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## COMMENT

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### BLOWING THE WHISTLE ON CONSUMER FINANCIAL ABUSE

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*The whistleblower programs that the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank) created within the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) offer large monetary rewards for actionable information. These “bounties” have attracted commentary from the academy, the bar, and corporate America. Less often discussed is section 1057 of Dodd–Frank, which creates a private cause of action for informants who experience retaliation for reporting violations of federal consumer financial law to the Consumer Financial Protection Bureau (CFPB). These informants could be a valuable tool for discharging the CFPB’s supervisory and enforcement responsibilities. Unfortunately, the history of whistleblower protection under the Sarbanes–Oxley Act of 2002 (Sarbanes–Oxley) demonstrates that section 1057 alone is not a viable long-term incentive for insiders to come forward. Therefore, this Comment argues that Congress or the CFPB should offer bounties for information that protects consumers’ financial welfare, much as existing Dodd–Frank programs remunerate individuals who contact law enforcement for the benefit of investors.*

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#### INTRODUCTION

Las Vegas police found Tracy Lawrence's body on November 28, 2011, the day she was scheduled to be sentenced to up to one year of jail time for notarizing the signature of an individual not in her presence.<sup>1</sup> Earlier that month, Lawrence had tipped off the Attorney General of Nevada to widespread fraud at Lender Processing Services Inc. (LPS) (since redubbed Black Knight Financial Services),<sup>2</sup> one of America's largest loan processors.<sup>3</sup> In February 2014, foreclosure-ravaged Nevada became the fiftieth state to reach a civil settlement with LPS.<sup>4</sup>

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<sup>1</sup> *Foreclosure Fraud Whistleblower Found Dead*, NBC NEWS (Nov. 29, 2011, 2:51 PM), [http://usnews.nbcnews.com/\\_news/2011/11/29/9099162-foreclosure-fraud-whistleblower-found-dead](http://usnews.nbcnews.com/_news/2011/11/29/9099162-foreclosure-fraud-whistleblower-found-dead) [hereinafter *Foreclosure Fraud*], archived at <http://perma.cc/7CZB-R8QW>.

<sup>2</sup> *Id.*

<sup>3</sup> See Ken Ritter, *Nevada AG Takes Deal in Lender Fraud Civil Lawsuit*, ASSOCIATED PRESS, Feb. 14, 2014, available at <http://bigstory.ap.org/article/nevada-ag-takes-deal-lender-fraud-civil-lawsuit> (describing the allegation that LPS organized a "robo-signing" scheme across various states).

<sup>4</sup> *Id.* Lawrence's testimony was also the linchpin of hundreds of criminal charges against two LPS loan officers, but the prosecution fell apart after her suicide. See *id.* ("A 306-count criminal case against two Southern California-based loan agents affiliated with the company collapsed a year ago, after a notary public [Lawrence] who claimed to have witnessed thousands of robo-signing improprieties committed suicide.").

LPS's alleged misconduct consisted of churning out thousands of default notices with forged signatures and no review.<sup>5</sup> Similar allegations underlay the \$25 billion National Mortgage Settlement in February 2012, the "largest consumer financial protection settlement in United States history."<sup>6</sup> This settlement was also predicated on information revealed by whistleblowers, who claimed that a host of banks contracted for illegitimate foreclosure documents and forged reviewers' signatures on the paperwork.<sup>7</sup>

From its earliest days, American law has recognized the utility of enlisting private citizens as monitors by encouraging them to blow the whistle on violations of public mandates.<sup>8</sup> Whistleblowing has been discussed and celebrated largely in the financial fraud context,<sup>9</sup> although it also has been suggested as an enforcement device in other arenas.<sup>10</sup> Whistleblowing

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<sup>5</sup> See *Foreclosure Fraud*, *supra* note 1 (noting that this practice "had thrown into question the legality of most Las Vegas home foreclosures in the past few years").

<sup>6</sup> *The National Mortgage Settlement*, U.S. DEP'T OF JUSTICE (Dec. 17, 2012, 10:26 AM), [http://www.justice.gov/ust/eo/public\\_affairs/consumer\\_info/nms](http://www.justice.gov/ust/eo/public_affairs/consumer_info/nms), archived at <http://perma.cc/8RH3-FCU7>; see also Karen Weise, *Mortgage Fraud Whistle-Blower Lynn Szymoniak Exposed Robosigning's Sins*, BLOOMBERG BUSINESSWEEK (Sept. 12, 2013), <http://www.businessweek.com/articles/2013-09-12/mortgage-fraud-whistle-blower-lynn-szymoniak-exposed-robosignings-sins>, archived at <http://perma.cc/L9HGF35A> (describing one whistleblower's allegations).

<sup>7</sup> See Weise, *supra* note 6 (noting that the National Mortgage Settlement reserved \$228 million to pay whistleblowers' qui tam claims).

<sup>8</sup> See Stephen M. Kohn, *The Whistle-Blowers of 1777*, N.Y. TIMES, June 13, 2011, at A23 (recounting how members of the Continental Navy reported their commodore's torture of British sailors, which precipitated the July 1778 enactment of "America's first whistle-blower protection law").

<sup>9</sup> See, e.g., William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1809 (1996) (crediting the False Claims Act's incentives for reporting information about fraudulent government contracts with "creat[ing] the most potent decentralized monitoring system in American public law"); Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1141 (describing how legitimized whistleblowing channels encourage employees to function as "active corporate monitors"); see also Geoffrey Christopher Rapp, *False Claims, Not Securities Fraud: Towards Corporate Governance by Whistleblowers*, 15 NEXUS 55, 61-62 (2010) (arguing that whistleblowing is better than private litigation at exposing fraud early enough for regulators to minimize its impact on corporate well-being). *But see* Jonathan Macey, *Getting the Word Out About Fraud: A Theoretical Analysis of Whistleblowing and Insider Trading*, 105 MICH. L. REV. 1899, 1920 (2007) (claiming that whistleblowing is ineffective unless "basic institutions of corporate governance" are already functional); Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 43 (2002) (worrying that the "leverage" provided to employees by antiretaliation protection for securities fraud whistleblowers may disrupt the workplace).

<sup>10</sup> See, e.g., Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 376 (2005) (recommending strong whistleblower protection as a component of effective labor regulation); Mary Kreiner Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, 76 U. CIN. L. REV. 183, 226-28 (2007) (proposing omnibus whistleblower protection under a wide range of federal statutes, including those punishing white collar crime and violations of antidiscrimination laws).

carries an intuitive appeal. Government agencies have limited resources, cannot afford to bring enforcement actions on the basis of incomplete information, and can only monitor so many entities effectively. Employees, by contrast, constantly watch these regulated companies and, as insiders, may have access to detailed information and key evidence. Convincing such insiders to report illegality provides supplemental supervision and fosters efficient enforcement.<sup>11</sup> And as the stories of LPS and the National Mortgage Settlement illustrate, these principles equally apply to the universe of consumer credit regulation.

Section 1057 of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank) creates antiretaliation protection for employees of banks, mortgage servicers, payday lenders, debt collectors, and other consumer financial product or service providers, who blow the whistle on a violation of federal consumer financial laws or Consumer Financial Protection Bureau (CFPB) regulations.<sup>12</sup> A robust whistleblowing program would complement the CFPB’s mandate. Like securities fraud, many violations of consumer financial protection laws are characterized by hidden information.<sup>13</sup> For example, inside information would be valuable in revealing forbidden kickbacks in the real estate and loan servicing industries, as well as the wide and vaguely defined world of fraud-like “unfair, deceptive or abusive act[s] or practice[s]” banned by the CFPB’s organic statute.<sup>14</sup>

Even where the violation at issue could have been exposed by an agency investigation, or where specific instances are revealed through consumer complaints, an inside source could still add value by confirming the systemic nature of malfeasance and preserving evidence from spoliation—an investigatory impediment that the CFPB can expect to arise more frequently in

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<sup>11</sup> See Anthony J. Casey & Anthony Niblett, *Noise Reduction: The Screening Value of Qui Tam*, 91 WASH. U. L. REV. 1169, 1189 (2014) (“Whistle-blowing laws are enacted with the express purpose of inducing parties with private information about socially costly dishonest or illegal behavior to come forward to the poorly informed government.”); Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2213, 2251 (2010) (examining alleged corporate frauds in the United States that took place between 1996 and 2004 in companies with more than 750 million dollars in assets, and concluding that fraud detection relies on several types of “nontraditional” actors, including employees); James Fisher et al., *Privatizing Regulation: Whistleblowing and Bounty Hunting in the Financial Services Industries*, 19 DICK. J. INT’L L. 117, 129 (2000) (“Whistleblowers conserve government resources by focusing investigations and providing secret data or keys to understanding available data that otherwise may have been obtained only at an extremely high cost.”).

<sup>12</sup> Pub. L. No. 111-203, § 1057, 124 Stat. 1376, 2031-35 (2010) (codified at 12 U.S.C. § 5567 (2012)).

<sup>13</sup> See *The Identity Crisis at the Consumer Financial Protection Bureau*, 100 Banking Rep. (BNA) 1, 3 (Jan. 22, 2013) [hereinafter *Identity Crisis*] (comparing federal consumer financial law violations to securities fraud).

<sup>14</sup> 12 U.S.C. § 5531(a) (2012); see also *infra* notes 41 and 97 and accompanying text.

those markets, such as payday lending, in which consumer financial activities have rarely been subjected to federal oversight.<sup>15</sup> The CFPB can spur the evolution of compliance culture in such industries by demonstrating early and consistent commitment to working with whistleblowers.

However, Dodd–Frank did not institutionalize whistleblowing at the CFPB in the same way as it did at the Securities Exchange Commission (SEC), where the Act created an Office of the Whistleblower to award bounty payments to qualified informants.<sup>16</sup> Therefore, the statute leaves it to the CFPB to gauge how much infrastructure to develop in order to encourage reporting and support informants. Because would-be tipsters often stay silent when they fear no one will act on their reports, the CFPB must cultivate a reputation for responsiveness in the early days of its nonbank supervisory activities. Furthermore, the CFPB must ensure that its program will be prepared to handle an increase in tip volume as the contours of the CFPB’s authority to prevent “unfair, deceptive, or abusive act[s] or practice[s]”<sup>17</sup> are clarified over time.

In light of the potential effectiveness of consumer financial whistleblowers, it is discouraging to see the CFPB backpedal on the lone public commitment it has made to facilitate whistleblowing and to see no further improvements mentioned in its latest strategic plan.<sup>18</sup> Given that the CFPB promises to maintain informants’ confidentiality, it is possible that no news is good news, but a historical analogy to Sarbanes–Oxley’s whistleblower provision<sup>19</sup> suggests that this is unlikely. That provision, section 806,<sup>20</sup> did not incentivize whistleblowing due to the persistent impotence of its antiretaliation cause of action.<sup>21</sup>

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<sup>15</sup> See Richard Cordray, Dir., Consumer Fin. Prot. Bureau, Remarks at the Brookings Institute (Jan. 5, 2012), available at [http://www.brookings.edu/~media/events/2012/1/05%20cordray/0105\\_cordray\\_remarks.pdf](http://www.brookings.edu/~media/events/2012/1/05%20cordray/0105_cordray_remarks.pdf) (“[The CFPB] will begin dealing face-to-face with [nonbank institutions, such as] payday lenders, mortgage servicers, mortgage originators, private student lenders, and other firms that often compete with banks but have largely escaped any meaningful federal oversight.”).

<sup>16</sup> See 15 U.S.C. § 78u-6(b) (2012) (authorizing the SEC to pay an award, ranging from ten to thirty percent of the amount collected, to individuals who voluntarily provided original information to the SEC that led to a successful enforcement action).

<sup>17</sup> 12 U.S.C. § 5531(a) (2012).

<sup>18</sup> See, e.g., *infra* Section II.B (recounting the CFPB’s apparent abandonment of its announced intention to create a web portal for whistleblower tips).

<sup>19</sup> Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 806, 124 Stat. 745, 802-04 (codified at 18 U.S.C. § 1514A (2012)).

<sup>20</sup> *Id.*

<sup>21</sup> See *infra* Section III.A (describing statutory and judicial obstacles for plaintiff whistleblowers relying on section 806 to protect themselves against retaliation from employers).

The regulatory scheme surrounding Sarbanes–Oxley section 806 requires whistleblowers to present complaints to the Department of Labor’s (DOL) Occupational Safety and Health Administration (OSHA) before going to court.<sup>22</sup> If OSHA finds a claim meritless, the whistleblower can appeal first to a DOL administrative law judge (ALJ), then to the Administrative Review Board (ARB), and finally to a federal court.<sup>23</sup> Dodd–Frank’s section 1057 includes an identical exhaustion requirement.<sup>24</sup> Throughout the Bush II administration, the DOL was notoriously hostile to Sarbanes–Oxley whistleblowers.<sup>25</sup> ALJs strictly policed the requirements of the Sarbanes–Oxley section 806 regulations,<sup>26</sup> while the ARB invented a series of new prerequisites to Sarbanes–Oxley section 806 claims—for example, a requirement that the fraud reported be “material” for section 806 to cover the reporting employee.<sup>27</sup>

Whereas the CFPB’s insulation from both Congress and the President makes it well-suited to maintain a commitment to whistleblowers, the DOL’s priorities are far more susceptible to the vagaries of the political branches, as the agency’s track record with Sarbanes–Oxley section 806 attests. Dodd–Frank’s section 1057 will be similarly undependable in the long term if its effectiveness depends on the DOL.

Even if Congress is unwilling to remove the DOL exhaustion requirement from Dodd–Frank’s section 1057 for fear of frivolous litigation, Congress could provide whistleblowers with a dependable incentive by means of a financial reward regime akin to the programs for securities, commodities,

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<sup>22</sup> 29 C.F.R. § 1980.103 (2014).

<sup>23</sup> *Id.* §§ 1980.105-7, .109-10, .112.

<sup>24</sup> 12 U.S.C. § 5567(c) (2012).

<sup>25</sup> See Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1773 (2007) (suggesting that because Sarbanes–Oxley offers a weak incentive for whistleblowers, they should be paid financial rewards derived from fees levied on all exchange-listed companies); Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes–Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 91 tbl.1 (2007) (finding that only 3.6% of the cases resolved at the initial OSHA investigation were decided in favor of employees and that employees prevailed 6.5% of the time at the ALJ level).

<sup>26</sup> See Meghan Elizabeth King, *Blowing the Whistle on the Dodd–Frank Amendments: The Case Against the New Amendments to Whistleblower Protection in Section 806 of Sarbanes–Oxley*, 48 AM. CRIM. L. REV. 1457, 1471 (2011) (observing that “ALJs [we]re very firm in enforcing th[e] ninety-day deadline” for whistleblowers to file a complaint with OSHA); see also Beverley H. Earle & Gerald A. Madek, *The Mirage of Whistleblower Protection Under Sarbanes–Oxley: A Proposal for Change*, 44 AM. BUS. L.J. 1, 52 (2007) (arguing that there is no policy justification for discouraging whistleblowers from coming forward after the ninety-day statute of limitations expires).

<sup>27</sup> See Richard Moberly, *Sarbanes–Oxley’s Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 32-33 (2012) (recounting the ARB’s determination that the reported fraud must be “‘material,’ as defined by securities laws to mean information ‘that a reasonable shareholder would consider important in deciding how to vote’”).

futures, options, and derivatives whistleblowers under Dodd–Frank. In the absence of legislative action, this Comment argues that the CFPB should use its rulemaking power to achieve the same result.

I begin by outlining the structure and objectives of the CFPB, as well as the protection its organic statute creates for whistleblowers. Next, I explain why the development of a vigorous consumer financial whistleblower scheme deserves more attention than it currently receives from the CFPB. After pointing out the crucial weakness in the existing incentive for informants by comparing Dodd–Frank section 1057 to Sarbanes–Oxley section 806, I conclude by arguing for a bounty system and discussing concerns related to implementing such a system.

## I. THE CONSUMER FINANCIAL PROTECTION ACT OF 2010

Adopting a proposal originally advanced by Senator Elizabeth Warren,<sup>28</sup> Title X of the Dodd–Frank Act (the Consumer Financial Protection Act of 2010, or the CFPA)<sup>29</sup> established what amounts to a Consumer Product Safety Commission for the credit market: the Bureau of Consumer Financial Protection (CFPB, or the Bureau).<sup>30</sup> One provision of the CFPA, Dodd–Frank section 1057,<sup>31</sup> prohibits retaliation against whistleblowers who report violations of the Bureau’s regulations or the statutes it administers. Coupled with the CFPB’s structural independence, section 1057 creates the possibility for a potent consumer financial whistleblower program.

### A. *The Powerful and Insulated CFPB*

The Bureau consolidates the consumer financial responsibilities of seven preexisting agencies: the Department of Housing and Urban Development

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<sup>28</sup> See Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 98 (2008) (advocating for the creation of a Financial Product Safety Commission); Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY J., Summer 2007, at 17 (proposing the creation of a Financial Product Safety Commission to protect consumers from “hidden tricks” in financial products); see also David S. Evans & Joshua D. Wright, *The Effect of the Consumer Financial Protection Agency Act of 2009 on Consumer Credit*, 22 LOY. CONSUMER L. REV. 277, 310–11 (2010) (surveying the “intellectual case” for the CFPB).

