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Katherine Porter

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# THE COMPLAINT CONUNDRUM: THOUGHTS ON THE CFPB'S COMPLAINT MECHANISM

*Katherine Porter*\*

The law requires the Consumer Financial Protection Bureau (CFPB) to collect, monitor, and respond to consumer complaints regarding consumer financial products or services. This Article explores these duties. Its premise is that the CFPB's complaint mechanism, even if carefully designed and heavily resourced, is unlikely to improve the overall level of consumer protection. While taking complaints will aid the CFPB in some of its duties, it also could erode some aspects of consumer protection. Those counterintuitive possibilities bring into sharper relief the issue of whether it is appropriate to task administrative agencies with resolving consumer complaints. What is the purpose of making the government—other than the court system—address complaints with nongovernment actors? The Article considers this fundamental question in the context of the CFPB, identifying theoretical and practical issues raised by the CFPB's strategies to date for handling consumer complaints.

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## INTRODUCTION

The Consumer Financial Protection Bureau (CFPB) is heralded as a victory for consumers. It represents a commitment from the federal government to be attentive to the concerns of people as they engage in financial transactions. The CFPB should give consumers an ally and a resource in the credit marketplace. Its rule-writing, examination, and enforcement duties were hard-fought by its proponents and remain controversial, and perhaps unwelcome, by its critics. One of the CFPB's major duties, however, receives universal praise. Its obligation to address complaints from consumers about financial transactions was supported by industry,<sup>1</sup> advocates,<sup>2</sup> and politicians.<sup>3</sup>

The CFPB solves a major problem with the prior complaint regime for financial transactions. Because of fractured regulatory authority, consumers had difficulty identifying the appropriate agency to submit a complaint. With consolidated authority in the CFPB, there is a one-stop shop for aggrieved consumers. This victory seems to have satisfied all parties. But it

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\* Professor of Law at UC Irvine School of Law.

1. *Creating a Consumer Financial Protection Agency: A Cornerstone of America's New Economic Foundation: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 111th Cong. 79 (2009) (statement of Edward L. Yingling, President and Chief Executive Officer, American Bankers Association) [hereinafter Hearing].

2. *Regulatory Restructuring: Enhancing Consumer Financial Products Regulation: Hearing Before the H. Comm. on Fin. Serv.*, 111th Cong. 145 (2009) (statement of Travis Plunkett, Consumer Fed'n of America and Edmund Mierzwinski, U.S. PIRG).

3. *Id.* at 1 (remarks of Congressman Barney Frank).

may also have blinded them to other, quite challenging issues with the CFPB's complaint duties.

The goal of this Article is to explore the purpose of a government-run consumer complaint mechanism and analyze its potential benefits and risks. I describe the law requiring the CFPB to develop a complaint mechanism and the CFPB's approach to implementing those duties. I then articulate several reasons why the government might be tasked with hearing and responding to complaints that consumers make against nongovernment actors; I examine those reasons against the larger framework of consumer protection. I conclude that the CFPB's complaint mechanism is not a clear victory for all. It will be difficult to achieve its potential, and even at best, taking complaints could undermine certain aspects of consumer protection.

### I. STATUTORY DUTIES REGARDING COMPLAINTS

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) that creates the CFPB prescribes a rough architecture for the CFPB. It mandates that the CFPB have six specific units.<sup>4</sup> The congressional requirement to have a particular unit likely reflects a strong consensus about the importance of that unit's duties. While the CFPB could be structured differently over time, such as by the addition of divisions, Congress is clear that the six statutory units must remain identifiable components. This ensures that these assigned tasks remain a visible part of the Bureau.

A complaint mechanism is one of the CFPB's required units. The statute spells out the basic obligations of the CFPB complaint unit.

#### (3) Collecting and Tracking Complaints.—

(A) In General.—The Director shall establish a unit whose functions shall include establishing a single, toll-free telephone number, a website, and a database or utilizing an existing database to facilitate the centralized collection of, monitoring of, and response to consumer complaints regarding consumer financial products or services. . . .<sup>5</sup>

The statute establishes three core tasks that the CFPB must perform with respect to complaints: collecting them, monitoring them, and responding to them. In later sections, the statute gives a comparatively high level of detail about how these tasks shall be executed. The result is that the CFPB has less flexibility in designing how to address consumer complaints than it enjoys for some of its other duties. Using the three duties—

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4. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 1013, 124 Stat. 1376, 1966 (2010) (codified at 12 U.S.C. § 5493 (2010)) (requiring units dedicated to research, community affairs, collecting and tracking complaints, fair lending and equal opportunity, financial education, service members' affairs, and older Americans' affairs).

5. *Id.* § 1013(b)(3)(A), 124 Stat. at 1969.

collecting, monitoring, and responding—as a framework, I explore the statutory obligations of the CFPB against the prior regime for complaints.

#### A. CENTRALIZED CONTACT FOR CONSUMERS

The CFPB's first charge regarding complaints is to “collect” them. At minimum, this means that the CFPB must take consumer complaints. This obligation is unsurprising, given that under prior law, most financial regulators were required to take consumer complaints.<sup>6</sup>

The major weakness of the prior regime was that consumers struggled to identify the appropriate regulator to contact. For a single financial product, such as a home mortgage, the regulator could be one of a dozen agencies and could be either state or federal. Because these regulators each had responsibility for the same financial products,<sup>7</sup> an aggrieved consumer with a mortgage problem would have to research the identity of the party selling the mortgage to know where to direct a complaint. To address this issue, the Federal Financial Institutions Examination Council created a web page where consumers type in the name of their financial institution and are given the name of its regulator.<sup>8</sup> Yet, consumers had to know about this site's existence, learn the correct name of their institution, be sure their institution was not a credit union (because those are not covered by the site), and then track down contact information for the appropriate regulator's complaint mechanism.

The fractured regulatory authority hampered consumers who tried to complain about financial services to the government. At the Federal Reserve Board in 2000, more than half of all complaints were referred to other agencies.<sup>9</sup> Even the banking industry conceded that reform was needed. The American Bankers Association, which strenuously opposed a separate consumer regulator, supported the creation of a “centralized call center for consumers that could forward complaints to the right agency and serve as a coordinated information source.”<sup>10</sup>

The CFPB consolidated authority for consumer protection and reoriented it to be based on the product sold, rather than the offering party. If the problem is a consumer financial product, then the consumer can

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6. 15 U.S.C. § 57a(f) (2006), *repealed by* Dodd-Frank Act § 1092(3), 124 Stat. at 2095 (requiring that major prudential regulators receive complaints).

7. Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY J., Summer 2007, at 16 (“Consumer financial products are regulated based, principally, on the identity of the issuer, rather than the nature of the product.”).

8. *FFIEC's Consumer Help Center*, FED. FIN. INSTS. EXAMINATION COUNCIL, <http://www.ffiec.gov/consumercenter/> (last visited Mar. 26, 2012).

9. Jeanne M. Hogarth & Maureen P. English, *Consumer Complaints and Redress: An Important Mechanism for Protecting and Empowering Consumers*, 26 INT'L J. CONSUMER STUDIES 217, 220 (2002).

10. *Hearing*, *supra* note 1, at 79 (statement of Edward L. Yingling).

contact the CFPB regardless of which entity licenses or supervises the business.

The statute contains several directives aimed at reducing consumer confusion about where to submit complaints. The CFPB must provide telephone access via a “single” telephone number.<sup>11</sup> This improves the prior regulatory situation, in which a consumer might have to call several prudential regulators to determine which one had oversight over the financial actor that had aggrieved them. The statute also specifies the “*centralized* collection of, monitoring of, and response to consumer complaints.”<sup>12</sup> Congress clearly wanted the CFPB to be a single portal of entry for consumers with complaints.

The statute does recognize that the CFPB may not, in fact, be the appropriate regulator for some consumer complaints. It provides that “the Director shall coordinate with the Federal Trade Commission or other Federal agencies to route complaints to such agencies,”<sup>13</sup> and that state agencies may receive routed calls about “appropriate complaints.”<sup>14</sup> The description of the permitted procedure as “routing” complaints is consistent with the idea that the CFPB must be available as an initial first point of contact for consumers.

A single portal for consumer complaints is a natural result of the consolidation of authority in the CFPB. Thus, the mere creation of the CFPB resolves the major “complaint” about the handling of complaints. On this issue, the CFPB clearly represents an advance over the prior system.

## B. CREATING COMPLAINT DATA

The second duty of the CFPB is to “monitor” complaints. The contours of this duty are somewhat unclear. The subsection’s title uses the phrase “collect and track,” and perhaps “monitor” and “track” are synonyms. The monitoring duty seems to require that, at minimum, the CFPB cannot just take complaints. It must do something to understand their origin, content, and disposition. The statute also requires an annual report to Congress on the prior year’s complaints. “Such report shall include information and analysis about complaint numbers, complaint types, and, where applicable, information about resolution of complaints.”<sup>15</sup> This type of monitoring is mostly a counting task. It does not seem to require the CFPB to track how any particular complaint is being handled. Rather, its purpose seems to be to work in tandem with the collecting task to ensure that the CFPB is “hearing” the public’s negative experiences with financial products.

