming) (preliminary draft), *available at* https://perma.cc/XH5P-Q4A6.

21. U.S. CENSUS BUREAU, SOURCE OF THE DATA AND ACCURACY OF THE ESTIMATES FOR THE 2020 HOUSEHOLD PULSE SURVEY 5 tbl. 4, https://perma.cc/2AJT-RGJS [hereinafter HOUSEHOLD PULSE PHASE 1 DATA].

22. *Id.*

23. *Id.*

of the survey, 35% of individuals surveyed (an estimated 87.3 million people in total) expected there to be a loss of income in the next four weeks by someone in their household.[24]

TABLE 1 – ECONOMIC LOSSES DURING THE PANDEMIC[25]

Week of Survey[26]			Experienced loss of employment income since March 13, 2020 (for self or household member)		Expected loss of employment income in next 4-weeks (for self or household member)	
	Begin	End	Total (in millions)	Percentage of Respondents	Total (in millions)	Percentage of Respondents
1	Apr. 23	May 5	116.4	47.0%	96.0	38.8%
2	May 7	May 12	117.9	47.5%	91.9	37.0%
3	May 14	May 19	120.2	48.5%	90.0	36.3%
4	May 21	May 26	119.2	48.1%	86.4	34.9%
5	May 28	June 2	119.7	48.3%	84.1	34.0%
6	June 4	June 9	118.5	47.8%	78.6	31.7%
7	June 11	June 16	118.7	47.8%	76.8	31.0%
8	June 18	June 23	119.8	48.3%	79.4	32.0%
9	June 25	June 30	121.7	49.1%	86.5	34.9%
10	July 2	July 7	123.6	49.9%	86.5	34.9%
11	July 9	July 14	124.3	50.1%	86.9	35.1%
12	July 16	July 21	126.6	51.1%	87.3	35.2%
13[27]	Aug. 19	Aug. 31	112.8	45.5%	64.9	26.2%
14	Sept. 2	Sept. 14	114.8	46.4%	62.3	25.2%
15	Sept. 16	Sept. 28	113.1	45.7%	59.3	24.0%
16	Sept. 30	Oct. 12	112.5	45.4%	58.3	23.6%
17	Oct. 14	Oct. 26	112.2	45.3%	59.7	24.1%

24. *Id.*
25. *Id.*
26. These are the dates the Census Bureau began and ended interviews for the "week" in question.
27. Begining in week 13, the Census Bureau began phase 2 of the survey. During phase 2, the Census Bureau reported information every two weeks, although it still referred to these periods as "weeks" to match phase 1. *See* HOUSEHOLD PULSE PHASE 1 DATA *supra* note 21. It is not clear why the estimated number of people reporting a loss of income since the pandemic began dropped so sisgnificantly between phases 1 and 2. Given that the question asks whether there has been a loss since the pandemic began, the number theoretically should not drop significantly over time. Some fluctuation likely is due to the estimation process, but it also is possible that the Census Bureau changed its estimation method between the two phases, that respondents' memories have faded, or that some other factor (or combination of factors) caused the large drop. However, given that the phase 2 estimates are relatively stable, it seems likely that the estimation process was changed in some way. During phase 2, the Census Bureau stopped displaying the loss of income data in its interactive tool, but the response data for that question still is in the detailed data table. Those tables do not calculate the percentage for that question. Therefore, for weeks 13–17, the percentage of individuals reporting a loss of employment

In addition, for the week ending October 26, an estimated 79.7 million people (33% of respondents who answered the relevant question[s]) reported "difficulty paying for usual household expenses"; 23.9 million (11%) reported food scarcity; 4.7 million (28%) reported a "likelihood of eviction or foreclosure"; and 9.8 million (7%) reported "housing insecurity."[28]

The Board of Governors of the Federal Reserve System ("the Fed") conducted a survey that reached similar results. The Fed surveyed approximately 12,000 people in 2019.[29] The Fed followed up by surveying slightly more than 4,000 of these respondents again in mid-July 2020.[30] Twenty percent of the people working in 2019 had lost their jobs since March 2020, and another 10% had been paid for fewer hours, although they had not lost their jobs.[31]

Moreover, people of color and women have been impacted economically at disproportionate rates by the pandemic.[32] In addition, fewer people of color have been able to work entirely remotely,[33] subjecting them to increased risk of COVID-19 exposure. Both the losses in income and the expected future losses in the Household Pulse Survey also have been disproportionately reported by people of color.[34] The Census Bureau tracked

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income was calculated by dividing the number of respondents who said "yes" to that question by the number of respondents who answered the question (which is the number of respondents minus those who did not answer this question). Using this method generates the same percentages for the expected-loss-in-the-next-four-weeks question as the data provided by the Census Bureau for that question in its interactive tool. *Id.* (stating that "[p]ercentages are based on reporting distributions and do not include the populations that did not report to specific items").

28. *Id.* (selecting for week 17 "Difficulty Paying for Usual Household Expenses," "Food Scarcity," "Likelihood of Eviction or Foreclosure," and "Housing Insecurity" respectively).

29. Board of Governors of the Federal Reserve System, Report on the Economic Well-Being of U.S. Households in 2019 1 n.1 (May 2020), https://perma.cc/R2UL-5HW4.

30. Board of Governors of the Federal Reserve System, Update on the Economic Well-Being of U.S. Households: July 2020 Results 1 & n.12 (Sept. 2020), https://perma.cc/73R3-VNQ7. [hereinafter SHED July 2020].

31. *Id.*

32. *Id.* at 6, fig.6 (noting that working mothers "were more likely than working fathers to report that they expected to work less or stop working altogether"); *Transcript: NPR's Full Interview with Fed Chairman Jerome Powell*, NPR 10 (Sept. 4, 2020) https://perma.cc/WM5K-FZRP (quoting the Chair of the Board of Governors of the Federal Reserve System as stating that people of color and women have been disproportionately affected by the economic fallout from the pandemic) [hereinafter Powell NPR Interview]; Jerome Powell, Chair, Board of Governors of the Federal Reserve System, Recent Economic Developments and the Challenges Ahead 5 (Oct. 6, 2020) (transcript at https://perma.cc/LR4P-DYBT) ("Combined with the disproportionate effects of COVID on communities of color, and the overwhelming burden of childcare during quarantine and distance learning, which has fallen mostly on women, the pandemic is further widening divides in wealth and economic mobility.").

33. SHED July 2020, at 5, fig.5.

34. U.S. Census Bureau, Household Pulse Survey Employment Table 1: Experienced and Expected Loss of Employment Income, by Select Characteristics: United States Week 12, https://perma.cc/H5AG-PPZB [hereinafter Week 12 Employment Data]. The reporting rates by men and women are very similar.

five racial or ethnic groups. As demonstrated in the table below, in the last week of phase 1 of the survey, each group aside from "White alone, not Hispanic" reported a loss of income or an expected loss of income in the next four weeks at a rate higher than the national rate.

TABLE 2 – PERCENTAGES OF GROUPS REPORTING ECONOMIC LOSSES DURING THE PANDEMIC BY RACE IN LATE JULY (WEEK 12)[35]

Hispanic origin and Race	Experienced loss of employment income since March 13, 2020 (for self or household member)	Expected loss of employment income in next 4-weeks (for self or household member)
National totals	51.1%	35.2%
Hispanic or Latino (may be of any race)	64.6%	53.0%
White alone, not Hispanic	45.5%	28.3%
Black alone, not Hispanic	57.3%	42.5%
Asian alone, not Hispanic	57.3%	41.7%
Two or more races + Other races, not Hispanic	54.6%	39.3%

People with lower incomes have also been disproportionately impacted.[36] As Chair Powell stated, "The burdens of the pandemic have fallen

35. The titles and racial groupings are taken directly from the Census Bureau data. *Id*. The percentages are derived from the Census Bureau's calculations of the estimated number of people in each group and their responses to each question. The specific percentage for each group is calculated by dividing the Census Bureau's number of estimated people who responded "Yes" to the question by the number of people in each group who answered the question (which is the total number in the group minus the number of people who did not respond). Using this method results in national percentages that match those reported by the Census Bureau. This pattern of disproportionate reporting of economic loss and expected loss existed in each of the weeks, although in four weeks people identifying as "Asian alone, not Hispanic" reported economic loss at rates below the national rate. *See, e.g.*, Week 12 Employment Data, *supra* note 34 (43.7% of people identifying as "Asian alone, not Hispanic" reported an economic loss, compared to 45.3% nationwide, while 24.5% reported an expected loss, compared to 24.1% nationwide). U.S. CENSUS BUREAU, SOURCE OF THE DATA AND ACCURACY OF THE ESTIMATES FOR THE 2020 HOUSEHOLD PULSE SURVEY 5 tbl. 4, https://perma.cc/2AJT-RGJS.

36. *See, e.g.*, Kim Tingley, *Watching What We Flush Could Help Keep a Pandemic Under Control*, N.Y. TIMES (Nov. 24, 2020) (discussing a study that found that wealthy zip codes around Boston had

to a greater extent on people at the low end of the income spectrum."[37] As the pandemic unfolded, lower-income workers were more likely to lose their jobs, and as the pandemic progressed, they were less likely to get those jobs back.[38] The Household Pulse Survey data also demonstrates that people with lower incomes are reporting loss of income and expected loss of income at higher rates than the national rate.

TABLE 3 – PERCENTAGES OF GROUPS REPORTING ECONOMIC LOSSES DURING THE PANDEMIC BY INCOME IN LATE JULY (WEEK 12)[39]

Education	Experienced loss of employment income since March 13, 2020 (for self or household member)	Expected loss of employment income in next 4-weeks (for self or household member)
National totals	51.1%	35.2%
Less than $25,000	60.1%	47.2%
$25,000–$34,999	58.2%	42.5%
$35,000–$49,999	57.3%	40.9%
$50,000–$74,999	51.6%	34.6%
$75,000–$99,999	47.2%	31.0%
$100,000–$149,999	45.9%	27.3%
$150,000–$199,999	36.5%	21.8%
$200,000 and above	33.0%	17.8%

More than ten months into the pandemic, the economic situation remains dire for millions of people. As noted *supra* in Table 1, as of the end of October more than 100 million people lived in households where a household member has lost income since the pandemic began and almost 70 million expected that someone in their household would have a loss of employment income in the next four weeks due to the pandemic.[40] According to the Bureau of Labor Statistics, 15.1 million people reported in October that they could not work, or worked fewer hours in the last four weeks, because of the pandemic's effect on their employer, and another 3.6 million

less virus in their sewage and that the amounts of virus did not correlate with the number of people in the zip code).

37. Powell NPR Interview, *supra* note 32, at 5, 10.

38. SHED July 2020, *supra* note 30, at 1, 4, fig. 3; *Id.* at 4 n.5 (noting that 1/3 of people in households making less than $40,000 per year were laid off after March, although they had been working in February 2020).

39. This table was calculated using the same methods and from the same Census Bureau data as Table 2. Approximately 14% of respondents apparently declined to provide income data and their responses are excluded from this table. *See* Week 12 Employment Data, *supra* note 34.

40. Table 1, *supra* Section II.

people were "prevented from looking for work due to the pandemic."[41] That figure counts only those people who are either actively looking for work or who have been temporarily laid off.[42] Further, in October, roughly 23 million received some form of unemployment benefits, and eight million people have fallen into poverty between May and October.[43] There has also been an "increase in permanent job loss, as well as recent layoffs,"[44] and an increase in the number of people defined as long-term unemployed.[45]

Initial reporting suggests that economic impacts described above would have been even worse but for the CARES Act and other stimulus efforts,[46] but also finds that aid did not reach everyone in need and did not always cover the lost income.[47] Moreover, the aid provided early in the

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41. Press Release, Bureau of Labor Statistics, *The Employment Situation – October 2020* 3 (Nov. 6, 2020) (on file with author).

42. *Id.*; *see also* Drew Desilver, *Not All Unemployed People Get Unemployed Benefits; In Some States, Very Few Do*, PEW RESEARCH CENTER (Apr. 24, 2020), https://perma.cc/FHD5-HLVK (noting that not everyone who is unemployed qualifies for unemployment insurance).

43. Rachel Siegel & Andrew Van Dam, *U.S. Economy Recoups Two-Thirds of Ground Lost in First Half of Year, But There is Still Far to Go*, WASH. POST (Oct. 29, 2020), https://perma.cc/6RAU-89YK (noting a "historic and devastating second quarter").

44. Jerome Powell, Chair, Board of Governors of the Federal Reserve System, Recent Economic Developments and the Challenges Ahead 6 (Oct. 6, 2020) (transcript at https://perma.cc/LR4P-DYBT).

45. Gillian Friedman, *New Unemployment Claims Show Little Sign of Economic Rebound*, N.Y. TIMES (Nov. 5, 2020), https://perma.cc/8U57-KTEB.

46. CFPB, THE EARLY EFFECTS OF THE COVID-19 PANDEMIC ON CONSUMER CREDIT 3, 12–13 (Aug. 2020) (noting that absent relief programs the "trends observed . . . may have differed substantially" and observing that, based on data through June 2020, credit delinquencies had not increased during the early months of the pandemic, that the percentage of accounts that showed a payment owed of zero despite an outstanding balance (indicating some form of assistance from the lender) increased sharply at the beginning of the pandemic, and that 33 million people received some unemployment benefits at the end of June) [hereinafter CFPB CONSUMER CREDIT REPORT]; Powell Speech at 3 (stating that "the substantial fiscal aid has given vital support to households"); Powell NPR Interview, *supra* note 32, at 10 (crediting Congress' relief efforts as "part of the reason why you see the amount of recovery we have seen with half of the people who lost their jobs now having gone back to work").

47. SHED July 2020, *supra* note 30, at 12–13, figs.12–13 (noting that the decline in reported well-being between October 2019 and July 2020 depended on whether the respondents had received unemployment benefits and that for respondents who lost income, were not working, and did not receive benefits the percentage reporting that they were not "okay or living comfortably" increased from 48% to 57% and the percentage expecting that they could NOT pay all of their bills increased from 46% to 56%); *Id.* at 8, fig.9, n.9 (noting that 51% of respondents who were working in July but had lost a job or had their hours cut reported making less in June than in February, that 71% of respondents were not working and had not received unemployment assistance reported making less, and that 47% of respondents who were not working and were receiving assistance reported making less); DONALD J. TRUMP, *Memorandum on Authorizing the Other Needs Assistance Program for Major Disaster Declarations Related to Coronavirus Disease* 2019 § 4(b)(i), (c), (d) (Aug. 8, 2020), https://perma.cc/FH83-YHV5 [hereinafter *Trump Unemployment Memo*] (providing a $300 unemployment benefit to people who lost income due to the pandemic and who receive at least $100 per week of specified benefits and whose governors request the aid and agree to cost sharing); Abigail Hess, *Here's How Trump's Weekend Executive Actions Will Impact Student Loans*, CNBC (Aug. 10, 2020, updated Aug. 11, 2020), https://perma.cc/BBM2-WZ2U (noting that the extension of deferments on federal student loans did not apply to 9 million borrowers whose federal loans were not held by the Department of Education); Coronavirus Aid,

pandemic is decreasing. The initial CARES Act unemployment assistance expired in late July and the subsequent assistance is lower and has been delayed.[48] The number of people whose lenders ended deferments or other loan assistance began "ticking upward between April and June for most types of credit"[49] and many of the relief efforts have ended or are set to expire toward the end of 2020.[50]

As Chair Powell has stated, "the key thing for the economic recovery and also just in general is to get the spread of the disease well and truly under control."[51] Unfortunately, just as the initial aid is tapering off, there has been a huge spike in cases in late October and early November.[52] Ab-

Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281, § 3513(a) (Mar. 27, 2020) [hereinafter CARES Act] (suspending payments only for federal loans).

48. Jessica Menton, *'We Shouldn't Have to Beg': Americans Struggle Without Unemployment Aid As Congress Stalls on Extending Benefits*, USA TODAY: MONEY (Aug. 25, 2020), https://perma.cc/8GBQ-AF6Q (describing people having trouble accessing the $300 a week unemployment benefit enacted on August 8 after the prior $600 a week benefit expired in July); CARES Act § 2104(e) (providing that the extra $600 in unemployment compensation allowed by § 2104(b)(1)(B) will not be provided for weeks ending after July 31, 2020); Greg Iacurci, *That Extra $600 Unemployment Benefit May End Sooner Than Many Think*, CNBC (July 21, 2020), https://perma.cc/C39P-R6VF (noting that the extra $600 benefit will end on July 25 or 26 in every state); Siegel & Van Dam, *supra* note 43 (reporting that $600 benefit expired in late July for almost 30 million people and that many people faced "gaps" between the lapse of the $600 benefit and the payment of the later enacted $300 benefit).

49. CFPB CONSUMER CREDIT REPORT, at 14 (noting that student loans were the exception).

50. Chris Arnold & Scott Horsley, *Millions Face Bitter Winter If Congress Fails to Extend Relief Programs*, NPR (Dec. 2, 2020) ("[s]ome 12 million Americans will lose unemployment benefits the day after Christmas," that foreclosure and eviction relief are expiring, and that many people already are struggling with lower assistance during the pandemic), https://perma.cc/65Z2-P4JJ; CARES Act § 2102(c)(1)(A)(ii), (c)(2) (providing extended unemployment benefits for unemployment, or reduced employment, due to the pandemic for a maximum of 39 weeks ending no later than December 31, 2020); DONALD J. TRUMP, *Memorandum on Continued Student Loan Payment Relief During the COVID-19 Pandemic* § 2(a) (Aug. 8, 2020), https://perma.cc/563E-GLFT (extending the deferments and waivers on interest for student loans held by the Department of Education until Dec. 31, 2020); *Id.* (providing that the extension of the $300 benefit applies only until the $25 billion cap is reached or for "weeks of unemployment ending not later than December 6, 2020, whichever occurs first"); Jeff Stein & Eli Rosenberg, *Trump's $300 Unemployment Funding Is Already Running Out, Leaving Millions In Crisis Again*, WASH. POST (Sept. 11, 2020), https://perma.cc/TH8J-MTU4 (noting that several states had been told that the week ending Sept. 5 was the last in which people could receive the extended benefit and that some states may receive the benefits for fewer than the six weeks the coverage was estimated initially to last); Greg Iacurci, *Millions Poised to Lose Unemployment Benefits in 'Enormous Cliff' at Year's End*, CNBC (Oct. 27, 2020, updated Oct. 28, 2020), https://perma.cc/6LA8-D8V6 ("Millions of jobless Americans are poised to lose their unemployment benefits at the end of the year without action from Congress to extend temporary aid programs").

51. Powell NPR Interview, *supra* note 32, at 6 & 7 (stating that "[s]o certainly to get us back to full employment, we're going to need to get the spread of the disease under control").

52. Kim Bellware et al., *U.S. Surpasses 10 Million Coronavirus Cases; Experts Warn Country is Entering Worst Phase*, WASH. POST (Nov. 9, 2020), https://perma.cc/L9YF-WQH8 (reporting one million new cases in the prior ten days, five straight days with more than 100,000 new cases, and at least 237,000 deaths); N.Y. TIMES, COVID IN THE U.S.: LATEST MAP AND CASE COUNT (last visited Nov. 6, 2020) (reporting 121,504 new cases on Nov. 5 with an average of 96,275 cases per day over the prior week, a 54% increase over the average from two weeks earlier, and at least 235,300 deaths); Kate Taylor, *A Day After Smashing the Single-Day Record, the U.S. Leaps to a New One: 121,000 Cases*,

sent dramatic action,[53] the combination of this surge[54] and the decrease in support is likely to wreak additional economic devastation.

III. The CFPB's Enforcement Response to the Pandemic

Congress created the CFPB in direct response to the 2008 financial crisis and to correct "the failure of the federal banking and other regulators to address significant consumer protection issues detrimental to both consumers and the safety and soundness of the banking system"[55] that led, in part, to that crisis.[56] Before the creation of the CFPB, federal consumer protection authority was spread across seven agencies, and this fragmentation hindered its effectiveness.[57] Because many of the other regulators pri-

N.Y. Times (Nov. 6, 2020), https://perma.cc/NN7V-WPAB (reporting that there were more than 107,000 new cases on Nov. 4, a record high at the time, that 23 states had more new cases in the past seven days than in any prior seven-day period, and that five states set single-day records); Joel Achenbach, Brittany Shammas & Jacqueline Dupree, *First Coronavirus Infections Increased. Then Hospitalizations. Now, Deaths Are On the Rise.*, Wash. Post (Oct. 30, 2020), https://perma.cc/GEH4-R4HL (noting a new single-day record of more than 98,000 cases on Oct. 30); Will Feuer, *Average daily new coronavirus cases in U.S. hit all-time high, Gottlieb warns of 'exponential spread'*, CNBC (Oct. 26, 2020), https://perma.cc/W4BF-SS6P (stating that the number of new cases hit an "all-time high single-day spike" of 83,757 cases on October 23).