<sup>29</sup> Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, tit. X, 124 Stat. 1376, 1955–2113 (2010) (codified in scattered sections of 12 & 15 U.S.C.).

<sup>30</sup> See generally Lydia DePillis, *A Watchdog Grows Up: The Inside Story of the Consumer Financial Protection Bureau*, WASH. POST WONKBLOG (Jan. 11, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/01/11/a-watchdog-grows-up-the-inside-story-of-the-consumer-financial-protection-bureau>, archived at <http://perma.cc/8DRL-4YJB> (outlining the CFPB’s three-year history).

(HUD); the Federal Trade Commission (FTC); the now-defunct Office of Thrift Supervision (OTS); and the four “prudential regulators,”<sup>32</sup> namely the Board of Governors of the Federal Reserve System (FRB),<sup>33</sup> the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Association (NCUA), and the Office of the Comptroller of the Currency (OCC).<sup>34</sup> It oversees extensions of credit, loan servicing, real estate settlement services and appraisals, deposit-taking activities, financial data processing, the collection of consumer credit history and debt, and numerous other financial products and services<sup>35</sup> that are “offered or provided for use by consumers primarily for personal, family, or household purposes.”<sup>36</sup> The statute terms such subject matter “consumer financial product[s] or service[s].”<sup>37</sup>

The Bureau’s mandate requires it to implement and enforce “Federal consumer financial law,”<sup>38</sup> a term that encompasses the CFPB itself, eighteen “enumerated consumer laws,”<sup>39</sup> and rules or orders the Bureau issues pursuant to those authorities.<sup>40</sup> Under the CFPB, the Bureau is empowered to define and prevent “unfair, deceptive, or abusive acts or practices” (UDAAPs) related to the classes of consumer financial services described above.<sup>41</sup> The “enumerated consumer laws” the CFPB administers include the Equal Credit Opportunity Act (ECOA), the Fair Debt Collection Practices Act (FDCPA), the Home Mortgage Disclosure Act of 1975 (HMDA), the Real Estate Settlement Procedures Act of 1974 (RESPA), and the Truth in Lending Act (TILA).<sup>42</sup>

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<sup>32</sup> 12 U.S.C. § 5581(c) (2012).

<sup>33</sup> Although the CFPB is housed within the Federal Reserve, it is “essentially an independent executive agency.” DAVID SKEEL, *THE NEW FINANCIAL DEAL: UNDERSTANDING THE DODD-FRANK ACT AND ITS (UNINTENDED) CONSEQUENCES* 106 (2011). The FRB has no authority to control CFPB officers or review CFPB rules and orders. *See* 12 U.S.C. § 5492(c)(2) (2012) (limiting the power of the FRB over the CFPB).

<sup>34</sup> *See* 12 U.S.C. § 5581 (2012) (listing functions from other agencies that have been transferred to the CFPB).

<sup>35</sup> *Id.* § 5481(15) (defining “financial product or service”).

<sup>36</sup> *Id.* § 5481(5)(A).

<sup>37</sup> *Id.* For convenience, the remainder of this Comment refers interchangeably to “consumer financial products” and “consumer financial services.”

<sup>38</sup> *Id.* § 5511(a).

<sup>39</sup> *Id.* § 5481(12).

<sup>40</sup> *Id.* § 5481(14).

<sup>41</sup> *See id.* § 5531(a) (conferring authority to prevent UDAAPs); *id.* § 5531(b) (conferring authority to identify UDAAPs through notice and comment rulemaking).

<sup>42</sup> *See id.* § 5481(12) (enumerating the eighteen consumer laws).



The CFPB oversees both “covered person[s]” that offer consumer financial products, and entities that provide financial services to covered persons.<sup>43</sup> This class of covered persons includes many depository institutions already subject to oversight by the prudential regulators.<sup>44</sup> The CFPB has primary rulemaking and enforcement authority over federal consumer financial law as applied to depositories with more than \$10 billion in assets and affiliates of such depositories.<sup>45</sup>

The Bureau is also authorized to supervise nondepository institutions that offer certain types of consumer financial products, including payday lenders, debt collectors, and residential mortgage brokers, originators, and servicers.<sup>46</sup> The CFPB is the first federal regulator responsible for monitoring most of these “nonbanks.”<sup>47</sup> Moreover, the Bureau can bring administrative actions and civil suits against an entity that it does not supervise, such as smaller participants in another consumer financial services market, if that entity violates the federal consumer financial laws.<sup>48</sup>

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<sup>43</sup> See *id.* § 5481(6) (defining “covered person”).

<sup>44</sup> The CFPB’s regulations still apply to smaller depositories, but the prudential regulators retain primary supervisory and enforcement authority over such institutions. See *id.* § 5516(d) (describing the role of prudential regulators). However, if such an institution is “a service provider to a substantial number” of entities over which the CFPB has primary enforcement authority, that authority also extends to the service provider. *Id.* § 5516(e). Monitoring “safety and soundness” also remains the purview of the prudential regulators. See *Memorandum of Understanding on Supervisory Coordination*, May 16, 2012, at 4 n.6, available at [http://files.consumerfinance.gov/f/201206\\_CFPB\\_MOU\\_Supervisory\\_Coordination.pdf](http://files.consumerfinance.gov/f/201206_CFPB_MOU_Supervisory_Coordination.pdf) (listing examples of examination subject matters that fall outside the range of the Bureau’s supervisory activities).

<sup>45</sup> See 12 U.S.C. § 5515 (2012) (conferring supervision and enforcement authority over “very large banks, savings associations, and credit unions”); see also *id.* § 5512(a) (conferring rulemaking authority over federal consumer financial law). But see *id.* § 5517 (limiting the Bureau’s authority over, inter alia, accountants, attorneys, retail brokers, and insurance companies).

<sup>46</sup> See *id.* § 5514(a)(1)(A) (providing for CFPB supervision of all mortgage originators, brokers, and servicers, and those who engage in loan modification or foreclosure relief related to mortgages); *id.* § 5514(a)(1)(D) (providing for the same supervision by the CFPB for private education lenders); *id.* § 5514(a)(1)(E) (providing for the same supervision by the CFPB for payday lenders); see also *id.* § 5514(a)(1)(B) (permitting the CFPB to supervise “larger participants[.]” as defined through rulemaking in consultation with the FTC). “To date, the [CFPB] has issued three rules defining larger participants in the following markets: consumer reporting (effective September 2012), debt collection (effective January 2013), and student loan servicing (effective March 2014).” CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS 4 (2013), available at [http://files.consumerfinance.gov/f/201401\\_cfpb\\_supervisory-highlights-winter-2013.pdf](http://files.consumerfinance.gov/f/201401_cfpb_supervisory-highlights-winter-2013.pdf).

<sup>47</sup> See Cordray, *supra* note 15 (explaining that the CFPB was created to “protect [consumers] against fraud” and to “ensure that they are treated fairly in the financial marketplace”).

<sup>48</sup> See 12 U.S.C. § 5563(a) (2012) (authorizing the CFPB to conduct administrative hearings and adjudication proceedings); *id.* § 5564(a) (permitting the CFPB to bring such civil actions).

Together with its expansive jurisdiction<sup>49</sup> and array of enforcement tools,<sup>50</sup> the CFPB has several structural features designed to make it uniquely resistant to capture. The Bureau is shielded from both congressional and presidential influence because it is funded by a fixed percentage transfer from the FRB<sup>51</sup> rather than by the appropriations process;<sup>52</sup> its rulemakings are not subject to review by the Office of Information and Regulatory Affairs (OIRA);<sup>53</sup> and its sole director serves a five-year term and can be removed only for cause.<sup>54</sup> The CFPB can also “bring its own actions in federal court without having to go through the Department of Justice.”<sup>55</sup>

The CFPB’s wealth of influence and dearth of political accountability continues to inspire energetic criticism.<sup>56</sup> For example, on February 27,

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<sup>49</sup> The CFPB also empowered the state attorneys general to enforce CFPB regulations issued under the Act, even against market participants the CFPB has no jurisdiction over. *See* CAROLYN L. CARTER ET AL., UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 13.2.6 (8th ed. 2012) (citing 12 U.S.C. §§ 5515(a)(c), 5552(a) (2012)) (“For example, state attorneys general, but not the CFPB, can enforce CFPB rules against banks, thrifts, and credit unions with assets under \$10 billion.”). The state attorney general must give the Bureau notice, and the Bureau has the right to intervene and remove the action to federal court. 12 U.S.C. § 5552(b) (2012).

<sup>50</sup> Including, for example, the ability to issue Civil Investigative Demands (CIDs) before pursuing an investigation. *See* 12 C.F.R. § 1080.6 (2014) (governing CID procedure).

<sup>51</sup> *See* 12 U.S.C. § 5497(a)(2)(A)(iii) (2012) (requiring the FRB to provide the CFPB with twelve percent of its budget from fiscal year 2013 onward). It is worth noting that, like the other banking regulators, the Federal Reserve enjoys an income stream unmoored from the appropriations process. *See id.* § 243 (empowering the Board of Governors to satisfy the Federal Reserve’s operating budget through semiannual assessments of Federal Reserve banks).

<sup>52</sup> The CFPB director was also authorized to request up to \$200 million in additional appropriated funds each fiscal year if he determined that the Bureau was underfunded, but that authorization expired at the beginning of fiscal year 2014. *Id.* § 5497(e)(1)-(2).

<sup>53</sup> *See* Exec. Order No. 12,866, § 3(b), 3 C.F.R. 638, 641 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2012) (exempting independent regulatory agencies from the definition of “agency” for the purposes of OIRA review); *see also* 44 U.S.C. § 3502(5) (2006) (defining “independent regulatory agency” to include the FRB).

<sup>54</sup> *See* 12 U.S.C. § 5491(b)(1) (2012) (establishing the director’s position); *id.* § 5491(c)(1) (providing for five-year term); *id.* § 5491(c)(3) (providing for-cause removal for the director).

<sup>55</sup> Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 78 (2010) (citing Dodd–Frank Act § 1054(b) (codified at 12 U.S.C. § 5564(b) (2012))).

<sup>56</sup> *See* Arthur E. Wilmarth, Jr., *The Financial Services Industry’s Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. BANKING & FIN. L. 881, 889–90, 900 (2011–2012) (discussing the financial services industry’s campaign against the CFPB); David Francis, *Critics Say Consumer Bureau Is an Overreaching Monster*, FISCAL TIMES (May 30, 2013), <http://www.thefiscaltimes.com/Articles/2013/05/30/Critics-Say-Consumer-Bureau-is-an-Overreaching-Monster>, *archived at* <http://perma.cc/S44F-44YN> (describing accusations leveled at the CFPB by Republican senators and the U.S. Chamber of Commerce); *see also* Evans & Wright, *supra* note 28, at 280 (labeling the CFPB a paternalistic “supernanny” agency); Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 900–01 (2013) (accusing the CFPB of bureaucratically undermining its own mission to encourage simplicity in consumer finance).

2014, the House of Representatives passed the Consumer Financial Freedom and Washington Accountability Act, H.R. 3193,<sup>57</sup> a bill that would replace the CFPB's Federal Reserve-derived funding with a yearly appropriation.<sup>58</sup> In expressing his support for the bill, House Financial Services Committee Chairman Representative Jeb Hensarling referred to the CFPB as "[a]rguably. . . the single most powerful and least accountable Federal agency in the history of our nation."<sup>59</sup>

H.R. 3193 is just one recent installment in the long-running efforts to disarm the CFPB.<sup>60</sup> The agency was under attack before it got off the ground.<sup>61</sup> Perhaps this is not surprising, given that "[u]nlike any other part of the Dodd-Frank Act, the Consumer Bureau . . . serve[s] as a

<sup>57</sup> Consumer Financial Freedom and Washington Accountability Act, H.R. 3193, 113th Cong. (2014).

<sup>58</sup> See Charles S. Clark, *House Passes Bill to Revamp Consumer Agency*, GOV'T EXECUTIVE (Mar. 3, 2014), available at <http://www.govexec.com/management/2014/03/house-passes-bill-revamp-consumer-agency/79735> (describing the proposed reform H.R. 3193 to increase accountability).

<sup>59</sup> Press Release, House Comm. on Fin. Servs., House to Consider CFPB Accountability Reforms This Week (Feb. 24, 2014), available at <http://financialservices.house.gov/news/documentsingle.aspx?DocumentID=371067>.

<sup>60</sup> See Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 25, 40-41 (2012) (describing earlier bills offered by Republican lawmakers as symbolic calls for increased oversight of the CFPB).

<sup>61</sup> For example, now-Senator Elizabeth Warren, the natural choice to head the CFPB, was removed from consideration in the face of vociferous Republican opposition. See Eric W. Dolan, *Larry Summers Helped Sink Elizabeth Warren's Nomination to Head New Consumer Bureau*, RAW STORY (Aug. 7, 2013, 8:57 PM), <http://www.rawstory.com/rs/2013/08/07/larry-summers-helped-sink-elizabeth-warrens-nomination-to-head-new-consumer-bureau>, archived at <http://perma.cc/R5Z3-TV4W> (identifying opposition to Senator Warren's nomination). More than a year passed between current Director Richard Cordray's recess appointment in January 2012 and his Senate confirmation. See Mary Beth Quirk, *Senate Finally Confirms Richard Cordray as CFPB Director*, CONSUMERIST (July 16, 2013), <http://consumerist.com/2013/07/16/senate-finally-confirms-richard-cordray-as-cfpb-director>, archived at <http://perma.cc/G9GN-GDWV> (congratulating Cordray on the "66-34 vote that finally confirmed him"). In fact, the legitimacy of the CFPB as a whole remains an open question, as a case challenging the constitutionality of the structural features outlined above is pending before the D.C. Circuit. See Final Opening Brief for the State Appellants, *State Nat'l Bank of Big Spring v. Lew*, Nos. 13-5247 & 13-5248 (D.C. Cir. May 12, 2014), ECF No. 45; Final Opening Brief of Private Plaintiffs-Appellants, *State Nat'l Bank of Big Spring v. Lew*, Nos. 13-5247 & 13-5248 (D.C. Cir. May 12, 2014), ECF No. 47; Final Brief for Appellees, *State Nat'l Bank of Big Spring v. Lew*, Nos. 13-5247 & 13-5248 (D.C. Cir. May 9, 2014), ECF No. 44; see also *State Nat'l Bank of Big Spring v. Lew*, 958 F. Supp. 2d 127, 165 (D.D.C. 2013) (finding that the plaintiff, a national bank, had not suffered cognizable injury-in-fact from the CFPB's activities and therefore lacked standing to challenge the Bureau's structure). Director Cordray, for his part, appears to be unfazed. See Richard Cordray, *Consumer Fin. Prot. Bureau, Prepared Remarks of CFPB Director Richard Cordray at the National Association of Attorneys General* (Feb. 26, 2014), available at <http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-national-association-of-attorneys-general> ("This regime will govern the mortgage servicing market—including both the banks and their nonbank competitors—in perpetuity.").

counterweight . . . limit[ing] the kinds of strategies that the largest banks can use to make profits.”<sup>62</sup> That said, the CFPB’s conduct on the job has done little to mollify the consumer financial industry’s misgivings. Its tenure so far has been colored by aggression and a strong preference for regulating through informal guidance and enforcement actions, as opposed to notice-and-comment rulemaking.<sup>63</sup> In particular, regulated entities have called for rulemakings to address the definition of “unfair, deceptive, or abusive acts or practices” under the CFPA.<sup>64</sup>

### B. Section 1057

In contrast to its supervision and enforcement actions, the CFPB’s whistleblower protections—one of its most interesting weapons—have been largely overlooked. Dodd–Frank Act section 1057 prohibits retaliation against a covered employee who, among other protected activities, reports what she reasonably believes to be a violation of federal consumer law, a CFPB regulation, or a CFPB order.<sup>65</sup> The statute creates a private right of action for an employee who suffers retaliation for reporting wrongdoing to her employer, the CFPB, or another law enforcement agency.<sup>66</sup>

Section 1057’s coverage is broad. It includes not only any employer who offers consumer financial products, but also employers who provide services to such offerors, even if the offeror does not control the service provider.<sup>67</sup>

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<sup>62</sup> SKEEL, *supra* note 33, at 114.

<sup>63</sup> See, e.g., Martin Bishop, *Regulatory: Collaborating to Solve the Vexing UDAAP Dilemma*, INSIDECOUNSEL (May 1, 2013), <http://www.insidecounsel.com/2013/05/01/regulatory-collaborating-to-solve-the-vexing-udaap>, archived at <http://perma.cc/UFJ4-7TDL> (providing one attorney’s opinions on why the CFPB should engage in rulemaking).

<sup>64</sup> *Id.*

<sup>65</sup> See 12 U.S.C. § 5567(b)-(c) (2012) (defining the term “covered employee” as “any individual performing tasks related to the offering or provision of a consumer financial product or service,” and delineating categories of protected conduct).

