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Pay Attention! Marginalized Communities, the Consumer Financial Protection Bureau, and Regulatory Advocacy

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PAY ATTENTION! MARGINALIZED COMMUNITIES, THE CONSUMER FINANCIAL PROTECTION BUREAU, AND REGULATORY ADVOCACY

Diane E. Thompson¹

ABSTRACT

Congress created the Consumer Financial Protection Bureau in the wake of the Great Recession to foresee, prevent, and mitigate risks to consumers and shocks to the larger economy. Congress mandated specific units and offices dedicated to engagement with underserved communities, service members, and older Americans, among other vulnerable populations. Congress also mandated a Consumer Advisory Board and a research agenda that included a focus on the experiences and understanding of “traditionally underserved communities.” Despite all the requirements of the Dodd-Frank Act, however, during the height of the coronavirus pandemic, leadership at the CFPB failed to act to protect those Black, Latinx, Indigenous, and immigrant communities hit hardest by both the economic and public health impacts of COVID-19.

Congress required the agency to pay attention to marginalized and vulnerable communities, and yet, at a critical juncture, the leadership of the agency did not. What went wrong? This Article examines the structure and policy development under both Obama and Trump administration appointees, as well as the CFPB’s COVID-19 response, using the statutory imperative to pay attention to marginalized and vulnerable communities as a lens. The Article argues that, to fulfill the long-term vision of the Dodd-Frank Act’s vision, the CFPB must go beyond its history to a deeper, more sustained engagement with marginalized communities.

1. Founder, Consumer Rights Regulatory Engagement and Advocacy Project. This article was written during the fall of 2020 while I was an Open Society Foundations Leadership in Government Fellow. It does not necessarily represent the views of the Consumer Financial Protection Bureau or the United States. Kate Muñoz provided critical thought partnership at every step of this article. Travis Doyle’s research assistance was essential. Nikka Pascador and Sarah Brandon helped sharpen my thinking about regulatory advocacy. Ron Borzekowski, Kelly Cochran, and David Silberman provided a generous testing ground for the ideas in this article. I owe a special debt of gratitude to the talented and dedicated staff and managers of the CFPB’s Office of Regulations 2014–19, who patiently schooled me in the art and science of drafting regulations. As always, I remain deeply grateful to the people in East St. Louis who gave me the distinct honor of being their attorney at the beginning of my legal career. Their lived experiences, which they were generous enough to share with me, echo in my head and heart and serve as my touchstone in this work.

The CFPB must center the voices of marginalized communities in every aspect of its work, from outreach, to foundational research, to integration of the diverse lived experiences of marginalized communities into the CFPB's policymaking. The CFPB must develop more robust internal structures to ensure the voices and experiences of marginalized communities are heard and incorporated in policymaking throughout the agency. Regular research reporting on the experiences of marginalized communities with consumer financial products and services is needed to chart the path forward in a way that balances the perpetual tension between access and protection, while also enabling wealth creation and economic self-determination. For the CFPB to make and sustain this shift, advocates must also recommit to regulatory advocacy at the CFPB that centers and contextualizes the voices and experiences of marginalized communities.

TABLE OF CONTENTS

I.	INTRODUCTION	345	R
II.	ORIGIN STORY	347	R
	A. Out of the Ashes Comes a Phoenix	347	R
	B. Dodd-Frank: Who Are Traditionally Underserved Communities?.....	351	R
	1. A Short History: From the FPSC to the CFPB.....	351	R
	2. The CRA and CDFIs: Defining Underserved	355	R
	3. A Pointillist Picture Emerges: Dodd-Frank and Traditionally Underserved Communities	360	R
	C. Building the Plane While Flying It	365	R
	1. Early Organizational Decisions	365	R
	2. Research and Market Monitoring.....	369	R
	3. Policy Development, Traditionally Underserved Communities, and the Cordray-Era CFPB	371	R
	4. External Engagement with Traditionally Underserved Communities	373	R
III.	A FOUNDATION OF SHIFTING SANDS	375	R
	A. The Times, They Are A-Changing	375	R
	B. Fair Lending Disappears	377	R
	C. Research under Attack.....	379	R
	1. Whose Cost and Whose Benefit?	379	R
	2. Leaving Racial Disparities Unexamined	380	R
	D. The Coronavirus Failure	385	R
	1. Consumer Complaints	385	R
	2. No Longer Data Driven	388	R
	3. Rulemaking and Guidance During COVID-19	390	R
IV.	BUILD IT BACK BETTER	392	R
	A. Center Consumers and Marginalized Communities	393	R

2021	<i>PAY ATTENTION!</i>	345	
	1. Taking Marginalized Communities Seriously Means Listening to Them	394	R
	a. Consumer Complaints	394	R
	b. Consultation in Rulemaking	395	R
	c. The Consumer Advisory Board	396	R
	2. Ask the Question: Embedding Race and Economic Equity Consciousness in Policymaking	397	R
	a. Regulatory Priorities	398	R
	b. Consumer Redress	398	R
	c. Center a Research Agenda	399	R
	3. Fostering Visibility: Why the Org Chart Matters ...	399	R
	B. Reframe Advocacy	400	R
	C. Move Beyond Dodd-Frank	403	R
	V. CONCLUSION	407	R

I. INTRODUCTION

In the middle of the coronavirus pandemic, the Consumer Financial Protection Bureau (“CFPB”) was shockingly absent. Congress created the CFPB in the wake of the Great Recession to foresee, prevent, and mitigate risks to consumers and ensuing shocks to the larger economy, but during the height of a pandemic that claimed over 500,000 lives and left millions out of work and behind on their rent and mortgage, the leadership of the agency focused instead on continuing with a pre-pandemic deregulatory agenda.

Congress required that the CFPB create a Consumer Advisory Board (“CAB”) and mandated a research agenda centering the experiences and understanding of “traditionally underserved communities.” Congress mandated specific units dedicated to engagement with servicemembers, older Americans, and underserved communities, among other vulnerable populations. All of these prescriptions as to what and who the agency pay attention to, even taken together, were not by themselves enough to keep the agency focused on its consumer protection mission during the pandemic. At a time when the country seemed finally to awaken to the magnitude and historical persistence of intertwined racial and economic inequity, the CFPB targeted consumers with messages to save more and rolled back fundamental requirements that lenders consider borrowers’ ability to repay loans. The voices of those historically excluded from and too often exploited by the financial mainstream remained unheard.

Dodd-Frank’s mandate of a research agenda that explicitly required the agency to consider the experiences and understanding of traditionally underserved consumers and communities was by itself innovative. So too were the requirements of units focused on specific populations with distinct vulnerabilities. This novel vision of a government agency that integrated the

diverse experiences of marginalized communities in its work, based on a solid evidentiary foundation, was never fully realized.

The impressive consumer protection foundation laid during the Obama administration and under its first Senate-confirmed Director, Richard Cordray,² was incomplete. The CFPB under the Obama administration was a proto-agency, with a culture driven by the need to accomplish the big rulemakings of Dodd-Frank at the same time the agency was hiring its first staff, negotiating leases for office space, and establishing internal processes and procedures. Long-term effective consumer protection that seeks to address systemic inequity will require greater, more consistent focus than we have yet seen from the CFPB.

After the Supreme Court's decision in *Seila Law, LLC v. Consumer Financial Protection Bureau*³ in June 2020, the CFPB is here to stay.⁴ This resolution of the CFPB's constitutionality creates an opportunity for new leadership to focus on the work of building an agency for the long term. Both financial institutions and consumer protection can benefit from a stable regulatory environment. The agency must ground its work in the statute and in empirical knowledge of the impact of financial products on underserved communities if it is to make the most of this historical moment.

Dodd-Frank suggests an agency built on a deep engagement with diverse communities. Rural communities are given special attention in the CFPB's statutorily-mandated cost-benefit analysis.⁵ The CAB should include "representatives of communities that have been significantly impacted by higher-priced mortgage loans."⁶ Specific units are expected to conduct outreach to service members⁷ and older Americans.⁸ A separate office is expected to be equipped to provide "technical assistance regarding the offering and provision of consumer financial products and services to

2. The CFPB Director serves by law for a five year term. 12 U.S.C. § 5491(c)(1) (2021). Director Cordray was confirmed by the Senate on July 16, 2013. On the Nomination (Confirmation of Richard Cordray, of Ohio, to be Director, Bureau of Consumer Financial Protection) Roll Vote 174, 113th Cong., 1st Sess. (July 16, 2013), <https://perma.cc/CA7R-GZUZ>. He was sworn in the following morning. Phillip Rucker, *Obama Takes Victory Lap as Cordray Is Sworn In*, WASH. POST (July 17, 2013), <https://perma.cc/E675-H5WG>. Director Cordray served for nearly a year under President Trump, resigning on November 24, 2017.

3. 140 S. Ct. 2183 (2020).

4. The Supreme Court held in *Seila* that the CFPB's structure was unconstitutional in the degree of independence that the Director had from the President. The Court rectified that flaw by making the Director removable at the President's pleasure instead of only for cause. *See, e.g.*, Kelly Anne Smith, *Supreme Court Says Trump Can Fire Consumer Watchdog Director, But CFPB Here to Stay*, FORBES (Jun. 30, 2020, 11:59 AM EDT), <https://perma.cc/W9RL-J48K>.

5. § 5512(b)(2)(A)(ii).

6. 12 U.S.C. § 5494(b) (2010). The statutes also calls-out for inclusion on the CAB "representatives of depository institutions that primarily serve underserved communities."

7. 12 U.S.C. § 5493(e) (2021).

8. *Id.* § 5493(g).

traditionally underserved consumers and communities.”⁹ Building productive relationships across so many different communities takes time. It cannot be done and re-done every four years. Mutual relationships of trust and open communication are built over years and sometimes decades.

Learning how to listen and how to integrate the “experiences of traditionally underserved consumers”¹⁰ into research and policy will take time. Marginalized communities do not speak with a single voice or have a single experience. But grounding the CFPB’s work in empirical knowledge of the diversity of experiences with and understandings of credit by communities across the country, and particularly those communities most marginalized and underserved by the financial system, is required by the statute.¹¹ Foundational, empirical work should also provide the CFPB with a consistent, non-ideological focus that in turn could allow the CFPB to better fulfill its statutory mandate and survive the tests of time.

The CFPB describes itself as a 21st century agency.¹² We should plan for it to be a 22nd and even 23rd century agency. Even as different presidential administrations with different policy preferences on consumer protection come and go, the CFPB must keep the voices and experiences of marginalized communities at its core. Anything less betrays the statutory mandate and the fundamental accountability to consumers and traditionally underserved communities built into Dodd-Frank.

II. ORIGIN STORY

A. *Out of the Ashes Comes a Phoenix*

The years leading up to the enactment of Dodd-Frank in July 2010 were grim. Foreclosure rates stood at historic levels, multiples above where they had been during the Great Depression.¹³ Unemployment was persistently high.¹⁴ Millions of families lost their homes.¹⁵ Millions more watched

9. *Id.* § 5493(b).

10. *Id.* § 5493(b)(1)(F).

11. *Id.* § 5493(b)(1).

12. *About Us*, CONSUMER FIN. PROT. BUREAU (last visited May 17, 2021), <https://perma.cc/TN6Q-QRXB> (“The Consumer Financial Protection Bureau (CFPB) is a 21st century agency . . .”).

13. The U.S. foreclosure rate (the percentage of outstanding mortgage loans in foreclosure) at the end of the first quarter of 2010 was 4.63%. MORTG. BANKERS ASS’N, NATIONAL DELINQUENCY SURVEY Q1 2010, at 2 (2010). The foreclosure rate for non-farm mortgages peaked in 1933, below 1.4%. David C. Wheelock, *The Federal Response to Home Mortgage Distress: Lessons from the Great Depression*, 90 FED. RES. BANK ST. LOUIS REV. 133, 138–39 fig.5 (2008).

14. See, e.g., *Chart Book: The Legacy of the Great Recession*, CTR. ON BUDGET AND POL’Y PRIORITIES (June 6, 2019), <https://perma.cc/R88W-TW55> (“Job losses in the Great Recession were huge, and it took much longer than in previous recessions simply to get back to the level of payroll employment at the start of the recession.”).

as the accumulated equity in their homes vanished.¹⁶ Speculators bought up empty housing for rental and resale. Localities struggled as their property tax base evaporated.¹⁷ Economic insecurity was widespread across the world.¹⁸ In the span of a few short years, subprime lending in communities of color went from something regulators assumed could not impact the larger economy¹⁹ to a central topic of conversation on the front pages of newspapers and over the airwaves.

While Republicans and Democrats sparred over the exact causes of the crisis,²⁰ regulators and investors discounted warning signs.²¹ Failure in the subprime market spread across many other unrelated markets, to create “financial shock and panic.”²² Consumer credit markets considered marginal were clearly central to the country’s economic health. A new regulator, and perhaps a new regulatory model, was needed to prevent a recurrence.²³

The CFPB’s creation was a specific and targeted response to that crisis, albeit a heavily politicized one.²⁴ Many agreed with then-Professor

15. William R. Emmons, *The End Is in Sight for the U.S. Foreclosure Crisis*, HOUSING MARKET PERSPECTIVES at 1 (Dec. 2016), <https://perma.cc/AG97-EGNE> (“As many as 10 million mortgage borrowers have lost their homes.”).

16. *Soaring Spillover: Accelerating Foreclosures to Cost Neighbors \$502 Billion in 2009 Alone; 69.5 Million Homes Lose \$7,200 on Average*, CTR. FOR RESPONSIBLE LENDING at 2 (May 2009), <https://perma.cc/LX4Q-VRB2> (estimating losses to neighboring property values due to the foreclosure crisis at \$1.86 trillion dollars during the years 2009 to 2013).

17. William Apgar & Mark Duda, *Collateral Damage: The Municipal Impact of Today’s Mortgage Foreclosure Boom*, HOMEOWNERSHIP PRESERVATION FOUND. 4 (May 11, 2005), <https://perma.cc/CNJ7-7L4L> (estimating per-foreclosure costs to the City of Chicago at upwards of \$30,000 for some vacant properties); Majority Staff of the Joint Econ. Comm., *The Subprime Lending Crisis: The Economic Impact on Wealth, Property, Values and Tax Revenues and How We Got Here*, U.S. CONG. JOINT ECON. COMM. at 1, 12 (Oct. 2007), <https://perma.cc/4BKK-6WQ9> (projecting loss of property tax revenue of over \$917 million).

18. See, e.g., Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., *Speech at the Federal Reserve System Conference on Housing and Mortgage Markets: Housing, Mortgage Markets, and Foreclosures* (Dec. 4, 2008), <https://perma.cc/B2ZQ-WTN5> (“Despite good-faith efforts by both the private and public sectors, the foreclosure rate remains too high, with adverse consequences for both those directly involved and for the broader economy.”).

19. FIN. CRISIS INQUIRY COMM’N, THE FINANCIAL CRISIS INQUIRY REPORT 9 (2011), <https://perma.cc/UN8W-MWQ6> [hereinafter FINANCIAL CRISIS INQUIRY REPORT] (“[P]olicymakers believed that even if the housing market tanked, the broader financial system and economy would hold up.”).

20. See, e.g., *id.* at 411–538 (dissenting statements).

21. See, e.g., *id.* at xvii.

22. *Id.* at 417 (dissenting statement).

23. See, e.g., DEP’T OF THE TREASURY, FINANCIAL REGULATORY REFORM, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 55 (2010), <https://perma.cc/6CCA-QTUJ> [hereinafter REBUILDING FINANCIAL SUPERVISION AND REGULATION (2010)] (“While this crisis had many causes, it is clear now that the government could have done more to prevent many of these problems from growing out of control and threatening the stability of our financial system. . . No regulator saw its job as protecting the economy and financial system as a whole.”).

24. See, e.g., Daniel Bush, *What is the Consumer Financial Protection Bureau, Anyway?*, PBS NEWSHOUR (Nov. 27, 2017, 4:39 PM EST), <https://perma.cc/5HKF-7NLS> (“The agency has been controversial since its inception six years ago.”); Joe Nocera, *CFPB Emerges from Trump Storm Battered*

Elizabeth Warren that the “tattered patchwork” of laws regulating the consumer financial products and services market contributed to the crisis.²⁵ Inconsistent application and enforcement of both consumer protection laws and fair lending laws had enabled the financial exploitation of certain communities and jeopardized the entire economic system. The remedy was a single agency with a singular focus: consumer protection.²⁶ Implicit was the belief that paying attention to the impact of financial products on underserved communities could have forestalled the Great Recession and might forestall future national economic crises.²⁷

The creation of the CFPB was, specifically and explicitly, deeply grounded in racial and economic equity. Legislators understood that predatory subprime lending and inflated housing prices had taken down the U.S. financial system,²⁸ and the hard-earned accumulated wealth of many families, particularly Black and Latinx families,²⁹ along with it. While some would fault borrower choice and others would argue that the problem was the expansion of credit to borrowers who could not afford to repay,³⁰ most

but Intact, BLOOMBERG OPINION (Jan. 27, 2021 6:00 AM EST), <https://perma.cc/D5Q2-ZK9G> (“From the moment the CFPB was created in July 2011 as part of the Dodd-Frank financial reform law, conservatives have been gunning for it.”). See generally S. REP. NO. 111-176, at 231, 246–47 (2010) (noting the Dodd-Frank Act was voted out of the Senate Committee on Banking, Housing, and Urban Affairs without any Republican support and representing the minority’s views that the CFPB posed a threat to civil liberties and free enterprise). Cf. Editorial, *Republicans Side with Banks Over Consumers*, USA TODAY (July 4, 2017), <https://perma.cc/J7QA-HGQC> (noting that “all but one” of the House Republicans, and no House Democrats, voted in 2017 in favor of a bill “to gut” the CFPB).

25. Elizabeth Warren, *Unsafe at Any Rate*, 5 DEMOCRACY: A J. OF IDEAS (Summer 2007). See REBUILDING FINANCIAL SUPERVISION AND REGULATION (2010), *supra* note 23, at 2 (“Multiple agencies have authority over consumer protection in financial products, but . . . the supervisory framework for enforcing those regulations had significant gaps and weaknesses. Banking regulators . . . had a potentially conflicting mission to promote safe and sound banking practices, while other agencies had . . . limited tools and jurisdiction.”); FINANCIAL CRISIS INQUIRY REPORT, *supra* note 19, at 308 (noting that the “patchwork quilt of regulators created opportunities for banks to shop for the most lenient regulator”); S. REP. NO. 111-176, at 3 (quoting FDIC Republican Chairman Sheila Bair as saying that the “existence of one regulatory scheme for insured institutions and a much less effective regulatory scheme for non-bank entities created the conditions for arbitrage that permitted the development of risk and harmful products and services outside regulated entities.”). See generally S. REP. NO. 111-176, at 14–15 (cataloging concerns about current consumer financial protection regulation and promising that the “CFPB will stop regulatory arbitrage.”).

26. S. REP. NO. 111-176, at 11.

27. See, e.g., REBUILDING FINANCIAL SUPERVISION AND REGULATION (2010), *supra* note 23, at 57 (“A single agency, such as the CFPB, could have acted much more quickly and potentially saved many more consumers, communities, and institutions from significant losses.”).

28. Even the main Republican dissent on the Financial Crisis Inquiry Commission agreed that combined credit and housing bubbles, coupled with the sale of what were tactfully called “nontraditional” mortgages, were leading causes of the Great Recession. FINANCIAL CRISIS INQUIRY REPORT, *supra* note 19, at 417.

29. See, e.g., Edward Wolff, *The Decline of African-American and Hispanic Wealth Since the Great Recession*, VOXEU, CEPR (Dec. 23, 2018), <https://perma.cc/Y6CH-7WH9>.

30. See, e.g., FINANCIAL CRISIS INQUIRY REPORT, *supra* note 19, at 154.

subprime loans went to borrowers with prime credit scores.³¹ Families who could have repaid a traditional mortgage loan were instead shunted into expensive, inappropriate products. The result was further economic marginalization for those already marginalized.

The Senate Report on Dodd-Frank recognized the disproportionate impact of the mortgage crisis on Black, Latinx, and low-income families of all races.³² The Senate Report cited the 2007 HMDA data.³³ As Federal Reserve researchers noted in their review of the 2007 HMDA data, “Gross differences in the incidence of higher-priced lending between non-Hispanic whites, on the one hand, and [B]lacks or Hispanic whites, on the other, are large”³⁴ According to the Senate Report, 54% of African Americans and 47% of Hispanics received high-cost mortgages in 2006, compared to only 18% of non-Hispanic whites.³⁵ The Federal Reserve researchers listed certain factors they deemed “borrower-related”: income, loan amount, location of the property, whether or not there was a co-applicant for the loan, and the sex of the borrower.³⁶ The Senate Report stated that these borrower-related factors, including income, accounted for only one-sixth of the disparity.³⁷ To this day, families of color, and Black families in particular, have not recovered from the economic fallout of the subprime lending boom and bust.³⁸

31. Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy: As Housing Boomed, Industry Pushed Loans to a Broader Market*, WALL ST. J. at A1 (Dec. 3, 2007), (reporting that 61% percent of subprime borrowers in 2006 were prime eligible based on their credit score).

32. S. REP. NO. 111-176, at 14–15.

33. S. REP. NO. 111-176, at 15.

34. Robert B. Avery, Kenneth P. Brevoort, & Glenn B. Canner, *The 2007 HMDA Data*, 94 FED. RES. BULL. A107, A139 (Dec. 2008), <https://perma.cc/CW5J-ZWMN>. Although not discussed in either the Senate Report or in the Federal Reserve Board study, American Indians, Alaska Natives, Native Hawaiians, and other Pacific Islanders, were also much more likely to receive a higher-priced loan than non-Hispanic whites. The researchers noted that controlling for the lender and available borrower-related factors, including income, reduced but did not eliminate the gap. *Id.* at A139–41 (tables 18A & 18B). Of course, steering Black and Latino borrowers to subprime lenders could well explain why controlling for lender reduced the disparities between Black, Latino, and non-Hispanic white borrowers in the rates at which they received higher-priced mortgage loans.

35. S. REP. NO. 111-176, at 15; *see also* Avery, et al., *supra* note 34, at A107, A139-A140 (discussing pricing differences correlated to race and ethnicity).

36. Avery, et al., *supra* note 34, at A107, A137 (Dec. 2008). Residential segregation makes controlling for property location, as way of identifying how much of the lending disparity is racially linked, particularly unreliable.

37. S. REP. NO. 111-176, at 15. *See also Id.* at A140–41 (tables 18A & 18B) (showing rates of higher-priced lending by race, ethnicity, and sex, for home purchase and refinance loans, with and without controlling for “borrower-related” factors and lender).

38. *See, e.g.*, Alanna McCargo & Jung Hyun Choi, *Closing the Gaps: Building Black Wealth Through Homeownership*, URBAN INST. 2 (Nov. 2020), <https://perma.cc/X2ZJ-ZBNK>; Emily Moss, Kristin McIntosh, Wendy Edelberg & Kristen E. Brody, *The Black-White Wealth Gap Left Black Households More Vulnerable*, BROOKINGS (Dec. 8, 2020), <https://perma.cc/Y9K6-ZMLQ> (“[T]he Great Recession exacerbated the Black-white wealth gap and left Black households more vulnerable to the current COVID-19 recession.”).

Dodd-Frank would build on this understanding of the origins of the financial crisis, and its disparate impact on marginalized communities, in a range of provisions instructing the CFPB to pay particular attention to “traditionally underserved communities.”³⁹ The term “traditionally underserved communities” is undefined in Dodd-Frank and only referenced glancingly in the Treasury white paper elaborating on the concept of what would become the CFPB.⁴⁰ In those glancing mentions, Treasury linked “fair lending” and “underserved consumers and communities.”⁴¹

These provisions in Dodd-Frank did not explain how the CFPB was supposed to integrate racial and economic equity into its policymaking or how the voices and experiences of marginalized communities would influence policymaking. As with previous legislation aimed at addressing systemic financial exclusion, the language of Dodd-Frank can be maddeningly indirect and inconclusive. Even though race was clearly part of what the CFPB was supposed to pay attention to, Congress did not instruct the agency how to pay attention to race and racial equity.

Even with these ambiguities, Dodd-Frank went significantly further than previous attempts to address systemic racial and economic inequity. The racial impact of the foreclosure crisis was devastatingly plain in 2010, when Congress passed Dodd-Frank. Advocates who had fought for decades to build and preserve capital in communities of color and other marginalized communities had high hopes and expectations for the CFPB.