53. Given the contested nature of the election results as of the writing of this article and Congress' inability to pass additional aid prior to the election, it is not clear that there will be additional federal aid in the last quarter of 2020 or first quarter of 2021, and it seems likely that if there is additional aid it will be less than prior aid efforts.

54. Although recent announcements (as of the writing of this article) regarding the efficacy of vaccines are promising, vaccines are not projected to be widely available until mid-2021. Pien Huang, *Operation Warp Speed's Logistics Chief Weighs In On Vaccine Progress*, NPR (Nov. 9, 2020), https://perma.cc/Z69W-ZZPS (noting promising results by two manufacturers and that if a vaccine is available in December most people will not have had a dose until mid-2021); Sheryl Gay Stolberg et al., *The Surging Coronavirus Finds a Federal Leadership Vacuum*, N.Y. Times (Nov. 11, 2020), https://perma.cc/UAY5-ADT6 (noting that a vaccine is not a "panacea" and that doses likely will not become available until mid-2021); Katie Thomas, David Gelles & Carl Zimmer, *Pfizer's Early Data Shows Vaccine is More than 90% Effective*, N.Y. Times (Nov. 9, 2020, last updated Nov. 10, 2020), https://perma.cc/BMU3-3FMM. Tremendous amounts of economic and physical harm can occur before then. Huang*, supra* (noting that 200,000 more people could die from the pandemic before a vaccine becomes widely available).

55. S. Rep. No. 111-176, 111th Cong., 2d Sess. 9 (2010) [hereinafter Senate Report].

56. *Id*. (stating that "[s]pecifically, it was the failure by the prudential regulators to give sufficient consideration to consumer protection that helped bring the financial system down."); Patricia A. McCoy, Prepared Statement, *Hearing on "Consumer Protections in Financial Services: Past Problems, Future Solutions" before the U.S. Senate Committee on Banking, Housing, and Urban Affairs* 11 (Mar. 3, 2009), *available at* https://perma.cc/C3FM-QLXT (noting the failure of Federal banking regulators to exercise their consumer protection powers, including enforcement, "until it was too late").

57. Senate Report at 10; Press Release, U.S. Dep't of the Treasury, *Administration's Regulatory Reform Agenda Moves Forward: Legislation for Strengthening Consumer Protection Delivered To Capitol Hill* (June 30, 2009), *available at* https://perma.cc/Z4UY-ZRZT [hereinafter Treasury Presser on CFPB] (quoting Treasury Secretary Timothy Geithner as stating that by "consolidating accountability . . . [the CFPB] will reduce gaps in federal supervision and enforcement"); Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 Rev. Banking & Fin. L. 321, 327–33 (2013) (discussing fragmentation of regulation and its impact); Christopher L. Peterson, *Consumer Financial*

marily focused on the safety and soundness of banks, consumer protection was subordinated in those agencies.[58] The Dodd-Frank Act, therefore, consolidated the authorities from those seven regulators into the CFPB,[59] a "streamlined independent consumer entity"[60] with "'only one mission—to protect consumers—'"[61] where "enforcement will be the rule, not the exception."[62] As a single agency, the CFPB "[would] be able to be more responsive to changes in the market and more vigorous in addressing unfair and abusive practices."[63]

Unfortunately, the CFPB under Director Kraninger was not, in fact, "more responsive" to the widespread economic distress resulting from the pandemic. Indeed, for the most part, it acted publicly as if nothing unusual was happening. As just one example, the CFPB's spring 2020 regulatory agenda, issued June 30, 2020, included nothing responding to the fallout from the pandemic.[64] Despite the fact that the agenda issued more than three months after the President's declaration of an emergency[65] and more than five months after discovery of the first COVID-19 case in the United

Protection Bureau Law Enforcement: An Empirical Review, 90 TUL. L. REV. 1057, 1065–67 (2016) (discussing fragmentation of regulation and its impact); Prentiss Cox, *The Importance of Deceptive Practice Enforcement in Financial Institution Regulation*, 30 PACE L. REV. 279, 287–93 (2009) (discussing the fragmented regulation of the mortgage market before the 2008 crisis).

58. Senate Report at 10; Raj Date, *Lessons Learned from the Financial Crisis: The Need for the CFPB*, CONSUMER FINANCIAL PROTECTION BUREAU: ARCHIVE (Sept. 15, 2011), https://perma.cc/66ZA-JF2U (noting that before the 2008 crisis, "consumer protection was not anyone's top priority"). The Federal Trade Commission did, and does, prioritize protecting consumers, but it lacks the authority to regulate key actors in the consumer financial space like banks. FTC, CONSUMER FINANCE (last visited Nov. 11, 2020), https://perma.cc/F2PE-V4HW.

59. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1061(b), 124 Stat. 1376 (2010) [hereinafter Dodd-Frank Act] (transferring to the newly created CFPB authorities from the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Federal Trade Commission, the National Credit Union Administration, and the Department of Housing and Urban Development); Senate Report at 11; *see also generally* Dodd-Frank Act §§ 1001–1010 (2010) (providing in Title X for the creation of the "Bureau of Consumer Financial Protection," also known as the Consumer Financial Protection Bureau or the CFPB).

60. Senate Report at 11.

61. Treasury Presser on CFPB, *supra* note 13 (quoting Treasury Secretary Timothy Geithner).

62. *Id.*; see *also* Cox, *supra* note 57, at 280–81 (stating that "enforcement of consumer protection laws prohibiting unfair and deceptive acts and practices should be part of the core mission of the restructured financial regulatory system").

63. Treasury Presser on CFPB, *supra* note 13 (quoting President Barack Obama); *see also* Cox, *supra* note 57, at 280 (stating that "enforcement of consumer protection laws prohibiting unfair and deceptive acts and practices should be part of the core mission of the re-structured financial regulatory system").

64. Susan M. Bernard, *Spring 2020 Rulemaking Agenda*, CONSUMER FINANCIAL PROTECTION BUREAU: BLOG (June 30, 2020), https://perma.cc/HE2B-UX53.

65. Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15,337, 15,337 (Mar. 13, 2020) (declaring a national emergency on March 13, 2020) [hereinafter Declaration of COVID-19 Emergency].

States,[66] the CFPB stated the agenda did not include anything specific to the pandemic, because the planning process "begins months before publication in the *Federal Register*."[67]

As another example, the CFPB has yet to address publicly the voluminous evidence that the harm from the pandemic is falling disproportionately on people of color. Along with the disparate economic impacts discussed above,[68] people of color are being infected at disproportionately high rates and are dying at disproportionately high rates.[69] Despite this fact, the CFPB has taken no public action to indicate that it is analyzing how to prevent these disparate effects from further harming consumers of color or to ensure that companies take these effects into account when offering consumers goods and services.

When the economic harm is falling disproportionately on people of color, ostensibly neutral policies, acts, and practices can, and will, have disparate effects on these groups, and likely will exacerbate pre-existing inequalities.[70] Studies have shown that some racial and ethnic groups al-

66. Press Release, Ctrs. for Disease Control, *First Travel-Related Case of 2019 Novel Coronavirus Detected in United States* (Jan. 21, 2020), *available at* https://perma.cc/XU34-FXX2.

67. Bernard, *supra* note 64 (emphasis in original).

68. *See* discussion *supra* Section II. The Bureau of Labor Statistics also reported that people of color (Black or African American, Asian, and Hispanic or Latino ethnicity) all reported higher unemployment rates than white responders. Press Release, Bureau of Labor Statistics, The Employment Situation – August 2020 2, 6 (Sept. 4, 2020) (on file with author). The data is from a sample survey of approximately 60,000 eligible households. *Id.*

69. COVID-19 Hospitalization and Death by Race/Ethnicity, CENTERS FOR DISEASE CONTROL AND PREVENTION: CORONAVIRUS DISEASE 2019 (July 24, 2020) (stating that "American Indian or Alaska Native, Non-Hispanic," "Black or African American, Non-Hispanic," and "Hispanic or Latino" persons get COVID-19 at slightly less than 3 times the rate of "White, Non-Hispanic" persons (2.8, 2.6, and 2.8 respectively), are hospitalized at approximately 5 times the rate (5.3, 4.7, and 4.6 respectively), and die from it at significantly higher rates (1.4, 2.1, and 1.1 respectively), and that "Asian, Non-Hispanic" persons get COVID-19 at slightly higher rates (1.1) and are hospitalized more often (1.3)); Daniel Wood, *As Pandemic Deaths Add Up, Racial Disparities Persist – And In Some Cases Worsen*, NPR (Sept. 23, 2020) ("[T]he trend is crystal clear: People of color [Blacks, Hispanics, and Native Americans] get sick and die of COVID-19 at rates higher than whites and higher than their share of the population."), https://perma.cc/YEJ2-HRR7; Joel Achenbach, Brittany Shammas & Jacqueline Dupree, *First coronavirus infections increased. Then hospitalizations. Now, deaths are on the rise.*, WASH. POST (Oct. 30, 2020) (noting that African Americans represent 20% of deaths (1 in 5) "far exceeding their proportion of the population," "Hispanics . . . have much higher infection rates than Whites," and noting other disparities for people of color); Health Equity Considerations and Racial and Ethnic Minority Groups, CENTERS FOR DISEASE CONTROL AND PREVENTION: CORONAVIRUS DISEASE 2019 (July 24, 2020) ("There is increasing evidence that some racial and ethnic minority groups are being disproportionately affected by COVID-19."), https://perma.cc/2DQK-KD48.

70. *See* Powell NPR Interview, *supra* note 32, at 10 (quoting Chair Powell, "The burdens of the pandemic have fallen to a greater extent on people at the low end of the income spectrum. And that's people who worked in the service industry in relatively low-paid jobs, dealing with the public, for example, in restaurants, in bars, in hotels, in airlines, in entertainment. Those people have tended to be, you know, have lower wages, be more skewed to minorities and more skewed to women. And to a very large extent, that's where the job losses have been and where the burdens have fallen."); Greg Rosalsky,

ready have, on average, lower credit scores,[71] and people of color are more likely to have economic losses related to the pandemic through no fault of their own.[72] Those disproportionate economic losses may lead to a disproportionate increase in delinquencies, which in turn may lead to disproportionately decreased credit scores for consumers of color. Assuming *arguendo* that scores pre-pandemic accurately predicted the risk of default,[73] one cannot simply assume that credit scores impacted by the pandemic will continue to reflect accurately a consumer's credit-worthiness once the economy has begun to recover. The pandemic's impacts on consumers' credit scores are largely beyond consumers' control and likely are not probative of their actions outside the context of the crisis. Absent action by regulators, consumers of color may labor under the costs—both increased costs of credit and decreased access to employment opportunities—for long after the pandemic itself has receded. Blindly relying on credit scores in this context likely will simply compound and extend the pandemic's harm to people of color. Similarly, blindly repossessing or evicting people likely also will disproportionately affect people of color. Neither the CFPB nor companies can pretend that the pandemic is affecting all Americans equally.

Lastly, and of particular relevance to this article, the CFPB also has not altered its enforcement strategy to address the pandemic. Consumer complaints hit historic levels during the initial days of the pandemic.[74] The CFPB has received thousands of complaints expressly mentioning the pandemic.[75] The FTC has had more than 325,000 complaints about COVID-19

How The Crisis Is Making Racial Inequality Worse, NPR: PLANET MONEY (May 26, 2020), https://perma.cc/776Q-RYGS.

71. *See, e.g.*, BD. OF GOVERNORS OF THE FED. RES. SYS., REPORT TO THE CONGRESS ON CREDIT SCORING AND ITS EFFECTS ON THE AVAILABILITY AND AFFORDABILITY OF CREDIT S-4 (2007) ("Blacks [and] Hispanics . . . and individuals residing in low-income or predominantly minority census tracts have lower credit scores than other subpopulations defined by race or ethnicity . . . or location.") [hereinafter FED REPORT ON CREDIT SCORING]; *Id.* O-13, O-25 & fig. O-1 (showing average normalized TransRisk scores of 54.0 for non-Hispanic whites, 38.2 for Hispanics, and 25.6 for blacks and showing that average scores decreased as the percentage of persons living in the census tracts who were minorities increased); *Id.* 80 ("Differences in credit scores among racial or ethnic groups and age cohorts are particularly large."); CFPB, Analysis of Differences between Consumer- and Creditor-Purchased Credit Scores 18 & fig.9 (2012) (stating that consumers who lived in zip codes where a majority of the population were "minorities" had median FICO scores in the 34th percentile of the overall score distribution while the median in "low minority areas" was in the 52nd percentile).

72. Powell NPR Interview, *supra* note 32, at 13.

73. *See* FED REPORT ON CREDIT SCORING, at O-5.

74. *See, e.g.*, CFPB COMPLAINT BULLETIN, *supra* note 4, at 5 (stating that complaint volume in March and April 2020 were the "highest monthly complaint volumes in the Bureau's history").

75. As of November 15, 2020, the CFPB had received more than 10,900 complaints in 2020 that included one of the following terms: pandemic, epidemic, covid, corona!, or CARES Act. CFPB, CONSUMER COMPLAINT DATABASE, https://perma.cc/8YDG-RWJC (enter "pandemic OR epidemic OR covid OR corona! OR 'CARES Act'" in "Search Within All data" field and from the "Map" tab, set the date from 1/1/2020 through 11/15/2020).

and the related government stimulus efforts.[76] There also are thousands of complaints regarding conduct of particular concern during the pandemic (*e.g.*, complaints about failures and delays in investigating credit reporting disputes)[77] and several public reports of problems.[78]

Although other federal agencies have taken numerous enforcement actions already, more than ten months into the pandemic, the CFPB under Director Kraninger did not take a single public enforcement action related to the pandemic. Instead, the action it took was to tell companies it will look the other way if they violate the law during the pandemic.[79] Although enforcement activity increased in the last quarter of the CFPB's 2020 fiscal year (July 1 to September 30, 2020), the increase reflects a trend toward smaller cases: more cases against nonbanks where the CFPB identified less consumer harm and required defendants[80] to pay less in redress and penalties. Just when the United States needs the CFPB to be the cop on the beat, it is repeating the mistakes that led to its creation by failing to take public action.

76. FTC, FTC COVID-19 AND STIMULUS REPORTS (last visited on Jan. 22, 2021), https://perma.cc/K2RG-9GRP (reporting complaints filed between Jan. 1 and Jan. 21, 2021). Although the FTC and the CFPB have different authorities, there is some overlap, and in particular, more than 9,900 of the complaints involved credit cards and more than 9,400 involved credit bureaus. *Id*. The CFPB also has access to the FTC's complaint database. CONSUMER SENTINEL NETWORK (last visited Nov. 1, 2020), https://perma.cc/8HCP-EV5F (listing CFPB among current members).

77. *See, e.g.*, Letter from Nat'l Consumer Law Ctr. et al. to Kathleen Kraninger, Director, CFPB (Sept. 24, 2020) (on file with author) (noting more than 13,000 complaints between Apr. 1 and Sept. 24, 2020, that disputes about credit reporting had not been addressed within the statutory deadline). In total there have been more than 21,000 such complaints between January 1 and November 15, 2020. CONSUMER COMPLAINT DATABASE, https://perma.cc/C6SG-THCC (from the "Map" tab, set the date from 1/1/2020 Through 11/15/2020 and select "Issue/sub-issue" "Investigation took more than 30 days" and "Was not notified of investigation status or results" under the "Problem with a credit reporting company's investigation into an existing problem" heading).

78. *See, e.g.*, Eleanor Laise, *Financial Watchdog Under Fire Amid Pandemic*, BARRON'S (Nov. 2, 2020), https://perma.cc/P4AP-L5KS; Scott Medintz, *How to Protect Your Credit Score During the Coronavirus Pandemic*, CONSUMER REPORTS (June 2, 2020), https://perma.cc/VF4V-TFHT (noting that "reports of people whose credit scores are nonetheless wrongly being harmed keep piling up, both in media reports and in stories shared directly with Consumer Reports by readers"); Nydia Han & Heather Grubola, *Is Your Credit Score Suffering Because of Deferments During COVID-19?*, 6ABC ACTION NEWS (Aug. 30, 2020), https://perma.cc/T7XZ-N998; Press Release, AG Xavier Becerra, *Attorney General Becerra Calls on Auto Manufacturers to Ensure Consumers Timely Vehicle Lease Returns During the COVID-19 Pandemic* (May 20, 2020) (on file with author) (warning auto dealerships about refusing to accept the return of leased vehicles during the pandemic in violation of federal and state laws).

79. *See* discussion *infra* Section III.A.

80. This Article uses the term "defendant" to refer to any party against which the CFPB brings an enforcement action, although such parties are called "respondents" in CFPB administrative adjudication proceedings.

A. The CFPB Took No Public Enforcement Action Under Director Kraninger Specifically Related to the Pandemic.

"One of the CFPB's 'primary functions . . . [is] taking appropriate enforcement action to address violations of Federal consumer financial law.' "[81] Yet, under Director Kraninger, more than ten months into the COVID-19 pandemic, the CFPB had not taken a single public enforcement action related to COVID-19.[82] Instead, the CFPB acted for the most part as if the pandemic did not exist and was not destabilizing and distressing millions of American families. In April 2020, as unemployment was rising to a historic rate (14.7%) and largest month-over-month increase since the government began tracking data with more than 23 million unemployed,[83] the CFPB's response was to release activities to "[b]uild your kids' skills while they're home from school . . . "[d]ue to the coronavirus."[84]

Indeed, instead of stepping up and altering its enforcement strategy to address squarely the unfolding economic crisis, the CFPB took a number of steps in late March and April alone to make clear that it would do just the opposite: it would *not* take enforcement activity when companies broke a variety of laws during the crisis. For example, the CFPB stated it would be "flexible" and not take supervisory or enforcement action when companies fail to meet statutory deadlines for investigating consumer disputes about their credit reports,[85] when they fail to provide required communications with distressed home borrowers seeking loan modifications,[86] when they

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81. Craig Cowie, *Putting Money Back Into Consumers' Pockets: An Empirical Study of the CFPB's Civil Penalty Fund*, 2021 U. ILL. L. REV. (forthcoming August 2021) (manuscript at 3), https://perma.cc/4HCP-HKWV (quoting 12 U.S.C. § 5511(c)(4) (2018), alterations in original).

82. A review of all enforcement cases filed or resolved during the period in question demonstrates that many involve conduct that allegedly ceased before the pandemic and none involved conduct directly related to the pandemic or its fallout.

83. U.S. Bureau of Labor Statistics, *Unemployment Rate Rises to Record High 14.7 Percent in April 2020*, TED: THE ECONOMICS DAILY, https://perma.cc/Y3GY-3FY9.

84. Leslie Jones & Laura Schlachtmeyer, *Build Your Kids' Money Skills While They're Home From School*, CONSUMER FINANCIAL PROTECTION BUREAU: NEWS (Apr. 10, 2020), https://perma.cc/W3YY-LPVB.

85. CFPB, STATEMENT ON SUPERVISORY AND ENFORCEMENT PRACTICES REGARDING THE FAIR CREDIT REPORTING ACT AND REGULATION V IN LIGHT OF THE CARES ACT 3 (Apr. 1, 2020) [hereinafter FCRA Statement].

86. CFPB et al., JOINT STATEMENT ON SUPERVISORY AND ENFORCEMENT PRACTICES REGARDING THE MORTGAGE SERVICING RULES IN RESPONSE TO THE COVID-19 EMERGENCY AND THE CARES ACT 6–7 (Apr. 3, 2020) [hereinafter Mortgage Servicing Statement]; *see also generally* Press Release, Nat'l Consumer Law Ctr., *New CFPB Mortgage Guidance Does More for Servicers than Consumers* (Apr. 6, 2020), *available at* https://perma.cc/PVG2-KU2W (stating that "[l]ate last Friday, the Consumer Financial Protection Bureau (CFPB) issued a one-sided policy guidance providing enormous flexibility to mortgage services while failing to ensure that distressed consumers can get access to crucial information and foreclosure-avoidance procedures").

fail to tell consumers the actual costs of remittances,[87] and when they fail to report quarterly fair-lending data.[88] Indeed, under the CFPB's "guidance," some institutions may not report any fair-lending data regarding lending during the pandemic until the next annual reporting deadline, Mar. 1, 2021.[89]

As for consumer disputes about credit reporting, the CFPB went even further and told companies that "they may take advantage" of provisions allowing them to "eliminate the obligation to investigate" consumers' disputes that they "reasonably determine to be frivolous or irrelevant." The CFPB even made clear that in determining whether a company's decision *not* to investigate was "reasonable," it would consider constraints on the *company*'s time and resources as opposed to the validity of the consumers' complaints or the burdens on the consumers' time and resources.[90] Twenty-three Attorneys General responded to the CFPB's statement by asking the CFPB to withdraw it and making clear that they would prosecute violations of these laws even if the CFPB would not.[91] Even though there have been more than 13,000 complaints since the CFPB issued its guidance about failures to investigate disputes within the statutory deadlines,[92] the CFPB has refused to alter its guidance.[93] Lastly, rather than taking public enforcement action related to the economic fallout from the pandemic, the CFPB chose to expend its resources on developing and issuing guidance on how companies—who the CFPB had found before to have violated the law—could terminate their consent orders with the CFPB *early*.[94]

The CFPB's lack of public enforcement action related to COVID-19 stands in stark contrast with the actions of other regulators of consumer law. The Federal Trade Commission ("FTC") has sued numerous defendants for unlawful actions related to the COVID-19 pandemic, including making

87. CFPB, Statement on Supervisory and Enforcement Practices Regarding the Remittance Rule in Light of the COVID-19 Pandemic 3 (Apr. 10, 2020) [hereinafter Remittance Rule Statement].

