June 1, 2020

Submitted to eRulemaking Portal
Director Kathleen L. Kraninger
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Request for Information from Taskforce on Federal Consumer Financial Law, Docket No. CFPB-2020-0013

Dear Director Kraninger,

The 27 undersigned consumer, community, and civil rights groups write in response to the request for information from Taskforce on Federal Consumer Financial Law (Taskforce).[1]

We view this Taskforce as illegitimate, one-sided, and highly inappropriate during a pandemic. The Taskforce consists solely of five outside conservative academics and industry lawyers, including those who have represented payday lenders or others in CFPB enforcement actions and consumer litigation, and has no consumer representatives.[2] We are aware of several well-qualified academics who have a track record of working to advance consumer protections who were rejected, some after hostile interrogations. The absence of anyone to hold the Taskforce accountable makes it especially concerning that it was created in apparent evasion of the Federal Advisory Committee Act, even though Congress explicitly mandated that the CFPB follow FACA.[3]

At a time when the Bureau and all of our organizations should be focused on protecting consumers – and our own organizations and staff – from the impacts of the COVID-19 economic and health crisis, the Bureau has asked the public to comment on broad, far-reaching questions that go to fundamental questions about how to protect consumers. The Bureau has also provided a short 60-day comment window, even though the Bureau recently extended a separate, much narrower, comment request on time-barred debt disclosures because "the pandemic makes it difficult to respond to the [proposed rule]

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[1] CFPB, Request for Information: Assist the Taskforce on Federal Consumer Financial Law, 85 Fed.Reg.18214 (Apr. 1, 2014), https://www.regulations.gov/document?D=CFPB-2020-0013-0001.

[2] Evan Weinberger, Bloomberg Law, Financial Watchdog's Conflicted Task Force Earning Top Dollar (May 11, 2020) ("E. Weinberger, Conflicted Task Force"), https://news.bloomberglaw.com/banking-law/financial-watchdogs-conflicted-task-force-earning-top-dollar (noting that the Taskforce has no consumer representation and "consists of five outside conservative academics and industry lawyers who have represented payday lenders in CFPB enforcement actions and consumer litigation, as well as banks and other companies in regulatory matters.").

[3] Congress passed 12 U.S.C. § 5493(h) specifically mandating that CFPB advisory committees be subject to the Federal Advisory Committee Act (FACA) after Republicans on the House Financial Services Committee criticized the CFPB for not holding public meetings. *See* Trey Garrison, Hensarling calls on CFPB to open closed meetings (March 17, 2014), https://www.housingwire.com/articles/29332-hensarling-calls-on-cfpb-to-open-closed-meetings/;Trey Garrison, Bill would force full transparency at CFPB (March 19, 2014), https://www.housingwire.com/articles/29366-bill-would-open-cfpb-regulators-advisors-to-full-transparency/. Yet the CFPB Taskforce is styled as an intra-governmental committee not subject to FACA "a CFPB spokesperson confirmed." E. Weinberger, Conflicted Task Force, *supra.*

thoroughly and to determine when stakeholders will be able to do so."[4] Yet even a time extension would not make this an appropriate endeavor. The CFPB should focus on preventing harm to consumers during the pandemic, rather than on an effort to rethink its mission and promote ideas to undo consumer protections.

Many of the questions the Taskforce poses hint at deeply disturbing ideological preconceptions that focus more on undoing consumer protections than enhancing them. Contrary to the subtext of the Bureau's questions, education, disclosures and competition are not enough to protect consumers. Enforcement must be more than a backstop that is limited to only the most abusive practices. The amount of industry profits or skewed industry cost estimates should not be used to block rules that provide important protection to consumers, even if the consumer benefits are not always quantifiable. Access to credit does not justify preserving predatory lending or destructive practices that leave consumers worse off. States are important backstops against inaction at the federal level. Indeed, Congress already made decisions about how to balance the competing interests on many of the questions the Bureau has posed, such as the important role of states in enforcing CFPB rules.

Moreover, the CFPB already consumed thousands of hours of our organizations' time by posing many of these same questions in the 12 requests for information that Acting CFPB Director Mick Mulvaney put out in 2018 on a wide range of aspects of the Bureau's operations and the laws and regulations it oversees:

- Civil investigative demands;[5]
- Administrative adjudications;[6]
- Enforcement processes;[7]
- Supervision program;[8]
- External engagements;[9]

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[4] CFPB, Supplemental notice of proposed rulemaking; extension of comment period, 85 Fed. Reg. 30890, 30891 (May 21, 2020).

[5] *See, e.g.,* Americans for Financial Reform et al., https://www.nclc.org/images/pdf/rulemaking/coalition-cid-rfi-2018.pdf (April 26, 2018) (coalition overview comments); Americans for Financial Reform et al., https://www.nclc.org/images/pdf/rulemaking/cfpb-crl-cfa-rfi-2018.pdf (April 26, 2018) (longer comments); Public Citizen, https://www.regulations.gov/document?D=CFPB-2018-0001-0074 (April 25, 2018); Legal Academics, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Legal-Academic-on-Civil-Investigatory-Demands.pdf (April 25, 2018); Appleseed Network, https://www.regulations.gov/document?D=CFPB-2018-0001-0081 (April 26, 2018); National Association of Consumer Advocates, https://www.regulations.gov/document?D=CFPB-2018-0001-0073 (April 26, 2018).

[6] *See, e.g.,* Center for Responsible Lending et al, https://www.regulations.gov/document?D=CFPB-2018-0002-0027 (May 7, 2018); Financial Services Scholars, https://www.regulations.gov/document?D=CFPB-2018-0002-0024 (May 7, 2018)

[7] *See, e.g.,* Allied Progress, et al., https://www.nclc.org/images/pdf/rulemaking/coalition-34-cfpb-enforcement.pdf (May 14, 2018) (coalition overview comments); Americans for Financial Reform, et al., https://www.nclc.org/images/pdf/rulemaking/cfpb-enforcement-rfi-group.pdf (May 14, 2018) (longer comments).

[8] *See, e.g.,* National Consumer Law Center, et al., https://www.nclc.org/images/pdf/legislation/43-group-comments-cfpb-superv.pdf (May 21, 2018) (coalition overview comments); Americans for Financial Reform, et al., https://www.nclc.org/images/pdf/legislation/natl-group-detailed-comments-cfpb-superv.pdf (longer comments).

[9] *See, e.g.,* Allied Progress, et al., https://www.nclc.org/images/pdf/rulemaking/group-comm-rfi-external-engagements.pdf (May 29, 2018). CAB: Consumer Lending Subcommittee, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/CAB-Comment-on-External-Engagement.pdf (April 18, 2018); Consumers Union, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Consumer-Union-Comment-on-External-Engagement.pdf (May 25, 2018); Legal Academics, https://ourfinancialsecurity.org/wp-

- Consumer complaint information;[10]
- Rulemaking process;[11]
- Adopted regulations;[12]
- Inherited regulations;[13]

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content/uploads/2018/06/Legal-Academic-on-External-Engagements.pdf (May 29, 2018); Appleseed, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Appleseed-Comment-on-External-Engagements.pdf (May 29, 2018); Consumer Action, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Consumer-Action-Comment-on-External-Engagements.pdf (May 29, 2018); National Association of Consumer Advocates, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/NACA-Comment-on-External-Engagements.pdf (May 29, 2018).

[10] *See, e.g.,* Alaska Public Interest Research Group, et al., https://www.nclc.org/images/pdf/regulatory_reform/cfpb-complaint-db-rfi-sign-on-2018.pdf (June 4, 2018); Veterans and Military Service Leaders, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Veterans-and-Military-Leaders-comment-on-RFI.pdf (June 4, 2018); National Consumers League, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/National-Consumers-Leagues-comments-on-RFI-regarding-public-reporting-practices.pdf (June 4, 2018); AARP, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/AARP-Comment-on-RFI-regarding-public-reporting-practices-and-consumer-complaint-infromation.pdf (June 4, 2018); Legal Academics, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Legal-Academic-on-Complaint-Reporting.pdf (June 4, 2018), The Indiana Assets & Opportunity Network, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/The-Indiana-Assests-Opportunity-Network-.pdf (June 4, 2018).

[11] *See, e.g.,* Americans for Financial Reform et al., https://www.nclc.org/images/pdf/rulemaking/letter-group-cfpb-rfi-2018.pdf (June 7, 2018) (coalition overview comments); https://www.nclc.org/images/pdf/rulemaking/comment-afr-crl-nclc-cfpb-rulemaking-rfi.pdf (June 7, 2018) (longer comments); Appleseed, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Appleseed-Comment-on-Rulemaking-processes.pdf (June 7, 2018); Woodstock Institute, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Woostock-Comment-on-Rulemaking-Processes.pdf (June 7, 2018); Consumers Union, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Consumers-Union-Comment-on-Rulemaking-Processes.pdf (June 7, 2018); Public Citizen, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Public-Citizen-Comment-on-Rulemaking-Processes.pdf (June 7, 2018), Legal Academics, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Legal-Academic-on-Rulemaking-Processes.pdf (June 7, 2018).

[12] *See, e.g.,* Americans for Financial Reform et al., https://www.nclc.org/images/pdf/rulemaking/comments-adopted-regulations-coalition-rfi-cfpb.pdf (June 19, 2018) (overarching comments); National Consumer Law Center et al., https://www.nclc.org/images/pdf/regulatory_reform/comments-cfpb-rfi-housing-rulemaking.pdf (June 19, 2018) (mortgages); National Consumer Law Center et al., https://www.nclc.org/images/pdf/rulemaking/comm-cfpb-rfi-adopted-rules-prepaid-cards.pdf (June 19, 2018) (prepaid accounts); National Consumer Law Center et al., https://www.nclc.org/images/pdf/rulemaking/comm-cfpb-rfi-adopted-rules-remittances.pdf (June 19, 2018) (remittances and credit cards); National Consumer Law Center et al., https://www.nclc.org/images/pdf/rulemaking/comm-cfpb-rfi-adopted-rules-debt-coll.pdf (June 19, 2018) (upcoming debt collection regulations); Legal Academics, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Legal-Academic-on-Adopted-Regulations.pdf (June 19, 2018).

[13] *See, e.g.,* Americans for Financial Reform, et al. https://www.nclc.org/images/pdf/rulemaking/cfpb-inherited-regs-all-regs.pdf (June 25, 2018) (overarching comments); National Consumer Law Center et al., https://www.nclc.org/images/pdf/rulemaking/cfpb-inherited-regs-and-non-lending.pdf (June 25, 2018) (Regulation E, overdraft fees and bank account issues); Americans for Financial Reform, et al, https://www.nclc.org/images/pdf/rulemaking/cfpb-inherited-regs-disparate-impact.pdf (June 25, 2018) (fair lending); National Consumer Law Center, et al. https://www.nclc.org/images/pdf/rulemaking/cfpb-inherited-regs-electronic-communications.pdf (June 25, 2018) (electronic communications); National Consumer Law Center, et al., https://www.nclc.org/images/pdf/rulemaking/cfpb-inherited-regs-pace.pdf (June 25, 2018) (Property Assessed Clean Energy (PACE) loans); National Consumer Law Center, et al.,

- Guidance materials;[14]
- Financial education programs[15]
- Consumer complaints and inquiries.[16]

We have attached over 500 pages of comments that our groups and others submitted – on top of hundreds of additional pages of comments on other Bureau rulemakings and information requests – in response to those 2018 requests for information. Yet the Bureau appears to have largely ignored the lengthy and detailed responses that our organizations submitted. We urge you to review those comments and others by the multitude of other organizations, academics, and members of the public who provided suggestions on things that the CFPB can do, within its jurisdiction, to improve the protection of consumers.