B. *Dodd-Frank: Who Are Traditionally Underserved Communities?*

1. *A Short History: From the FPSC to the CFPB*

The idea of a unitary agency to regulate consumer financial protection is usually traced to a short article Elizabeth Warren wrote in 2007.⁴² Warren’s initial proposal was for a “Financial Product Safety Commission”

39. See generally II.B.3, *infra*.

40. REBUILDING FINANCIAL SUPERVISION AND REGULATION (2010), *supra* note 23, at 15, 58, 69.

41. See, e.g., REBUILDING FINANCIAL SUPERVISION AND REGULATION (2010), *supra* note 23, at 15 (“The Agency should enforce fair lending laws and the Community Reinvestment Act and otherwise seek to ensure that underserved consumers and communities have access to prudent financial services, lending, and investment.”).

42. See, e.g., Bush, *supra* note 24 (“The idea for a financial watchdog agency came from Sen. Elizabeth Warren, . . . a Harvard Law School professor at the time. Warren first proposed creating the agency in 2007 as a way to better regulate mortgages, student loans, and other financial products.”); Lydia DePillis, *A watchdog grows up: The inside story of the Consumer Financial Protection Bureau*, WASH. POST (Jan. 11, 2014, 9:28 AM EST), <https://perma.cc/852N-2ZC6> (“The bureau began as an idea published in 2007 in Democracy Journal, a small lefty quarterly. Its author, a Harvard Law School bankruptcy professor named Elizabeth Warren . . . described a feisty ‘Financial Product Safety Commission’ whose emissaries would be as familiar to Americans as firefighters.”).

(“FPSC”).⁴³ Warren modeled her proposed FPSC on the Consumer Product Safety Commission (“CPSC”), which regulates items like children’s sleepwear and toasters.⁴⁴ Like the CPSC, Warren’s FPSC would have focused on safety and disclosure. Warren’s central thesis was that financial products are sufficiently complex that it is unreasonable for consumers to evaluate all the risks of those products just as we do not expect a purchaser of a toaster “to become an engineer.”⁴⁵ Warren’s short piece does not mention race, “traditionally underserved communities,” or “traditionally underserved consumers,” although, of course, the risks of an exploding adjustable rate mortgage and the other financial products she cites as “unsafe at any rate” were more concentrated in communities of color and low-income communities.⁴⁶

By the time the United States Department of the Treasury (“Treasury”) put out its white paper on financial regulatory reform, the proposed agency’s working title was the Consumer Financial Protection Agency (“CFPA”).⁴⁷ The CFPA was structured to put consumers first and to reduce the supervisory gaps Treasury believed had led to the crisis.⁴⁸ So far, Treasury closely followed Warren’s proposal.

43. Warren, *supra* note 25, at 5.

44. Warren started her article by comparing credit products to toasters:

It is impossible to buy a toaster that has a one-in-five chance of bursting into flames and burning down your house. But it is possible to refinance an existing home with a mortgage that has the same one-in-five chance of putting the family out on the street—and the mortgage won’t even carry a disclosure of that fact to the homeowner. Similarly, it’s impossible to change the price on a toaster once it has been purchased. But long after the papers have been signed, it is possible to triple the price of the credit used to finance the purchase of that appliance, even if the customer meets all the credit terms, in full and on time. Why are consumers safe when they purchase tangible consumer products with cash, but when they sign up for routine financial products like mortgages and credit cards they are left at the mercy of their creditors?

Id. (keeping consumers safe from toasters continues to be part of the CPSC’s work, with recalls of defective toasters in 2019, *Bodum Recalls Toasters Due to Shock Hazard*, CONSUMER PRODUCT SAFETY COMMISSION (last visited Jan. 22, 2021), <https://perma.cc/F43T-G8MJ>, and a recall of a toy toaster in 2014).

45. Warren, *supra* note 25.

46. *E.g.*, Vikas Bajaj & Ron Nixon, *For Minorities, Signs of Trouble in Foreclosures*, N.Y. TIMES (Feb. 22, 2006), <https://perma.cc/ay64-8N6S>; Geoff Smith, *Woodstock Institute, Key Trends in Chicago Area Mortgage Lending: Analysis of Data from the Chicago Area Community Lending Fact Book* (2006), <https://perma.cc/H7YE-XXYZ>; Neighborhood Econ. Dev. Advocacy Project, *Home Mortgage Lending and Foreclosures in Three New York City Neighborhoods: Bedford-Stuyvesant, Brooklyn, Cypress Hills, Brooklyn, Jamaica, Queens* (2002), <https://perma.cc/6VAD-G6N3>; Ellen Schloemer, Wei Li, Keith Ernst & Kathleen Keest, *Losing Ground: Foreclosures in the Subprime Market & Their Cost to Homeowners*, CTR. FOR RESPONSIBLE LENDING 7 (Dec. 2006), <https://perma.cc/QSC9-J5VR>.

47. U.S. DEP’T OF THE TREASURY, FINANCIAL REGULATORY REFORM, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 55 (2009) [hereinafter REBUILDING FINANCIAL SUPERVISION AND REGULATION (2009)].

48. REBUILDING FINANCIAL SUPERVISION AND REGULATION (2010), *supra* note 23, at 57 (“Creating a single federal agency . . . with supervisory, examination, and enforcement authority for protecting consumers would better promote accountability and help prevent regulatory arbitrage. A federally super-

Treasury built on to the safety and disclosure focus of Warren’s article—ultimately an approach based on protection—an affirmative obligation to promote financial inclusion.⁴⁹ Treasury included in the CFPB’s mandate ensuring that traditionally underserved consumers and communities had access to financial services.⁵⁰ Treasury proposed that the CFPB would have a range of authorities and tools to make sure communities of color and low-income communities were well served by consumer financial products and services.⁵¹ The CFPB would have had jurisdiction over the Community Reinvestment Act (“CRA”) to promote access to credit for underserved communities and consumers, as well enforcement authority over fair lending laws and data collection for both mortgage and small business lending.⁵² Treasury envisioned a “community affairs function” that would “promote community development investment and fair and impartial access to credit.”⁵³ The inclusion of this lens of access, and the vision of the agency as a champion of community development and fair lending, pushed the agency’s obligations towards racial and economic equity.

Notably, Treasury advocated an external advisory panel to “promote . . . accountability” in the CFPB’s rulemaking.⁵⁴ Treasury thought the advisory panel would bring “deep” expertise in “financial services and community development” to the CFPB. This twinning of financial services and community development again suggests a vision of the agency as a champion for using financial services to provide capital for underserved communities, with accountability for community development.

Within weeks of the release of the Treasury white paper, the Obama administration released a detailed legislative proposal for the creation of a Consumer Financial Protection Agency.⁵⁵ The 2009 Obama legislative proposal to create the CFPB carried over key features from the Treasury white paper. It included an objective for the CFPB to provide access to under-

vised institution would no longer be able to choose its supervisor based on any consideration of . . . differences in . . . consumer protection . . .”).

49. *Id.*, at 69 (“A critical part of the CFPB’s mission should be to promote access to financial services, especially for households and communities that traditionally have had limited access.”).

50. REBUILDING FINANCIAL SUPERVISION AND REGULATION (2009), *supra* note 47, at 55, 58.

51. *See generally* REBUILDING FINANCIAL SUPERVISION AND REGULATION (2010), *supra* note 23, at 69–70 (discussing the need for the CFPB to “enforce fair lending laws and the Community Reinvestment Act and otherwise seek to ensure that underserved consumers and communities have access to prudent financial services, lending, and investment.”).

52. REBUILDING FINANCIAL SUPERVISION AND REGULATION (2009), *supra* note 47, at 69–70.

53. REBUILDING FINANCIAL SUPERVISION AND REGULATION (2010), *supra* note 23, at 62.

54. *Id.* at 60.

55. *Administration’s Regulatory Reform Agenda Moves Forward: Legislation for Strengthening Consumer Protection Delivered to Capitol Hill*, DEP’T OF THE TREASURY (June 30, 2009), <https://perma.cc/UM5F-5VU4>.

served consumers and a unit focusing on consumer affairs.⁵⁶ It would have provided for the CFPB to have primary authority under the CRA rather than leaving CRA authority dispersed among the various federal financial authorities.⁵⁷ It too would have established an advisory panel focused on financial services and community development, although with the addition of expertise on consumer financial services and products and no explicit mention of “accountability.”⁵⁸ And, in a move that bridged the two approaches, one of fostering inclusion for underserved communities and the other of consumer protection, it would have required monitoring of risks affecting underserved consumers.⁵⁹

Title X of Dodd-Frank retained and even expanded the identification of underserved communities for specific attention by the CFPB through the creation of specific offices, the elaboration of a research agenda, and the specific identification of communities harmed by high-cost mortgage lending in the composition of the Consumer Advisory Board.⁶⁰ The CAB was now also required to have fair lending expertise and representatives of civil rights groups, among other changes. Monitoring for risks to underserved communities remained a “consideration” of the market monitoring function.⁶¹

Title X of Dodd-Frank was both more specific and more vague regarding which groups should get the CFPB’s focus. It created offices specifically for service members and older Americans, but diluted the focus on development and financial inclusion. The community affairs function, originally envisaged by Treasury as serving a cheerleader role for fair lending,⁶² was separate and more focused, under the statutory language, on “technical assistance” rather than “promotion” of fair lending, financial inclusion, or community development.⁶³

The access mandate moved from promoting access for the traditionally underserved to the broader mandate of access for “all consumers,”⁶⁴ and title X did not include CRA authority among the CFPB’s authorities. In broadening the focus from access for those historically marginalized com-

56. *Title X—Consumer Financial Protection Agency Act of 2009*, at 15, 19 (the community affairs unit provided for in the Obama legislative proposal dropped the focus on community development and promotion of fair lending and shifted instead to “providing information, guidance, and technical assistance regarding the provision of consumer financial products or services to traditionally underserved consumers or communities.”).

57. *Id.* at 110–12.

58. *Id.* at 15.

59. *Id.* at 27.

60. *See generally* II.B.3, *infra*.

61. 12 U.S.C. § 5512(c)(2)(E) (2018).

62. REBUILDING FINANCIAL SUPERVISION AND REGULATION (2010), *supra* note 23, at 62.

63. 12 U.S.C. § 5493(b)(2).

64. 12 U.S.C. § 5511(a).

munities, and in dampening the focus on community development, the purpose of promoting access was lost. No longer did the promotion of access unambiguously mean access to community development funds for traditionally underserved communities. In title X, the CFPB was tasked with promoting access for all consumers, as a good in itself, decoupled from the consequences of that access.

2. *The CRA and CDFIs: Defining Underserved*

As we saw above, Treasury introduced the language regarding “underserved communities and consumers” that Congress would ultimately include in Dodd-Frank. Treasury, and Dodd-Frank, did not define the term or explain how the CFPB should think about its relationship to “traditionally underserved communities.” The term “underserved” seems to trace back to the anti-redlining work of the 1960s and 1970s that culminated in the passage of the CRA.⁶⁵ Its survival in Dodd-Frank, even though authority under the CRA was not, in the end, transferred to the CFPB, speaks of a specific, activist view of the role of credit in marginalized communities coupled with a deep understanding of the relationship between racial and economic equity.

The CRA was based on Congress’s controversial finding that regulated financial institutions have an “affirmative obligation” to “help meet the credit needs of the local communities.”⁶⁶ Regulators were charged with “assess[ing] the institution’s record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods.”⁶⁷ Financial institutions and regulatory agencies were united in their opposition to the bill.⁶⁸ Under the CRA, the federal regulators evaluate banks’ lending, investments, community development, and retail banking services.⁶⁹ Poor CRA ratings can be leveraged by community groups to negotiate significant

65. See *Upholding the Spirit of CRA: Do CRA Ratings Accurately Reflect Bank Practices?: Hearing Before the H. Subcomm. on Dom. Pol’y of the Committee on Oversight and Government Reform*, 110th Cong. 124 (2007) [hereinafter *Upholding the Spirit of CRA*] (statement of Calvin Bradford) (community organizations advocated for defining in the CRA “historically underserved” communities as ones “characterized by minority . . . populations, lower income household, or an older housing stock”).

66. 12 U.S.C. § 2901(a)(3). Compare, e.g., *Community Credit Needs: Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs*, 95th Cong. 132 (1977) [hereinafter *Hearings Before the S. Comm. On Banking, Housing, and Urban Affairs*] (statement of Gale Cincotta) (“I agree fully with the concept that all financial institutions have an affirmative obligation to meet the credit needs of all our citizens and their neighborhoods.”); with, e.g., A. Brooke Overby, *The Community Reinvestment Act Reconsidered*, 143 U. PA. L. REV. 1431, 1514 (1995) (“[I]t is indefensible to assert that, through the CRA, private institutions should bear the risk for [affirmative targeted lending] programs.”).

67. Community Reinvestment Act, 12 U.S.C. § 2903(a).

68. *Upholding the Spirit of CRA*, *supra* note 65, at 125 (statement of Calvin Bradford).

69. 12 U.S.C. 2901(b). See, e.g., 12 C.F.R. 228.21–29 (Federal Reserve Board of Governors’ standards for assessing banks’ CRA performance).

community reinvestment commitments by lending institutions.⁷⁰ Decades later, the CRA and the affirmative obligations it imposes on financial institutions to help meet the credit needs of low- and moderate-income communities remain controversial.⁷¹

The CRA, passed by Congress in 1977,⁷² was born out of the prodigious organizing work of Gale Cincotta and National People's Action.⁷³ Cincotta, described by the New York Times at her death as "a plainspoken mother of six,"⁷⁴ helped lead the movement to make banking and other financial institutions more responsive to the communities in which they were located and from which they drew their capital.⁷⁵ Reading hearings on the CRA, one is struck by Cincotta's tenacity of vision: here she is introducing a panel of neighborhood activists, all prepared to talk about bank

70. See, e.g., *Greater Rochester Community Reinvestment Coalition, Comment Letter OCC* (Nov. 16, 2018), <https://perma.cc/2ZC2-562R> ("Since 1996, CRA has leveraged almost \$2 trillion in small business loans and community development loans and investments in low-moderate income communities across the country."). See generally Raphael W. Bostic & Breck L. Robinson, *Do CRA Agreements Influence Lending Patterns*, 31 *REAL ESTATE ECON.* 23 (2008) (discussing increases in lending to lower-income and minority communities in response to CRA agreements).

71. Joseph Otting, the Comptroller of the Currency under Donald Trump and the former CEO OneWest Bank, "had made overhauling CRA a priority" of his time at the head of the OCC and announced his resignation the day after the OCC released its rules. Andrew Ackerman, *Fed Moves to Overhaul Lending Rules for Poorer Communities*, *WALL ST. J.* (Sept. 21, 2020, 2:09 PM EST), <https://perma.cc/JAZ5-F42R>. The National Community Reinvestment Coalition, an advocacy group dedicated to using the CRA to improve access to capital in marginalized communities, has led the charge to preserve the CRA from what it characterizes as attempts to gut the CRA. See generally *It's Our Money. Keep it in our Neighborhoods*, NCRC (last visited Jan. 26, 2021), <https://perma.cc/WER9-RJX7>.

72. Pub. L. No. 95-128, 91 Stat. 1147 (1977) (codified as amended at 12 U.S.C. §§ 2901–2907).

73. See, e.g., *Upholding the Spirit of CRA*, *supra* note 65, at 116 (statement of Calvin Bradford); Michael Barry & Jessie Romero, *Community Reinvestment Act of 1977*, Fed. Reserve History, <https://perma.cc/TM75-SVFZ>; Marijoan Bull, *Data, Accountability, and the Public: Using Community Reinvestment Act Data for Local Community Development*, 19 *CITYSCAPE* 161, 162 (2017); Douglas Martin, *Gail Cincotta, 72, Opponent of Biased Banking Policies*, *N.Y. TIMES* B9 (Aug. 17, 2001), <https://perma.cc/P55D-FJGA>.

74. Martin, *supra* note 73, at B9. While the description in the N.Y. Times's obituary seems faintly patronizing and certainly unnecessarily gender-signaling, Nancy Pelosi, another powerful and indefatigable person, has said that being the mother of five children was instrumental in her developing her own leadership style and abilities. Ellen McCarthy, *'Makes Going to Work Look Easy': Decades Before She Was House Speaker, Nancy Pelosi Had an Even Harder Job*, *WASH. POST* (Feb. 12, 2019, 1:32 PM MST), <https://perma.cc/3F66-FRNH>.

75. See, e.g., *If Federally or Insured Lenders Have Fulfilled Their Affirmative Obligations to Make Loans in Their Communities and If the Federal Regulators Met Their Legal Responsibilities: Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs*, 100th Cong. 33 (1988) (statement of Sen. Proxmire) ("Gale Cincotta is . . . an old friend of the committee . . . and she's a person who's done a tremendous amount of fine work in this . . . throughout the country."); Calvin Bradford & Gale Cincotta, *The Legacy, the Promise, & the Unfulfilled Agenda*, FROM REDLINING TO REINVESTMENT: COMMUNITY RESPONSES TO URBAN DISINVESTMENT 228 (Gregory D. Squires ed., 1992) (stressing that one purpose of the CRA was to ensure that banks reinvested deposits in the communities they took deposits from). See generally MICHAEL WESTGATE & ANN VICK-WESTGATE, *GALE FORCE—GALE CINCOTTA: THE BATTLES FOR DISCLOSURE AND COMMUNITY REINVESTMENT* (2011).

redlining in their communities;⁷⁶ there, she is describing a sophisticated lobbying strategy to strengthen the CRA, covering the White House, administrative agencies, and Congress; and there again, referring Senators to an eight-city study of the prevalence of redlining, based on the then-brand-new Home Mortgage Disclosure Act (“HMDA”) data.⁷⁷ Of course, Cincotta was instrumental in the passage of HMDA in 1975 as well.⁷⁸

Although the CRA’s statutory language is centered on geographic areas and communities divided by income, not race, recognition of race was embedded in its DNA.⁷⁹ Cincotta called out race as a factor in the neighborhood disinvestment the CRA was meant to remedy.⁸⁰ She recognized the intertwining of geography and community, and of race and space.⁸¹ Decades later, in the face of the clear evidence that Black and Latinx communities were both underserved traditional banking products and overserved high-cost home mortgages, Representative Dennis Kucinich would declare, simply, “Congress enacted the Community Reinvestment Act in 1977 to combat redlining practices by the banks.”⁸² The CRA continues to be used by community advocates to promote both racial and economic justice on behalf of specific communities.⁸³

Cincotta urged Congress to define specifically historically underserved communities as the intended beneficiaries of the CRA:

Congress must recognize that many communities have historically been underserved. S. 406 should include provisions that address the needs of historically underserved areas The bill should therefore be amended to in-

76. *Community Credit Needs: Hearings Before the H. Subcomm. On Fin. Institutions of the Comm. On Banking, Fin., and Urban Affairs*, 95th Cong. 817 (1978) [hereinafter *Hearings Before the H. Subcomm. On Fin. Institutions of the Comm. On Banking, Fin., and Urban Affairs*].

77. *Hearings Before the H. Subcomm. on Fin. Institutions of the Comm. on Banking, Fin., and Urban Affairs*, *supra* note 76, at 965 (statement of Gale Cincotta).

78. Edmund Mierwinski, *Regulation as Civic Empowerment*, AM. PROSPECT (June 27, 2009), <https://perma.cc/6HKD-YSSB>.

79. See Overby, *supra* note 66, at 1504 (“The attention in the CRA debates and hearings to the problem of redlining . . . makes it plain that Congress was aware of the interrelationship between the CRA, credit needs, and discrimination.”).

80. See, e.g., *Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs*, *supra* note 66, at 136 (statement of Gale Cincotta) (noting that areas of heavy FHA lending were also ones with a higher percentage of Spanish speakers).

81. *Upholding the Spirit of CRA*, *supra* note 65, at 125 (statement of Calvin Bradford) (noting that the push to define “historically underserved areas” came in part from the evidence that low- to moderate-income white neighborhoods adjoining African American neighborhoods also suffered disinvestment and that white opposition to integration came, in part, from fear of disinvestment).

82. See, e.g., *Id.* at 2 (statement of Rep. Dennis Kucinich) (“Congress enacted the Community Reinvestment Act in 1977 to combat redlining practices by the banks.”).

83. See generally Manual CRA 101, NAT’L COMMUNITY REINVESTMENT COALITION (last visited Aug. 30, 11:07 PM EST), <https://perma.cc/7F6E-QSPG>; see also Raphael W. Bostic & Breck L. Robinson, *Do CRA Agreements Influence Lending Patterns*, 31 REAL ESTATE ECON. 23 (2008) (noting the use of CRA advocacy by community groups to press for increased lending in both low-income and minority communities).

clude underserved areas as specific areas where credit needs are more acute and where financial institutions should place special emphasis on meeting those needs.⁸⁴

Congress declined the invitation, but the language of the “underserved” remained in currency to describe what the CRA was meant to do and whom it was meant to serve. To this day, when advocates, policy makers, and financial institutions speak of the CRA, they often use the shorthand of “underserved” communities to refer both to communities of color and low-income communities.

Cincotta did not get the targeted lending programs for historically underserved communities she sought in the CRA. Two decades later, the Riegle Community Development and Regulatory Improvement Act created a Community Development Financial Institutions (“CDFI”) Fund.⁸⁵ The CDFI Fund, an agency within Treasury,⁸⁶ was a partial response to Cincotta’s observation that historically underserved communities needed affirmative reinvestment. Under the Act, CDFIs would receive some limited federal funding (and tax advantages) in return for providing the targeted reinvestment Cincotta had sought to make an affirmative obligation of all financial institutions.⁸⁷ Like the CRA, the Riegle Community Development and Regulatory Improvement Act nowhere uses the word “underserved.” Yet like the CRA, the concept of communities underserved by mainstream institutions and society’s affirmative obligation to remedy financial exclusion is nonetheless embedded in the creation of the CDFI Fund.⁸⁸

84. *Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs*, *supra* note 66, at 132 (statement of Gale Cincotta).

85. Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 104, 108 Stat. 2160 (1994).

86. Sean Lowry, CONG. RESEARCH SERV., COMMUNITY DEVELOPMENT FINANCIAL INSTITUTIONS (CDFI) FUND: PROGRAMS AND POLICY ISSUES 2 (2018), <https://perma.cc/DQF4-DZ6F> (explaining that the CDFI Fund was originally an independent agency but was moved to be an agency within the Treasury in 1995).

87. *See generally id.*

88. *See, e.g., id.* at 1, 7 (“CDFIs are specialized financial institutions that work in market niches that are underserved by traditional financial institution”; “[a]ll of the Fund’s programs use geographically targeted incentives intended to increase community development in underserved and distressed communities, where certain types of economic activity might not otherwise occur.”). *See generally* § 102, 108 Stat. at 2106:

(a) FINDINGS. —The Congress finds that—

- (1) many of the Nation’s urban, rural, and Native American communities face critical social and economic problems arising in part from the lack of economic growth, people living in poverty, and the lack of employment and other opportunities;
- (2) the restoration and maintenance of the economies of these communities will require coordinated development strategies, intensive supportive services, and increased access to equity investments and loans for development activities, including investment in businesses, housing, commercial real estate, human development, and other activities that promote the long term economic and social viability of the community;

Under its authorizing statute, the CDFI Fund defines the “targeted population” that an individual CDFI serves as “low-income persons” or those who “otherwise lack adequate access to loans or equity investments.”⁸⁹ By 2010, Congress and the CDFI Fund itself were routinely using “underserved” as shorthand for the communities the CDFI Fund was meant to serve.⁹⁰ As described in a 2010 Federal Register notice, the CDFI Fund’s “mission is to expand the capacity of financial institutions to provide credit, capital and financial services to underserved populations and communities in the United States.”⁹¹

In other words, for the CDFI Fund, and those at Treasury who incorporated its model, the primary meaning of “underserved” was, as with the CRA, low-income communities. Those who used the term “underserved” often also had in mind communities of color that “otherwise lack[ed] adequate access to loans or equity investments.”⁹² In a society built on centuries of racial exclusion, Black communities in particular would almost always “lack adequate access to loans or equity investments.”⁹³ As Representative David Scott noted in a 2010 hearing, “Because the history of it is that these CDFIs came about because of the outmigration of White communities. These communities became African American in many cases, and when the White community left, the banks left, and they were underserved.”⁹⁴

Congress also used the term “underserved” in setting affordable housing goals for Fannie Mae and Freddie Mac, the government sponsored en-

(3) community development financial institutions have proven their ability to identify and respond to community needs for equity investments, loans, and development services.

89. 12 U.S.C. § 4702(20) (2018). The statute also required the CDFI Fund to be geographically diverse over metropolitan and rural areas. 12 U.S.C. § 4706(b). In this way, too, it was a precursor to the CFPB’s requirement to give special consideration to rural areas in evaluating the impact and effectiveness of its rules. See 12 U.S.C. § 5512(b)(2)(A)(ii).