<sup>66</sup> See *id.* § 5567(a) (banning any “covered person or service provider” from retaliating against any “covered employee” for protected conduct). The statute also protects employees who “filed, instituted, or caused to be filed” any federal consumer financial law “proceeding,” *id.* § 5567(a)(1)(3), which theoretically shelters an employee who blows the whistle to an affected consumer or to an enterprising plaintiff’s attorney.

<sup>67</sup> 12 U.S.C. § 5567(a)(1)(3); see also *id.* § 5481(6) (defining “covered person” to include offerors of consumer products and “any affiliate” who “acts as a service provider to such [offerors]”); *id.* § 5481(26) (defining “service provider” as “any person that provides a material service to a covered person in connection with the offering . . . of a consumer financial product”(emphasis added)). This range is especially significant because the CFPB has stressed its intention to hold supervised entities liable for the malfeasance of third-party service providers. See *CFPB to Hold Financial Institutions and their Service Providers Accountable*, CONSUMER FIN. PROT. BUREAU (Apr. 13, 2012), <http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-to-hold-financial-institutions-and-their-service-providers-accountable>, archived at <http://perma.cc/JK8N-KVPW>

Moreover, Dodd–Frank section 1057 governs conduct that other federal whistleblower statutes, including the False Claims Act (FCA) and the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), leave unregulated. The FCA allows relators to bring a *qui tam*<sup>68</sup> lawsuit on the government’s behalf if they detect a fraudulent “request or demand” for federal assets.<sup>69</sup> Although the FCA therefore reaches some consumer finance cases that involve government initiatives such as the Home Affordable Modification Program (HAMP),<sup>70</sup> “[u]nfortunately, many banking [and] mortgage cases are not tied to any demand or request for money,” much less federal money.<sup>71</sup> Similarly, because mortgage services are often provided by nonbank institutions, FIRREA’s whistleblower provisions also have limited applicability to this field; the statute only covers the conduct of federally insured depositories.<sup>72</sup> Neither federal

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(outlining the CFPB’s “expectation that supervised financial institutions have an effective process for managing the risks of service provided relationships,” and recommending that “supervised financial institutions take steps to ensure that business arrangements with service providers do not present unwarranted risks to consumers”); *see also* Marie-Charlotte Patterson, *Spotlight on the Consumer Financial Protection Bureau*, INSIDECOUNSEL (June 7, 2013), <http://www.insidecounsel.com/2013/06/07/spotlight-on-the-consumer-financial-protection-bur>, *archived at* <http://perma.cc/MNJ-56U7> (arguing that the key challenge the CFPB poses is understanding potential liability for suppliers and subcontractors).

<sup>68</sup> “*Qui tam*” is an abbreviation of “*qui tam pro domino rege quam pro se ipso in hac parte sequitur*,” which means “who as well for the king as for himself sues in this matter.” BLACK’S LAW DICTIONARY 1444 (10th ed. 2014). In modern usage, it refers to “[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive.” *Id.*

<sup>69</sup> 31 U.S.C. §§ 3729(b)(2), 3729(c), 3730(b) (2012). The Department of Justice (DOJ) may opt to join the relator’s suit, but the relator can proceed without government intervention. *Id.* § 3730(c)(3). The relator is entitled to a percentage of any successful recovery, which varies depending on whether the DOJ intervenes. *See id.* § 3730(d)(1)-(2) (awarding fifteen to twenty-five percent of the claim proceeds to the relator in government-joined actions and twenty-five to thirty percent of proceeds in actions in which the government does not join).

<sup>70</sup> *See* Jessica Dye, *Whistleblower Says BofA Defrauded HAMP*, REUTERS, Mar. 7, 2012, *available at* <http://www.reuters.com/article/2012/03/08/bank-of-america-whistleblower-idUSL2E8E804820120308> (reporting on an FCA whistleblower complaint alleging fraud under the HAMP filed by a former employee of Urban Lending Solutions, a company that performed contract work for Bank of America and its loan servicing subsidiary).

<sup>71</sup> THAD M. GUYER & MELISSA KOVEN, GOV’T ACCOUNTABILITY PROJECT, BANKING SECTOR ACCOUNTABILITY: UNDERSTANDING AND HANDLING THE COMPLEX “SOX PLUS ONE” WHISTLEBLOWER CLAIM 16 (2013) (citing Order, *United States v. Countrywide Fin. Corp.*, No. 12-1422 (S.D.N.Y. May 8, 2013)), *available at* <http://www.whistleblower.org/sites/default/files/BSA.pdf> (pointing out that the Southern District of New York dismissed the FCA claims in a suit related to Countrywide’s fraud on Fannie Mae and Freddie Mac).

<sup>72</sup> 12 U.S.C. § 4205(a) (2012); *see also* Brian Mahany, *Mortgage Servicers Ripe for Whistleblowers*, DUE DILIGENCE (Mar. 2, 2014, 2:37 AM), <http://www.mahanyertl.com/mahanyertl/2014/mortgage-servicers-ripe-whistleblowers>, *archived at* <http://perma.cc/C8FX-GHH8> (explaining the

statute covers the market segments for which CFPB enforcement authority generally represents a first taste of federal oversight, such as payday lending. And state law in this area is predictably patchwork.<sup>73</sup>

Although it casts a commendably wide net, Dodd–Frank section 1057 is more notable for what it fails to do. The provision stands apart from the two other sets of whistleblower protections in the Dodd–Frank Act. Section 922 provides incentives and protections for individuals who report violations of federal securities laws to the SEC.<sup>74</sup> Another section, Section 924 of Dodd–Frank, directs the SEC to establish an Office of the Whistleblower (OWB) to administer this new informant program.<sup>75</sup> Section 748 creates a similar program for tips regarding the federal commodities and futures statutes, and the associated regulations provide for a “Whistleblower Office” (WBO) within the Commodity Futures Trading Commission (CFTC).<sup>76</sup> Both the CFTC program’s statute and its regulations substantially mirror those of the SEC.<sup>77</sup>

Despite their similarities, the programs created under sections 748 and 922 differ from section 1057’s scheme in several important respects. First, whistleblowers who relay original information to the CFTC or SEC are statutorily entitled to between ten to thirty percent of any recovery the agency attains based on that information, provided that the recovery exceeds \$1 million.<sup>78</sup> Section 1057 does not provide for a similar bounty payment. Second, and more germane to the immediate point, Dodd–Frank section 1057 does not establish a unit within the CFPB equivalent to the SEC’s OWB or the CFTC’s WBO for collecting tips. The CFPB has discretion over how much infrastructure to assemble around this modest incentive for consumer financial whistleblowers.

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difficulties of bringing whistleblower claims against nonbank mortgage servicers like Ocwen or Green Tree, two companies that the CFPB has targeted).

<sup>73</sup> See Geoffrey Christopher Rapp, *States of Pay: Emerging Trends in State Whistleblower Bounty Schemes*, 54 S. TEX. L. REV. 53, 70–71 (2012) (surveying state false claims laws).

<sup>74</sup> 15 U.S.C. § 78u-6 (2012).

<sup>75</sup> *Id.* § 78u-7.

<sup>76</sup> 7 U.S.C. § 26 (2012) (creating the commodities informant program); 17 C.F.R. § 165.15(c) (2014) (delegating authority for most informant-related action to the head of the WBO).

<sup>77</sup> Compare 17 C.F.R. pt. 165 (2014) (codifying final CFTC bounty rules), *with id.* § 240.21F (codifying final SEC bounty rules). *But see* Douglas J. Davison et al., *CFTC and SEC Whistleblower Bounties: Largely Similar but Important Differences Remain*, 13 J. INVESTMENT COMPLIANCE 36, 37 (2012) (enumerating a series of fine-grained but “notable differences” between the programs, including the CFTC’s failure to mirror the SEC’s ban on duplicative recovery).

<sup>78</sup> 7 U.S.C. § 26(a)(1), (b)(1) (2012); 15 U.S.C. § 78u-6(a)(1), (b)(1) (2012).

## II. WHISTLEBLOWING UNDER FEDERAL CONSUMER FINANCIAL LAW

Developing this type of infrastructure for collecting tips would be a worthwhile investment. Although pursuing whistleblower tips is a reactive style of enforcement, the CFPB is already designed to respond to external complaints from angry consumers—so why not respond to complaints from members of the consumer financial services industry who might have inside information on developing species of deception and abuse?<sup>79</sup> Many of these federal consumer financial law violations resemble fraud, which whistleblowers have proven to be helpful in exposing.<sup>80</sup> Nevertheless, the CFPB does not currently devote substantial resources to facilitating such tips.

### A. *The Potential Value of Consumer Financial Services Informants*

Over a decade after the Enron and WorldCom accounting scandals and subsequent passage of Sarbanes–Oxley, corporate financial fraud is still the iconic violation Americans associate with whistleblowers.<sup>81</sup> And rightly so, perhaps: from August 2011 through the close of the 2014 fiscal year, the SEC’s new OWB received 1714 whistleblower tips related to “corporate disclosures and financials,” comprising 16.8% of the office’s 10,193 complaints and making this complaint category the most common type of allegation reported.<sup>82</sup>

Turning to utility rather than volume, studies indicate that insider tips play a vital role in detecting fraud at large companies.<sup>83</sup> The underlying dynamic at work here is not limited to situations where someone is cooking

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<sup>79</sup> See CARTER ET AL., *supra* note 49, § 4.3.3.1 (“It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known practices were specifically defined and prohibited, it would be at once necessary to begin over again.” (quoting H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.))).

<sup>80</sup> See *supra* note 19.

<sup>81</sup> See Adam Geller, *The Whistleblower’s Unending Story*, USA TODAY (Apr. 26, 2008, 12:24 PM), [http://usatoday30.usatoday.com/news/nation/2008-04-26-3579244419\\_x.htm](http://usatoday30.usatoday.com/news/nation/2008-04-26-3579244419_x.htm), archived at <http://perma.cc/4VSQ-ERTS> (recalling the scandals of 2002, which the press dubbed as “the year of the whistleblower”).

<sup>82</sup> SEC, 2014 ANNUAL REPORT TO CONGRESS ON THE DODD–FRANK WHISTLEBLOWER PROGRAM 20, 27 (2014) [hereinafter OWB ANNUAL REPORT]. “Offering fraud” came in a close second at 1599 tips, or 15.7%. *Id.*

<sup>83</sup> See Dyck et. al., *supra* note 11, at 2226 (noting that, compared to other potential “fraud detectors,” employees of a company frequently act as whistleblowers, reporting fraud in 17% of the instances studied); see also ASS’N OF CERTIFIED FRAUD EXAM’RS, REPORT TO THE NATIONS ON OCCUPATIONAL FRAUD AND ABUSE: 2010 GLOBAL FRAUD STUDY 16 (2010), available at [http://www.acfe.com/uploadedFiles/ACFE\\_Website/Content/documents/rtrn-2010.pdf](http://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/rtrn-2010.pdf) (finding that tips were responsible for detecting over 40% of the organizational fraud reported by examiners from 2008 to 2010).

the books. Whistleblowers are valuable whenever a violation puts an enforcer at an informational disadvantage—that is, whenever a violation involves hidden information.<sup>84</sup>

The discovery of hidden information characterizes many prosecutions for violations of federal consumer financial law.<sup>85</sup> One example that recently garnered nationwide attention in the foreclosure context is the practice of “robo-signing,” or directing employees to rubber-stamp documents without meaningful review.<sup>86</sup> Whistleblowers could also be useful in exposing arrangements that violate the RESPA’s prohibition on kickbacks, a subject of increasing CFPB attention,<sup>87</sup> or the TILA’s ban on “steering incentives.”<sup>88</sup> A former SEC enforcement attorney who was among the Bureau’s earliest hires<sup>89</sup> has observed that the CFPB’s generalized ban on UDAAPs charges the CFPB with preventing yet another range of acts which shares much in common with securities fraud.<sup>90</sup> And, to name a final example, the CFPB’s

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<sup>84</sup> See Casey & Niblett, *supra* note 11, at 1208 (“Our analysis suggests that when there are sticky asymmetric information problems—which is, of course, the definition of hidden information—the screening mechanism is important.”).

<sup>85</sup> The CFPB has admittedly found ways to enforce other statutes without requiring inside information. For example, the Bureau has come under fire from House Republicans for using its finding that auto lenders violated ECOA’s and Regulation B’s prohibition on discriminatory lending, arrived at by means of a disparate-impact theory and undisclosed methods of analysis, to force the lenders into high-value settlements. See Letter from Jeb Hensarling, Chairman, House Comm. on Fin. Servs., to Hon. Richard Cordray, Dir., Bureau of Consumer Fin. Prot. (Mar. 7, 2014), available at [http://images.magnetmail.net/images/clients/CBA\\_/attach/IndirectAutoLendingLetter3142014.pdf](http://images.magnetmail.net/images/clients/CBA_/attach/IndirectAutoLendingLetter3142014.pdf) (detailing congressional efforts, beginning in May 2013, to get the CFPB to disclose the details of “the methodology the [CFPB] has adopted to determine whether fair lending violations exist in indirect auto lending” and threatening to invoke the House Committee’s compulsory process to obtain this information).

<sup>86</sup> See Complaint at 13, *Consumer Fin. Prot. Bureau v. Ocwen Fin. Corp.*, No. 13-2025 (D.D.C. Dec. 19, 2013) (defining “robo-signing” as “preparing, executing, notarizing, and filing affidavits . . . whose affiants lacked personal knowledge of the assertions in the affidavits and did not review any information or documentation to verify the assertions in such affidavits”); see also *supra* notes 5-7 and accompanying text (discussing settlement of a case involving forged reviewer signatures).

<sup>87</sup> See Brad Finkelstein, *Former FHA Chief: RESPA Enforcement on the Way*, NAT’L MORTGAGE NEWS (Mar. 16, 2012, 10:20 AM), [http://www.nationalmortgagenews.com/dailybriefing/2010\\_560/stricter-enforcement-respa-1029390-1.html?site=default\\_on](http://www.nationalmortgagenews.com/dailybriefing/2010_560/stricter-enforcement-respa-1029390-1.html?site=default_on), archived at <http://perma.cc/B8NC-QUUP> (quoting former Federal Housing Administration Commissioner Brian Montgomery as anticipating an uptick in RESPA enforcement “now that the CFPB has purview” over the statute).

<sup>88</sup> See 15 U.S.C. § 1639b(c) (2012) (barring loan originators from paying loan officers or brokers compensation that varies based on loan terms other than the size of the principal).

<sup>89</sup> *Professionals: Ronald L. Rubin*, HUNTON & WILLIAMS LLP, [http://www.hunton.com/ronald\\_rubin](http://www.hunton.com/ronald_rubin) (last visited Jan. 12, 2015), archived at <http://perma.cc/7JUJ-EMDF>.

<sup>90</sup> See *Identity Crisis*, *supra* note 13, at 3 (arguing that the CFPB shares more in common with the SEC than with the prudential regulators or FTC, in part because both agencies’ enforcement investigations target “fraudulent conduct” or “close relatives of fraudulent conduct,” namely



ban on originating loans without an evaluation of the borrowers' ability to repay raises the possibility of loan officers reporting abuses similar to robo-signing.<sup>91</sup>

The deeper and more deliberately buried the violation, the greater the value added by an inside source. But whistleblowers can be a useful supervisory supplement even when the information they report could have been exposed by a government investigation.<sup>92</sup> CFPB examiners cannot be omnipresent, and the CFPB can examine only the largest depository institutions "on a continuing basis."<sup>93</sup> Moreover, even when the CFPB does engage in supervisory action, its detection of even relatively poorly concealed violations suffers from a problem with which the SEC is familiar: CFPB enforcement attorneys no longer accompany examiners during supervisory exams.<sup>94</sup>

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"unfair, deceptive, and abusive practices," that are banned in "very general terms" by their respective organic statutes).

<sup>91</sup> See 15 U.S.C. § 1639c(a)(1), (a)(3) (2012) (requiring evaluation of ability to repay for loans other than qualified mortgages); see also JOSEPH L. BARLOON ET AL., SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, CONSUMER PROTECTION PROVISIONS IN THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 14, available at [http://www.skadden.com/newsletters/FSR\\_A\\_Consumer\\_Protection\\_Provisions\\_in\\_Dodd-Frank.pdf](http://www.skadden.com/newsletters/FSR_A_Consumer_Protection_Provisions_in_Dodd-Frank.pdf) (noting employers' concern regarding the relationship between section 1057 and the ability to repay rule).

<sup>92</sup> See Marsha J. Ferziger & Daniel G. Currell, *Snitching for Dollars: The Economics and Public Policy of Federal Civil Bounty Programs*, 1999 U. ILL. L. REV. 1141, 1159 ("Although an agency could obtain the same information [as provided by an informant], it would likely come at significant investigatory cost.").

<sup>93</sup> Peggy Twohig & Steve Antonakes, *A Guide to CFPB's Supervision*, CONSUMER FIN. PROT. BUREAU (Oct. 13, 2011), <http://www.consumerfinance.gov/blog/guide-cfpb-supervision>, archived at <http://perma.cc/YU2K-9YWV>.