88. CFPB, Statement on Supervisory and Enforcement Practices Regarding Quarterly Reporting Under the Home Mortgage Disclosure Act 1 (Mar. 26, 2020) [hereinafter HMDA Statement].

89. 12 C.F.R. § 1003.5(a)(1)(i).

90. FCRA Statement, *supra* note 85, at 3.

91. Letter from Josh Shapiro, Attorney Gen., Commonwealth of Pa., et al. to Kathleen Kraninger, Director, CFPB (Apr. 13, 2020), *available at* https://perma.cc/4SFA-Y2YA.

92. Letter from Nat'l Consumer Law Ctr. et al. to Kathleen Kraninger, Director, CFPB (Sept. 24, 2020) (on file with author).

93. Letter from Kathleen Kraninger, Director, CFPB, to Chi Chi Wu, Nat'l Consumer Law Ctr. (Nov. 9, 2020) (on file with author) (stating that the CFPB will not prosecute companies that make "good faith" efforts to investigate disputes "as quickly as possible").

94. CFPB, Statement of Policy on Applications for Early Termination of Consent Orders (Oct. 5, 2020, eff. Oct. 8, 2020).

false health claims related to COVID-19,[95] deceptively luring consumers to sales events by claiming to provide COVID-19 stimulus benefits,[96] falsely claiming rapid shipping of personal protective equipment or that such equipment was in stock,[97] and falsely claiming to be a government-approved lender providing COVID-19 relief to small businesses.[98] In at least some cases, the FTC managed to cease the unlawful conduct almost immediately.[99] The FTC also began sending warning letters to companies about

95. Complaint for a Temporary Restraining Order & Preliminary Injunction pursuant to Sections 13(A) and (B) of the FTC Act at 2, *FTC v. Ching*, https://perma.cc/VFJ9-VJPD (C.D. Cal. Apr. 24, 2020) (No. 2:20-cv-3775) (seeking a temporary restraining order and alleging dissemination of false or unsubstantiated claims that products treat, prevent, or reduce the risk of COVID-19); *see also* Complaint for Permanent Injunction & Other Equitable Relief at 1–2, *FTC v. Golden Sunrise Nutraceutical, Inc*., 2020 WL 4501968 (E.D. Cal. July 30, 2020) (No. 1:20-at-540) (alleging deceptive claims that products will treat, prevent, or cure COVID-19).

96. Complaint for Permanent Injunction & Other Equitable Relief at 3–6, *FTC v. Traffic Jam Events, LLC*, 2020 WL 3490434 (E.D. La. June 16, 2020) (No. 2:20-cv-1740).

97. Complaint for Permanent Injunction & Other Equitable Relief at 3, *FTC v. SuperGood-Deals.com, Inc*., https://perma.cc/P9CG-XD5B (E.D.N.Y. July 8, 2020) (No. 20-cv-3027) (alleging that defendants falsely claimed to provide next-day shipping of personal protective equipment beginning in March 2020); Complaint for Permanent Injunction & Other Equitable Relief at 3–4, *FTC v. Amer. Screening, LLC*, https://perma.cc/2U9T-5PMA (E.D. Mo. Aug. 5, 2020) (No. 4:20-cv-1021) (alleging that defendants falsely claimed to ship personal protective equipment 24–48 hours after processing); Complaint for Permanent Injunction & Other Equitable Relief at 4–11, *FTC v. Zaappaaz LLC*, https://perma.cc/3TS9-AUGL (S.D. Tex. Aug. 4, 2020) (No. 4:20-cv-2717) (alleging defendants falsely claimed same-day shipping and that items were in stock); Complaint for Permanent Injunction & Other Equitable Relief at 4–8, *FTC v. QYK Brands LLC*, https://perma.cc/V63V-YDNU (C.D. Cal. Aug. 4, 2020) (No. 8:20-cv-1431-JLS-KES) (alleging defendants falsely claimed same-day shipping and that items were in stock).

98. Complaint for Permanent Injunction & Other Equitable Relief at 3, *FTC v. Ponte Investments, LLC*, https://perma.cc/6X42-N6QD (D.R.I. Apr. 17, 2020) (No. 1:20-cv-177) (seeking temporary restraining order).

99. Stipulated Preliminary Injunction Order with Other Equitable Relief at 7–9, *FTC v. Zaappaaz LLC* (S.D. Tex. Aug 10, 2020) (No. 4:20-cv-2717) (enjoining defendants—within a week of the filing of the complaint—from, *inter alia*, falsely representing same-day shipping and refusing to provide refunds and cancellations for delayed orders); Stipulated Temporary Restraining Order & Order to Show Cause Why a Preliminary Injunction Should Not Issue at 10–13, *FTC v. QYK Brands LLC* (C.D. Cal. Aug 9, 2020) (No. 8:20-cv-1431 (enjoining—within a week of complaint being filed—defendants from, *inter alia*, deceptively claiming that products can treat COVID-19, falsely claiming same-day shipping of PPE, and failing to provide refunds or cancellations for delayed orders); Stipulation to Preliminary Injunction by Defendant Marc Ching at 5–7, *FTC v. Ching*, https://perma.cc/Q7MQ-PWAR (C.D. Cal. Apr. 27, 2020) (No. 2:20-cv-3775) (enjoining—three days after filing of complaint—defendant from, *inter alia*, making false health claims regarding the treatment of COVID-19); Stipulated Preliminary Injunction at 4, *FTC v. Ponte Investments, LLC*, (D.R.I. Apr. 20, 2020) (No. 1:20-cv-177) (enjoining defendants three days after the complaint was filed from, *inter alia*, misrepresenting their authority to make Paycheck Protection Program loans under the CARES Act or their affiliation with the U.S. Small Business Administration); *cf.* Order & Reasons at 16–22, *FTC v. Traffic Jam Events, LLC*, 2020 WL 3490434 (E.D. La. June 26, 2020) (No. 2:20-cv-1740) (denying motion for temporary restraining order because, *inter alia*, less than a week after the complaint was filed, defendants had submitted a declaration and also testified that they would not represent that they were offering COVID-19 stimulus funds for the purchase of automobiles and the court found that the deceptive sales events were one-time events that would not be repeated by defendants).

unlawful COVID-19-related conduct as soon as March 9, 2020,[100] before the President even had declared the national emergency, and it has continued to warn hundreds of companies about unlawful conduct as the pandemic developed.[101]

United States' Attorneys and the Department of Justice also have taken actions related to COVID-19, including for fraudulent COVID-19 treatment claims,[102] deceptive claims regarding "in stock" or shipping times for per-

100. Press Release, FTC, *FTC, FDA Send Warning Letters to Seven Companies about Unsupported Claims that Products Can Treat or Prevent Coronavirus* (Mar. 9, 2020), *available at* https://perma.cc/LT9G-KJ72 (stating that although assisting illegal robocalls is always a concern, "it's especially bad when your company is helping telemarketers exploiting fears about the coronavirus to spread disinformation and perpetuate scams.").

101. The FTC has sent more than 200 additional warning letters to companies about deceptive claims regarding products' abilities to treat or prevent COVID-19. Press Release, FTC, *FTC Sends Letters Warning 30 More Marketers to Stop Making Unsupported Claims that their Products and Therapies Can Effectively Prevent or Treat COVID-19* (June 18, 2020), *available at* https://perma.cc/A836-A4G9; Press Release, FTC, *FTC Sends Second Round of Warning Letters to Multi-Level Marketers Regarding Coronavirus Related Health and Earnings Claims* (June 5, 2020), *available at* https://perma.cc/EWB2-3GLQ; Press Release, FTC, *FTC Sends Letters Warning 35 More Marketers to Stop Making Unsupported Claims that their Products and Therapies Can Effectively Prevent or Treat COVID-19* (June 4, 2020), *available at* https://perma.cc/B5FE-2UUF; Press Release, FTC, *FTC Sends Letters Warning 50 More Marketers to Stop Making Unsupported Claims that their Products and Therapies Can Effectively Prevent or Treat COVID-19* (May 21, 2020), *available at* https://perma.cc/2255S-UCRT; Press Release, FTC, *FTC Sends 45 More Letters Warning Marketers to Stop Making Unsupported Claims that their Products and Therapies Can Effectively Prevent or Treat COVID-19* (May 7, 2020), *available at* https://perma.cc/2KNH-R6EN; Press Release, FTC, *FTC Sends Warning Letters to Multi-Level Marketers Regarding Health and Earnings Claims They or Their Participants are Making Relating to Coronavirus* (Apr. 24, 2020), *available at* https://perma.cc/F93Q-2NV4; Press Release, FTC, *FTC Sends 21 Letters Warning Marketers to Stop Making Unsupported Claims that their Products and Therapies Can Effectively Treat Coronavirus* (Apr. 23, 2020), *available at* https://perma.cc/S45S-98WY; Press Release, FTC, *FTC Announces Latest Round of Letters Warning Companies to Cease Unsupported Claims that their Products Can Treat or Prevent Coronavirus* (Apr. 14, 2020), *available at* https://perma.cc/XW72-TVWM. The FTC also has issued warning letters to service providers about facilitating illegal telemarketing related to COVID-19. *See, e.g.*, Press Release, FTC, *FTC and FCC Send Joint Letters to VoIP Service Providers Warning against 'Routing and Transmitting' Illegal Coronavirus-related Robocalls* (Apr. 3, 2020), *available at* https://perma.cc/G8DS-ES3U; Press Release, FTC, *FTC Warns Nine VoIP Service Providers and Other Companies Against 'Assisting and Facilitating' Illegal Coronavirus-related Telemarketing Calls* (Mar. 27, 2020), *available at* https://perma.cc/3TN9-CB5K; Press Release, FTC, *FTC and FCC Send Joint Letters to VoIP Service Providers Warning against 'Routing and Transmitting' Illegal Coronavirus-related Robocalls* (Apr. 3, 2020), *available at* https://perma.cc/FR76-UPJ9.

102. *See, e.g.*, Complaint at 2, *United States v. My Doctor Suggests LLC*, https://perma.cc/3NV3-67ZR (D. Utah Apr. 27, 2020) (No. 2:20-cv-00279); Complaint at 4–6, *United States v. Xephyr LLC*, 2020 WL 2530731 (E.D. Okla. May 13, 2020) (No. CIV-20-140-RAW); Complaint for TRO, PI, and Perm. Inj. at 1, *United States v. Purity Health and Wellness Centers, Inc.*, 2020 WL 1980534 (N.D. Tex. Apr. 22, 2020) (No. 3:20-cv-00985-L); USA's Complaint for Preliminary & Permanent Injunction at 9, *United States v. Genesis II Church of Health and Healing*, 2020 WL 4691418 (S.D. Fla. Apr. 16, 2020) (No. 1:20-cv-21601) (alleging deceptive claims that product can treat COVID-19); Indictment at 5–6, *United States v. Tieu* (E.D. Cal. July 9, 2020) (No.1:20-cr-0109 DAD-BAM) (alleging criminal fraud against the owner of Golden Sunrise Nutraceutical, which was sued by the FTC, for, *inter alia*, statements that Golden Sunrise products were approved to treat COVID-19); *see also* Press Release, U.S.

sonal protective equipment,[103] and other COVID-19-related unlawful activity.[104] There have also been numerous criminal complaints filed against people who fraudulently sought various federal relief payments related to COVID-19.[105] Other regulators also have formed taskforces expressly to combat COVID-19-related unlawful activity.[106]

States have also taken a variety of actions to protect consumers during the pandemic. States and state Attorneys General have promulgated laws and regulations declaring specified conduct illegal during disasters like the pandemic.[107] State Attorneys General also have filed enforcement actions

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Attorney's Office N. Dist. of Ga., *Fayetteville Woman Pleads Guilty to COVID-19 Related Federal Offense for Selling Unregistered Pesticides on eBay* (May 29, 2020), *available at* https://perma.cc/LJ56-HWRT (noting criminal case filed against defendant for selling an unregistered pesticide as protection against COVID-19).

103. Press Release, U.S. Attorney's Office for the E. Dist. of N.Y., *Staten Island Business Owner Arrested for Violating the Defense Production Act and Defrauding Customers* (July 8, 2020), *available at* https://perma.cc/VTT2-9R6L (filing a criminal case related to *SuperGoodDeals.com* alleging fraud and price gouging); Press Release, U.S. Attorney's Office for the N. Dist. of Cal., *Michigan Man Charged with COVID-19 Related Wire Fraud Scheme* (Apr. 28, 2020), *available at* https://perma.cc/Z5JB-XWXD (filing criminal charges for fraudulently selling personal protective equipment that was never provided).

104. Criminal Complaint at 2–3, *United States v. Schena*, https://perma.cc/9U53-D5QS (N.D. Cal. June 8, 2020) (No. CR 20-707021-MAG) (alleging violations of securities laws related to deceptive claims regarding the provision of COVID-19 testing); Press Release, U.S. Dep't of Justice, *COVID-19 Alert: Fraudulent Facemask Flyers* (June 25, 2020), *available* at https://perma.cc/V3XR-YY95 (warning about a company selling cards claiming to exempt the holders from complying with mask mandates that falsely suggested approval by or affiliation with Department of Justice, although no action was taken against that particular company); Christina Morales, *Mask Exemption Cards from the 'Freedom to Breathe Agency'? They're Fake*, N.Y. Times (June 28, 2020), https://perma.cc/K4ZC-4Z82.

105. *See, e.g.*, Press Release, U.S. Attorney's Office for the Dist. of Mass., *Winchester Man Charged with COVID-19 Relief Fraud* (July 15, 2020), *available at* https://perma.cc/SGF8-3KUQ.

106. *See, e.g.*, Memorandum from A.G. William P. Barr, *Department of Justice COVID-19 Hoarding and Price Gouging Task Force* 2 (Mar. 24, 2020), *available at* https://perma.cc/W78F-8LFH (forming a COVID-related price gouging task force); Press Release, U.S. Attorney's Office for W.D. Pa., *COVID-19 Fraud Hotline: 1-888-C19-WDPA* (last visited Sept. 10, 2020), *available at* https://perma.cc/C3CX-PCDZ (noting formation of joint task force between the U.S. Attorney's Office for the Western District of Pennsylvania and the Pennsylvania Attorney General's Office); Press Release, U.S. Attorney's Office for the N. Dist. of Ill., *U.S. Attorney Announces Appointment of Federal Prosecutor to Lead Fight Against COVID-19 Fraud* (Mar. 20, 2020), *available at* https://perma.cc/TU8C-WYFV; Press Release, U.S. Attorney's Office for the Dist. of Nev., *Nevada COVID-19 Task Force Provides Guidance For Victims of Unemployment Benefits Fraud* (July 21, 2020), *available at* https://perma.cc/WLR8-BQA9 (noting task force between U.S. Attorney's Office and the Nevada Attorney General's Office); Press Release, U.S. Attorney's Office for Middle Dist. of Ga., *Top Federal, State Prosecutors Form Georgia COVID-19 Fraud Task Force* (Apr. 7, 2020), *available at* https://perma.cc/BMS8-VBLJ; Press Release, U.S. Attorney for the Middle Dist. of Fla., *U.S. Attorney Announces Multi-Agency Group to Investigate and Prosecute COVID-19 Fraud* (Mar. 30, 2020), *available at* https://perma.cc/96NP-D5RF.

107. *See, e.g.*, Colo. Rev. Stat. Ann. § 6–1–730 (West 2020) (effective July 14, 2020) (providing that it is unfair and unconscionable to charge "a price so excessive as to amount to price gouging" for specified goods during a disaster period); 940 Code Mass. Regs. 3.18 (2020) (providing that charging "unconscionably high" prices for particular goods during specified emergencies is an unfair or deceptive act or practice); Press Release, A.G. Maura Healey, *AG Healey Issues Emergency Regulation Prohibit-*

alleging price-gouging[108] and illegal evictions,[109] as well as taking other actions to protect consumers.[110] Many Attorneys General also have protested the CFPB's refusal to enforce violations, stating that they at least would continue to enforce the law to protect consumers.[111]

B. *Instead, the CFPB Brought Smaller Enforcement Actions.*

The CFPB under Director Kraninger continued to bring cases during the pandemic, but rather than bringing cases about violations related to the pandemic, the CFPB tended to bring smaller cases, primarily against non-banks. Given the overall slow pace of enforcement activity under Director Kraninger, there are relatively few cases,[112] but these cases are probative of

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ing Price Gouging of Critical Goods and Services During COVID-19 Emergency (Mar. 3, 2020), *available at* https://perma.cc/7TF3-AE23 (promulgating regulations in Massachusetts to prohibit price gouging during the pandemic); N.Y. GEN. BUS. LAW § 396-(r) (McKinney 2020) (prohibiting "unconscionably excessive price[s]" for "goods and services vital and necessary for the health, safety and welfare of consumers or the general public" during "any abnormal disruption of the market"); Press Release, Gov. Andrew Cuomo, *Governor Cuomo Signs Legislation Banning Price Gouging of Personal Protective Equipment* (June 6, 2020), *available at* https://perma.cc/36KP-NXHQ.

108. Press Release, A.G. Dana Nessel, *AG Nessel Continues Consumer Protection Work with Price-gouging Enforcement* (May 26, 2020) (on file with author); Press Release, A.G. Josh Stein, *Attorney General Josh Stein Wins Preliminary Injunction Against Towing Company in COVID-19 Price Gouging Lawsuit* (May 27, 2020) (on file with author) (reporting a preliminary injunction against predatory booting and towing of vehicles delivering pandemic supplies).

109. Press Release, A.G. Keith Ellison, *Attorney General Ellison Sues to Protect Tenant from Illegal Eviction Tomorrow* (Apr. 29, 2020) (on file with author) (reporting 4 suits to stop evictions in violation of executive order prohibiting evictions during the pandemic).

110. Press Release, A.G. Xavier Becerra, *Attorney General Becerra Calls on Auto Manufacturers to Ensure Consumers Timely Vehicle Lease Returns During the COVID-19 Pandemic* (May 20, 2020) (on file with author) (warning auto dealerships about refusing to accept the return of leased vehicles during the pandemic); Letter from Letitia James, Attorney Gen., State of N.Y., et al., to Steven Mnuchin, Secretary, U.S. Dep't of Treasury (Apr. 13, 2020) (on file with author) (request from 25 Attorneys General and the Hawaii Office of Consumer Protection that Secretary Mnuchin issue regulations or guidance prohibiting garnishment of CARES Act payments); Press Release, A.G. Kathleen Jennings, Top Federal and State Prosecutors Form Delaware COVID-19 Anti-Fraud Coalition (Apr. 24, 2020) (on file with author); Letter from Letitia James, Attorney Gen., State of N.Y., Josh Shapiro, Attorney Gen., Commonwealth of Pa., and Karl Racine, Attorney Gen., D.C., to Patrick Walsh, Chairman and CEO, Town Sports Int'l Holdings, Inc. 3–4 (Apr. 3, 2020) (on file with author) (stating that it is deceptive to charge fees when services are no longer being provided due to the pandemic and unfair and deceptive not to inform consumers of their right to cancel or freeze their gym memberships during the pandemic).

111. Letter from Josh Shapiro, Attorney Gen., Commonwealth of Pa., et al. to Kathleen Kraninger, Director, CFPB 3 (Apr. 13, 2020), *available at* https://perma.cc/6XLS-T4Y9); Letter from Letitia James, Attorney Gen., State of N.Y., Josh Shapiro, Attorney Gen., State of Pa. et al., to Craig Boundy, CEO, Experian, et al. 1–2 (Apr. 28, 2020) (on file with author) (stating that 22 Attorneys General "will continue to enforce all federal and state requirements during this crisis" even if the CFPB will not the statutory deadlines for investigating credit reporting disputes).

112. The CFPB filed 51 cases in total in the 660 days of Director Kraninger's tenure (as of September 30, 2020—the last day of the period being analyzed in this Article), 27 pre-pandemic and 24 during the pandemic. In addition, 50 orders have issued in that same period wherein the CFPB received some relief (including redress, injunctive relief, or penalties), including orders in cases filed before Director Kraninger's tenure.

her tenure as director and the CFPB's approach to enforcement under her leadership. In short, although the rate of enforcement activity increased in the last quarter of fiscal year 2020,[113] as a general matter, the available data all demonstrate a trend toward bringing smaller cases against nonbanks where the CFPB typically identified much less consumer harm and required defendants to pay less redress and lower penalties.