We do not intend to spend more time rebutting the implications in the Taskforce's questions; in many cases, even a single question – such as whether we can count on disclosures and consumer "choice" to protect people – has been the subject of extensive research, commentary and debate over decades. Nor do we intend to embark on a project to justify the entire federal statutory consumer protection framework. Our organizations have thin resources that have already been severely strained by the need to respond to the coronavirus crisis. While some organizations and members of the public may submit brief responses to Taskforce questions, the Taskforce should not view those responses – or the absence of rebuttals to those who support weakening consumer protections – as legitimizing this enterprise.

The Taskforce claims to be inspired by the National Commission on Consumer Finance created in 1968. But the CFPB's Taskforce has only five members, all with a track record of pushing for de-regulation – and, in some cases, conflicts of interests in the clients they have represented and may represent in the future.[17] In contrast, the National Commission on Consumer Finance was specifically authorized and funded by Congress; its work was bipartisan; a majority of its 12 members, supported by dozens of staff and student researchers, were members of Congress accountable to the public; its work spanned four years and drew on multiple public hearings with hours of testimony from leading consumer advocates as well as individual consumers and lenders.[18] Whereas the National Commission concerned itself with problems in the consumer financial market, the Taskforce asks about the burdens of compliance with consumer protections.

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https://www.nclc.org/images/pdf/rulemaking/cfpb-inherited-regs-tila-respa-mortg.pdf (June 25, 2018) (Regulation Z (TILA) and Regulation X (RESPA); National Consumer Law Center, et al., https://www.nclc.org/images/pdf/rulemaking/cfpb-inherited-regs-tila-respa-mortg.pdf (June 25, 2018) (FTC mortgage rules); Legal Academics, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Legal-Academic-on-Inherited-Regulations.pdf (June 25, 2018).

[14] *See, e.g.,* Alabama Appleseed Center for Law & Justice, et al., https://www.nclc.org/images/pdf/rulemaking/coalition-comm-guidance-cfpb-rfi.pdf (July 2, 2018).

[15] *See, e.g.,* Allied Progress, et al., https://www.nclc.org/images/pdf/regulatory_reform/Comments-CFPB-on-Financial-Education-RFIs.pdf (July 9, 2018).

[16] *See, e.g.,* Allied Progress, et al., https://www.nclc.org/images/pdf/rulemaking/grp-comments-rfi-cfpb-cons-inquiry-process.pdf (July 16, 2018); California Reinvestment Coalition (July 13, 2018), https://californiareinvestmentcoalitio.app.box.com/s/i31q75dqg7o4k12ualcxqz504zbxexph.

[17] E. Weinberger, Conflicted Task Force, *supra* (noting that the Taskforce has no consumer representation and "consists of five outside conservative academics and industry lawyers who have represented payday lenders in CFPB enforcement actions and consumer litigation, as well as banks and other companies in regulatory matters.").

[18] *See* National Commission on Consumer Finance, Consumer Credit in the United States (December 1972), https://babel.hathitrust.org/cgi/pt?id=uc1.31822024338451&view=1up&seq=1.

Even responsible industry players will be harmed by this diversion. Banks and other companies are overwhelmed trying to assist their customers seeking help due to the COVID-19 crisis. That's where their attention needs to be, not on this academic exercise, opining on the theoretical virtues of principle-based versus prescriptive regulation or on regulation versus deregulation. And if the CFPB actually implements any recommendations of the Taskforce, companies will face the prospect of see-sawing regulatory frameworks that, in light of the illegitimacy of this Taskforce, may well be undone by the next change of leadership.

The CFPB has received record-setting numbers of complaints by consumers crying out for help in dealing with abusive companies and the impacts of the coronavirus economic crisis. The CFPB should listen to and respond to those cries, not spend time proposing harmful changes to the consumer protection framework that protects the American public.

Yours very truly,

Allied Progress
Americans for Financial Reform Education Fund
Arkansans Against Abusive Payday Lending
California Reinvestment Coalition
Center for Digital Democracy
Center for Economic Integrity
Center for Responsible Lending
Consumer Action
Consumer Federation of America
Interfaith Center on Corporate Responsibility
Jacksonville Area Legal Aid, Inc.
Kentucky Equal Justice Center
Maryland Consumer Rights Coalition
Mississippi Center for Justice
NAACP
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low income clients)
National Fair Housing Alliance
National Housing Law Project
North Dakota Economic Security and Prosperity Alliance
Public Citizen
Public Counsel
Reinvestment Partners
Texas Appleseed
U.S. PIRG
Virginia Citizens Consumer Council
Virginia Poverty Law Center

May 21, 2018

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

Re: 43 Groups Comment on CFPB Request for Information re: the Bureau's Supervision Program (Docket No. CFPB-2018-004)

Dear Ms. Jackson:

The forty-three (43) undersigned consumer, community, legal services, and advocacy groups submit these comments in response to the Consumer Financial Protection Bureau's (CFPB's) Request for Information ("RFI") regarding the Bureau's Supervision Program. We urge the CFPB not to weaken its supervision program, which is a critical and indispensible part of the Bureau's work. CFPB examinations have resulted in enormous benefits to millions of consumers across a number of markets, as well as improvements to the systems and operations of the companies in those markets.

Supervision is critical in order for the CFPB to fulfill its mission. It is a complementary tool to the Bureau's enforcement program, and has the advantages of often being faster, less resource-intensive, and more flexible. Moreover, the Dodd-Frank Act makes clear that it is the CFPB, and not any other regulator, that has exclusive authority to supervise certain entities (i.e., banks with over $10 billion in assets) for consumer protection compliance. The Act is also clear that it *requires* the Bureau to supervise certain nonbank companies for the consumer protection compliance.

Thus, any effort to delegate or cede the CFPB's supervision activities to prudential or state regulators would contravene the Dodd-Frank Act itself. Furthermore, such delegation would be a very bad idea. Before the CFPB existed, the prudential regulators did a weak job at supervision for compliance with consumer financial laws, due in part to a perceived conflict between protecting consumers and bank safety and soundness (misinterpreted as short-term bank profits). This failure was directly responsible for the foreclosure crisis of a decade ago. As for state regulators, they often lack the authority and resources to supervise nonbank financial services providers and leave consumers without uniform protection across the country.

CFPB supervision has greatly improved compliance by supervised entities with consumer financial laws, to the advantage of millions of consumers who are customers or otherwise impacted by those companies. For example:

- In the consumer reporting marketing, CFPB supervision has forced the Big Three credit bureaus to institute some much-needed fundamental reforms, such as establishing robust quality control programs and overseeing information furnishers to ensure they are meeting legal and compliance obligations.

- In the student loans servicing market, examiners halted unfair practices such as servicers declaring loans to be automatically in default when a co-signer died or declared bankruptcy, where the loan contracts were ambiguous.
- CFPB supervision of mortgage servicers has resulted in hundreds of thousands of homeowners avoiding millions of dollars in improper charges, sometimes through something as simple as fixing a software flaw. CFPB examinations of the loss mitigation practices of servicers have led to substantial improvements, helping put homeowners in a better position to avoid foreclosures.
- In the debt collection market, examiners uncovered multiple violations of the Fair Debt Collection Practices Act and directed collectors to take remedial actions to address these violations. Violations included common practices that are often the subject of complaints, such as attempting to collect from authorized users who were not liable for credit card debts, impermissibly communicating with third parties about a debt, and communicating with consumers at inconvenient times.

Furthermore, the CFPB has been cautious and measured in determining *which* entities to supervise. It has defined a limited and appropriate set of "larger participants" in nonbank markets, such as debt collection, consumer reporting, student loan servicing, international money service transfer, and automobile finance companies. The Bureau should engage in rulemakings to similarly define larger participants in the prepaid account, installment loan, vehicle title lending, and financial data aggregator markets.

Finally, the CFPB should continue to issue its Supervisory Highlights reports. The reports provide valuable information, transparency, and guidance to consumers, the general public, the media, and industry itself.

Thank you for the opportunity to submit these comments. If you have any questions about them, please contact Chi Chi Wu at cwu@nclc.org or 617-542-8010.

Respectfully submitted,

National Organizations

National Consumer Law Center (on behalf of its low-income clients)
Allied Progress
Americans for Financial Reform
Center for Responsible Lending
Consumer Action
Consumer Federation of America
Interfaith Center on Corporate Responsibility
Main Street Alliance
National Association of Consumer Advocates
National Center for Law and Economic Justice
Public Citizen
The Institute for College Access & Success
U.S. PIRG

State and Location Organizations

Center for Economic Integrity (AZ)
Arizona PIRG (AZ)
Arkansans Against Abusive Payday Lending (AR)
California Reinvestment Coalition (CA)
East Bay Community Law Center (CA)
Elder Law & Advocacy (CA)
Public Counsel (CA)
Connecticut Legal Services, Inc. (CT)
Delaware Community Reinvestment Action Council, Inc. (DE)
Tzedek DC (DC)
Florida Alliance for Consumer Protection (FL)
Jacksonville Area Legal Aid, Inc (FL)
Atlanta Legal Aid Society, Inc. GA)
Woodstock Institute (IL)
Heartland Alliance for Human Needs & Human Rights (IL)
Legal Aid Foundation of Metropolitan Chicago (IL)
Kentucky Equal Justice Center (KY)
Maryland Consumer Rights Coalition (MD)
Baltimore Neighborhoods, Inc (MD)
Public Justice Center (MD)
Montana Organizing Project (MT)
Charlotte Center for Legal Advocacy (NC)
North Carolina Justice Center (NC)
Legal Services of New Jersey (NJ)
New Jersey Citizen Action (NJ)
Community Service Society of New York (NY)
Center for NYC Neighborhoods (NY)
VOICE – OKC (OK)
South Carolina Appleseed Legal Justice Center (SC)
Virginia Poverty Law Center (VA)

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June 4, 2018

Comment Intake
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

RE: **Request for Information Regarding Bureau Public Reporting Practices of Consumer Complaint Information**
Docket No. CFPB-2018-0006

Dear Acting Director Mulvaney:

On behalf of nearly 38 million members in all 50 States, the District of Columbia and U.S. territories, AARP writes today to thank you for the opportunity to respond to the Consumer Financial Protection Bureau's (CFPB) request for information on public reporting practices of consumer complaint information. AARP believes that the CFPB's public consumer complaint database serves a vital function in ensuring that individuals who encounter difficulties with a financial product or service will have their concerns addressed, and that policymakers and researchers have the opportunity to identify distressing trends before they become market-wide problems that cause greater financial harm. AARP is a nonpartisan, nonprofit, nationwide organization that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as financial security, retirement planning, healthcare, affordable utilities and protection from financial abuse.

AARP has a long history of advocating for consumer rights and in 2013 launched its Fraud Watch Network[1] with the goal of raising awareness about scams and fraud, and providing information and support to people of all ages. AARP's education and awareness efforts include online content, in-person group presentations, and the Fraud Watch Helpline that people can call to assess potential scams and where victims can receive assistance with navigating fraudulent encounters. Today, AARP has about 1.3 million subscribers to Fraud Watch and receives about 30,000 calls a year. In addition, AARP has utilized data collected by the CFPB and finds the insight and information shared by the bureau critical to supporting older Americans across the country.