<sup>94</sup> The CFPB used to send enforcement attorneys to on-site examinations, but after supervised interests protested the practice's potential to impede "free exchange during the examination," the Bureau changed its policy. CFPB OMBUDSMAN'S OFFICE, FY2012 ANNUAL REPORT TO THE DIRECTOR 13 (Nov. 15, 2012), available at [http://files.consumerfinance.gov/f/201211\\_Ombuds\\_Office\\_Annual\\_Report.pdf](http://files.consumerfinance.gov/f/201211_Ombuds_Office_Annual_Report.pdf); CFPB OMBUDSMAN'S OFFICE, FY2013 ANNUAL REPORT TO THE DIRECTOR 13-14 (Nov. 15, 2013), available at [http://files.consumerfinance.gov/f/201311\\_cfpb\\_annual-report\\_ombuds-office.pdf](http://files.consumerfinance.gov/f/201311_cfpb_annual-report_ombuds-office.pdf). Matthew Martens, a former SEC enforcement attorney who led the insider trading case against Goldman's "Fabulous Fab," has spoken critically of the Commission's comparable "bifurcation of the investigative process." See Ben Protess, *For S.E.C., a Much-Needed Win*, N.Y. TIMES, Mar. 13, 2014, at B1 (pointing to the "bureaucratic hurdles" presented by excluding enforcement attorneys from SEC investigations as one reason for the agency's struggles at trial in the period leading up to the Toure verdict). As described in subsection IV.A.2 *infra*, properly incentivized consumer financial services whistleblowers can help enforcement staff compensate for this division and the resulting limits on the staff's ability to investigate.

### B. *Is Anybody Listening?*

In sum, section 1057 and the CFPB's broad mandate create the desirable possibility of many covered employees coming forward with tips. However, the concern that their tip will not inspire a vigorous response deters many would-be whistleblowers from reporting to law enforcement.<sup>95</sup> Most informants also fear being perceived as "crazy" and therefore are less likely to report when the misconduct they observe is not definitively illegal.<sup>96</sup> Both of these fears should be mitigated over time as the CFPB clarifies the contours of the "unfair, deceptive, or abusive act[s] or practice[s]"<sup>97</sup> its organic statute prohibits, and as regulated employees become more familiar with the Bureau's energetic brand of enforcement. But an uptick in tips will be counterproductive if the Bureau is not prepared and loses its reputation for responsiveness.

What has the CFPB done for whistleblowers so far? In terms of publically disclosed activity, the answer is *not much*. The Bureau issued a bulletin and press release informing the public of Dodd-Frank section 1057 in late 2011.<sup>98</sup> Since then, the CFPB has made no observable effort to leverage the provision. There are no references to whistleblowing in the Bureau's strategic plan through 2017, and the Bureau has not promulgated any regulations or taken any public enforcement actions related to section 1057.<sup>99</sup>

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<sup>95</sup> See Orly Lobel, *Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems*, 54 S. TEX. L. REV. 37, 48 (2012) ("Perhaps most importantly, individuals will choose to remain bystanders in the face of misconduct if they believe that their reporting will not be treated seriously." (citations omitted)); Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 104 (2007) (describing whistleblowers' fear of bureaucratic indifference); see also Fisher et al., *supra* note 11, at 130 (arguing that faith in law enforcement's propensity to follow up actionable information is one of the "most important" ways to encourage whistleblowing).

<sup>96</sup> Rapp, *supra* note 95, at 122-23.

<sup>97</sup> 12 U.S.C. § 5531(a) (2012).

<sup>98</sup> See CONSUMER FIN. PROT. BUREAU, CFPB BULL. NO. 2011-05 (ENFORCEMENT AND FAIR LENDING), BUREAU INVITES WHISTLEBLOWER INFORMATION AND LAW ENFORCEMENT TIPS AND HIGHLIGHTS ANTI-RETALIATION PROTECTIONS (2011), available at [http://files.consumerfinance.gov/f/2011/12/CFPB\\_Enforcement\\_Bulletin\\_12-15-11.pdf](http://files.consumerfinance.gov/f/2011/12/CFPB_Enforcement_Bulletin_12-15-11.pdf) (fleshing out statutory whistleblower protections in greater detail); Press Release, Consumer Fin. Prot. Bureau, CFPB Begins Taking Whistleblower Tips (Dec. 15, 2011), available at <http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-begins-taking-whistleblower-tips> (announcing the option to anonymously report via telephone hotline or email and outlining consumer whistleblowers' cause of action for retaliation).

<sup>99</sup> See generally CONSUMER FIN. PROT. BUREAU, STRATEGIC PLAN, BUDGET, AND PERFORMANCE PLAN AND REPORT (Mar. 2014), available at <http://files.consumerfinance.gov/f/strategic-plan-budget-and-performance-plan-and-report.pdf> (lacking any mention of whistleblowers).

At least one prominent attorney for consumer financial service providers was skeptical of the Bureau's ability to attract substantial numbers of informants from the outset.<sup>100</sup> That skepticism proved warranted. The CFPB appears to have abandoned its only stated plan for drawing in more tips. A 2011 press release claimed that the CFPB planned to introduce an "online tips portal accessible through its website" in early 2012.<sup>101</sup> Two years later, the "Whistleblowers" tab on [consumerfinance.gov](http://consumerfinance.gov) links to a CFPB blog page resembling the CFPB's 2011 press release, but it makes no mention of plans for a web portal.<sup>102</sup>

Given the utility of a robust consumer financial whistleblower program, why is the unfulfilled promise of another reporting channel the last we have heard about section 1057? Of course, the fact that the CFPB has never announced taking action on the basis of inside information does not mean that its hotline has not received occasional tips. The Bureau does promise to allow whistleblowers to request confidentiality or even remain anonymous to the extent permitted by law.<sup>103</sup> Perhaps it opted not to set up a web portal for employee whistleblowers because the relevant staff members had their hands full with the tips coming through existing channels. But there are more likely explanations for the Bureau's apparent abandonment of the online portal. An obvious one is that the CFPB did not receive many tips and lost confidence in section 1057's ability to entice informants.

If this is the case, the Bureau's response is partially misguided, as whistleblowing may increase over time as the Bureau's reputation develops and it clarifies standards through rulemaking. But a low volume of initial tips is not encouraging. As discussed in the following section, a historical comparison to Sarbanes–Oxley section 806 suggests one reason Dodd–Frank

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<sup>100</sup> See Alan S. Kaplinsky, Ballard Spahr LLP, *CFPB's Whistleblowers Announcement Is a Wake-up Call*, CFPB MONITOR (Dec. 20, 2011), <http://www.cfpbmonitor.com/2011/12/20/cfpb%E2%80%99s-whistleblowers-announcement-a-wake-up-call>, archived at <http://perma.cc/F93Y-WR2E> ("We do not anticipate a large number of these kinds of whistleblower reports.").

<sup>101</sup> Press Release, *supra* note 98.

<sup>102</sup> Kent Markus, *The CFPB Wants You to Blow the Whistle on Lawbreakers*, CONSUMER FIN. PROT. BUREAU (Dec. 15, 2011), <http://www.consumerfinance.gov/blog/the-cfpb-wants-you-to-blow-the-whistle-on-lawbreakers>, archived at <http://perma.cc/CN5F-3ZPV>. The CFPB has implemented a consumer complaint portal on its website, but as the whistleblower page stresses, consumer complaints are distinct from whistleblower tips. *Id.* Incidentally, the web portal has been the most heavily utilized channel for consumers to submit complaints. See CONSUMER FIN. PROT. BUREAU, CONSUMER RESPONSE: A SNAPSHOT OF COMPLAINTS RECEIVED 4 (June 19, 2012), available at [http://files.consumerfinance.gov/f/201206\\_cfpb\\_snapshot\\_complaints-received.pdf](http://files.consumerfinance.gov/f/201206_cfpb_snapshot_complaints-received.pdf) (explaining that forty-four percent of all consumer complaints were lodged through the CFPB website, compared to eleven percent over the phone). Consumer usage therefore indicates that the whistleblower web portal may be a proposal worth reviving.

<sup>103</sup> Markus, *supra* note 102.

section 1057 may provide a less-than-ideal incentive for whistleblowers in the short term and illustrates a problem that may sabotage section 1057's long-term viability.

### III. FIXING A CRACK IN THE INSULATION

Even if the CFPB's lack of accountability makes some people legally or politically queasy,<sup>104</sup> it responds to one of the chief threats to a healthy whistleblower program: capture. Some scholars have questioned why we worry more about capture in this context than in others.<sup>105</sup> There are two good responses to that concern: First, whistleblowers are often disgruntled employees who are easy to discredit and ignore, making it easier for an agency to abandon an externally imposed commitment to working with them.<sup>106</sup> Second, inconsistent administration undermines an agency's reputation for responding to tips, and whistleblowers will not step forward unless they expect law enforcement to take action swiftly.<sup>107</sup> Professor Richard Moberly credits this type of inconstancy with making the IRS's program "dysfunctional,"<sup>108</sup> and agency disinterest may explain why the SEC's insider trading whistleblower program withered on the vine.<sup>109</sup>

The CFPB's structural independence is an important argument in favor of the enforcement potential of a CFPB-administered consumer financial

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<sup>104</sup> See *supra* notes 56-59 and accompanying text (discussing attacks on the CFPB's lack of accountability). *But see* Block-Lieb, *supra* note 60, at 27 (arguing that locking in a commitment to consumer financial protection is wise, because such legislation has "diffuse benefits and narrowly defined costs" that make enforcement challenging).

<sup>105</sup> See Casey & Niblett, *supra* note 11, at 1174-75 ("Our analysis suggests that worries of agency capture . . . are overemphasized.").

<sup>106</sup> For example, the SEC's failure to follow up on tips about several high-profile frauds, most notably Madoff's Ponzi scheme, inspired scathing criticism. See, e.g., Matt Tiabbi, *Why Didn't the SEC Catch Madoff? It Might Have Been Policy Not to*, ROLLING STONE, May 31, 2013, <http://www.rollingstone.com/politics/blogs/taibblog/why-didnt-the-sec-catch-madoff-it-might-have-been-policy-not-to-20130531>, archived at <http://perma.cc/NT7C-EBD4> (characterizing the SEC as "aggressively clueless" and noting that the Commission ignored whistleblower Harry Markopolos' timely and "extraordinarily detailed" attempt to inform it about Bernie Madoff's scheme).

<sup>107</sup> See *supra* note 95.

<sup>108</sup> Moberly, *supra* note 27, at 51.

<sup>109</sup> See Vanessa Castellina, Note, *The New Financial Incentives and Expanded Anti-Retaliation Protections for Whistleblowers Created by Section 922 of the Dodd-Frank Act: Actual Progress or Just Politics?*, 6 BROOK. J. CORP. FIN. & COM. L. 187, 193 (2011) (discussing the SEC Office of the Inspector General's assessment of the Insider Trading and Securities Fraud Enforcement Act of 1988's unsuccessful whistleblower program, an evaluation which concluded that "the SEC did not follow up with informants regarding their tips" (citing OFFICE OF INSPECTOR GEN., SEC, REP. NO. 474, ASSESSMENT OF THE SEC'S BOUNTY PROGRAM 5 (2010), available at <http://www.sec.gov/about/offices/oig/reports/audits/2010/474.pdf>)).

whistleblower program. But there is a crack in section 1057's insulation—the requirement that plaintiffs exhaust the DOL's administrative remedies before bringing suit.

Section 1057 shares this feature with Sarbanes–Oxley's defensively minded whistleblower provision, section 806. A whistleblower who believes she has been retaliated against must file a complaint with the DOL and allow the Secretary of Labor an opportunity to investigate the claim before bringing suit in federal court.<sup>110</sup> If the Secretary of Labor concludes that the claim is without merit, there is an appeals process through the DOL's ARB.<sup>111</sup> The statutory remedies are also identical: under either cause of action, a prevailing employee may receive back pay plus interest, reinstatement at the same seniority level, and compensation for special damages, including fees and costs.<sup>112</sup> In fact, the two provisions are very similar. Section 1057 bears a closer resemblance to Sarbanes–Oxley section 806 than it does to its Dodd–Frank brethren, Dodd–Frank sections 922 and 748.<sup>113</sup> Aside from nearly identical administrative enforcement mechanisms, section 1057 and section 806 share a focus on antiretaliation and an absence of statutory bounty provisions.

#### A. *The Shortcomings of Pre-Amendment Sarbanes–Oxley Section 806*

Unfortunately, this is not a promising comparison. Sarbanes–Oxley section 806 is a provision with an inglorious past. The Sarbanes–Oxley Act as a whole was tarnished by its inability to forestall the financial crisis, but, prior to being altered by the Dodd–Frank amendments, Sarbanes–Oxley section 806 in particular was perceived as providing inadequate incentives for employee whistleblowers.<sup>114</sup>

Scholars such as Professor Geoffrey Rapp interpret this as evidence that antiretaliation protection in general is not sufficient to convince employees to report violations.<sup>115</sup> If this is true, the CFPB's abandonment of a web

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<sup>110</sup> 12 U.S.C. § 5567(c)(1)(A) (2012); 18 U.S.C. § 1514A(b) (2012).

<sup>111</sup> 12 U.S.C. § 5567(c)(2)(C) (2012).

<sup>112</sup> *Id.* § 5567(c)(4)(B), (D); 18 U.S.C. § 1514A(c)(2) (2012).

<sup>113</sup> Compare Dodd–Frank Act § 1057, 12 U.S.C. § 5567 (2012), with Sarbanes–Oxley Act § 806, 18 U.S.C. § 1514A (2012).

<sup>114</sup> See Dyck et al., *supra* note 11, at 2250–51 (finding that the percentage of employee whistleblowers in large U.S. fraud cases declined after 2002, and indicating “that [Sarbanes–Oxley's] protection for whistleblowers has not increased employees' incentives to come forward with cases of fraud”).

<sup>115</sup> See Rapp, *supra* note 95, at 118 (noting that there are “severe counterincentives that can convince insiders not to bring information about ongoing corporate and financial fraud to light”).

portal likely demonstrates its loss of faith in Dodd–Frank section 1057, suggesting that section 1057 is unlikely to attract many tips.

Even if Professor Rapp is mistaken on this point, Sarbanes–Oxley section 806 demonstrates that the antiretaliation rights available to whistleblowers are unconvincing. Unfortunately, the same problem that dragged down Sarbanes–Oxley section 806 threatens to undermine the future of Dodd–Frank section 1057.

Despite the outpouring of public support for whistleblowers that accompanied its enactment, Sarbanes–Oxley did a poor job of protecting informants from retaliation. Simply put, whistleblowers who brought claims under Sarbanes–Oxley section 806 almost never won. In 2007, Professor Moberly completed a comprehensive review of administrative decisions that were produced through the administrative process that claimants under Sarbanes–Oxley section 806 must satisfy.<sup>116</sup> He discovered that the Bush DOL was a “remarkably one-sided” boneyard for plaintiffs.<sup>117</sup> By the time Professor Moberly repeated his study in 2012, the employee success rate at the OSHA investigation stage stood at just 1.8% over the lifetime of Sarbanes–Oxley section 806.<sup>118</sup>

Professor Moberly and other academics identified a series of specific flaws in the statute’s language and administration. For example, the regulatory scheme of pre-Dodd–Frank section 806 included a tight ninety-day statute of limitations, a political compromise<sup>119</sup> that led to the DOL rejecting many whistleblowers’ claims as untimely.<sup>120</sup> The most crucial problem with Sarbanes–Oxley section 806 is that the ARB and the DOL’s ALJs have invented and imported harsh requirements for litigants, such as insisting that the fraud reported be “material” and aimed at shareholders, or reading section 806’s requirement that a whistleblower “reasonabl[y] belie[ve]” she is

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<sup>116</sup> See Moberly, *supra* note 25, at 83-90 (outlining the timing of the study).

<sup>117</sup> See *id.* at 91 (describing the low success rates of whistleblowers at the ALJ and ARB level).

<sup>118</sup> See Moberly, *supra* note 27, at 29 (noting that OSHA decided in the employer’s favor 488 times between 2006 and 2008 without a single employee victory).

<sup>119</sup> See Moberly, *supra* note 25, at 133-34 (explaining that Senators Chuck Grassley and Patrick Leahy shortened the original 180-day statute of limitations to “mollify a group of Republican senators”).

<sup>120</sup> See Earle & Madek, *supra* note 26, at 52 (arguing that there is no policy justification for a ninety-day statute of limitations, particularly if the goal of the statute is to encourage whistleblowers to come forward); Moberly, *supra* note 25, at 132 (“The study’s results indicate that OSHA and ALJs denied large numbers of whistleblowers Sarbanes–Oxley protection because of the restrictive 90-day statute of limitations.”); see also King, *supra* note 26, at 1471 (observing that “ALJs are very firm in enforcing this ninety-day deadline”).

reporting a securities violation to exclude whistleblowers who come forward regarding potential or imminent violations.<sup>121</sup>

### B. Undermining the Lock-In Effect

Dodd–Frank made several amendments to section 806, taking aim at specific problems such as the statute of limitations. The same corrective measures were incorporated into Dodd–Frank section 1057. Section 1057 and amended Sarbanes–Oxley section 806 now include a 180-day statute of limitations.