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11. Dodd-Frank Act § 1013(b)(3)(A), 124 Stat. at 1969 (2010) (codified at 12 U.S.C. § 5493(b)(3)(A)).

12. *Id.* (emphasis added).

13. *Id.*

14. *Id.* § 1013(b)(3)(B), 124 Stat. at 1969.

15. *Id.* § 1013(b)(3)(C), 124 Stat. at 1969.

The monitoring duty has another aspect. The CFPB is required to share consumer complaint information with the prudential regulators, the Federal Trade Commission, other federal agencies, and state agencies.<sup>16</sup> In turn, those entities are required to share their consumer complaint data with the CFPB.<sup>17</sup> This aggregation is designed to “facilitate” the “supervision and enforcement activities” of the CFPB, and to aid it in “monitoring of the market for consumer financial products and services.”<sup>18</sup> It appears that the data sharing was designed to give the CFPB a comprehensive view of consumers’ frustrations to allow it to better perform its oversight of financial institutions. This is quite an entirely separate responsibility with respect to consumer complaints than being responsive to aggrieved consumers. Indeed, the CFPB could use information gleaned from monitoring complaints to write a rule to eliminate a troublesome practice without any actions whatsoever to acknowledge, respond to, or obtain redress for any consumer on an individual level.

### C. RESPONDING TO CONSUMERS

The CFPB’s third duty, however, is to respond to complaints. This obligation was apparently not present in some early formulations of the CFPB’s duties. In a hearing one year before the Dodd-Frank Act was passed, a consumer advocate stated that while collecting and tracking complaints was a “very important function,” the proposed agency should also be “charged with resolving consumer complaints.”<sup>19</sup> This history may explain why the CFPB’s duty to respond to complaints appears in a separate section of Title X of Dodd-Frank, one that is not even proximate to the section discussed above on “collecting and tracking” complaints.

Section 1034 is titled “Response to Consumer Complaints and Inquiries.” It imposes on the CFPB a duty to establish “reasonable procedures to provide a timely response to consumers” who make complaints.<sup>20</sup> The statute describes the content of the response as including—

- (1) steps that have been taken by the regulator in response to the complaint or inquiry of the consumer;
- (2) any responses received by the regulator from the covered person [this is the term for the businesses that the CFPB regulates]; and

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16. *Id.* § 1013(b)(3)(D), 124 Stat. at 1969–70.

17. *Id.*

18. *Id.*

19. *Hearing, supra* note 1, at 99 (statement of Travis Plunkett, Legislative Dir., Consumer Fed’n of Am.).

20. Dodd-Frank Act § 1034(a), 124 Stat. at 2008 (codified at 12 U.S.C. § 5534).

- (3) any follow-up actions or planned follow-up actions by the regulator in response to the complaint or inquiry of the consumer.<sup>21</sup>

There is a parallel statute that imposes identical duties on “covered persons” to provide responses to the CFPB concerning complaints.<sup>22</sup> These laws establish a communication chain: businesses (a.k.a., covered persons) must respond to the CFPB, and the CFPB must respond to consumers. These duties do not mean that the consumer can simply rely on the CFPB to negotiate with the business. The statute contemplates that the business will work with the consumers to resolve the complaint and then must share information on whether that process occurred and how it proceeded with the CFPB for oversight.

This tripartite structure is less robust than it may appear at first blush. While it imposes obligations to share information, it seemingly does not require that any action occur with respect to consumer complaints. That is, steps taken, responses received, or follow-up plans must be communicated from business to the CFPB and from the CFPB to consumer but, presumably, if the CFPB and the business take no action, they need only communicate that fact in a “timely response.”<sup>23</sup> Could the following letter satisfy the CFPB’s statutory duty?

Dear Consumer:

We collected your complaint. We added it to our database. We have taken no steps with respect to your complaint, have received no response from a business regarding it, and do not plan any follow-up.

Sincerely,

Consumer Complaint Unit, The Consumer Financial Protection Bureau

It is possible, perhaps even likely, that Congress intended the statute to impose an affirmative duty to do something more than generate such letters

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21. *Id.*

22. *Id.* § 1034(b), 124 Stat. at 2009.

A covered person subject to supervision and primary enforcement by the Bureau pursuant to section 1025 shall provide a timely response, in writing where appropriate, to the Bureau, the prudential regulators, and any other agency having jurisdiction over such covered person concerning a consumer complaint or inquiry, including—

- (1) steps that have been taken by the covered person to respond to the complaint or inquiry of the consumer;
- (2) responses received by the covered person from the consumer; and
- (3) follow-up actions or planned follow-up actions by the covered person to respond to the complaint or inquiry of the consumer.).

*Id.*

23. *Id.* § 1304(a), 124 Stat. at 2008.

in response to consumer complaints. And, of course, the CFPB in fact will likely do much more than the statutory minimum.<sup>24</sup>

A weak duty to respond, however, may be the norm for government action on consumer complaints.<sup>25</sup> Under the prior regime for financial regulators, many consumers did not receive any redress after complaining. Since 1975, federal law has required the regulators of financial institutions to address consumer complaints. “In order to prevent unfair or deceptive acts or practices,” the regulators were to “establish a separate division of consumer affairs which shall receive and take appropriate action upon complaints.”<sup>26</sup> The regulations fleshed out the concept of “appropriate action” to require regulators to provide consumers “a substantive response or an acknowledgment setting a reasonable time for a substantive response” to be “sent to the individual making the complaint” within fifteen days after receipt of a written complaint.<sup>27</sup> The regulations do not seem to provide a definition of substantive response.

Although it seems clear that more than an acknowledgement of receipt of complaint was intended, consumer advocates reported that federal regulators often took no action on complaints that were legitimate and reflected serious or repeated violations.<sup>28</sup> These problems with complaint handling cannot be explained by the tremendous increase in the size and influence of the financial industry nor the alleged nearly complete regulatory capture of some entities, such as the Office of the Comptroller of the Currency (OCC). In the heyday of consumer protection—in 1976—a congressional report found serious shortcomings in how consumer affairs offices dealt with complaints.

None of the consumer affairs offices (or Washington offices of those agencies without consumer affairs offices) become involved in the actual investigation of the consumer complaints which they receive. . . . The method of investigation of consumer complaints most frequently used by all agencies is to request details concerning the complaint from the financial institution complained about. This method puts primary reliance on the financial institution’s version of the problem. Consumers are rarely

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24. While the “timely response” should include the steps, responses, and follow-up actions, the statute does not preclude a more comprehensive response.

25. An examination of government and nongovernment complaint systems concluded that government systems are not significantly better. *See generally* Laura Nader, *Disputing Without the Force of Law*, 88 *YALE L.J.* 998 (1979).

26. 15 U.S.C. § 57a(f)(1), *repealed by* Dodd-Frank Act § 1092, 124 Stat. at 2094–95 (2010).

27. 12 C.F.R. § 227.2 (2012).

28. *Improving Federal Consumer Protection in Financial Services—Consumer and Industry Perspectives: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 43 (2007) (statement of Travis Plunkett, Legislative Dir., Consumer Fed’n of Am.).



contacted for additional details and examiners are rarely sent out to conduct on-site investigations of consumer complaints.<sup>29</sup>

Thirty years later, the OCC was the subject of a similar study of its complaint handling. The report's title, *OCC Consumer Assistance: Process Is Similar to That of Other Regulators but Could Be Improved by Enhanced Outreach*, gives away the punch line.<sup>30</sup> The Government Accountability Office found that the OCC largely was like the other federal banking regulators. It resolved most complaints by "providing information to consumers" in the form of referring consumers to other regulators or advising them to seek counsel.<sup>31</sup> Consumers were required to submit a written complaint form for the OCC to take action on the complaint; if the consumer failed to do so, the OCC considered the complaint "withdrawn."<sup>32</sup> As a result of these procedures, consumers rarely received the "substantive response" that seems to be required by regulation. In 2004, the OCC reported only 20 percent of all complaints resolved; the remainder were either marked as informational or withdrawn.<sup>33</sup> This suggests that the OCC actually investigated only a modest fraction of all complaints. The vast majority of consumers contacting a prudential regulator with a complaint did not receive a response that reflected any investigation.

The efficacy of the regulators in dealing with complaints was contested. An article describing the Federal Reserve Board's process states that it does "look into every complaint."<sup>34</sup> The agencies did have dozens of employees in complaint departments, and millions of dollars were spent in aggregate on collecting and responding to consumers' complaints about financial institutions.