Quantitative assessment of enforcement output has important limitations.[114] For example, a simple recitation of the numbers of cases filed tells one nothing about the quality of those cases.[115] Similarly, stating the total amount of consumer harm remediated in a given period can allow a single case with a large amount of harm to mask a pattern of numerous cases with relatively little harm. Focusing exclusively on a quantitative assessment of harm also may miss the importance of cases designed to prevent future violations or cases in which it may be difficult to tie a specific amount of individual harm to the violations in question.[116]

But a quantitative assessment, especially if appropriately nuanced, can provide meaningful insights into enforcement priorities and impacts.[117] At a basic level, an assessment of the amounts of consumer harm caused by defendants in enforcement actions provides insight into how much an enforcer is helping ordinary, individual consumers. An assessment of the amounts of redress and penalties defendants are ordered to pay provides insight into whether an enforcer is holding to account those responsible for the harm. If an enforcer only, or primarily, brings cases with relatively low amounts of identifiable harm, that fact is a telling indicator of its enforcement priorities. By distinguishing between types of defendants (*e.g.*, banks and nonbanks), considering medians and means for a number of measures, and comparing specific, individual cases, one can glean valuable insights into trends in enforcement.

113. The CFPB's fiscal years run from October 1 through September 30. The last quarter of fiscal year 2020 ran from July 1, 2020, through September 30, 2020.

114. *See, e.g.*, James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CALIF. L. REV. 115, 128–29 (2012) (discussing limitations on measuring only enforcement "output").

115. *Id.* at 129.

116. *See, e.g.*, Consent Order at 5–13, Dwolla, Inc., CFPB No. 2016-CFPB-0007 (Mar. 2, 2016) (finding deceptive marketing of products' security and a lack of policies and training related to security and ordering the adoption of specific data-security measures to address the violations but not alleging a data breach tied to those violations and not ordering any redress for consumers).

117. *See generally, e.g.*, Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. LEG. 37, 53–98 (2018) (analyzing a variety of quantitative factors in developing a framework of different enforcement strategies employed by various enforcers of consumer law); Peterson, *supra* note 57, at 1107–03 (using analysis of quantitative factors to assess the CFPB's early enforcement efforts); Amy Widman, *Protecting Consumer Protection: Filling the Federal Enforcement Gap*, 69 BUFFALO L. REV. (forthcoming 2021) (analyzing penalty and redress amounts recovered by various federal and state enforcers in 2018).

1. Methodology

In assessing the CFPB's enforcement actions under Director Kraninger, the author reviewed every enforcement action taken publicly.[118] When necessary, additional documents related to these cases were pulled from the federal court dockets or the CFPB's Office of Administrative Adjudication's docket. For each case, the author coded more than two hundred variables related to the case, including the dates of the relevant actions, the types of unlawful activity alleged, the amounts of consumer harm identified in the orders, and the amounts of relief and penalties defendants were ordered to pay. For comparing different periods, this article sums the total number events (*e.g.*, orders filed that impose liability or cases filed) that happened during the pertinent time and divides that sum by the number of days in the period to calculate a daily rate. That rate then is multiplied by 365 to calculate an annual rate. The President declared a national emergency regarding COVID-19 on Friday, March 13, 2020.[119] Therefore, for purposes of this analysis, the CFPB's enforcement activity during the pandemic is measured from March 13, 2020.[120] The analysis was completed before the 2020 presidential election, and therefore includes cases only through September 30, 2020.[121] These rates are compared to enforcement activity under Director Kraninger pre-crisis (from December 11, 2018[122] through March 12, 2020) and in some cases under Director Cordray (from April 1, 2013[123] through November 24, 2017).

118. This includes cases noted on the CFPB's enforcement page, in its press releases, or in its financial reports.

119. Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15,337, 15,337 (Mar. 13, 2020) (declaring a national emergency on March 13, 2020).

120. In addition, the Office of Enforcement went fully remote in response to the crisis on Monday, March 16, although employees had an expanded ability to work remotely due to the crisis beginning March 11.

121. The CFPB continued to file actions under Director Kraninger after that date. Although those cases are outside the scope of the analysis that follows, none of them involved conduct arising from the pandemic.

122. Alan S. Kaplinksy, *Kathy Kraninger's First Day as Director of the BCFP*, Consumer Finance Monitor (Dec. 11, 2018), https://perma.cc/29HG-WKT4.

123. April 1, 2013, is the beginning of the third quarter of the second full fiscal year after the date on which the CFPB had all of its powers (July 21, 2011, otherwise known as the designated transfer date). 12 U.S.C. § 5582; (2018); Designated Transfer Date, 75 Fed. Reg. 57,252, 57,253 (Sept. 10, 2010). However, unlike Director Kraninger (and Acting Director Mulvaney), who inherited ongoing enforcement activity, the CFPB under Director Cordray had to ramp up its enforcement activity over time. *See generally* Peterson, *supra* note 57, at 1076 (discussing how the CFPB began its enforcement activities). Choosing a date when the ramp-up period fairly can be considered concluded is a somewhat arbitrary exercise. The CFPB has stated that its goal is to file or settle enforcement actions within two years of opening the investigations. CFPB, *The CFPB Strategic Plan, Budget, and Performance Plan and Report* 44 (February 2016). Thus, one could start two years after the transfer date, but that would miss an increase in activity toward the end of that two-year period. The CFPB's enforcement activity began

2. *The CFPB Initially Filed Few Cases During the Crisis but the Filing Rate Increased in the Last Quarter of its 2020 Fiscal Year.*

On average, the CFPB under Director Kraninger's tenure filed approximately 28 cases[124] a year or slightly more than an average of two cases per month. As the pandemic began, the CFPB was in a trough where it filed only a single case per month for several months. This period was among the slowest periods during Director Kraninger's tenure, and the CFPB's enforcement activity during the pandemic remained below average for Director Kraninger's tenure until July 2020. In the last few months of fiscal year 2020,[125] however, the rate of enforcement activity increased to an average of slightly more than six cases per month.[126]

The precise reasons for the lull and the subsequent increase are not particularly germane[127] to this analysis, because as noted above, even

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slowly. It filed only 3 actions through the end of the first full fiscal year after the designated transfer date (*i.e.*, through September 30, 2012), and only two more in the first two quarters of fiscal year 2013 (from October 1, 2012 to March 31, 2013). But from April 1, 2013, to July 21, 2013, the CFPB filed ten cases, twice as many as in the entire period before April 1, 2013. Beginning with the second half of fiscal year 2013, therefore, is a conservative approach, as the number of filings in that period is lower than any subsequent semi-annual period while Director Cordray headed the CFPB. In addition, in implementing its Civil Penalty Fund, which the CFPB uses to provide redress to consumers harmed by the defendants in CFPB enforcement actions who otherwise would receive little or nothing, the CFPB considered all of the enforcement actions filed before April 1, 2013, as one period, and began using regular six-month periods on April 1, 2013. *See generally* Cowie, *supra* note 81.

124. The CFPB may file enforcement actions in federal court, 12 U.S.C. § 5564(a), (f) (2018), or in administrative adjudication proceedings, 12 U.S.C. § 5563(a) (2018). Often, the CFPB initiates and resolves an administrative adjudication proceeding by filing a consent order that describes the unlawful conduct and orders relief to which the respondent has already agreed. In a few instances, the CFPB has initiated an administrative adjudication proceeding by filing a notice of charges, and the case is then litigated before the CFPB's Office of Administrative Adjudication. *See, e.g.*, Notice of Charges Seeking Restitution, Disgorgement, Other Equitable Relief, and Civil Money Penalties, *In re Integrity Advance, LLC & James R. Carnes*, (CFPB Nov. 18, 2015) (No. 2015-CFPB-0029); *see also generally* 12 C.F.R. pt. 1081 (2020) (Rules of Practice for Adjudication Proceedings). "Cases" in this context refers to consent orders filed administratively that initiate and resolve the action in the same filing, complaints filed in federal courts, and notices of charges filed administratively.

125. July 1 to Sept. 30, 2020.

126. The rate of filing in the last quarter of fiscal year 2020 is the equivalent of approximately 76 cases per year if the CFPB continued at this pace.

127. Although it is not strictly relevant to the thesis of this article, it is still worth noting that the CFPB arguably was in a very good position to shift to remote work, as it had years of experience with attorneys teleworking before the crisis. The CFPB's collective bargaining agreement allows attorneys (who are not in managerial positions) up to three days a week of telework on a regular basis. In fiscal year 2018 (Oct. 1, 2017 – Sept. 30, 2018), 80% of CFPB employees (1,202 employees) teleworked with almost 500 (498 or 33% of employees) teleworking three or more days a week and another 351 teleworking one to two days per week. U.S. Office of Personnel Management, Status of Telework in the Federal Government, Report to Congress, Fiscal Year 2018 81, 86, Mar. 2020, *available at* https://perma.cc/77LW-MQK3 (2019 Telework Report to Congress); *see also* CFPB, 2016 Strategic Sustainability Performance Plan 7 (2016) (stating that through December 2015 47% of CFPB employees teleworked regularly and another 31% teleworked situationally, for 78% of employees), https://perma.cc/5HWT-7FN6. Moreover, the other federal regulators faced similar disrup-

though the rate of enforcement activity increased, the CFPB still did not announce a single case related to COVID-19. Indeed, a large percentage of the increase was due to a "sweep" of nonbank mortgage lenders. As explained *infra*, the CFPB required *none* of the defendants in that sweep to pay a single dollar in redress to consumers and ordered the defendants to pay only modest penalties.[128] The CFPB clearly chose to devote resources to this sweep. The question, however, is why it chose to conduct this sweep—especially given the lack of redress and modest penalties—instead of a sweep focused on illegal conduct related to the economic fallout from the pandemic.

Some commentators have claimed that this spike in the last quarter demonstrates that the CFPB now is " 'firing on all cylinders again.' "[129] This conclusion is premature—and likely incorrect—for a number of reasons. Most importantly, the increase in enforcement activity during the pandemic has been due entirely to a shift in enforcement strategy toward bringing more—but smaller—cases against nonbank[130] entities.[131] Under Director Kraninger, less than eight percent of the CFPB's cases were against banks. The CFPB filed three cases against banks before the pandemic, a rate of 2.39 cases per year, and one case against a bank during the pandemic, a rate of 1.81 cases per year. These cases accounted for 11% of the cases filed before the pandemic and 4% during. By comparison, the CFPB filed an average of more than eight cases per year against banks under Director Cordray, accounting for almost 22% of its cases. The CFPB also went for more than a year under Director Kraninger without filing against a bank (from January 3, 2019, when it filed an action against USAA Federal Savings Bank to January 30, 2020, when it filed an action against Citizens Bank, N.A.). The decrease in enforcement actions against banks under Director Kraninger—unless one assumes that banks are violating the law less frequently now than before—is deeply troubling, as the CFPB is the federal

tions from the pandemic, but, as described above, nonetheless took enforcement action directly related to COVID-19.

128. The penalties ranged from a low of $50,000, Consent Order at 35, *In re Hypotec, Inc.*, https://perma.cc/SQZ4-8YED (U.S. Bureau of Consumer Financial Protection Sept. 1, 2020) (No. 2020-BCFP-0012) to a high of $645,000, Consent Order at 50, *In re Prime Choice Funding, Inc.*, https://perma.cc/TZR2-HQ4E, (U.S. Bureau of Consumer Financial Protection July 24, 2020) (No. 2020-BCFP-0006) with an average of just over $330,000.

129. Jon Hill, *CFPB Enforcement Sees Highest New Case Volume in 5 Years*, LAW360 (Oct. 14, 2020), https://perma.cc/66KL-QL42.

130. Nonbank in this context includes cases against nonbank companies and against individuals, although the CFPB has filed only one case against an individual under Director Kraninger that did not also name a company. Consent Order, *In re Mark Corbett*, https://perma.cc/MB8G-S778 (U.S. Bureau of Consumer Financial Protection Jan. 23, 2019) (No. 2019-BCFP-0002),

131. The cases in the pandemic period also were more likely to settle at or near the time of filing: 59% of the cases settled within 30 days of filing under Director Kraninger pre-pandemic and 71% during the pandemic.

agency with primary authority for enforcing Federal consumer financial laws against large banks.[132]

Thus, the vast majority of the cases filed under Director Kraninger—both before and during the pandemic—were against nonbanks, and as discussed in more detail *infra*, the "spike" arose from an increase in small cases against nonbanks with a concomitant decrease in the number of large cases against nonbanks while the number of cases against banks, which tended to involve more harm and concomitantly higher redress and penalties,[133] remained low but steady. In other words, the CFPB filed more cases but typically identified less harm to consumers and typically required the defendants to pay less in redress and penalties.

Lastly, fully one-third (33%) of the cases filed during the crisis through September 30—and over 40% of the cases filed during the spike in the last quarter of fiscal year 2020—were part of a sweep of cases related to false or misleading advertising about mortgages that did not relate to the pandemic.[134] These cases involved analyzing advertisements that often were deceptive on their face, including allegedly advertising rates that were not actually offered or falsely suggesting affiliation with the government.[135] Because these cases did not order defendants to pay redress and ordered only relatively modest penalties, they also likely were relatively easy to settle.

132. *See* Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. OF BANKING AND FINANCIAL LAW 321, 357 (2013); 12 U.S.C. § 5515(a), (c)(1) (2018) (providing that the CFPB has primary enforcement authority for violating Federal consumer financial law committed by banks and credit unions with assets exceeding $10 billion, and their affiliates).

133. The two cases resolved against banks during the period covered by this article both involved redress and penalties that were significantly higher than the averages or the medians. *See* discussion *infra* Section III.B.3–5.

134. Consent Order, *In re Sovereign Lending Group, Inc.*, https://perma.cc/VW5S-BKZM (U.S. Bureau of Consumer Financial Protection July 24, 2020) (No. 2020-BCFP-0005); Consent Order, *In re Prime Choice Funding, Inc.*, *supra* note 128; Consent Order, *In re Go Direct Lenders, Inc.*, https://perma.cc/ETY6-SMH4 (U.S. Bureau of Consumer Financial Protection Aug. 21, 2020) (No. 2020-BCFP-0008); Consent Order, *In re PHLoans.com, Inc.*, https://perma.cc/UQ4M-MVXQ (U.S. Bureau of Consumer Financial Protection Aug. 26, 2020) (No. 2020-BCFP-0009); Consent Order, *In re Service 1st Mortgage, Inc.*, https://perma.cc/6SDW-XYHN (U.S. Bureau of Consumer Financial Protection Sept. 1, 2020) (No. 2020-BCFP-0013); Consent Order, *In re Hypotec, Inc.*, *supra* note 128; Consent Order, *In re Accelerate Mortgage, LLC*, https://perma.cc/7GMF-C37A (U.S. Bureau of Consumer Financial Protection Sept. 2, 2020) (No. 2020-BCFP-0014); Consent Order, *In re ClearPath Lending, Inc.*, https://perma.cc/Z65B-6738 (U.S. Bureau of Consumer Financial Protection Sept. 14, 2020) (No. 2020-BCFP-0015).

135. *See, e.g.*, *In re Hypotec*, *supra* note 128, at 7–10; *see also* Hill, *supra* note 129 ("Given the nature of these purported violations, Moglinicki said the cases would have been fairly straightforward for the agency to put together.").

3. During the Crisis, Orders in CFPB Actions Involved Less Consumer Harm.

During the pandemic, the number of orders filed without any indication of the magnitude of consumer monetary harm increased substantially, and in those cases in which the amount of monetary harm was identified, the magnitude of the harm tended to be significantly smaller. First, the number of cases that the CFPB settled without providing any monetary relief to consumers or any indication of the amount of consumer monetary harm jumped dramatically during the pandemic, increasing 96% from 22% of orders filed pre-pandemic to 43% of orders filed during the pandemic. In this context, providing monetary relief includes ordering payments to consumers, even if those payments were suspended due to the defendants' financial conditions,[136] ordering credits to consumers' accounts, and banning defendants from collecting outstanding, unlawful debt.[137]

There are also a number of cases during the pandemic period where the CFPB did not require defendants to pay redress even though it did require defendants in similar cases to pay redress, including, most notably, the sweep of nonbank mortgage lenders discussed above who, *inter alia*, advertised rates and terms for loans guaranteed by the United States Department of Veterans Affairs cheaper than the loans that the lenders actually offered.[138] In these cases, the CFPB found that the defendants' advertising, *inter alia*, was deceptive and violated the Mortgage Acts and Practices Rule ("MAP Rule").[139] In many cases, the CFPB found that tens, or even hun-

136. Redress that is ordered, but suspended, still indicates the amount of monetary harm to consumers the defendants caused, and the CFPB may be able to use its Civil Penalty Fund to provide relief to those consumers even though the defendants cannot. *See generally* Cowie, *supra* note 81 (finding that through May 2019, the CFPB had allocated more than $671 million to consumers harmed by defendants in its enforcement actions and had actually distributed almost $447.5 million).

137. Even if one counts those cases in which the defendants paid nothing because the redress was suspended in full as cases in which consumers did not receive any monetary relief, the percentage of cases without monetary relief for consumers still increased 43% during the pandemic, rising from 33% of orders filed pre-pandemic to 48% of orders filed during.

138. *See* discussion *supra* Section III.B.2.

139. *In re Sovereign Lending*, *supra* note 134, at 8–10, 19, 24 (finding that defendant advertised loans that were cheaper than it actually offered); *In re Hypotec, Inc.*, *supra* note 128, at 8, 21, 24 ((finding that defendant advertised loans that were cheaper than it actually offered); *In re Prime Choice Funding*, *supra* note 128, at 8–10, 29, 36 ((finding that defendant advertised loans that were cheaper than it actually offered); *In re Go Direct Lenders*, *supra* note 134, at 8, 15, 18, 22 (finding that defendant advertised loans that were cheaper than it actually offered); *In re PHLoans.com*, *supra* note 134, at 8–10, 14, 16–17 (same); *In re Service 1st Mortgage*, *supra* note 134, at 8–9, 25-26, 30 (finding that defendant advertised loans that were cheaper than it actually offered); *In re Accelerate Mortgage, supra* note 134, at 7–8, 18-19, 22–23 (finding that defendant advertised loans that were cheaper than it actually offered); *In re ClearPath Lending*, *supra* note 134, at 8–9, 23–24, 27–28 (same).

dreds, of thousands of consumers saw these advertisements.[140] Nonetheless, the CFPB did not require *any* of these lenders to pay redress and required them to pay modest penalties averaging only $330,000 per case.[141]

These cases raise claims and potential harm that is very similar to those raised in *In re Amerisave Mortgage Corporation*[142] that the CFPB filed in 2014 under Director Cordray. In *Amerisave*, the CFPB found, *inter alia*, that the defendants had advertised rates lower than those they were willing to offer, including in some cases by not properly disclosing that the advertised rates depended on very high credit scores or the purchase of points.[143] As in the cases that were part of the sweep the CFPB settled during the pandemic, the CFPB found that the *Amerisave* defendants' advertising of rates were deceptive and violated the MAP Rule.[144] However, in stark contrast to the sweep the CFPB conducted during the pandemic, the CFPB ordered the *Amerisave* defendants to pay $14.9 million in redress and $6 million in penalties.[145] In particular, the order required, *inter alia*, payment of redress to consumers who viewed the deceptive advertising and then took out a mortgage at a higher than advertised or quoted rate.[146] Given the magnitude of the harm in the *Amerisave* case and the high volume of deceptive mailers in the sweep, it is not clear why the CFPB settled the cases in the sweep for no redress and relatively modest penalties. Indeed, 16 senators sent a letter to Director Kraninger asking why the CFPB did not order the sweep defendants to pay redress to harmed servicemembers and their families and whether the CFPB even sought evi-

140. *See, e.g.*, *In re Sovereign Lending Group*, *supra* note 128, at 8 (noting 87,000 consumers received a given mailer); *In re Prime Choice Funding*, *supra* note 134, at 8, 10 (84,000 and 87,000 consumers); *In re Go Direct Lenders*, *supra* note 134, at 8 (30,000 consumers); *In re Service 1st Mortgage*, *supra* note 134, at 8–9 (134,000 and 250,000 consumers); *In re ClearPath Lending*, *supra* note 134, at 8–9 (260,000 and 80,600 consumers).

141. *See* discussion *supra* Section III.B.2.

142. Consent Order at 6–9, *In re Amerisave Mortg. Corp.*, https://perma.cc/6JL4-ZN42 (U.S. Consumer Financial Protection Bureau Aug. 12, 2014) (No. 2014-CFPB-0010).

143. *Id*. (finding that the defendants knew that they were advertising rates that they were not willing to honor and that they failed to disclose that some of the rates were based on credit scores of 800 or the purchase of points to lower the interest rate).