However, the state of the DOL is probably the most salient change in the current environment for whistleblowers. David Michaels, whom President Obama appointed Assistant Secretary of Labor in charge of OSHA, acknowledged that OSHA’s Whistleblower Protection Program is “clearly not functioning well.”<sup>122</sup> He has since engaged in reforms, including updating the OSHA investigation manual and relocating OSHA within the DOL.<sup>123</sup> Under the new board of the ARB, which was selected by Secretary of Labor Hilda Solis, another President Obama appointee, the restrictive additions to Sarbanes–Oxley section 806 were trimmed away, and plaintiffs are now winning more cases.<sup>124</sup> Sarbanes–Oxley section 806 itself seems to be enjoying a resurgence under the new guard.<sup>125</sup> In 2011, two whistleblowers won a \$2.2 million jury verdict in a section 806 suit.<sup>126</sup> More recently, a former Playboy employee, Catherine Zulfer, collected six million dollars, the largest verdict ever doled out under the provision.<sup>127</sup>

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<sup>121</sup> Moberly, *supra* note 27, at 33.

<sup>122</sup> *Id.* at 40 (quoting Letter from David Michaels, Assistant Sec’y, OSHA, to OSHA Personnel (July 19, 2010), available at [http://www.osha.gov/as/opa/Michaels\\_vision.html](http://www.osha.gov/as/opa/Michaels_vision.html)).

<sup>123</sup> *Id.*

<sup>124</sup> *See id.* at 43 (noting that the new ARB removed the Bush-era requirement that whistleblowers “definitively and specifically” articulate a statement of a material securities violation).

<sup>125</sup> *See generally* Miranda Tolar, *Whistleblower Claims in the Corporate Context: An Employer’s Perspective*, in RECENT DEVELOPMENTS IN WHISTLEBLOWER CLAIMS: LEADING LAWYERS ON ANALYZING POTENTIAL CLAIMS, NAVIGATING RECENT JUDICIAL DECISIONS, AND BUILDING AN EFFECTIVE DEFENSE (Jo Alice Darden ed., 2010) (outlining the recent amendments Congress has made to the Sarbanes–Oxley Act “to provide more protection to corporate employees”).

<sup>126</sup> *See* Van Asdale v. Int’l Game Tech., No. 04-0703, 2011 WL 2118637, at \*1, \*19 (D. Nev. May 24, 2011) (affirming the \$2.2 million jury verdict and ordering the employer to pay an additional \$2.4 million in attorneys’ fees, costs, and prejudgment interest).

<sup>127</sup> Special Verdict Form at 2, *Zulfer v. Playboy Enters., Inc.*, No. 12-8263 (C.D. Cal. Mar. 5, 2014); L.A. Ross, *Playboy Must Pay \$6 Million in Largest Federal Whistleblower Verdict*, CHI. TRIB. (Mar. 6, 2014), [http://articles.chicagotribune.com/2014-03-06/news/chi-playboy-whistleblower-20140306\\_1-whistleblower-jury-playboy-enterprises](http://articles.chicagotribune.com/2014-03-06/news/chi-playboy-whistleblower-20140306_1-whistleblower-jury-playboy-enterprises), archived at <http://perma.cc/34JQ-7HB4> (elaborating on Zulfer’s case against Playboy).

Changes like this would be helpful over the long term—if they stuck. Unfortunately, however, the tweaks reflected in Dodd–Frank’s amendments to Sarbanes–Oxley section 806 are putting out fires instead of preventing them. The overriding lesson of both Sarbanes–Oxley section 806’s pre-amendment futility and the sudden uptick in whistleblowers’ post-amendment success is, as Professor Moberly puts it, that “[w]e should be uneasy that the actions of whoever is in power could so easily determine the success or failure of a whistleblowing system.”<sup>128</sup> Section 1057 still has plenty of hooks from which future ARB board members can hang obstructions, including the requirement that a whistleblower have a reasonable belief that she is reporting a violation of consumer financial law. In short, the DOL exhaustion requirement undoes much of the good that the CFPB’s structure could effectuate in terms of sustained commitment to a whistleblower program.<sup>129</sup>

#### IV. CONSUMER FINANCIAL BOUNTY HUNTERS

Depending on how broad the lesson of Sarbanes–Oxley section 806 sweeps, Congress might be able to adequately incentivize consumer financial whistleblowers by amending Dodd–Frank section 1057. Unfortunately, the obvious “fixes,” such as transferring investigative and adjudicatory authority over section 1057’s administrative process to the CFPB or eliminating the exhaustion requirement entirely, present issues of frivolous litigation and increased administrative costs, respectively.<sup>130</sup> And if, as Professor Rapp

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<sup>128</sup> Moberly, *supra* note 27, at 45.

<sup>129</sup> See Barkow, *supra* note 55, at 51 (“If the executive agency has the authority to veto or dictate the insulated agency’s policies, the other design features of the insulated agency are meaningless because the insulated agency answers to a political entity that shares none of its insulating features.”).

<sup>130</sup> Transferring OSHA’s Dodd–Frank section 1057 investigation responsibilities to the CFPB sounds promising at first blush. Aside from encouraging the CFPB to make further investments in a whistleblower program, transfer would enhance investigative efficiency and competency. As it stands, a key element for protected activity under section 1057 is the employee’s “reasonable belief” that the conduct she reports violated federal consumer financial protection law. Especially if the definition of the UDAAPs banned by the CFPB continues to evolve over time, investigators will need experience with consumer financial law and products in order to do a large part of their job. Even without the reasonable belief requirement, CFPB personnel gain the most synergistic insight from investigating the entities that they regulate, and giving CFPB personnel direct information on these claims streamlines CFPB intervention in appropriate suits, such as where a putative UDAAP is at issue.

The problem with this move, however, is that shifting only *investigatory* responsibility to the CFPB does not fully cordon the DOL’s influence. Because the CFPA is an article of federal consumer financial law and section 1057 is a component of the CFPA and prohibits retaliation in general terms, the CFPB could use its enforcement powers to directly resolve complaints that its



argues, antiretaliation provisions are inherently poor motivators,<sup>131</sup> these costly solutions may not generate corresponding benefits. The better course is to create a Bureau-administered incentive that is less historically dubious than antiretaliation protection: a system for rewarding informants with monetary bounties.

I do not discuss the political feasibility of achieving this reform through legislation here.<sup>132</sup> But, in the absence of congressional action, the CFPB's own rulemaking power offers another possible method of creating a bounty system.<sup>133</sup> After outlining the case for bounties, I discuss the CFPB's

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investigators concluded had merit. *See* 12 U.S.C. § 5567(a) (2012) (“No covered person or service provider shall terminate or in any other way discriminate against . . . any covered employee.” (emphasis added)). However, for other complaints, including false negatives, the appeals process would continue to run through the DOL's ALJs and the ARB. Truly divorcing Dodd–Frank section 1057's exhaustion requirement from the DOL would necessitate not only hiring or transferring a new contingent of CFPB investigators but also creating a whole new adjudicatory system within the CFPB for the sole purpose of resolving section 1057 complaints.

Instead of incurring this substantial expense, Congress could simply eliminate the administrative exhaustion requirement altogether, as it did for claims under the new securities and commodities whistleblower provisions. For examples of statutes without an exhaustion requirement, see 7 U.S.C. § 26 (2012) and 15 U.S.C. § 78u-6 (2012). The chief objection to this approach is that it opens the door to frivolous complaints that the exhaustion requirement sought to address in the first place.

An appropriately designed bounty system can avoid both of these problems with a reformed antiretaliation cause of action. If the CFPB makes the final decision whether to take enforcement action based on a tip, there is no risk of frivolous private litigation. As for costs, whistleblowers themselves can be compensated with a percentage of the recoveries that they precipitate, and the cost of additional CFPB enforcement attorneys pales in comparison to the cost of creating a miniature DOL exclusively dedicated to Dodd–Frank section 1057.

<sup>131</sup> *See* Rapp, *supra* note 92, at 113 (arguing that Sarbanes–Oxley has failed “to generate sufficient incentives for whistleblowers”).

<sup>132</sup> That said, regulated industries and lawmakers who represent their interests should welcome changes that encourage the CFPB to adopt a more reactive approach. Armed with a productive whistleblower program, the CFPB would be more likely to set clear standards through rulemaking rather than murky enforcement and supervisory actions. With more consistent access to inside information, the Bureau would also be more likely to rely on tangible evidence of wrongdoing and less likely to engage in controversial techniques, such as enforcing ECOA by means of undisclosed formulae.

<sup>133</sup> The Bureau also has less dramatic options available for signaling its commitment to Dodd–Frank section 1057, but these measures are fairly unsatisfying. For instance, the CFPB could adopt a policy of exercising its independent authority to enforce section 1057 and use claims that OSHA deems meritless as a jumping-off point for its own investigation. The Chief of the SEC's Office of the Whistleblower has announced his office's intention to directly enforce the antiretaliation provisions connected to its program when it has the opportunity to do so. *See* Rachel Louise Ensign, *Q&A: Sean McKessy, Chief, SEC's Office of the Whistleblower*, WALL ST. J. RISK & COMPLIANCE J. (Sept. 24, 2013, 12:23 PM), <http://blogs.wsj.com/riskandcompliance/2013/09/24/q-a-sean-mckessy-chief-of-the-secs-office-of-the-whistleblower>, archived at <http://perma.cc/EK5T-VRFV> (declaring that the OWB is “actively looking for ways to be proactive in pursuing, under appropriate circumstances, a retaliation claim, either as an add-on to an instance where

rulemaking options and conclude with a brief survey of design concerns that would be relevant to either a legislatively or administratively created program.

### A. *The Argument for CFPB Whistleblower Bounties*

An in-house CFPB bounty program, resembling the regimes under Dodd–Frank sections 748 and 922 for commodities and securities whistleblowers, would provide three principle benefits.

#### 1. Offering an Effective Incentive

First, such a program would ensure a reliable long-term incentive for consumer financial whistleblowers. As outlined above, Dodd–Frank section 1057’s antiretaliation cause of action is the only positive incentive federal law currently offers to encourage such reporting, and its efficacy relies on the DOL, the agency that disarmed section 1057’s closest historical analogue for a decade. Although the CFPB’s insulation does not immunize it from capture by regulated interests,<sup>134</sup> the Bureau is well-built to resist the type

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there was substance to the underlying report, but also if we are given evidence that a person reported to us in good faith and it turned out that they were wrong”).

This tactic would become costly and duplicative in the long run, and may not otherwise be necessary in the immediate future because of the current composition of the DOL. Another, less resource-intensive option would be for the CFPB to harness its existing amicus program and participate in suitable proceedings as *amicus curiae*. See *Amicus Program*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/amicus> (last visited Sept. 6, 2014), *archived at* <http://perma.cc/7JTV-6RU7> (listing all of the cases in which the CFPB participates as a friend of the court and inviting suggestions for cases in which to submit briefs). OSHA has not finalized its rules of procedure for Dodd–Frank section 1057 retaliation complaints, but those rules will likely give the CFPB the right to participate in this way. The analogous rules for complaints under amended Sarbanes–Oxley section 806 give the SEC the right to “participate as a party or as *amicus curiae* at any time in the proceeding” at its discretion. 29 C.F.R. § 1980.108(a)(1) (2014).

Even if the CFPB’s input in some of these cases consists of black letter recitals of consumer financial law, the filings might send a message to the plaintiffs’ bar. Plaintiffs’ attorneys have some motivation to monitor Dodd–Frank section 1057, because the statute provides for fee awards to a successful employee at both the administrative and judicial levels. See 12 U.S.C. § 5567(c)(4)(B)(ii) (2012) (granting fee awards at the administrative level); *id.* § 5567(c)(5)(C) (granting fee awards at the judicial level). But neither amicus briefs nor direct enforcement initiatives signal long-term commitment as reliably as would a schedule of guaranteed bounty payments, and both options require an existing pool of Dodd–Frank section 1057 complaints to use as a starting point.

<sup>134</sup> For example, critics have pointed to Raj Date’s transition from a deputy director position at the CFPB to a mortgage origination startup as a foreshadowing of such troublesome coziness. See Nick Summers, *A Consumer Hero Returns to Wall Street*, BLOOMBERG BUSINESSWEEK (Oct. 17, 2013), <http://www.businessweek.com/articles/2013-10-17/former-cfpb-deputy-raj-date-launches-for-profit-financial-startup>, *archived at* <http://perma.cc/3YT6-QVTD> (considering the implications

of executive influence that compromised DOL's administration of Sarbanes–Oxley section 806.<sup>135</sup> Providing an additional incentive parallel to Dodd–Frank section 1057, but administered by the CFPB, would make consumer financial whistleblowing less likely to wane with shifts in presidential priorities.

## 2. Functional Consolidation

Second, a system that allows the CFPB to distribute financial awards to cooperative consumer financial services employees unites several key facets of the whistleblowing process within a single agency: (1) the motivation for making an initial report, as described in the preceding paragraph; (2) a law enforcer's ability to take remedial action and acquire expertise in directing further investigations of potential violations; and (3) a mechanism for motivating further assistance from informants.

For an illustration of how this consolidation could generate more efficient enforcement, consider the CFPB's November 2013 action against Cash America International, Inc. (CAI).<sup>136</sup> The Bureau discovered that CAI was engaged in robo-signing court documents from debt collection suits; that is, the company ordered its employees to “stamp a lawyer's signature” on materials without reviewing them.<sup>137</sup> The agency went on to extract an additional \$5 million fine after CAI employees confessed that their managers had “coached them on what to say to [CFPB] examiners” and “instructed [them] to shred files and erase calls” while the CFPB examination was pending.<sup>138</sup>

It is not surprising that the CFPB's first public enforcement action against a payday lender was also the first CFPB enforcement action where the subject failed to “comply fully.”<sup>139</sup> CAI is “one of the largest short-term,

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of Washington, D.C.'s revolving door in light of Date's transition from the public to private sector). *But see* David Zaring, *Against Being Against the Revolving Door*, 2013 U. ILL. L. REV. 507, 531 (criticizing abstract antipathy toward law enforcement officials taking private-sector jobs and presenting a study of prosecutors from the U.S. Attorney's Office for the Southern District of New York that indicated no correlation between career success and “laxity on regulated industry”).

<sup>135</sup> See *supra* text accompanying notes 128–132 (discussing how Congress could use the lessons of Sarbanes–Oxley section 806 to amend Dodd–Frank section 1057).

<sup>136</sup> CONSUMER FIN. PROT. BUREAU, *supra* note 46, at 11 (describing the CFPB's enforcement action against CAI).

<sup>137</sup> Danielle Douglas, *Payday Lender Cash America Fined Over Claims of Robo-signing, Gouging Military Members*, WASH. POST (Nov. 20, 2013), available at [http://www.washingtonpost.com/business/economy/cfpb-fines-payday-lender-cashamerica-for-robo-signing-gauging-military-members/2013/11/20/23d31f54-520e-11e3-a7f0-b790929232e1\\_story.html](http://www.washingtonpost.com/business/economy/cfpb-fines-payday-lender-cashamerica-for-robo-signing-gauging-military-members/2013/11/20/23d31f54-520e-11e3-a7f0-b790929232e1_story.html).

<sup>138</sup> *Id.*

<sup>139</sup> CONSUMER FIN. PROT. BUREAU, *supra* note 46, at 12.

small-dollar lenders in the country,<sup>140</sup> yet its internal controls were inadequate at best. For most payday lenders, the CFPB is the company's first taste of not only a federal banking regulator, but of federal supervision in general.<sup>141</sup> Some segments of the market, such as tribal lenders,<sup>142</sup> had previously operated outside of state regulation as well.<sup>143</sup> The CFPB may encounter greater obstinacy from these smaller, newly overseen firms as it continues to address payday lending and to expand its oversight of nonbanks generally. In this environment, where spoliation of evidence is a genuine risk, whistleblowers can provide a valuable pipeline for information that would be ripe for destruction by other internal actors if the Bureau notified the consumer financial services provider of an imminent examination.<sup>144</sup>

Standing alone, antiretaliation protection is a poor tool for convincing employees to go the extra mile and secure evidence for the CFPB. This conduct could expose the employee to numerous vexations, including possible civil or criminal liability for "stealing" the evidence used to prove the employer's wrongdoing.<sup>145</sup> And although a whistleblower's "theft" of

<sup>140</sup> *Id.* at 11. Cash America is also a publicly traded company (NYSE: CSH).

<sup>141</sup> See Cordray, *supra* note 15 (noting that "[s]ince most of these businesses are not used to any federal oversight, [the CFPB's] new supervision program may be a challenge for them").

<sup>142</sup> Together with legitimate tribal businesses, regulators are concerned that unaffiliated payday lenders use so-called "rent-a-tribe" schemes to evade state oversight. See Jessica Silver-Greenberg & Rachel Abrams, *Costly Loans Are Drawing Attention From States*, N.Y. TIMES, Mar. 19, 2014, at B1 (contending that some lenders devise innovative ways to skirt laws); Daniel Wagner, *Six Federal Agencies Are Investigating Online Payday Lenders*, CTR. FOR PUB. INTEGRITY (Aug. 8, 2013, 11:12 AM), <http://www.publicintegrity.org/2013/08/08/13145/six-federal-agencies-are-investigating-online-payday-lenders>, archived at <http://perma.cc/66TR-6C3F> (describing a millionaire motorsport driver's involvement in "rent-a-tribe" arrangements).

