Comments of

Americans for Financial Reform

Center for Responsible Lending

The Consumer Federation of America

National Community Reinvestment Coalition

National Consumer Law Center (on Behalf of Its Low-Income Clients)

U.S. PIRG

May 14, 2018

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2018-0003; Document Number: 2018-05784--Request for Information Regarding Bureau Enforcement Processes

Ms. Jackson:

The comments below are submitted in response to the Consumer Financial Protection Bureau's Request for Information ("RFI") Regarding the Bureau Civil Investigative Demands and Associated Processes (Docket No. CFPB-2018-003) on behalf of the undersigned advocacy groups. All of the signatories are joined together by their long history of protecting and defending the rights of consumers through education, advocacy, policy, research, and litigation. Our organizations address a wide variety of consumer issues and have extensive knowledge of the consumer needs addressed by the Consumer Financial Protection Bureau ("CFPB"), the statutes the CFPB enforces, and the work the agency has accomplished.

A. Overview

Congress created the CFPB in the wake of the financial crisis that caused the Great Recession. As part of this reform, "Congress saw a need for an agency to help restore public confidence in markets: a regulator attentive to individuals and families. So, it established the Consumer Financial Protection

Bureau."[1] Congress gave the agency both power to improve financial markets for consumers and autonomy to guarantee the agency "the authority and accountability to ensure that existing consumer protection laws and regulations are comprehensive, fair, and vigorously enforced."[2] Since its establishment, the CFPB effectively has used its authority and accountability to serve the public interest. The CFPB's supervision and enforcement actions alone resulted in nearly $12 billion in ordered relief for more than 29 million consumers victimized by unlawful activity.[3]

A central lesson of the financial crisis was that federal regulatory agencies must firmly police financial institutions that may engage in deceptive practices.[4] On this point, the U.S. Financial Crisis Inquiry Commission concluded that in the run up to the crisis, regulators failed to enforce the law because of their "belief[] that regulation was unduly burdensome, that financial institutions were capable of self-regulation, and that regulators should not interfere with activities reported as profitable."[5] Congress responded to this fairly by creating a consumer protection agency with the mandate to pursue an assertive and firm law enforcement program. With the Dodd-Frank Act, as Senator Cardin put it, Congress aimed to "create a consumer bureau … that will be on the side of the consumer, that is independent, so the consumer is represented in the financial structure."[6]

Our organizations believe that the Bureau's enforcement processes should emphasize:

- the flexibility for career enforcement staff to efficiently and effectively bring resources to bear in enforcing the law;
- promoting quick investigations but not at the expense of closing investigations that in the natural course of events require additional time to hold businesses and individuals accountable for violating the law;
- providing robust consumer restitution that fully compensates consumers for illegal activity;
- providing civil money penalties that deter illegal conduct;
- preserving the independence of the Bureau enforcement staff from political and lobbying pressure; and,
- leading in enforcement efforts to stop illegal activity that will otherwise cause serious harm to the American people.

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1 PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 77 (D.C. Cir. 2018).
2 H.R. Rep. No. 111-517, at 874 (2010) (Conf. Rep.); *see generally PHH*, 881 F.3d at 77.
3 Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau: By the Numbers (July 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_by-the-numbers.pdf; Zixta Q. Martinez, *Six Years Serving You*, Consumer Fin. Prot. Bureau (July 21, 2017), https://www.consumerfinance.gov/about-us/blog/six-years-serving-you/.
4 FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT, at 308 (2011).
5 *Id.*
6 156 Cong. Rec. S5870, 5871 (daily ed. July 15, 2010).

B. Specific questions raised in the RFI concerning the CFPB's discretion in the use of its CID and investigatory authority.

1. Communication between the Bureau and the subjects of investigations, including the timing and frequency of those communications, and information provided by the Bureau on the status of its investigation.

We believe the current rules, policies and procedures for Bureau communication with investigation subjects are sufficient to allow Bureau management to control the enforcement process consistent with its enforcement priorities. We are unaware of any federal enforcement agencies that have adopted a regulation that prescribes how enforcement staff are to communicate with investigation subjects. Instead, communication with subjects as a general matter is controlled by a variety of other considerations including enforcement staff's ethical obligations under state bar licensing rules, the Federal Rules of Civil Procedure or the Bureau's Rules for Administrative Adjudication, court orders, and common norms of professional conduct and courtesy.

It will be difficult and likely counter-productive to micromanage enforcement staff's communication with investigation subjects and litigation defendants. Staff need the flexibility to respond to a broad variety of different covered persons, service providers, and individuals. Successful communication with a large money center bank may require different tactics than communication with a sole-proprietorship. Communication with investigation subjects that are cooperating with an investigation may require different style of communication than that with subjects who are delaying, dissembling, or concealing evidence. Enforcement staff must be careful to not allow communication with investigation subjects to devolve into attempts by the subject to lobby for special treatment, favors, or policy changes. Some litigation counsel may attempt to use communication with Bureau enforcement attorneys to undermine enforcement cases by converting enforcement staff into fact witnesses. Enforcement staff should remain focused on communication that effectuates the goal of enforcing consumer financial services laws.