144. *Id.* (finding violations of 12 U.S.C. § 5536(a)(1)(B) (2018); 12 C.F.R. § 1014.3 (2011)).

145. *Id*. at 27, 29. The CFPB ordered the defendants to pay the redress to the CFPB and the CFPB ultimately paid more than $15.8 million to harmed consumers. CFPB, FINANCIAL REPORT OF THE BUREAU OF CONSUMER FINANCIAL PROTECTION: FISCAL YEAR 2018 27, 32 (Nov. 15, 2018), *available at* https://perma.cc/8GFR-SXZG. It is impossible to tell from the publicly available data precisely how many consumers received redress, but the CFPB sent consumers two groups of checks: 96,780 checks averaging $150 and another 50,061 averaging $27.29. *Id*. Even if some of the checks were reissues and many consumers received a check from each group, it is likely that tens of thousands of consumers received redress in *Amerisave*.

146. *In re Amerisave Mortg. Corp.*, *supra* note 142, at 27–28.

dence of consumers who, as was the case in *Amerisave*, took out loans with the defendants at a cost higher than advertised.[147]

In addition, in those cases that identified the amount of consumer monetary harm, the magnitude of the harm identified in orders filed during the pandemic tended to be smaller. In slightly more than half[148] of the orders in which the CFPB received some relief, one can calculate how much consumer harm those defendants caused.[149] As with the number of cases filed, there are a relatively small number of orders, again due to the generally slow pace of enforcement activity under Director Kraninger, but the availa-

147. Letter from Hon. Catherine Cortez Masto et al. to Kathleen Kraninger, Director, Consumer Financial Protection Bureau, *Concerns About Recent Public Enforcement Actions Against Mortgage Originators Offering Veterans Administration Guaranteed Loans* (Oct. 1, 2020), *available at* https://perma.cc/rZX2-YF5R.

148. 59% of the orders in the pre-pandemic period and 57% in the pandemic period allow an identification of the harm (16 orders in the pre-pandemic period and 13 orders during the pandemic, including four orders against different defendants in a single case). In the pre-pandemic period, there also are five cases in which a harm is identified but the amount cannot be calculated. Stipulated Final Judgment & Order at 7, *CFPB v. NDG Fin. Corp.*, https://perma.cc/E7GP-U8AF (S.D.N.Y. Feb. 4, 2019) (No. 1:15-cv-05211-CM) (S.D.N.Y. Feb. 4, 2019) (restraining defendants from collecting on unlawful loans, but providing no detail on the value of those loans); Consent Order at 12, *In re USA Serv. Fin., LLC*, https:/perma.cc/ZQ8G-26Y4 (U.S. Bureau of Consumer Financial Protection Nov. 25, 2019) (No. 2019-BCFP-0010) (ordering payment of $54,625.31 in redress and of an unspecified amount of credits to consumers' accounts); Consent Order at 12–13, *In re Conduent Educ. Servs., LLC*, https://perma.cc/BE3H-ZJNX (U.S. Bureau of Consumer Financial Protection May 1, 2019) (No. 2019-BCFP-0005) (ordering defendant to refund or credit overpayments, if any, by consumers and to prevent collection of undercharges, but providing no information on the amounts); Consent Order at 6, 23–24, *In re CMM, LLC*, https://perma.cc/MM2W-4DR5 (U.S. Bureau of Consumer Financial Protection Feb. 5, 2019) (No. 2019-BCFP-0004) (ordering refunds of overpayments and overdraft and insufficient funds fees and noting that defendants collected "at least $21,800 that consumers did not owe and likely resulted in overdraft fees being charged"); Stipulated Order for Permanent Injunction & Monetary Judgment at 28–32, 35–41, 49–54, *BCFP v. Equifax Inc.*, https://perma.cc/Z7VH-YLM5 (N.D. Ga. July 23, 2019) (No. 1:19-cv-03300-TWT) (ordering Equifax to pay up to $425 million in total as part of providing relief to consumers, including paying for administrative costs, provision of identity theft protection/credit monitoring/credit restoration services to consumers, and cash payments, some of which are capped initially at $31 million and $38 million respectively, although if funds remained after all other costs were paid those caps could be lifted). If those five cases were included in the pre-pandemic period, 78% of the orders would allow identification of the harm.

149. This calculation includes amounts ordered to be paid as redress (even if suspended), amounts ordered to be credited to consumers' accounts, and amounts the defendants are banned from collecting. In one case, the CFPB identified the harm in a press release, rather than the order. *See, e.g.*, Press Release, CFPB, Consumer Financial Protection Bureau and Multiple States Enter Into Settlement with Owner of ITT Private Loans for Substantially Assisting ITT in Unfair Practices, (Sept. 15, 2020) *available at* https://perma.cc/K9G2-3W6U (stating that the Stipulated Final Judgment and Order, *BCFP v. Student CU Connect CUSO LLC*, https://perma.cc/JT9S-8FTD (S.D. Ind. June 20, 2019) (No. 1:19-cv-02397-JRS-DLP (JLS) (JEMx) required the discharge of $168 million in loans). In some cases, the order suspends part of the ordered payments. *See, e.g.*, Consent Judgment at 11–12, *BCFP v. Vincent Howard*, https://perma.cc/Y3GD-Q9F2 (C.D. Cal. Mar. 27, 2019) (No. 8:17-cv-00161) (ordering a judgment for $35,256,275 in equitable relief "for the purpose of providing redress to Affected Consumers for the unlawful advance fees they paid" but suspending all but $50,000 of the order). For purposes of the analysis in this subsection, the full amount from the order is included, rather than just the portion actually paid by the defendants.

ble evidence supports the conclusion that while the pandemic raged, the cases that the CFPB settled identified significantly less consumer harm, demonstrating a trend toward bringing fewer cases against nonbanks involving large amounts of consumer harm and more cases against nonbanks identifying relatively small amounts of harm.

TABLE 4 – AVERAGE AMOUNT OF CONSUMER HARM IDENTIFIED IN ORDERS

	Orders Prior to Mar. 13, 2020 (Pre-Pandemic)	Orders Between Mar. 13 and Sept. 30, 2020 (Pandemic)
Average	$42,730,757	$34,851,517
Median	$5,630,742	$1,345,224
Average Excluding Two Cases Against Banks	$44,759,538	$29,672,477
Median Excluding Two Cases Against Banks	$5,261,484	$1,310,112

Both the average and median harm identified in orders from the pre-pandemic period are significantly greater than the same figures from the pandemic period. Furthermore, the difference in averages expands if one considers only orders against nonbanks by excluding the two orders involving banks. As is discussed *supra* in Section III.B.2, for the period in question, the CFPB under Director Kraninger filed only four cases against banks, and there had been settlements in only two of those cases; one in the pre-pandemic and one in the pandemic period.[150] Because the activity against banks was roughly consistent in the two periods and there was significantly more activity against nonbanks, excluding the orders against banks gives a clearer view of how the CFPB's enforcement strategy altered during the pandemic—namely that there have been fewer settlements with defendants that identified large amounts of consumer harm and more identifying much smaller amounts of harm. To be clear, this is not to say that there have been no settlements involving large amounts of consumer harm during the period encompassed by the pandemic, there have,[151] but the *trend* has been toward more settlements involving less harm.

150. Consent Order, *In re TD Bank, N.A.*, https://perma.cc/H49Q-W3AP (Bureau of Consumer Financial Protection Aug. 20, 2020) (No. 2020-BCFP-0007); Consent Order, *In re USAA F.S.B.*, https://perma.cc/NCH8-3BZ5 (U.S. Bureau of Consumer Financial Protection Jan. 3, 2019) (No. 2019-BCFP-0001).

151. *See, e.g.*, Stipulated Final Judgment & Order at 6–7, *BCFP v. PEAKS Trust 2009-1*, https://perma.cc/5777-ZAE8 (S.D. Ind. Oct. 1, 2020) (No. 1:20-CV-2386-JRS-MJD) (ordering the defendants to cease collection on approximately $330 million in outstanding principal and fees from unlawful

For example, the two periods have comparable numbers of orders, but just over half of the orders in the pandemic period are under $1.4 million while the median in the pre-pandemic period is over five million dollars. Further, if one looks at just the orders at or below the respective medians, the difference becomes even clearer: the average harm in those cases below the median in the pre-pandemic period is still more than $2.1 million, while the average for the pandemic period is just under $564,000. Indeed, 38% of the orders issued during the pandemic involved less than one million dollars in consumer harm, while only 19% of the orders before the pandemic did.

As just one example of a case the CFPB settled during the pandemic, the CFPB found that remittance providers had failed to refund fees as required when funds were not made available on the date promised.[152] The CFPB noted "more than 9,280 instances . . . resulting in a total cost to consumers of approximately $99,944.95,"[153] or approximately $10.77 per instance.[154] As another example, the CFPB filed a case against a short-term, small-dollar nonbank lender that offered payday, installment, and auto title loans.[155] In that case, the defendant, *inter alia*, failed to provide 1,228 consumers with a promised 50% discount, causing a total of $286,675.64 in harm.[156] While the harm per consumer was significant (an average of $233.45 per consumer), the CFPB identified relatively few consumers who were harmed.

Thus, while one must be cautious given the relatively small numbers of cases, the evidence on the amount of consumer harm identified, when combined with the consistent evidence of other measures discussed *infra* in Sections III.B.4–6, supports the conclusion that as economic devastation began rippling out from a historic pandemic, the CFPB chose to settle more cases against nonbanks that identified relatively smaller amounts of con-

loans). The *PEAKS* case is related to the unlawful student loan practices at issue in the ITT Educational Services case filed under Director Cordray. Complaint for Injunctive Relief & Damages at 6–25, *CFPB v. ITT Educ. Servs., Inc.*, https://perma.cc/LY7V-598A (S.D. Ind. Feb. 26, 2014) (No. 1:14-cv-292); *see also* Stipulated Final Judgment &Order at 6, *BCFP v. Student CU Connect CUSO, LLC*, https://perma.cc/JT9S-8FTD (S.D. Ind. June 20, 2019) (No. 1:19-cv-2397-JRS-DLP (JLS) (JEMx)) (requiring defendants to cease collection on another group of loans related to the ITT litigation). Although the ITT case originated under Director Cordray, the CFPB settled all three cases under Director Kraninger.

152. Consent Order at 7–8, *In re Sigue Corp.*, https://perma.cc/8MR5-TPQ2 (U.S. Bureau of Consumer Financial Protection Aug. 31, 2020) (No. 2020-BCFP-0011).

153. *Id.* at 8.

154. The CFPB also settled another case against remittance providers, but that order required no redress and did not identify an amount of consumer harm. Consent Order, *In re Trans-Fast Remittance LLC*, https://perma.cc/QL78-VJA2 (U.S. Bureau of Consumer Financial Protection Aug. 31, 2020) (No. 2020-BCFP-0010).

155. Consent Order at 4, *In re Cottonwood Fin. Ltd.*, https://perma.cc/7JAL-K6YA (U.S. Bureau of Consumer Financial Protection Apr. 1, 2020) (No. 2020-BCFP-0001).

156. *Id.* at 3, 8, 9, 16.

sumer harm,[157] rather than changing its focus to bring cases addressing violations related to the pandemic.

4. During the Crisis, the CFPB Required Defendants to Pay Lower Amounts of Redress to Consumers.

As with the data on consumer harm identified in orders, the data on how much—and how often—the CFPB is requiring defendants to pay redress to consumers supports the conclusion that during the pandemic, the CFPB is settling more, but smaller, cases against nonbanks.

In those cases settled during the pandemic in which defendants actually were ordered to pay redress, the defendants typically had to pay less.[158] Once again, the single case against a bank in each period masks the shift in most of the enforcement activity from the pre-pandemic to the pandemic period. In this case, when the two bank cases are included, the average is higher during the pandemic period, but when they are excluded, the average for the pre-pandemic period is roughly the same, but the average for the pandemic period drops substantially.

157. One cannot always tell from the publicly available information whether the lower amounts of harm and the increase in cases with no harm result from the CFPB pursuing cases for conduct that actually caused less financial harm to consumers or whether—as appears the case with the lender sweep—the CFPB is failing to identify financial harm that defendants actually caused consumers. Either way, the CFPB's enforcement strategy during the pandemic has focused on cases that provided less redress to consumers. This analysis includes orders in cases filed before Director Kraninger's tenure. Because Director Kraninger controlled the terms on which these cases settled, it is appropriate to include these orders in the analysis of the CFPB's enforcement strategy under her. If one considers only orders in cases in which the CFPB filed the case while she was Director, there are only six orders against nonbanks and one against a bank in the pre-pandemic period, making any comparison less probative. The numbers for the pandemic period do not change. The average harm in the pre-pandemic period decreases—although it includes only six cases—to just over $30 million, which is roughly comparable to the average during the pandemic period, but the median remains significantly higher at approximately $3.1 million versus $1.3 million during the pandemic.

158. This analysis includes only amounts that defendants actually are ordered to pay, as opposed to amounts that are ordered but suspended or amounts defendants are ordered not to collect. Thus, it does not include orders where redress was ordered but then suspended in full. Those figures are captured in the analysis *supra* in Section III.A.3. As is discussed *infra* in Section III.B.6, although the CFPB suspends some of the ordered redress in some cases due to the defendants' limited resources, the percentage of cases in which this occurs actually has decreased during the pandemic period.

TABLE 5 – AMOUNTS OF REDRESS DEFENDANTS ACTUALLY ORDERED TO PAY[159]

	Orders Prior to Mar. 13, 2020 (Pre-Pandemic)	Orders Between Mar. 13 and Sept. 30, 2020 (Pandemic)
Average	$6,646,840	$9,237,310
Median	$137,518	$99,945
Average Excluding Two Cases Against Banks	$6,133,004	$461,041
Median Excluding Two Cases Against Banks	$75,036	$64,972

By contrast, the medians are relatively close. Thus, the data shows that while many cases in both periods require relatively little redress, the pre-pandemic period included more cases against nonbanks wherein the defendants were ordered to pay larger amounts of redress, and these cases pulled the average for that period higher than the average during the pandemic.

A number of cases in both periods suspend a portion of the ordered redress because of financial considerations.[160] If one excludes those cases in which a portion of the redress was suspended, there are only four[161]

159. These figures include only those orders where the defendants were ordered to pay some amount of redress (either directly to consumers or to the CFPB for distribution to consumers), and the amount could be determined from the order. If the order required payment of redress but suspended the entire amount, the order was not included in this analysis. There were three such orders in the pre-pandemic period (Universal Debt & Payment Solutions, Edmiston Marketing, and ITT) and one in the pandemic period (Certified Forensic Loan Auditors). Stipulated Final Judgment & Order as to Defendant Bagga at 15, *CFPB v. Universal Debt & Payment Sols., LLC*, https://perma.cc/R8UW-8M96 (N.D. Ga. Nov. 15, 2019) (No. 1:15-cv-00859-RWS); Consent Order at 25, *In re Edmiston Mktg., LLC*, https://perma.cc/9PJH-BYGG (U.S. Bureau of Consumer Financial Protection Nov. 25, 2019) (No. 2019-BCFP-0011); Stipulated Final Judgment & Order at 7, *CFPB v. ITT Educ. Servs., Inc.*, https://perma.cc/7GCN-3GBW (S.D. Ind. Aug. 16, 2019) (No. 1:14-cv-00292-SEB-TAB) (ordering the CFPB to amend its proof of claim in the bankruptcy proceeding to $0 such that it would receive nothing from the ITT's estate); Stipulated Final Judgment & Order as to Certified Forensic Loan Auditors, LLC (CA), Certified Forensic Loan Auditors (TX) and Andrew P. Lehman at 7–11, *BCFP v. Certified Forensic Loan Auditors, LLC*, https://perma.cc/X84E-VC6D (C.D. Cal. July 20, 2020) (No. CV 19-07722-ODW (JEMx)). If those orders are included as zero, the figures reduce for both periods. Similarly, as with the calculations of harm identified in the order, three cases were excluded because the defendants were ordered to pay redress, but the amount could not be determined from the order. *See* discussion *supra* text accompanying note 148 (discussing the exclusion of Conduent, CMM, and Experian).

160. *See* discussion *infra* Section III.B.6.

161. Consent Order at 16, *In re Cottonwood Fin. Ltd.* at 16, https://perma.cc/7JAL-K6YA (U.S. Bureau of Consumer Financial Protection Apr. 1, 2020) (No. 2020-BCFP-0001) (ordering payment of $286,675.64); Consent Order at 15, *In re Specialized Loan Servicing, LLC*, https://perma.cc/R894-2X7J (U.S. Bureau of Consumer Financial Protection May 11, 2020) (No. 2020-BCFP-0002) ($775,000); Consent Order at 19, *In re Sigue Corp.* at 19, https://perma.cc/8MR5-TPQ2 (U.S. Bureau of Consumer Financial Protection Aug. 31, 2020) (No. 2020-BCFP-0011) ($99,944.95); Consent Order at 10, *In re*

nonbank orders in the pandemic period and seven in the pre-pandemic period, but the difference remains. The average redress for the four orders in the pandemic period is only $626,711 while the average for the seven cases in the pre-pandemic period is over $9.5 million.[162]

In other words, during the pandemic, the number and percentage of settlements involving high amounts of redress dropped significantly, resulting in settlements that mostly required defendants to pay relatively low amounts of redress.

5. During the Crisis, the CFPB Ordered Lower Penalties.

As with the other metrics, the data on penalties ordered also shows a trend toward smaller cases against nonbanks. As with Table 5 *supra*, the presence of a single case against a bank in each period masks the differences in the much more frequent cases against nonbanks. Although the medians excluding the banks are the same, the mean for cases against nonbanks for the pre-pandemic period is significantly higher, demonstrating that the pre-pandemic period included a number of orders involving significantly higher penalties and a general trend during the pandemic toward fewer cases with large penalties against nonbanks.[163]

Lobel Financial Corp., https://perma.cc/CBY8-63RH (U.S. Bureau of Consumer Financial Protection Sept. 21, 2020) (No. 2020-BCFP-0016) ($1,345,224).

162. As with all the analyses, including the one case against a bank in each period masks the difference in the vast majority of cases—those against nonbanks. If one includes that single bank case in each period, the average during the pre-pandemic period for orders that did not suspend any redress increases slightly to just over $9.9 million, but the average in the pandemic period increases dramatically to over $19.9 million. If one considers only cases against nonbanks that were filed originally and settled under Director Kraninger, the number of pre-pandemic cases with redress that was not suspended drops to four, and the average drops significantly to $1.5 million, although that is still considerably higher than the pandemic average of $626,711, which would not change.

163. As with the analysis in Section III.A.4, this trend does not appear to be a result of the CFPB prosecuting more defendants with few resources. *See* discussion *infra* in Section III.A.6.

TABLE 6 – PENALTIES ORDERED

	Orders Prior to Mar. 13, 2020 (Pre-Pandemic)	Orders Between Mar. 13 and Sep. 30, 2020 (Pandemic)
Average / Excluding Outlier[164]	$5,974,438 $1,886,370	$1,412,273
Median	$200,000	$187,500
Average Excluding Two Cases Against Banks + Outlier	$ 1,813,024	$289,048
Median Excluding Two Cases Against Banks + Outlier	$150,000	$150,000

6. The Observed Trend is not a Result of Pursuing More Cases Against Defendants with Limited Resources.

Given that the orders will in some cases suspend all or a portion of the redress ordered or require payment of only nominal penalties (*e.g.*, one dollar per defendant),[165] one should consider whether the trend toward smaller cases during the pandemic is actually a byproduct of an increase in the number of orders against defendants with limited resources. The evidence indicates that the data regarding lower amounts of redress and penalties in orders against nonbanks during the pandemic is not a product of an increase in suits against defendants with fewer resources. First, in some instances, the orders themselves indicate that the amounts of redress or penalties were lowered because of the defendants' financial constraints.[166] The percentage

164. On top of the two orders against banks under Director Kraninger's tenure, one of the pre-pandemic cases, Equifax, had an outlier penalty of $100 million or more. *See* Stipulated Order for Permanent Injunction & Monetary Judgment at 59–60, *BCFP v. Equifax*, https://perma.cc/3A7E-4H7B (N.D. Ga. July 23, 2019) (No. 1:19-cv-3300). Of the 207 orders through September 30, 2020 (which includes all orders under prior directors), in which a penalty was imposed, only three were $100 million or more. The next highest penalties were for $40 million. For context, the average penalty imposed over all enforcement actions is approximately $7 million and the median penalty is only $645,000. *See also* Cowie, *supra* note 81 (manuscript at 38–39, 40 nn.187–88, 190) (discussing the exclusion of outlier penalties from these types of analyses). Given the rarity of such large penalties, and the relatively short duration of the pandemic to date, it is appropriate to exclude that penalty from the comparison. As the table shows, if it is included, it only heightens the disparity between the two periods.