<sup>143</sup> Federal consumer protection laws govern tribal businesses. See CAROLYN L. CARTER ET AL., CONSUMER CREDIT REGULATION: CREDIT CARDS, PAYDAY LOANS, AUTO FINANCE AND OTHER NON-MORTGAGE CREDIT § 9.6.3.2a (1st ed. 2013 supp.) ("[Tribal] businesses may not assert sovereign immunity against the United States.").

<sup>144</sup> Cf. *Identity Crisis*, *supra* note 13, at 8 (noting that when the CFPB investigates "relatively small consumer scam[s]" there is a real possibility that the investigation's subjects will "fire up their shredders and wipe their hard drives clean before the CFPB's investigators can collect evidence of the illegal practices"). The author of the BNA Banking Report, Ronald L. Rubin, doubts that "the majority" of the entities that the CFPB investigates are brazen enough to destroy evidence in the face of potential criminal liability for obstruction of justice. *Id.* However, he argues that a CID carries no additional deterrent threat in such circumstances, and "the only way to guarantee document preservation" would be "to have the FBI or some other police force raid [the company's] offices." *Id.* Rubin was writing in the context of the Bureau's skeletal whistleblower program. Improvements to that model, which encourage consumer financial services informants to cooperate with the Bureau by preserving and expropriating evidence, would provide an alternative to the dramatic measures to which Rubin alludes.

<sup>145</sup> Mary Kreiner Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, 76 U. CIN. L. REV. 183, 186 n.19 (2007) (citing TOM DEVINE, THE WHISTLEBLOWER'S SURVIVAL GUIDE: COURAGE WITHOUT MARTYRDOM 28-32, 35-36 (1997)).

nonprivileged, non-trade-secret company documents should be protected activity under Dodd–Frank section 1057 (at least to the extent that a whistleblower acts at the CFPB’s direction), an employee who obtains documents without being discovered by her employer but is later terminated for other protected activity could find her remedies in a subsequent antiretaliation suit limited by the “after-acquired evidence” doctrine.<sup>146</sup> Financial awards incentivize further digging and perseverance in the face of these risks and in the face of management obfuscation generally.<sup>147</sup>

On a related note, a bounty system that rewards whistleblowers for continuing to assist the CFPB could mitigate the difficulties that flow from the rigid bifurcation of the Bureau’s supervisory and enforcement functions. Although the CFPB houses its Office of Supervision and Office of Enforcement within the same division,<sup>148</sup> the terms of the Bureau’s Enforcement Action Process (EAP) ensure that there is “minimal functional overlap” between the two offices.<sup>149</sup> A particularly onerous aspect of the EAP bans “information gathering contact” between Enforcement attorneys and persons not on the Bureau’s payroll until the CFPB begins a formal investigation.<sup>150</sup> Because the Office of Enforcement’s preliminary investigatory options are so limited, the office ends up opening formal investigations with lengthy, unfocused CIDs that inflict “significant legal expenses” on subjects as they scramble to prepare for initial discussions with CFPB staff.<sup>151</sup>

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<sup>146</sup> See DAVID J. MARSHALL & ABIGAIL COOK-MACK, PURLOINED DOCUMENTS, CONFIDENTIAL EMPLOYER DATA, AND COUNTERCLAIMS IN WHISTLEBLOWER RETALIATION CASES 22 (2013), available at <http://www.kmblegal.com/publications/purloined-documents-confidential-employer-data-and-counterclaims-in-whistleblower-retaliation-cases-2> (noting that “[g]enerally, neither reinstatement nor front pay is considered [an] appropriate [remedy]” when an employer later discovers evidence of misconduct, such as purloining confidential documents, that would have justified terminating the employee “if it had been discovered at the time [the misconduct] occurred”).

<sup>147</sup> See Rapp, *supra* note 95, at 136 (arguing that, although Enron’s management was able to “block[]” concerned employees in the absence of a “financial incentive [for the employees] to go public,” a system of monetary awards “offers incentives for whistleblowers to persist even in the face of deliberate efforts by fraudsters to suppress information about fraudulent activity”).

<sup>148</sup> That division is known as the Supervision, Enforcement, and Fair Lending Division (SEFL). See *Identity Crisis*, *supra* note 13, at 1 (describing the organizational structure of the CFPB).

<sup>149</sup> See *id.* at 4 (attributing this result to tension between the “examination model” familiar to those who head the Office of Supervision, and the litigation-centric approach of the CFPB’s senior Office of Enforcement staff, who are veterans of the FTC’s Bureau of Consumer Protection).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 5; see also 12 C.F.R. § 1080.6(c) (2014) (requiring the recipient of a CID and Bureau staff to “meet and confer” no more than ten days after the receipt of the CID).

Whistleblowers, however, are exempt from the EAP's restriction on pre-investigation contact with extra-agency sources.<sup>152</sup> The more information the Office of Enforcement can convince whistleblowers to gather and divulge, the less the office's target selection suffers from its disconnect with the Office of Supervision. Formal investigations can open with narrowly tailored CIDs to which recipients can respond at a more measured pace, without wasting resources on needless production. Furthermore, whistleblowers can also expose violations of federal consumer financial law committed by entities that are not subject to CFPB supervision. While the Bureau has the authority to punish these entities,<sup>153</sup> it often has no mechanism to detect their violations, aside from consumer complaints.

### 3. Shaping Compliance Culture

In addition to highlighting the evidence-gathering advantages whistleblowers can offer, the Cash America action also points to the third important benefit of a CFPB bounty system: spurring the development of a compliant culture in segments of the Bureau's enforcement roster that are unacquainted with government oversight. This benefit, however, comes hand-in-hand with two serious arguments against bounty programs.

First, critics of the SEC's Dodd-Frank bounty program worry that offering a monetary reward for original information will lead to an influx of spurious or underdeveloped tips, forcing the agency to divert resources to screening these unhelpful complaints. As Professors Casey and Niblett suggest, the SEC's Dodd-Frank whistleblower program responds to a nonexistent problem: the SEC already received a tremendous number of private complaints before implementing the program, and, according to the professors, using bounties to attract *more* information ignores the real goal of attracting *higher quality* information.<sup>154</sup>

Casey and Niblett's argument may be a valid critique of the SEC's program, but it is less damning when applied to a hypothetical CFPB

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<sup>152</sup> See *Identity Crisis*, *supra* note 13, at 4-5 (pointing out that the Office of Enforcement can gather information from whistleblowers and consumers before instituting formal proceedings).

<sup>153</sup> See 12 U.S.C. § 5563(a) (2012) (authorizing CFPB to conduct hearings and adjudication proceedings against "any person" who violates federal consumer financial law); *id.* § 5564(a) (authorizing the CFPB to take the same steps when bringing civil actions); see also *Identity Crisis*, *supra* note 13, at 3 (noting that like the SEC Enforcement Division, "CFPB Enforcement conducts a high volume of investigations of individuals or businesses that are not subject to the Bureau's supervisory oversight").

<sup>154</sup> See Casey & Niblett, *supra* note 11, at 1207 ("Encouraging whistle-blowing by allowing anonymous reporting to the SEC without substituting in other costs[ ] will encourage weaker information, resulting in information overload for the regulator.").

regime. In terms of complainant interest without bounties, the two agencies stand on very different footing: the SEC is an American institution that celebrated its eightieth birthday in June 2014, whereas the CFPB is a “start-up”<sup>155</sup> that turned three in July 2014.<sup>156</sup> Although the Bureau has succeeded in attracting a high volume of consumer complaints,<sup>157</sup> there is no evidence of comparably vigorous reporting from consumer financial services insiders.<sup>158</sup> Left unbalanced, reliance on outsider complaints will push the CFPB away from enforcement of fraud-like violations that involve significant information asymmetries and toward practices akin to its controversial “disparate impact” approach to fair lending under the ECOA.<sup>159</sup> The idea that a bounty system incentivizes the production of underdeveloped tips, rather than motivating whistleblowers to collect *more* quality information, necessarily depends on the specifics of that system.<sup>160</sup> The Bureau’s system should focus on rewarding whistleblowers for gathering substantiating evidence and deemphasize the importance of convincing the Bureau to open an investigation. Requiring more investigative work from whistleblowers as a prerequisite to larger bounty awards would move the CFPB’s program closer to the balance of incentives that Professors Casey and Niblett suggest.

More generally speaking, there is a dearth of empirical support for the intuition that “having stronger monetary incentives to blow the whistle

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<sup>155</sup> See DePillis, *supra* note 30 (explaining how the CFPB “was designed as a Google-era regulator: a data-obsessed start-up, forever iterating, laser-focused on the safety of consumers rather than the soundness of banks”).

<sup>156</sup> See *We’re 732 Days Old: Here’s What We’ve Been Up to*, CONSUMER FIN. PROT. BUREAU (July 22, 2013), <http://www.consumerfinance.gov/blog/hbd>, archived at <http://perma.cc/73W8-P82M> (listing the CFPB’s accomplishments as of its second birthday).

<sup>157</sup> See CONSUMER FIN. PROT. BUREAU, CONSUMER RESPONSE ANNUAL REPORT: JANUARY 1–DECEMBER 31, 2013 6 (2014), available at [http://files.consumerfinance.gov/f/201403\\_cfpb\\_consumer-response-annual-report-complaints.pdf](http://files.consumerfinance.gov/f/201403_cfpb_consumer-response-annual-report-complaints.pdf) (“Since beginning to accept complaints [on] July 21, 2011 through February 28, 2014, the CFPB has handled approximately 309,700 consumer complaints. Complaint volume has steadily increased, rising 80% from 91,000 in 2012 to 163,700 in 2013.”). In evaluating this statistical trend, it is important to note that the Bureau has been periodically opening new categories of products to consumer complaints throughout the relevant time period. See *id.* (plotting the dates on which the CFPB opened various consumer financial product categories to customer complaints, from credit cards on July 21, 2011, to payday loans on November 6, 2013).

<sup>158</sup> See *supra* Section III.B (discussing changes for whistleblowers after the implementation of Dodd–Frank section 1057).

<sup>159</sup> Letter from Jeb Hensarling, *supra* note 85, at 2; see also Casey & Niblett, *supra* note 11, at 1175 (arguing that an agency’s inability to identify high-quality whistleblower tips may “shift enforcement to other types of cases with less information asymmetry”).

<sup>160</sup> Indeed, Professors Casey and Niblett do not object to whistleblower bounties across the board; they simply argue that a qui tam mechanism balances incentives better than a model that requires only contacting law enforcement. Casey & Niblett, *supra* note 11, at 1211.

leads to more frivolous [enforcement].”<sup>161</sup> Even if offering bounties requires the CFPB to allocate more resources toward implementing screening measures—such as devising a procedure for cross-checking tips against consumer complaints, reworking the Bureau’s approach to CIDS, or even establishing a whistleblower unit within the Office of Enforcement—this allocation will have salutary consequences. One key difference between the SEC’s nearly-silent Insider Trading and Securities Fraud Enforcement Act (ITSFEA) program<sup>162</sup> and its so-far-bustling<sup>163</sup> Dodd–Frank program is that Dodd–Frank “institutionalized whistleblowing in the agency by creating an Office of the Whistleblower.”<sup>164</sup> Agency responsiveness is the best incentive for informants to report. To the extent that sunk costs, reassigned staff, and earmarked funds nudge the Bureau toward continued attention to consumer financial informants, they bolster the Bureau’s reputation among consumer financial services employees and the plaintiffs’ bar as an enforcer to whom it is worth reporting.<sup>165</sup>

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<sup>161</sup> Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd–Frank Act*, 2012 BYU L. REV. 73, 123 (citing Dyck et al., *supra* note 11, at 2246). Professor Rapp bases this conclusion on Dyck and his coauthors’ finding that, despite the lure of False Claims Act bounty awards, healthcare whistleblowers lodge fewer frivolous claims than whistleblowers in other industries. *Id.*; see also SEC OFFICE OF INSPECTOR GEN. OFFICE OF AUDITS, REP. NO. 511, EVALUATION OF THE SEC’S WHISTLEBLOWER PROGRAM 23 (2013), available at <http://www.sec.gov/about/offices/oig/reports/audits/2013/511.pdf> (stating that agency staff responsible for administering existing federal whistleblower programs “were not particularly concerned that award levels could induce illegitimate claims since they were confident their review process would weed out illegitimate claims through independent corroboration of asserted facts”).

<sup>162</sup> See Castellina, *supra* note 109, at 188 (“Prior to the passage of the Dodd–Frank Act, the SEC had a bounty program for informants who provided the SEC with tips regarding insider trading.”).

<sup>163</sup> See OWB ANNUAL REPORT, *supra* note 82, at 8 (observing that the Commission received over 3000 whistleblower complaints in fiscal year 2013, as compared to just over 300 complaints in fiscal year 2011).

<sup>164</sup> Moberly, *supra* note 27, at 52 (citation omitted).

<sup>165</sup> Committing resources to follow up on whistleblower tips does not need to entail an undue limit on the discretionary, line-drawing enforcement activities for which the CFPB has exhibited a taste. To the extent that the CFPB is unwilling to take away too many resources from policy-oriented enforcement, it has a mechanism available to outsource the work. Dodd–Frank empowers state attorneys general to enforce the statutes the CFPB administers. CARTER ET AL., *supra* note 49, § 13.2.6. Cooperation with state attorneys general has been a hallmark of the CFPB’s early enforcement and supervisory actions, and there is no reason that should change in the context of a whistleblower program. See, e.g., Press Release, Consumer Fin. Prot. Bureau, Federal Consumer Agency to Partner with State Regulators on Supervision of Providers of Consumer Financial Products and Services, Including Mortgage Lenders, Private Student Lenders and Payday Lenders (Jan. 4, 2011), available at <http://www.consumerfinance.gov/newsroom/consumer-agency-to-partner-with-state-regulators> (discussing the Memorandum of



The second pertinent argument against whistleblower bounties also relates to responsiveness—in this case, the employer’s responsiveness, not that of law enforcement. Commentators fear that whistleblowers racing to cash in on “original” information will run directly to the agency, rather than reporting a problem to management or to the company’s own compliance personnel.<sup>166</sup> Consequently, companies will have no reason to invest in their own compliance programs.<sup>167</sup>

This argument has intuitive resonance, but one could present a competing story. Bounties might foster, rather than discourage, investment in internal controls.<sup>168</sup> Preliminary evidence related to the SEC’s program supports this hypothesis.<sup>169</sup>

Existing research on whistleblower motivation<sup>170</sup> indicates that (1) the threat of whistleblowers circumventing responsive compliance programs is low, and (2) bounties can nonetheless pressure companies to invest in these programs. Informants usually act out of a desire to correct misconduct, and although there is potential for retaliation, they tend to report concerns internally before going to the government.<sup>171</sup> The most common reason whistleblowers forego internal channels such as company hotlines is because

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Understanding signed by federal and state regulators establishing coordination and cooperation for supervision of consumer financial service providers).

<sup>166</sup> See, e.g., Patrick Gnazzo & Joseph Murphy, *Summary: An Insider Perspective on Whistleblower Programs* (articulating the fear of “[m]any in the corporate community” that “employees will circumvent internal reporting channels in a race to obtain bounties”), in *FOR WHOM THE WHISTLE BLOWS: ADVANCING CORPORATE COMPLIANCE AND INTEGRITY EFFORTS IN THE ERA OF DODD–FRANK 10*, 10 (Michael D. Greenberg ed., 2011).

<sup>167</sup> *Id.*

<sup>168</sup> See Iskra Miralem, Comment, *The SEC’s Whistleblower Program and Its Effect on Internal Compliance Programs*, 62 *CASE W. RES. L. REV.* 329, 332 (2011) (predicting that the bounty program’s short-term interference with extant compliance mechanisms will improve those mechanisms in the long run). This is the type of behavior that the CFPB is seeking to encourage from regulated entities.

<sup>169</sup> See Moberly, *supra* note 27, at 53 (describing “early evidence indicat[ing] that corporations have strengthened their internal systems out of fear that [Dodd–Frank section 922’s] financial rewards will entice employees to report to the SEC”).

<sup>170</sup> For a summary of the existing research, see *supra* note 169 and *infra* notes 171–172.

<sup>171</sup> See, e.g., ETHICS RES. CTR., *BLOWING THE WHISTLE ON WORKPLACE MISCONDUCT 5* (2010), available at <http://www.ethics.org/files/u5/WhistleblowerWP.pdf> (describing National Business Ethics Survey data relating to whistleblowing between 2000 and 2009, which showed that only four percent of employees who reported wrongdoing contacted someone outside of the company before reporting internally); Aaron S. Kesselheim et al., *Whistle-Blowers’ Experiences in Fraud Litigation Against Pharmaceutical Companies*, 362 *NEW ENG. J. MED.* 1832, 1837 (2010) (surveying several unsealed federal qui tam cases against pharmaceutical manufacturers from 2001 to 2009 and finding that “[g]enerally, whistle-blowers’ first move was to try to address problems internally”).

they do not believe their report will be treated seriously.<sup>172</sup> If companies take meaningful steps to investigate reports, few employees will expose themselves to the social and professional repercussions that attend external whistleblowing without attempting to raise the matter in-house.