90. See, e.g., *Community Development Financial Institutions (CDFIs): Their Unique Role and Challenges Serving Lower-Income, Underserved, and Minority Communities: Hearing Before the H. Comm. On Fin. Servs.*, 111th Cong. 106 (2010); H.R. REP. NO. 107-59, at 48 (2001) [hereinafter *Community Development Financial Institutions*] (“Recipients must use the funds to support mortgage, small business and economic development lending in currently underserved, distressed neighborhoods.”).

91. Request for Public Comment: Community Development Financial Institutions Fund, Community Development Financial and Technical Assistance Awards, Native Initiatives, and Bank Enterprise Awards, 75 Fed. Reg. 10,561 (Mar. 8, 2010).

92. Request for Public Comment: Community Development Financial Institutions Fund, Community Development Financial and Technical Assistance Awards, Native Initiatives, and Bank Enterprise Awards, 75 Fed. Reg. 10,561, 10,562 (Mar. 8, 2010). Cf. Michael Neal, *To Significantly Increase Access to Capital for Communities of Color, We Need to Support Black Banks and All CDFIs*, URBAN INST. BLOG (July 31, 2020), <https://perma.cc/73RN-9LJY> (reporting that more than a third of CDFIs are led by minorities and nearly half of CDFIs’ loans and investments go to majority-minority communities).

93. See generally MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* (2017).

94. *Community Development Financial Institutions*, supra note 90, at 3 (statement of Rep. David Scott).

terprises (“GSEs”).⁹⁵ Again, the focus was on low- to moderate-income families.⁹⁶ As with the CDFI Fund and the CFPB, rural communities were called out for special attention, as well.⁹⁷ In setting the GSE goals for underserved areas, the Department of Housing and Urban Development (“HUD”) defined underserved by reference to low rates of mortgage originations and high rates of mortgage denials.⁹⁸ Unsurprisingly, these were, as HUD noted, “high minority census tracts,” even though the formal definition only referenced income levels.⁹⁹

During the 2007–08 financial crisis and in the hearings leading to the passage of Dodd-Frank, many used the term “underserved” somewhat more fluidly and expansively. For example, President Bush’s Advisory Council on Financial Literacy included immigrants, low-income individuals, and minorities in its discussion of the “credit underserved.”¹⁰⁰ Congressional witnesses routinely used “underserved” to describe low-income and minority communities, as well as, occasionally, older Americans.

In using the language of “underserved” in Dodd-Frank, Congress invoked these decades of work to promote access to a specific kind of credit and capital: community development funds. “Underserved” was always used to point towards those excluded from the financial mainstream and nearly always coupled with a recognition of some affirmative obligation to remedy past, traditional, or historical exclusion and predatory inclusion. The framers of Dodd-Frank were responding to the largest foreclosure crisis in the nation’s history, and the worst economic downturn since the Great Depression. In a consumer financial protection agency, they also sought to address financial exclusion. The CFPB was meant to be a force for inclusion and racial and economic equity.

3. *A Pointillist Picture Emerges: Dodd-Frank and Traditionally Underserved Communities*

Title X of Dodd-Frank itself never defines “traditionally underserved communities.” But it does use the term in several places in the statute, particularly in the sections establishing the “specific functional units” of Re-

95. 12 U.S.C. § 4565 (2018). *See generally* FINANCIAL CRISIS INQUIRY REPORT, *supra* note 19, at 38–42 (discussing the history of Fannie Mae, Freddie Mac, and the affordable housing goals).

96. 12 U.S.C. § 4565(a)(1).

97. 12 U.S.C. § 4565(a)(1)(C).

98. Office of Pol’y Dev. and Research, Dep’t of Housing and Urban Dev. HUD’s Affordable Lending Goals for Fannie Mae and Freddie Mac 3 (Jan. 2001), <https://perma.cc/G567-52CC>.

99. *Office of Pol’y Dev. and Research*, *supra* note 98, at 3.

100. PRESIDENT’S ADVISORY COUNCIL ON FINANCIAL LITERACY, 2008 ANNUAL REPORT TO THE PRESIDENT, 31–32.

search and Community Affairs¹⁰¹ and in the section detailing the CFPB's market monitoring function.¹⁰² Dodd-Frank also calls out other specific communities for the CFPB's attention, including "communities that have been particularly impacted by higher-priced mortgage loans,"¹⁰³ servicemembers,¹⁰⁴ older Americans,¹⁰⁵ and student loan borrowers.¹⁰⁶ It calls out repeatedly the centrality of fair lending to the CFPB's work, in the statutorily-mandated Office of Fair Lending and Equal Opportunity, to be headed by an Assistant Director,¹⁰⁷ in the composition of the Consumer Advisory Board¹⁰⁸ and in the CFPB's objectives.¹⁰⁹ And it creates an Office of Financial Education, charged with "empower[ing]" consumers, not merely passively "educating" them.¹¹⁰

The first "specific functional unit" to appear in Dodd-Frank is research.¹¹¹ Congress charged the Director with "establish[ing] a unit to research, analyze, and report on" six specific aspects of consumer financial products and services:

- Market developments, including "alternative consumer financial products or services with high growth rates and areas of risk to consumers";
- "access to fair and affordable credit for traditionally underserved communities";
- disclosures and consumer use of disclosures;
- consumer understanding of the risks and pricing of consumer financial products and services;

101. 12 U.S.C. § 5493(b)(1) (2021) (requiring a research unit, whose work includes research on "access to fair and affordable credit for traditionally underserved communities" and "the experiences of traditionally underserved consumers"); 12 U.S.C. § 5493(b)(2) (requiring a unit of community affairs "whose functions shall include providing information, guidance, and technical assistance regarding the offering and provision of consumer financial products or services to traditionally underserved consumers and communities").

102. 12 U.S.C. § 5512(c)(2)(E) (providing that considerations for the CFPB's market monitoring may include, among others, "the extent, if any, to which the risks of a consumer financial product or service may disproportionately affect traditionally underserved consumers").

103. *Id.* § 5494(b) (membership of the Consumer Advisory Board).

104. *Id.* § 5493(e) (establishing the Office of Service Member Affairs). *See also* S. REP. NO. 111-176, at 22 (2010) ("In addition to minorities and lower-income borrowers, military personnel are among those whom are frequently exploited by auto dealers.").

105. *Id.* § 5493(g) (establishing the Office of Financial Protection for Older Americans).

106. *Id.* § 5535(a) (requiring the Secretary of the Treasury to name a private education loan ombudsman and listing the duties of the role).

107. *Id.* § 5493(c).

108. 12 U.S.C. § 5494(b) (membership of the Consumer Advisory Board shall include experts on "fair lending and civil rights").

109. *Id.* § 5511(b)(2) (listing, among the CFPB's objectives, that "consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination"). *See also* S. REP. NO. 111-176, at 162 (citing "evidence of discriminatory pricing in the provision of auto loans, certain terms of mortgage loans, and other products" as a reason for creating the Office of Fair Lending and Equal Opportunity).

110. *Id.* § 5493(d).

111. *Id.* § 5493(b)(1).

- consumer behavior; and
- “experiences of traditionally underserved consumers”¹¹²

By itself, this is a remarkable statement of mission. Neither the Federal Reserve Act nor the Federal Trade Commission Act, to take two examples close to the CFPB’s DNA, require the relevant agency to conduct research, much less research focusing on how people themselves experience and understand the regulated markets. Research relevant to risks to consumers is highlighted; access, as an area of focus, is access to “fair and affordable credit” for traditionally underserved communities. Everywhere, the consumer experience—the reality of how consumers interact in the real world with consumer financial products and services—is in the foreground. Empiricism trumps theory or ideology.¹¹³

The market monitoring function, which overlaps with the research function, is supposed to inform rulemaking and other policymaking functions.¹¹⁴ The market monitoring function, like the research mandate, was a CFPB-specific innovation. The statute recognizes risks to consumers as risks that the CFPB is specifically supposed to monitor and address. The CFPB must “monitor for risks to consumers in the offering or provision of consumer financial products or services”¹¹⁵ The statute then lists six considerations the CFPB may take into account in conducting its monitoring. In that context, the risks that “may disproportionately affect traditionally underserved consumers” are identified as an appropriate focus of the CFPB’s attention.¹¹⁶

In addition to the identification of research as a specific functional unit, the statute identifies six other offices or functional units: community affairs, tasked with “providing information, guidance, and technical assistance” on traditionally underserved communities’ experiences with consumer financial products and services;¹¹⁷ the consumer complaint function, itself a sweeping new mandate intended to make visible to the agency, and to Congress, consumers’ experiences with credit, in their own voices;¹¹⁸

112. *Id.*

113. *See* S. REP. NO. 111-176, at 162 (“The Committee expects these functions to ensure that the Bureau has a robust knowledge of the markets for consumer financial products and services”).

114. S. REP. NO. 111-176, at 165 (“The Committee considers the monitoring and information gathering function to be an essential part of the Bureau’s work. The Bureau must stay closely attuned to the marketplace for consumer financial products and services in order to effectively fulfill the purposes and objectives of this title.”).

115. 12 U.S.C. § 5512(c)(1).

116. *Id.* § 5512(c)(2)(E).

117. *Id.* § 5493(b)(2).

118. *Id.* § 5493(b)(3) (establishing the unit); 12 U.S.C. § 5534 (detailing the CFPB’s authority to take complaints, including requiring “timely responses” by financial institutions). *See* S. REP. NO. 111-176, at 162 (including the complaint function among those functions expected “to ensure that the Bureau has a robust knowledge of the markets for consumer financial products and services”); Katherine M. Porter, *The Complaint Conundrum: Thoughts on the CFPB’s Complaint Mechanism*, 7 BROOK. J. CORP.

and the Offices for Fair Lending,¹¹⁹ Financial Education,¹²⁰ Service Member Affairs,¹²¹ and Older Americans.¹²² Each of these functional units is tasked with “coordinating” with relevant state and federal agencies, and all but the community affairs unit and the Office of Service Member Affairs are tasked with providing reports to Congress. Each of the offices and units has a different mandate, some more focused on education or supervision, but each is expected to develop and communicate expertise on the experiences and views of the communities called out for their focus.¹²³ Under the statute’s architecture, each office or unit is positioned to build relationships with advocates and organizations interested in the needs of the community it is working with and to serve as a conduit between those communities and the CFPB, as well as other federal and state agencies.

In separate sections of the statute are the private education loan ombudsman and the Consumer Advisory Board. The private education loan ombudsman is also required to make annual reports to Congress, as well as compile and analyze borrower complaints about private student loans.¹²⁴

The Consumer Advisory Board is supposed to “advise and consult” on how the CFPB exercises its functions.¹²⁵ This echoes the language of the Treasury white paper that saw the inclusion of a consumer advisory board

FIN. & COM. L. 57, 61 (2012) (The complaint function “was designed to give the CFPB a comprehensive view of consumers’ frustrations to allow it to better perform its oversight of financial institutions.”).

119. *Id.* § 5493(c).

120. *Id.* § 5493(d).

121. 12 U.S.C. § 5493(e).

122. *Id.* § 5493(g).

123. *Id.* § 5493(b)(2) (the community affairs unit shall “provid[e] information, guidance, and technical assistance regarding the offering and provision of consumer financial products or services to traditionally underserved consumers and communities”); 12 U.S.C. § 5493(b)(3)(C) (requiring an annual report to Congress on the consumer complaints); 12 U.S.C. § 5493(c)(2)(B), (C), (D) (suggesting that the Office of Fair Lending and Equal Opportunity coordinate fair lending efforts with other governmental agencies, work with the private sector and advocates to “promot[e] . . . fair lending compliance and education,” and provide annual reports to Congress); 12 U.S.C. § 5493(d)(2), (3) (requiring the Office of Financial Education to “develop and implement a strategy to improve the financial literacy of consumers . . . in consultation with the Financial Literacy and Education Commission” and to coordinate with both the “Community Affairs Office” and the “research unit” in implementing the strategy and conducting research); 12 U.S.C. § 5493(e)(1) (requiring the Office of Service Member Affairs to coordinate on complaint monitoring by “service members and their families” and coordinating governmental consumer protection work as it impacts service members and their families); 12 U.S.C. § 5493(g)(3) (requiring the Office of Financial Protection for Older Americans to “develop goals” for programs serving “seniors,” monitor certifications of financial advisors for seniors and alert other governmental entities of unfair, deceptive or abusive practices, provide recommendations to Congress, conduct research, coordinate consumer protection, and work with nonprofits assisting seniors); *see also* S. REP. NO. 111-176, at 162 (noting that the “Bureau functional units for research, community affairs, and consumer complaints” are meant “to ensure that the Bureau has a robust knowledge of the markets for consumer financial products and services”).

124. 12 U.S.C. § 5535.

125. *Id.* § 5494(a).

as an important step in “accountability” for the agency.¹²⁶ Its members are to include “representatives of communities that have been significantly impacted by higher-priced mortgage loans” as well as experts in fair lending, civil rights, and consumer protection.¹²⁷ The Senate Report on Dodd-Frank stressed the importance of appointing members “with a broad spectrum of perspectives” and without regard to party affiliation. The Senate Report noted that politicizing the Consumer Advisory Board would “jeopardize” its work.¹²⁸

Taken as a whole, the focus on low-income communities and communities of color is unavoidable. The evolving usage of “underserved,” from Gale Cincotta’s organizing in the early 1970s, to the creation of the CDFI Fund and the GSE Affordable Housing Goals in the 1990s, to Dodd-Frank in 2010, all recognized the relationship between race and financial exclusion. The passage of Dodd-Frank in the wake of the foreclosure tsunami made the general racial justice focus unmistakable. Subprime lending and foreclosures were disproportionately concentrated in communities of color¹²⁹ and led to dramatic drops in the absolute wealth of Black and His-

126. REBUILDING FINANCIAL SUPERVISION AND REGULATION (2010), *supra* note 23, at 60.

127. 12 U.S.C. § 5494(b).

128. S. REP. NO. 111-176, at 162.

129. *See, e.g.*, Marsha J. Courchane, *The Pricing of Home Mortgage Loans to Minority Borrowers: How Much of the APR Differential Can We Explain?*, 29 J. Real Estate Res. 399 (2007) (African Americans more than two and a half times as likely and Hispanics roughly twice as likely as whites to receive a subprime loan); Thomas P. Boehm, Paul D. Thistle, & Alan Schlottman, *Rates and Race: An Analysis of Racial Disparities in Mortgage Rates*, 17 HOUSING POL’Y DEBATE 109, 126 (2006) (finding that African Americans in the conventional market pay 20 basis points more for purchase loans and 94 basis points more for refinances, and Latinos pay 12 basis points more for purchase loans, than whites with similar income and education); First Nations Dev. Inst., *Borrowing Trouble: Predatory Lending in Native Communities* 14–16 (2008), <https://perma.cc/YYJ3-PSRX> (American Indians receive subprime loans at roughly twice the rate whites do); Carsey Inst., *Subprime and Predatory Lending in Rural America: Mortgage Lending Practices That Can Trap Low-Income Rural People*, Pol’y Brief No. 4 (2006), <https://perma.cc/SLQ3-WWAJ> (rural Latinos, Native Americans, and African Americans all disproportionately receive subprime loans, with African Americans nearly three times as likely as Whites to receive subprime loan); Howell E. Jackson & Laurie Burlingame, *Kickbacks or Compensation: The Case of Yield Spread Premiums*, 12 STAN. J.L. BUS. & FIN. 289, 350 (2007) (Black and Latinx borrowers pay more, on average, in broker compensation than whites); Robert B. Avery, Kenneth P. Brevoort & Glenn B. Canner, *Higher Priced Home Lending and the 2005 HMDA Data*, FED. RES. BULL. A123, A157-A158 (2006) (pricing disparities between whites and minorities highest for broker originated loans); Debbie Gruenstein Bocian, Keith S. Ernst & Wei Li, Ctr. for Responsible Lending, *Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages* 21–23 (May 31, 2006); Elvin K. Wyly, Mona Atia, Holly Foxcroft, Daniel J. Hamme, Kelly Phillips Watts, *American Home: Predatory Mortgage Capital and Neighbourhood Spaces of Race and Class Exploitation in the United States*, 88 GEOGRAFISKA ANNALER, SERIES B: HUMAN GEOGRAPHY 105 (2006); Binyamin Appelbaum & Ted Mellnik, *The Hard Truth in Lending*, CHARLOTTE OBSERVER, (Aug. 28, 2005), at 1A; Debbie Gruenstein Bocian, Wei Li, & Keith S. Ernst, Ctr. For Responsible Lending, *Foreclosures by Race and Ethnicity*, (June 18, 2010); Ira Goldstein, *Subprime Lending, Mortgage Foreclosures, and Race: How Far Have We Come and How Far Have We To Go?*, THE REINVESTMENT FUND (2008), <https://perma.cc/RUL4-RHZZ>.

panic households.¹³⁰ To include the voices of communities impacted by higher-priced mortgage lending meant to include representatives of Black and Hispanic communities. The racial and economic disparities in access to banking services, with people of color and lower-income households, across racial and ethnic lines, disproportionately numbering among the underbanked and unbanked, were well-established and undisputed.¹³¹

The language of “traditionally underserved” is broad enough to permit inclusivity and evolution but pointed enough to be clear. Congress wove that history through its creation of the structure and function of the CFPB, placing at the heart of CFPB’s mandated structure a mission of accountability to racial and economic justice. The CFPB must pay attention to the voices and experiences of Black and Brown communities, of low-income communities, and of communities with particular vulnerabilities, such as older Americans and service members. Congress envisioned the CFPB to be accountable to these specific communities. Congress did not, however, tell the CFPB how to ensure that accountability or even much about how to incorporate the perspectives, experiences, and voices of those communities in the CFPB’s policymaking work.

C. *Building the Plane While Flying It*

1. *Early Organizational Decisions*

Anyone who worked at the CFPB during its early years heard and likely used, even if ironically, the Silicon Valley, entrepreneurial cliché¹³² “building the plane while flying it.”¹³³ There was a prodigious amount of

130. See, e.g., Nathalie Baptiste, *Staggering Loss of Black Wealth Due to Subprime Scandal Continues Unabated*, THE AM. PROSPECT (Oct. 13, 2014); Wolff, *supra* note 29; Rakesh Kochhar & Anthony Cilluffo, *How Wealth Inequality Has Changed in the U.S. Since the Great Recession, by Race, Ethnicity & Income*, PEW RESEARCH CTR., NOV. 1, 2017, <https://perma.cc/C3UY-7Q5E>; Kriston McIntosh, Emily Moss, Ryan Nunn, & Jay Shambaugh, *Examining the Black-white wealth gap*, BROOKINGS, (Feb. 27, 2020), <https://perma.cc/3CKT-UBR6>.

131. See, e.g., *Nat’l Survey of Unbanked and Underbanked Households*, FDIC at 11 (Dec. 2009), <https://perma.cc/GS43-MGQ9> (finding that a majority of Black, 44.5% of American Indian and Alaskan Native, and 43.3% of Hispanic households were either underbanked or unbanked, and that close to 20% of lower-income households lacked any bank account); see also *How America Banks: Household Use of Banking and Financial Services*, FDIC at 1-2 (Oct. 2020), <https://perma.cc/L7MA-UY5L> (“Consistent with the results of previous surveys, in 2019 unbanked rates varied considerably across the U.S. population. For example, unbanked rates were higher among lower-income households, less-educated households, Black households, Hispanic households, American Indian or Alaska Native households, working-age disabled households, and households with volatile income.”).

132. See, e.g., Ruth Walker, ‘*Build the Plane While You’re Flying It;’ A look at Why a Nonsensical Idiom Beloved in Silicon Valley Has Caught on so Among the Rest of Us*, CHRISTIAN SCI. MONITOR (Mar. 24, 2016), <https://perma.cc/B68W-LU7Z>.

133. See, e.g., Cliff Rosenthal, *My Life on the Dark Side*, AM. BANKER (Dec. 15, 2014, 12:00 PM EST), <https://perma.cc/R94G-LKE5> (“The mantra we heard went like this: ‘We’re trying to fly the plane while we’re building it.’”).

work to do,¹³⁴ from locating headquarters and furnishing them to staffing up an agency to meeting statutory deadlines for Dodd-Frank Act rulemaking.¹³⁵ Initial staffing was done in just ten months.¹³⁶ The early CFPB pulled from several existing agencies, including the Federal Trade Commission, the Federal Reserve Board, the Department of Housing and Urban Development, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision, all with their own cultures and norms.¹³⁷ Added in were academics, former Hill staffers, and financial industry insiders from Wall Street, as well as both big and small financial institutions.¹³⁸ Each group, and subgroup, had their own internalized assumptions about what a functioning organization could and should look like.¹³⁹

Dodd-Frank, as discussed above,¹⁴⁰ mandated certain functional units, a consumer complaint function, and regular reports to Congress on a variety of topics, as well as setting a research and market monitoring agenda. But there was plenty of room to adjust. Where should the private loan ombudsman sit, for example, and what staff, if any, would that person have? Only some of the mandated structures were called “offices” with

134. See, e.g., DePillis, *supra* note 42 (“New recruits would show up to no desk, no phone and way too much to do.”).

135. Title XIV of the Dodd-Frank Act provided, for many of its mandated mortgage rulemakings, that, if final rules were not issued 18 months after the transfer date, the statute would take effect as written without the benefit of regulatory implementation. Pub. L. No. 111-203, § 1400(c), 124 Stat. 2136. The statute granted authority to the Secretary of the Treasury, in consultation with the heads of other agencies, to designate a transfer date from six to 18 months after the enactment of the Dodd-Frank Act. 12 U.S.C. § 5582(c). On September 2, 2010, the Secretary of the Treasury published a Federal Register notice designating July 21, 2011, as the transfer date. Designated Transfer Date, 75 Fed. Reg. 57252 (Sept. 2, 2010). See, e.g., Rosenthal, *supra* note 133 (“My colleagues worked hard, sometimes insanely so, to produce regulations and research in time for statutory deadlines.”). DePillis, *supra* note 42 (noting that the CFPB established “a record of hitting each rulemaking deadline set by Dodd-Frank as it fundamentally reshaped the mortgage market, while other agencies let theirs slide”).

136. See Emily Stewart, *Elizabeth Warren Has Just One Plan*, Vox (Sept. 19, 2019, 8:30 AM EDT), <https://perma.cc/3UB2-RGJH>.

137. Dodd-Frank provided for the transfer of consumer financial protection functions and personnel from these agencies. 12 U.S.C. §§ 5581, 5583. The Treasury white paper premised the rapid startup of what would become the CFPB on transferring “reasonably quickly” core personnel from other federal agencies. In what seems in hindsight to be a significant understatement, the Treasury white paper noted, “Combining staff from different agencies is not simple, to be sure” REBUILDING FINANCIAL SUPERVISION AND REGULATION (2010), *supra* note 23, at 57. See also DePillis, *supra* note 42 (“[T]he larger issues [in integrating staff from other agencies] were cultural.”).

138. See Lachlan Markay, *Elizabeth Warren Built the Consumer Financial Protection Bureau. It Became a Revolving Door*, DAILY BEAST (Dec. 9, 2019, 5:19 AM EST), <https://perma.cc/2I89-QPEK>.

139. See DePillis, *supra* note 42 (“[I]ts strong-willed staff, drawn from other agencies, private companies and consumer advocacy groups, got bogged down in constant fights over the mission.”); Stewart, *supra* note 136 (“‘There was this old Washington versus 21st century agency culture clash,’ said Leandra English.”).

140. See II.B.3, *supra*.

mandated heads of “Assistant Director.” Nor did the statute make clear where “Assistant Directors” should fit in the overall hierarchy. Clearly an “Assistant Director” was below the Director and Deputy Director called for in the statute, but the rest was all up to the agency.

Early CFPB leaders settled on six “Divisions,” led by “Associate Directors.”¹⁴¹ The specific offices and units mandated by the statute were housed within these larger divisions, with the statute’s “Assistant Directors” reporting to Associate Directors. The grouping of the statutory offices and units into divisions communicated important decisions about how the CFPB would do its work.

Consumer Education and Engagement housed the statutory offices focused on specific populations, as well as the Office of Financial Education.¹⁴² Having a whole division focused on work directly with consumers demonstrated a commitment by early CFPB leadership to place engagement with consumers on a par in importance and focus with supervision and enforcement or research and regulations. Moreover, the inclusion of the specific population offices with the Office of Financial Education suggested a view of consumer education as participatory and anchored in the specific experiences of discrete populations.¹⁴³

Similarly, housing supervision, enforcement, and the statutorily-mandated office of fair lending within the same division was a strategic choice.¹⁴⁴ Combining enforcement and supervision in the same agency was a departure from existing norms of other regulators, and CFPB leadership doubled down on that aspect of the statute by combining the two functions in the same division. This suggested to many that supervisory oversight would serve enforcement, at least in part, and that examiners might have a more adversarial role with the institutions they supervised.¹⁴⁵ Fair lending would be part of the CFPB’s work overseeing financial institutions, and the

141. CFPB 2011 Semi-Annual Report, 12, <https://perma.cc/2JKW-EDVQ> [hereinafter CFPB 2011 Semi-Annual Report]; CFPB 2013 Semi-Annual Report, 143, <https://perma.cc/J3VU-Y48C> [hereinafter CFPB 2013 Semi-Annual Report].