[1] www.aarp.org/fraudwatchnetwork

The CFPB's commitment to protecting older Americans from financial abuse is especially important to AARP. As noted in the CFPB's May 2017 monthly snapshot on complaints from older consumers, the bureau has received over 103,000 complaints from individuals age 62 or older[2] from July 2011 through March 2017.[3] Even though scams and fraud are likely very underreported, the CFPB's complaint database gives researchers and others a vital glimpse into what is happening in the marketplace. For instance, for the first time this year and with information provided by the CFPB, the Federal Trade Commission (FTC) was able to issue a report that includes age breakouts showing that seniors lose a significantly higher amount of money per victimization than younger people.[4]

Furthermore, the CFPB's public database demonstrates, via specific narratives, the wide range of practices at financial firms that harm consumers. A glance at the CFPB's public complaints conveys the difficulties and frustrations individuals have faced. These challenges are illustrated in a variety of settings and relationships, including but not limited to:

- Servicing problems with reverse mortgages -- reverse mortgages in particular are exclusively available to people age 62 and over and present issues related to servicing problems that sometimes result in foreclosure proceedings.
- Banks unresponsiveness to reports of fraudulent charges on credit cards;
- Collections threats on debts beyond statute of limitations;
- Medical billing disputes that may result in negative impact to credit scores; and
- Reports of fraudulent use of checks by a caregiver.

These consumer complaints are far from frivolous; an analysis last year by Bloomberg found that depending on the market, the average annual rate of complaints between January 2015 and April 2017 ranged from a low of 9 per 100,000 bank account clients to a high of 62 per 100,000 debt collection clients.[5] In many of these cases, victims have already attempted to resolve the matter directly with their financial institution, and the CFPB's complaint portal is their last hope for relief. Given the rapid, continuing decline in the number of bank branches nationwide, customers have less ability to attempt to resolve

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[2] Since only 54 percent of consumers report their age, the number of complaints by older consumers is likely understated.

[3] Consumer Financial Protection Bureau, "CFPB Monthly Snapshot Spotlights Complaints from Older Consumers," May 31, 2017, available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-monthly-snapshot-spotlights-complaints-older-consumers/.

[4] FTC, Consumer Sentinel Network Data Book, January-December 2017 https://www.ftc.gov/policy/reports/policy-reports/commission-staff-reports/consumer-sentinel-network-data-book-2017/main. The Data Book is a compilation of reported complaints available only to law enforcement. Data is from January – December 2017, from FTC, CFPB, IRS, USPIS and many state law enforcement organizations.

[5] Mark Whitehouse, "How Financial Companies Handle Angry Customers," Bloomberg, November 27, 2017, available at https://www.bloomberg.com/view/articles/2017-11-27/how-financial-companies-handle-angry-customers.

financial account disputes in-person.[6] There are also certain financial services -- such as credit reporting and debt collection -- in which the consumer has limited service provider options. In such cases, a dissatisfied consumer may lack the ability to simply switch to another company, as demonstrated after last year's Equifax data breach.

Victims also have few legal avenues for cases in which these informal efforts fail. Mandatory arbitration provisions in contracts often preclude victims from taking a financial institution to court.[7] Meanwhile, the dollar amounts at stake may be too small to justify pursuing arbitration or, in the absence of arbitration language, paying for an attorney. For all of these reasons, the CFPB's complaint portal is an essential tool. Public disclosure of individual complaints, and timely, periodic reporting about aggregate complaint trends, ensures that individual complaints are fully investigated and that victims' voices are heard.

The public complaint database is also a beneficial tool for companies because it provides an opportunity for them to identify and resolve problems without the impetus of new regulations or enforcement. The database also validates whether a company's stated commitments by leadership are kept by staff on the ground, or if company policies and procedures are inconsistently applied.[8] The public complaint database can also serve as a positive influencer over the marketplace -- for example, if a particular practice at a bank leads to a high frequency of complaints then this may also serve as a warning to other banks to examine whether they engage in the same practices. Without publishing the complaint records -- and naming companies publicly, as is presently the case -- then these deterrent effects are lost.

Additionally, the public database allows third parties to analyze trends and identify areas where future intervention may be necessary. If the CFPB complaint database had existed prior to the 2008 financial crisis, consumers' difficulties with mortgage lenders and servicers would have been more widely known sooner and could have been addressed in a more timely manner. In this case, the avoidance and mitigation of individual consumer harm in response to widespread public complaints could have prevented far larger and more sweeping economic harm across the country.

The public-facing nature of the CFPB complaint database has also been recognized as an innovative approach to regulate markets more efficiently.[9] Notably, the CFPB is not the only federal agency to make complaints public. Both the National Highway Traffic Safety

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[6] Rachel Louise Ensign, Christina Rexrode, and Coulter Jones, "Banks Shutter 1,700 Branches in Fastest Decline on Record," *The Wall Street Journal*, February 5, 2018, available at https://www.wsj.com/articles/banks-double-down-on-branch-cutbacks-1517826601.

[7] Consumer Financial Protection Bureau, "Arbitration Study: Report to Congress 2015," available at http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[8] Joe Valenti, Julia Gordon, and Marc Jarsulic, "Making Consumer Voices Count" (Washington: Center for American Progress, 2014), available at https://www.americanprogress.org/issues/economy/news/2014/10/02/98243/making-consumer-voices-count/.

[9] Blair Levin and Larry Downes, "We need more, not fewer, government Yelps," The Washington Post, May 2, 2018, available at https://www.washingtonpost.com/news/innovations/wp/2018/05/02/we-need-more-not-fewer-government-yelps/.

Administration's vehicle complaint database[10] and the Consumer Product Safety Commission's household products complaint database[11] publish individual complaints, including complaint narratives. Rather than an anomaly, the CFPB public complaint database is a best practice for empowering consumers and monitoring market trends.

In addition to AARP's stated support for the CFPB's public complaint database, AARP would like to recommend ways in which the current system and process could be strengthened and improved for the sake of consumers. AARP recommends that the CFPB:

- Continue collection of age data and require that age data be reported for all complaints. If the age data were more complete, researchers and advocates would have a better picture of where older consumers need help.
- Continue collecting and reporting state and local data, including ZIP code data where appropriate – regional information can be useful for many reasons including targeting resources and supporting state and local action in addressing trends.
- Continue reporting company names – this information is invaluable in helping consumers identify potentially risky service providers.
- Publish the company responses to the complaints – this transparency is critical in assessing a company's handling of a serious claim and should be readily available.
- Continue to prepare reports specifically about older consumers – as stated above, these reports serve as an important source of information not only for advocates such as AARP but also for other agencies like the FTC.

AARP appreciates the opportunity to address our concerns about public reporting practices on consumer complaints, and believes that the CFPB's public complaint database advances market transparency and consumer protection for all Americans. If you have any questions, please feel free to contact Jasmine Vasquez of our Government Affairs staff at (202) 434-3711 or by email at JVasquez@aarp.org.

Sincerely,

David Certner
Legislative Counsel and Policy Director
Government Affairs

[10] https://www-odi.nhtsa.dot.gov/VehicleComplaint/
[11] https://www.saferproducts.gov/Search/default.aspx

Comments of

Allied Progress

Americans for Financial Reform

Center for Responsible Lending

Consumer Federation of America

National Association of Consumer Advocates

NAACP

New Yorkers for Responsible Lending

U.S. PIRG

Woodstock Institute

May 7, 2018

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

RE: Request for Information ("RFI") on CFPB Rules of Practice for Adjudication Proceedings (Docket No.: CFPB-2018-0002)

Dear Ms. Jackson:

The comments below are submitted in response to the Consumer Financial Protection Bureau's Request for Information ("RFI") Regarding the CFPB's Rules of Practice for Adjudication Proceedings (Docket No.: CFPB-2018-0002) 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.

The undersigned organizations frequently engage with the CFPB and vigorously support both its mission and independence. Many of our staff have significant experience in public enforcement of consumer protection laws. We appreciate the opportunity to submit these comments for your consideration

I. Overview

The CFPB was created in response to the 2008 financial crisis. This crisis was driven in large part by the failures of existing agencies that did not have the tools, the will, the foresight, or the speed to address

looming problems in the consumer credit markets. Reacting to market and regulatory failures that fueled this "Great Recession," Congress in 2010 enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (Dodd-Frank Act).

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] Congress gave the CFPB the authority and discretion to enforce consumer financial protections laws through two different means— filing an action in U.S. district court or initiating an adjudication proceeding before an Administrative Law Judge ("ALJ"). The flexibility in selecting from these different forums is essential to CFPBs effectiveness in fulfilling its mission to protect consumers.

Since its establishment, the CFPB has used its authority effectively 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] The CFPB has carried out much of this work through adjudication proceedings, whether through consent orders or contested adjudication proceedings. Constraining or diminishing the CFPB's flexibility to enforce through adjudications likely will place consumers at greater risk and delay their compensation for the harm caused by illegal practices.

A. The CFPB should continue to use its authority to enforce through adjudication

Federal court often involves lengthy pre-trial discovery and motion practice in a more crowded litigation docket, whereas adjudications often allow for a prompt resolution of pre-trial issues, including discovery. There are circumstances where action in federal court is the more appropriate means for the CFPB to enforce the law, as evidenced by the numerous CFPB actions filed in court. However, the discretion to enforce the law through adjudication ensures the CFPB has an efficient means by which to address ever-changing schemes that harm consumers and in some cases, to correct action or bring restitution to consumers quickly, minimizing the impact of the violation over a long period of time. Industry generally should be accustomed to the administrative forum, as it is a common avenue for enforcement by federal regulators.

The CFPB has developed extensive rules of practice governing the adjudication process.[4] These rules address many of the same fundamental aspects as the Federal Rules of Civil Procedure. However, the Rules of Practice also fulfill a statutory goal of the CFPA, by allowing for an expeditious resolution of matters through the administrative forum.

B. **The RFI seeks comment before the current Rules of Practice have been significantly tested.**

The RFI comes at a time when only a handful of adjudications have been meaningfully litigated under the rules which were adopted in their final form in June 2012.[5] The CFPB has initiated only eight

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[1] PHH Corp. v. CFPB, 881 F.3d 75, 77 (D.C. Cir. Jan. 31, 2018).
[2] H.R. Rep. No. 111-517, at 874 (2010) (Conf. Rep.); *see generally* PHH, at 77-78.
[3] Consumer Financial Protection Bureau, *Factsheet: 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*, CFPB (July 21, 2017).https://www.consumerfinance.gov/about-us/blog/six-years-serving-you/.
[4] Consumer Financial Protection Bureau, Rules of Practice for Adjudication Proceedings, 12 C.F.R. § 1081.101 et seq. ("Rules of Practice")
[5] Rules of Practice for Adjudication Proceedings, 77 FR 39057, (June 29, 2012), https://www.federalregister.gov/documents/2012/06/29/2012-14061/rules-of-practice-for-adjudication-proceedings.

adjudication proceedings through the filing of a Notice of Charges, rather than a Consent Order that resolves the matter. Of these eight cases, five were resolved shortly after filing through a stipulated consent order. Respondents have filed an answer to formally respond and contest the adjudication proceeding in only three cases, with one of these having been resolved through consent order shortly after respondent's answer. Thus, the CFPB's RFI seeks comment on rules which to date have rarely been put to use.