Nonetheless, Professors Feldman and Lobel's research into whistleblowing incentives indicates that people *suspect others are most likely to blow the whistle* in return for money.<sup>173</sup> If consumer financial products companies believe their employees are inclined to pursue bounties, they have a stark financial incentive to invest in internal reporting channels that employees take seriously enough to use—channels which will reliably relay employee tips to upper management because CFPB policy proscribes leniency for self-reported violations.<sup>174</sup> In this context—and possibly in the securities fraud context as well—a bounty system is best understood as a means of influencing corporate governance, not just as an enforcement tool.<sup>175</sup>

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<sup>172</sup> See GNAZZO & MURPHY, *supra* note 166, at 10 (“[T]he most important impediment to internal reporting by employees tends to be the perception that nobody is really listening.”).

<sup>173</sup> See Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1202-03 (2010) (“In the absence of a legal duty to report, the introduction of a higher financial reward is perceived to have the greatest impact on the reporting behavior of others . . . [and respondents] predicted that bounties would lead to significantly higher whistleblowing activity for nonpeers.”).

<sup>174</sup> See CONSUMER FIN. PROT. BUREAU, CFPB BULL. NO. 2013-06 REASONABLE BUSINESS CONDUCT: SELF-POLICING, SELF-REPORTING, REMEDIATION, AND COOPERATION 2-5 (2013) (indicating that the Bureau will take into account many factors, including a party's self-policing, self-reporting, remediation, and cooperation, when assessing penalties against that party). To date, the most prominent “whistleblower” that the CFPB's Office of Enforcement has publically is a Connecticut mortgage lender, 1st Alliance Lending, LLC. See *generally* Consent Order, 1st Alliance Lending, LLC, No. 2014-CFPB-0003 (Feb. 24, 2014), 2014 WL 3685991. 1st Alliance not only admitted its own culpability for splitting unearned fees in contravention of RESPA section 8(b), it also disclosed the identity of the hedge fund that was its counterparty in the illegal arrangements. *Id.* at 3-4. 1st Alliance paid an \$83,000 penalty, or \$1000 for each loan connected to a split origination or loss-mitigation fee. *Id.* at 4. Gauging the leniency of this penalty is difficult without knowing the size of the fees involved, but RESPA does provide for fines of up to \$10,000 dollars per violation, as well as damages “equal to three times the amount of any charge paid for such settlement service.” See 12 U.S.C. § 2607(d)(1)-(2) (2012).

Although the CFPB bulletin and consent order do not explain what prompted 1st Alliance to come forward, this is the type of behavior in which a company can be convinced to engage when employees and affiliates blow the whistle internally.

<sup>175</sup> See, e.g., *Is Your Company Ready for the New Whistleblower Rules?*, TO THE POINT (PricewaterhouseCoopers, LLP, Del.), Summer 2011, at 1, 4, available at <http://www.pwc.com/us/en/corporate-governance/assets/to-the-point-summer-2011.pdf> (counseling that the best response to the SEC's Dodd-Frank section 922 program consists of a public company's audit committee captaining adjustments to company culture, hotlines, investigation action plans, and compliance department staffing); cf. Rapp, *supra* note 9, at 62 (calling for the cultivation of internal whistleblowers as a standard feature of American companies, because whistleblowers' information “help[s] ensure more effective management of business firms,” which is “a classic objective of ‘corporate governance’” (internal citations omitted)).

The discipline whistleblower bounties impose on compliance programs is particularly valuable in the consumer financial services arena, where ubiquitous mandatory arbitration agreements coupled with class-arbitration waivers impede private litigation.<sup>176</sup> The CFPB has the authority to ban mandatory arbitration agreements in contracts for consumer financial services.<sup>177</sup> Proponents of consumer financial services arbitration agreements argue that banning them would be a drastic misstep. In support of this argument, they point both to the rise of “consumer-friendly features”<sup>178</sup> in such agreements, such as company-footed arbitration bills, that arguably “make arbitration more beneficial to the consumer than court litigation”<sup>179</sup> and to the economic benefits these agreements provide for consumer financial products companies by facilitating “streamlined proceedings, informality, [and] reduced cost.”<sup>180</sup> A bounty program offers one way to compensate for arbitration agreements’ potential to slow the evolution of compliance programs in the consumer financial services industry without sacrificing the efficiencies that mandatory arbitration can generate for consumer financial service providers and their customers.

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<sup>176</sup> In many industries, private litigation is a key driver of compliance development. *See, e.g.,* Sharon Finegan, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law*, 111 PENN ST. L. REV. 625, 657 (2007) (exploring the increasing role of private settlements in dictating corporate compliance programs, particularly in the healthcare industry). However, because creditors fear punitive damages, costly discovery, and damaging publicity, “[m]andatory arbitration provisions are nearly universal in consumer credit contracts.” *See* CAROLYN L. CARTER ET AL., CONSUMER CREDIT REGULATION: CREDIT CARDS, PAYDAY LOANS, AUTO FINANCE AND OTHER NON-MORTGAGE CREDIT § 7.4.1 (1st ed. 2012).

Recent Supreme Court decisions have bolstered mandatory arbitration agreements by affirming companies’ rights to contractually bar customers from arbitrating their claims as a class. In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Court dealt a “*coup de grace . . .* to consumer class actions” by upholding a class arbitration waiver in the face of a California precedent that declared mandatory arbitration agreements containing such provisions categorically unconscionable. Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 627 (2012). By a 5-4 count, the Court found that the Federal Arbitration Act preempted California’s rule. *Concepcion*, 131 S. Ct. at 1753; *see also* *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) (rejecting the argument that class arbitration waivers could be unenforceable on a case-by-case basis where they make vindicating the customer’s federal statutory rights impractically expensive).

<sup>177</sup> Before banning mandatory arbitration agreements, the Bureau must conduct a study of such agreements and present its findings to Congress. 12 U.S.C. § 5518(a)-(b) (2012). *See generally* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS: SECTION 1028(A) STUDY RESULTS TO DATE (2013), available at [http://files.consumerfinance.gov/f/201312\\_cfpb\\_arbitration-study-preliminary-results.pdf](http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf).

<sup>178</sup> Alan S. Kaplinsky & Mark J. Levin, *Consumer Financial Services Arbitration: What Does the Future Hold After Concepcion?*, 8 J. BUS. & TECH. L. 345, 346 (2013).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 357.

This line of reasoning leads to, and answers, a question that arose regarding the SEC and CFTC programs:<sup>181</sup> should the CFPB make whistleblowers ineligible for a bounty unless they first report internally, in order to ensure that companies' investments in compliance programs do not go in vain?<sup>182</sup> If part of bounties' effectiveness at attracting investment in internal compliance programs derives from the need to build employees' confidence in those programs, such a requirement would undercut the very purpose of a bounty program.

Questions about the prerequisites for receiving a bounty relate to the creation and design of a CFPB program, which the rest of this Comment discusses.

### B. Implementing a CFPB Bounty Rule

Relative to its bureaucratic ancestors, the CFPB has "efficient and straightforward" rulemaking power.<sup>183</sup> The Consumer Financial Protection Act authorizes the director of the Bureau to "prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof."<sup>184</sup> Under this broad delegation of legislative authority, the Bureau has several avenues for promulgating whistleblower bounty regulations.

The ideal approach would be to guarantee the whistleblower an adjustable percentage of any civil penalties the CFPB assesses in reliance on information provided by the whistleblower. The Bureau could accomplish this by amending its Civil Penalty Fund Rule to allocate the first ten to thirty percent of penalties the Bureau imposes to whistleblowers who provide information or other assistance integral to the underlying enforcement action.<sup>185</sup>

The CFPA created the Civil Penalty Fund (CPF), which collects the proceeds of civil penalties received by the Bureau and distributes "payments to the victims of activities for which civil penalties have been imposed

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<sup>181</sup> For a further description of this question, see Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,300-01 (June 13, 2011) (codified at 17 C.F.R. pts. 240, 249 (2014)) (noting that "[c]ommenters were sharply divided on the issues raised by" the "interplay of the whistleblower program and company internal compliance processes").

<sup>182</sup> For a summary of the SEC's response to this issue, see *infra* note 230.

<sup>183</sup> See Dee Pridgen, *Sea Changes in Consumer Financial Protection: Stronger Agency and Stronger Laws*, 13 WYO. L. REV. 405, 414 (2013) (comparing rulemaking authority of the CFPB to that of the FTC).

<sup>184</sup> 12 U.S.C. § 5512(b)(1) (2012).

<sup>185</sup> See 12 C.F.R. § 1075.104 (2014) (codifying the CFPB's current Civil Penalty Fund rule).

under the Federal consumer financial laws.”<sup>186</sup> The Bureau’s current rule generally requires the CPF’s administrator to direct money toward injured consumers for “uncompensated harm,” where feasible.<sup>187</sup>

This rule demonstrates the breadth of discretion Congress granted the CFPB in distributing civil penalty proceeds. Most saliently, in promulgating the CPF rule, the Bureau necessarily subordinated the interests of some injured consumers to the interests of others. For example, in a period where uncompensated consumer harm exceeds available CPF reserves, the administrator must pay the most recently harmed class of consumers first.<sup>188</sup> But this rule also makes a less obvious judgment call about how to order the interests of “victims.” The CFPA simply permits the Bureau to make “payments” to anyone “victim[ized]” by a violation of federal consumer financial law that provokes a civil penalty.<sup>189</sup> Nothing in the statutory language limits the Bureau to paying victimized *consumers*, nor does the statute confine CPF payments to the amount of a victim’s uncompensated harm.

The CFPA’s definitions section does not define “victim.”<sup>190</sup> Dictionary definitions of the term encompass anyone harmed by a given action.<sup>191</sup> Under this reading of the term, employee whistleblowers are “victims” of the federal consumer financial violations they report in at least two senses.

First, violations expose a company to liability,<sup>192</sup> which works to the detriment of all of the company’s employees through layoffs, liquidation, or other potentially adverse consequences. The harm may be more attenuated in certain situations than in others, but, again, the CFPA’s terms empower the Bureau to *pay* victims from the CPF, not to make them whole or

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<sup>186</sup> 12 U.S.C. § 5497(d)(2) (2012). The statute also allows the Bureau to use the CPF for sponsoring “consumer education and financial literacy programs” where “victims cannot be located or [paying victims is] otherwise not practicable.” *Id.*

<sup>187</sup> See 12 C.F.R. § 1075.106 (2014) (governing the allocation of funds to victims).

<sup>188</sup> *Id.* § 1075.106(b)(1).

<sup>189</sup> 12 U.S.C. § 5497(d)(2) (2012).

<sup>190</sup> *Id.* § 5481. The current CPF rule defines victims eligible for payments from the Fund as those “harmed” by a “violation or violations” for which “a final order in a Bureau enforcement action imposed a civil penalty.” 12 C.F.R. § 1075.103 (2014).

<sup>191</sup> Merriam-Webster offers numerous definitions of “victim.” Two of these focus on the subject being “cheated or fooled” or “tricked or duped,” which more closely fits consumers in this context. *Victim*, MERRIAM-WEBSTER (last visited Jan. 15, 2015), <http://www.merriam-webster.com/dictionary/victim>, archived at <http://perma.cc/7FV3-TEZ3>. However, other definitions sweep much wider: “a person who has been . . . injured . . . by someone else,” “someone . . . that is harmed by an unpleasant event,” “one that is acted on and usually adversely affected by a force,” and “one that is injured . . . under any of various conditions.” *Id.*

<sup>192</sup> At the point where the Bureau divvies up new fines in the CPF, the company or its insurer has already incurred the CFPB penalty’s cost.

provide restitution.<sup>193</sup> The CFPA also omits any express requirement of materiality or proximate causation.<sup>194</sup>

Second, the vast majority of whistleblowers face retaliation from their employers, and almost all experience painful psychological and social repercussions.<sup>195</sup> Congress recognized this fact in Dodd–Frank section 1057. Again, there is room for debate about what extent the company’s legal violation “causes” this type of harm if the statute does not impose an affirmative duty to report, but the Bureau has a colorable position.

Although the argument for revising the CPF rule to treat whistleblowers as “victims” may not be overwhelmingly persuasive, courts should afford the Bureau some leeway because it is interpreting an ambiguous and undefined term in a statute it administers.<sup>196</sup> If consumer financial service providers challenge the revised rule as arbitrary and capricious under the Administrative Procedure Act (APA), the Bureau’s legal conclusion should be entitled to *Chevron* deference.<sup>197</sup> This standard of review is, in theory,

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<sup>193</sup> See generally 12 U.S.C. § 5497(d) (2012).

<sup>194</sup> The clearest argument for causation arises in connection with smaller entities, large-scale illegality, or in situations where employees hold company stock. Serious violations of federal consumer financial law could bring about penalties large enough to shut down a business or force it to make layoffs, potentially costing an internal whistleblower her job. At a smaller firm, the same results could follow from more modest penalties. And at larger, publicly traded businesses, an enforcement action—or the investing public’s reaction to the announcement of the action or the underlying illegal conduct—could reduce the company’s value, thereby injuring employee–stockholders.

<sup>195</sup> See *Legislative Proposals to Address the Negative Consequence of the Dodd–Frank Whistleblower Provisions: Hearing Before the Subcomm. on Capital Mkts. & Gov’t Sponsored Enters. of the H. Comm. on Fin. Servs.*, 112th Cong. 59 (2011) (statement of Geoffrey Christopher Rapp, Professor of Law, Univ. of Toledo College of Law) (describing employer retaliation and other consequences faced by whistleblowers, including “severe social ostracism” and “personal hardship”).

<sup>196</sup> If the CFPB concludes that this argument is too tenuous, one alternative would be to draw whistleblower bounties from other sources of recovery available to the CFPB that do not share civil penalties’ express restrictions on the disposition of the funds procured. The CPFA grants the Bureau a wide range of remedies, including disgorgement, money damages, and “other monetary relief.” 12 U.S.C. § 5565(a)(2) (2012). Although the practice of using these funds to pay whistleblower bounties stands in tension with the reparative purpose of remedies such as disgorgement, the SEC’s efforts to stretch disgorgement beyond its equitable roots have received judicial acceptance. See Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, 4 HARV. BUS. L. REV. ONLINE 1, 12 (2013), <http://www.hblr.org/?p=3528>, archived at <http://perma.cc/7W2E-6DNJ> (arguing that disgorgement often functions as “a legal remedy akin to a simple money judgment” in SEC enforcement cases).

<sup>197</sup> See *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359, 366 (D.C. Cir. 2014) (articulating the *Chevron* test which provides that when a statute is “silent or ambiguous with respect to a specific issue at hand” the agency “may exercise its reasonable discretion in construing the statute” (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984))). For *Chevron* purposes, “[a] statute is considered ambiguous if it can be read more than one way.” *AFL–CIO v. FEC*, 333 F.3d 168, 173 (D.C. Cir. 2003) (citations omitted).

highly deferential, although empirical studies cast doubt on whether *Chevron's* application actually leads to more courts upholding agency interpretations.<sup>198</sup> Whether the court treats the CFPB's rule revision under *Chevron's* laissez-faire mandate or under some more strict species of reasonableness review, the reading of the CFPB's organic statute at issue here furthers a cogent policy goal in keeping with the Bureau's mission to "prevent evasions" of federal consumer financial law<sup>199</sup> and its objective of consistent enforcement.<sup>200</sup> Section 1057 expresses a congressional desire for the CFPB to foster consumer financial services whistleblowing,<sup>201</sup> and data from the SEC's OWB demonstrates that financial awards tied to law enforcement recoveries are an effective way to attract more informants.<sup>202</sup>

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*Chevron* deference is inappropriate when an agency's interpretation does not produce a reasonable policy result. *Chevron*, 467 U.S. at 845. Opponents to a consumer financial whistleblower bounty program may argue that such a program unreasonably circumvents the DOL's place in Dodd-Frank's statutory scheme. Here, although CFPB-administered bounties do, in a very broad sense, reduce the Bureau's reliance on the DOL, they do not truly undercut the DOL's role in the Dodd-Frank framework. Under Dodd-Frank section 1057, just as under Sarbanes-Oxley section 806, the DOL serves as a gatekeeper over private litigation and a watchdog for whistleblowers with retaliation complaints. Neither of these purposes is usurped or diminished by adding another incentive for employees to blow the whistle in the first place. If more whistleblowers come forward, perhaps more will suffer retaliation and thereby increase OSHA's responsibilities, but the same is true of any step that the Bureau takes to encourage informants. For example, few would accuse the CFPB of overreaching when it added dedicated channels for tips.

<sup>198</sup> See David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 173-76 (2010) (finding that agency interpretations prevailed 64-73% of the time when courts claimed to be applying *Chevron*); see also Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 85 (2011) (consolidating studies and finding 60-81.3% affirmance rate under *Chevron*).

<sup>199</sup> 12 U.S.C. § 5512(b)(1) (2012).

<sup>200</sup> See *id.* § 5511(a)-(b) (outlining the CFPB's purpose and objectives).