142. CFPB 2013 Semi-Annual Report, *supra* note 141, at 43–54 (describing the Offices of Financial Education and the “special populations” offices housed in the Consumer Education and Engagement division).

143. *See, e.g., id.* at 43 (“Reaching out to consumers is essential to the work of this division . . . These . . . opportunities to hear directly from consumers about their financial needs, aspirations, and experiences help inform all of the Bureau’s work.”).

144. *See, e.g.,* CFPB 2011 Semi-Annual Report, *supra* note 141, at 9, 25 (“The CFPB’s Supervision, Enforcement, and Fair Lending & Equal Opportunity Division promotes compliance with consumer financial protection laws under the Bureau’s authority.”).

145. DePillis, *supra* note 42 (“One of bureau’s three major divisions, ‘Supervision, Enforcement, and Fair Lending’ is a mix of the litigious culture of the Federal Trade Commission, which relies on prosecuting wrongdoers, and the more observational approach of the Fed, which could always revoke a bank’s charter if it found anything amiss.”); Alan Zibel, *Consumer Regulator to Stop Bringing Lawyers to Firm Exams*, WALL ST. J. (Oct. 9, 2013, 6:33 pm ET) (“Supervision examiners and enforcement

CFPB would explicitly focus its fair lending efforts on supervision and enforcement, rather than, say, “the promotion of fair lending . . . education.”¹⁴⁶

The CFPB’s organizational structure left unaddressed what input the various statutory units, offices, and functions, other than the Office of Research, would have into the development of policy in regulations. Practically, almost anyone from any office was given a voice in the CFPB’s early policymaking.¹⁴⁷ But, on the organizational chart, there was no clear line from the offices and functions that, under the statute, had a special focus on marginalized communities to the division, Research, Markets, and Regulations, charged with developing the rules that govern the consumer financial marketplace. Staff were left to negotiate input rights and equities largely on an ad hoc basis.¹⁴⁸ This left as undetermined and variable the weight to be given the voices of marginalized communities, whether expressed by CAB members from communities affected by higher-priced mortgage lending¹⁴⁹ or by the Office of Community Affairs, charged with providing technical assistance on credit in traditionally underserved communities.¹⁵⁰ Both the statute and the early organizational chart were silent on what weight should be given consumer complaints in determining policy,¹⁵¹ even though accepting consumer complaints and requiring companies to respond to them is one of the CFPB’s “primary functions.”¹⁵² This organizational lacunae,

attorneys will continue to work closely to ensure that the financial institutions that we oversee are following the rules.’”).

146. 12 U.S.C. § 5493(c) (2011). See CFPB 2011 Semi-Annual Report, *supra* note 141, at 10 (“Fair Lending & Equal Opportunity leads the Bureau’s efforts to ensure fair, equitable, and nondiscriminatory access to credit for individuals and communities through supervisory oversight and enforcement of federal fair lending laws, outreach, education, and engagement.”). The statutory language would later be used to justify a restructuring that downplayed the importance of fair lending in enforcement and supervision. See III.C, *infra*.

147. See, e.g., DePillis, *supra* note 42 (“Everything had to come before a Thursday morning policy committee and be vetted through working groups with staff from other divisions ‘Everybody was weighing in on everybody’s business . . . ,’ said one former Fed staffer”); see generally II.C.3, *infra*.

148. See, e.g., DePillis, *supra* note 42 (“‘There wasn’t even consensus about whether we were to achieve consensus.’”).

149. 12 U.S.C. §5494(b). Note as well that the statute identifies “representatives of depository institutions that primarily serve underserved communities” as another group to be included in the CAB, and that these representatives would also be well-suited to speak to specific financial concerns of “underserved communities.”

150. *Id.* §5493(b)(2).

151. Acting Director Mick Mulvaney would place great emphasis on the number of debt collection complaints in prioritizing enforcement regarding debt collection and rulemaking on debt collection practices over rulemaking on other matters, including prepaid cards and payday lending. See Yuka Hayashi, *CFPB to Work with FTC on Policing Debt Collectors: Some Republicans have called for merging CFPB’s enforcement authority into FTC’s, citing overlap*, WALL ST. J. (Mar. 20, 2018 7:09 PM ET); Mick Mulvaney, *The CFPB Has Pushed Its Last Envelope*, WALL ST. J. (Jan. 23, 2018 7:40 pm ET).

152. 12 U.S.C. §5511(c)(2).

coupled with a lack of clear processes for input across the organization, would contribute to the CFPB's missteps during COVID.

2. *Research and Market Monitoring*

Placing the research unit into a division with the market monitoring function so central to Congress's conception of the CFPB,¹⁵³ and joining them both to the rulewriting function shaped how the CFPB made policy. Grouping the statutorily-mandated "unit" of research with markets, teams, and rulewriters in a single division signaled a commitment to data-driven policy and integration of diverse professional perspectives into every stage of the rulemaking process.¹⁵⁴ From the beginning of every rule, the economists, lawyers, and market specialists (who came from a range of professional backgrounds but usually had significant experience working for or with consumer financial products or service providers) were expected to talk to each other. This organizational choice also influenced how both the markets teams and the researchers thought of their work and what they did.

This organizational choice expanded significantly the responsibilities of the Office of Research. In addition to issuing reports on the topic areas mandated by Dodd-Frank, which heavily emphasized the experience of traditionally underserved communities, research was now responsible for helping scope every rule. The responsibility to write "the 1022," the description of the costs and benefits of the rule mandated by section 1022(b)(2) of Dodd-Frank, fell to the Office of Research, as did the mandated five-year lookback, or "assessment," of every significant rule issued by the CFPB.¹⁵⁵ The 1022s and the assessments were large, intellectually ambitious projects, particularly in the early days.¹⁵⁶

Most executive agencies are required to conduct a cost-benefit analysis, overseen by the Office of Management and Budget ("OMB"), under Executive Order 12,866.¹⁵⁷ Independent agencies, including the CFPB and most federal financial regulators, are exempt from direct OMB oversight in their assessments of the effectiveness of their rules and not required to fol-

153. S. REP. NO. 111-176, at 162 (2010).

154. *Cf.* DePillis, *supra* note 42 ("'Research, Markets, and Regulation,' blended academically minded behavioral economists with lawyers. A clash of philosophies was inevitable.")

155. 12 U.S.C. §5512(d).

156. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-158, DODD-FRANK REGULATIONS: CONSUMER FINANCIAL PROTECTION BUREAU NEEDS A SYSTEMATIC PROCESS TO PRIORITIZE CONSUMER RISKS 18–24 (2018) (describing the CFPB's assessments to date and process for scoping the assessments).

157. The President, Exec. Order No. 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (Oct. 4, 1993). *See also* The President, Exec. Order No. 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 21, 2011); Office of Management and Budget, Circular A-4 (Sept. 17, 2003).

low Executive Order 12,866.¹⁵⁸ Nonetheless, most do follow the OMB guidance, at least in spirit and court challenges to rulemakings frequently focus on how administrative agencies perform cost-benefit analyses where required by law or internal procedure.¹⁵⁹

An initial task for the CFPB was how to implement Dodd-Frank's particularized approach to cost-benefit analysis. Dodd-Frank imposes special statutory considerations for assessing the effectiveness of the CFPB's rules.¹⁶⁰ Costs to consumers, as well as to financial institutions and other entities covered by the rules, must be identified.¹⁶¹ The CFPB is told to consider "potential reduction of access by consumers to consumer financial products and services."¹⁶² No guidance is given as to how to measure benefits to consumers, or whether to treat all access equally. Impacts on rural consumers are called out for special attention,¹⁶³ but the CFPB is not told to consider "traditionally underserved communities" or other specific populations beyond consumers in rural areas.

Implementing Dodd-Frank's particularized approach to cost-benefit analysis for the CFPB had to be done before any rules could be finalized. Given the statutory deadlines for several major Dodd-Frank rulemakings within just 18 months after the transfer date,¹⁶⁴ this foundational work had to be done as the agency was being stood up and while the first major rules were being written. As a result, although the Office of Research conducted important studies during the CFPB's early years,¹⁶⁵ the Office of Research necessarily had less attention for its core statutory research agenda. Re-

158. The President, Exec. Order No. 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (Oct. 4, 1993). Section 3(b) of Executive Order 12866 defines an "agency" as in 44 U.S.C. § 3502(1), excluding independent regulatory agencies. 44 U.S.C. 3502(5) was amended by Dodd-Frank to include the CFPB. See Ryan Rainey, *CFPB's Cost-Benefit Analysis Office to Be Modeled after FTC's Bureau of Economics*, MORNING CONSULT (May 10, 2018, 5:05 PM ET), <https://perma.cc/7JMD-DFVC> ("Specifically, the bureau is not required to submit its proposed rules to the Office of Information and Regulatory Affairs, a unit of the Office of Management and Budget that's charged with determining how rules proposed by federal agencies would affect the U.S. economy."). See generally Vivian S. Chu & Daniel T. Shedd, Cong. Research Serv., *Presidential Review of Independent Regulatory Commission Rulemaking: Legal Issues* (Sept. 10, 2012), <https://perma.cc/HM27-Z9PU>; Curtis W. Copeland, *Economic Analysis and Independent Regulatory Agencies 6–7* (Apr. 30, 2013), <https://perma.cc/7DUT-9GQM>.

159. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-151, *DODD-FRANK REGULATIONS: IMPLEMENTATION COULD BENEFIT FROM ADDITIONAL ANALYSES AND COORDINATION* 12 (2011).

160. See Howell E. Jackson & Paul Rothstein, *The Analysis of Benefits in Consumer Protection Regulations*, 9 HARVARD BUS. L. REV. 197, 223–27 (2019) (cataloging the CFPB's legal requirements regarding regulatory analysis).

161. 12 U.S.C. § 5512(b)(2)(A)(i) (2010). See Rainey, *supra* note 158.

162. *Id.*

163. *Id.* § 5512(b)(2)(A)(ii).

164. See *supra* note 135.

165. E.g., Kenneth P. Brevoort, Phillip Grimm & Michelle Kambara, *Data Point: Credit Invisibles*, THE CFPB OFFICE OF RESEARCH (May 2015), <https://perma.cc/B36G-29LM>; Kenneth P. Brevoort & Michelle Kambara, *Data Point: Medical Debt and Credit Scores*, THE CFPB OFFICE OF RESEARCH (May 2014), <https://perma.cc/FPJ4-VT9U>; Kathleen Burke, Jonathan Lanning, Jesse Leary, Jialan Wang,

search attention needed to be directed on supporting rulemaking, from designing the CFPB's cost-benefit framework to conducting studies documenting consumer harm in markets under consideration for regulation to drafting the individual cost-benefit analyses.¹⁶⁶

On the other hand, the CFPB's addition of specialized markets teams to the division of Research, Markets, and Regulations ("RMR"), expanded and diversified available expertise and staff capacity for the research and market monitoring functions. The markets teams varied in their backgrounds, but they were often industry insiders with deep expertise in particular product and business lines, built up over decades of work in the various markets. The markets teams prepared many of the required reports of "significant findings" from market monitoring.¹⁶⁷ Regular reports on credit cards¹⁶⁸ and debt collection¹⁶⁹ were, for example, led by markets teams.

Including markets teams in RMR shaped policy development. The markets teams' knowledge of industry practices averted unintended consequences and helped craft more effective and targeted regulation. Their engagement in preparing some of the mandatory reports both lightened the load of the Office of Research and ensured that those reports were appropriately contextualized to the appropriate markets. Left underdeveloped, however, was a formal role in RMR's policy development for expertise on the impact of financial products on underserved communities.

3. Policy Development, Traditionally Underserved Communities, and the Cordray-Era CFPB

Aside from weighing consumer benefits as part of the cost-benefit analysis,¹⁷⁰ there was no explicit, structural consumer-centric checkpoint in rulemaking policy.¹⁷¹ Rulewriting teams did not have to prepare an analysis

CFPB Data Point: Payday Lending, THE CFPB OFFICE OF RESEARCH (March 2014), <https://perma.cc/H4BZ-7VYZ>.

166. See Rainey, *supra* note 158.

167. 12 U.S.C. § 5512(c)(3) (2010).

168. The Credit Card Accountability Responsibility and Disclosures Act of 2009, Pub. L. No. 111-24, 123 Stat. §1734 (2009) (requires the CFPB to prepare a biennial report). The first two CARD Act reports, *CARD Act Report: A Review of the Impact of the CARD Act on the Consumer Credit Card Market*, CONSUMER FIN. PROT. BUREAU (Oct. 1, 2013), <https://perma.cc/63LH-CLL8>; *The Consumer Credit Card Market*, CONSUMER FIN. PROTECTION BUREAU (Dec. 2015), <https://perma.cc/76HA-446R>, were led by staff from markets offices.

169. The Fair Debt Collection Practices Act requires the CFPB to submit an annual report to Congress on debt collection enforcement and compliance. 15 U.S.C. § 1692m(a). See, e.g., *Fair Debt Collection Practices Act: CFPB Annual Report 2013*, CONSUMER FIN. PROT. BUREAU (Mar. 20, 2013), <https://perma.cc/HGS9-KZE2>.

170. 12 U.S.C. § 5512(b)(2)(A)(i).

171. Cf. DODD-FRANK REGULATIONS, *supra* note 156, at 15 ("CFPB currently lacks a systematic, bureau-wide process for prioritizing financial risks facing consumers . . .").

of the impacts of their proposed regulations on traditionally underserved communities, for example, despite the statute's repeated mention of traditionally underserved consumers and communities.¹⁷² The markets offices tended to focus on gathering information from financial institutions and other businesses rather than consumers.¹⁷³

The specific populations offices required by the statute were in different divisions from the rulewriters and just one voice among many in the CFPB's policy development process.¹⁷⁴ The Office of Fair Lending and Equal Opportunity was in the supervision and enforcement division.¹⁷⁵ The complaint function, named "Consumer Response," reported to the Associate Director for Operations.¹⁷⁶ The Office of Community Affairs, tasked with providing technical assistance on the needs and experiences of traditionally underserved communities, was housed in the External Affairs division,¹⁷⁷ but its statutory functions were largely carried out by the Office of Financial Empowerment, in the division of Consumer Education and Engagement.¹⁷⁸ And the offices for financial education, older Americans, service members, and students were housed in the Consumer Education and Engagement division.¹⁷⁹ Some of these offices were quite lightly staffed; none had a formal role in developing rulemaking policy.

Under the tenure of Director Cordray, the lack of a formal role did not prevent any of these offices from engaging with the CFPB's policymaking, either in the rulewriting function or elsewhere in the agency. Policy development was intentionally, sometimes exasperatingly, cross-matrixed.¹⁸⁰ Teams on policy initiatives were often led by a manager from one office

172. See generally II.B.3, *supra*. Note that Dodd Frank requires consideration of the impact of its regulations on "consumers in rural areas." 12 U.S.C. § 5512 (b)(2)(A)(ii).

173. DODD-FRANK REGULATIONS, *supra* note 156, at 9–10 (reporting an average of 50 meetings per month with industry organizations and 4 meetings per month with consumer organizations during the 2018 fiscal year).

174. See II.C.1, *supra*. Cf. Cliff Rosenthal, *My Life on the 'Dark Side'*, AM. BANKER (Dec. 15, 2014, 12:00 PM EST) <https://perma.cc/Z8SA-5YMR> ("The Office of Financial Empowerment was, of course, only one office in the much larger bureau, whose defined mission was to serve all consumers; the underserved were only one sector.").

175. CFPB 2014 Semi-Annual Report, 187, <https://perma.cc/9XJ5-PRLC> [hereinafter CFPB 2014 Semi-Annual Report].

176. *Id.* at 59–60, 187.

177. *Id.* at 16, 187.

178. *Id.* at 71–74, 187.

179. See generally *id.* at 60–69, 187.

180. See, e.g., DePillis, *supra* note 42 ("Everything had to come before a Thursday morning policy committee and be vetted through . . . staff from other divisions, on the theory that multiple perspectives improve the final outcome. . . . 'Everybody was weighing in on everybody's business, which I really think . . . bogs down the agency,' said one former Fed staffer . . ."); Cliff Rosenthal, *My Life on the 'Dark Side'*, AM. BANKER (Dec. 15, 2014, 12:00 PM EST), ("The margins of my draft were filled with comments from lawyers, economists, policy staff, communications staff and assorted others."), <https://perma.cc/Z8SA-5YMR>.

with staff from other offices and even other divisions. On some initiatives, such as the development of the TILA-RESPA integrated disclosures, teams in different divisions would play different roles in the development of policy, forcing management and staff in different divisions to engage jointly on policy decisionmaking.¹⁸¹ In 2015, the CFPB formalized this collaborative approach to policy development in its “One Bureau” initiative, which brought together subject matter experts from across the CFPB to set policy priorities and design and develop policy initiatives.¹⁸²

Nearly from the beginning, a central tool for the CFPB’s collaborative approach was Policy Committee. Representatives from every office in the CFPB were expected to attend weekly Policy Committee meetings and invited to weigh in on policy matters great and small.¹⁸³ Although the Policy Committee had no formal decisionmaking role and was not attended by the Director, teams would spend weeks preparing for Policy Committee meetings with decks and slides. Objections raised during a Policy Committee briefing could derail a proposal and require cross-division negotiations before the matter proceeded to the Director for approval. In this cross-matrixed environment, offices without a designated policy role in the CFPB’s organizational chart, such as the Office of Community Affairs or the Office of Older Americans, were able to raise concerns regarding the impact on traditionally underserved communities and other groups of consumers, even as the weight to give such input was constantly being re-negotiated by the policymaking teams.

4. *External Engagement with Traditionally Underserved Communities*

Under Dodd-Frank, the CFPB was required to establish a CAB, for information gathering and “advise and consult” purposes. The CFPB’s Director was instructed to:

seek to assemble experts in consumer protection, financial services, community development, fair lending and civil rights, and consumer financial products or services and representatives of depository institutions that primarily serve underserved communities, and representatives of communities that have been significantly impacted by higher-priced mortgage loans, and seek representation of the interests of covered persons and consumers.¹⁸⁴

181. See, e.g., Leonard J. Kennedy, Patricia A. McCoy, & Ethan Bernstein, *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century*, 97 CORNELL L. REV. 1141, 1160–67 (2012) (describing the “iterative, collaborative” development of the disclosure form).

182. DODD-FRANK REGULATIONS, *supra* note 156, at 15–17.

183. See, e.g., DePillis, *supra* note 42 (“Everything had to come before a Thursday morning policy committee. . . .”); ASR Analytics, *Independent Performance Audit of CFPB Operations and Budget* (Nov. 13, 2012), <https://perma.cc/5UYE-NWG>, at 121 (noting that attendees at Policy Committee meetings were “assistant directors and other key managers throughout the Bureau”)

184. 12 U.S.C. § 5494(b) (2010).

Like the Federal Reserve Board's Consumer Advisory Council,¹⁸⁵ the CFPB's CAB initially provided for three-year staggered terms and drew members from a wide range of backgrounds, including fair lending and consumer protection advocates as well as academics and representatives of financial institutions.¹⁸⁶ Although its initial charter set the minimum number of members at 16,¹⁸⁷ the first CAB had 25 members.¹⁸⁸ The size, tenure, and composition of the CAB would be changed under the CFPB's next two Directors.¹⁸⁹

Arguably, some of the impact of the CAB in terms of foregrounding the perspectives of marginalized communities was diluted by the creation of two additional, extra-statutory advisory bodies: the Community Bank Advisory Council (15-20 members) and the Credit Union Advisory Council (15-20 members).¹⁹⁰ Because the CAB, by statute, also included "financial services" experts and "representatives of depository institutions,"¹⁹¹ this meant that representatives of banks and credit unions had more formal representation in the CFPB's advisory councils than consumers or traditionally underserved communities.¹⁹²

Although staff met with members of all three advisory councils, there was not a formal mechanism with either the CAB or the two advisory councils for providing input into the CFPB's policymaking. What the statute meant by "advise and consult" remained largely unelucidated and left to individual CAB members and staff to flesh out. As a result, using input from the CAB was optional, not mandatory.

185. See, e.g., Consumer Advisory Council: Solicitation of Nominations for Membership, 66 Fed. Reg. 29,806 June 1, 2001 (noting the three-year staggered terms) [hereinafter Solicitation of Nominations for Membership]. See also Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239 (1976) § 3 (amending 15 USC 1691b to require the Consumer Advisory Council).

186. Compare, e.g., Consumer Advisory Council, *supra* note 185 (listing council members, whose employers included consumer advocacy organizations, housing counselors, banks, among others) with CFPB Announces Consumer Advisory Board Members (Sept. 12, 2012), <https://perma.cc/7Y4Q-SL4N> (announcing the formation of the first CAB, with staggered three-year terms; noting that, "The newly appointed board members include experts in consumer protection, financial services, community development, fair lending, civil rights, and consumer financial products or services. They also represent depository institutions that primarily serve underserved communities, and they represent communities that have been significantly impacted by higher-priced mortgage loans.").

187. Charter of the Consumer Advisory Board, at §5(b) (May 10 2012), <https://perma.cc/9CRP-TBDX>.

188. CFPB Announces Consumer Advisory Board Members, *supra* note 186.

189. See, e.g., Renae Merle, *Mick Mulvaney fires all 25 members of consumer watchdog's advisory board*, WASH. POST, June 6, 2018 at 5:32 pm EDT; John Nancarrow, *Advisory Board Revamp*, BLOOMBERG L. (Mar. 22, 2019, 6:01 am), <https://perma.cc/36SH-LECC>.

190. DODD-FRANK REGULATIONS, *supra* note 156, at 10.

191. 12 U.S.C. § 5494(b) (2010).

192. Note, however, that the statute instructs the CFPB's director to "seek" "representatives of depository institutions that primarily serve underserved communities," suggesting that even selected representatives of financial institutions would nonetheless have a focus on underserved communities. 12 U.S.C. § 5494(b) (2010).

Other, less formal mechanisms were established for gathering input about consumers in general and marginalized communities in particular.¹⁹³ Director Cordray had regular calls with legal services organizations from around the country. Faith-based coalitions had regular meetings with Director Cordray and CFPB staff, providing another avenue for hearing perspectives other than those of regulated entities.¹⁹⁴ Field hearings provided a chance for people in local communities around the country to provide direct input to the CFPB on a variety of consumer financial protection topics.¹⁹⁵ All of these mechanisms were useful to staff, and all were unstructured regarding the weight the input was given, or the manner and timing of integrating the input into policymaking.¹⁹⁶

III. A FOUNDATION OF SHIFTING SANDS

A. *The Times, They Are A-Changing*

The CFPB went through its first political transition in the fall of 2017. Although Director Cordray still had slightly more than half a year remaining in his term, he made the decision to step down.¹⁹⁷ President Trump selected the Office of Management and Budget Director “Mick” Mulvaney as the Acting Director of the CFPB.¹⁹⁸ Mulvaney was widely known for calling the CFPB “a sick, sad” joke while he was in Congress,¹⁹⁹ and President Trump seemed to agree with Mulvaney, tweeting that the CFPB was a

193. See, e.g., CFPB 2014 Semi-Annual Report, *supra* note 175, at 74–76 (describing CFPB outreach).

194. Carrie Harris, *CBF Advocacy Leads Delegation to Meet with New Consumer Financial Protection Bureau Director*, CBF BLOG (Jan. 25, 2019), <https://perma.cc/TZ53-E2BB> (noting two coalitions, Faith for Just Lending and the Faith & Credit Roundtable, had a “strong relationship with Director Cordray”).

195. See generally DODD-FRANK REGULATIONS, *supra* note 156, at 10.

196. See generally *id.* at 9–10.

197. RICHARD CORDRAY, WATCHDOG: HOW PROTECTING CONSUMERS CAN SAVE OUR FAMILIES, OUR ECONOMY, AND OUR DEMOCRACY 205 (2020). Director Cordray was confirmed by the Senate on July 16, 2013. On the Nomination (Confirmation of Richard Cordray, of Ohio, to be Director, Bureau of Consumer Financial Protection) Roll Vote 174, 113th Cong., 1st Sess. (July 16, 2013), <https://perma.cc/CA7R-GZUZ>. He was sworn in the following morning. Rucker, *supra* note 2. The Dodd-Frank Act provides that the CFPB director has a five-year term. 12 U.S.C. § 5491(c). See also Kate Berry, *Dems: CFPB’s Cordray Would Sue if Forced Out*, AM. BANKER (Jan. 17, 2017), <https://perma.cc/C4EK-JYUD> (noting Cordray’s term would have expired in July 2018).