C. The CFPB should not alter the existing rules, especially to the detriment of consumers, based on comments from a handful of litigants that have practiced under the current rules.

The public record[6] in the limited number of contested proceedings provide scant evidence that the CFPB's Rules of Practice have raised of significant controversies or issues. Given the lack of contested adjudication proceedings, the CFPB should exercise caution in acting on the comments it receives, which are likely to be based largely on conjecture. Those industry participants who have been involved in adjudication proceedings and their counsel may take the CFPB's RFI as an invitation to voice concerns based largely on hypotheticals or single examples. However, consumers who have benefitted from these proceedings or could depend on them for recourse in the future understandably may lack awareness of the arcana of CFPB's adjudication procedure such that they might provide comment on how the rules benefit them. Further, it is too early to tell whether single examples demonstrate any pattern of a problem or simply the individual circumstances in one case. Ultimately, however, the Rules of Practice for adjudications will affect the CFPB's ability to protect consumers from harm in the future. Constraining the ability to enforce through adjudication proceedings at the expense of consumers would be a waste of the CFPB's resources and staff and a break with its mission of putting consumers' interests first.

Given this record, the RFI's suggestion that the CFPB consider limiting its use of adjudication proceedings to only those matters that are uncontested is troubling. The Dodd-Frank Act granted the CFPB the authority to bring adjudication proceedings or file actions in federal court in order to ensure that the CFPB has the necessary powers to accomplish its statutory duties. Retreating from the administrative forum would hamper the CFPB's efforts to enforce consumer financial protection laws and could potentially allow egregious abuses to persist for years when a more efficient remedy process is available. Congress clearly intended that the CFPB avail itself of the administrative enforcement process. The CFPB should not make hasty changes to its adjudication procedures based on the experience of less than a handful of litigants, but should continue to ensure that adjudication proceedings remain an effective and fair means of enforcing the law.

D. The CFPB should utilize the adjudication process more frequently in contested matters

We recommend that the Bureau increase the number of contested enforcement actions handled through adjudications. If anything, the Bureau has erred on the side of over-protecting the rights investigation subjects by turning to federal litigation even in situations where the overwhelming evidence supports a violation of law. Adjudication proceedings are particularly appropriate a defendant may be litigious, uncooperative or will attempt to tie the Bureau down in protracted litigation. Where evidence gathered during an investigation overwhelmingly points to a violation of law and there is little or no room for reasonable disagreement on the legality of an investigation subject's practices, federal litigation may prove an inefficient use of resources, especially where it allows a recalcitrant defendant to tie down

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[6] The Bureau provides free public access to its administrative adjudication proceedings, including dockets and pleadings. See https://www.consumerfinance.gov/policy-compliance/enforcement/actions/. This is in contrast to the federal courts which require access through PACER, a system which charges fees for searching records or downloading pleadings.

precious federal enforcement resources through tactics which are unlikely to affect the outcome save for the effect of justice delayed.

II. Response to Specific Questions in the RFI

1. Whether, as a matter of policy, the CFPB should pursue contested matters only in Federal court rather than through the administrative adjudication process;

In passing the Dodd-Frank Act, Congress made clear that the CFPB could pursue matters in adjudication proceedings and in federal court, whether the matter was to be resolved through a consent order or not.[7] To the extent the question suggests that the CFPB might abandon administrative enforcement process, it suggests that the CFPB is contemplating neglect of its duties to enforce Federal consumer financial protection laws. Further, this practice would be a departure from similar adjudication processes by the FTC and SEC.

Moreover, this inquiry suggests the CFPB would abandon enforcing the law in a forum that, if anything, has not been used enough. Of the 119 cases filed administratively by the CFPB, 111 were resolved through immediate entry of a Consent Order, six more settled shortly after filing, and all but two involved contested litigation. This track record suggests that the CFPB's use of the adjudication proceedings is judicious and, if anything, too cautious. The CFPB may well have erred on the side of not bringing contested matters in adjudication proceedings and instead litigating in federal courts, where lengthy discovery and motion practice delay final resolution. No doubt, there are reasons for bringing an action in court – the need for immediate injunctive relief, the involvement of a state or federal partner, the ability to gather additional facts through civil discovery process. However, these benefits come with the risk of inconsistent application of the law, a delay in final resolution, and heightened costs for both the CFPB and the litigant.

Enforcement through the CFPB's adjudication process, will help foster consistent development of the CFPB's legal authorities, by avoiding inconsistent or contradictory outcomes that might arise in different federal district courts. An ALJ conducts the adjudication proceedings and then provides a recommended decision to the Director. The ALJ is more likely to hear matters arising under the CFPB's authority more regularly than a judge in federal court. The final decision, rendered by the Director, is subject to appeal in a similar manner as final decisions of federal district court judges. Moreover, there is significant evidence that ALJs are no less disposed to rule against the government than federal court judges.[8]

At a minimum, it is dubious that proceeding to federal court in all contested cases will better protect the rights of the parties accused of violations of law. If the CFPB were to address contested matters solely through federal court, this would impose additional costs and delay on parties in resolving matters. It is likely these costs would not be borne equally by different institutions. For smaller institutions, these heightened costs could mean the difference between mounting a defense and settling. On the other hand, by choosing beforehand to impose on itself the costs of federal court litigation in contested matters, the CFPB would provide added leverage to larger financial institutions seeking to avoid further investigation or prosecution for suspected violations of law. Larger institutions could use the prospect of expensive, protracted federal litigation to extract a more favorable settlement from the CFPB. Under this regime,

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[7] See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 1053, 12 U.S.C. § 5563 (2010) (authorizing the Bureau to conduct adjudication proceedings and permitting parties to appeal any order except Consent Orders).
[8] See David Zaring, *Enforcement Discretion at the SEC*, 94 Tex. L. Rev. 1155, 1184-85 (2016).

consumers who were harmed by illegal practices would likely see less relief obtained through settlements or years of waiting for any resolution of any contested matter.

Rather than adopt a one-size-fits-all approach, the CFPB should continue to use its discretion to seek to enforce the law in the appropriate forum. The CFPB should aim for a balance that ensures full protection of consumer rights, affords fairness to litigants, avoids unnecessarily burdensome litigation process, promotes partnerships with state and federal regulators, and facilitates consistent application of the law.

2. The Rules' protection of the rights and interests of third parties;

Without more detail, it is very difficult to ascertain the scope of the term “third parties” in this inquiry. However, first and foremost among “third parties” should be those consumers who have been affected by the practices of the respondent in the adjudication. A prompt resolution which seeks to redress to the fullest extent possible the harms to these consumers from violations of the law should be the primary goal of any CFPB enforcement proceeding. The Rules of Practice can address this through ensuring that they do not create opportunities for industry respondents and their counsel to delay or bog down adjudications and ultimately weaken the CFPB’s enforcement authority and its ability to seek restitution on behalf of consumers.

With respect to other “third parties,” we note that various parts of the rules afford non-parties the same or similar rights they may have in federal court. For instance, witnesses are entitled to the same fees for attendance as are available in federal court in proceedings where the United States is a party.[9] The Rules of Practice provide that parties may seek leave to file an amicus brief, as is the case in federal court.[10] Third parties may also seek a protective order with respect to disclosure of confidential information obtained from them and are entitled to notification by any party that seeks to disclose such information.[11] While there may be industry “third parties” that might be affected by the CFPB’s enforcement against their contractual counterparty or by some other relationship to the named respondents, this does not appear to be a difficulty unique to the administrative forum.

3. 12 CFR 1081.200(b)'s requirements for the contents of the CFPB's notice of charges;

The content requirements of § 1081.200(b) are very similar to those adopted by the SEC[12] and the FTC.[13] The CFPB’s Notice of Charges generally have been fact-laden and include specific citations to all claims for which the CFPB seeks relief. To date, the CFPB has filed only eight Notice of Charges, only three of which resulted in the filing of an answer by the respondent. None of these answers allege the notice of charges was insufficiently pled in a manner typically addressed by rules regarding the content of complaints or other pleadings to initiate an action. Thus, it is unclear what basis the CFPB would have for significant modifying the existing requirements.

4. The policy, expressed in 12 CFR 1081.101 for administrative adjudication proceedings to be conducted expeditiously, including:

a. 12 CFR 1081.201(a)'s requirement that respondents file an answer to a notice of charges within 14 days;

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[9] See Consumer Financial Protection Bureau, Rules of Practice for Adjudication Proceedings, 12 C.F.R. § 1081.116.
[10] 12 C.F.R. § 1081.216.
[11] 12 C.F.R. § 1081.119.
[12] Securities and Exchange Commission, 17 C.F.R. § 201.200(b).
[13] Federal Trade Commission, Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 3.11(b).

There is little evidence to support altering § 1081.201(a), which is consistent with the FTC's rules and only modestly shorter than federal court. The time period provided is only seven days shorter than the time period allowed for under the Rules of Federal Civil Procedure. The shorter time-period for adjudication proceedings serves the policy of the Rules, stated in § 1081.101, to conduct proceedings "fairly and expeditiously."

Furthermore, it is unlikely that, upon service of a Notice of Charges from the CFPB, a respondent is unaware of the nature of the pending litigation. The CFPB usually initiates adjudication proceedings after an extensive investigative process, subject to the CFPB investigative rules.[14] In addition, the Office of Enforcement has a policy, while not mandatory, that provides for advance notice to a Respondent of the possible claims and bases for such action prior to filing any enforcement action.[15] Notably, the three adjudication proceedings that have been contested in any way have given scant indication that § 1081.201(a) affords respondents an unreasonably short time to answer the Notice of Charges. In one proceeding, the respondent filed a dispositive motion two days after filing of the Notice and one day after service.[16] In another, Respondent's counsel filed a motion for extension of time five days after service of the Notice of Charges. The motion requested that the Respondent have one additional week to respond, was unopposed by the CFPB, and promptly granted.[17] In the other matter, multiple parties filed answers within the 14-day period following service.[18]

Three cases hardly constitute a rigorous sample from which to draw conclusions. However, the most reasonable conclusion that can be drawn from these cases is that, given the nature of the CFPB's investigations, the timing requirements under § 1081.201(a) are appropriate and do not unduly burden respondents.

b. 12 CFR 1081.115(b)'s requirement that the hearing officer in administrative adjudications strongly disfavor motions for extensions of time except upon a showing of substantial prejudice;

Section 1081.115(b) provides a similar set of guidelines for granting extensions of time as under the FTC's and SEC's rules. It is also notable that to date, no request for an extension has been denied by a hearing officer in an adjudication proceeding. Thus, the concerns expressed by industry commenters to the Interim Final Rule, that the rule may impose unrealistic filing deadlines, have not yet borne out. Section 1081.115(b) requires that the hearing officer take into consideration several factors which provide ample guidance to avoid overly harsh denials of extension requests without opening the door to delay tactics aimed at hindering the objectives of § 1081.101. Moreover, in the few cases that have been litigated, the CFPB and the presiding ALJ have generally been accommodating of requests for an extension of time.

c. 12 CFR 1081.212(h)'s requirement that the hearing officer decide any motion for summary disposition within 30 days; and

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[14] Consumer Financial Protection Bureau, Rules Relating to Investigations, 12 C.F.R. Part 1080.

[15] CFPB Bulletin 2011-04, Notice and Opportunity to Respond and Advise (November 7, 2011, updated January 18, 2012), https://files.consumerfinance.gov/f/2012/01/Bulletin10.pdf.