Indeed, in some circumstances, enforcement staff must remain free to minimize communication in ways that are consistent with administration of justice and the legitimate goals of law enforcement. For example, in rare occasions the Bureau may need to bring *ex parte* temporary restraining orders to seize assets from defendants that are likely to hide illegally obtained funds. The courts have long-standing experience in determining when such a remedy is appropriate. And enforcement staff must have the flexibility to request this type of procedure from a federal judge without revealing plans to uncooperative subjects. Similarly, the Dodd-Frank Act requires that the enforcement staff send criminal referrals to the Department of Justice whenever the Bureau uncovers evidence of criminal activity. Bureau staff must have the flexibility to constrain communication in a way that would not interfere with the ability of the Federal Bureau of Investigation or the United States Postal Inspection Service to gather evidence of crimes. The Bureau's communication policies must also remain flexible enough to accommodate simultaneous investigations running parallel to criminal prosecutions.[7]

[7] CONSUMER FIN. PROTECTION BUREAU, OFF. OF ENFORCEMENT, POLICIES AND PROCEDURES MANUAL VERSION 3.0 37 (2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-

Neither the laws of the United States nor the Bureau's enforcement communication obligations should be interpreted in a way that hinders the legitimate law enforcement efforts the public has every right to expect.

Bureau leadership should also bear in mind that requiring additional communication from enforcement staff to investigation subjects will come with an opportunity cost. Because the Bureau's enforcement personnel hours are inherently limited, time spent communicating with enforcement investigation subjects inevitably means less time spent taking testimony in investigational hearings or drafting civil investigative demands, pleadings, legal memoranda, or other internal reports. Bureau leaders should not modify management style or policies and procedures in a way that squanders scarce law enforcement resources by engaging in unnecessary or dilatory communication. Bureau leaders should not create an overly formal set of communication procedures that could spawn motions or litigation about minor issues that should be worked out informally. The undersigned groups do not support changes that ease the investigatory burden on businesses at the expense of consumer financial safety and welfare.

Bureau leaders should also be careful not to generalize from anecdotes in industry submitted comments. Some comments are likely to be submitted by disgruntled businesses or individuals that have lost Bureau enforcement cases. These comments should be viewed with caution. The United States government should not change its law enforcement policies based on the views of those that have been found to have violated federal law. We urge the Bureau to preserve flexibility in communications with investigation subjects and work to empower career enforcement staff to do their jobs in an effective way.

Moreover, effective communication regarding enforcement actions should also include communication with the public and ordinary families about Bureau law enforcement. In previous years when the Bureau announced an enforcement action, the Bureau issued a press release summarizing the case and in higher profile matters the Director or a senior enforcement manager from the Enforcement Office would invite the media to a press call to answer questions. These steps were an appropriate method of helping prevent confusion, setting expectations, and informing the public about the operation of their government. Since Acting Director Mulvaney took control, the Bureau has announced only one public enforcement action. In this case, the Bureau did not engage with the press, forcing journalists to scramble to gather information. The press still wrote stories about the case, but we believe journalists were more likely to turn to uninformed sources of information and engage in speculation. The only document the Bureau released in that matter was a consent order. Release of enforcement action consent orders is necessary, but by itself it is insufficient to allow the public to understand law enforcement settlements. Consent orders are technical documents that can confuse the press and the public. Without a press release, press call, or other communication, journalists covering the Bureau's enforcement actions are more likely to make mistakes, follow false leads, and misinform the public. Failing to summarize the case and answer questions also allows the defendant to shape and control its own message—potentially blunting the deterrent effect of the enforcement action and facilitating a public misapprehension of the defendant's illegal activities. We

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and-procedures-memo_version-3.0.pdf [hereinafter "POLICIES AND PROCEDURES MANUAL VERSION 3.0"]. *See* also United States v. Stringer, 521 F.3d 1189, 1191 (9th Cir. 2008) ("There is nothing improper about the government undertaking simultaneous criminal and civil investigations…").

urge the Bureau's leadership to recognize that public communication about enforcement is itself an important feature of the Bureau's enforcement process.