198. Mulvaney had been a Tea Party Republican congressional representative from South Carolina and would go on to become President Trump’s acting Chief of Staff.

199. Emily Stewart, *Mick Mulvaney Once Called the CFPB a “Sick, Sad” Joke. Now He Might be in Charge of it*, VOX (Nov. 16, 2017), <https://www.vox.com/policy-and-politics/2017/11/16/16667266/mick-mulvaney-cfpb-cordray-omb-joke>.

“total disaster.”²⁰⁰ Mulvaney began splitting his time between the CFPB and the OMB.²⁰¹

Mulvaney was only at the CFPB for a year. In that time, he initiated a roll back of CFPB rulemaking on payday loans and Home Mortgage Disclosure Act data, brought in political appointees to head most divisions,²⁰² removed enforcement and supervisory authority from the Office of Fair Lending and Equal Opportunity, and generally worked to shift the focus from what he saw as over-zealous enforcement of unduly burdensome regulations.²⁰³

Initial press coverage assumed the Trump administration was confronting an agency “stacked with loyalists” that would not be “easy to reshape.”²⁰⁴ Three years later, the organizational chart looked very different.²⁰⁵ Internal processes that promoted collaboration in prioritization had been shelved.²⁰⁶ Two divisions had been merged,²⁰⁷ new offices created, and reporting lines and position descriptions changed.²⁰⁸ Taken together, the changes undermined the ability of the agency to step forward aggressively during the COVID-19 pandemic and reduced the agency’s funda-

200. Patrick Rucker & Jeff Mason, *U.S. consumer watchdog agency official sues to block Trump’s pick*, REUTERS (Nov. 26, 2017), <https://perma.cc/7V3H-TP3G>.

201. See generally Patricia A. McCoy, *Inside Job: The Assault on the Structure of the Consumer Financial Protection Bureau*, 103 MINN. L.REV. 2543, 2574-79 (2019) (discussing the legal controversy surrounding Mulvaney’s joint appointment as the OMB Director and the CFPB Acting Director).

202. See, e.g., Kelsey Ramírez, *CFPB to Dramatically Reorganize Operational Structure*, HOUSING WIRE, (May 10, 2018 1:54 PM), <https://perma.cc/9PS7-ALFX>.

203. See, e.g., Mick Mulvaney, *The CFPB Has Pushed Its Last Envelope*, WALL ST. J. (Jan. 23, 2018 7:40 pm ET).

204. Michael Gruenwald, *Trump Wants to Dismantle Elizabeth Warren’s Agency. Good Luck with That*, POLITICO (Dec. 3, 2017) <https://perma.cc/H24E-BXKG>.

205. See, e.g., Joe Nocera, *CFPB Emerges from Trump Storm Battered but Intact*, BLOOMBERG OPINION (Jan. 27, 2021 6:00 AM EST), <https://perma.cc/WZR8-XSCH> (“By the 2020 election, many of the high-ranking civil servants had left.”). In January 2021, all but one division head had been hired since Cordray left. If we compare the CFPB’s March 4, 2021, organizational chart, *Bureau Structure*, CFPB (last updated Mar. 4, 2021), <https://perma.cc/82FY-C8L8>, to the chart presented to Congress in the last semi-annual report prepared under Director Cordray, for spring 2017, the only head of a division that is the same is Mary McLeod, the CFPB’s General Counsel. CFPB Spring 2017 Semi-annual Report, 175, <https://perma.cc/J82K-BVGW>. Acting Director Mulvaney discontinued the CFPB’s practice of making the organizational charts public in the Semi-Annual report, which impedes tracing organizational changes over time. See, e.g., Semi-annual report of the Bureau of Consumer Fin. Protection, (Apr. 2018), <https://perma.cc/G4NV-VLVP>. One can trace most of the hires through review of the CFPB’s press releases announcing new executive and senior leadership hires. See, e.g., CFPB Announces Additions to Executive Team, (Nov. 30, 2020), <https://perma.cc/MU66-3F5Z>.

206. See DODD-FRANK REGULATIONS, *supra* note 156, at 15.

207. The divisions of External Affairs and Consumer Education and Engagement have been merged into a new division of Consumer Education and External Affairs. Compare <https://perma.cc/8JY9-FJGM> with CFPB Spring 2017 Semi-annual Report, *supra* note 205, at 175.

208. Kate Muñoz, *Where Did All the Statutory Offices Go?*, CONSUMER RIGHTS REGULATORY ENGAGEMENT ADVOCACY PROJECT (Oct. 5, 2020), <https://perma.cc/G8RK-LGQ2>.

2021

PAY ATTENTION!

377

mental ability to pay attention to the voices of marginalized communities.²⁰⁹

B. Fair Lending Disappears

Within about two months of becoming the Acting Director, Mulvaney stripped the Office of Fair Lending and Equal Opportunity, one of the statutorily mandated offices, of its decision rights and formal involvement in supervision and enforcement matters.²¹⁰ Although justified at the time as promoting “efficiency and consistency,”²¹¹ it would be more than two years before the CFPB would bring its next redlining case.²¹² This was the longest absence of fair lending referrals in the agency’s history.²¹³

“Fair lending” stayed in the title of the division of Supervision, Enforcement, and Fair Lending. But the CFPB’s public actions and statements veered away from acknowledging either racial discrimination or the CFPB’s obligation to address it directly and substantively. Under questioning in 2020, the Director defended the CFPB’s failure to bring fair lending enforcement cases by suggesting that such enforcement work was no longer necessary.²¹⁴ The CFPB’s portal for homeowners and renters facing challenges as a result of the COVID-19 pandemic failed to advise homeowners of their right to file a fair lending complaint if they believed their mortgage

209. One study found that, while financial restitution in response to complaints to the CFPB dropped by 30% during the Trump administration, the financial restitution to “low-socioeconomic areas” dropped particularly sharply, suggesting that even the complaint function failed to maximize inclusion of marginalized communities. Charlotte Haendler & Rawley Z. Heimer, *The Financial Restitution Gap in Consumer Finance: Insights from Complaints Filed with the CFPB* (Jan. 2021), <https://perma.cc/45F4-WBHC>.

210. Renae Merle, *Trump administration strips consumer watchdog office of enforcement powers in lending discrimination cases*, WASH. POST (Feb. 1, 2018, 3:40 PM MST), <https://perma.cc/ZM2A-25PU>.

211. *Id.* (reporting statement of Mulvaney spokesman John Czwartacki).

212. In July 2020, the CFPB filed its sole fair lending discrimination case under President Trump’s appointees, Townstone Financial. Complaint, *Bureau of Consumer Fin. Prot. v. Townstone Fin., Inc.*, No. 20-cv-04176 (N.D. Ill. Filed July 15, 2020), <https://perma.cc/Z7AP-7FH4>. See also Kate Berry, *Where Have All the CFPB Fair-Lending Cases Gone?*, AM. BANKER (Dec. 16, 2019, 9:30 PM EST), <https://perma.cc/CYP9-XMKM> (“But neither Kraninger, nor her predecessor, Mick Mulvaney, filed any other orders or referred possible Equal Credit Opportunity Act violations to the Department of Justice in the past two years.”). See generally, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-21-393, *Fair Lending: CFPB Needs to Assess the Impact of Recent Changes to Its Fair Lending Activities* (2021) (recommending that the CFPB assess the extent to which the reorganization hampered fair lending enforcement).

213. Kate Berry, *Where Have All the CFPB Fair-Lending Cases Gone?*, AM. BANKER (Dec. 16, 2019, 9:30 PM EST), <https://perma.cc/CYP9-XMKM>.

214. In testimony before the Senate Banking Committee, Director Kraninger suggested that the CFPB’s failure to obtain redress for consumers in discrimination cases “could be read as a success of the original enforcement actions.” *The Consumer Financial Bureau’s Semi-Annual Report to Congress: Hearing Before S. Comm. on Banking, Housing, and Urban Affairs*, 116th Cong. (2020), <https://perma.cc/7RQV-Q8GP>, at 26:40 minute mark.

servicer had discriminated against them while flagging that renters could complain to HUD regarding discrimination in rentals.²¹⁵ A July 2020 CFPB blog post on financial inclusion concluded by punting the CFPB's responsibility to address financial discrimination to financial institutions, describing the CFPB's role in addressing financial exclusion as "ensuring that financial companies know they have a responsibility to treat consumers fairly and to eliminate discrimination."²¹⁶

In June 2020, the CFPB settled with Harbour Portfolio Advisors and its affiliates for a total of \$35,000 for Fair Credit Reporting Act violations.²¹⁷ Harbour bought properties that had been foreclosed on during the Great Recession and resold them, on often exorbitant terms that left its primarily low-income and often Black "customers" "swimming in a sea of debt."²¹⁸ Harbour had been sued before, including by the city of Cincinnati²¹⁹ and the Atlanta Legal Aid Society, joined by the National Consumer Law Center.²²⁰ Both suits settled. Harbour paid the City of Cincinnati \$125,000 and agreed to fix all the housing it was selling.²²¹ The Atlanta Legal Aid case, which included allegations of race-based discrimination, settled for an undisclosed amount, but all sixteen of the plaintiff households received some financial redress, including, for those homeowners still in the home, reformation of the contracts reducing the overall payment obligations.²²² Harbour's practice bore, in many ways, an uncanny resemblance to the abusive lending practices that had led to the Great Recession and Congress's creation of the CFPB. The CFPB settlement, however, provided no relief for homeowners and failed to address Harbour's discriminatory practices. This was a distinct turning away from the congressional mandate to address and elevate fair lending concerns.

215. Under questioning from Senator Menendez, Director Kraninger sought to distinguish between fair housing complaints under the Fair Housing Act, which the Department of Housing and Urban Development has jurisdiction over, and fair lending complaints under the Equal Credit Opportunity Act. *The Consumer Financial Bureau's Semi-Annual Report to Congress: Hearing Before S. Comm. on Banking, Housing, and Urban Affairs*, 116th Cong. (2020), available at <https://perma.cc/ZX2F-V3D8>, at 4:00 minute mark.

216. Kathleen L. Kraninger, *The Bureau is taking action to build a more inclusive financial system*, CONSUMER FIN. PROT. BUREAU (July 28, 2020), <https://perma.cc/EVC8-8Y5B>

217. Consent Order, *In the Matter of Harbour Portfolios Advisors, et al.*, Case No. 2020-BCFP-0004 (June 23, 2020), <https://perma.cc/5UX4-55G7>.

218. Matthew Goldstein & Alexandra Stevenson, *Market for Fixer-Uppers Traps Low-Income Buyers*, N.Y. TIMES (Feb. 20, 2016), <https://perma.cc/5ZQZ-7CFM>.

219. James Leggate, *'Predatory' Property Investors Agree to Pay Cincinnati, Change Practices to Settle Lawsuit*, WCPO CINCINNATI (Mar. 28, 2018, updated Dec. 12, 2018, 2:08 PM), <https://perma.cc/VH9S-FBB5>.

220. Second Amended Cmplt, *Horne v. Harbour Portfolio VI, LP*, No. 1:17-CV-954-RWS (June 15, 2017), <https://perma.cc/E92W-Q42R>.

221. Leggate, *supra* note 219.

222. General Predatory Lending Briefs, Reports & Press Releases, NAT. CONSUMER LAW CTR. (last visited May 21, 2021) <https://perma.cc/R988-P9UT>.

C. Research under Attack

1. Whose Cost and Whose Benefit?

The early CFPB boasted itself as a 21st century data-driven agency.²²³ Research was integrated into every rulemaking from initial scoping to finalization.²²⁴ Rulemakings were often preceded by detailed research reports investigating the nature of the market and the extent, if any, of consumer harm.²²⁵ The CFPB's Office of Research scrupulously sought to ground the CFPB's policymaking in empirical research, free from ideological or political bias.²²⁶

The Trump administration seemed suspicious of this approach and questioned the caliber, objectivity, and methodology of the work done by the CFPB's economists and researchers.²²⁷ Acting Director Mulvaney proposed to create a separate office of cost benefit analysis.²²⁸ Unlike the existing Office of Research, housed with the markets teams and the rulewriters in the division of RMR,²²⁹ the Office of Cost-Benefit Analysis would have been in the Director's office.²³⁰ The exact purpose and responsibilities of such an office were not clear, but many observers assumed the goal was to make cost-benefit analysis more subject to political control.²³¹

Tensions between political appointees and the career economists flared into view in April 2020 with the publication of a memo by a career econo-

223. Kennedy, McCoy & Bernstein, *supra* note 181, at 1160–67.

224. See generally II.C.2, *supra*.

225. See, e.g., Burke, Lanning, Learly & Wang, *supra* note 165.

226. See Kennedy, McCoy & Bernstein, *supra* note 181, at 1155.

227. Alan Rappeport, *Mick Mulvaney Calls for 'Humility' from Consumer Financial Protection Bureau*, N.Y. TIMES (Jan. 23, 2018), <https://perma.cc/EJQ6-KQAK>. Mulvaney's suggestion that rulemakings should be driven by complaint data was at odds with what most observers believe can be credibly deduced from complaints. See, e.g., Disclosure of Certain Credit Card Complaint Data, 76 Fed. Reg. 76,628, 76,630 (Dec. 8, 2011) (discussing limitations in drawing conclusions about provider quality and consumer harm from the complaint data). Katherine M. Porter, *The Complaint Conundrum: Thoughts on the CFPB's Complaint Mechanism*, 7 BROOK. J. CORP. FIN. & COM. L. 57, 70–71, 80 (2012) (noting complaint frequency can be generated by complex products, or vary depending on the effectiveness of various companies' internal complaint handling mechanisms, as well as the general "nonrandom" nature of who complains; praising the CFPB for being "sensitive" to these concerns in its rulewriting) ("These concerns reveal that the raw numbers of complaints have little meaning on their own.") (noting that marginalized consumers in particular "may be less likely to complain").

228. See, e.g., Rainey, *supra* note 158.

229. CFPB Spring 2017 Semi-annual Report, *supra* note 205.

230. See, e.g., Rainey, *supra* note 158.

231. See, e.g., *id.* (quoting Sen. Warren as saying, "This redundant office, put directly under the control of Mulvaney and his political staff, is designed to substitute political ideology for data driven rulemaking."); Ramírez, *supra* note 202 (quoting Rep. Maxine Waters, "The creation of an Office of Cost Benefit Analysis, to be closely controlled within the Office of the Director, is nothing more than a way to internally block regulations that may benefit consumers under the guise of cost-benefit analysis.").

mist detailing political meddling in the drafting of the cost-benefit analysis on the notice of proposed rulemaking to rescind the 2017 payday rule's ability to repay protections.²³² Career staff were, according to the memo, treated as “adversaries;” political appointees disregarded staff expertise and sought revision of the rule on “philosophical” grounds rather than new or updated research and data.²³³

The 2020 final payday rule rolled back the ability-to-repay protections of the 2017 rule on the basis that the 2017 final rule would unduly constrain consumer choice.²³⁴ It relied on the relatively low number of consumer complaints about payday loans to dismiss the Bureau's previous analyses regarding evidence of consumer confusion.²³⁵ The CFPB specifically refused to consider whether consumers taking out payday loans understood their own chances of being caught in a debt trap (as they would presumably need to do in order to be making an informed choice).²³⁶ Instead, the CFPB relied on a legal and philosophical line-drawing exercise that deemed irrelevant individual consumers' understanding about their individual circumstances.²³⁷ This was the opposite of being data-driven and showed a supreme indifference to the lived experiences of the marginalized, predominately Black, communities, whose wealth is too often drained by payday lenders.²³⁸

2. *Leaving Racial Disparities Unexamined*

Dodd-Frank, as we have seen, mandated a specific research agenda that included the risks to traditionally underserved communities and consumers.²³⁹ Yet the Trump-era CFPB failed to use its prodigious research

232. Nicholas Confessore & Stacy Cowley, *Trump Appointees Manipulated Agency's Payday Lending Research, Ex-Staffer Claims*, N.Y. TIMES (Apr. 29, 2020), <https://perma.cc/T9KJ-BBEN>.

233. The memo fueled public speculation about political contributions Mulvaney had received from payday lenders and their trade associations while he was a congressional representative. *See, e.g.*, Kate Berry, *Link Between Payday Campaign Cash & Lawmakers' Votes, Report Claims*, AM. BANKER (Apr. 26, 2018, 3:53 PM EDT), <https://perma.cc/J932-CAMK>.

234. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 85 Fed. Reg. 44,382, 44,393 (July 22, 2020). Of course, people from marginalized communities are often underrepresented in complaint databases, in part because they often suspect, too often correctly, that their complaints will be ignored. *See* Katherine M. Porter, *The Complaint Conundrum: Thoughts on the CFPB's Complaint Mechanism*, 7 BROOK. J. CORP. FIN. & COM. L. 80 (2012).

235. Payday, Vehicle Title, and Certain High-Cost Installment Loans, *supra* note 234, at 44,391.

236. *Id.* at 44,395.

237. *Id.*

238. Payday lending is overwhelmingly concentrated in Black neighborhoods. *See, e.g.*, Uriah King, Wei Li, Delvin Davis, & Keith Ernst, *Race Matters: The Concentration of Payday Lenders in African-American Neighborhoods in North Carolina*, CTR. FOR RESPONSIBLE LENDING (Mar. 22, 2005), <https://perma.cc/RV85-DY23>; Pew Charitable Trusts, *Payday Lending in America: Who Borrows, Where They Borrow, and Why* (July 2012), <https://perma.cc/VDE2-N8WS>.

239. 12 U.S.C. § 5493(b)(1) (2010). *See* II.B.3, *supra*.

capabilities to illuminate racial disparities,²⁴⁰ even as the country went through what many have called a racial reckoning in 2020.²⁴¹ The lack of data impeded work to advance racial and economic equity and hindered work for financial inclusion.

Some of these failures, like the failure to advance the Dodd-Frank mandated small business lending data collection,²⁴² date back to decisions made early in the CFPB's existence. Work on that rulemaking had only begun in earnest in 2016,²⁴³ leaving it vulnerable to being shelved under the Trump administration.²⁴⁴ The CFPB's failure to move forward with the small business lending data collection rulemaking meant that data and reporting on small business lending was lacking when COVID-19 hit. The lack of that data contributed to the widely documented failures of the Paycheck Protection Program to deliver credit to small businesses owned by people of color.²⁴⁵

240. See generally, Diane Thompson, *CFPB, Show Your Work: The Case for Data-Driven Regulation in the Time of COVID-19*, MORNING CONSULT (June 10, 2020 at 5:00 am EST), <https://perma.cc/H4WF-LBB6>.

241. See, e.g., Michele L. Norris, *Don't Call It a Racial Reckoning. The Race Toward Equality Has Barely Begun*, WASH. POST, (Dec. 18, 2020 at 1:41 pm EST), <https://perma.cc/Y6CQ-W8P2> (arguing that the term "racial reckoning" was overused in 2020 given the scale of remaining racial injustice).

242. 15 U.S.C. § 1691c-2 (2010). This amendment to the Equal Credit Opportunity Act was § 1071 of the Dodd-Frank Act, and so is commonly referred to as the 1071 rulemaking. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. §1376 (2010). Small businesses can serve as powerful engines of wealth creation, particularly for African Americans, and access to credit can mean the difference between success and failure. Add to that the idiosyncratic, opaque, and highly discretionary nature of small business lending, and concerns about access to credit quickly multiply. See generally CFPB, *Key dimensions of the small business lending landscape* (May 2017), <https://perma.cc/F7KW-M26X>.

243. Kelly Cochran, *Fall 2016 rulemaking agenda* (Dec. 2, 2016), <https://perma.cc/V52G-7QES> ("The Bureau is also in the very early stages of starting work to implement section 1071 of the Dodd-Frank Act, which amends the Equal Credit Opportunity Act to require financial institutions to report information concerning credit applications made by women-owned, minority-owned, and small businesses.").

244. See Kelly Cochran, *Fall 2018 rulemaking agenda* (Oct. 17, 2018), <https://perma.cc/Q7R9-F9EN> ("The Bureau has now reclassified the section 1071 project from pre-rule status to longer-term action status."). The California Reinvestment Coalition, represented by Democracy Forward, sued the CFPB to force reinstatement of small business lending data collection rulemaking. *Cal. Reinvestment Coalition v. Kraninger*, 19-cv-02572, May 24, 2019 (N.D. Cal.).

245. See, e.g., Stacy Cowley, *Minority Entrepreneurs Struggled to Get Small-Business Relief Loans*, N.Y. TIMES, (Apr. 4, 2021); Amanda Fischer, *Did the Paycheck Protection Program work for small businesses across the United States?*, WASHINGTON CTR. FOR EQUITABLE GROWTH 4 (July 2020), <https://perma.cc/5DN7-58RV> (discussing evidence showing that PPP loans did not go the hardest-hit areas); Gregory Ugwi, *Black-Owned Businesses Received Less than 2% of PPP Loans while White-Owned Businesses Received 83%*, THE BUSINESS OF BUSINESS (July 6, 2020, 7:09 PM) <https://perma.cc/U236-JFA6> (reporting that, based on the 14% of businesses that identified race in their loan application, of those who received PPP loans, 1.9% were Black-owned and 7% were Hispanic-owned, far below their proportional representation in the overall population).

The Trump administration actively rolled back reporting under the HMDA.²⁴⁶ The HMDA data collection had been expanded by Congress and the Bureau in the aftermath of the 2008 financial crisis in recognition of the importance of the mortgage market to the economy and to racial equity issues in particular. Racial disparities in home mortgage lending drive much of the racial wealth divide,²⁴⁷ and HMDA data is widely used to track racial disparities in home mortgage lending.²⁴⁸ In 2020, the CFPB raised the number of closed-end mortgages a lender must make before it is mandated to collect and report the HMDA data from 25 to 100.²⁴⁹ The new CFPB threshold will exclude roughly one-third of all financial institutions that make residential mortgages from required collection and reporting of data, making it that much harder for policymakers to observe any racial disparities.²⁵⁰ At the same time, the CFPB signaled its interest in removing certain new data points collected from lenders used to identify lending patterns by racial subgroup.²⁵¹ The National Coalition for Asian Pacific Americans Community Development, among other advocacy groups,²⁵² had pushed hard for collection of data specific to racial subgroups, given the wide diversity of experiences across the communities labeled as “Asian American.”²⁵³

246. 85 Fed. Reg. 28,364 (May 12, 2020).

247. See, e.g., S. REP. NO. 111-176, at 14–15 (using HMDA data to calculate racial disparities in mortgage lending); Vicki Been, Ingrid Ellen, & Josiah Madar, *The High Cost of Segregation: Exploring Racial Disparities in High-Cost Lending*, 36 FORDHAM URBAN L. J. 361, 363 n. 2 (2009) (explaining authors’ use of HMDA data to study racial disparities in subprime lending); *Letter from Americans for Financial Reform, et al., to Ren Essene, Manager, Policy Section of the Chief Data Officer, CFPB*, <https://perma.cc/N7ZU-QJQF> (discussing generally the importance of the HMDA data).

248. See, e.g., Alanna McCargo & Jung Hyun Choi, *Closing the Gaps: Building Black Wealth through Homeownership* 7–10 (Nov. 2020), <https://perma.cc/89CM-R385>.

249. 85 Fed. Reg. 28,364 (May 12, 2020).

250. 85 Fed. Reg. 28,364, 28,393 (May 12, 2020) (estimating that about 1,700 institutions will no longer report closed-end loans from about 4,860 current HMDA reporters or 34.9%).

251. Home Mortgage Disclosure (Regulation C) Data Points and Coverage, 84 Fed. Reg. 20,049, 20,051 (May 8, 2019) (“[I]nstitutions are now required to request that the applicant self-identify their ethnicity using disaggregated categories (e.g., Cuban or Mexican) and their race using disaggregated categories (e.g., Chinese or Korean) Some financial institutions have stated that these new requirements can prolong and complicate the application process.”); Office of Information and Reg. Affairs, Office of Management and Budget, Fall 2020 Unified Agenda and Regulatory Plan, CFPB, Home Mortgage Disclosure Act (Regulation C), <https://perma.cc/574U-GWC6> (“The Bureau expects to issue a Notice of Proposed Rulemaking in early 2021 to follow up on the May 2019 ANPRM.”).

252. Jason Richardson & Jad Edlebi, *Preliminary Analysis of 2019 HMDA Mortgage Lending Data* (June 30, 2020), <https://perma.cc/56A4-DUJJ> (“2018 saw the introduction of ethnic and racial subgroups to HMDA. This was a response to community advocacy from Hispanic, Asian and Pacific Islander communities. These groups are not homogenous, and by grouping them together we can miss evidence of excluded populations that are locked out of the mortgage system.”).