[16] *See* Respondent's Motion to Dismiss, CFPB v. PHH, et al., No. 2014-CFPB-0002, (filed January 31, 2014) https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201402_cfpb_0002_motion-to-dismiss-alternative-for-summary-disposition.pdf.

[17] *See* Order Granting Motion for Extension of Time to Respond to CFPB's Notice of Charges, CFPB v. Integrity Advance, LLC and James Carnes, No. 2015-CFPB-0029 (November 30, 2015).

[18] *See* CFPB v. 3D Resorts-Bluegrass, LLC, No. 2013-CFPB-0002.

Section 1081.212 addresses dispositive motions before a hearing, the hearing officer's recommendation, and the ultimate decision by the Director. A 30-day time-frame for the hearing officer to decide the motions after full briefing by the parties appears consistent with the CFPB's stated policy goal to conduct adjudication proceedings fairly and expeditiously.[19] While also facilitating prompt resolution and, where the CFPB prevails, prompt remediation of consumer harm, a short period for the hearing officer to decide summary dispositions means that parties defending themselves against CFPB actions are able to more quickly obtain favorable judgment when the CFPB is not successful. As the CFPB noted in its final rule adopting the Rules of Practice, the timelines on decisions "should help ensure that a party ultimately determined to be entitled to dismissal is not required to engage in the adjudicative process for a lengthy period of time."[20] There appears to be no evidence from the record of the CFPB's adjudication proceedings thus far to adjust this requirement.

d. The CFPB's implementation of the requirement in 12 U.S.C. 5563(b)(1)(B) that hearings take place within 30 to 60 days of the notice of charges, unless the respondent seeks an extension of that time period;

Again, this question seeks comment on the effect of a process that has not been tested very often. As is contemplated by the statute,[21] the CFPB's rules provide for a later date to be determined at the scheduling conference required by § 1081.203(b)(1). To date there have been only two full adjudication hearings conducted by the CFPB. One of these hearings was commenced within the 60 day time-frame envisioned by the notice content requirements of the Dodd-Frank Act, while the other hearing was conducted more than 7 months after the notice of charges. In both cases, the timing of the hearing followed a scheduling conference where the CFPB and other parties were able to argue for an earlier or a later date. From these meager results, it appears the CFPB's adjudication procedures allow for significant flexibility to the hearing schedule by leaving to the ALJ the ability to determine a date and time for hearing, having heard the parties' concerns through the scheduling conference.

5. 12 CFR 1081.206's requirements that the CFPB make documents available for copying or inspection, including whether the CFPB should produce those documents in electronic form to respondents in the first instance, at the CFPB's expense;

This inquiry suggests that the Office of Enforcement currently does not provide documents in electronic form as part of its affirmative disclosure obligations under § 1081.206. However, the preamble to the 2012 Final Rule addressed this concern in direct response to a commenter:

> *The Bureau adopted the language regarding photocopying from the SEC Rules, but as indicated in the preamble to § 1081.206, the Bureau anticipates providing electronic copies of documents to respondents in most cases. The Bureau is retaining the language regarding photocopying in order to retain its discretion, particularly in cases where the safekeeping of documents subject to inspection and the cost of production may be of particular concern. The Bureau expects these cases to be rare.*[22]

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[19] *See* 12 C.F.R. § 1081.101.
[20] 77 FR 39057, at 39078.
[21] 12 U.S.C. §5563(b)(1)(B) (2018) ("…such hearing to be held not earlier than 30 days nor later than 60 days after the date of service of such notice, unless an earlier or a later date is set by the CFPB, at the request of any party so served.").
[22] *Id.*, at 39075.

The CFPB's Enforcement manual reiterates that providing documents in electronic form is to be the norm.[23] From review of the CFPB's dockets, it appears that the Office of Enforcement has adhered to this policy. The pleadings in the PHH case indicate the CFPB provided the affirmative disclosures electronically. While formally codifying this in the text of § 1081.206 may make this policy more clear to future litigants, the CFPB would be well-advised to take into account the concerns noted in the 2012 Final Rule before taking such a step.

6. 12 CFR 1081.208's requirements for issuing subpoenas, and whether counsel for a party should be entitled to issue subpoenas without leave of the hearing officer;

The 2012 Final Rule notes that "[t]he Bureau had considered whether to permit parties to issue subpoenas."[24] The CFPB declined to do so because a hearing officer can help ensure that subpoenas are not "unreasonable, oppressive, excessive in scope, or unduly burdensome."[25] Notably, virtually all subpoenas requests from respondents have been granted. The only outright denial of a request was without prejudice and due to errors in form. As with many aspects of this RFI, to the extent this question raises an issue, there is little or no evidence that there is a problem to address, at least as indicated by the limited sample of contest proceedings.

7. 12 CFR 1081.209(g)(3)'s provision that failure to object to a question or document at a deposition is, with some exception, not deemed a waiver of the objection;

Section 1081.209(g)'s provision is common among rules for federal agencies' adjudication proceedings. The CFPB's rules provide that objections shall be noted by the deposition officer, but limit rulings on the competency, materiality, or relevance of evidence to the ALJ when serving as the deposition officer. Sec. 1081.209(g)(3) then limits waiver of objection to situations where ground for the objection might have been avoided if the objection had been timely presented. The SEC and FTC similarly limit waiver of objection to testimony to instances where the objection is not timely made.[26]

8. 12 CFR 1081.210(b)'s limitation on the number of expert witnesses any party may call at a hearing, absent "extraordinary circumstances";

This inquiry again invites abandonment of a rule that has not yet been tested. The 2012 Final Rule noted that the limitation in § 1081.201(b) is consistent with FTC rules. The CFPB adopted § 1081.201(b) unchanged from the Interim Final Rule after receiving no comments and stating that the "limitation will provide the parties with a sufficient opportunity to present expert testimony without unduly delaying the proceedings."[27] To date, no adjudication proceeding has involved a motion for leave to call an additional expert witness above the five experts parties are already permitted to call. If any conclusion can be drawn

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[23] Consumer Fin. Protection Bureau, Office of Enforcement, Policies and Procedures Manual Version 3.0, https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-and-procedures-memo_version-3.0.pdf. ("However, the Office of Enforcement has committed to making documents available to the respondent as soon as possible (but in any event commencing no later than seven days after service of the notice of charges) and to producing the information in electronic format, unless electronic production is not feasible.")
[24] 77 FR 39057, at 39073
[25] *Id.*
[26] *See* Securities and Exchange Commission (SEC), Rules of Practice, 17 C.F.R. § 201.233(i) (2016) ("An objection to a deponent's competence - or to the competence, relevance, or materiality of testimony - is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time"), and Federal Trade Commission, Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 3.33(g) (2015) (stating that such objections as to competence, relevance or materiality are "not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.").
[27] 77 FR 39057, at 39076

from the history of the adjudication proceedings thus far, the rule seems appropriate and does not unduly burden litigants.

9. 12 CFR 1081.210(c)'s requirements for expert reports, including whether that paragraph should expressly incorporate the requirements of the Federal Rules of Civil Procedure relating to the required disclosures of expert witnesses;

It is not necessary or advisable for the Bureau to amend 12 CFR § 1081.210(c) to expressly incorporate the requirements of the Federal Rules of Civil Procedure relating to the required disclosures of expert witnesses. The Bureau's Rules of Practice for Adjudication Proceedings on this point are modeled on the FTC's rules.[28] Both the Bureau and the FTC's rules are very similar to the Federal Rules of Civil Procedure. All three sets of rules require that experts sign a report with complete statement of all opinions to be expressed with the expert's basis and reasons.[29] Each requires that expert reports include disclosure of facts or data considered by the expert.[30] Each requires that expert reports disclose any exhibits to be used at trial or an administrative hearing respectively.[31] Each requires disclosure of the witness's qualifications, including a list of all publications authored in the previous 10 years and previous cases in which the witness testified as an expert during the previous four years.[32] And, each requires that reports include a statement of the expert witness's compensation.[33] Given these similarities, the Bureau's Rules of Practice for Adjudication Proceedings are sufficient to provide a comparable level of notice and transparency to defendants as the Federal Rules of Civil Procedure.

However, taking the additional step of expressly tying the Bureau's rules to those used in each federal district court throughout the country would introduce an unnecessary new level of formality and complexity to interpreting these currently straightforward provisions. For example, federal district courts and circuit courts of appeal occasionally reach different results in interpreting the Federal Rules of Civil Procedure. Neither the Bureau's staff nor the administrative hearing officer should be expected to study the expert witness disclosure jurisprudence of every federal circuit. Indeed, smaller defendants with fewer resources should also prefer the flexibility of the Bureau's current expert disclosure rules. The point of an administrative enforcement system is to create a simpler, more flexible, and faster method of enforcing federal law. Expressly tying the Bureau's rules to the Federal Rules of Civil Procedure risks unproductive collateral litigation, delays, and added work for Bureau staff with little or no actual improvement in the administration of justice.

Moreover, in subparagraph (a)(2)(C)(i), the Federal Rules of Civil Procedure explicitly cross references the Federal Rules of Evidence.[34] But, the Bureau's Rules of Practice for Adjudication Proceedings expressly set out different rules of evidence for administrative hearings that are designed to facilitate the cases and fact finding suited to the Bureau's administrative enforcement mission. Thus, tying expert witness disclosures to the Federal Rules of Civil Procedure could risk importing certain elements of the Federal Rules of Evidence that may be in tension with the standards and procedures in 12 CFR § 1081.303.

Of course, nothing in existing Bureau rules prevents defendants from citing cases interpreting the Federal Rules of Civil Procedure as persuasive authority. And because the Bureau's rules on this point are

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[28] *See* 77 FR 39057, at 39076 ("This section of the Interim Final Rule is modeled after the FTC Rules, 16 CFR 3.31A.")
[29] *Compare* FED. R. CIV. P. § 26(2)(B)(i) *with* 12 CFR § 1081.210(c) and 16 CFR § 3.31A(c).
[30] *Compare* FED. R. CIV. P. § 26(2)(B)(ii) *with* 12 CFR § 1081.210(c) and 16 CFR § 3.31A(c).
[31] *Compare* Fed. R. Civ. P. § 26(2)(B)(iii) *with* 12 CFR § 1081.210(c) and 16 CFR § 3.31A(c).
[32] *Compare* FED. R. CIV. P. § 26(2)(B)(iv), (v) *with* 12 CFR § 1081.210(c) and 16 CFR § 3.31A(c).
[33] *Compare* FED. R. CIV. P. § 26(2)(B)(iv), (vi) *with* 12 CFR § 1081.210(c) and 16 CFR § 3.31A(c).
[34] FED. R. CIV. P. § (a)(2)(C)(i).

virtually identical to the FTC's rules, defendants also have the benefit of persuasive authority from the FTC's long-standing practices. Changing the Bureau's expert witness disclosure rules is unnecessary at this time and would be a distraction from other more pressing Bureau priorities.

10. 12 CFR 1081.212(e)'s instruction that extensions of the length limitation for motions for summary disposition are disfavored;

This question seeks comment on a provision that is similar to the SEC's rule[35] and more tolerating of extensions than the FTC's rule.[36] Section 1081.212(e) has not been the subject of any contention in adjudication proceedings to date and provides for 35-page limit for briefs in support and in opposition to a motion, with 10 pages allowed for the moving party's reply brief. While shorter page-limits than some local court rules allow, these limits seem to provide an adequate length for parties to present their arguments for and against motions.