Because it was created to improve the level of consumer protection and to address criticisms of prudential regulators, the CFPB almost certainly has a heavier burden to respond to complaints than the prior regulators. The statute requires a "response" rather than an "appropriate action"—a pretty clear effort from Congress to ensure that individual consumers receive more help after complaining. The exact nature of that help remains unclear,

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29. STAFF OF H. SUBCOMM. ON CONSUMER AFFAIRS, 94TH CONG., DO FINANCIAL REGULATORY AGENCIES LISTEN TO CONSUMERS? 1–2 (Comm. Print 1976) [hereinafter Staff Report] (emphasis omitted).

30. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-293, OCC CONSUMER ASSISTANCE: PROCESS SIMILAR TO THAT OF OTHER REGULATORS BUT COULD BE IMPROVED BY ENHANCED OUTREACH (2006).

31. *Id.* at 3.

32. *Id.* at 17.

33. *Id.* at 15.

34. FRB: *Current FAQs*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., [http://www.federalreserve.gov/faqs/credit\\_12666.htm](http://www.federalreserve.gov/faqs/credit_12666.htm) (last visited Sept. 7, 2012).

however, as difficult challenges will confront the CFPB in carrying out its statutory duties to collect, monitor, and respond to complaints.<sup>35</sup>

## II. CFPB'S APPROACH TO COMPLAINTS

The CFPB is a young organization, about eighteen months old. Its design and implementation of its duties are still in progress. Because its duties to handle complaints (unlike its rule-writing and enforcement powers) did not require a Director, the CFPB could begin its work on consumer complaints immediately. To date, the CFPB has tackled only a portion of its complaint obligations. In this section, I describe the CFPB's actions thus far and evaluate them against its statutory duties.

The CFPB has taken a product-by-product approach to complaints. This is consistent with consolidation of authority for consumer protection issues in the CFPB, regardless of the prudential regulator of the company that offered the product. Its website's complaint page begins by asking the consumer to identify the product at issue.<sup>36</sup> Currently, the CFPB has a mechanism for seven categories of consumer financial products: bank accounts or service, credit cards, credit reporting, money transfers, home loans, student loans, and vehicle or consumer loans.<sup>37</sup>

### A. CREDIT CARDS AND MORTGAGES

On its opening day as a separate entity, July 21, 2011, the CFPB rolled out a website that permitted consumers to submit complaints about their credit cards.<sup>38</sup> In December 2011, the CFPB began to handle complaints about a second product—home mortgages. Neither site publishes a toll-free phone number or a mailing address as alternate submission routes. The former is particularly surprising in light of the specific statutory language requiring a toll-free number for complaints.<sup>39</sup> The site does offer a live online chat with a representative for twelve hours each week day, although this tool would not seem to address the problem of consumers who lack web access or computer sophistication. To find the mailing address or phone number, consumers have to go to another area of the site entirely,

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35. The CFPB could take on additional duties with respect to complaints. Section 1013 states that the functions "shall include" establishing centralized means for aggrieved consumers to contact the CFPB and a database of complaints. Dodd-Frank Act, Pub. L. No. 111-203, § 1013(b)(3)(A), 124 Stat. 1367, 2008 (2010) (codified at 12 U.S.C. § 5493(b)(3)(A) (2010)). That language leaves open the possibility of additional kinds of activity with respect to complaints.

36. *Consumer Questions and Complaints*, CFPB, <http://www.consumerfinance.gov/get-help-now/consumer-questions-and-complaints/> (last visited Mar. 27, 2012).

37. *Submit a Complaint*, CFPB, <http://www.consumerfinance.gov/complaint/> (last visited Jan. 16, 2013).

38. *File a Credit Card Complaint*, CFPB, <https://help.consumerfinance.gov/app/creditcard/ask> (last visited Mar. 27, 2012).

39. Dodd-Frank Act § 1013(b)(3)(A), 124 Stat. at 1969 (codified at 12 U.S.C. § 5493(b)(3)(A)).

“Contact Us,” where a phone number and post office box are given.<sup>40</sup> Perhaps partially as a result, 44 percent of complaints submitted directly to the CFPB came via its website.<sup>41</sup>

The CFPB’s web form for credit cards asks consumers to “describe what happened so we can understand the issue” and contains a large text box.<sup>42</sup> The consumer inputs a narrative. Below that, there is a long list of credit card-related issues and the consumer is asked to mark the single category that best describes their complaint.<sup>43</sup> Those categories are imprecise and imperfect. Some categories are very large, such as “transaction issue.” Other categories seem to overlap; for example, there would seem to be no obvious difference between “collection practices” and “collection debt dispute.” The main use of such categories at this point may be to develop a program to analyze the consumer’s own description of the problem. The CFPB could use a natural language algorithm to try to identify the nature of a complaint—without any human reading the complaint. It could check the output of the algorithm against the consumer’s self-identified category of the complaint and refine the algorithm accordingly. To date, this idea is not deployed.

The CFPB site asks several other questions of complainants, including the amount of the dispute, what techniques they tried before contacting the CFPB, and if the consumer believes the company engaged in discrimination. After submitting that information, the consumer is asked to describe in her own words “What do you think would be a fair resolution to your issue?” The form then gathers information about the consumer and the product. Upon submission, the consumer is given a tracking number. The consumer can check the status of their complaint by using a login created as part of the submission process to revisit the web page.

The complaint intake for mortgages is substantially similar to the one described above for credit cards. It is a web form, primarily consisting of open-ended text boxes for the consumer to describe the problem and the relief sought.<sup>44</sup> The mortgage form has far fewer closed-ended categories for the type of problem. It asks consumers to identify “which part of the mortgage process is your issue related to” from five choices: applying for

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40. *Contact Us*, CFPB, <http://www.consumerfinance.gov/contact-us/> (last visited Mar. 27, 2012). In its most recent semi-annual report, the CFPB emphasizes its call center, noting that it handles calls with little or no wait time, is U.S.-based, and provides services in 187 languages and for hearing- and speech-impaired consumers. CFPB, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 16 (2012) [hereinafter SEMI-ANNUAL REPORT], available at [http://files.consumerfinance.gov/f/2012/01/Congressional\\_Report\\_Jan2012.pdf](http://files.consumerfinance.gov/f/2012/01/Congressional_Report_Jan2012.pdf).

41. SEMI-ANNUAL REPORT, *supra* note 40, at 17.

42. *File a Credit Card Complaint*, CFPB, <https://help.consumerfinance.gov/app/creditcard/ask> (last visited on Sept. 20, 2012).

43. *Id.*

44. *File a Mortgage Complaint*, CFPB, <https://help.consumerfinance.gov/app/mortgage/ask> (last visited Sept. 20, 2012).

the loan, receiving a credit offer, signing the agreement, making payments, and problems when you are unable to pay.<sup>45</sup> The mortgage categories do not overlap, are broad in nature, and identify moments in a transaction rather than a substantive legal issue. There seems to be a different strategy to building a typology of mortgage complaints than credit card complaints. It seems likely to me that the variation in categories in the credit card form and mortgage form reflect different teams of people building complaint systems for different products, rather than a coherent and thoughtful strategy based on the products themselves.

### **B. RESPONSES TO COMPLAINTS**

The CFPB does not review complaints in the first instance. Its website describes the basic process. “We’ll forward your issue to your [credit card/mortgage] company, give you a tracking number, and keep you updated on the status of your complaint.”<sup>46</sup> The benchmark for evaluating this referral process is the statutory language requiring the CFPB to “respond” to complaints. The adequacy of the CFPB’s “receive and refer” approach will turn on how businesses deal with forwarded complaints and the CFPB’s efforts to ensure that such responses are adequate.

The CFPB has a web portal to communicate to companies that a complaint was made. The web portal permits companies to acknowledge complaints and mark their status. The Company Portal Manual provides detail about what businesses are to do with complaints to satisfy the CFPB’s rules.<sup>47</sup> Businesses have fifteen days to select one of four responses: closed with relief, closed without relief, in progress, and alerted CFPB. If the business does not select a response in fifteen days, the web portal flags the complaint and prioritizes it for investigation by the CFPB Consumer Response unit, a group of non-lawyer investigators.

The Company Portal Manual defines the four responses available to businesses. Selecting “in progress” gives the business sixty days to close the complaint, with or without relief.<sup>48</sup> If the business fails to update the status after sixty days, it is automatically changed to “No Response,” which prioritizes it for investigation by Consumer Response.<sup>49</sup> “Alerted CFPB” is a category that tells the CFPB of a problem that limits the company’s ability to respond, such as suspected fraud in making the complaint or that the complaint is already the subject of pending legal action.<sup>50</sup>

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45. *Id.*

46. *File a Credit Card Complaint*, CFPB, <https://help.consumerfinance.gov/app/creditcard/ask> (last visited Mar. 27, 2012).

47. CFPB, COMPANY PORTAL MANUAL (Nov. 21, 2011) [hereinafter COMPANY PORTAL MANUAL], available at <http://www.cfpbmonitor.com/files/2012/01/CFPBCompanyPortalManualv2.pdf>.