253. See, e.g., *Letter from Lisa Hasegawa, Executive Director, National CAPACD, to Richard Cordey, Director, CFPB*, Comment on CFPB-2014-0019-0001 (Oct. 29, 2014), <https://perma.cc/D7VP-4L36>, (“The HMDA race and ethnicity data as currently reported has been ineffective in capturing the varied experiences of AAPI borrowers.” “[W]e recommend that the reporting loan data should include:

Against this backdrop, advocates were particularly concerned that the CFPB, in its first reports analyzing the expanded HMDA data, stopped short of conducting a full analysis of racial disparities.²⁵⁴ Due to privacy concerns, only some of the HMDA data points are made publicly available.²⁵⁵ Key factors relevant to mortgage pricing and availability, including credit score, are available to researchers at the CFPB but not to the public.²⁵⁶ Therefore, only the CFPB (and others who have access to the non-public data) can determine whether those factors account for observed racial disparities in pricing.²⁵⁷

In 2019 and 2020, the CFPB released its first analyses of the expanded HMDA data. In both years, the researchers found that, even controlling for credit score, Black and Hispanic borrowers were denied more often than white borrowers.²⁵⁸ Unsurprisingly, the researchers also found that Black and Hispanic borrowers pay more than white borrowers, across a wide

disaggregated data for Asian American and Pacific Islander borrowers.”). *See also* Seema Agnani & Jason Richardson, *Mortgage Lending in the Asian American and Pacific Islander Community*, (Aug. 6, 2020), <https://nrcr.org/mortgage-lending-in-the-asian-american-and-pacific-islander-community/> (using disaggregated HMDA data to show wide disparities in lending patterns across AAPI subgroups); Cy Watsky, Josh Ishimatsu, Arika Harrison, & Emmanuel Nieves, *The Economic Reality of the Asian American Pacific Islander Community Is Marked by Diversity and Inequality, Not Universal Success*, <https://perma.cc/TU42-9TR9>;

254. *See, e.g.*, Kelsey Ramírez, *Consumer groups, CFPB clash over handling of HMDA data*, HOUSINGWIRE, (Sept. 5, 2019, 5:47 pm) (“‘The way the CFPB is handling HMDA data is also alarming,’ NCRC CEO Jesse Van Tol said. ‘Without [detailed reporting from the CFPB], the general public is left in the dark about the nation’s mortgage lending. It is just another example of how the Trump Administration is working to hide public data’”).

255. *See generally* Disclosure of Loan-Level HMDA Data, 84 Fed. Reg. 649 (Jan. 31, 2019).

256. Disclosure of Loan-Level HMDA Data, 84 Fed. Reg. 649, 650 (Jan. 31, 2019). *See also* Letter from Americans for Financial Reform, et al., to Ren Essene, Manager, Policy Section of the Chief Data Officer, CFPB, <https://perma.cc/87ZX-8YT8> (“[The credit score and debt-to-income ratio] are key to identifying potential lending discrimination and understanding longstanding racial disparities in mortgage lending.”).

257. Feng Liu, Young Jo, Akaki Skhirtladze, & Laura Barriere, *An Updated Review of the New and Revised Data Points in HMDA*, CONSUMER FIN. PROT. BUREAU 50 (Aug. 2020) (“These new data make it possible for users of non-public HMDA data to analyze denial rates and pricing differentials after controlling for credit scores (and other variables discussed in this article).”), <https://perma.cc/SY3B-4TQ4>.

258. Feng Liu, Jason Dietrich, Young Jo, Akaki Skhirtladze, Misha Davies & Corinne Cadilis, *Introducing New & Revised Data Points in HMDA*, CONSUMER FIN. PROT. BUREAU 53–54 (Aug. 2019), <https://perma.cc/5C22-SWXW>; Feng Liu, Young Jo, Akaki Skhirtladze, & Laura Barriere, *An Updated Review of the New and Revised Data Points in HMDA*, CONSUMER FIN. PROT. BUREAU 70 (Aug. 2020), <https://perma.cc/SY3B-4TQ4>. It is highly contested whether credit scores themselves are truly race neutral and legitimate measures of credit risk. *See, e.g.*, Michelle Singletary, *Credit scores are supposed to be race-neutral. That’s impossible*, WASH. POST, (Oct. 16, 2020), <https://perma.cc/839F-XT9D>; Natalie Campisi, *From Inherent Racial Bias to Incorrect Data—The Problems with Current Credit Scoring Models*, FORBES (Feb. 26, 2021), <https://perma.cc/BRK9-2G6U>; Karan Kaul, *Adopting Alternative Data in Credit Scoring Would Allow Millions of Consumers to Access Credit*, (Mar. 15, 2021), <https://perma.cc/M6SN-T5GL>.

range of mortgage products,²⁵⁹ but the CFPB did not analyze the pricing disparity controlling for credit score.²⁶⁰ One national advocate characterized the CFPB's release of HMDA data and public analysis as leaving "the general public . . . in the dark."²⁶¹

Often, the research reports did address racial disparities, even as the CFPB's press releases ignored or downplayed the racial equity implications of the research. For example, in July 2020, the CFPB released the first results from the Making Ends Meet survey.²⁶² This survey noted that 64.9% of surveyed African Americans, or nearly two-thirds, had trouble paying a bill in the previous six months, compared to only 35% of whites.²⁶³ Even more striking is that the disparity between African Americans and whites "persists even when controlling for income, age, gender, education, and rural status."²⁶⁴ As the CFPB stated, "[B]eing African American significantly predicts having difficulty even when income, rural status, age, education, and gender are included. Being Hispanic did not significantly predict having difficulty"²⁶⁵ The authors of the report surmised that lack of average net wealth has a compounding impact, meaning that African Americans are less likely to have friends and family members who have money to lend, and that they are nonetheless often called upon to help financially-strapped family members and friends.²⁶⁶ Failing to even mention the racial disparities in the press release was, in July 2020, a glaring omission.

259. Liu, et al., *supra* note 258, at 68. Feng Liu, Young Jo, Akaki Skhirtladze, & Laura Barriere, *An Updated Review of the New and Revised Data Points in HMDA*, Consumer Fin. Prot. Bureau 222 (Aug. 2020), https://files.consumerfinance.gov/f/documents/cfpb_data-points_updated-review-hmda_report.pdf.

260. In both 2019 and 2020, the CFPB pointed to "underlying credit characteristics" "such as credit score, CLTV, choice of loan term, whether the loan has a fixed rate or adjustable rate, non-amortizing features, lien status, occupancy status, and whether the borrowers have paid discount points or received lender credits, etc." as possible explanations of the differences in median interest rates across a wide-range of mortgage products for Black and Hispanic borrowers compared to non-Hispanic whites. Liu et al., *supra* note 258, at 70.; Liu, et al., *supra* note 257 (the introductory rate period is completed as "N/A" for fixed-rate mortgages). All of these credit characteristics are in the HMDA data, although not all are in the public HMDA data. See *Filing Instructions Guide for HMDA Data Collected in 2019*, OMB Control #3170-0008, FFIEC (July 2019), <https://perma.cc/5G7L-SPGA> 16 (credit score, occupancy), 51 (lien status), 55(combined loan-to-value ratio, loan term, discount points, and lender credits), 56 (introductory rate period, non-amortizing features).

261. Ramírez, *supra* note 254 ("The way the CFPB is handling HMDA data is also alarming," NCRC CEO Jesse Van Tol said. "Without [detailed reporting from the CFPB], the general public is left in the dark about the nation's mortgage lending. It is just another example of how the Trump Administration is working to hide public data").

262. Scott Fulford & Marie Rush, *Insights from the Making Ends Meet Survey*, CFPB OFFICE OF RESEARCH 5 (July 2020), <https://perma.cc/62PM-MR7X>.

263. *Id.* at 5.

264. *Id.* at 6.

265. *Id.* at 6 n. 9.

266. *Id.* at 6.

D. The Coronavirus Failure

The CFPB lost significant opportunities to address the economic crisis caused by the pandemic, in large part because the CFPB failed to engage in precisely the data collection and market monitoring demanded by the Dodd-Frank Act. Instead of focusing on the CFPB's singular research and market monitoring statutory mandates, the Director focused on consumer education.²⁶⁷ Those materials were laudable. But they were not a sufficient response to the COVID-19 crisis, and they neglected tools Congress had deliberately given the CFPB to equip it to address systemic crises facing consumers and the national economy. The CFPB's lack of real time data and market monitoring undercut its ability to respond effectively to the COVID-19 crisis and increased the risk that its interventions would be faulty.

1. Consumer Complaints

Early on in the pandemic, the CFPB's director characterized complaints to the CFPB as "a backstop."²⁶⁸ Still, the situations people found themselves in were dire, and consumer complaints to the CFPB skyrocketed in March.²⁶⁹ Complaints continued to climb throughout 2020.²⁷⁰

The increase in volume was driven mostly by complaints about credit reporting.²⁷¹ Over the course of 2020, complaints to the CFPB about credit reporting more than doubled.²⁷² Advocates repeatedly pointed to the in-

267. *The Consumer Financial Bureau's Semi-Annual Report to Congress: Hearing Before S. Comm. on Banking, Housing, and Urban Affairs*, 116th Cong. (2020), <https://perma.cc/FGU7-8VBE>, at 15:15 minute mark. For a brief discussion of what the CFPB could and should have done to contain the crisis, see Richard Cordray, Diane E. Thompson & Christopher L. Peterson, *Consumer Financial Protection in the COVID-19 Crisis: An Emergency Agenda*, U. PENN. L. REV. BLOG (last visited Feb. 7, 2021), <https://perma.cc/C47W-EY3F>. See also Craig Cowie, *Is the CFPB Still on the Beat? The CFPB's (Non)Response to the COVID-19 Pandemic*, 82 MONT. L. REV. 41 (2021).

268. Kathleen L. Kraninger, *Director Kraninger Remarks During the Fin. Stability Oversight Council Meeting*, CONSUMER FIN. PROT. BUREAU (Mar. 26, 2020), <https://perma.cc/WZL5-U4Q3>.

269. Andrew Keshner, *Consumer Complaints to the CFPB Are Skyrocketing as the Coronavirus Outbreak Continues*, MARKETWATCH (July 19, 2020, 6:58 AM ET), <https://perma.cc/F6ES-B85T>; U.S. PIRG, *Analysis of CFPB Consumer Complaints March-April 2020*, (May 2020), <https://perma.cc/RN5Q-VYEE>.

270. CONSUMER FIN. PROT. BUREAU, *CONSUMER RESPONSE ANNUAL REPORT, JANUARY 1 – DECEMBER 31, 2020* at 9, <https://perma.cc/G58Z-Z9X3> [hereinafter 2020 CFPB Annual Report].

271. *Id.* The CFPB reports credit and consumer reporting together. Consumer reporting includes background checks and employment screening. Of the complaints for which the company acknowledged a commercial relationship with the consumer, there were only 1,600 complaints about consumer reports compared to 279,200 about credit reporting. 2020 CFPB Annual Report, *supra* note 270. See also U.S. PIRG, *Analysis: CFPB Complaints Surge During Pandemic, Led by Credit Report Complaints*, (Aug. 2020), <https://perma.cc/4Y3A-HFFT>.

272. 2020 CFPB Annual Report, *supra* note 270 (credit reporting complaints increased by 129% over the course of 2020); Ann Carns, *More Consumers Complain About Errors on Their Credit Reports*, N.Y. TIMES, Feb. 19, 2021. Complaints about credit reporting had been increasing before the pandemic. Beginning in 2017, the CFPB had allowed consumers to complain against all three of the national credit

creasing volume of credit reporting complaints as a rebuke to the CFPB's relaxation of rules²⁷³ governing timelines for responding to disputes of credit reporting accuracy, suggesting that attention to the data would likely have led to a different regulatory intervention.²⁷⁴ Consumers with complaints about credit reporting received financial restitution well below all other categories, other than debt collection, with a larger percentage of complaints about credit reporting being closed with only an explanation than any other category.²⁷⁵

Complaint volume increased in other categories as well, most dramatically for prepaid cards,²⁷⁶ which also saw a doubling in complaints over 2020.²⁷⁷ Sixty-three percent of the complaints about prepaid cards were about government benefits cards,²⁷⁸ including the prepaid cards issued to consumers for payment of stimulus funds.²⁷⁹ The leading complaint about the prepaid cards for stimulus funds and unemployment benefits was a fail-

reporting agencies at once, 2020 CFPB Annual Report, *supra* note 270, at 21, 23. As this change in the complaint process occurred in 2017, it is implausible that it accounts for the doubling of complaints in 2020.

273. *Statement on Supervisory and Enforcement Practices Regarding the Fair Credit Reporting Act and Regulation V in Light of the CARES Act*, CONSUMER FIN. PROT. BUREAU (Apr. 1, 2020), <https://perma.cc/EE67-5EQY>pdf (relaxing timing requirements for investigations of credit reporting disputes).

274. *See, e.g.*, Letter from Nat'l Consumer L. Ctr., et al. to David Uejio, Acting Director, CFPB (Mar. 25, 2021), <https://perma.cc/3HV7-7MV5>; Ann Carns, *More Consumers Complain About Errors on Their Credit Reports*, N.Y. TIMES, Feb. 19, 2021 (quoting Chi Chi Wu of the National Consumer Law Center as saying that "mistakes are an even bigger worry during the pandemic" and that "[d]isputes have not been responded to, or have taken an excessive amount of time"); Letter from Nat'l Consumer L. Ctr., et al. to Kathleen L. Kraninger, Director, CONSUMER FIN. PROT. BUREAU (Sept. 24, 2020), <https://perma.cc/HDK6-3H9T>; Press Release, National Consumer L. Ctr., National Consumer Law Center Advocate Slams Trump Administration Credit Reporting Guidance for Giving Relief to Creditors and Credit Bureaus But Not Consumers During COVID-19 Pandemic, Apr. 1, 2020, ("The CFPB's guidance does not provide one iota of assistance to consumers Instead, the CFPB provides a helping hand to . . . credit bureaus, . . . the number one source of complaints to the CFPB's . . . Complaint Database. This . . . will make it much more difficult for [consumers] to recover financially for many years to come," quoting Chi Chi Wu).

275. Less than 1% of all credit and consumer reporting and debt collection complaints received monetary relief, while 91% of credit and consumer reporting complaints were closed with only an explanation. By comparison, in 2020, 3% of all complaints resulted in monetary relief. 2020 CFPB Annual Report, *supra* note 270, at 17. Given that many complaints are likely to be about accuracy disputes, it is perhaps not surprising that so few of the complaints resolved with monetary relief, although the percentage of complaints closed with non-monetary relief, also lags both the overall rate (6%) and the debt collection specific rate (9%).

276. CONSUMER FIN. PROT. BUREAU, COMPLAINT BULLETIN, COMPLAINTS MENTIONING CORONAVIRUS KEYWORDS at 7 (July 2020), <https://perma.cc/LXA3-3GJU> [hereinafter COMPLAINT BULLETIN JULY 2020] ("Comparing the weekly average complaint volume before and after the emergency declaration, shows that prepaid card complaints saw the greatest percent increase").

277. 2020 CFPB Annual Report, *supra* note 270, at 23.

278. *Id.* at 70.

279. *Id.* at 71.

ure to receive the card in a timely way.²⁸⁰ Prepaid companies were also among the slowest to respond to complaints filed with the CFPB, failing to provide timely responses 8% of the time.²⁸¹ Given the scale of the crisis, it may have been too much to hope that the CFPB's rulemaking to enable the payment of government benefits on prepaid cards²⁸² would, as promised, result in "the fast, secure, and efficient" delivery of stimulus funds to consumers,²⁸³ but the gap between the rulemaking's promise and consumer reality as evidenced in the CFPB's own complaint database was sobering.

Throughout 2020, the CFPB issued only two reports on the complaint data,²⁸⁴ not counting the annual report on the complaint data required by Dodd-Frank.²⁸⁵ By contrast, until 2018, the CFPB issued monthly reports analyzing complaint data and highlighting important trends.²⁸⁶ Instead, under the Trump administration, during the pandemic, as complaint volumes rose to historic levels, the CFPB left the work of analysis to independent researchers and nonprofit advocacy organizations.²⁸⁷ Ignoring what

280. *Id.* (noting that consumers complained of waiting weeks to get cards needed to meet living expenses). See also David Dayen & Bryce Covert, *Government Contractors Nickle-and-Diming Coronavirus Relief Recipients*, AM. PROSPECT (Aug. 14, 2020), <https://perma.cc/SJ3M-TGV5>.

281. 2020 CFPB Annual Report, *supra* note 270, at 17 (only payday loan companies were more often untimely in their responses).

282. Treatment of Pandemic Relief Payments Under Regulation E and Application of the Compulsory Use Prohibition, 85 Fed. Reg. 23,217 (Apr. 27, 2020).

283. Press Release, Consumer Financial Protection Bureau Paves Way for Consumers to Receive Economic Impact Payments Quicker (Apr. 13, 2020), <https://perma.cc/ULV4-FW8M> ("The steps we are taking today ensure that consumers can receive these payments in a fast, secure, and efficient manner.").

284. I searched the "Research and Reports" section of the CFPB's website, checking the box for "consumer complaints" and providing a date range of 1/1/2020 through 1/1/2021. *Research and Reports*, CFPB (last visited May 19, 2021), <https://perma.cc/P7C2-9CZ3>. The two reports are both short bulletins identifying complaints that mention COVID-19 keywords. CONSUMER FIN. PROT. BUREAU, COMPLAINT BULLETIN, COMPLAINTS MENTIONING CORONAVIRUS KEYWORDS (May 2020), <https://perma.cc/KJ2G-34Z5>; COMPLAINT BULLETIN JULY 2020, *supra* note 276.

285. 12 U.S.C. § 5493(b)(3)(C) (2021).

286. A search of the CFPB's "Research and Reports" section, with "consumer complaints" selected and date range of 1/1/2017 through 1/1/2018 shows eight monthly complaint reports, ending with volume 26 in October 31, 2017, as well as the annual report and a "snapshot" of older consumers and student loan debt. *Research and Reports*, CFPB (last visited May 19, 2021), <https://perma.cc/RAA9-Q87A>.

287. See, e.g., Lisa L. Gill, *Why the Pandemic May Be Hurting Your Credit Score*, CONSUMER REPORTS (Feb. 3, 2021), <https://perma.cc/953K-AVTK>; Letter from Syed Ejaz, Analyst, Financial Policy, Consumer Reports, to Michael Corbat, Chief Executive Officer, Citibank, N.A. (June 24, 2020), <https://perma.cc/5AMJ-QARV> (detailing a review of complaints to the CFPB that found that Citibank had more COVID-19 related complaints about credit cards than any other credit card company); *Consumer Complaints During COVID-19*, STUDENT BORROWER PROTECTION CENTER, CONSUMER ACTION, U.S. PIRG EDUCATION FUND (Apr. 2020), <https://perma.cc/S5EG-AZNG>; *Consumers in Peril: CFPB Data Shows Consumer Problems in Year of COVID-19*, U.S. PIRG EDUCATION FUND (Mar. 2021), <https://perma.cc/7WS3-THCU>; *CFPB Complaints Surge During Pandemic, Led by Credit Report Complaints*, U.S. PIRG EDUCATION FUND, (Aug. 2020), <https://perma.cc/9F6T-WGKV>; *Consumer Complaints Break Records: CFPB Must Take Powerful Action to Protect Consumers in Pandemic*, U.S. PIRG EDUCATION FUND (July 2020), <https://perma.cc/77PW-YD2J>; *Analysis of CFPB Consumer Complaints March-April*

was in the complaint data was costly to consumers and likely impeded the effectiveness of the distribution of state and federal COVID relief money.

2. *No Longer Data Driven*

Just as the CFPB failed to leverage its complaint data to drive either its own rulemaking or public policy, so too the CFPB left underutilized its research capabilities during 2020. The CFPB had in its early days²⁸⁸ assembled impressive research capabilities, including world-class researchers and economists and specialized databases, including the Consumer Credit Panel and National Mortgage Database. But the CFPB issued only two research reports on the impact of COVID-19 on consumers' use of and access to credit during 2020,²⁸⁹ while JP Morgan Chase²⁹⁰ and the Philadelphia Federal Reserve Bank²⁹¹ churned out regular status reports on the financial health of consumers. Indeed, the CFPB even suspended multiple data collections as part of its pandemic response.²⁹²

The CFPB's regulatory response to COVID-19 seemed largely disconnected from data, whether from complaints, research, or its own enforcement actions. Timing requirements for credit reporting corrections and mortgage disclosures were relaxed as responsive to the crisis, never mentioning any data.²⁹³ The rules ensuring consent for electronic disclosures

2020, U.S. PIRG EDUCATION FUND, (May 2020), <https://perma.cc/VX4J-FC9U>; Yiwei Dou & Yongoh Roh, *Public Disclosure and Consumer Financial Protection* (July 9, 2020), <https://perma.cc/E4PS-MG45>; Christopher Bertsch, Isaiah Hull, Yingjie Qi, & Xin Zhang, *Bank Misconduct and Online Lending*, 116 J. OF BANKING AND FIN. (July 2020).

288. Cordray, *supra* note 197, at 90–91; McCoy, *supra* note 201, at 2579.

289. *Special Issue Brief: The Early Effects of the COVID-19 Pandemic on Consumer Credit*, CONSUMER FIN. PROT. BUREAU (Aug. 2020) <https://perma.cc/V3GA-ZJPY>; *The Early Effects of the COVID-19 Pandemic on Credit Applications*, CONSUMER FIN. PROT. BUREAU (May 1, 2020), <https://perma.cc/PBN7-DXXV>. To be fair, the CFPB did issue two monthly reports on its complaint data, including complaints with COVID-19 “keywords.” The CFPB has also started the process for a survey of consumers on how COVID-19 is impacting them. Scott Fulford & Marie Rush, *Insights from the Making Ends Meet Survey: CFPB Office of Research, Research Brief No. 2020-1*, CONSUMER FIN. PROT. BUREAU 3 (July 2020), <https://perma.cc/NVV5-MQXF>; Agency Information Collection Activities: Comment Request, 85 Fed. Reg. 52,333 (Aug. 25, 2020) (notice seeking comment information collection in support of Making Ends Meet survey geared to understanding the impacts of COVID-19 on consumers).

290. *Research COVID-19*, J.P. MORGAN CHASE (last viewed on May 19, 2021), <https://perma.cc/8WHB-SXC3>.

291. *Household Rent During COVID-19: Update for 2021*, FED. RES. BANK PHILADELPHIA (last viewed on May 19, 2021), <https://perma.cc/AS45-G92Z>.

292. *CFPB Provides Flexibility During COVID-19 Pandemic*, CONSUMER FIN. PROT. BUREAU (Mar. 26, 2020), <https://perma.cc/8F34-6YFL>. Even temporary freezes of data collection can impede the CFPB's ability to do core work. *Cf.* McCoy, *supra* note 201, at 2579–83 (describing the harm done by Acting Director Mulvaney's temporary freeze of data in early 2018).

293. *Statement on Supervisory and Enforcement Practices Regarding the Fair Credit Reporting Act and Regulation V in Light of the CARES Act*, *supra* note 273 (relaxing timing requirements for investigations of credit reporting disputes); Application of Certain Provisions in the TILA-RESPA Integrated Disclosure Rule and Regulation Z Right of Rescission Rules in Light of the COVID-19 Pandemic, 85

related to credit cards, including the required account opening disclosures, were relaxed,²⁹⁴ without noting that Wells Fargo,²⁹⁵ Bank of America,²⁹⁶ and Fifth Third²⁹⁷ had all been investigated by the CFPB for opening accounts without consumer consent. The CFPB relaxed rules governing the timing and accuracy of mortgage servicers' communications with borrowers having trouble making their mortgage payments²⁹⁸ while complaint data showed historic numbers of borrowers complaining to the CFPB about exactly that.²⁹⁹ And, although the CFPB's own research showed that there was no generalized demand during the early days of the crisis for an increase in credit,³⁰⁰ the CFPB justified some deregulatory actions by saying they would help consumers access credit faster.³⁰¹

Fed. Reg. 26,319 (May 4, 2020) (relaxing timing requirements for mortgage disclosures, purportedly to help support refinancing, despite earlier guidance); The Bureau's Mortgage Servicing Rules FAQs related to the COVID-19 Emergency (Apr. 3, 2020), <https://perma.cc/S3XX-TT2G>, allowing mortgage servicers additional time to provide borrowers the payoff statements necessary for refinancing.

294. *Statement on Supervisory and Enforcement Practices Regarding Electronic Credit Card Disclosures in Light of the COVID-19 Pandemic*, CONSUMER FIN. PROT. BUREAU (June 3, 2020), <https://perma.cc/HFB2-ASQ4> (relaxing provisions ensuring consent to electronic disclosures in credit card applications).