11. 12 CFR 1081.303(b)'s rules pertaining to admissible evidence in administrative adjudications, including:

a. Whether, in general, the CFPB should expressly adopt the Federal Rules of Evidence; and

b. whether, if the CFPB does not expressly adopt the Federal Rules of Evidence, the acceptance of prior testimony hearsay evidence pursuant to 12 CFR 1081.303(b)(3) should comply with the requirements of Federal Rule of Evidence 804(b)(1);

The CFPB adopted § 1081.303(b) to establish rules of evidence that were "consistent with general administrative practice."[37] The Bureau's rules on this point are essentially the same as those set forth in the FTC and SEC Rules.[38] While it is to be expected that some litigants before the CFPB would prefer that the more extensive Federal Rules of Evidence be brought into adjudication proceedings, those rules might introduce complexity and added litigation that would likely delay final resolution. This would not be consistent with the expeditious proceedings contemplated under the Dodd-Frank Act.

12. The Rules' lack of authorization for parties to conduct certain discovery, including deposing fact witnesses or serving interrogatories; and

The 2012 Final Rule addressed a comment similar to this inquiry, noting:

> *The Bureau considered allowing third-party depositions or interrogatories but declined to do so because the need for these third-party discovery tools will likely be met through the discovery mechanisms that are available under the Final Rule, and because of the potential for third-party depositions and interrogatories to delay the proceedings.*

The 2012 Final Rule noted that parties could subpoena witnesses for testimony at the hearing, under § 1081.208, and depose the witness if unavailable for the hearing. Interrogatories, while a useful tool in civil litigation, also tend to be the subject of significant dispute. Thus, limiting testimony outside of trial

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[35] SEC Rules of Practice, 17 C.F.R. § 201.250(e) (2016) ("Requests for leave to file motions and accompanying documents in excess of 9,800 words are disfavored.")
[36] FTC Rules of Practice, 16 C.F.R. § 3.22(c) (2015) ("Documents that fail to comply with these provisions shall not be filed with the Secretary.").
[37] 77 FR 39057, at 39079.
[38] *Id.*

and not permit interrogatories helps facilitate the expeditious proceeding contemplated by the Dodd-Frank Act and by § 1081.201.

13. Whether respondents should be afforded the opportunity to stay a decision of the Director pending appeal by filing a supersedeas bond, consistent with Federal Rule of Civil Procedure 62(d).

Thus far, only one matter has involved a request for a stay on appeal under § 1018.407 to which this inquiry seems to apply. Though the Director denied the requested stay, he delayed the effectiveness of his order to allow the respondent to seek a stay from the Court of Appeals, which ultimately stayed the Director's order. It unclear what harm or disadvantage the CFPB believes may be occurring that merits reconsideration of the CFPB's previous determination not to provide what would be unique powers to obtain a stay.

April 23, 2018

Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: CFPB Civil Investigative Demands and Associated Processes, Docket No. CFPB-2018-0001

Dear Ms. Jackson:

The 53 undersigned consumer, community, civil rights and legal services groups submit these comments in response to the Consumer Financial Protection Bureau's (CFPB's) Request for Information ("RFI") regarding Civil Investigative Demands (CIDs) and associated processes.

The Consumer Bureau must retain broad, flexible and nimble authority to investigate potential violations of the law and consumer harm. The bureau's investigation procedures must not bring in political calculations, hinder the ability to act quickly when there is ongoing consumer harm, or give lawbreakers tools to delay, hide evidence, or hamstring the Bureau's investigations. We elaborate on these points below.

1. The severe consumer protection failures that led to the creation of the Consumer Financial Protection Bureau are strong evidence why the Bureau must retain broad, flexible and nimble authority to investigate potential violations of the law and consumer harm.

The CFPB was created in response to the severe 2008 financial crisis that devastated the nation and American families. This crisis began with fundamental problems in the mortgage and other consumer credit markets but spread to the entire economy and harmed individuals and businesses alike. The financial marketplace was rife with reckless, unfair and abusive practices. Those practices had done immense damage to countless consumers, while helping bring on a financial and economic meltdown in which tens of millions of Americans lost homes, jobs, assets, savings and economic security. Responsible businesses large and small also suffered from the damage created by irresponsible companies.

Until the CFPB opened its doors in 2011, the responsibility of standing up for fair treatment of consumers by banks and other lenders had been scattered across half a dozen federal regulators, and often neglected by them. Other financial companies, such as debt collectors, credit reporting agencies and payday lenders, had faced little or no real federal oversight. The clear inadequacy of that arrangement, and the enormous harm consumers suffered as a result, led Congress to establish an agency expressly dedicated to this one task.

The CFPB was created in order to have the focus, tools, information, speed and flexibility to address existing and emerging problems in consumer financial markets. Congress held over 100 hearings and had extensive debate about ways to prevent similar consumer protection failures. Congress carefully considered how to craft an agency that would be independent of financial interests and politics, focus on consumer protection, and have the means and flexibility to address new problems quickly and responsibly as they arise. Many aspects of the Consumer Bureau's structure, including its investigative tools and procedures, were designed to serve these goals.

Since it was established, the Consumer Bureau has used its authority wisely to protect the public. The agency's supervision and enforcement actions have resulted in nearly $12 billion in relief for more than 29 million consumers victimized by unlawful activity. There is undoubtedly still greater benefit to consumers that has occurred as a consequence of firms exercising greater care not to break the law given more rigorous enforcement.

The Bureau's investigation process is critical to the ability to achieve these results for the American public. The Bureau's processes for investigating potential violations of the law and consumer harm are appropriate and do not need to be changed. We urge the Bureau to resist calls to hinder investigations by politicizing them or by imposing procedures that cause delay.

The Bureau should be especially wary of calls by firms that were found to have broken the law to alter the procedures used to hold them accountable. The effect of weakening the investigative process would be to make it easier for lawbreaking firms to harm the public without facing consequences or being required to desist. This in turn penalizes law abiding firms who must compete with them.

2. The ability to initiate investigations and to promulgate investigative demands must remain in the hands of senior professional staff, and must not be subject to political calculations.

Some of the questions in the RFI hint at requiring the Director or other more senior officials to approve the opening of an investigation or the issuing of civil investigative demands. Approval by senior professional staff is already required, and in many cases the Dodd-Frank Act itself specifies who must approve an activity and whether that approval may be delegated. In addition, current procedures sometimes require recommendations from a panel of career professional staff and experts within the agency. These procedures ensure sufficient management control and expert input.

Requiring approval by the Director or other political appointees would risk politicizing the investigative process. The Director already has the authority to end an investigation and to set priorities for the Bureau's work. But requiring approval before new investigations are launched or pursued could bring an element of politics into the process and could be influenced by companies that might have the Director's ear. Not only the public, but also senior political staff at agencies benefit from having investigation decisions in the hands of staffers who are relatively immune to potential political repercussions of investigating the largest financial institutions in the world.

3. Speed can be important when there is ongoing consumer harm or a fast-spreading new problem, and staff must retain the authority to initiate demands quickly and expect quick responses, without front-office bottlenecks.

Requiring approval at a more senior level to open or pursue an investigation could unnecessarily delay an investigation. It is critical that the Bureau be able to act quickly when it has reason to believe that the law has been violated. The Director and other senior officials have many pressing duties, and investigatory decisions should not have to compete for attention with these other responsibilities of multiple levels of management. The agency must be able to move quickly to investigate suspected illegal activity and take necessary steps to enforce the law and protect consumers. A tremendous amount of consumer harm can happen in short periods of time.

For similar reasons, we believe that the presumptive timeframes for the CID process are appropriate and should not be extended. Professional staff already have the discretion to grant extensions when warranted. Industry will often want more time, but many requests are simple and can be responded to quickly. More complicated requests can be handled through extensions.

Delaying an initial CID needed for preliminary information to identify witnesses or issues, for example, can lead to delays on a whole series of CIDs. The base timelines must remain relatively short, with flexibility to extend them, in order not to delay important investigations of entities the Bureau has reason to believe are violating the law.

4. The Bureau's investigation procedures should not provide opportunities for lawbreakers to delay, limit or hide evidence, or hamstring the Bureau.

The RFIs ask a number of questions, including about the specificity of the CID's notice of purpose, the nature and scope of the CIDs, application of the Federal Rules of Civil Procedure, the role of counsel, and the process for challenging CIDs.

We believe that the Bureau's current procedures are appropriate, and many of the changes that the questions hint at could unduly delay investigations, allowing consumer harm to continue, and give lawbreakers tools to thwart the Bureau's work to protect the public.

The Bureau's procedures already require that CIDs identify the purpose of the demand. Further levels of red tape or details could limit the avenues that the CFPB may pursue, or encourage recipients to limit their responses or conceal evidence.

As in civil court discovery, broad initial demands are often narrowed or specified through the meet and confer process. But broad initial requests are important in order to cover the range of evidence that might reveal a violation of the law. If the Bureau is limited to the evidence it already knows about or is forced to make the demands unduly specific, that could allow lawbreakers to hide evidence of their violations through strategically narrow responses.

CFPB staff are already required to engage in reasonable negotiations, and can modify CIDs for good cause. Potential lawbreakers should not be given opportunities to waste time demanding extended meetings, concessions or extensions. Indeed, delaying tactics could be more in the interests of industry attorneys who are generating billable hours than of responsible companies that wish to see an investigation come to its conclusion. Notably, injured consumers do not have a say in the investigation process.

For the same reasons, the processes for challenging CIDs already provide sufficient protections to companies. Encouraging more litigation before the Bureau has even concluded an investigation could only harm the public. The rules on the transparency of CID petitions, which follow longstanding FTC rules, also serve the public and discourage delay tactics and special treatment.

Nor is it necessary or appropriate to extend the Federal Rules of Civil Procedure to Bureau investigations. The FRCP are designed for litigation after a complaint is filed in court, and are not crafted for government investigations. They are overseen by a judge with authority to rule on disputes. While many aspects of the FRCP are replicated in the Bureau's procedures, applying the rules en masse could give recalcitrant companies opportunities to cause delay and to create burdensome hurdles that would hinder discovery and enforcement against law violations.

Similarly, the statutory right in fair housing investigations for a deposition witness to consult counsel about any question should not be extended to all investigations. Witnesses have a right to consult counsel about privileged matters, but a broader right could lead to undue coaching of witnesses, and is inappropriate in these other kinds of investigations, where the CFPB does not have the same procedure for compelling answers as in fair housing investigations.

Any changes to the Bureau's procedures that would hinder or delay its investigations would harm the public and also lead to more inefficient use of taxpayer funds.

* * *

It is the civic duty of all companies and individuals to cooperate when The Bureau works to minimize the burden of these investigations, but any investigation can impose some burdens, which is inevitable if the Consumer Bureau is to fulfill its role in protecting the public.

Moreover, some of the comments that the Bureau receives about its investigative demands may come from companies that were ultimately found to have broken the law or to have mistreated consumers. The Bureau must keep in mind that unscrupulous companies will exploit any changes the Bureau makes.

Maintaining a robust, flexible and efficient investigation process is essential to the Consumer Bureau's mission. Thank you for the opportunity to submit these comments.