2. The length of Bureau investigations.

The undersigned groups believe that enforcement investigations should proceed as promptly as possible in order to provide a remedy to harmed consumers and deter illegal activity. However, in our view it is equally important that investigations should not be closed, hindered, or second-guessed merely because an investigation, in the natural course of events, takes more time than expected. Some investigations require inquiries to be made in steps, building upon each other as the first step provides facts needed to move on to the next stage. Each step along the way can present logistical hurdles, communication challenges, and legal disputes. Sometimes unexpected, important evidence can emerge late in an investigation requiring many of the same steps taken earlier in a case to be repeated in order to provide legally appropriate restitution to harmed consumers. Our organizations support prompt law enforcement investigations, but not at the cost of absolving wrongdoers of accountability for illegal acts that hurt American families.

The Bureau should also refuse to speed up investigations by cutting corners in charging individual persons with illegal activity. A central lesson of the Great Recession was that individuals working within a company can have profoundly different financial incentives than the business itself.[8] The Financial Crisis Inquiry Commission found that individuals within many banks and consumer financial services business had incentive-based compensation that encouraged illegal activity.[9] This recognition helped spur Congress to create specific new provisions in the Dodd-Frank Act that allow the Bureau to charge individual defendants with violating consumer financial laws. The statute provides two different types of individual liability: either as a "related person," or where an individual provided "substantial assistance" to a covered person committing a UDAAP violation. In some cases, enforcement staff need the flexibility and time to develop evidence showing an individual's *mens rea* which can necessitate additional discovery. Through 2016, the Bureau charged individual defendants with violating the law in about 30 percent of its cases.[10] Cases charging individual defendants have been much less likely to settle because individual defendants fight more aggressively to prevent personal losses. Our organizations believe that investigations and litigation that seek to hold individuals accountable are likely to require additional time and resources. Nevertheless, we believe that existing Bureau policies and procedure are up to the task of individuals accountable for their illegal activity provided that staff have the support of Bureau leadership.

The duration of an investigation should not be used as a lever to close the investigation because subjects themselves have significant control over how long an investigation will take. If the Bureau were to adopt some sort of timeframe that would put pressure on Bureau staff to justify or close an investigation after the period of time elapses, then subjects would have an incentive to slow-walk their cooperation with the Bureau staff in order to "run out the clock." Enforcement Office management

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[8] FIN. CRISIS INQUIRY COMM'N, *supra* note 4, at 78.
[9] *Id.*
[10] Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TUL. L. REV. 5, 1080 (2016).

should create high expectations that Bureau investigations will move forward quickly. But career professional staff should have flexibility, discretion, and support from management in determining the necessary length of investigations to promote justice.

Some financial services businesses have reported anecdotally in recent years that CFPB investigations have taken somewhat longer than investigations at other federal regulators. In our view this is to be expected for a variety of reasons. Consumer financial services practice is relatively complex. Many of the Bureau's cases have been very large matters requiring extensive, technical discovery. And during the early years of the Bureau's enforcement program, the Bureau, investigation subjects, and the courts have been working through many issues of first impression that take extra time to resolve. Some growing pains in the creation of a new federal law enforcement agency are inevitable and, in our view, are not indicative of a problem with the agency's staff or policies and procedures. Bureau leadership should bear in mind that some commenters may use this RFI to air private grievances and anecdotes arising from their own cases in which they were held liable for breaking the law. Bureau leadership should seek out and listen to Bureau staff members that are likely to have an informed, alternative view of past enforcement matters.

3. The Bureau's Notice and Opportunity to Respond and Advise process, including:

a. CFPB Bulletin 2011-04, Notice and Opportunity to Respond and Advise (NORA), issued November 7, 2011 (updated January 18, 2012) including whether invocation of the NORA process should be mandatory rather than discretionary; and

b. The information contained in the letters that the Bureau may send to subjects of potential enforcement actions pursuant to the NORA process.

Our organizations believe the Bureau's NORA process should continue to be discretionary. The Enforcement Office's policies and procedures manual currently provides that "[t]he NORA process should be used in most cases when Staff expects to recommend a lawsuit, but Staff have discretion to forego the process, with approval from the Enforcement Deputy, if there is a valid reason to do so."[11] The CFPB's NORA standards are loosely based on the SEC's "Wells" notices. In our experience the vast majority of Bureau defendants have received a NORA notice in past years. Caselaw is clear that the Bureau has the authority to forego NORA notices entirely.[12] Consistent with existing policy, we believe that those defendants that did not receive a NORA notice did not receive it for valid reasons.