48. *Id.* at 8.

49. *Id.* at 12.

50. *Id.* at 13.

If it categorizes a complaint as “closed,” the business is to provide detail to support that it has given a “final responsive explanation to the consumer.”<sup>51</sup> The required information tracks the provisions of Dodd-Frank section 1034, including communications from the consumer and follow-up actions or planned follow-up actions.<sup>52</sup> The business is to “attach copies of all responsive written communications to the consumer.”<sup>53</sup> The Manual states that “relief” is defined by the CFPB as “objective, measurable, and verifiable monetary value to the consumer as a direct result of the steps you have taken or will take in response to the complaint. If relief has been or will be provided, describe the relief and enter the dollar amount of that relief.”<sup>54</sup> From my research, I conclude that this is the most robust formulation of relief for consumer complaints in use by the federal government. The definition is not the law, because it is not a rule made after notice and comment pursuant to the CFPB’s statutory powers. Industry may contest the definition in favor of a different, lesser standard in the future. Or future CFPB leadership may relax the standard.

The CFPB definition of relief has some other limitations. First, the requirement of monetary relief seems to evince a belief that banks should spend money to help consumers. But some complaints may not be for monetary harms. Consider complaints based on rude behavior by a customer service representative or having to resubmit lost paperwork. There arguably was no monetary harm in such instances. Other complaints may reflect harms that are difficult to monetize. A consumer who experiences lending discrimination or debt collection abuses has suffered real harm, and money damages are available if the consumer filed and won a private lawsuit. Without a jury to determine damages, however, it is unclear what the appropriate dollar amount a consumer should receive without either under- or overcompensation.

The requirement that the relief be objective and measurable may also undermine some kinds of relief that consumers actually find meaningful. In other legal contexts, such as criminal law and medical malpractice, there is a rich literature on the value of apology.<sup>55</sup> Apologies can be highly valuable in making a consumer feel that a wrong was righted. Yet, a letter admitting an error and apologizing would not seem to satisfy the CFPB definition.

The emphasis in the CFPB’s Manual seems to be on enabling it to count, view, and report on the outcome to the consumer. Like prior

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51. *Id.* at 10, 11.

52. *See id.* at 1–2.

53. *Id.* at 1.

54. *Id.* at 10.

55. *See, e.g.,* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 *YALE L.J.* 85 (2004); Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 *MICH. L. REV.* 460 (2003); Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 *THE LANCET* 1609 (1994).

regulators, the CFPB also surveys consumers after the complaint procedure is complete to measure their satisfaction. But the CFPB surely will not rely only on such data to evaluate whether the relief was sufficient. The effect is to require the business to satisfy both the consumer—so that she makes a favorable report on the outcome of the complaint to the CFPB—and the CFPB itself, which could use the data on the relief given to create a benchmark on whether the relief was sufficient.

### C. COMPLAINT DATA

The CFPB is required by statute to provide an annual report to Congress on its complaint operations every March 31.<sup>56</sup> The first such report was released in 2012.<sup>57</sup> The CFPB also must provide semi-annual reports that cover a range of topics, including “an analysis of complaints about consumer financial products or services that the Bureau has received and collected in its central database on complaints during the preceding year.”<sup>58</sup> These publications will allow policymakers, industry, advocates, and, of course, the public to assess the CFPB’s complaint mechanism. It is not only the CFPB that is to “track” and “monitor” complaints. Instead, as part of that duty, the CFPB is to facilitate the ability of other entities to evaluate its work in handling complaints.

The CFPB’s final policy statement describes the circumstances under which the CFPB will disclose credit card complaint data.<sup>59</sup> The statement is clear that the CFPB will not disclose any information from complaints that would be exempt from the Freedom of Information Act. Consumers’ personally identifiable information, including names, will not be revealed.<sup>60</sup> The CFPB will not disclose to the public a consumers’ or companies’ narrative responses because they may contain confidential consumer information or material protected from disclosure under law.<sup>61</sup>

The CFPB will withhold the narrative data because of privacy concerns.<sup>62</sup> While this seems sensible, it creates a marked consequence for the CFPB’s approach of relying nearly exclusively on narratives to gather the complaint data. If the CFPB were to ask more closed-ended questions, more complaint data would be available for disclosure and analysis. This creates considerable pressure on the CFPB to ask the “right” questions in its complaint form to permit identification of the nature of consumers’ grievances.

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56. Dodd-Frank Act, Pub. L. No. 111-203, § 1013(b)(3)(C), 124 Stat. 1376, 1969 (2010) (codified at 12 U.S.C. § 5493 (2010)).

57. CFPB, CONSUMER RESPONSE ANNUAL REPORT 4 n.3 (2012).

58. Dodd-Frank Act § 1016, 124 Stat. at 1974–75 (codified at 12 U.S.C. § 5496(c)(4)).

59. Disclosure of Certain Credit Card Complaint Data, 77 Fed. Reg. 37,558 (June 22, 2012), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-06-22/pdf/2012-15163.pdf>.

60. *Id.* at 37,569 (Policy Statement § 2(e)).

61. *Id.* at 37,568 (Policy Statement § 2(e)).

62. *Id.* at 37,568 (Policy Statement § 1).

The CFPB will disclose non-narrative data from complaints.<sup>63</sup> The data will be available in fully searchable and downloadable format.<sup>64</sup> The data will also be used in CFPB reports.<sup>65</sup> The CFPB's policy statement provides that a complaint will be added to the public database within fifteen days of receipt, in most instances, and other information about the complaint will be updated daily.<sup>66</sup> It also states that the CFPB will publish complaint reports "at periodic intervals."<sup>67</sup> However, these terms are subject to interpretation and could vary over time. The intent of disclosure is to "improve the transparency and efficiency of the credit card market,"<sup>68</sup> which would seem to require relatively rapid disclosure—measured in months, not years—of the complaint data.

While it notes that the reliability of such data are disputed because complainants are certainly a nonrandom subset of all users of a financial product, the CFPB anticipates that disclosed complaint data's primary use would be study "for trends and patterns" by "academics and groups dedicated to empowering consumers in making well-informed decisions."<sup>69</sup> It minimizes the potential use of such data by industry, stating in a footnote to the preceding quoted sentence that "[i]n addition, issuers would likely mine the data and might publicize to consumers how their complaint performance measures up against competitors."<sup>70</sup> If the data reflect better performance by some actors, then marketing on that basis would enhance the marketplace for financial products. The CFPB notes, however, that complaint rates and resolutions may vary for reasons other than provider quality.<sup>71</sup> For example, more complex products may result in more complaints, and some providers may specialize in such products. Or, businesses with effective internal complaint procedures may have fewer consumers that reach out to the CFPB. The CFPB's thoughtful analysis of these problems suggests that it will be sensitive to such issues in using complaint data for purposes such as rule-writing and consumer education.

### III. ASSESSING THE CFPB'S COMPLAINT MECHANISM

In its first-ever semi-annual report, the CFPB provided data on the complaints received and their dispositions. These data, along with the rules and statutes discussed above, permit a tentative assessment of the CFPB's likely effectiveness with regard to its complaint resolution function.

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63. *Id.* at 37,568–69 (Policy Statement § 2(b)).

64. *Id.* at 37,569 (Policy Statement § 2(d)).

65. *Id.* (Policy Statement § 3).

66. *Id.* (Policy Statement § 2(c)).

67. *Id.* at 37,568 (Policy Statement § 3).

68. *Id.* at 37,567 (Policy Statement § 1).

69. Disclosure of Certain Credit Card Complaint Data, 76 Fed. Reg. 76,628, at 76,630 (Dec. 8, 2011).

70. *Id.* at 76,630 n.9.

71. *Id.* at 76,630.

### A. CONSUMERS' COMPLAINTS

In the roughly six-month period beginning July 2011, the CFPB received 13,210 consumer complaints.<sup>72</sup> Most of these (9,307) pertained to credit cards.<sup>73</sup> This is not surprising given that the CFPB took credit card complaints for the entire period. In only one month, December 2011, CFPB received 2,326 mortgage complaints.<sup>74</sup> It is impossible to evaluate the CFPB's success in attracting complaints without comparable data on how many complaints were received collectively by the prudential regulators in the preceding periods. The economy is also a factor. The slowdown or halt in foreclosures may have limited the impetus for consumers to complain about mortgage problems. On the other hand, tight standards for underwriting may increase complaints about applying for or obtaining credit. Similarly, legal changes will affect complaint volume. The Credit Card Act of 2009<sup>75</sup> may have eliminated many practices that were most likely to aggrieve consumers, reducing complaints for that product.