Yours very truly,

Alabama Appleseed Center for Law & Justice
Allied Progress
Americans for Financial Reform
Arizona Community Action Association
Arizona Public Interest Research Group (Arizona PIRG)
Arkansans Against Abusive Payday Lending
Atlanta Legal Aid Society, Inc.
California Reinvestment Coalition
CASH Campaign of Maryland
Center for Economic Integrity
Center for Progressive Reform
Center for Responsible Lending
Connecticut Fair Housing Center
Connecticut Legal Services, Inc.
Consumer Action
Consumer Advocacy and Protection Society (CAPS) (CA)
Consumer Federation of America
Consumers Union
Demos
Florida Alliance for Consumer Protection
Georgia Watch
Greater Boston Legal Services (on behalf of its low-income clients)
Heartland Alliance for Human Needs & Human Rights (IL)
Interfaith Center on Corporate Responsibility
Jacksonville Area Legal Aid, Inc. (FL)
Kentucky Equal Justice Center
Legal Aid Society of Southwest Ohio, LLC
Legal Aid Society of the District of Columbia
Maryland Consumer Rights Coalition
Montana Organizing Project
NAACP
National Association of Consumer Advocates
National Center for Law and Economic Justice
National Community Reinvestment Coalition (NCRC)
National Consumer Law Center (on behalf of its low income clients)
New Jersey Citizen Action
North Carolina Justice Center
People's Action Institute
Prosperity Now
Public Citizen

Public Justice Center (Baltimore, MD)
Public Law Center (Santa Ana, CA)
Reinvestment Partners (NC)
SC Appleseed Legal Justice Center
Southern Poverty Law Center
Tennessee Citizen Action
Texas Appleseed
U.S. PIRG
UnidosUS (formerly NCLR)
Virginia Citizens Consumer Council
Virginia Organizing
Virginia Poverty Law Center
VOICE - OKC (OK)
West Virginia Center on Budget and Policy
Woodstock Institute

Comments of

Americans for Financial Reform

Center for Responsible Lending

The Consumer Federation of America

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

U.S. Public Interest Research Group

March 27, 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-2 018-0001; Document Number: 2018-05783-- Request for Information Regarding Consumer Financial Protection Bureau Civil Investigative Demands and Associated 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-2018-001) 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.

The undersigned frequently engage with the CFPB and vigorously support both its mission and its independence. Many of our staff have significant experience in public enforcement of consumer protection laws. We appreciate the opportunity to submit these comments for your consideration

The CFPB was created in response to the 2008 financial crisis. Inattention by other regulatory agencies, along with limitations on their authority, contributed significantly to the crisis that destabilized the American economy and caused grave hardship to American families. Reacting to market and regulatory failures that fueled this "Great Recession," Congress in 2010 enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank Act").

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. Congress intended the CFPB to be an independent agency with broad and flexible CID authority to support its investigatory and public enforcement duties

Congress created the CFPB in 2010 after more than 100 hearings and extensive debate about the causes of the 2008 financial crisis and the ways in which the government could prevent a similar crisis in the future.[4] When it did so, Congress "gave the new agency a focused mandate to improve transparency and competitiveness in the market for consumer financial products."[5]

Congress concluded that with this singular focus on consumers, the CFPB could serve American households more effectively than other regulators. In the past, "[f]ederal bank regulators had given short shrift to consumer protection."[6] "Congress concluded that [the] 'failure by the prudential regulators to give sufficient consideration to consumer protection … helped bring the financial system down.'"[7] "All told, nearly $11 trillion in household wealth … vanished" in the 2008 financial crisis.[8] "In Congress's view, the 2008 crash represented a failure of consumer protection."[9]

Congress responded to these failures by consolidating in the CFPB "authorities to protect household finance that had previously been scattered among separate agencies in order to … ensure accountability."[10] It also gave the CFPB important new authority.

The CFPB is the first federal regulator to supervise credit reporting agencies—companies whose data fuel many of consumers' most important financial transactions.[11] More generally, Congress

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[1] PHH Corp. v. CFPB, -- F.3d --, 2018 WL 627055, *1 (D.C. Cir. Jan. 31, 2018).
[2] H.R. Rep. No. 111-517, at 874 (2010) (Conf. Rep.); *see generally PHH*, 2018 WL 627055, at *3-4.
[3] CFPB, *Factsheet, 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*, CFPB (July 21, 2017).https://www.consumerfinance.gov/about-us/blog/six-years-serving-you/.
[4] *See* Dodd-Frank Act, § 1011, 124 Stat. at 1964 (12 U.S.C. § 5491); S. Rep. No. 111-176, at 44 (2010).
[5] *PHH*, 2018 WL 627055, at *3; *see also* 12 U.S.C. § 5511(a).
[6] *PHH*, 2018 WL 627055, at *3.
[7] *Id.*. (ellipsis in original) (quoting S. Rep. No. 111-176, at 166).
[8] *Id.* (internal brackets and quotation marks omitted).
[9] *Id.*
[10] *Id.* (internal quotation marks and brackets omitted); 12 U.S.C. § 5581(b).
[11] *See CFPB to Supervise Credit Reporting*, CFPB (July 16, 2012), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-to-superivse-credit-reporting/; *see generally* 12 U.S.C. § 5481(15)(A)(ix).

made the CFPB the first federal regulator to supervise both banks and non-bank financial companies, including mortgage companies, private student lenders, and payday lenders.[12] With this "level playing field" approach, Congress aimed to ensure that consumers would receive the same level of protection and companies the same level of regulation, in either sector of the market.[13]

Congress also paid careful attention to the CFPB's structure. Vital to the new agency's success, Congress concluded, was its independence.[14] Other financial regulators had been "overly responsive to the industry they purported to police."[15] 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."[16]

Within this context, Congress assigned the CFPB five key functions. In addition to support activities, the CFPB is charged with the responsibility for: (1) "collecting, investigating, and responding to consumer complaints"; (2) supervising financial companies and taking enforcement action to address violations of the law; (3) "issuing rules, orders, and guidance" to implement consumer protection law; (4) "conducting financial education programs," and (5) researching and monitoring the markets for consumer financial products and services.[17]

To fulfill these functions independently and effectively, the CFPB has the authority to issue pre-complaint investigative demands, often referred to as Civil Investigative Demands ("CID" or "CIDs") to gather the critical facts and data needed to inform its judgments. The undersigned consumer organizations strongly believe the CFPB needs to retain broad and flexible CID investigatory discretion in order to meet the ever-evolving range of challenges within its mandate. It is from this perspective that we respond to the specific questions raised in the RFI concerning the CFPB's use of CIDs and in the exercise of its investigatory duties.

B. The CFPB recently received a successful independent review of its CID procedures—further revisions are duplicative and unnecessary.

In 2017, the Board of Governors of the Federal Reserve System and Consumer Financial Protection Bureau Office of the Inspector General conducted an independent audit of the CFPB's CID rules and policies.[18] This evaluation included a review of the CFPB's records management policy,

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[12] *See* 12 U.S.C. §§ 5514-15; S. Rep. 111-176, at 167–169; CFPB, *Semi-Annual Report of the Consumer Financial Protection Bureau* 70 (Spring 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201706_cfpb_Semi-Annual-Report.pdf.
[13] S. Rep. 111-176, at 11, 167-68, 229; *see also* 12 U.S.C. § 5511(b)(4).
[14] *See* S. Rep. No. 111-176, at 10-11, 161, 163; H.R. Rep. No. 111-517, at 874. Congress also provided exacting direction about other aspects of the new agency's organization. The Dodd-Frank Act required specific offices and units and an advisory board, 12 U.S.C. §§ 5493(a)(5), (b)-(g), 5494, 5535, specified personnel rules, *id.* § 5493(a)(1)-(4), and described how employees could be transferred from other agencies, *id.* § 5584.
[15] *PHH*, 2018 WL 627055, at *1.
[16] 156 Cong. Rec. S5871 (daily ed. July 15, 2010).
[17] 12 U.S.C. § 5511(c)(1)-(6).
[18] BD. OF GOVERNORS OF THE FED. RES. SYS. AND CONSUMER FIN. PROTECTION BUREAU OFF. OF INSPECTOR GEN., THE CFPB GENERALLY COMPLIES WITH REQUIREMENTS FOR ISSUING CIVIL INVESTIGATIVE DEMANDS BUT CAN IMPROVE CERTAIN GUIDANCE AND CENTRALIZE RECORDKEEPING,

the file plans for the Office of Enforcement and Office of the Director's records, and every petition to modify or set aside CIDs filed from June 2012 to June 2017.[19] The evaluation also included a sample of CIDs and CID responses.[20] Additionally, the Inspector General conducted over a dozen interviews with CFPB officials as well as contextually appropriate interviews of related officials at the Department of Justice and the Federal Trade Commission.[21]

After this detailed, professional, and thorough review of the CFPB's CID procedures, the Inspector General concluded that the CFPB generally complies with the Dodd-Frank Act and the CFPB's own policies and procedures manual. Moreover, the Inspector General found that "the CFPB often uses modifications and extensions of time to alleviate some of the potential burden associated with CID requests."[22] The Inspector General noted that the CFPB enforcement staff were cooperative and responsive to the evaluation and thanked the CFPB's career, professional staff for their help.[23] The Inspector General did make a handful of constructive suggestions on recordkeeping and providing notice to CID recipients. The CFPB's Enforcement Office immediately responded favorably to these recommendations and began adopting them.[24]

The Inspector General's independent review is strong evidence that further revisions to the CFPB's CID policies and practices are unnecessary. The Inspector General's evaluation shows that the CFPB's CID procedures are working well; are in line with the practices at other federal law enforcement agencies; and, should not be further reformed or altered at this time. Conducting a second review of the CFPB's CID polices within a year is entirely unnecessary and a waste of resources.

Moreover, this RFI should not be used as a pretext for slowing federal investigations or holding off on sending CIDs in light of the fact that the CFPB *already completed an audit of CID practices* just six months ago. Additionally, our organizations are concerned that this Request for Information may be politically motivated and calibrated simply to allow companies found violating federal law and other special interests to air grievances related to the CID process. We are concerned that the decision to issue an RFI on CID processes following the Inspector General's successful audit is a waste of time and encourage CFPB leadership to instead focus on protecting consumers from unfair, deceptive, and abusive financial practices in the marketplace.

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

1. The Bureau's processes for initiating investigations, including 12 CFR 1080.4's delegation of authority to initiate investigations to the Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement.

EVALUATION REPORT 2017-SR-C-015 (2017), https://oig.federalreserve.gov/reports/cfpb-civil-investigative-demands-sep2017.pdf (hereinafter FED OIG CID EVALUATION REPORT).

[19] *Id.* at 17.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 10.

[23] *Id.*, executive summary memorandum.

[24] *Id.* at 20.

The signatories believe the current process for initiating investigations is appropriate. 12 CFR § 1080.4 delegates to the Assistant Director and Deputy Assistant Directors of the Office of Enforcement the discretion to open investigations. Currently, the Enforcement Office's policies and procedures manual requires that "the Enforcement Director must approve the opening of any new investigation."[25] In addition, existing Enforcement Office policies require that a panel of career professional staff headed by an issue expert from the Enforcement Office's Policy and Strategy Team ("PST") weigh in with a recommendation prior to any investigation opening decision.[26] This process already guarantees that a panel of issue experts act as a check on ill-advised investigation proposals.

We believe the current CFPB rules and procedures provide an appropriate level of management control over professional enforcement staff. In particular, we believe the CFPB should not require more senior CFPB staff approval to begin investigations, as such a step would place investigation approvals at a level of managerial control too far removed from professional enforcement attorneys and investigators. An added level of bureaucratic managerial control would risk chilling professional enforcement staff, possibly discouraging them from opening investigations and recommending certain types of investigations and legal theories.