In our view, the Bureau needs the flexibility to forgo the NORA process where there is a risk that the investigation subject may respond to a NORA notice by hiding assets, concealing evidence, or avoiding service of process. Moreover, it is foreseeable that under the right circumstances enforcement office staff and management may reasonably feel confident that delaying enforcement for a NORA process may not serve the interests of justice because it could be likely to simply increase the attorney's

11 POLICIES AND PROCEDURES MANUAL VERSION 3.0 at 94.

12 *See, e.g.,* Consumer Fin. Protection Bureau v. Nationwide Biweekly Administration Inc., No. 15-cv-02106-RS, slip op. at 9 (N.D. Cal. May 23, 2016).

fees paid by the subject and delay restitution to the public. Indeed, some defendants may prefer not to respond to a NORA notice because they are concerned about the potential for their response to be used as impeachment material or an admission against interest either in the Bureau's case or in a subsequent related criminal prosecution or private civil litigation.[13] If the Bureau anticipates that the NORA process will be unproductive because counsel for the subject is unlikely to provide a response of any substance, then enforcement staff might reasonably dispense with a NORA notice. The Bureau might also simply conclude that time is of the essence and the benefits of a discretionary NORA process are outweighed by the consequences of delay. In our view existing NORA procedures strike a reasonable balance between fairness to investigation subjects and protection of American families. The informal, discretionary framework of the NORA process allows the Bureau to retain its ability to respond to unlawful conduct in a timely fashion.

Moreover, we believe the Bureau should not extend NORA timeframes or revise NORA procedures in a way that would create further delay. Current procedures give a default NORA response time of 14 days.[14] While our organizations understand that attorneys representing investigation subjects often want more time to craft arguments (and generate billable hours) in advance of a suit, every day of delay in prosecuting enforcement cases can come at the expense of financial harm to the public. Moreover, existing procedures already contemplate that investigation subjects may request deviation from the informal NORA timeframe and process by submitting a request in writing.[15] The Enforcement Office Policies and Procedures Manual contemplates that supervisors may from time to time exercise their discretion to facilitate a departure from standard informal procedures when appropriate.[16] Our organizations believe the existing policies provide sufficient time for a meaningful opportunity to respond and advise and the right method to request an extension where appropriate.

The Bureau should also not revise its policies to require more detailed written NORA notices. Under current policies the substance of Bureau's notice is provided in a call, rather than in a written notice. Current policies instruct staff to send a letter to the subject's counsel memorializing logistics of the NORA process such as the date on which the response is due and page and font limitations on the subject's response. The purpose of the NORA letter is simply to memorialize the Bureau's invitation to the subject to submit a written statement in response to the Bureau's NORA disclosures. The sample NORA letter currently in use by Bureau staff accomplishes this objective and does not need modification.

Furthermore, we believe that the Bureau should not change the purpose of this letter to include providing written description of the charges the Bureau may pursue against the subject. Every defendant in a CFPB enforcement action is already entitled to detailed notice of the claims against them—this is the purpose of notice of charges documents in administrative adjudications and complaints in federal court. It is a waste of time and resources to force the enforcement office's

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13 *See, e.g.,* John J. Carney & Francesca M. Harker, *Benefits and Dangers of an SEC Wells Submission*, Law360, December 17, 2009 ("[T]he careful SEC defense counsel has to ponder whether a Wells submission intended to be a shield against an unfounded enforcement action could wind up being a sword used against their own client.").

14 POLICIES AND PROCEDURES MANUAL VERSION 3.0 at 91.

15 *Id.*

16 *Id.*

professional staff to create a "pre-complaint." Actual liability is determined in court or an administrative adjudication—institutions with robust procedures, rules, and appeals all designed to protect defendants' rights. The NORA process should not be formalized to create a "mini-court" in advance of actual adjudication. Rather NORA should remain entirely subject to prosecutorial discretion, quickly completed, and informally flexible in application.

With respect to substantive NORA disclosures, existing policies and procedures provide sufficient guidance to enforcement staff on what information should be provided to investigation subjects in NORA calls. The Policies and Procedures Manual provides the following ten-point list on what staff should disclose in a NORA call:

> 1. The Office of Enforcement is considering recommending or intends to recommend that the Bureau file an action or proceeding against the Person;
> 2. Identification of the charges Staff is considering recommending to the Director, including the specific laws Staff believes were violated, a general description of the violative conduct, and any other information necessary to make the NORA meaningful;
> 3. A general description of the types of relief, remedies, and penalties available to the Bureau in the contemplated action;
> 4. The NORA recipient has the opportunity to provide a voluntary statement explaining why the Bureau should not bring an action against them;
> 5. The deadline for notifying the Office of Enforcement of the Person's intention to make a NORA submission (the deadline should generally be seven days after the initial NORA notification, but it may be extended at our discretion);
> 6. The deadline for submitting the NORA materials (the deadline should generally be 14 days after the initial NORA notice, but it may be extended or shortened at our discretion);
> 7. The restrictions/guidelines for NORA submissions, including their length (the length should be no more than 40 pages, but it may be expanded at our discretion) and the requirement that any factual assertions relied upon or presented in the written statement must be made under oath by someone with personal knowledge of such facts;
> 8. The NORA submission will be provided to the Director together with any request for authority to sue;
> 9. Instructions regarding the Office of Enforcement staff member to whom the NORA submission should be sent, including that staff member's email and mailing address; and
> 10. Any NORA submission may be used by the Bureau in any action or proceeding that it brings and may be discoverable by third parties in accordance with applicable law.[17]

[17] *Id.* at 96.