165. In ordering a penalty the CFPB or the court must consider a defendant's financial resources. 12 U.S.C. § 5565(c)(3)(A) (2018) (providing that "[i]n determining the amount of any penalty . . . the Bureau or the court *shall* take into account the appropriateness of the penalty with respect to (A) the size of financial resources . . . of the person charged[.]") (emphasis added). When a penalty is ordered, even a nominal one, the CFPB may use its Civil Penalty Fund to provide monetary redress to consumers harmed by the defendant's unlawful conduct for which the penalty was ordered. 12 U.S.C. § 5497(d)(2) (2018); *see generally* Cowie, *supra* note 81, at 3–7.

166. *See, e.g.*, Stipulated Final Judgment & Order at 5, 7, *CFPB v. ITT Educ. Servs., Inc.*, https://perma.cc/7GCN-3GBW (S.D. Ind. Aug. 16, 2019) (No. 1:14-cv-00292-SEB-TAB) (ordering a judgment

of orders containing such reductions actually decreased during the pandemic period, dropping from 41% to 35%. Similarly, the percentage of orders with only nominal penalties[167] also decreased slightly in the pandemic period, dropping from 33% to 27%.[168]

C. What Enforcement Activity Should the CFPB have Taken?

The CFPB could have taken—and, to be clear, *still can take*—any number of actions that will help consumers and provide certainty to the marketplace. One of the CFPB's primary functions is to take "enforcement action to address violations of Federal consumer financial law" for the purpose of ensuring that consumers and companies have access to fair and competitive marketplaces.[169] Deterring unlawful conduct is a key goal of the public enforcement of consumer laws.[170] Enforcement actions deter unlawful conduct both directly, by stopping the conduct at issue,[171] and—perhaps even more importantly—indirectly, by putting other market actors on notice that the conduct is unlawful and that the CFPB will prosecute said conduct.

Similarly, consumers can hardly be said to have access to a "fair" marketplace if their participation causes them harm, including, but not limited to, monetary loss, from unlawful conduct.[172] Remediating that harm also is

for equitable monetary relief of $60 million but ordering the CFPB to amend its proof of claim in the bankruptcy proceeding to $0 such that it would receive nothing from the ITT's estate); Stipulated Final Judgment & Order at 5–9, *BCFP v. Timemark Solutions, Inc.*, https://perma.cc/V8S2-X9GS (S.D. Fla. Aug. 12, 2020) (No. 9:20-CV-81057) (ordering approximately $3.8 million in redress, but suspending all but $22,000 based on the defendants' financial condition and ordering each defendant to pay a $1 penalty). This analysis includes only orders where the amounts are explicitly reduced due to the defendants' financial conditions. If, for example, the order simply notes that the penalty was determined by "taking into account the factors in 12 U.S.C. § 5565(c)(3)," *see, e.g.* Consent Order at 23, *In re Trans-Fast Remittance LLC*, https://perma.cc/QL78-VJA2 (U.S. Bureau of Consumer Financial Protection Aug. 31, 2020) (No. 2020-BCFP-0010), the order is not included in this analysis.

167. Nominal penalties are defined in this article as less than $10 in total for all defendants in a given order.

168. This figure is the percentage of orders requiring the payment of a penalty, and does not include orders where no penalty was imposed.

169. 12 U.S.C. § 5511(a), (c)(4); *cf.* Prentiss Cox, *Public Enforcement Compensation and Private Rights*, 100 MINN. L. REV. 2313, 2351 & n.194 (2016) (noting the "unfair market advantage" wrongdoers have over their competitors who follow the law) (Cox, *Public Enforcement*).

170. Cox, *supra* note 169 at 2350 & n.190 (2016) ("Deterrence is the core goal of civil law enforcement."); Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 359 (2015) ("The primary purpose of the SEC's enforcement activity is deterrence.").

171. Cox, *supra* note 169 at 2350 (noting that injunctive relief is central to "directly deterring future misconduct").

172. Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 FORDHAM URB. L.J. 1903, 1904 n.1 (2013) (arguing consumer protection laws should be enforced to maximize "the physical but also the economic health and safety of consumers and the economy"); Amy Widman, *Advancing Federalism Concerns in Administrative Law Through a Revitali-*

an important function of enforcement activity.[173] Recognizing the importance of making consumers whole through enforcement actions, Congress gave the CFPB extensive authority to seek relief for individual consumers[174] and even created a penalty fund that could be used to compensate harmed consumers when the defendants who caused the harm could not.[175] Making defendants pay for their violations—by requiring wrongdoers to make consumers whole, imposing penalties, or ordering disgorgement—also increases the deterrent effect of the action.[176] Enforcement actions also can deter unlawful conduct, and even provide a blueprint for affirmatively beneficial conduct, by giving companies credit when they act responsibly in handling violations.[177]

Unfortunately, more than ten months into a historic pandemic, the CFPB under Director Kraninger took no public enforcement action to address consumer harm arising from the pandemic. The fact that others have acted[178] is not enough. The fact that the CFPB—a "streamlined independent consumer entity" that consolidated the consumer protection powers from seven other federal regulators[179]—had not taken any action speaks volumes to the marketplace. Combined with the public statements that it would not prosecute certain violations,[180] the CFPB under Director Kraninger sent a clear message: the cop is no longer on the beat.

Companies always have competing demands on their resources, and during the pandemic those demands likely are more numerous. Putting

zation of State Enforcement Powers: A Case Study of the Consumer Product Safety and Improvement Act of 2008, 29 Yale L. & Pol'y Rev. 165, 189 (2010) (noting that "[i]n the context of consumer protection, the public interest largely consists of the health and safety of consumers, and anti-public-interest behavior is the absence of regulation or enforcement").

173. Cox, et al., *Strategies of Public UDAP Enforcement*, *supra* note 117, at 48 (noting the "structural need" for public enforcers to obtain redress for harmed persons due to limited access to private class actions); Velikonja, *supra* note 170, at 332 (stating that the SEC has "become an important source of compensation for defrauded investors").

174. 12 U.S.C. § 5565(a) (authorizing courts and the CFPB to "grant any appropriate legal or equitable relief," including, *inter alia*, restitution, "damages or other monetary relief," "refund of moneys or return of real property," and "rescission or reformation of contracts"); *see also* Peterson, *supra* note 57, at 1078 & fig.2 (2016) (discussing the relief CFPB actions provided to consumers from 2012 through 2015).

175. 12 U.S.C. § 5497(d); *see also* Cowie, *supra* note 81 (discussing how the CFPB has used its Civil Penalty Fund to provide hundreds of millions in monetary relief to harmed consumers when the defendants did not have the resources to pay for the harm they caused).

176. 12 U.S.C. § 5565(a)(2)(D), (F), (H); *id.* § 5565(c); *see also* Cowie, *supra* note 81, at 4 (noting deterrent effect of penalties); Cox, *Public Enforcement Compensation*, *supra* note 169, at 2350–51 (noting that penalties and making consumers whole deters unlawful conduct).

177. *See generally* Responsible Business Conduct: Self-Assessing, Self-Reporting, Remediating, and Cooperating (CFPB Bulletin 2020-01), 85 Fed. Reg. 15,917, 15,918 (Mar. 20, 2020).

178. *See* discussion *supra* Section III.A.

179. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1061(b), 124 Stat. 1376 (2010); S. Rep. No. 111-176, 111th Cong., 2d Sess. 11 (2010).

180. *See* discussion *supra* Section III.A.

processes into place to ensure that consumers are protected during the pandemic will require the expenditure of likely scarce resources. Absent action by the CFPB, some companies will not prioritize devoting the necessary resources or may even prey upon consumers. Indeed, the CFPB itself found an "elevated risk of consumer harm" during the pandemic due to inadequate training, staffing shortages, and a lack of policies that led to companies taking money from consumers when they should not have, failing to give consumers protections required by law, telling consumers erroneous information about possible relief, and failing to process requests or resolve disputes in a timely manner.[181] Companies that spend fewer resources on protecting consumers have a competitive advantage over those companies who do devote the appropriate resources. By not taking public action, the CFPB is creating a playing field that is not level and that may trap consumers for years to come.

The CFPB needs to change its enforcement strategy to pivot quickly (1) to identifying conduct related to the pandemic that is harming consumers and (2) to bringing actions *now* to protect those consumers. The pandemic is pushing people to the edge, financially and physically. Ultimately, mitigating the economic harm from the pandemic will require a concerted national effort that is beyond the scope of any agency. In the meantime, the CFPB should focus on taking public action against conduct that may push people over the economic edge before the country acts on the larger issues. To do so, the CFPB should consider the following guidelines in deciding which actions to pursue. Does the conduct undercut protections specifically designed to protect consumers during the pandemic (*e.g.*, failing to provide CARES Act forbearances to furnish accurate credit information or to follow state laws prohibiting foreclosures or repossessions during the pandemic)? Will the conduct interfere with consumers' ability to hold a job, stay in their home, or recover from the pandemic (*e.g.*, violating foreclosure or repossession laws or failing to report forbearances or accommodations accurately)? Does the conduct unlawfully take money from consumers who are already economically distressed by the pandemic (*e.g.*, charging fees so that consumers can get forbearances to which they are entitled under law or creating foreclosure relief or loan modification scams)? Does the unlawful conduct impact those who are already disproportionately affected by the pandemic (*e.g.*, people of color)? Does the conduct prey on consumers' fears about the pandemic or its fallout? How widespread might the conduct, or similar conduct, be (*e.g.*, failing to have appropriate policies in place that lead to violations)? Actions addressing these concerns send the signal that consumer harm will not be tolerated, even during a pandemic.

181. CFPB, SUPERVISORY HIGHLIGHTS, *supra* note 3, at 6–7, 14–18 (Jan. 2021).

1. *Change its Enforcement Strategy*

Unfortunately there is too much unlawful conduct in the consumer marketplace for public enforcers like the CFPB to prosecute all of it, and every public enforcer faces serious resource constraints. Thus, public enforcers always must weigh competing interests—including the magnitude of possible harm from the unlawful conduct alleged in a given case, the deterrence benefits of bringing a given case, and the cost of being unable to bring other worthy cases—in determining which cases to investigate and bring. They face similar considerations in determining whether, and if so on what terms, to settle an action.[182] Ultimately, the determination whether to bring a given enforcement action should be a fact-specific analysis that considers the enforcer's goals, its resources, the effect on the marketplace, and the benefit to consumers.[183]

Historically, the CFPB has typically taken a very deliberative approach, using its ability to issue subpoenas as part of an investigation to develop relevant facts extensively *before* filing an action.[184] The use of these tools results in a process that looks very much like discovery in federal court,[185] although only the CFPB can use these tools before the filing of an action.[186] These investigations generally are not public,[187] and often take two years or more before leading to public enforcement action.[188] However, because the extent of the harm and the unlawful conduct is clear before filing, many CFPB actions resolve immediately or relatively quickly after the first public action is taken. At least 60% of the orders resolving CFPB actions against given defendants were filed or proposed on the same day that the CFPB took the first public action (*e.g.*, the CFPB filed a consent order administratively that filed and settled the matter in the same doc-

182. Cox, *Public Enforcement Compensation*, *supra* note 169, at 2352 ("Whether to seek civil penalties, public compensation, or both as monetary relief for violations also is a discretionary matter, and different government enforcers have different policies as to balance of remedies.").

183. *See* Cowie, *supra* note 81.

184. 12 U.S.C. § 5562(b), (c) (2018) (allowing the CFPB to issue "civil investigative demands," or CIDs, demanding, *inter alia*, documents, production of reports, or attendance at depositions as part of an investigation of violations of Federal consumer financial law before the "institution of any proceedings under the Federal consumer financial law"); *see generally* 12 C.F.R. pt. 1080 (2012) (Rules Relating to Investigations).

185. *Compare* 12 U.S.C. § 5562(c)(1)(A)–(E), *with* FED. R. CIV. P. 30 (depositions), 33 (interrogatories), 34 (requests for documents and tangible things).

186. 12 U.S.C. § 5562(c).

187. 12 C.F.R. § 1080.14(b).

188. *See* BCFP, FISCAL YEAR 2020: ANNUAL PERFORMANCE PLAN AND REPORT, AND BUDGET OVERVIEW 80 tbls. 2.2.7.74 & 2.2.7.75 (Feb. 2020) (stating that in fiscal year 2019 only 36% of actions were settled or filed within two years of opening an investigation with the average time between opening an investigation and taking public action being 32 months and that between fiscal years 2014 and 2019 the average percentage of cases in a year where public action was taken within two years of opening an investigation was 58%).

ument or filed a proposed stipulated judgment contemporaneously with a complaint). In addition, 78% of the orders resolving CFPB actions issue within 60 days of the CFPB's filing of the action.[189]

The CFPB's typical strategy has several benefits. First, because these tools allow the CFPB to determine the relevant facts before taking public action (*e.g.*, filing a case), including in particular the breadth and scope of consumer harm from the alleged unlawful conduct, the CFPB can decide whether it should take public action because of those facts and in light of its enforcement goals (*e.g.*, deterrence and remediating harm). Cases involving higher amounts of consumer harm, higher penalties, particularly egregious conduct, or emerging threats can send strong signals to the marketplace. Other market participants can assess their own possible exposure for similar unlawful conduct and, if necessary, change their conduct to mitigate any existing harm and prevent future harm. Thus, as its various investigations develop, the CFPB may choose to prioritize taking public action when there is significant harm and may decide to close investigations without public action if it appears that the unlawful conduct was isolated and sporadic. Understanding the full extent of the harm also allows the CFPB to determine whether to settle or litigate the matter prior to filing in federal court. Second, because so many defendants settle when the cases are filed, in most cases the CFPB can achieve its goals without the uncertainty and cost of protracted litigation. Lastly, this strategy allows the CFPB more control over its expenditure of scarce enforcement resources (namely the time of its enforcement attorneys and staff). Unlike in federal litigation where the CFPB must respond to courts and demands by the defendants, the CFPB controls the pace of its non-public investigations.[190] Therefore, it can adjust the timing of a given investigation and reallocate resources to other matters as it deems necessary. The CFPB also does not incur the costs of responding to defendants' motions or discovery requests during an investigation.

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189. In some cases, it can take the court more than a month to review the proposed order, determine that it is appropriate, and issue the final order, even if no substantive changes are made to the proposed order. *Compare, e.g.*, [Proposed] Stipulated Final Judgment and Order, BCFP v. Timemark Solutions, Inc., No. 9:20-cv-81057 (S.D. Fla. July 7, 2020), *with* Stipulated Final Judgment and Order, BCFP v. Timemark Solutions, Inc., No. 9:20-cv-81057 (S.D. Fla. Aug. 12, 2020). These figures include only those orders that granted the CFPB some relief against at least one of the defendants in the action (*e.g.*, enjoining defendants' conduct or ordering defendants to pay redress or penalties). In some cases, the CFPB filed an action against multiple defendants, and multiple orders issued resolving the action against different subsets of the defendants. These orders are included separately in the analysis. There have been six orders (through September 30, 2020) that resolved an action against at least one defendant in which the CFPB received no relief (*e.g.*, the case was dismissed). Including those orders has a minimal impact, dropping the percentage only one point to 77%.

190. Of course, the subjects of such investigations may delay the investigations by not responding to civil investigative demands in a timely manner, but the CFPB still controls how fast to push the investigation in general.

The CFPB's typical strategy, however, has serious drawbacks in addressing emerging threats or rapidly changing circumstances. In these contexts, two years—and often more—is simply too long to wait for public signaling that regulators are addressing arising problems and that given conduct is unlawful. Too many consumers and lawful market competitors will be harmed in the meantime. As explained *supra* in Section II, the unfolding economic fallout from the pandemic is just such an emerging threat. There is widespread and increasing economic harm that can be exacerbated by unlawful and even predatory conduct.

Unfortunately, even assuming *arguendo* that the CFPB has begun nonpublic investigations into pandemic-related violations,[191] the fact remains that more than ten months into a historic pandemic, the CFPB had not taken any public enforcement action related to COVID-19 aside from issuing statements providing flexibility to companies that violate the law and pablum statements "encouraging" companies to work with consumers.[192] Moreover, under the CFPB's normal enforcement strategy, none[193] of the deterrent effects described below will accrue *for years*—during which time countless additional consumers will be harmed and during which time the marketplace will have no idea what conduct the CFPB considers unlawful.[194] In normal times, that strategy may be a reasonable way to allocate

191. Eleanor Laise, *Financial Watchdog Under Fire Amid Pandemic*, BARRON'S (Nov. 2, 2020) ("The CFPB said in a statement to *Barron's* that it has launched numerous new investigations in 2020, 'some of which directly concern Covid-19.'").

192. *See, e.g.*, FCRA Statement, *supra* note 85, at 2–3; Mortgage Servicing Statement, *supra* note 86, at 6–7; HMDA Statement, *supra* note 88, at 1.

193. The subjects of CFPB investigations may have some idea of the conduct that concerns the CFPB, but it is not until very late in the investigation process that the CFPB explains in detail what conduct it believes violated the law, and even then, that information does not become public until a complaint or consent order is filed.

194. The CFPB appears to have focused on pandemic-related problems in its supervisory activity, which is not public, as opposed to taking public enforcement action. On July 16, 2020, the CFPB gave a presentation on its supervisory and enforcement work during the pandemic. CFPB, CONSUMER FINANCIAL PROTECTION WEEK: CONDUCTING SUPERVISORY AND ENFORCEMENT WORK DURING A PANDEMIC (July 16, 2020) (video), https://perma.cc/87PK-FJ4X. The presentation described how the CFPB changed its approach to supervisory work by adopting a new prioritized assessment approach to identify concerns related to the pandemic, but it did not describe any changes to enforcement in light of the pandemic. *Id.* Supervision and enforcement are both important tools, but they play different roles and have different strengths. As is relevant here, supervisory activity simply does not provide the same deterrent effect and does not signal the marketplace in the same way as enforcement, and therefore it is not a sufficient response in itself to the crisis. *First*, as the CFPB itself states, the prioritized assessments are "not designed to identify violations of Federal consumer financial law." COVID-19 SUPERVISORY HIGHLIGHTS, *supra* note 3. *Second*, supervisory work is *not* public, and therefore does not provide the signaling benefits to consumers and the marketplace that public enforcement actions do. Although the CFPB does produce occasional supervisory highlights, they provide far less detail about the violations. *Compare, e.g.*, CFPB, Supervisory Highlights, Issue 22 – Summer 2020 5 (Sept. 2020) (stating only that "[e]xaminers found that one or more debt collectors falsely threatened consumers with lawsuits that the collectors could not legally file or did not intend to file, in violation of Section 807(5) [15 U.S.C. § 1692e(5),]" but providing no details on the unlawful conduct, including failing to state what action(s)

scarce enforcement resources, but in times of crisis and rapid change like the pandemic, the benefits of providing increased clarity to the market *now* warrants taking public action more quickly,[195] especially given that the CFPB can use discovery to uncover the full extent of consumer harm *after* taking public action. As discussed *supra*, other federal agencies and state actors have acted to combat unlawful pandemic-related conduct, but the CFPB has not.

Thus, in the context of the pandemic, the CFPB should change its enforcement strategy to take public action *now*. Changing the CFPB's enforcement strategy to file some public enforcement actions quickly, even if based on a relatively small number of instances, provides several potential benefits. First, the complaint[196] will provide the marketplace with notice

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the entity took or whether it was legally prohibited from taking said action(s) or did not intend to do so) *with* Consent Order 22–23, 28, Encore Capital Grp., Inc., CFPB No. 2015-CFPB-0022 (Sept. 9, 2015) (finding that representing explicitly or implicitly that consumers had a legally enforceable obligation to pay debt where the applicable state statutes-of-limitations had expired was both deceptive under 12 U.S.C. § 5536(a) and violated the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692e(5), 1692e(10)), Complaint 18–48, CFPB v. Universal Debt & Payment Solutions, LLC, No. 1:15-cv-0859 (N.D. Ga. Mar. 26, 2015) (alleging in detail a scheme to deceive consumers that included false threats of litigation). Indeed, the CFPB's Supervisory Highlights related to its prioritized assessments identified numerous problems that appear to have caused significant consumer harm, but the highlights provide little detail on the conduct or the scope of the possible harm. *See generally* COVID SUPERVISORY HIGHLIGHTS, *supra* note 3 (noting inaccurate credit reporting; erroneous taking of consumers' money; erroneous cancelation of preauthorized transfers; erroneous failure to cancel preauthorized transfers; failing to process forbearances timely; and erroneously moving people into forbearances they did not request). Despite the number of different types of problems identified in the highlights, the CFPB appears merely to have sent close-out letters and made supervisory recommendations. *Id.* at 3. The confidential nature of supervision also prevents outsiders from assessing the regulator's efforts. *See* McCoy, *Hearing*, *supra* note 56, at 19, https://perma.cc/C3FM-QLXT (noting that the highly confidential nature of examinations "make[s] it easy for a lax regulator to hide its tracks"). *Third*, because it is confidential, it does not create the same reputational risk to an offender as public enforcement action—in other words, no one knows that the offender broke the law. As a result, supervisory actions may not result in the same level of compliance by the entity. *Id.* at 19–22 (noting that focusing on nonpublic examinations at the expense of public enforcement proceedings by the Office of Thrift Supervision and the Office of the Comptroller of the Currency failed to ensure compliance with the laws); OFFICES OF INSPECTOR GENERAL, EVALUATION OF FEDERAL REGULATORY OVERSIGHT OF WASHINGTON MUTUAL BANK, REPORT NO. EVAL-10-002 33 (Apr. 2010) (finding that if the agency had taken formal enforcement action against a bank that later it failed, the bank may have taken "more aggressive steps to correct weaknesses and stem the losses that eventually occurred because of its risky loan products") https://perma.cc/SXU3-Q2RP; COVID SUPERVISORY HIGHLIGHTS, *supra* note 3 (reporting numerous problems but not identifying any specific companies). *Lastly*, supervision cannot penalize, meaning that the only consequence of getting caught is having to do what it should have done in the first place.