295. Consent Order, *In the Matter of: Wells Fargo Bank, N.A.*, 2016-CFPB-0015 (Sept. 8, 2016), <https://perma.cc/89XX-ZDNP> (consent order based on the finding that Wells Fargo had, among other matters, submitted applications for credit cards without customers' knowledge).

296. Decision and Order on Petition by Bank of America Corp. to Set Aside or Modify Civil Investigative Demand, *In Re Bank of Am. Corp.*, 2019-MISC-Bank of America Corp.-0001 (July 19, 2019), <https://perma.cc/X2ZQ-URRV> (order signed by Director Kraninger denying Bank of America petition to modify or set aside Civil Investigative Demand on Bank of America sales and account opening practices); Kevin Wack, *Ex-Bank of America Employees Allege 'Extreme Pressure' to Sell Credit Cards*, AM. BANKER (Aug. 27, 2020, 9:00 PM EDT), <https://perma.cc/FD9X-BWXB>.

297. Complaint, *Bureau of Consumer Fin. Prot. v. Fifth Third Bank, N.A.*, 20-cv-01683 (N.D. Ill. Mar. 9, 2020), <https://perma.cc/GH8M-YXV9> (alleging that Fifth Third Bank employees, since at least 2008, were opening credit card accounts without customers' permission).

298. *Joint Statement on Supervisory and Enforcement Practices Regarding the Mortgage Servicing Rules in Response to the COVID-19 Emergency and the CARES ACT*, CONSUMER FIN. PROT. BUREAU, BD. OF GOVERNORS OF THE FED. RESERVE SYS., FED. DEPOSIT INSURANCE CORP., NAT. CREDIT UNION ADMIN., OFFICE OF THE COMPTROLLER OF THE CURRENCY, CONF. OF STATE BANK SUPERVISORS (Apr. 3, 2020), <https://perma.cc/Y5BW-BKBZ>.

299. Kate Berry, *CFPB Gets Earful from Consumers About Mortgage Servicers*, AM. BANKER (May 10, 2020, 9:00 PM EDT), <https://perma.cc/8GSX-U5TK>.

300. *Special Issue Brief: The Early Effects of the COVID-19 Pandemic on Consumer Credit*, CONSUMER FIN. PROT. BUREAU (Aug. 2020) <https://perma.cc/V3GA-ZJPY>; *The Early Effects of the COVID-19 Pandemic on Credit Applications*, CONSUMER FIN. PROT. BUREAU (May 1, 2020), <https://perma.cc/PBN7-DXXV>.

301. See, e.g., *Statement on Supervisory and Enforcement Practices Regarding Electronic Credit Card Disclosures in Light of the COVID-19 Pandemic* (June 3, 2020), <https://perma.cc/JVV4-ZF6Z> (relaxing provisions ensuring consent to electronic disclosures in credit card applications); Application of Certain Provisions in the TILA-RESPA Integrated Disclosure Rule and Regulation Z Right of Rescission Rules in Light of the COVID-19 Pandemic, 85 Fed. Reg. 26,319 (May 4, 2020) (relaxing timing requirements for mortgage disclosures, purportedly to help support refinancing); Consumer Fin. Protection Bureau, *Consumer Financial Protection Bureau Issues Final Rule on Small Dollar Lending* (July 7, 2020), <https://perma.cc/64MA-LHUH> ("[T]oday's action will help to ensure the continued availability

3. Rulemaking and Guidance During COVID-19

The CFPB's first major independent action³⁰² to address the coronavirus was on March 26, 2020. On that day, it suspended reporting and data collection under a number of different regulatory requirements, including collections meant to provide empirical grounding for two new congressionally-mandated rulemakings.³⁰³ This would prove to be the template for the CFPB's response to COVID-19 during 2020: using the pandemic to justify relaxing regulatory requirements on businesses with only the thinnest evidentiary basis.³⁰⁴

of small dollar lending products for consumers who demand them, including those who may have a particular need for such products as a result of the current pandemic.”).

302. Although the CFPB is an independent agency, Director Kraninger initially indicated that she would take her lead in responding to the crisis from the Secretary of the Treasury. Consumer Fin. Prot. Bureau Oversight Senate Hearing (Mar. 10, 2020), <https://perma.cc/267E-KDE3> at 31:15 to Senator Tester.

303. *CFPB Provides Flexibility During COVID-19 Pandemic*, *supra* note 292. The two mandated rulemakings were the small business lending data collection rulemaking, Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. §1376 (2010), codified at 15 U.S.C 1691c-2 (2010), and the PACE loans rulemaking, mandated by section 307 of the Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174 (2018).

304. *Statement on Supervisory and Enforcement Practices Regarding the Fair Credit Reporting Act and Regulation V in Light of the CARES Act*, *supra* note 273 (relaxing timing requirements for investigations of credit reporting disputes); *Joint Statement on Supervisory and Enforcement Practices Regarding the Mortgage Servicing Rules in Response to the COVID-19 Emergency and the CARES Act*, *supra* note 298 (promises mortgage servicers, “until further notice,” that neither it nor any other federal or state banking regulator will enforce the majority of loss mitigation rules put in place during the Great Recession to protect homeowners from facing foreclosure before being evaluated for loss mitigation options); *The Bureau's Mortgage Servicing Rules FAQs related to the COVID-19 Emergency*, *supra* note 293 (relaxing timing requirements to provide payoff statements; “Servicers can provide payoff notices in a reasonable time rather than within 7 business days if they cannot provide it within 7 business days due to the COVID-19 emergency.”); Bulletin 2020-02, Compliance Bulletin and Policy Guidance: Handling of Information and Documents During Mortgage Servicing Transfers, 85 Fed. Reg. 25,281 (May 1, 2020) (promising a light touch for problems impacting consumers resulting from poor mortgage servicing transfer practices during the pandemic); Application of Certain Provisions in the TILA-RESPA Integrated Disclosure Rule and Regulation Z Right of Rescission Rules in Light of the COVID-19 Pandemic, 85 Fed. Reg. 26,319 (May 4, 2020) (relaxing timing requirements for mortgage disclosures, purportedly to help support refinancing, despite earlier guidance giving servicers more time to process payoff notices necessary for refinancing); *The Bureau's Equal Credit Opportunity Act and Regulation B FAQs related to the COVID-19 Emergency*, CFPB (May 6, 2020), <https://perma.cc/WX6P-XE2E> (addressing lenders' uncertainty about what constituted an application for a PPP loan under ECOA); *Statement on Supervisory and Enforcement Practices Regarding Regulation Z Billing Error Resolution Timeframes in Light of the COVID-19 Pandemic*, CONSUMER FIN. PROT. BUREAU (May 13, 2020), <https://perma.cc/VTP7-C5FK> (extending time to resolve billing error disputes, provided no negative credit reporting or fees charged to the consumer); *Statement on Supervisory and Enforcement Practices Regarding Electronic Credit Card Disclosures in Light of the COVID-19 Pandemic*, CONSUMER FIN. PROT. BUREAU (June 3, 2020), <https://perma.cc/K5E9-NBHT> (relaxing provisions ensuring consent to electronic disclosures in credit card applications). *See also* III.D.2, *infra* (discussing the lack of evidentiary foundation for the CFPB's COVID-19 response).

For example, the CFPB waived price disclosures in a small part of the remittance market for a few months³⁰⁵ while it finished a final rule permanently removing those disclosure requirements.³⁰⁶ In doing so, it claimed that the relaxation was related to COVID-19, without any apparent logical or empirical support.³⁰⁷

More generally, as the CFPB acknowledged in a blog post, to the extent it was responding to the crisis, it intended to prioritize the recovery and stability of the “financial sector.”³⁰⁸ The CFPB, along with other financial regulators, promised that it would not take enforcement action for violation of any consumer protection or fair lending rules, “provided that the circumstances were related to the National Emergency and that the institution made good faith efforts to assist borrowers . . .”³⁰⁹ An otherwise laudable supervisory guidance document on mortgage servicing transfers, promoting sensible best practices to minimize consumer harm, and noting that the risks of consumer harm were particularly elevated under existing market circumstances, nonetheless gave mortgage servicers a free pass during the pandemic.³¹⁰ The CFPB stated that it would “consider the challenges that entities may face” for transfers during or within four months of the end of the National Emergency.³¹¹ There was no meaningful countervailing consideration of the challenges that millions of families were facing at that very moment³¹² or the risks that servicing transfers present to borrowers seeking assistance from their mortgage servicer.³¹³

305. *Statement on Supervisory and Enforcement Practices Regarding the Remittance Rule in Light of the COVID-19 Pandemic*, CONSUMER FIN. PROT. BUREAU (Apr. 10, 2020), <https://perma.cc/WY5TQLUT>.

306. *Remittance Transfers Under the Electronic Fund Transfer Act (Regulation E)*, 85 Fed. Reg. 34,870 (June 5, 2020). *See also* *Supervisory Highlights, Issue 22 (Summer 2020)* 85 Fed. Reg. 55,828, 55,837 (explaining the statement as allowing a transition period to the final rule’s effective date of July 21, 2020).

307. *Consumer Financial Protection Bureau Announces Guidance on Remittance Transfers During COVID-19 Pandemic*, CONSUMER FIN. PROT. BUREAU (Apr. 10, 2020), <https://perma.cc/M5D6-G4AT>.

308. Susan M. Bernard, *Spring 2020 Rulemaking Agenda*, CONSUMER FIN. PROT. BUREAU (June 30, 2020), <https://perma.cc/FM8Y-C2YH>.

309. *Interagency Statement on Loan Modifications & Reporting for Financial Institutions Working with Customers Affected by the Coronavirus (Revised)*, Bd. OF GOVERNORS OF THE FED. RESERVE, FED. DEPOSIT INS. CORP. NAT’L CREDIT UNION ADMIN., OFFICE OF THE COMPTROLLER OF CURRENCY, CONSUMER FIN. PROT. BUREAU 5 (Apr. 7, 2020), <https://perma.cc/9RTM-L6SZ>.

310. *Bulletin 2020-02, Compliance Bulletin and Policy Guidance: Handling of Information and Documents During Mortgage Servicing Transfers*, 85 Fed. Reg. 25,281 (May 1, 2020).

311. *Bulletin 2020-02*, 85 Fed. Reg. at 25,281.

312. By May 2020, more than four million mortgages were in forbearance, with most of those mortgages entering forbearance in April 2020. Freddie Mac, *Mortgage Forbearance and Performance during the Early Months of the COVID-19 Pandemic* (Feb. 8, 2021), <https://perma.cc/7RUK-N65S>.

313. The CFPB had found in examinations in fall of 2019, immediately before the pandemic, when servicers’ systems were not strained by record numbers of forbearance requests, that servicers asked borrowers to resubmit loss mitigation applications and failed to credit periodic payments when received. *Supervisory Highlights, Issue 22 (Summer 2020)* 85 Fed. Reg. 55,828, 55,833 (Sept. 10, 2020).

Some of the CFPB's regulatory actions during 2020 seemed sensible policy interventions addressed to the challenges of COVID-19. These actions, however, failed to go far enough in providing needed consumer protections. For example, the CFPB relaxed the rules limiting the circumstances that government benefits can be put on prepaid cards to speed access to stimulus payments.³¹⁴ But even in August, five months after the CFPB had issued this directive, and months after most people had received their stimulus payment checks in the mail, reports continued to circulate of people struggling to access the funds on the government-issued prepaid card.³¹⁵ Concerns were raised regarding the fees, mandatory arbitration clauses, and privacy.³¹⁶ Another example of a rulemaking that, while helpful, nonetheless was insufficient, was the CFPB's COVID-19 mortgage servicing rulemaking.³¹⁷ It provided strong encouragement to mortgage servicers to avoid lump sum repayment requirements but failed to provide general protection from foreclosure for homeowners exiting forbearance.³¹⁸

IV. BUILD IT BACK BETTER

During the last three years, Acting Director Mulvaney's abortive attempt at renaming the CFPB³¹⁹ and smaller, more insidious changes have

314. Press Release, *supra* note 283 (“The steps we are taking today ensure that consumers can receive these payments in a fast, secure, and efficient manner.”); Treatment of Pandemic Relief Payments Under Regulation E and Application of the Compulsory Use Prohibition, 85 Fed. Reg. 23,217 (Apr. 27, 2020).

315. Dayen & Covert, *supra* note 280. Matthew Haag, *To Reach a Single A.T.M., a Line of Unemployed Stretches a Block*, N.Y. TIMES (June 5, 2020, updated July 7, 2020), <https://perma.cc/XN7M-UVB3> (reporting that, “from dawn to dusk,” hundreds of people queue to access an A.T.M. with low fees and high withdrawal limits in order to get unemployment benefits); *see also* 2020 CFPB Annual Report, *supra* note 270, at 71 (reporting on surge of complaints to the CFPB about government benefits prepaid cards, predominately complaints about delays of weeks in receiving them).

316. *Senators Hassan, Brown, Reed Lead Colleagues in Calling for Answers Over Difficulties with Stimulus Payments Issued as Debit Cards*, JACK REED UNITED STATES SENATOR OF RHODE ISLAND (June 24, 2020), <https://perma.cc/8WQS-WW9M>; Dayen & Covert, *supra* note 280; *Cf.* Matthew Haag, *To Reach a Single A.T.M., a Line of Unemployed Stretches a Block*, N.Y. TIMES (June 5, 2020, updated July 7, 2020), <https://perma.cc/XN7M-UVB3>.

317. Treatment of Certain COVID-19 Related Loss Mitigation Options Under the Real Estate Settlement Procedures Act (RESPA) (Regulation X), 85 Fed. Reg. 39,055 (June 30, 2020).

318. *See* Comments to the Consumer Financial Protection Bureau Regarding Treatment of Certain COVID-19 Related Loss Mitigation Options under the Real Estate Settlement Procedures Act (RESPA), Regulation X; Interim Final Rule Submitted By Nat'l Consumer L. Ctr., et al., at 3 (Aug. 14, 2020), <https://perma.cc/LRR6-GWCW> (“But the CFPB must ensure that servicers do not foreclose on borrowers who need relief other than a deferral before evaluating them for a complete loss mitigation application.”).

319. One of Acting Director Mulvaney's first acts at the CFPB was to order a name change, from “Consumer Financial Protection Bureau” to “Bureau of Consumer Financial Protection.” *Introducing Our New Bureau Seal*, CONSUMER FIN. PROT. BUREAU (Mar. 30, 2018), <https://perma.cc/WQ5A-WC3W>. Robert O'Harrow, Jr., Shawn Boburg & Renae Merle, *How Trump Appointees Curbed a Consumer Protection Agency Loathed by the GOP*, WASH. POST (Dec. 4, 2018, 2:16 PM MST) (that, while the

blurred and obscured the CFPB's statutory focus on consumer financial protection. As we have seen, during the COVID-19 pandemic and the accompanying economic turmoil, the CFPB was largely absent, whether we look at providing public data and analysis or significant regulatory intervention on behalf of individuals. Could the missed opportunities of the CFPB's COVID-19 response been avoided?

A CFPB that centered the voices of marginalized communities, that prioritized data gathering and market monitoring on the impact of financial products on underserved communities, would have been better equipped to respond in a timely and effective way to the COVID-19 pandemic. Such an agency would also be better positioned to respond to future crises. Grounding the consumer protection work in empiricism rather than ideology reduces the risk of regulatory error and promises a more robust and resilient agency in the future. Both the CFPB and advocates can and must contribute to building the CFPB back better and centering the voices of the marginalized in its work. The powerful Dodd-Frank mandate to date has been insufficient to sustain a focus on racial and economic equity for marginalized communities. We can and must do better.

A. *Center Consumers and Marginalized Communities*

The CFPB has a unique accountability to consumers and particularly to those vulnerable and marginalized consumers and communities whose exploitation triggered the Great Recession only slightly more than a decade ago.³²⁰ That central relationship should be acknowledged, highlighted, and owned. That relationship is anchored in the statute and is the source of the CFPB's ultimate power and validity. Hearing the voices and perspectives of marginalized communities will require active engagement. The potential payoff is a stronger and more resilient framework for the work of the CFPB.

decision was not official until March 22, four months into Mulvaney's time at the CFPB, it had been an early priority of his, delayed because of concerns that the press might think "we're not making thoughtful and coordinated decisions"). Director Kathleen "Kathy" Kraninger, who succeeded John Michael "Mick" Mulvaney, reversed course on the name change, noting that people often go by nicknames without any harm. Sylvan Lane, *Warren Calls for Probe into Trump Name Change for Consumer Bureau*, THE HILL (Dec. 18, 2018), <https://perma.cc/CN5V-W3RV>. See also Letter from Sen. Elizabeth Warren to Mark Bialek, Inspector General, Board of Governors of the Fed. Reserve and the Consumer Fin. Prot. Bureau (Dec. 17, 2018), <https://perma.cc/W6HU-SGGY> (noting that the Census Bureau, Fannie Mae, and Freddie Mac all go by nicknames).

320. See generally I.B., *supra*.

1. *Taking Marginalized Communities Seriously Means Listening to Them*

a. *Consumer Complaints*

Consumer complaints are central to the CFPB's work. They are the way the CFPB hears most consistently and most directly about the consumer experience. And the CFPB has done surprisingly well in terms of getting complaints from at least some marginalized communities.³²¹ But the CFPB has been inconsistent about how it integrates those complaints into its work and not always transparent about how those complaints are responded to. More could be done to strengthen this vital function.³²²

Over the years, advocates and others have interrogated the adequacy of the CFPB's responses to consumer complaints and the extent to which CFPB uses complaints in setting internal priorities.³²³ Recent research has also raised questions about whether financial restitution skews to richer, whiter complainants, as well as whether that bias was accelerated under the Trump administration.³²⁴ Formal rules about how the CFPB uses complaint data could be too inflexible to adjust to emerging trends in the complaint data or new questions that emerge in rulemaking. But the CFPB could decide to target certain areas for more individualized responses as an adjunct to using complaint data to fuel supervision and enforcement and could publish and seek comment on the criteria for such targeting. Similarly, the CFPB could provide additional clarity in its reports to Congress and in its monthly reports on the complaint data about what use the CFPB is making of the data. More generally, the CFPB complaint database is a rich source

321. See, e.g. Ian Ayres, Jeff Lingwall, & Sonia Steinway, *Skeletons in the Database: An Early Analysis of the CFPB's Consumer Complaints*, 19 *FORDHAM J. CORP. & FIN. L.* 343 (2013) (reporting that areas with a greater Hispanic population have a higher rate of per capita complaints to the CFPB); Devesh Raval, *Which Communities Complain to Policymakers? Evidence from Consumer Sentinel at 5* (July 10, 2018), <https://perma.cc/74UA-6QYP> (finding that "heavily [B]lack areas have a 119% increase in complaint rate relative to areas with few [Black residents]").

322. See Letter from Advocacy for Principled Action in Gov't, et al., to Kathleen L. Kraninger, Director, CONSUMER FIN. PROT. BUREAU (Aug. 11, 2020), <https://perma.cc/J7JY-4TUD> (discussing the difficulty finding the narratives on the reorganized website). See also *Putting Consumer First: The Missing Voice in the CFPB's Coronavirus Response*, STUDENT BORROWER PROT. CTR., CONSUMER ACTION, U.S. PIRG EDUC. FUND (Apr. 2020), <https://perma.cc/R9S8-CU4N> (describing improvements needed to the consumer complaint function in response to the COVID-19 pandemic, many of which the report argues should be made permanent once adopted). See generally Porter, *supra* note 118, at 75–82 (discussing various rationales for consumer complaint functions and concluding, "A crisp and transparent articulation of its goals would . . . advance debate about what the CFPB should accomplish with its complaint system").

323. See, e.g., Letter from Allied Progress, et al., to Michael Mulvaney, Acting Director, CFPB, July 16, 2018, https://www.consumer-action.org/downloads/coalition/Complaint_RFI2_Group_Comment.pdf.

324. Haendler & Heimer, *supra* note 209.

of direct information about what consumers are experiencing and how those experiences vary across the country. The CFPB should make maximum use of this data source in identifying the diversity of experiences of consumers, including how experiences vary across communities and within marginalized communities in particular.

b. Consultation in Rulemaking

The CFPB must do more to build out its capacity to integrate the perspectives of marginalized communities into its rulemaking. This means using the CFPB's consumer engagement function, the CAB, and special populations offices to bring diverse voices from across the country into the policymaking apparatus of the agency.

As the CFPB recognized early on, Dodd-Frank mandated "targeted outreach to groups that face particular challenges."³²⁵ What was less clear was how and whether that outreach would or should influence policy setting inside the agency. A mature agency will answer those questions.

Fundamentally, the CFPB must establish a consultation standard for marginalized communities. Outreach is important and needed. Marginalized communities are unlikely to submit comment letters or have hired lobbyists to represent their interests. Advocacy groups can help fill that role, but they are often outspent and outstaffed by lobbyists for financial institutions. Advocacy groups, too, can vary in the level of their engagement directly with marginalized communities and their ability to translate the diverse perspectives of marginalized communities into rulemaking. The CFPB should build out the organizations it engages with, to engage more deeply and consistently with a wider range of groups, including more grass roots organizations. The CFPB could also explore how better to facilitate participation in the rulemaking process by marginalized communities and representatives of marginalized communities. That could include meeting facilitation designed to encourage participation, for example. It could also include experimentation with other participatory models to solicit input from a wider range of communities. Language access—translation services—and accessibility are essential for facilitating meaningful engagement by a wider swath of underserved and marginalized communities.

Once that outreach is effective, though, the next question is what the agency does with it, and how that information and data is ultimately incorporated into the rulemaking process. Formalized input points for the CAB could help bridge that divide, as could formal consultation during the rulemaking process with the special populations offices. The CFPB could

³²⁵ *Building the CFPB: A Progress Report*, CONSUMER FIN. PROT. BUREAU 19 (July 18, 2011), <https://perma.cc/7JGY-9SMK>.

consider including an analysis of the impact of its rules on racial and economic equity, for example, as a formal part of its analysis of the benefits and costs of the rule.

Doing this work will take time and will require the development of new skills and relationships. It will also have payoffs for the agency, consumers, and the financial institutions who both serve and profit from marginalized communities. Deep listening and engagement should result in rules that have more precisely targeted interventions. More targeted interventions, as a general rule, are less costly for financial institutions to comply with as well as more effective and responsive to the needs of the communities impacted.

The CFPB's 2020 advisory opinion policy is a pronounced step away from an inclusive and consultative approach.³²⁶ Under the advisory opinion program, the CFPB provides that it will issue interpretive rules. Issuing interpretive rules is a standard function of administrative agencies. What makes the CFPB's program troubling is the functional exclusion of marginalized communities from those empowered to request an advisory opinion.

Only regulated entities, or those representing regulated entities,³²⁷ are likely to be able to set forth "actual facts or a course of action that the requestor (or third party) is engaged in, or considering engaging in," as required to make a request for an advisory opinion.³²⁸ There is no process for input, either before or after, and no way to ensure that the concerns of consumers, much less marginalized communities, are considered equally with the desires of financial institutions. Absent some mechanism to include consumers' voices, the concerns of financial institutions will override those of consumers. Marginalized communities, who by definition already struggle to make their concerns heard in the regulatory process, will likely be further excluded by such a one-sided process.³²⁹

c. The Consumer Advisory Board

The Consumer Advisory Board (CAB) has been through two reorganizations since 2017. The statute requires that the Director "seek" members of

326. Advisory Opinions Policy, 85 Fed. Reg. 77,987 (Dec. 3, 2020).

327. The policy provides that a law firm or trade association may submit a request for an advisory opinion on behalf of an undisclosed third party. Advisory Opinions Policy, 85 Fed. Reg. 77,987, 77,988 (Dec. 3, 2020).

328. Advisory Opinions Policy, 85 Fed. Reg. 77,987, 77,988.

329. Moreover, the advisory opinions proposed are on their face not limited to obscure technical matters with little practical impact on consumers and their rights. The policy contemplates that the advisory opinions issued will provide regulated entities a safe harbor from the various federal consumer financial protection statutes, thus effectively barring the courthouse door to consumers, without any formal opportunity for their input. Advisory Opinions Policy, 85 Fed. Reg. 77,987, 77,988.

the CAB that include experts in consumer protection, “fair lending and civil rights,” “community development,” and “representatives of communities that have been significantly impacted by higher-priced mortgage loans,” as well as representatives of depository institutions that primarily serve underserved communities.³³⁰ In order for the CAB to function as designed, it needs a fairly large and stable membership so that these diverse areas of experience and expertise are fairly represented. The reorganizations over the last few years have reduced the ability of consumers and marginalized communities to provide meaningful input to the CFPB.³³¹

A director focused on hearing from representatives of all these groups, and in particular marginalized communities, will want to increase both the numbers of members, to ensure a robust representation, and the terms back to the more standard three-year term for advisory boards.³³² The longer term makes it more likely that members of the CAB will find ways of engaging effectively with the CFPB and be able to transmit institutional knowledge to newer members. A longer term also provides more payoff on the CFPB’s investment in CAB members.