This list of discussion topics for a NORA call strikes the appropriate balance between assisting enforcement staff in providing sufficient detail and the risk of unproductively micromanaging the content of meetings. The Enforcement Office is responsible for bringing a broad variety of enforcement cases against many different types of defendants. Enforcement staff need flexibility in the amount of detail they share in NORA meetings. Attempting to further standardize NORA meetings in pursuit of a one-size-fits-all approach is unlikely to provide meaningful assistance to investigation subjects and is counterproductive to the administration of justice.

4. Whether the Bureau should afford subjects of potential enforcement actions the right to make an in-person presentation to Bureau personnel prior to the Bureau determining whether it should initiate legal proceedings.

The Bureau should not provide investigation subjects with a formal right to make in-person presentations to Bureau personnel prior to initiating legal proceedings. The NORA process already provides the great majority of defendants an opportunity to submit a detailed, forty-page argument on why the Bureau should not sue. An in-person presentation requirement would go well beyond the SEC's pre-suit Wells notification procedures. Providing in-person presentations as a right would unnecessarily slow down the investigation process because of the time and effort required to assemble the necessary people to travel to and hold an in-person presentation instead of the usual NORA phone call. These meetings are unlikely to shed additional light beyond the existing NORA process, will raise costs for the Bureau as well as investigation subjects and will distract Bureau staff from other pressing responsibilities. In the meantime, consumers may continue to be harmed by violations of enumerated statutes or unfair, deceptive, and abusive practices.

Moreover, investigation subjects already have ample opportunity to engage in settlement discussions with the Bureau. Like all practicing attorneys, Bureau enforcement staff are required under professional rules of ethics to convey to their client plausible settlement offers.[18] By their very nature, settlement discussions inevitably revolve around the merits of each party's potential claims and defenses. Nothing in the existing policies and procedures prevents subjects from meeting with individual enforcement attorneys. Bureau enforcement staff can always, at their discretion, listen to the feedback, arguments, and questions of opposing counsel. If defendants in some past cases report that Bureau staff were unwilling to meet, the most plausible explanation is that in the professional judgment of Bureau staff such a meeting was not likely to be productive. Bureau leaders should be reluctant to second guess this professional judgment by burdening investigations with unnecessary red-tape. Some subjects may misuse meetings with Bureau staff to waste time, create needless correspondence and demand useless concessions, extensions, or other special favors.

Our organizations especially oppose requiring meetings with senior Enforcement Office managers or Bureau leaders in advance of filing a public action. A meeting requirement of this type would create a

[18] *See* AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.4 cmt. 2 (2106) ("For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer.").

bottleneck slowing the process of enforcing the law and distracting senior staff from their existing duties. Moreover, requiring a meeting of this type could undermine the credibility and authority of front-line enforcement staff. If investigation subjects know that they are guaranteed the right to make an in-person presentation directly to a senior level Bureau leader, they will be far more likely to disregard the views of front line staff. Many defendants will delay settlement, preferring to revisit substantive issues and even raise discovery grievances before senior leadership. This will spread the Bureau's already limited enforcement resources more thinly and place unrealistic burdens on senior leaders. Because existing policies and procedures already afford investigation subjects sufficient opportunities to communicate with enforcement staff in advance of litigation, our organizations oppose the creation of a formal in-person meeting requirement.

5. The calculation of civil money penalties, consistent with the penalty amounts and mitigating factors set out in 12 U.S.C. 5565(c), including whether the Bureau should adopt a civil money penalty matrix, and, if it does adopt such a matrix, what that matrix should include.

The undersigned groups believe the Bureau should not adopt a civil money penalty matrix. The Dodd-Frank Act requires that the Bureau consider the following factors in determining the appropriate size of a civil money penalty:

(A) the size of financial resources and good faith of the person charged;

(B) the gravity of the violation or failure to pay;

(C) the severity of the risks to or losses of the consumer, which may take into account the number of products or services sold or provided;

(D) the history of previous violations; and

(E) such other matters as justice may require.[19]

The statute itself does not provide for a civil money penalty matrix. Congress could have, if it had chosen to, included a matrix in the statute. Indeed, if Congress had wanted a matrix, it could have based such a matrix on the Office of the Comptroller of the Currency's matrix. Alternatively, Congress could have directed the Bureau to come up with a matrix and then issue a regulation establishing the matrix based on guidelines in the statute.[20] Instead, Congress chose to provide a list of factors and empower the Bureau's staff and the courts to set appropriate penalties on a case-by-case basis. The humbler approach to implementing Congressional intent would not graft a rigid, one-size-fits-all quasi-mathematical formula on top of the factors chosen by Congress.