195. *See, e.g.*, Park, *Competition to Enforce*, *supra* note 114, at 118–119 (noting that different types of enforcement actions have different impacts).

196. Although the CFPB could file these actions administratively, *see* 12 U.S.C. § 5563(a), the relatively short duration of these proceedings makes extensive discovery infeasible. *See* 12 C.F.R. § 1081.400 (a) (providing that "the hearing officer shall file a recommended decision . . . in no event later than 300 days after filing of the notice of charges"). Thus, unlike in federal court, the CFPB likely would not have time to develop fully the extent of the respondents' unlawful conduct or of the harm to consumers.

that the CFPB believes the conduct in question is unlawful and that the CFPB is willing to act to stop it.[197] With this notice, the defendants may choose to alter their conduct while the action is pending to mitigate or prevent similar harm to future consumers as well as limiting their own potential liability if the CFPB wins the action. Other marketplace actors also can evaluate their own conduct in light of the filing of the complaint to determine whether they are violating the law and at risk of a similar enforcement action.[198] Based on that analysis, they can alter their conduct, thereby preventing future harm to consumers, and even remediate consumers who were already harmed, thereby possibly avoiding a future enforcement action or at least receiving credit for responsible conduct. The complaint also can notify consumers who are being harmed, or may be harmed in the future, by similar conduct that the conduct is illegal. Consumers then can act to avoid the harm or can notify regulators, including the CFPB, of the illegal conduct. Consumer advocacy groups and trade associations can further publicize the filing to reach more consumers and companies. Thus, the public act of filing itself may mitigate future harm from similar conduct by a wider variety of entities.[199]

Second, even if the initial complaint is based on a relatively small number of instances, acting publicly quickly does not mean the CFPB has to forego providing complete relief to all harmed consumers. Although the CFPB typically uses its nonpublic investigatory powers to uncover the full scope of consumer harm prior to filing litigation, the CFPB has access to similar tools in federal litigation. Thus, the CFPB can use the discovery process in federal court to ensure that it uncovers the full scope of consumer harm and resolves the matter with appropriate relief for consumers.

Third, using the suggested strategy, the CFPB still can, and should, resolve the action based on the specific facts uncovered during the litigation. Although the CFPB should require defendants to remediate harmed consumers even if the violations were inadvertent, isolated, or sporadic, the appropriate resolution, including for example whether to penalize a given company or to give it credit for responsible conduct, will depend on both the extent of the consumer harm and the specific conditions that led to the harm. The CFPB can and should treat a company making good faith efforts

197. A complaint is not proof that a defendant violated a law. A court may determine that the conduct in question was lawful, or further development of the facts in litigation may demonstrate that the defendant was not engaging in the conduct alleged by the CFPB. Importantly, however, a complaint *does demonstrate* the types of conduct that the CFPB considers unlawful and serious enough to warrant litigation, and as such, the filing of a complaint provides valuable signaling to the market, especially in the context of emerging threats or changing conditions.

198. Park, *supra* note 114, at 167 ("Aggressive enforcement effectuates a policy of encouraging integrity in the marketplace.").

199. *Id.* at 162 (noting the value of predictability in enforcement to the industry being regulated).

to comply with the law who has only a handful of violations due to stresses from the pandemic differently from a company that has widespread violations or has taken only limited or even no steps to comply with the law in the context of the pandemic. As noted above, a key policy reason for quickly bringing these small cases is the deterrence impact on *other* market participants. That goal can be achieved with an action that finds only a few violations—by clarifying that the conduct in question is illegal—even if the CFPB praises a given defendant's compliance efforts. Indeed, such an outcome can provide an example for other companies that wish to comply with the law.

Lastly, in times of crisis, it is especially important that the public realize that government enforcers still are enforcing the laws.[200] Setting aside the important deterrence effects discussed above regarding the specific types of unlawful conduct at issue in a given action, the mere fact that an enforcer is taking pandemic-related action gives the marketplace confidence that the cop is still on the beat and that it is looking for unlawful pandemic-related conduct. That knowledge alone can cause companies to increase their own compliance efforts to ensure they stay on the right side of the law. Just as importantly, the lack of such action sends the opposite message, and companies will hear that message, possibly reducing their own compliance efforts and in some cases pushing the boundaries of what is legal.[201]

Pursuing this suggested strategy also will have costs. As noted above, litigation requires increased use of scarce resources and subjects the CFPB to deadlines outside its control, which likely will limit its flexibility in reallocating those resources. Filing cases earlier in the investigative process also presents a risk that the CFPB will litigate cases that ultimately do not involve widespread consumer harm or that involve defendants who engaged in mitigating conduct.[202] In other words, the CFPB might file a case that it would not have filed when operating under its typical strategy. To be clear, this does not mean the CFPB would have erred, or done anything wrong, by filing. It means only that under its typical enforcement strategy it may have exercised its prosecutorial discretion to *not* file a case because of the spo-

200. Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 877 (2014) ("[G]eneral deterrence depends on potential violators believing that a regulatory response is likely.").

201. Raj Date, *Lessons Learned from the Financial Crisis: The Need for the CFPB*, CFPB (Sept. 15, 2011) https://perma.cc/66ZA-JF2U (stating that "[a]nd without a level playing field, even honest businesses can feel pressured to lower their standards, to avoid losing market share or losing money").

202. Of course litigation also presents a risk that the CFPB could lose the case outright, but that risk is not relevant to determining whether to alter its enforcement strategy in this context. Any time that the CFPB cannot negotiate a settlement and files suit, there is a risk that it could lose. Moreover, the CFPB should not file—or for that matter settle—cases that it does not believe in good faith involve unlawful conduct, and that determination—that the conduct in question is unlawful—must be made before the CFPB takes public action under any enforcement strategy.

radic nature of the unlawful conduct or because the entity in question also engaged in responsible conduct. Exercising prosecutorial discretion not to file does not make the conduct in question lawful,[203] but it does mean the CFPB may have expended more of its resources than it would have preferred.

Ultimately, considering all of the above, the benefits of altering its enforcement strategy outweigh the benefits of maintaining the status quo. Maintaining the current strategy of lengthy investigations before public action runs the risk of years of uncertainty and consumer harm resulting from pandemic-related conduct. Even assuming *arguendo* that all wrongdoers ultimately were held to account, the CFPB only would be redressing past wrongful conduct and harm. By acting now, the CFPB can prevent that harm before it occurs. In a time of increasing economic stresses like the pandemic, any relief may be too late for consumers pushed over the edge by the pandemic. In addition, the CFPB will have lost the chance to leverage the impact of its action by signaling to all market participants, as opposed only to those being investigated, to allow them to adjust their conduct to mitigate their exposure proactively, which also would have the benefit of limiting future consumer harm. Taking public action now will provide needed clarity in the market and will protect consumers from being harmed in the first place. Other regulators have filed actions quickly,[204] and the CFPB can, and should, do so as well.

2. *Bring Fast Enforcement Actions*

There are a number of actions that the CFPB could take quickly to address the impacts of the pandemic. As an initial matter, the CFPB should rescind its guidance stating that it will not prosecute companies that violate certain laws.[205] The existing guidance is not necessary, as the CFPB always can exercise its prosecutorial discretion in determining whether to bring an enforcement action,[206] and the existing guidance simply sends the wrong message to the marketplace. In particular, although the CFPB observed in April and May 2020, that "some" furnishers could not conduct investigations of credit disputes by the June deadline, "the average time to resolve

203. Filing earlier does mean that the defendant may face higher costs, including reputational costs, than if the CFPB engaged in a lengthy nonpublic investigation. However, filing also means that the CFPB believes that the defendant violated the law, and the defendant would have faced costs from the investigation under the CFPB's typical enforcement strategy in any case. Further, as is noted above, any reputational costs may be ameliorated, if appropriate, by the way the CFPB resolves the action.

204. *See* discussion *supra* Section III.A (discussing actions brought by the FTC, DOJ, and states).

205. FCRA Statement, *supra* note 85; Mortgage Servicing Statement, *supra* note 86; HMDA Statement, *supra* note 88.

206. Cox, *Strategies of Public UDAP Enforcement*, *supra* note 117, at 45 (discussing the use of prosecutorial discretion by public enforcers).

disputes by furnishers had returned to the average time from prior years."[207] Thus, it is not clear why the CFPB still refuses to enforce that deadline. The CFPB should issue guidance highlighting the importance of accurate reporting and timely dispute resolution during the pandemic.

In addition, the CFPB can use its access to consumer complaints, including its own consumer complaint database, as well as public reports of problems,[208] to identify harmed consumers and take action on those violations. The CFPB also identified numerous problems with companies' responses to the pandemic that caused significant consumer harm.[209] With these complaints as a starting point, the CFPB could use informal discovery methods (*e.g.*, interviewing harmed consumers, asking them for relevant documents, and so on) to quickly determine both whether there is merit to the individual consumers' complaints and if so, the cause of the violations. The CFPB also could issue narrowly targeted civil investigative demands to the companies in question to gather necessary information. If the CFPB determines that the company in question has violated the law with respect to these consumers, it could file a complaint in federal court and use discovery to uncover the full extent of the violations. If the CFPB feels that a lawsuit is not warranted given what it uncovers, it still could take public action, for example by issuing a warning letter, providing guidance on the specific nature of the violations, or taking education efforts to encourage consumers to report similar violations. Further, even if the CFPB files suit, it does not mean that the CFPB necessarily should, or would, "throw the book" at these defendants. As noted above, the appropriate resolution of a given matter will depend on a variety of factors specific to the matter.

There are many areas in which the CFPB could bring such actions. For example, the CARES Act modified the Fair Credit Reporting Act to require, *inter alia*, companies that provide accommodations[210] to consumers who

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207. CFPB, SUPERVISORY HIGHLIGHTS COVID-19 PRIORITIZED ASSESSMENTS SPECIAL EDITION: ISSUE 23, WINTER 2021 3, 19 (Jan. 2021).

208. *See* discussion *supra* Section III & text accompanying notes 4, 5, 74–78 (discussing the tens of thousands of complaints to the CFPB, FTC, state Attorneys General, and advocates and reporters expressly related to the pandemic).

209. It appears that the CFPB did not use its supervisory prioritized assessments to identify violations of the law and that it resolved the issued uncovered by those assessments through confidential supervisory recommendations. COVID SUPERVISORY HIGHLIGHTS, *supra* note 3, at 3-4. If that is true, the CFPB should consider seriously whether to change any internal processes that may limit appropriate enforcement actions based on the conduct identified in the prioritized assessments. If the conduct identified in these assessments warrants enforcement action, the CFPB should take it if it can. Even if the CFPB determines that it cannot or should not take enforcement action against those companies, it can and should look for similar problems at other companies.

210. Accommodations are defined as "an agreement to defer 1 or more payments, make a partial payment, forbear any delinquent amounts, modify a loan or contract, or any other assistance or relief granted to a consumer who is affected by the coronavirus disease 2019 (COVID-19) pandemic during the covered period." 15 U.S.C. § 1681s-2(a)(1)(F)(i)(I) (2020).

are current on their loans to continue to report those consumers as current as long as the consumers comply with the accommodations.[211] The CFPB has repeatedly stated that companies must report properly any accommodations they give in light of the pandemic.[212] Nonetheless, there have been more than 3,600 complaints to the CFPB consumer complaint database that identify "incorrect information on your report" or "problem with a credit reporting company's investigation into an existing problem" as the issue of the complaint,[213] and more than 1,300 of those complaints involve a complaint that the account status or information is incorrect.[214] In more than 150 of the complaints involving incorrect account status or information, the consumers in question received some sort of relief (either monetary or non-monetary),[215] suggesting that there was merit to these claims.

The CFPB could use these complaints to bring an action to provide guidance to the marketplace on how companies must report accommodations properly. The CFPB has said that companies must do so, but it has done nothing publicly to enforce it.[216] Many consumers have complained that they received accommodations on various types of loans (*e.g.*, student loans, auto loans) but have been reported as delinquent, resulting in harm to their credit scores.[217] Further, these are just the consumers who knew that

211. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281, § 4021 (Mar. 27, 2020); 15 U.S.C. § 1681s-2(a)(1)(F)(ii)(I).

212. *See, e.g.*, FCRA Statement, *supra* note 85 (stating that the CFPB expects companies to report accommodations under the CARES Act as current); Remittance Rule Statement, *supra* note 87.

213. *Consumer Complaint Database*, *supra* note 5 (enter "pandemic OR epidemic OR covid! OR corona! OR 'CARES Act'" in "Search Within All data" field and from the "Map" tab, set the date from 1/1/2020 Through 11/21/2021, select "Credit Reporting" under "Product / sub-product" and "Incorrect information on your report" and "Problem with a credit reporting company's investigation into an existing problem" under "Issue/sub-issue"). The CFPB's prioritized assessment also identified companies that did not properly report accommodations. COVID SUPERVISORY HIGHLIGHTS, *supra* note 3, at 17-18. The CFPB has not indicated whether those inaccurate reports have been corrected. *Id.*

214. *Consumer Complaint Database*, *supra* note 5 (enter "pandemic OR epidemic OR covid! OR corona! OR 'CARES Act'" in "Search Within All data" field and from the "Map" tab, set the date from 1/1/2020 Through 1/21/2021, select "Credit Reporting" under "Product / sub-product" and under the "Incorrect information on your report" "Issue/sub-issue," select "Account status incorrect," "Account information incorrect," and "Information is missing that should be on the report").

215. *Id*. (same as note 214 *supra* but also select "Closed with monetary relief" and "Closed with non-monetary relief" under "Company response to consumer").

216. Instead of taking action on unlawful investigations into disputes during the pandemic, the CFPB filed a consent order on November 12, 2020, regarding failures to conduct reasonable investigations into credit reporting disputes *from 2016 and 2017*. Consent Order at 9–15, *In re AFNI, Inc.*, https://perma.cc/RCD9-73YT (U.S. Bureau of Consumer Financial Protection Nov. 12, 2020) (No. 2020-BCFP-0021) (finding in addition that some failures to respond to direct disputes extended into August 2018).

217. *See, e.g.*, *Consumer Complaint Database*, *supra* note 5, Complaint Nos. 3618579, 3755102, 3650290, 3656138, 3664213, 3672862, 3673877, 3651118, 3661119 (search for complaint number and then select "List" tab or "Export data" to view the complaint). At least one of the complaints even stated that the company's response when the consumer had complained was that the company was "behind" and would continue to report the inaccurate information. *Consumer Complaint Database*, *supra* note 5, Complaint No. 3650290.

they could submit a complaint to the CFPB; there could be many more who did not know how to complain.

Another violation that the CFPB could investigate quickly and prosecute is a company that attempts to scam consumers into paying for deferrals on federal student loans.[218] The CFPB has warned consumers about such scams,[219] and the CFPB even has prosecuted similar unlawful conduct in the past. In *In re Student Aid Institute, Inc.* ("SAI"), for example, the defendants, *inter alia*, "represented to consumers that they were required to pay SAI a fee in order to enroll in federal student loan repayment programs" when, in fact, consumers "did not have to pay a fee to enroll in these programs."[220] These statements were deceptive and violated the Telemarketing Sales Rule's prohibition on misrepresenting material aspects of a debt relief service.[221] Scammers seeking fees from consumers to suspend payments on federal student loans likely also would be violating these same laws.[222] If the scammers stated or implied that they were affiliated with the federal government, they also would be deceiving consumers and violating the Telemarketing Sales Rule.[223] However, despite warning consumers expressly about these scams and having prosecuted similar violations in the past, the CFPB in this context inexplicably is referring consumers complaining about such scams to a different regulator—the Federal Trade Commission.[224]

In addition, the CFPB's prioritized assessment found numerous problems relating to the pandemic that could be the basis of enforcement action, including companies taking money from consumers when those consumers should have been in forbearance or an accommodation, canceling pre-authorized payments when consumers only asked about forbearances, failing to timely process forbearances or accommodations, enrolling consumers in forbearances without their approval, and simply telling consum-

218. Similarly, the CFPB also could investigate scams where companies charge fees for CARES Act forbearances or otherwise deceptively claim to provide foreclosure or loan modification relief or deceptively claim to be affiliated with the government).

219. CFPB, *Information for Student Loan Borrowers*, CONSUMER FINANCIAL PROTECTION BUREAU: CONSUMER EDUCATION, https://perma.cc/Z72K-X6YU.

220. Consent Order at 6, *In re Student Aid Inst., Inc.*, https://perma.cc/2NMM-9ZNX (U.S. Consumer Financial Protection Bureau Mar. 30, 2016) (No. 2016-CFPB-0008).

221. *Id.* at 7 (finding that the statements violated 12 U.S.C. §§ 5531(a), 5536(a)(1)(B) (2018); 16 C.F.R. § 310.3(a)(2)(x) (2016)).

222. Other provisions of the Telemarketing Sales Rule also would have to be met.

223. *See* 12 U.S.C. § 5536(a)(1)(B); 16 C.F.R. § 310.3(a)(2)(vii); *see also, e.g.*, *In re Student Aid Inst. Inc*, *supra* note 220, at 7–8; Complaint at 7, 24, 26–27, *CFPB v. Fed. Debt Assist. Assoc., LLC*, https://perma.cc/K592-KJYC (D. Md. Oct. 12, 2017) (No. 1:17-cv-02997-GLR) (alleging defendants falsely claimed affiliation with the CFPB and FTC); Complaint at 8–11, 13–15, *CFPB v. IrvineWebWorks, Inc.*, https://perma.cc/35N2-KVRL (S.D. Cal. Dec. 11, 2014) (No. 8:14-cv-1967) (alleging defendants falsely claimed affiliation with the Department of Education).

224. *Information for Student Loan Borrowers*, *supra* note 219.

ers things that were not true (*e.g.*, that one had to be delinquent before one could get a CARES Act forbearance).[225]

3. Bring Actions Against Collection Efforts that Violate State Pandemic Laws

The CFPB should also work with states to bring cases against debt collectors that threaten consumers with actions that would violate state prohibitions on specific collections activity during the pandemic. In response to the pandemic, numerous states have passed laws, or state actors (*e.g.*, governors) have issued orders, prohibiting certain collection actions during the pandemic, including prohibitions on taking consumers' pandemic-relief funds to satisfy certain outstanding obligations and prohibitions on foreclosures, repossessions of automobiles, and other collection of debt.[226] When collection actions are prohibited under applicable state law, including prohibitions issued as a result of the pandemic, it violates federal law to threaten to take the collection actions or, in certain instances, actually to take them.[227] Courts have held in a variety of circumstances that collectors violated federal law by threatening to take actions that violated state laws.[228] The CFPB itself has taken action against debt collectors who

225. COVID SUPERVISORY HIGHLIGHTS, *supra* note 3, at 6–7, 10, 13, 15.

226. *See, e.g.*, Executive Order in Response to COVID-19, Ill. Exec. Order No. 2020-16 (Mar. 28, 2020), https://perma.cc/J25T-LFPX (limiting repossessions in Illinois); Executive Order in Response to COVID-19, Ill. Exec. Order No. 2020-25 (Apr. 14, 2020), https://perma.cc/V2WV-3TSL (limiting service of garnishment or wage deduction summonses in Illinois); Md. Exec. Order No. 20-04-03-01, 2–3 (Apr. 3, 2020), https://perma.cc/HQS5–XA7F (limiting repossessions, residential foreclosures, and evictions in Maryland); Mont. Directive Implementing Exec. Order Nos. 2-2020 & 3-2020 & establishing conditions for Phase Two, 3 (May 19, 2020), https://perma.cc/PHA3-QYLG (Montana); COVID-19 Response Supplemental Emergency Act of 2020, D.C. Act 23-286 §§ 202, 207 (Apr. 10, 2020), https://perma.cc/4WGH-Z3ME (limiting actions that mortgage services and debt collectors could take during the initial stages of the pandemic, including requiring lump sum mortgage payments, initiation of collections lawsuits, and repossessions); *see also generally* Powell NPR Interview, *supra* note 32, at 12 (stating that "as a country, we shouldn't let those people [lower-income individuals] lose everything they have and have to move out or be evicted and move in with family").