These concerns reveal that the raw numbers of complaints have little meaning on their own. Their best use may be to chart trends over time. If the CFPB enacts new rules and complaints continue to trend upward, the rules may have missed the mark or may not be translating into relief on the ground for consumers. Similarly, a spike in complaints that consumers categorize as being "other" in nature could reflect the development of a new industry practice that is troubling to consumers. The larger issue is that the CFPB's entire purpose is to reduce complaints from consumers about financial products and services. If its rulemaking initiatives are successful, fewer complaints will be filed. However, fewer complaints could also evidence poor effort by the CFPB to promote its complaint mechanism or weak enforcement of its complaint duties.

The CFPB report gives detail on the complaints filed using the categories on the web input form.<sup>76</sup> For credit cards, 69.5 percent of complaints were in one of ten categories. The most popular category was "billing disputes," which is broad enough to capture a wide swath of problems, including those with their own category such as late fees, APR or interest rates, or collection disputes. Tellingly, the third most popular category of complaints is "other," capturing 9.2 percent of consumer input.<sup>77</sup> This is particularly noteworthy given that this appears at the bottom of the list of categories on the CFPB's web form and requires consumers to take the additional step of describing the "other" in their own words. These

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72. SEMI-ANNUAL REPORT, *supra* note 40, at 17.

73. *Id.*

74. *Id.*

75. Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit Card Act of 2009), Pub. L. No. 111-24, 123 Stat. 1734 (2009) (codified in scattered sections of 15 U.S.C.).

76. STAFF REPORT, *supra* note 29, at 17.

77. SEMI-ANNUAL REPORT, *supra* note 40, at 17.



categories of data seem to have little value for rulemaking, legislative advocacy, or enforcement. The responses are too diffuse, the categories are too broad, and the reliance on consumer interpretation is too great.

As described above, the mortgage categories focus on points in the process rather than substantive violations. Although there are fewer categories and they seem more distinct, consumers still chose “other” in 23.2 percent of instances.<sup>78</sup> The most popular categories—unsurprisingly given the economy—related to “problems when you are unable to pay” at 38.2 percent and “making payments” at 21.5 percent.<sup>79</sup> Without subcategories, it is impossible to discern whether consumers were complaining about legal violations, such as a misapplied payment or an abuse of the foreclosure process, or were writing to the CFPB because they wanted a loan modification in the form of a principal write-down or refinance. The former is squarely in the purview of the CFPB’s core duties to protect consumers, while the latter raises larger issues about economic policy that concern the Treasury, Fannie Mae and Freddie Mac, and Housing and Urban Development. At least in their first iteration, the mortgage data, like the credit card data, offer only a weak foundation for understanding the level of consumer protection.

#### **B. COMPANIES’ RESPONSES**

A firmer basis for evaluating the design of the CFPB’s complaint mechanism is the response data. The CFPB reports that in its first six months, 75 percent of all complaints were sent to companies for review and action.<sup>80</sup> This may seem impressive. The referral process is highly automated, however, so that forwarding complaints would seem to be an easy task.

The CFPB is transparent about the disposition of the quarter of complaints that do not reach companies. About 11 percent of them were referred to other regulatory agencies.<sup>81</sup> It will be instructive to see if this fraction drops as the CFPB enables its complaint capacity for the complete array of financial products and services. Consumers fail to make complete complaints in 5.4 percent of instances.<sup>82</sup> This percentage is odd, given that the web form requires the consumer to complete a certain amount of information to even be able to submit a complaint. The CFPB may be able to reduce incomplete complaints if it analyzes what aspects of the form give consumers the most difficulty and redesigns them accordingly. Pending responses account for the other 8.9 percent of complaints, with that fraction

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78. *Id.*

79. *Id.*

80. *Id.* at 19.

81. *Id.* at 19 n.15.

82. *Id.*

split about evenly between consumers and the CFPB as to which party has responsibility to take the next action.<sup>83</sup>

The key to evaluating the CFPB's complaint system is data on how companies respond to complaints. The early data are moderately encouraging. The CFPB reports that companies have responded to 88.1 percent of the complaints sent to them.<sup>84</sup> Over half (55 percent) of all complaints sent to businesses were "closed with relief provided" to consumers.<sup>85</sup> Approximately 31 percent of complaints were closed without relief.<sup>86</sup> The remaining portion remained with the company for review.<sup>87</sup> There will always be some complaints pending, given that submission is a rolling process and companies have between fifteen and sixty days to respond as described above.<sup>88</sup> The portal for companies and the timeline for responses are working as transmission channels to funnel complaints from the CFPB to businesses. Upon receipt, businesses are processing those complaints rather than letting them linger. These are positive notes.

The current data reveal little about the nature of relief provided to consumers and why no relief was provided in some instances. The CFPB uses the term "consumer review" to describe its process for asking consumers whether the business's response was adequate. Consumers had not responded to almost half (47.5 percent) of the CFPB's requests for feedback on the company's resolution.<sup>89</sup> This may reflect that the complaint process is in its infancy; consumers often may let these e-mails or letters linger before giving the CFPB feedback on the business's response. Alternatively, and probably more likely, the low rate of response to the CFPB could reflect a serious weakness in the design of the complaint mechanism. Consumers may simply not see any value in responding to the CFPB, but that could stem from two very different reasons: (1) because consumers are satisfied with the resolution, or (2) because consumers are unsatisfied with the resolution. In either case, consumers may think it a waste of time to respond to the CFPB. The crux of the problem is that we cannot know the relative size of either of these groups. Those who do not respond to the CFPB's request for feedback may not be the same population as those who do respond. This makes it difficult to have confidence in the data from the half of consumers who did respond. Analysis by the CFPB could ameliorate this concern to some degree.

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83. *Id.*

84. *Id.*

85. *Id.* at 19.

86. *Id.*

87. *Id.*

88. Because mortgage complaints had only been taken for month or two at the time of the report, it is not surprising that 30.3 percent of those complaints were still under review at companies, compared with only 6.7 percent of credit card complaints. SEMI-ANNUAL REPORT, *supra* note 40, at 19.

89. *Id.* at 20.

To the extent the feedback data are valid, their interpretation is complicated. In 12.9 percent of cases, consumers provided feedback to the CFPB that they “disputed [the] company’s reported resolution.”<sup>90</sup> Consumers who “did not dispute the company’s reported resolution” were 39.6 percent of all closed cases.<sup>91</sup> These consumers accepted the company’s response as valid—regardless of whether the business provided them with relief.<sup>92</sup> One is tempted to interpret these categories as “failure” and “success” rates, respectively. Certainly, they represent the “worst” and “best” outcomes in the CFPB’s current taxonomy for resolution status.

However, consumers may accept a company’s response even if that response is unfair or incomplete.<sup>93</sup> They may believe that if their complaint did not generate relief or only generated relief of a given amount, that such an outcome is the best possible outcome. In their mindset, if the CFPB could only help them get “X,” then “X” is the relief that their complaint merited. This is almost certainly true in many instances, but the data as currently disclosed do not permit an evaluation of the actual relief offered. Conversely, consumers may dispute a company’s resolution of their complaint even if the company acted in compliance with the law or was even generous in its resolution. Some consumers will request impossible or ridiculous relief, just as others will cave for a modicum of accommodation or help. Without a substantive audit of the nature of the complaint and the relief provided, it is difficult to know whether to accept consumers’ evaluations at face value. They provide only a self-reported measure of consumer satisfaction, not an actual assessment of consumer protection.

Another fatal flaw in the CFPB’s report is that it does not permit a determination of the overlap in categories to determine the percentage of those who received relief and did not dispute that relief. The statistics simply do not provide enough transparency to understand how the CFPB’s complaint mechanism is faring in its early efforts. The danger, of course, is that the CFPB builds out its entire capacity without a more careful examination of its efforts to date.

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90. *Id.*

91. *Id.*

92. *Id.*

93. *Cf.* Paul Lubin, *Stop Assuming Your Good Customer Satisfaction Scores Indicate Fairness*, AM. BANKER (Dec. 27, 2012, 12:00 PM), <http://www.americanbanker.com/bankthink/stop-assuming-your-good-customer-satisfaction-scores-indicate-fairness-1055459-1.html> (“This is because consumers are not always able to accurately judge whether or not their needs are met based on the information they are provided. They are especially vulnerable when information is insufficient or faulty, when products are complex and when access to service and products is limited.”).

#### **IV. THE GOVERNMENT'S CONSUMER: PURPOSES OF COMPLAINT MECHANISMS**

A lack of necessary data is not the only barrier to evaluating the CFPB's complaint system. A more fundamental problem is a lack of consensus about the purpose of the government acting on behalf of consumers aggrieved with nongovernment actors. Without a clear exposition of the goals of a complaint mechanism, its evaluation is fraught with difficulties. Parties may dispute its success because they are using different metrics, and the complaint mechanism could be manipulated to serve varying purposes over time. Using the CFPB as an illustrative example, this section develops arguments for why the government should address complaints and assesses the reasonableness of such expectations. It exposes the weak theoretical framework for government complaint handling that makes it challenging to evaluate the CFPB's work on complaints.