2. *Ask the Question: Embedding Race and Economic Equity Consciousness in Policymaking*

As Gale Cincotta noted decades ago, while advocating for the passage of the CRA, “It wasn’t good enough to say we will hire minorities, you had to put a program together and have disclosure to see how your program was working.”³³³ It is the same with rulemaking. The CFPB must measure the effectiveness of its rules, not just against costs to covered persons and consumers generally, but the particularized impact on marginalized communities. This must be a critical step before entering onto an intervention and in deciding among interventions, just as the CFPB asks about the impact on rural communities, before it finalizes a rule.

Asking the question of how a proposed policy impacts marginalized communities does not dictate a result. But, as with other forms of cost-

330. 12 U.S.C. § 5494(b) (2021).

331. Renae Merle, *Mick Mulvaney Fires All 25 Members of Consumer Watchdog’s Advisory Board*, WASH. POST (June 6, 2018, 3:32 PM MDT), <https://perma.cc/JCA9-K93Q> (Mulvaney fires all CAB members; CAB members were reportedly told that they could not re-apply for seats on the CAB); *Bureau of Consumer Financial Protection Announces New Advisory Committee Members*, CONSUMER FIN. PROT. BUREAU (Sept. 7, 2018), <https://perma.cc/5B34-6ZQK> (CAB shrunk from 25 members to 9 and terms reduced from three years to one year); *Consumer Financial Protection Bureau Charter of the Bureau’s Consumer Advisory Board* (Mar. 19, 2019), <https://perma.cc/SC5B-VKPM> (current CAB charter; membership is now “approximately ten” and terms are two years).

332. See discussion accompanying footnotes 185–189, *supra*.

333. *Community Credit Needs: Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs*, 95th Cong. 159 (1977) (statement of Gale Cincotta).

benefit analysis, it guards against unintended consequences and corrects for blind spots. It is time to stop relying on our good intentions and critically examine the impact of our work.

a. Regulatory Priorities

The CFPB's regulatory priorities must be examined to see if they match the statutory focus on consumer protection and risks to marginalized communities. Presumably a regulatory agenda that centers consumers rather than financial institutions would focus on areas where there is identified consumer harm, including denial of access to "fair, transparent, and competitive" consumer financial products and services.³³⁴ Rather than removing protections in favor of access, as the CFPB under Trump has done,³³⁵ it would take up the hard, unfinished question of access to what. The CFPB could return to Gail Cincotta's original quest to leverage the power of capital to develop communities and enrich the marginalized as much as those already centered and powerful. This is a challenge that has only gotten more difficult in the years since the passage of the CRA and the many groundbreaking titles of the Consumer Protection Act. Lending is no longer done exclusively or even primarily by bricks-and-mortar institutions. Nor are all or even most of an individual's financial transactions handled by a depository institution. Payment processor applications like Venmo and Zelle are one piece of the general unbundling of financial services. All of this can make it more challenging to detect exclusion or define inclusion. Consequently, we need the CFPB more than ever to use all of its tools, including data collection, research, and market monitoring, as well as direct engagement with marginalized communities, to understand the impact of financial services and products on underserved communities.

b. Consumer Redress

For the CFPB to fulfill its statutory mandate to address risks to traditionally underserved communities, it must prioritize consumer redress. Under the Trump administration, the CFPB stepped back from full consumer redress in enforcement cases.³³⁶ Recent research has also raised questions about whether the consumer complaint function resulted in

334. 12 U.S.C. § 5511(a) (2010).

335. Helaine Olen, *The CFPB Once Defended Consumers. Thanks to Trump, It Now Helps Companies Prey on Them Instead.*, WASH. POST (Aug. 1, 2020, 11:35 AM MDT), <https://perma.cc/EK6FJYQW>.

336. MAJORITY STAFF OF H.R. COMM. ON FIN. SERV., *SETTLING FOR NOTHING: HOW KRANINGER'S CFPB LEAVES CONSUMERS HIGH AND DRY*, H.R. REP. 116TH CONG. at 15 (First Session) (Oct. 2019), <https://perma.cc/WU23-4UB2>.

greater monetary relief for complainants from whiter, higher-income neighborhoods as compared to poorer communities and communities of color.³³⁷

One possible approach to provide greater consistency across administrations would be to seek comments on a rule setting forth the centrality of redress in settlements or otherwise bind the agency to public standards regarding when redress is sought and when not. In any event, the CFPB should look critically at who gets redress for what across supervision, enforcement, and consumer complaints.

c. *Center a Research Agenda*

As discussed above, the CFPB's statutory research mandate is remarkable.³³⁸ But beyond the annual publication of articles analyzing the Home Mortgage Disclosure Act data and the few statutorily mandated reports, there is no regular, public cadence of research reports whereby the CFPB commits itself publicly to the regular release of reports on its statutory research agenda. Nor is there a requirement, as there is with rules, to publish a plan for the coming year.³³⁹ Building out a public facing research agenda could create accountability for fulfilling the mandated research agenda, which would help to center the voices and experiences of marginalized communities inside the CFPB.

3. *Fostering Visibility: Why the Org Chart Matters*

During the Trump administration, the CFPB's organizational structure was significantly rearranged. Four offices mandated in Dodd-Frank as either "offices" or "units" disappeared from the recent CFPB's organizational chart under the Trump administration and were subsumed as suboffices, housed in offices, housed in divisions:

- Community Affairs: "a unit whose functions shall include providing information, guidance, and technical assistance regarding the offering and provision of consumer financial products or services to traditionally underserved consumers and communities"³⁴⁰
- Financial Education: an office "responsible for developing and implementing initiatives intended to educate and empower consumers"³⁴¹
- Servicemember Affairs: a unit "responsible for developing and implementing initiatives for service members and their families. . ."³⁴²

337. See Haendler & Heimer, *supra* note 209.

338. See II.B.3, II.C.2, *supra*.

339. The CFPB is not among the agencies required by the Foundations for Evidence-Based Policymaking Act, Pub. L. No. 115-435 (2019), to publish an annual Learning Agenda, which would serve some of the same purposes.

340. 12 U.S.C. § 5493(b)(2) (2021).

341. *Id.* § 5493(d).

342. *Id.* § 5493(e).

- Office of Financial Protection for Older Americans: a unit instructed to undertake “activities designed to facilitate the financial literacy [of seniors] on protection from unfair, deceptive and abusive practices”³⁴³

All were housed, along with the office of students, as “program offices” in the office of consumer education.³⁴⁴ Instead of a division of Consumer Education and Engagement, all the offices bundled under the “consumer education” rubric—students and service member affairs, community affairs, older Americans, as well as financial education—reported up to a political appointee overseeing a division of Consumer Education and External Affairs.

As we can see with the sharp drop-off in fair lending cases under the Trump administration,³⁴⁵ structure both reflects leadership priorities and facilitates certain outcomes. Placing the statutory offices and functional units within new offices obscured their visibility. Statutory offices, however, were created to ensure the visibility of special populations and traditionally underserved consumers. Obscuring the statutory offices and functional units on the organizational chart both reflects leadership de-emphasis on racial and economic justice and further impedes the ability of those offices to do their statutorily mandated work.

Reorganizations take time and energy. They deplete morale. People struggle to remember the name of their office (or agency). Few like to have their work patterns disrupted just for the sake of disruption. At the same time, these reorganizations so fundamentally obscure the functions and operations of the offices, to connect the CFPB to marginalized communities, that a CFPB committed to re-centering those voices will have to re-consider this organizational structure. At a minimum, marginalized communities need to know from looking at the organizational chart which office is tasked with outreach and who heads the office. That level of transparency is a bare minimum for meaningful engagement with, and accountability to, marginalized communities.

B. Reframe Advocacy

As Richard Cordray notes, regulatory advocacy is not like either litigation or legislative advocacy.³⁴⁶ Cordray confesses that, as a litigator, he

343. *Id.* § 5493(g).

344. *Consumer Education and External Affairs*, CONSUMER FIN. PROT. BUREAU (last visited August 30, 2020, at 12:41 PM EST), <https://perma.cc/57Y2-D8HX>. See also discussion accompanying notes 207-208, *supra*.

345. See III.B., *supra*.

346. Cordray, *supra* note 197, at 90–91. (“I was a lawyer . . . often relying on the impressions made by narratives and stories. . . . For the lobbyists, this platform was not nearly as good as the one they have in dealing with Congress to shape legislation.”).

relied on instinct and stories.³⁴⁷ Facts were important, but it was a select universe of them. And, Cordray notes, legislative lobbyists “have levers such as financial contributions and political pressures on individual members.”³⁴⁸ But good regulators care about data.³⁴⁹

Stories can humanize, but rule writers, bound by the constraints of administrative law, the requirement that their work stand up to scrutiny as reasoned and fact-based, need data. This institutional demand for hard, quantitative data provides opportunities for advocates. That opportunity is increased by the Administrative Procedure Act’s requirement that all substantive comments to a rule be considered. When an agency is presented with a unique, fact-based comment, the agency is constrained to consider it. And, even more, an individual rule writer is often eager to consider it because data helps rule writers solve problems and do their jobs.

For advocacy to be successful, it must meet policy makers where they are, and credit them with good faith. Fundamentally, advocates should think of their role as translating the lived experiences of the communities they work with, represent, and belong to, into usable information for agencies. When the individuals writing the rules at agencies recognize data in the stories advocates tell, and the lived experiences of the communities they represent, then rulemaking will of necessity acknowledge and address those experiences. That data can and should inform every aspect of rulemaking, from policy framing to placement of commas in regulatory text. Regulators need the context for the story before they can recognize its importance. Framing stories with that context—“How often does this happen?” “What is the scale of the harm?” “How typical is this story with other experiences?”—lets regulators see the data in the lived experiences. Naming the harms flowing from regulatory action or inaction can make those harms visible to regulators and provide urgency. Even when the individual harm is not itself easily quantified, the scale of those harms often can be.

Advocates have a powerful moral calling to remind the CFPB of its fundamental mission to center the voices of marginalized communities. They can best do this by insistent particularity. What are the harms? Who are the harmed? What does that harm look like? Those are questions that regulators are charged to acknowledge. Asking those questions with regulators as well as offering the evidence that exists can help regulators internalize the perspectives of marginalized communities.

Regulators hear often of the concerns and impacts on regulated entities. Those concerns weigh in the decisionmaking, as regulators weigh what the costs are. Even unfounded fears, for example, could potentially dry up

347. *Id.* at 90. (“I was a lawyer . . . used to operating on intuition . . . often relying on . . . stories.”).

348. *Id.* at 91.

349. *Id.* at 90–91.

access to credit.³⁵⁰ Advocates have an obligation to make sure that regulators hear the concerns of and impacts on marginalized communities with as much force as regulators hear from regulated entities. Raising the profile of marginalized communities can change how a regulator understands a problem, what solutions seem viable, and what realities are internalized. This requires sustained engagement across administrations.

The faith-based advocacy that championed the payday lending rule was extremely effective in keeping that rule on the CFPB's agenda and a priority of Director Cordray over many years. The constant interactions, the direct recounting of the experiences of parishioners struggling with payday loans and disabling debt loads, and the sheer variety and number of the voices in the faith-based coalitions, all helped elevate those concerns and center them. And yet, successful as this advocacy was, the rule was vulnerable.

The rule was vulnerable because it took too long. The young CFPB was an ambitious, energetic institution. It wanted to solve every problem—and solve every problem the “right” way. But agencies need to be selective in their priorities. Had the payday rule been finalized in 2015 and fully implemented by the time of the 2016 election, for example, it would have been much harder for a subsequent administration to roll it back. Finalizing the payday rule in 2015 would likely have required a different rule, though—one with a narrower scope or a more limited intervention.³⁵¹

In the CFPB's debt collection rulemaking, we again see a rule that took too long. In part, that was because the rule tried to do everything.³⁵² The places where advocates most wanted to see change, including coverage of creditors collecting their own debts and meaningful substantive protections, were hard to execute against a background of no rule at all. Could the CFPB have done a smaller rule with more meaningful interventions? Was it necessary to create *ab initio* an entire regulatory framework or could the

350. For example, the CFPB provided institutions making a “qualified mortgage” a safe harbor from any challenge by a borrower that the institution had failed to evaluate the borrower's ability to repay, in violation of the Dodd-Frank Act. In doing so, it relied on what it characterized as a largely baseless “widespread fear” by financial liability of litigation. *See Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z)*, 78 Fed. Reg. 6408, 6533, 6505 (Jan. 30, 2013).

351. The payday rule, as a brand-new intervention in a largely unregulated market, required a more extensive development of the administrative record, including research and market monitoring than an intervention that built on top of existing interventions and administrative records. The payday rule also required more *de novo* legal analysis than most rules, again, because it was a largely unregulated market and because the CFPB was implementing its largely undeveloped authority to regulate unfair, deceptive, and abusive practices in the consumer financial marketplace and not a more straightforward implementation of a specific statutory mandate.

352. The incentive to try to do everything at once was strong, as there had been no prior rulemaking over the many decades of the FDCPA's existence. The CFPB had a clean slate to work from and pent-up demand for clarity from debt collectors as well as obvious consumer protection gaps.

framework have been built up more incrementally? Looking back, it seems that advocates and regulators may have talked past each other without understanding the other's goals. In the absence of understanding clearly what the CFPB thought it needed to do, and what the CFPB thought the limits on its authority were, advocates found themselves in the fall of 2020 wondering if no debt collection rule would have been better than the final rule.

Advocates must make the lived experiences of marginalized communities salient and visceral to policy makers; advocates must also learn to recognize the limitations agencies operate under, whether political, legal, or time, staff, or other resources. Advocates can best support policy makers at agencies if the solutions they promote are matched to the limitations policy makers experience themselves as operating under. Advocates, with their more direct knowledge of the experiences of marginalized communities, may be better positioned than agencies to identify the key provisions of any market intervention. In a world of limited resources, for advocates and agencies, advocates owe it to the marginalized communities whose voices they seek to elevate to exercise strategic focus.

C. *Move Beyond Dodd-Frank*

The argument in this article is grounded in the history and language of Dodd-Frank. The language of Dodd-Frank, when read against the context in which it was enacted, creates a clear direction for the CFPB to focus on marginalized and vulnerable communities.³⁵³ Those communities are where risks to the wider consumer market often first appear, and those communities suffer the most when risky products are left unaddressed. Moreover, as became clear in the Great Recession, risks to marginalized communities can metastasize to the global economy.

Yet Dodd-Frank is far from perfect. Its focus on marginalized communities operates in fits and starts. The picture is pointillistic rather than sharply defined.³⁵⁴ Marginalized communities are called out in great specificity in the CAB,³⁵⁵ but not directly in the statutory purpose,³⁵⁶ for example. The weight to be given to the risks to traditionally underserved communities is nowhere set out, even if the statute requires attention to those risks.³⁵⁷

353. See generally II. B, *supra*.

354. See generally II. B. 3, *supra*.

355. 12 U.S.C. § 5494(b) (2021) (requiring “experts in . . . community development, fair lending, and civil rights, . . . and representatives of depository institutions that primarily serve underserved communities, and representatives of communities that have been significantly impacted by higher-priced mortgage loans” as members of the Consumer Advisory Board).

356. *Id.* § 5511(a).

357. See, e.g., *id.* § 5512(c)(2)(E).

One can debate whether the identified special populations offices in the statute are the right choices for all time. Are service members and older Americans marginalized in the same ways traditionally underserved communities are? What happens if and when we bring traditionally underserved communities into the mainstream of financial life? Do we no longer focus on those communities? Should the CAB always contain representatives of communities beset by a prevalence of higher-priced mortgage lending?³⁵⁸ How does the CFPB's mandate to pay attention to small financial service providers³⁵⁹ and lending to small businesses fit in?³⁶⁰ And what about the requirement that the CFPB consider the impact of any rule on rural communities?³⁶¹

As I have suggested throughout, Dodd-Frank has an uneasy twinning of access and consumer protection. The CFPB is told to “ensure access” for all consumers,³⁶² but given no levers (other than deregulation) to do so. Conversely, the agency is given authority to root out “abusive practices”³⁶³ but forbidden from imposing a usury cap,³⁶⁴ even though, for many, usurious interest is the definition of a per se abusive practice.³⁶⁵ Congress did not, in Dodd-Frank, provide clear instruction on how to resolve these tensions.

These tensions resolve or at least abate if we recognize Dodd-Frank's wellspring in the civil rights and economic rights organizing of the 1960s and 1970s.³⁶⁶ In that context, we can see that access to consumer financial products and services is not meant to be access to any financial product or service, no matter how abusive or exploitative, but to financial products and services that foster development and growth. Risks to that growth and development are to be identified and addressed. Those communities and persons most at risk, most historically excluded and traditionally underserved, are to be given a place of preference in prioritization and decisionmaking, in recognition of the long historical denial of their legitimate needs.

358. The CAB's inclusion of “representatives of depository institutions that primarily serve underserved communities” seems more plausibly a membership cohort for the long term. *Id.* § 5494(b) (2010).

359. Only three agencies, the CFPB, the EPA, and the Occupational Safety and Hazards Administration, are currently required to follow the extra procedural steps of convening a panel of small businesses prior to initiating a rulemaking. *SBREFA*, U.S. SMALL BUSINESS ADMINISTRATION (last visited May 20, 2021), <https://perma.cc/8ZTF-WSR3>.

360. 12 U.S.C. § 1691c-2 (2010).

361. *Id.* § 5512 (b)(2)(A)(ii).

362. *Id.* § 5511(a) (identifying the CFPB's purpose as “ensuring that all consumers have access”).

363. *Id.* § 5531(a).

364. *Id.* § 5517(o).

365. *See, e.g.*, United States Conference of Catholic Bishops, *Payday Lending Rule Exposes the Poor and Vulnerable to Predatory and Abusive Lending Practices*, July 10, 2020, <https://perma.cc/MN8H-Z5V2>.

366. *See* II.B.2, *supra*.

If we are to take seriously the mandate of development and access for traditionally underserved communities, we must start with race. This country was built on slavery and race-based exclusion.³⁶⁷ The financial system has embedded in it systematic racial preferences.³⁶⁸ But race is not the only basis of exclusion and underdevelopment, and we should all want and strive toward a market that is truly free and that allows each of us to grow and develop and prosper.³⁶⁹

We can see in Dodd-Frank repeated gestures at this broad vision. Service members' frequent moves and deployments can keep them from being able to participate fully in the financial mainstream, while debt collection for a service member is far more likely to result in life altering consequences than for a civilian.³⁷⁰ Scammers are quick to exploit declining cognitive abilities and reduced social networks where they appear among older Americans.³⁷¹ Digital literacy and access can also be challenging for some older Americans, which can hamper their ability to navigate the consumer financial marketplace and could become an even greater barrier to access as use of technology in the provision of financial services continues to accelerate. As we can see with the continuing debates about how to provide small dollar mortgages,³⁷² financial institutions will often struggle to find a cost- and profit-effective way to provide access to needed capital to lower-income people. Rural areas also often suffer from a lack of access to capital, for a variety of reasons, including pockets of poverty, increased costs to deliver certain financial products and services,³⁷³ and geographic disper-

367. *E.g.*, Chinese Exclusion Act, Pub. L. No. 47-126.

368. *See, e.g.*, MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* (2017); DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* (2021); KEEANAGE-YAMAHTTA TAYLOR, *RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP* (2019).

369. *See generally* HEATHER MCGHEE, *THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER TOGETHER* (2021).

370. *See, e.g.*, Courtney-Rose Dantus, *Servicemembers and debt collection: Sharing your stories* (Sept. 22, 2017), <https://perma.cc/VLH2-QKHX> (“[D]ebt collection attempts can cause an extra layer of concern for active-duty servicemembers. We’ve received reports from military consumers that some debt collectors threaten them with reporting the debt to their commanding officer, having their rank reduced, or putting their security clearance up for review.”).

371. *See, e.g.*, Lisa Weintraub Schifferle, *Grandparent Scams in the Age of Coronavirus*, FED. TRADE COMM’N BLOG (Apr. 3, 2020), <https://perma.cc/6NQ4-SVWS> (describing the “grandparent” scam where an older person receives a seemingly-frantic call from someone posing as a grandchild). When I received such a call recently, after I told the caller I had no grandchildren, I was beseeched, “Don’t you remember me, Grandma?”

372. *See, e.g.*, Matthew Goldstein, *Where a Little Mortgage Goes a Long Way*, N.Y. TIMES (Aug. 2, 2020), <https://perma.cc/4JGJ-LSR9>.

373. For example, it can be harder in rural areas to appraise property, which can make rural mortgage lending slower and most costly. *E.g.*, Letter from Carlos T. Perez, Vice President and Chief Credit Officer for Single-Family, to All Fannie Mae Single-Family Sellers, *Lender Letter LL-2014-02: Prop-*

sion. Small business lending is another area where reports continue to suggest both illegal discrimination and more straightforward problems with making such lending pay.³⁷⁴ It can be harder to evaluate the financial strength of a small business than a large business, requiring more time and individualized attention, which translates into more cost and risk for a lender.

Focusing on access as an enabler, rather than access for access's sake alone, could help make sense of the push-and-pull of the current statute. The statute itself, in its insistence on access to "fair, transparent, and competitive" markets for "all" recognizes that not all access is equal and not everyone has equal access to begin with.³⁷⁵ Centering marginalized communities and their needs and risks could give focus and coherence to the work of the CFPB, without dictating a single policy path to do that. Champions of the free market have recognized the need to provide some entry-level access, even if they have been reluctant to engage the forces of government in making that access available.³⁷⁶

Congress could perhaps clarify that this is its intention. Congress could expand the CFPB's authority to focus more squarely on development of and access to capital for wealth-building. Congress could create authority for the CFPB to provide incentives for the provision of access to wealth-building credit and responsible financial services, as a CRA regulator or administrator of the CDFI Fund, for example. Congress could allow the CFPB to set usury caps, thus setting a clear line between "good" and "bad" credit. Congress could even specifically define what it meant by "traditionally underserved consumers and communities."

But a functioning, focused CFPB is urgently needed now, as part of a new administration working to confront the pandemic, the uneven economic recovery, and the legacy of structural racism. In the presence of congressional gridlock and partisan divides, CFPB leadership can and must act. CFPB leadership could center the voices of marginalized communities, and a goal of development-enabling access, to guide its work and provide a strong foundation, for its work now and in the future. This work of necessity is a work in progress. As market conditions evolve, and as the CFPB learns more from data collection, research, and market monitoring, what it means to center the voices of marginalized communities, and who is in

erty and Appraisal Requirements for Properties Located in Small Towns and Rural Areas (Mar. 25, 2014), <https://perma.cc/W3JF-85LP>.

374. See, e.g., Stacy Cowley, *Minority Entrepreneurs Struggled to Get Small-Business Relief Loans*, N.Y. TIMES (Apr. 4, 2021), <https://perma.cc/V859-WETG>. See generally CFPB, Key dimensions of the small business lending landscape (May 2017), <https://perma.cc/9QEP-WZGG>.

375. 12 U.S.C. § 5511(a) (2010).

376. See, e.g., Bureau of Consumer Financial Protection, *Taskforce on Federal Consumer Financial Law Report*, Volume II at 94 (Jan. 2021).

2021

PAY ATTENTION!

407

those marginalized communities, will shift and evolve. Nonetheless, the statute's north star, and the agency's, is the pursuit of hearing, and listening to, the voices of those pushed to the margins, underserved and poorly served by the financial system as it is.

V. CONCLUSION

When Congress created the CFPB, it was responding to the last great economic crisis of this country. It recognized, both implicitly and explicitly, that racial and economic inequity must be addressed and must be addressed together. Its work was incomplete, as the work of legislation always is, and required implementation. That implementation began but was never carried fully through.

The CFPB's mandate was centered in the communities laid to waste by predatory lending and the toxic combination of no access to wealth-building capital and too much access to extractive credit. The great promise of the CFPB to those communities remains as yet unfulfilled. The need is more urgent than ever as we confront the persistent economic impact of the coronavirus pandemic and the demands for racial justice in our streets.

For the CFPB to do this great work, it must be clear about its intentions and goals. It must be clear about who it serves and for what ends. It must make sure that it is, in fact, paying attention to those individuals and communities, historically marginalized, who were nonetheless raised up in Dodd-Frank. Their voices and lives should inform the work of the CFPB at every stage. When we learn to center the diverse experiences and perspectives of those marginalized, we will be on our way to a society that is more just and that affords all of us the opportunities for economic self-determination so richly promised, and as yet so unfulfilled, in this nation's founding documents.