227. *See, e.g.*, 15 U.S.C. § 1692e(5) (2018) (providing that "[t]he threat to take any action that cannot legally be taken or that is not intended to be taken" violates the law); 15 U.S.C. § 1692e(10) (providing that "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt" violates the law); 15 U.S.C. § 1692f(6) (2018) (providing that "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if . . . (C) the property is exempt by law from such dispossession or disablement" violates the law); 12 C.F.R. § 1006.18(c) (effective Nov. 30, 2021) ("A debt collector must not: (1) Threaten to take any action that cannot legally be taken or that is not intended to be taken."); 12 C.F.R. § 1006.22(e) (effective Nov. 30, 2021) (providing that "[a] debt collector must not take or threaten to take any nonjudicial action to effect dispossession or disablement of property if: . . . (3) The property is exempt by law from such dispossession or disablement.").

228. *See, e.g.*, Phillips v. Asset Acceptance, LLC, 736 F.3d 1076, 1079 (7th Cir. 2013) (stating that filing suit after the statute of limitations had expired violates, *inter alia*, 15 U.S.C. §§ 1692e, 1692f); Huertas v. Galaxy Asset Mgmt., 641 F.3d 28, 32–33 (3d Cir. 2011) (per curiam) (holding that threaten-

threaten actions prohibited under state law, finding that such actions are both deceptive under 12 U.S.C. § 5536(a) and violate the Fair Debt Collection Practices Act, and in particular 15 U.S.C. § 1692e(5), (10).[229] The state prohibitions on collections activity during the pandemic are no different: threatening to take these actions—which are prohibited under state law—is both deceptive, in violation of 12 U.S.C. § 5536(a), and violates federal law, 15 U.S.C. § 1692e(5), (10).[230]

Filing cases against defendants who violate state prohibitions on collection activity during the pandemic has several benefits. First, as discussed above, it is a way the CFPB can protect vulnerable consumers during a crisis, and it sends a strong signal to the marketplace that such unlawful collections activity will be prosecuted. States have authorities that allow them to protect consumers during the pandemic in a way that the CFPB

ing to file litigation when the statute of limitations has expired violates the Fair Debt Collection Practices Act and noting that "the majority of courts have held that when the expiration of the statute of limitations does not invalidate the debt, but merely renders it unenforceable, the FDCPA permits a debt collector to seek voluntary repayment of the time-barred debt *so long as the debt collector does not initiate or threaten legal action* in connection with its debt collection efforts") (emphasis added); Crossley v. Lieberman, 868 F.2d 566, 571 (3d Cir. 1989) (holding that debt collector who threatened to sue one week after providing notice violated 15 U.S.C. §§ 1692e(5), (10) because state law prohibited filing suit without providing 30 days' notice); Collins v. Erin Capital Mgmt., LLC, 991 F. Supp. 2d 1195, 1212 (S.D. Fla. 2013) (holding that state law prohibited debt collectors from filing wage garnishment actions when they were not registered with the state and that filing such an action when not registered violated 15 U.S.C. § 1692e(5)); Day v. Check Brokerage Corp., 511 F. Supp. 2d 950, 956–57 (N.D. Ill. 2007) (holding that threatening to file suit violated 15 U.S.C. § 1692e(5) when debt was not assigned to collector in accordance with state law because under state law collector may file suit only if debt has been legally assigned to it); Edwards v. McCormick, 136 F. Supp. 2d 795, 805 (S.D. Ohio 2001) (holding that threatening to foreclose on property protected from foreclosure under state homestead exemption violated 15 U.S.C. § 1692e(5)); Kuhn v. Account Control Tech., Inc., 865 F. Supp. 1443, 1452 (D. Nev. 1994) (holding that taking collections actions without being licensed when state law prohibited such actions in the absence of a license violated 15 U.S.C. §§ 1692e(5), (10), 1692f).

229. Consent Order at 22–23, 28, *In re Encore Capital Grp., Inc.*, https://perma.cc/HP5H-S43X (U.S. Consumer Financial Protection Bureau Sept. 9, 2015) (No. 2015-CFPB-0022) (finding that representing explicitly or implicitly that consumers had a legally enforceable obligation to pay debt where the applicable state statutes-of-limitations had expired was both deceptive under 12 U.S.C. § 5536(a) (2018) and violated the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692e(5), 1692e(10)); Consent Order at 15, 19–20, 25–26, *In re Portfolio Recovery Assoc., LLC*, https://perma.cc/9JNR-VYHB (U.S. Consumer Financial Protection Bureau Sept. 9, 2015) (No. 2015-CFPB-0023) (same); CFPB v. CashCall, Inc., No. CV 15-7522-JFW, 2016 WL 4820635, at *10 (C.D. Cal. 2016) (holding that servicing and collecting on loans that were void or not payable under state law was deceptive under 12 U.S.C. § 5536(a)(1)(B)); CFPB v. NDG Fin. Corp., No. 15-cv-5211, 2016 WL 7188792, at *13–14 (S.D.N.Y 2016) (denying motion to dismiss where CFPB alleged that defendants engaged in unfair and deceptive conduct by attempting to collect loans that were void under state law); *cf.* CFPB, SUPERVISORY HIGHLIGHTS, ISSUE 22, SUMMER 2020 (Sept. 2020), https://perma.cc/LH86-RRK9 (stating that examiners determined than an entity violated 15 U.S.C. § 1692e(5) by "falsely threaten[ing] consumers with lawsuits that the collectors could not legally file or did not intend to file").

230. The CFPB's supervisory highlights noted that violating state laws like these could violate Federal consumer financial law, but stated that the "limited information" obtained through the prioritized assessments did not allow the CFPB to determine whether companies were complying with these laws. COVID SUPERVISORY HIGHLIGHTS, *supra* note 3, at 21–22.

cannot directly do. However, when companies violate these state laws they also violate federal laws. By prosecuting them, the CFPB both strengthens federal law, and targets its public enforcement activity at consumers at particular risk during the pandemic. Moreover, in so doing, the CFPB, which has significantly more resources than most Attorneys General, can provide valuable assistance to its state partners.[231] There is some risk that courts may find provisions of these laws invalid,[232] but that risk exists for all laws, both state and federal, and defendants will be able to raise any challenges to the state laws themselves when defending the CFPB's action. Many, but not all,[233] of these provisions had expired or been narrowed as of November 1, 2020, but with coronavirus cases increasing, aid expiring, and millions of people in economic distress[234] similar prohibitions may issue in the future. For many of the same reasons that the CFPB should change its enforcement strategy to bring public actions more quickly, the benefits of working with states to bring cases against defendants who threaten to violate state pandemic-related laws outweigh the costs.

4. *Issue Guidance on Assessing Unfairness During the Pandemic*

The pandemic is not normal, and the CFPB must not treat it as normal. For example, in normal times, setting aside anticompetitive pricing, the government generally allows companies to charge what the market will bear,[235] but, during emergencies, charging what the market will bear can become unlawful price gouging.[236] Just as price-gouging laws change the

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231. *See, e.g.*, CFPB *et al.*, MEMORANDUM OF UNDERSTANDING BETWEEN THE CFPB, THE CONFERENCE OF STATE BANK SUPERVISORS, AND THE OTHER SIGNATORIES HERETO ON THE SHARING OF INFORMATION FOR CONSUMER PROTECTION PURPOSES § IV(B) (signed Jan. 4, 2011) (providing, in part, "The parties will work together, to the greatest possible extent, in order to— . . . effectively enforce Federal consumer financial laws and State consumer protection laws"); CFPB *et al.*, 2013 CFPB-STATE SUPERVISORY COORDINATION FRAMEWORK § V(C)(3) (May 7, 2013) ("The Parties intend to support each other, to the fullest extent permitted by law and as warranted by the circumstances, in the enforcement of laws that protect consumers of financial products and services . . . .").

232. *See, e.g.*, Borger Mgmt., Inc. v. Hernandez-Cruz, No. 2020-LTB-006637, at *2–3, 15–16 (D.C. Super. Ct. Dec. 16, 2020) (slip op.) (holding D.C.'s ban on eviction filings unconstitutional when the evictions themselves are separately prohibited and noting that the law prohibited filings in cases "that are entirely unrelated to the pandemic and that even predate the pandemic").

233. *See, e.g.*, Md. Exec. Order No. 20-10-16-01, 3–4 (Oct. 16, 2020), https://perma.cc/AU6Z-9CMQ (prohibiting repossession of mobile homes by self-help in Maryland); Mont. Directive Implementing Exec. Order Nos. 2-2020 & 3-2020 & establishing conditions for Phase Two, 3 (May 19, 2020), https://perma.cc/PHA3-QYLG (limiting foreclosures of vulnerable populations under specified circumstances).

234. *See* discussion *supra* Section II.

235. *See, e.g.*, COLO. REV. STAT. ANN. § 6-1-730(1)(a)(I) (West. 2020) (providing that "[u]nder ordinary conditions, the pricing of consumer goods and services generally is best left to the marketplace").

236. *See, e.g.*, 940 CODE MASS. REGS. § 3.18 (2020) (providing that charging "unconscionably high" prices for particular goods during specified emergencies is an unfair or deceptive act or practice); N.Y. GEN. BUS. LAW § 396-r (McKinney 2020) (prohibiting "unconscionably excessive price[s]" for "goods

legality of conduct, in that case setting prices, during a crisis, the CFPB should clarify that acts and practices that may be "fair" in normal times can be "unfair" during the pandemic.[237]

Enforcers like the CFPB can prosecute violations of specific rules[238] or violations of more general standards.[239] Standards are necessary, and necessarily broad, because a system comprised only of rules is unworkable[240] and would not allow enforcers to respond in a timely manner to new schemes and changing conditions.[241] Because of their breadth, enforcing standards like unfairness can be particularly important in times of crisis like the unfolding pandemic.[242] Standards, however, require market actors to anticipate what conduct is unlawful,[243] and therefore, providing guidance can help to focus companies' attention on the importance of taking the pandemic into account in assessing the fairness of their acts and practices.[244]

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and services vital and necessary for the health, safety and welfare of consumers or the general public" during "any abnormal disruption of the market"); 73 PA. CONS. STAT. ANN. § 232.4 (West 2020); *see also generally* Open Memorandum from Luisa Altmann, Senior Research Analyst, Nonpartisan Services for Colorado's Legislature, on *State Laws Prohibiting Price Gouging During Declared Emergencies* (Mar. 26, 2020) https://perma.cc/7WWP-D53A (listing then-existing state laws prohibiting price gouging).

237. Indeed, many price-gouging statutes and regulations expressly define price gouging as an unfair practice. *See, e.g.*, 940 CODE MASS. REGS. § 3.18 (2020); COLO. REV. STAT. ANN. § 6-1-730(2) (West. 2020).

238. The Truth in Lending Act, which requires, *inter alia*, specific disclosures is a classic example of a rule. 15 U.S.C. § 1601.

239. The prohibition on unfair, deceptive, and, in the case of the CFPB, abusive acts and practices is a classic example of a standard. *See* 12 U.S.C. §§ 5536(a)(1)(B) (prohibiting "unfair, deceptive, or abusive act[s] or practice[s]"); *see generally* James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CALIF. L. REV. 115, 130–33 (2012) (discussing enforcement of rules versus standards or principles and noting that in reality the enforcement of securities laws involves both); Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. LEG. 37, 44–45 & nn.38, 41 (2018) (discussing rules versus principles).

240. Park, *supra* note 114, at 168 ("No system of rules is comprehensive because constructing a comprehensive scheme would simply cost too much and would also impose too many arbitrary restraints on the industry.").

241. Cox, Widman & Totten, *supra* note 117, at 45 (noting that the broad discretion under principles allows "enforcers [to] respond to ever-changing practices that may harm consumers, without returning to the legislature every time a new scheme hatches"); Amy Widman, *Protecting Consumer Protection: Filling the Federal Enforcement Gap*, 69 BUFFALO L. REV. (forthcoming 2021) (noting that principles "give enforcers broad discretion to enforce the laws against ever-changing fraudulent schemes").

242. Prentiss Cox, *The Importance of Deceptive Practice Enforcement in Financial Institution Regulation*, 30 PACE L. REV. 279, 300–01 (2009) (arguing that enforcers concentrating on enforcing unfair and deceptive standards "were the only regulators or organizations that made substantial efforts to identify and address rampantly imprudent mortgage lending practices during the time of explosive growth in this type of lending" and noting importance of enforcing these standards as a response to the 2008 mortgage crisis).

243. Park, *supra* note 114, at 168–69.

244. The lack of such guidance would not be a valid defense to a prosecution for unfair conduct. Companies should be assessing the fairness of their conduct already. However the guidance does provide information to companies about the CFPB's enforcement priorities, and to the extent that compa-

The CFPB may find an act or practice "unfair" when it has a "reasonable basis to conclude" that (1) "the act or practice causes, or is likely to cause substantial injury to consumers"; (2) that consumers cannot reasonably avoid the injury; and (3) the injury "is not outweighed by countervailing benefits to consumers or to competition."[245] In analyzing their own acts and practices during a nationwide crisis like the pandemic, companies must take the pandemic, including its impacts on consumers and on the companies themselves,[246] into account.

Assuming *arguendo* that the act in question causes—or is likely to cause—a substantial injury, the next question is whether consumers reasonably cannot avoid the injury. When the injury arises due to the pandemic, the requirement most likely is met. As Chair of the Board of Governors of the Federal Reserve System Jerome Powell has noted, the people being harmed in the pandemic did nothing wrong,[247] and the sweep of the pandemic has caught the entire country off guard. Moreover, regulators have found that events beyond consumers' control can make injury unavoidable. As one example, in promulgating the Credit Practices Rule,[248] the Federal Trade Commission found that the "precipitating cause of default is usually a circumstance or event beyond the debtor's immediate control," and therefore, the majority of defaults by consumers were not reasonably avoidable because they were due to "events that are largely beyond the consumer's control," including primarily loss of income resulting from "adverse employment change[s]" (*e.g.*, the loss of a job or a reduction in hours) or from illness that prevents one from working.[249] These are the exact impacts being felt—on a widespread and historic basis—by consumers harmed by the pandemic,[250] and much like the remedies found unfair under the Credit

nies are not properly considering their conduct in light of the pandemic, the guidance may prompt them to do so, thereby potentially avoiding future consumer harm.

245. 12 U.S.C. § 5531(c) (2018); *cf.* 15 U.S.C. § 45(n) (2018) (providing virtually the same standard for unfairness under the FTC Act).

246. This can include, for example, considering the effects of *not* taking the action in question on the safety and soundness of the company as part of the analysis.

247. *Transcript: NPR's Full Interview with Fed Chairman Jerome Powell*, NPR 13 (Sept. 4, 2020) https://perma.cc/WM5K-FZRP (stating that "[t]here's no guilty party to look up and punish here in terms of the, you know, the disease. And so I think it really does behoove us as a country, as a very wealthy country, to use our great powers to support people who did nothing wrong.").

248. 16 C.F.R. pt. 444 (2020).

249. Trade Regulation Rule; Credit Practices, 49 Fed. Reg. 7,740-01, 7,747-48 (Mar. 1, 1984) (codified at 16 C.F.R. pt. 444). The CFPB also has found certain collection practices unfair even though the consumer had defaulted on the original obligation. *See, e.g.*, Consent Order at 14–15, *In re Nat'l Credit Adjusters, LLC*, https://perma.cc/TZ8N-5YHD (U.S. Bureau of Consumer Financial Protection July 13, 2018) (No. 2018-BCFP-0004) (finding that consumers could not reasonably avoid injury caused by debt collectors chosen by the defendants).

250. *See supra* Section II.

Practices Rule,[251] consumers cannot reasonably avoid the economic consequences of the pandemic or the actions taken by their service providers as a result.

The last question is whether the injury is outweighed by countervailing benefits to consumers or competition from the act or practice. It is in this portion of the analysis where the companies most need to consider the impacts of the pandemic. For example, if *not* taking the act would threaten a company's safety and soundness, that fact should be weighed against the injury caused by the act. But even if an act or practice may benefit consumers or competition, the company cannot blithely assume during a pandemic that the benefit outweighs the injury just because that is how the company operates in normal circumstances. Companies must actually consider the pandemic and its effects.

As one example of how weighing the benefits to consumers and competition can be affected by the pandemic, early in the pandemic some consumers were having trouble paying their mortgages due to illness or lost income. When they requested relief, they were told that they could have a temporary deferment (*e.g.*, 90 days), but that they would have pay the entire amount from the deferment in full at the end of the deferment.[252] Granting such a consumer a temporary deferment has a number of clear benefits for consumers. The consumer avoids delinquency and possible foreclosure. In addition to all of the other harms from foreclosure, foreclosure also presents the risk of increased exposure to COVID-19 if the consumer becomes homeless or is forced to crowd in with others during the pandemic.[253] To their credit, many lenders are working with consumers and even suspending late fees.[254] However, making such a deferment conditional on a lump-sum repayment at the end of the deferment period when the consumer is likely to be in exactly the same situation at the end of the deferment just kicks the can down the road, ultimately forcing the consumer into foreclosure when the deferment ends and providing little relief.[255] If interest continues to ac-

251. 16 C.F.R. § 444.2 (2020).

252. Anna Bahney, *Confused About Delaying Your Mortgage Payments? You're Not Alone*, CNN: BUSINESS (May 2, 2020), https://pema.cc/RDT6-TASS.

253. This is why the Centers for Disease Control and Prevention issued its ban on evictions. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292-01, 55,292 (Sept. 4, 2020) (stating that "[i]n the context of a pandemic, eviction moratoria—like quarantine, isolation, and social distancing—can be an effective public health measure utilized to prevent the spread of communicable disease.").

254. The CARES Act prohibits additional fees, penalties, or interest (beyond scheduled amounts) from a forbearance, but that prohibition applies only Federally backed mortgages. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281, § 3513(a) (Mar. 27, 2020).

255. Federal regulators have since made clear that for consumers whose mortgages are backed by the federal government, which is the majority of the mortgage market, unaffordable balloon payments like these cannot be required, but that guidance does not help the significant number of people whose mort-

crue during the deferment period, the loan also becomes more expensive than initially disclosed, which, by itself, does not benefit the consumer and may catch the consumer unaware. Looking at the company's situation during the pandemic, indefinitely granting everyone deferments or forgiving interest likely will threaten the company's viability, especially given the duration of the crisis to date, the lack of a clear end, and the cost of forbearing payments while advancing escrow payments. Some other solutions may be cost prohibitive as well. The proper answer to this problem is highly fact dependent and is well beyond the scope of this article,[256] but what is clear is that companies cannot simply do nothing and pretend that "business as usual" is fair during a pandemic.[257] The CFPB needs to make this clear to all market actors along with making clear that it will bring enforcement actions against companies that fail to do this analysis.

IV. Conclusion

More than ten months into a historic pandemic that has wreaked economic devastation, the CFPB—the primary Federal consumer financial protection regulator that was created in response to the last economic crisis—had not taken a single public enforcement action to address the fallout from the pandemic despite thousands upon thousands of consumer complaints and its own knowledge of ongoing problems. The CFPB can—and must—change its enforcement strategy to bring cases now to protect the consumers being harmed during the pandemic. The CFPB cannot solve every problem facing consumers as a result of the pandemic. But it can help keep consumers from falling into an economic abyss while the country addresses its larger problems. By concentrating on unlawful conduct that undermines or evades laws designed to protect consumers during the pandemic, that makes it harder to keep a job, stay in a home, or recover after the pandemic recedes, or that hurts those who are already suffering more, the CFPB can signal to the marketplace that consumer protection laws will be enforced, even during a pandemic, and that the cop is still on the beat.

gages are not backed by the federal government. Treatment of Certain COVID–19 Related Loss Mitigation Options Under the Real Estate Settlement Procedures Act (RESPA) (Regulation X), 85 Fed. Reg. 39,055-01, 39,061 (June 30, 2020) (codified at 12 C.F.R. pt. 1024 (2020)). Of course, this does not address what happens if the borrower cannot make the normal payments once the forbearance ends.

256. Long term, any solution likely will require aggressive action by the President and Congress or else the consequences will be disastrous for both consumers and the lenders.

257. Repossessions are one possible example of a practice that normally can be fair but could be unfair during a pandemic. Some states have limited repossessions during the pandemic because of the difficulty of maintaining social distancing on public transportation. *See* Executive Order in Response to COVID-19, Ill. Exec. Order No. 2020-16 (Mar. 28, 2020) (limiting repossessions in Illinois); *see also Auto Finance and the Coronavirus Crisis: What States Should Do to Help*, National Consumer Law Center, Mar. 2020, https://perma.cc/2E4A-LXAA (noting that "cars will play a vital role in containing the spread of the virus and facilitating an economic recovery for families and states").