##### **A. EXPRESSIVE DEMOCRATIC RIGHT (*CF. VOTING*)**

A simple point to begin the discussion is that the complaints at issue are not grievances with the government. The counterparty to the consumer's complaint is a private actor. This contrasts with situations in which the government is being asked to change its own actions, such as a denial of government benefits or to provide recompense for a tort committed by a government actor. The CFPB's complaint mechanism puts the government in a mediating role between private actors with a dispute. America has an entire branch of government—the courts—that performs just this function (although, of course, courts also decide matters between government and private citizens). The complaints directed to administrative agencies are sometimes precursors to lawsuits, but that is not required. The CFPB and most government agencies are not clearinghouses for litigation; there is no administrative exhaustion requirement to file an action for any violation of federal or state consumer law. When it takes complaints from individuals about businesses, the government is not performing an adjudicative function.

A crisp purpose for the government as complaint handler is largely unarticulated. One expression, in a general form, seems to be that such a role is an outgrowth of democracy. The right to complain to the government about private parties—and to expect the government to be responsive in return—is a way for the government to serve the people. In this way, it supplements core citizen rights such as voting, filing suit against the government in court, or exercising free speech rights.

In the consumer rights context, this concept dates back at least to President John F. Kennedy. The 1962 Consumer Bill of Rights included the right to “be assured that consumer interests will receive full and sympathetic consideration in the formulation of Government policy, and

fair and expeditious treatment in its administrative tribunals.”<sup>94</sup> The first part of this right could be completely satisfied without the government responding to complaints. It is instead an expressive right. The government collecting and monitoring complaints, and using them in policy, would satisfy this goal even if it never pursued any redress for consumers. Complaint mechanisms improve democracy by providing a conduit for consumers to express their problems and desired solutions.

President Richard Nixon’s articulation of the consumer rights concept expanded the idea to suggest redress. He added to the Consumer Bill of Rights the consumer’s right “to register his dissatisfaction, and have his complaint heard and weighed, when his interests are badly served.”<sup>95</sup> This gives the government at least some responsibility to determine if the consumer’s complain has merit. The reference to a consumer’s “interests” in President Nixon’s statements is ambiguous. Are those the interests that an individual has as a private party—a consumer? Or are the interests those of an individual as a partner in a civic relationship—as a citizen—when the government does not perform its functions in ways that respect the position of consumers?

One way of analyzing this ambiguity is asking whether the government is creating a customer relationship when it collects and responds to complaints. The foundations of democracy clearly rest on consumers as vital actors in a political marketplace of sorts, but the analogy can be stretched too far. The government is not selling something, and, at least without a lengthy and majoritarian process, its leadership cannot change. Nor can it go out of business in the conventional sense because consumers are dissatisfied. Lest this concept of complaining citizens as the government’s customers seems far-fetched, I note that the Federal Reserve’s website speaks of contacting a “Federal Reserve customer service representative.”<sup>96</sup> Citizens may feel a stronger connection to the government when they think of themselves as its customers. The creation of vibrant forums for public complaining and satisfying aggrieved consumers may increase confidence in government. It provides a positive point of contact between the administrative branch and citizens and increases consumers’ belief in the government as a positive force in society.

This discussion suggests that one purpose for government handling complaints in modern America is to demonstrate to citizens on an individual level that the government hears their concerns and will work on their behalf to pursue redress from industry. Note that the CFPB, like most

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94. SPECIAL MESSAGE TO THE CONGRESS ON PROTECTING THE CONSUMER INTEREST, 1962 PUB. PAPERS 235, 236.

95. SPECIAL MESSAGE TO THE CONGRESS ON CONSUMER PROTECTION, 1969 PUB. PAPERS 883, 883.

96. *Consumer Help*, FED. RES., <http://www.federalreserveconsumerhelp.gov> (last visited Mar. 28, 2012).

administrative government entities with complaint mechanisms, does not take complaints between industry actors.<sup>97</sup> The government interferes only when a business has aggrieved a consumer, and upon the consumer's request.

#### **B. LITIGATION SUBSTITUTE (*CF.* PRIVATE RIGHT OF ACTION IN STATUTES)**

The fact that complaint mechanisms concern themselves only with consumer-business relationships reveals another purpose for the government handling complaints: such mechanisms are a remedial tool to make up for shortcomings in the courts. The administrative branch of the government takes complaints because the judicial branch is not effective at providing redress for consumers wronged by businesses. In this conception, the existence of a complaint mechanism in any given area is a marker of the failure of litigation. This "alternate dispute resolution" reason for complaints is a service to citizens that is distinct from the government's duty to hear consumer concerns and reflect them in lawmaking discussed in the preceding section. The latter is largely legislative in nature, while the former is adjudicative. The administrative branch could well be performing either or both functions when it handles consumer complaints, but distinguishing these goals provides analytical clarity.

The focus on obtaining relief for consumers is consistent with government complaint mechanisms as alternatives to filing suit in court. In the financial services area, Congress may have mandated "appropriate action" and "responses" to complaints because consumers were, and are, not able to bring successful actions in court to police consumer protection rules. Multiple factors hinder consumers in pursuing the private rights of action in consumer laws, including difficulty in affording lawyers or proceeding *pro se*, a lack of awareness that a legal violation has occurred (as opposed to a mere feeling of being wronged), and insufficient or inefficient remedies that undercompensate or take too long. This is not the place to expound upon those concerns, despite their legitimacy. The relevant point concerns how to evaluate complaint mechanisms. To the extent that such units function as substitutes for the courts, that role suggests comparison with private right of action outcomes as a standard for measuring the government's efficacy in handling complaints. Congress has expressed support for this understanding of complaint mechanisms by stating an expectation that regulatory agencies "conduct independent

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97. One exception to this idea is the Federal Trade Commission's Antitrust division. Businesses can be complaining parties asserting unfair trade practices by a competitor.

investigations of the complaint,” rather than merely asking the business “to look into the situation.”<sup>98</sup>

One criticism of a framework for complaints as alternatives to litigation is that complaints are, by definition, not limited to problems that are violations of the law. The CFPB defines complaints in a way that recognizes lesser claims. “Consumer complaints are submissions that express dissatisfaction with, or communicate suspicion of wrongful conduct by, an identifiable entity related to a consumer’s personal experience with a financial product or service.”<sup>99</sup> This standard not only includes both possible and probable legal violations, but also vague expressions of being wronged. Dissatisfied consumers can be widespread in lawful industries; indeed, financial services may be a poster child for such an industry. For example, most of the mortgage lending practices that were decried during the foreclosure crisis were lawful when they occurred, and many remain lawful today. Yet, millions of consumers are dissatisfied with their home loans and appeal to the government for help in changing their mortgage obligations. These are complaints that the CFPB collects, monitors, and tracks, even though it knows that consumers do not have the legal right to demand a loan modification.

Government complaint mechanisms may siphon some claims away from courts and provide an alternative route to redress for legal violations. Lawsuits are clearly a subset of all complaints, however, suggesting that litigation outcomes as a benchmark for evaluating complaint mechanisms is only partially correct. Moreover, if complaints are a substitute for litigation, we would expect two additional features in such mechanisms. First, a requirement of administrative exhaustion before filing suit would help sort the most appropriate cases into courts and agencies’ complaint systems. The Equal Employment Opportunity Commission requirement arguably serves such a purpose.<sup>100</sup> The CFPB, like most complaint systems, does not have such a rule. Consumers who are suing are not proper complainants,<sup>101</sup> but one can sue without having ever complained. Second, if complaint systems replace litigation, then in at least some instances the agency should litigate on behalf of consumers. Agencies usually sue, however, to obtain widespread relief and change practices on a going-forward basis. The

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98. STAFF REPORT, *supra* note 29, at iii (Letter of Transmittal from Frank Annusio to Henry S. Reuss) (internal quotation marks omitted).

99. SEMI-ANNUAL REPORT, *supra* note 40, at 17 n.13.

100. Katherine A. Macfarlane, *The Improper Dismissal of Title VII Claims on “Jurisdictional” Exhaustion Grounds: How Federal Courts Require That Allegations be Presented to an Agency Without the Resources to Consider Them*, 21 GEO. MASON U. C.R. L.J. 213, 219 (2011) (“Exhaustion allows agencies the first chance ‘to resolve issues over which [they have] primary responsibility.’” (quoting 33 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE § 8397 (1st ed. 1982))).

101. COMPANY PORTAL MANUAL, *supra* note 47, at 8–13 (describing how businesses should alert the CFPB if a complaint is already the subject of legal action by the consumer).

litigation may take too long to help a particular consumer or may be brought against a particular business for strategic reasons rather than against the business that aggrieved any given consumer.