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[19] 12 U.S.C. § 5565(c)(3).

[20] By way of contrast, Congress has explicitly tasked the United States Sentencing Commission with creating a set of sentencing guidelines for imposing prison and probation sentences on convicted defendants in criminal cases. *See, e.g.*, UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING: THE BASICS (August 2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf.

As a policy matter, case-by-case applications of factors adopted by Congress is superior to a CMP matrix. From the perspective of investigation subjects, a rigid matrix could risk over-penalizing some defendants where flexibility suggests a lesser penalty. However, we believe that counsel for defendants in CFPB enforcement actions are likely to use a matrix to complicate settlement negotiations and push Bureau staff to reduce CMPs overall. The Bureau should not reduce its leverage or minimize the potential for penalties of a sufficient size to deter repeat violations. In negotiating CMP settlement agreements on behalf of the public, the Bureau staff should "think big," "maximize their options," and "use [their] existing leverage."[21] Adopting a CMP matrix would tie the hands of Bureau staff in negotiations, leaving them less capable of "fight[ing] back" for harmed families against financial services companies that have violated federal law.[22]

Furthermore, to the extent that there is some heuristic benefit in the use of a matrix, the Bureau's enforcement staff have already captured that benefit by adopting a policy allowing staff to consider the OCC's matrix in formulating CMP awards. Specifically, the Office of Enforcement's policy and procedures manual instructs enforcement staff to consider the Bureau's past precedent in assessing CMPs as well as "the past precedent of the Federal Trade Commission and the prudential regulators."[23] The Policies and Procedures Manual already lists factors considered in prudential regulator's matrices and, in effect, allows the Bureau to treat the OCC's matrix as akin to persuasive authority.[24] In our view, the Bureau would only limit deterrence and negotiating leverage of staff by imposing a matrix at this time.

Nevertheless, if, unlike Congress, the Bureau does decide to adopt a matrix, we believe that matrix should be crafted to direct staff to seek the statutory daily maximum CMP. And Bureau staff should continue to consider violations against each individual consumer as separately triggering potential liability. "For example, if a company engaged in a deceptive telemarketing scheme for three months and deceptively induced 3,000 consumers to purchase a product, the number of violations would equal 3,000 rather than 90 (the number of days the deceptive telemarketing scheme was in place)."[25] A potential CMP matrix should clarify that it is only guidance that does not reduce the CMP process to a mathematical equation or serve as a substitute for sound judgment of enforcement staff. If the Bureau adopts a matrix, then like the OCC, it should reserve the right to depart from the matrix when necessary to achieve a result in line with the Bureau's objectives.[26]

6. The standard provisions in Bureau consent orders, including conduct, compliance, monetary relief, and administrative provisions.

[21] Peter Economy, *11 Winning Negotiation Tactics from Donald Trump's 'Art of the Deal'*, INC., May 7, 2016, https://www.inc.com/peter-economy/11-winning-negotiation-tactics-from-trump-s-art-of-the-deal.html.
[22] *Id.*
[23] POLICIES AND PROCEDURES MANUAL VERSION 3.0 at 129.
[24] *Id.*
[25] POLICIES AND PROCEDURES MANUAL VERSION 3.0, at 126.
[26] *See* Office of the Comptroller of the Currency, Civil Money Penalties, Policies and Procedures Manual PPM 50000-7 (REV) (February 26, 2016), https://www.occ.gov/news-issuances/bulletins/2016/bulletin-2016-5a.pdf ("The matrices are only guidance; they do not reduce the CMP process to a mathematical equation and are not a substitute for sound supervisory judgment.").

As the question suggests, the Bureau has used a consistent format for the remedial provisions in consent orders that proceeds as follows: *conduct regulation provisions*, whether judicial or administrative, that directly address the violations causing the enforcement action; *compliance provisions*, including reporting and certification of procedural changes, independent review systems if so ordered, and the Board role in compliance; *general redress provisions*, including the amount and timing of payments and the control over money paid; *civil money penalties,* which to date have consistently been paid into the civil penalty fund; *consumer restitution*, identifying and specifying the type of program required; and *miscellaneous administrative provisions*, including reporting and record-keeping requirements, notices and other matters.

The consistency of the Bureau consent order format make clear the Bureau's approach to enforcement to all people interested in the enforcement process. The particular provisions typically included in these orders are substantially similar to a combination of the orders of other banking regulators, including the OCC, and the orders of the other primary federal UDAP regulator, the FTC. With one important exception, the Bureau's first administrative consent order of 2018 against Wells Fargo was consistent with the prior approach of the Bureau.[27] Our organizations support continued use of these standard provisions.