<sup>201</sup> See *id.* § 5567(a)(1) (protecting employees' provision of information to the Bureau by prohibiting retaliation against whistleblowers in general terms); *id.* § 5567(d) (rendering such employee rights unwaivable and immune to mandatory arbitration agreements). The statute's lack of a legislatively mandated bounty mechanism, such as those in Dodd-Frank sections 728 and 922, merely reflects Congress's decision not to micromanage the resources of an agency that is much newer than the CFTC or SEC and which has not yet demonstrated the type of inattention to whistleblowers that would necessitate institutionalization similar to that by the OWB or WBO. Note that the statute did not even require the Bureau to erect the minimal whistleblower infrastructure, namely a hotline and dedicated e-mail address, that the CFPB has chosen to institute thus far. See *id.* § 5512(c)(4)(B) (merely stating that the Bureau "may gather and compile information from a variety of sources, including examination reports concerning covered persons or service providers, consumer complaints, voluntary surveys and voluntary interviews of consumers, surveys and interviews with covered persons and service providers, and review of available databases" (emphasis added), but not requiring the Bureau to adopt a particular methodology of information gathering). That is, Dodd-Frank section 1057 protects reporting but leaves the means of facilitating such reports up to the Bureau's discretion.

<sup>202</sup> See OWB ANNUAL REPORT, *supra* note 82, at 8 (reporting a 7.9% increase in the volume of whistleblower tips between fiscal year 2012 to fiscal year 2013).

Before judicial review becomes an issue, though, the Bureau's rulemakings must satisfy the CFPA's special procedural requirements. Generally, these requirements resemble the standard notice-and-comment obligations that the APA imposes on any informal rulemaking.<sup>203</sup> For example, although the CFPB does not need to submit rules to OIRA, it must conduct its own cost-benefit analysis of the proposed rule's impact on both "covered persons" and consumers.<sup>204</sup> As part of this analysis, the CFPA directs the Bureau to assess the rule's potential to reduce consumers' access to consumer financial products<sup>205</sup>—a result which is unlikely to follow from a rule that facilitates a more reactive CFPB enforcement strategy, as opposed to prohibiting new categories of activity—and the rule's impact on rural consumers,<sup>206</sup> which should not be pronounced in this instance.

Similarly, the CFPA instructs the Bureau to confer with the prudential regulators "regarding [a proposed rule's] consistency with prudential, market, or systemic objectives,"<sup>207</sup> but if a regulator presents a written objection, all the Bureau must do is include an explanation of the regulator's concern and of the Bureau's decision in the rule's adopting release.<sup>208</sup>

After satisfying these modest requirements, however, the CFPB faces a final hurdle that is at least theoretically more daunting: the Financial Stability Oversight Council (FSOC) can veto CFPB rules.<sup>209</sup> In a paper published shortly after Dodd-Frank's enactment, Professor Barkow observed that this "veto threat appear[ed] to be the greatest limit on the [Bureau's] independence."<sup>210</sup> This label made sense at the time, given that "[m]ost of [FSOC's voting] members have a long history of favoring the

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<sup>203</sup> See 5 U.S.C. § 553 (2012) (establishing procedures for informal rulemaking). Although this Comment proposes a rule amendment rather than an altogether new rule, a whistleblower system is not a "logical outgrowth" of the originally proposed CPF rule, so the Bureau will need to renounce the change. See *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 533 (D.C. Cir. 1982) ("An agency adopting final rules that differ from its proposed rules is required to renounce when the changes are so major that the original notice did not adequately frame the subjects for discussion.")

<sup>204</sup> 12 U.S.C. § 5512(b)(2)(A)(i) (2012).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* § 5512(b)(2)(A)(ii).

<sup>207</sup> *Id.* § 5512(b)(2)(B).

<sup>208</sup> *Id.* § 5512(b)(2)(C). In addition to these front-end constraints, "significant" CFPB rules also require a second round of review within five years of their effective date. *Id.* § 5512(d)(1)-(2). The Bureau must provide another opportunity to comment and suggest modifications to the rule during this review. *Id.* § 5512(d)(3). Following the comment period, the Bureau must publish a report reflecting its assessment of reasonably available evidence as it relates to "relevant factors," including the rule's "effectiveness . . . in meeting the purposes and objectives [of the CFPA] and the specific goals stated by the Bureau." *Id.* § 5512(d)(1).

<sup>209</sup> See *id.* § 5513(c)(3)(A) (providing for FSOC veto by a two-thirds vote).

<sup>210</sup> Barkow, *supra* note 55, at 78.



industries they are charged with regulating.”<sup>211</sup> For example, the Secretary of the Treasury chairs the Council, and its other nine voting members include, along with the director of the CFPB and an independent insurance expert<sup>212</sup> appointed by the president: the chairpersons of the CFTC, Federal Reserve, FDIC, NCUA, and SEC; the Comptroller of the Currency; and the director of the FHFA.<sup>213</sup>

To exercise its veto power, the FSOC must conclude by a two-thirds vote that the rule in question “put[s] the safety and soundness of the *United States banking system* or the stability of the *financial system of the United States* at risk.”<sup>214</sup> This is a challenging standard; indeed, its stringency has been the target of recent House of Representatives bills seeking to increase oversight of the CFPB.<sup>215</sup> As a U.S. Chamber of Commerce representative pointed out at a Senate Committee on Banking, Housing, and Urban Affairs hearing regarding such legislation, “rules that threaten the safety and soundness of some financial institutions, or even an entire sector of the financial system, but do not arise to the level of posing a systemic risk, would not appear to qualify” for a veto by the FSOC.<sup>216</sup>

Concluding that reinforcing Dodd–Frank section 1057’s incentive structure for consumer financial whistleblowers with bounties poses a systemic risk to American banking or finance requires some mental stretching. But if the CFPB believed that FSOC review seriously imperiled its whistleblower bounty rule, it could make a veto even more difficult to justify by exempting

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<sup>211</sup> *Id.* at 75; see also Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183, 213 (2013) (“[C]ritics of the veto are concerned that many of the FSOC’s members share a common pro-banking industry bias.” (citing *Enhanced Consumer Financial Protection After the Financial Crisis: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 112th Cong. 13–15 (2011) (statement of Adam J. Levitin, Professor of Law, Georgetown University Law Center) [hereinafter *Enhanced Consumer Financial Protection*])).

<sup>212</sup> President Obama appointed S. Roy Woodall, Jr., the former General Counsel and Insurance Commissioner of Kentucky, to this post in May 2011. *S. Roy Woodall, Jr.*, U.S. DEPT’ T TREASURY, [http://www.treasury.gov/initiatives/fsoc/about/council/Pages/roy\\_woodall.aspx](http://www.treasury.gov/initiatives/fsoc/about/council/Pages/roy_woodall.aspx) (last updated Oct. 23, 2012, 9:53 AM), archived at <http://perma.cc/4H5X-XCJK>.

<sup>213</sup> 12 U.S.C. § 5321(b)(1) (2012).

<sup>214</sup> *Id.* § 5513(a), (c)(3)(A) (emphasis added).

<sup>215</sup> See Alec C. Covington, Note, *Fighting Yesterday’s Battles: Proposed Changes to the Consumer Financial Protection Bureau*, 16 N.C. BANKING INST. 299, 306–07 (2012) (citing bills proposing modifications of the CFPB, including the Consumer Financial Protection Safety and Soundness Improvement Act, H.R. 1315, 112th Cong. (2011), and the Communities First Act, H.R. 1697, 112th Cong. (2011)).

<sup>216</sup> *Enhanced Consumer Financial Protection*, 112th Cong. 90–91 (2011) (statement of Andrew J. Pincus, U.S. Chamber of Commerce); see also *id.* (arguing that FSOC “review authority is unlikely to place any meaningful constraint on the CFPB” and is “essentially illusory”).

employees of very large depositories, as defined by the CFPA,<sup>217</sup> and systematically important (nondepository) financial intuitions (SIFIs), as designated by the Council, from bounty eligibility.<sup>218</sup> Bounties add less value at such institutions, which are more heavily supervised and have been historically accustomed to regulation, than at the more distant corners of the CFPB's enforcement sphere where supervision is more rare and compliance programs less developed.

### C. Design Concerns

In fashioning a whistleblower bounty rule, or enacting new whistleblower legislation, the drafters should use the SEC's program under Dodd-Frank section 922 as a model and award informants a variable percentage of any recovery that the Bureau achieves in reliance on their information. A system that relies on the agency to bring enforcement actions, such as the new SEC program, is preferable to a *qui tam* mechanism that allows whistleblowers to sue on the government's behalf inasmuch as the CFPB seeks to retain some ability to make policy through enforcement actions. Additionally, although *qui tam* systems can provide a desirable check on an agency with a proclivity for ignoring tips, the CFPB's structure already facilitates the consistent pursuit of relevant information.

As for the percentage of the Bureau's recovery that should be paid to a successful informant, the guiding principle should be incentivizing whistleblowers to continue cooperating and investigating after contacting the CFPB and after encountering resistance from management or coworkers.<sup>219</sup>

One consequence of this strategy is that the Bureau will need a wide range of permissible award percentages so that it can increase compensation for informants who go the extra mile to preserve evidence or conduct further research. The ten to thirty percent guaranteed by the other two

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<sup>217</sup> See 12 U.S.C. § 5515 (2012) (referring to insured depository institutions and credit unions with assets of more than ten billion dollars as "very large banks, savings associations, and credit unions").

<sup>218</sup> See *State Nat'l Bank of Big Spring v. Lew*, 958 F. Supp. 2d 127, 135 (D.D.C. 2013) (explaining FSOC's authority to designate an institution as a SIFI, where "material financial distress at the U.S. nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the U.S. nonbank financial company, could pose a threat to the financial stability of the United States" (quoting 12 U.S.C. § 5323 (a)(1) (2012))).

<sup>219</sup> For a discussion of the benefits that accompany this approach, see *supra* subsection IV.A.2. This goal does not require changing the Bureau's policy of allowing whistleblowers to remain anonymous, even if they fail to retain an attorney that the Bureau can contact; informants whose cooperation can be driven by cash will voluntarily identify themselves in the hopes of being able to claim an award later.

Dodd–Frank programs is a sensible range and would be an easy number for the Bureau to defend against judicial or FSOC review by pointing to Dodd–Frank sections 748 and 922. If the Bureau or Congress wanted to limit the amount of money diverted from direct consumer recompense, it could lower the ceiling from thirty percent to the FCA’s minimum of twenty-five percent for cases in which the government intervenes.<sup>220</sup> Dropping the cap further to the IRS program’s minimum of fifteen percent is inadvisable, because in cases with modest but significant recoveries, such as the minimum one million dollars required to trigger award eligibility under Dodd–Frank sections 728 and 922, the five percent gap between a minimum award and a maximum award may represent less than \$100,000.<sup>221</sup>

In other respects, the goal of encouraging whistleblowers to develop their tips counsels against mimicking the Dodd–Frank section 922 regime. The SEC’s process for determining the amount of an individual informant’s award depends on seven nonweighted factors, including “the degree of assistance” a whistleblower provides the SEC in its investigation,<sup>222</sup> the “significance of the information provided,”<sup>223</sup> the timeliness of the whistle-

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<sup>220</sup> See EVALUATION OF THE SEC’S WHISTLEBLOWER PROGRAM, *supra* note 161, at 24 tbl.5 (comparing the range of permissible whistleblower award amounts, based on a percentage of the funds the agency recovers, among the SEC, CFTC, IRS, and DOJ regimes).

<sup>221</sup> Professors Feldman and Lobel found that “low rewards” of \$1000 are inefficient incentives and may even discourage whistleblowers, whereas “high reward[s]” of \$100,000 are far more effective. See Feldman & Lobel, *supra* note 173, at 1190-92. Continuing with the example of a \$1 million base recovery, because the professors’ study does not demonstrate that a \$50,000 award is guaranteed to be ineffectual, further empirical study of whistleblower motivation could shed more light on the question. See EVALUATION OF THE SEC’S WHISTLEBLOWER PROGRAM, *supra* note 161, at 22 (“[F]ew empirical studies have been done on how monetary award levels influence whistleblowing behavior.”). However, \$50,000 is unlikely to provide sufficient incentive for a potential whistleblower to come forward, considering the long-term damage that blowing the whistle tends to inflict on informants’ careers. See *id.* at 23 (“[H]igh rewards can motivate potential whistleblowers to come forward because the monetary amount may mitigate the cost of professional and social sanctions that can result.”). By comparison, the DOL found in 2012 that the median annual wage for U.S. loan officers was about \$60,000. See U.S. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, 2014-15 EDITION: LOAN OFFICERS, available at <http://www.bls.gov/ooh/business-and-financial/loan-officers.htm>.

One way to deal with the problem of making available only a narrow range of possible rewards, while still maintaining a low cap, would be to eliminate the ten percent floor. However, no similar federal whistleblower regime, namely those operated by the SEC, CFTC, IRS, and DOJ, guarantees awards of less than ten percent. See EVALUATION OF THE SEC’S WHISTLEBLOWER PROGRAM, *supra* note 161, at 24 tbl.5. The same concerns that weigh against a five percent spread between the minimum and maximum suggest that a five percent minimum may be ineffectual and that a meaningful award floor is a key component of a whistleblower bounty system. *Id.* at 22-23 (paraphrasing the chief of the OWB’s opinion that a “guaranteed award amount mitigates the risk to whistleblowers’ employment prospects or reputation”).

<sup>222</sup> 17 C.F.R. § 240.21F-6(a)(2) (2014).

<sup>223</sup> *Id.* § 240.21F-6(a)(1).

blower's initial report,<sup>224</sup> and the whistleblower's interaction with the company's "internal compliance systems."<sup>225</sup> According to the chief of the SEC's whistleblower office, the Commission has not applied this complicated formula through "mathematical, scientific, [or] step-by-step process[es]."<sup>226</sup>

How can a system as rife with *ex ante* uncertainty as the SEC's convince an employee to engage in any of the activities that the system's component factors aim to encourage? Instead, the CFPB should determine awards based solely on the extent of the assistance a whistleblower provides. This single criterion impounds, to a degree, the considerations behind the SEC's "significance of the information provided" factor;<sup>227</sup> it also does away with the unnecessary<sup>228</sup> attempt to make award amounts play a role in convincing whistleblowers to report internally.<sup>229</sup>

Finally, the Bureau's program should depart from its sisters' incorporation of a minimum recovery requirement for award eligibility.<sup>230</sup> An agency-centric model, as opposed to one predicated on *qui tam* suits, allows the Bureau ultimate discretion over whether to pursue a tip. Once the Bureau has enough information to believe it is investigating an inconsequential violation, it can simply stop investigating. Conversely, if the tip initially seems important enough that the Bureau decides it is worth following up with an enforcement action, there is no reason to penalize the whistleblower for reporting what appeared to be valuable information.

## CONCLUSION

A well-designed system of bounty awards for consumer financial whistleblowers would further the CFPB's objectives by enhancing the

<sup>224</sup> *Id.* § 240.21F-6(2)(ii).

<sup>225</sup> *Id.*

<sup>226</sup> *See* Ensign, *supra* note 133.

<sup>227</sup> 17 C.F.R. § 240.21F-6(a)(1) (2014).

<sup>228</sup> *See supra* notes 173-175 and accompanying text.

<sup>229</sup> Confronted by widespread concern over a bounty program's potential to undermine companies' existing compliance departments, the SEC has made several changes to its rules. *See* 76 Fed. Reg. 34,300, 34,300-01 (2011) (codified at 17 C.F.R. pts. 240, 249 (2014)) (explaining the inclusion of regulatory mechanisms designed to foster internal reporting). Although the Commission rejected comments urging it to *require* that whistleblowers report malfeasance to the company before contacting the agency, it decided to include "whether, and the extent to which, a whistleblower assisted any internal investigation or inquiry concerning the reported securities violations," 17 C.F.R. § 240.21F-6(a)(4)(ii) (2014), as one of many factors that may increase an award, and a whistleblower's interference with internal reporting systems as a factor that may decrease an award. *Id.* § 240.21F-6(b)(3).

<sup>230</sup> Both the CFTC and SEC programs require a total of at least one million dollars in monetary sanctions before entitling whistleblowers to a share. 7 U.S.C. § 26(a)(1), (b)(1) (2012); 15 U.S.C. § 78u-6(a)(1), (b)(1) (2012).

Bureau's enforcement capabilities—especially to the extent that those capabilities are divorced from the Bureau's supervisory functions—and by accelerating the growth of compliance programs at consumer financial services companies unaccustomed to regulatory oversight. The system could also benefit consumer financial service providers by encouraging the Bureau to undertake less policy-making enforcement, as opposed to following insider evidence and using rulemaking to set clear standards under which whistleblowers can confidently report. The Bureau might even have one less reason to ban mandatory arbitration agreements in consumer financial contracts, because the threat of whistleblowers could correct for the limitations such agreements place on private litigation as a motive for companies to invest in compliance. But even if consumer financial product providers react poorly to the idea of a government agency paying their employees to rat on them, a CFPB rulemaking implementing this idea stands a fighting chance of surviving FSOC and judicial review. Either Congress or the Bureau should exercise its lawmaking power to ensure that whistleblowers have a reliable incentive to report infringements of federal consumer financial law, now and in the future.