### C. KNOWLEDGE BASIS FOR LAWMAKING (*CF.* NOTICE AND COMMENT RULEMAKING)

Complaints may provide knowledge to government agencies that aids them in their traditional administrative law duties. Complaints can help identify targets for enforcement, alert the government to new practices and products, and reveal perceptions about the marketplace. Such knowledge is useful both for enforcement and for rulemaking. In this conception, complaint mechanisms are an adjunct to agencies' research units. They provide useful data, albeit of a nonrandom type. The repository of consumer complaints, including businesses' response to them and consumers' satisfaction levels with those responses, gives the government information on the perceptions of consumers and businesses about fairness in a marketplace. The knowledge value of complaints has been recognized for decades. One of the only law review articles on complaint systems, published in 1979, observed that "[a]n ideal system would improve the quality of goods and services by alerting producers about defects and by providing administrative agencies with data to guide and support enforcement."<sup>102</sup> This knowledge function for complaints can be analogized to the perspectives provided by a robust system of public notice-and-comment rulemaking that generates insights on the marketplace and its actors' concerns.

The use of complaints to generate enforcement targets is related to their use to address weaknesses in litigation. Because public enforcement serves different goals than private enforcement,<sup>103</sup> the usefulness of complaints for these purposes may be different. Effective public enforcement activity requires a deep knowledge of the marketplace. To design a successful strategy for rulemaking, the agency must know if the violations are widespread or concentrated among a few actors, the extent of damages in the typical and the most egregious cases, and how the practice at issue fits into companies' larger businesses. Complaints can provide such information, and this is the likely reason for requiring the CFPB to create a database of complaints.

The government cannot rely blindly on a complaint repository for choosing its enforcement targets. Complaints to the government are almost

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102. Nader, *supra* note 25, at 1007.

103. See J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1155 (2012) ("Private enforcement provides, in many respects, a direct response to the functional limitations of public regulatory bodies in the enforcement of various laws."); see also Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357 (1984).



certain to be more likely for certain kinds of violations and to be made by certain kinds of people. Marketing scholars have examined the propensity to complain and the choices people make to be passive or active after experiencing product dissatisfaction.<sup>104</sup> Consumers who are less connected to the government because of age, immigration status, race, religion, or other demographic qualities may be significantly less likely to complain. This means that companies and products targeting certain populations may not be complained about in numbers or ways that attract attention. To take one example applicable to the CFPB, service members may refrain from complaining about financial problems because debt problems can be a violation of military honor codes or grounds for loss of security clearance. The law requiring the CFPB to have an Office of Service Members Affairs presumably reflects congressional recognition that this is a population in need of additional attention, including enforcement.<sup>105</sup>

The use of complaint data for enforcement was criticized during reforms of the Federal Trade Commission (FTC, or the Commission). One study found that more than two-thirds of the investigations begun by the Commission arose from complaints received in the mail, a reliance on outside complaints that it characterized as excessive.<sup>106</sup> Former Commissioner Elman offered that study as a “measure of the Commission’s failure to follow a responsible system of priorities” in developing investigations based on the Commission’s own work rather than relying on “random ‘applications for complaint’ received from the public at large.”<sup>107</sup> Using the limited data from the CFPB as an example of the possibility for misdirection, the number of people seeking mortgage modifications surely says more about housing prices and the consumer protection problems of the past than it does about the optimal deployment of resources in forward-looking enforcement.

Relying on complaints to gauge enforcement needs could lead to substantial underenforcement or inactivity. Just as lack of awareness of their legal rights is a hindrance to litigation, so too does it limit consumers’ belief that their experiences form the basis of valid complaints. Legal knowledge is a prerequisite to successful enforcement activity, and consumers often do not know the law. On a more fundamental level, they may not even be complaining about a practice or product. Instead, the consumer may be complaining about poor customer service, such as long wait times in bank branches, or complex disclosures that are legally

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104. See, e.g., William O. Bearden & Richard L. Oliver, *The Role of Public and Private Complaining in Satisfaction with Problem Resolution*, 19 J. CONS. AFFAIRS 222 (1985).

105. Dodd-Frank Act, Pub. L. No. 111-203, § 1013(e), 124 Stat. 1376, 1972 (2010) (codified at 12 U.S.C. § 5493(e) (2010)).

106. Carl A. Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383, 393–94 (1964).

107. Philip Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L.J. 777, 797 (1971).

mandated. In its early years, the Federal Reserve Board concluded that often its review “indicates that no regulation or law has been violated, but rather that communications between the bank and the consumer have broken down.”<sup>108</sup> Those problems may reveal a dysfunctional marketplace for financial products, but enforcement would be an unusual solution to such concerns.

The CFPB could issue rules to deal with communication problems that generate complaints. Confusing disclosures may not be legal violations, but consumers’ concerns about them could guide a redesign of those forms. Complaints could reveal harms of new products that are not subject to existing rules. Consumer groups that supported the CFPB were optimistic about this potential. “The agency also should be required to conduct real-time analysis of consumer complaints regarding patterns and practices in the credit and payment systems industries and to apply these analyses when writing rules and enforcing rules and laws.”<sup>109</sup> At its best, complaint handling could offer valuable insights into industry to guide rulemaking.

There are countervailing concerns. First, industry knowledge might be gleaned in a less expensive and more comprehensive way than from handling complaints. Examination powers give the CFPB access to detailed data on business practices, and even simple tools like mystery shoppers could yield insights on problematic practices. Second, complaints are necessarily subjective. They may provide guidance for rulemaking, but of a noisy and unreliable sort. Well-written rules should improve the marketplace overall. They should reflect a balance of competing concerns between consumers and industry, not placate a minority of consumers. The purpose for rules is not merely to make consumers more satisfied.

Comments submitted in response to proposed rules are also subjective, reflecting the perspective of their authors. But they are made available to all for scrutiny, and agencies must explain why they did or did not take account of their concerns. Even if complaint data are disclosed in various ways, the use of complaints to guide rulemaking is less transparent than the notice and comment process. The CFPB has recognized this issue, without mentioning complaints specifically. It has a policy of summarizing and publishing what it terms “ex parte presentations”—telephone calls, emails, and letters that it receives during a notice and comment process that pertain to a rule but are not submitted via official channels.<sup>110</sup>

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108. *Oversight on Consumer Protection Activities of Federal Banking Agencies: Hearings Before the S. Comm. on Banking, Hous. & Urban Affairs*, 94th Cong. 256 (1976) (responses to questions in letter of July 9, 1976 from Arthur F. Burns, Chairman of the Bd. of Governors, Fed. Reserve Sys.).

109. *Hearing*, *supra* note 19, at 99 (statement of Travis Plunkett, Legislative Dir., Consumer Fed’n of Am.).

110. CFPB, CFPB BULLETIN 11-3, POLICY ON EX PARTE PRESENTATIONS IN RULEMAKING PROCEEDINGS (Aug. 16, 2011), [http://www.consumerfinance.gov/wp-content/uploads/2011/08/Bulletin\\_20110819\\_ExPartePresentationsRulemakingProceedings.pdf](http://www.consumerfinance.gov/wp-content/uploads/2011/08/Bulletin_20110819_ExPartePresentationsRulemakingProceedings.pdf).

Government complaint mechanisms for consumers are relatively undeveloped terrain. That fact has policy consequences. The CFPB faces choices in designing and implementing its complaint mechanism that may prioritize one of the identified purposes over another. Perhaps the best course forward is for the CFPB to be clear about its own aspirations for its complaint system. Within the limits of its statutory mandate to “collect, monitor, and respond” to complaints, the CFPB could delineate the ways in which complaints will bear on its other duties. A crisp and transparent articulation of its goals would, at minimum, advance debate about what the CFPB should accomplish with its complaint system.

## V. THE PARADOX OF COMPLAINTS FOR CONSUMER PROTECTION

The law mandates that the CFPB will have a complaint mechanism for the foreseeable future. The unanswered question is whether that complaint system will improve the overall consumer protection framework. This final section identifies a paradox. The CFPB’s willingness to help consumers with complaints may retard some of its other efforts. In the end, the CFPB’s complaint mechanism may not improve the equilibrium level of consumer protection. Considering such a possibility points to pitfalls for the CFPB to avoid as it builds out its complaint system.

I begin with a brief review of the benefits of the CFPB handling complaints about financial products and services, taking into account its statutory duties and the possible purposes of government complaint mechanisms. On the most obvious level, some consumers will get relief because the CFPB forwards their complaints that they would not receive if they had contacted the business themselves. Fundamentally, businesses will reverse decisions and pay restitution to consumers who are aggrieved because those businesses do not want to be targets for CFPB rulemaking or enforcement. The early data show that the CFPB clearly will receive tens of thousands of complaints each year. Aiding a fraction of those complainants in obtaining monetary relief is a notable achievement.