The Wells consent order, however, substantially deviated from prior Bureau practice in structuring the restitution provisions in a way that is decidedly unfavorable to the consumers harmed by law violations. Previously, the Bureau took one of two approaches in structuring consumer restitution programs—either a set amount of money to be distributed in the discretion of the Bureau, or a defined restitution programs with clear parameters as to the consumer eligible and the amount of payment. The recent Wells order follows neither of these approaches. Instead, the Wells order provides that the bank is to develop its own restitution plan subject to non-objection by the Bureau. It sets no minimum amounts and allows Wells to identify who is eligible and the amount of payment based on its determination of consumer "economic and cognizable harm." This is not a precedent that will promote the type of enforcement settlement on which the American public has come to rely when the Bureau takes an enforcement action. Nor is this settlement form an efficient or effective means of enforcement, for at least four reasons.

First, the lack of a consumer restitution directive means many of the contentious issues have not been resolved, even as the bank benefits from the public perception that it is no longer subject to Bureau enforcement on that matter. A final resolution of an enforcement action often leaves open administrative details on public compensation, such as the identity of specific individuals who are eligible for restitution, but the issues in an enforcement action are not fully resolved if the rights of consumers to receive a specific amount or type of restitution is not fully resolved. Second, the use of the phrase "economic and cognizable harm" along with the failure to fully resolve the details of the restitution program and the discretion given to the bank to make initial determinations about restitution is particularly troubling. Banks and other enforcement defendants often take the position that consumers cannot demonstrate they were individually harmed in resisting payment to consumers affected by violations. The Bureau has an obligation to make clear its position on this crucial issue, which can be the most contentious matter in settlement negotiations in a public enforcement action. Third, when an enforcement action resolution is announced by the Bureau, the consumers impacted

[27] Wells Fargo Bank, N.A., CFPB No. 2018-BFCP-0001 (April 20, 2018).

by the law violations should reasonably expect to know if they will receive compensation, and if so, the amount and process for recovering. Fourth, allowing a bank found to have repeatedly violated a law to make initial determinations about which consumers should be paid and what amounts they should receive communicates to the public, and other regulated entities, that the Bureau believes the violator is a well-intentioned actor who can be relied on to make decisions appropriate for the public interest. In the case of Wells, there is little in recent revelations about its extensive and blatant violations of consumer protection laws to warrant this public trust. The similar outlook of banking regulators prior to the financial crisis has been identified as a factor in failure to curb the imprudent practices that led to the crisis.

7. The manner and extent to which the Bureau can and should coordinate its enforcement activity with other Federal and/or State agencies that may have overlapping jurisdiction.

Our organizations believe that the Bureau has successfully collaborated with other federal, state, and in one case, tribal enforcement partners. Between 2012 and 2015, the Bureau cited the collaboration of an enforcement partner in about a third of its public enforcement actions.[28] This coordination has taken different forms in different matters. In some cases, the Bureau collaborated by filing joint pleadings. In other matters the Bureau expressed thanks to another regulatory agency for assisting the Bureau with information, expertise, or other cooperation in developing the enforcement action. Because the Bureau is responsible for a variety of potential cases, the Bureau should remain flexible on the type of coordination required in any given matter. For example, in its consent order with JP Morgan Chase Bank for unlawful debt collection practices Bureau worked in partnership with the attorneys general of 47 states, the District of Columbia, and the OCC.[29] From 2012-2015, cases in which the Bureau cited the cooperation of another law enforcement or regulatory agency generated approximately $10.7 billion in consumer relief accounting for almost 95% of all relief provided to U.S. consumers.[30] This suggests that in order to address the largest violations of consumer protection law, the Bureau will likely need to continue an active program of coordinating with other enforcement partners.

Our organizations believe that the Bureau has an important role in providing criminal referrals where its enforcement investigations uncover evidence of crimes. Federal law requires the Bureau to refer to the U.S. Department of Justice evidence it obtains that "any person…has engaged in conduct that may constitute a violation of federal criminal law."[31] Our organizations understand that the Bureau may not be in a position to share information on criminal referrals or ongoing criminal investigations with the public. Nevertheless, we believe the Bureau should have an active and robust program making criminal referrals whenever possible. The Bureau could also do a better job providing general information about criminal referrals to Congress and to the public. We recommend that in future

[28] Peterson, *supra* note 10, at 1083.
[29] Press Release, CFPB, CFPB, 47 States and D.C. Take Action Against JPMorgan Chase for Selling Bad Credit Card Debt and Robo-Signing Court Documents (July 8, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-47-states-and-d-c-take-action-against-jpmorgan-chase-for-selling-bad-credit-card-debt-and-robo-signing-court-documents/.
[30] Peterson, *supra* note 10, at 1096.
[31] 12 U.S.C. § 5566

semiannual reports to Congress, the Bureau should inform Congress of the total number of criminal referrals the Bureau has sent to the DOJ.