The CFPB has made remarkable efforts to be visible to consumers. It has deployed new technologies to reach consumers and keep them up to date on the CFPB’s activities, including the availability of its complaint system. Taking complaints is a tangible way that the CFPB shows consumers that it is a “cop on the beat” of consumer protection.<sup>111</sup> The dissemination of complaint data also allows the public to count in a measurable way the benefits of the CFPB to consumers. The responses

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111. See Elizabeth Warren, *Letter from Elizabeth Warren, in BUILDING THE CFPB, A PROGRESS REPORT 5* (2011), [http://files.consumerfinance.gov/f/2011/07/Report\\_BuildingTheCfpb1.pdf](http://files.consumerfinance.gov/f/2011/07/Report_BuildingTheCfpb1.pdf) (“[The CFPB] will be a cop on the beat to enforce the laws on credit cards, mortgages, student loans, prepaid cards, and other kinds of financial products and services.”).

from industry and consumers' satisfaction with those responses show citizens that the CFPB is not a victim of regulatory capture. The database, particularly over time, can provide a baseline level of consumer protection and can disseminate data to academics and advocates for research.

The biggest weakness in the CFPB's complaint framework is that it will always fall well short of its goals. This problem is not entirely the CFPB's fault. Most complaint systems seem to struggle.<sup>112</sup> Congress has handed the CFPB a near impossible task in asking it to respond to every consumer complaint. In its early years, the FTC enjoyed protection from such an obligation. "It was never the intention of Congress that the Commission should be a forum where private disputes . . . should be settled, and the Commission is required to find that a proceeding is in the public interest in order to retain jurisdiction of it."<sup>113</sup> The CFPB was built, however, with years of frustration with the way in which the financial regulators handled consumer complaints in mind. The CFPB needs to do better than those entities or its complaint mechanism will be judged a failure.

The CFPB has upped the stakes for its complaint system by adopting a robust definition of relief. It seems almost certain that the majority of consumers will not get relief under the CFPB's definition. The early CFPB data suggest that only a fraction of consumers get relief and are satisfied with that relief. More depressingly, data from the other regulators suggest more dismal prospects once the CFPB begins handling more types of complaints and has higher volume. In 1967, the FTC closed more than half of its cases "without any action at all being taken—no complaint issued, no assurance of voluntary compliance taken."<sup>114</sup> A study of the financial agencies in 1976 found that only 31 percent of consumers were satisfied with agency resolution of their problem.<sup>115</sup> Nearly half (49 percent) rated the agency's overall handling of their complaint as poor.<sup>116</sup> A study of both private and public complaint systems found that a "pervasive pattern of unsatisfied complaints and inadequate relief emerges from research on extrajudicial complaint settings."<sup>117</sup>

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Instead of providing easy access to swift relief, many of the programs obstruct the complainants' path with complex procedures and repeated delays. . . . Intermediary organizations are often understaffed, underfinanced, and overworked, and the resulting backlogs and inefficiency can discourage consumers from pressing their complaints. . . . In sum, complaint-processing methods often make it so difficult for complainants to persist that they are likely to 'lump it' and even likely to avoid raising claims in the future.

Nader, *supra* note 25, at 1006.

113. S. REP. NO. 74-1705, at 2 (1936).

114. Elman, *supra* note 107, at 797.

115. STAFF REPORT, *supra* note 29, at 5.

116. *Id.*

117. Nader, *supra* note 25, at 1000.

The CFPB may do better than its predecessors or other government entities. To do so, however, it will almost certainly have to expend greater resources than other agencies. It will be expensive to follow up on complaints when industry does not give relief. Even auditing complaints that result in relief to assess their adequacy will have significant costs. Over time, if the CFPB realizes that its complaint system has high costs relative to its benefits, it may weaken the system so that it does not help the same number of consumers or demand that businesses provide relief. The FTC apparently struggled to maintain appearances for its complaint mechanism, which eroded significantly over time.<sup>118</sup>

The CFPB may achieve better effects for consumers through its other activities, such as public enforcement, rulemaking, or education. To the extent that complaint data provide information for those other activities, the same or more reliable knowledge may be obtained at lower costs through different means, such as direct surveys of consumers or targeted research studies. There may be an inherent tension between the CFPB's duties that help all citizens and its duties to handle particular complaints.

A former Commissioner has chastised the FTC for too much orientation to complaints at the expense of its other duties.

Commission members should concern themselves more with general problems and broad solutions, and less with individual cases and narrow adjudications. Agencies were created not to decide issues like "Did X Company do these particular acts charged against it?" but rather to consider questions such as "Is it unfair and anticompetitive for companies in this industry to engage in this kind of practice?" The more the Commission immerses itself in the former type of question, the less able it is to deal with the latter.<sup>119</sup>

The FTC's rules also highlight how complaint mechanisms straddle responsiveness to individuals and a primary mission of achieving an overall effect in the marketplace. Chapter 1, section .3.3 of the FTC Operating Manual says that "[a]n investigation of an individual, business entity or industry may be started as a result of public complaints, reports, or studies by staff."<sup>120</sup> Yet this ideal of consumer as client has been eroded by other rules. Past provisions clarified that complainants are not parties "in the strict sense" and do not have "legal status."<sup>121</sup> "The FTC does not resolve

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118. "It should be obvious why any number of investigations are closed without any administrative action taken, simply on the ground of age and staleness. Usually no letter closing the matter is sent to the proposed respondent because of the embarrassment that it would cause the Commission." Elman, *supra* note 107, at 799.

119. *Id.* at 826.

120. FTC, OPERATING MANUAL ch. 1, § .3.3 (2007), available at <http://www.ftc.gov/foia/ch01overview.pdf>.

121. 16 C.F.R. § 1.1 (1946).

individual consumer complaints.”<sup>122</sup> These are long-standing FTC policies that have endured multiple administrative reforms.

The tension between complaints and other activities is likely to face the CFPB on an ongoing basis. Ultimately, the solution may be for the CFPB to engage in strategic planning that identifies the purpose of its complaint mechanism. It should develop policies and procedures that spell out when and how complaints will guide its other duties. This kind of clarity would help the CFPB achieve its democratic purpose for complaint handling as well. Consumers, and their advocates, would know the CFPB’s expectations for its complaint system and have a set of goals to assess its efficacy.

The resource competition between complaints and other activities is the first way that complaint handling may erode the overall level of consumer protection. If other activities that are less resource-intensive would be more effective, the CFPB is limiting its ability to improve the marketplace by dealing with individuals’ problems. The paradox that helping consumers could actually be hurting consumer protection could occur in at least two other ways.

By channeling complaints to business, the CFPB may be giving industry an opportunity to head off litigation. Industry can provide modest recompense (that still meets the CFPB’s definition of relief) and make its potential plaintiffs satisfied enough. That is, there should be an inverse relationship between the strength of a complaint mechanism and the amount of private litigation. That relationship is not problematic if complaints have the same ability to provide restitution for consumers and deter bad acts that litigation outcomes do. That proposition is somewhat dubious, however, and is in part the exact reason why many consumer protection statutes provide for punitive damages and class actions.<sup>123</sup>

The other way that a complaint mechanism can erode consumer protection is if it provides insufficient relief or is understaffed. If the government receives complaints but does not deliver relief, consumers may erroneously believe that they have no legal claim. Not all consumers would be deterred by a lack of response from the government, but some portion almost certainly would. This could lower the overall threat of litigation and its deterrent effect on businesses. In the absence of a complaint mechanism, some consumers would file lawsuits in the first instance because they would not be discouraged by the complaint experience from doing so.

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122. *Before you Submit a Complaint*, FTC, <https://www.ftccomplaintassistant.gov> (last visited Nov. 12, 2012).

123. *See, e.g.*, Truth in Lending Act, 15 U.S.C. § 1640 (2006) (providing for class action); Fair Credit Reporting Act, 15 U.S.C. § 1681n (2006) (providing for punitive damages).

## CONCLUSION

Although the CFPB is a new agency, the problems that it will face in handling complaints are old. In the 1970s, a researcher found government complaint units fit the same “dismal pattern” as private, industry-run complaint systems.<sup>124</sup> She explained that, “Dependent on the government for its continued existence, a public complaint agency has little or no incentive to respond to grievances, and instead may divide the community, lower complainants’ expectations, and continue to be perceived as legitimate despite its inadequate resolution of complaints.”<sup>125</sup> The future will provide the CFPB with the opportunity to break from this tradition of unsatisfactory outcomes when the government handles complaints that consumers have with businesses.

To date, the CFPB has developed innovative strategies to achieve excellence in carrying out many of its duties. The complaint system, however, may prove to be a conundrum for the CFPB. There are few successful models to consider for inspiration. The resource costs of handling complaints are high. The expectations of Congress and consumers for the CFPB may be unreasonable and almost certainly are ill-defined. On the bright side, the CFPB is a unique agency, born of a crisis and being designed in a world of new technology. Its work to date with complaints suggests that it may chart a new path forward for government complaint systems.

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124. Nader, *supra* note 25, at 1006.

125. *Id.* at 1010–11.