We also urge the Bureau to continue to prioritize its statutory fair lending requirements, including continued coordination with other federal agencies. The Dodd-Frank Act expressly created the Office of Fair Lending and Equal Opportunity (OFLEO) within the Bureau, in order to provide oversight and enforcement of Federal laws intended to "[e]nsure the fair, equitable, and non-discriminatory access to credit for both individuals and communities that are enforced by the Bureau, including the Equal Credit Opportunity Act and the Home Mortgage Disclosure Act."[32] The Bureau is also required to coordinate its fair lending efforts with other Federal agencies to promote consistent and effective enforcement of Federal fair lending laws.[33] The CFPB established OFLEO as an office within its Supervision, Enforcement, and Fair Lending ensuring resources would be dedicated to this vital statutory mandate.

Recently, Acting Director Mulvaney announced plans to reorganize OFLEO, stripping it of its enforcement and supervisory role.[34] Congress created OFLEO in order to combat predatory mortgage lending practices that target racial and ethnic minorities and underserved communities, which helped fuel the foreclosure crisis.[35] The CFPB found these concerns to still be relevant, noting in its 2016 Fair Lending Report it was concerned with emerging fair lending risks and therefore increasing its focus on redlining and mortgage loan servicing, among other things.[36] While the details of any restructuring of OFLEO are still unfolding, any actions stripping OFLEO of its enforcement and supervisory powers would largely weaken OFLEO's work.

The Bureau's fair lending cases have generated over $400 million for harmed consumers through 2016.[37] A large part of this relief came from the activities of OFLEO including two significant redlining actions against BancorpSouth and Hudson City Bank. Both of these actions were brought in coordination with the Department of Justice (DOJ). Coordinated efforts have been a large aspect of CFPB fair lending enforcement. As part of its fair lending enforcement responsibilities the Bureau refers matters to the DOJ when it believes there is a pattern of lending discrimination, and coordinates joint investigations on matters related to fair lending. After its creation, the CFPB entered into multiple coordination agreements with other federal regulators, including a Memorandum of Understanding

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32 Dodd-Frank Act § 1013(c)(2) (codified as 12 USC § 5493(c)(2)).

33 *Id.*

34 Renae Merle, *Trump Administration Strips Consumer Watchdog Office of Enforcement Powers in Lending Discrimination Cases*, Washington Post (February 1, 2018), https://www.washingtonpost.com/news/business/wp/2018/02/01/trump-administration-strips-consumer-watchdog-office-of-enforcement-powers-against-financial-firms-in-lending-discrimination-cases/?utm_term=.8294c66e012f.

35 Congressional Letter to CFPB (February 16, 2018), https://democrats-financialservices.house.gov/uploadedfiles/cfpb_fair_lending_bicameral_letter_-_final.pdf.

36 Consumer Fin. Protection Bureau, Fair Lending Report of the Consumer Financial Protection Bureau (April 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201704_cfpb_Fair_Lending_Report.pdf.

37 *Id.*

Regarding Fair Lending Coordination with the DOJ.[38] In 2016 the Bureau also referred eight matters to the DOJ upon finding discrimination based on race, national origin, age, receipt of public assistance income, sex, and marital status.[39]

However, since the administration transition in 2017, DOJ has largely retreated from enforcing fair lending violations. OFLEO has played a significant role in ensuring fairness in lending, and as DOJ becomes less active in addressing fair lending concerns, the need for an OFLEO with full supervisory and enforcement powers is even more important. Our organizations believe that discrimination and redlining should continue to be a high priority in consumer financial services law enforcement. In a study released in February of 2018, a Center for Investigative Reporting study of Home Mortgage Disclosure Act data found that modern-day redlining against black and other minority communities persists in at least 61 metropolitan areas.[40] Our organizations believe that the most effective way to preserve the Bureau's fair lending mission is to continue to house the OFLEO within the SEFL division. But in any event, any reorganizing of Bureau offices must preserve dedicated resources for enforcement of the Equal Credit Opportunity Act.

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38 Memorandum of Understanding between the Consumer Financial Protection Bureau and the United States Department of Justice Regarding Fair Lending Coordination (December 6, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/12/06/fair_lending_mou_12-6-12.pdf.

39 CONSUMER FIN. PROTECTION BUREAU, FAIR LENDING REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 62 (April, 2017).

40 Aaron Glantz & Emmanuel Martinez, *Keep Out: For people of color, banks are shutting the door to homeownership*, Center for Investigative Reporting (February 15, 2018), https://www.revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership/.