Moreover, requiring higher level approvals prior to initiating investigations could prevent enforcement staff from responding to new and unexpected harmful practices that emerge with new forms of commerce. A critical lesson of the financial crisis of 2008 was that federal consumer financial law enforcement was too slow to respond and to deferential to banking industry preferences and legal opinions.[27] To protect the public interest, the CFPB's career enforcement staff must have the latitude to investigate suspected illegal activity whenever it occurs.

Requiring senior management approval also risks slowing down the process for commencing investigations and bottlenecking the Bureau's law enforcement work. Consumers have a right to expect that the federal law enforcement staff working on their behalf will move expeditiously to resolve suspicion of illegal activity. Large financial institutions can cause tremendous consumer harm in short periods of time. The necessity of opening enforcement investigations must not be stacked in

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[25] 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-and-procedures-memo_version-3.0.pdf [hereinafter "POLICIES AND PROCEDURES MANUAL VERSION 3.0].

[26] The current CFPB Enforcement Office Policy and Procedures Manual requires:

> The Opening Memo should be shared with the appropriate Issue Team for Issue Team and PST input. The Issue Team and PST should, within a week of receipt of the Opening Memo, provide the case team with feedback about whether they believe the investigation should be opened and how this investigation fits into the Enforcement Strategic Plan and articulated priorities. The Issue Team and PST feedback may be oral and informal, but should also include a short written recommendation to the Enforcement Front Office about whether to proceed with opening the investigation. That written recommendation should be no more than one page long, and should be provided in a document separate from the Opening Memo.

POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26,

[27] *See, e.g.,* U.S. FIN. CRISIS INQUIRY COMM'N, FINANCIAL CRISIS INQUIRY REPORT, 15 (2011), http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf (discussing whistleblowers who were "infuriated at the slow pace of enforcement and at prosecutors' lack of response to a problem that was wreaking economic havoc . . . .").

queue behind competing political duties, public appearances, educational activities, responding to Congressional oversight, and other responsibilities of senior levels of management.

Instead the decision to open enforcement investigations should remain at a managerial level below political staff with career enforcement professionals in order to prevent conflicts of interest, partisanship, and the appearance of impropriety. Political staff simply may be distracted by their public duties and lack the focus needed for making timely and reflective decisions on opening investigations. Furthermore, political staff are more likely to be deterred from opening necessary investigations because these decisions could impede future electoral campaign fundraising, appointment or confirmation to top level political posts, or transition into the lucrative management positions in large financial institutions following public service. The public must have confidence that law enforcement investigations will not be affected by public relations, electoral politics, or campaign finance. Keeping the authority to open investigations at the career enforcement level avoids the appearance of impropriety and promotes public confidence. Moreover, it is in the best interests of senior political management to have investigation opening decisions in the hands of staffers who are relatively immune to potential political repercussions of investigating the largest financial institutions in the world.

If the Bureau makes any changes to its investigation opening procedures, the signatories recommend revising the Enforcement Office Policies and Procedures Manual to allow the Deputy Assistant Directors of the Office of Enforcement to open investigations without requiring approval from the Assistant Director of the Office of Enforcement.[28] Such a change would be consistent with the existing regulations which explicitly provide for this delegation of authority.[29]

2. The Bureau's processes for the issuance of CIDs, including the non-delegable authority of the Director, Assistant Director of the Office of Enforcement, and the Deputy Assistant Directors of the Office of Enforcement to issue CID.

The signatories believe that the current process for issuing CIDs is appropriate. 12 CFPR § 1080.6 provides discretion to the Assistant Director and Deputy Assistant Directors of the Office of Enforcement to issue CIDs.[30] Current office policies require CID forms be "signed by the Enforcement Director or a Deputy Enforcement Director."[31] This procedure strikes the appropriate balance between managerial control and the potential for slowing enforcement investigations.

Furthermore, the CFPB should not require a higher level of senior management approval prior to issuing CIDs. As with the decision to open investigations, professional enforcement staff need flexibility, discretion, and speed to provide a nimble, 21st century response to illegal activity. Slowing down investigations by requiring career staff to obtain buy-in from more senior leaders would lead to slower investigations, fewer investigations, less deterrence of illegal activity and more harm to the American public.

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[28] *Cf* POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 37,

[29] 12 CFR § 1080.4 ("The Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement have the nondelegable authority to initiate investigations.").

[30] 12 CFR § 1080.6.

[31] POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 57,

Moreover, requiring sign-off from more senior managers for sending CIDs could harm the subjects of investigations themselves. For example, some publicly traded consumer finance businesses disclose the existence of CFPB investigations in their securities disclosures. Slowing down the investigation process by requiring more red-tape and hurdles in issuing CIDs could force investigation subjects to disclose investigations more frequently and for longer periods of time.

The signatories believe that the current rules and process on issuing CIDs is working well and should not be changed.

3. Specific steps that the Bureau could take to improve CID recipients' understanding of investigations, whether through the notification of purpose included in each CID or through other avenues, including facilitating a better understanding of the specific types of information sought by the CID.

Current Bureau practices strike the right balance between CID recipients' need for understanding investigations and the Bureau's need to uncover evidence of illegal activity. Existing regulations and CFPB Enforcement Office Policies *already* require enforcement staff to provide notice to CID recipients of the purpose of CIDs in the "Notification of Purpose" section of the standard office CID form.[32] Under existing policy, enforcement staff "are required to describe the nature of the conduct constituting the alleged violation under investigation and the applicable provisions of law."[33] The undersigned believe this existing policy is more than sufficient to provide notice to CID recipients. Further levels of red tape, bureaucratic detail, or instructions to CFPB enforcement staff could interfere with their ability to effectively investigate suspicious activity.

CFPB leadership should bear in mind that many investigation subjects are hostile to CFPB investigations because the subjects are engaged in violations of the law. While some investigation subjects are forthcoming and cooperative in investigations, other subjects may engage in spoliation of evidence, concealment, and obfuscation in order to frustrate the federal government's legitimate law enforcement goals. In order to hold businesses and individuals accountable for their illegal activity, CFPB enforcement staff need the flexibility to craft CIDs for both cooperative and uncooperative recipients alike. Making Bureau investigators provide even more information than existing policies already require might inadvertently divulge information that bad actors could use to obstruct the investigation.

Furthermore, some investigation subjects may prefer that the Bureau not provide more detailed disclosures regarding the purpose of the CID. For example, the Bureau must often serve CIDs on third parties that are not currently under investigation in order to gather information about whether an investigation subject may be violating the law. Revealing to the third party the nature and purpose of the CID could expose the investigation subject to inadvertent reputational harm prior to an adjudication of liability. If CFPB leadership requires further disclosure of the purpose of CIDs, this information should be very general in nature and limited to the importance of law enforcement and the rule of law generally, as CID recipients have a civic duty to cooperate with law enforcement.

Finally, in 2017, pursuant to the recommendation of the Office of the Inspector General of the Federal Reserve Board of Governors and a D.C. Circuit Court of Appeals decision, the Bureau

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[32] 12 CFR § 1080.5; POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 58,

[33] POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 58,

both revised its Policy and Procedures Manual and officially reminded enforcement staff of the importance of providing notice regarding the subject matter of CIDs. Further adjustment of the Bureau's CID policies in this area is unnecessary.[34]

> **4. The nature and scope of requests included in Bureau CIDs, including whether topics, questions, or requests for written reports effectively achieve the Bureau's statutory and regulatory objectives, while minimizing burdens, consistent with applicable law, and the extent to which the meet and confer process helps achieve these objectives.**

The CFPB's existing procedures adequately achieve the Bureau's objectives while minimizing burdens on CID recipients. For example, the CFPB Office of Enforcement's Policies and Procedures Manual already provides that:

> [A] CID for the production of documentary material or tangible things should describe each class of material requested with definiteness and certainty. A reasonable return date for the material should be provided. CID recipients should comply with the detailed instructions relating to the productions of documents, including the Document Submission Standards.[35]

Moreover, the CFPB's existing meet and confer procedures are sensible and effective. Under the current policies and procedures, the recipient of a CID normally is required to attend a meeting with CFPB staff to discuss any of the recipient's questions and concerns regarding the CID. This meeting, which can occur face-to-face or over the phone, is a proactive step the CFPB has integrated into its enforcement policies that helps promote communication, identify problems, and avoid unnecessary disputes. While federal law enforcement investigations by their nature lead to contention and stress, the CFPB's meet and confer process strikes a reasonable balance in helping recipients respond to CIDs without burdening CFPB enforcement staff with procedures, disclosures, meetings, or delays that might slow down prosecution of the public interest.

CFPB leadership should bear in mind that some financial institutions and their attorneys may attempt to misuse their contacts with CFPB Enforcement Office managers and professional staff in order to lobby for a favorable investigation outcome, changes to current regulations or policies, or other forms of special treatment. Unlike investigation subjects and their attorneys, ordinary American consumers do not have the benefit of extended face-time with CFPB enforcement staff. Enforcement policies and procedures should not be amended in a way that allows investigation subjects to waste time, create needless correspondence, demand useless concessions, extensions, or other special favors.

Furthermore, for every investigation subject that may be violating the law, there are likely dozens of law-abiding companies that are suffering from a competitive disadvantage. Businesses that are complying with the law have a right to expect that CFPB political leadership will not allow the investigation process to be manipulated for purposes unconnected to law enforcement investigations. The purpose of meet and confer meetings is to allow the CFPB's investigation to move forward in an expeditious and fair manner. The CFPB must not amend its procedures to allow contact or discussions that run the risk of interfering with the law enforcement purpose and mission.

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[34] CFPB v. Accrediting Council for Indep. Colleges and Schools, 854 F.3d 683, 685 (D.C. Cir., 2017)

[35] POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 58.

5. The timeframes associated with each step of the Bureau's CID process, including return dates, and the specific timeframes for meeting and conferring, and petitioning to modify or set aside a CID.

Existing CID timeframes strike a reasonable balance between the interests of the CFPB and CID recipients. Several observations are in order: First, many CIDs are relatively simple, specific, and do not require significant costs or time for a response. For example, some CIDs merely request business records from a third party that easily are retrieved and readily available. It is critical that the Bureau's rules and procedures not be amended to create needless delay in law enforcement where there are no legitimate compliance concerns from CID recipients. The existing rules and procedures sensibly set an expectation of brisk compliance and grant professional staff the discretion to extend times for responding as necessary.

Some CID recipients, and their attorneys, may prefer additional time irrespective of whether it is truly necessary. In some circumstances, CID recipients may try to abuse requests for additional time in order to engage in spoliation of evidence, obscure computer records, or conceal assets that could be used to provide restitution to victims of illegal activity. Enforcement staff need the flexibility and discretion to exercise their professional judgment on how to balance the best interests of both the public as well as CID recipients. Although the CPFB likely will receive many comments from well-funded financial institutions and their counsel on this point, the primary focus of the Bureau should remain on ensuring that the public is protected from illegal activity by covered persons, related persons, and their service providers.

Second, investigations often require cumulative, as opposed to simultaneous, CIDs. This is to say that CFPB staff must often send a CID to a recipient in order to gather information necessary to ask the right questions of and request the needed documents from a subsequent recipient. Delaying one CID may lead to delays in a whole sequence of dependent CIDs. Any one given CID recipient may not understand that their delays can cause the Bureau to fail to ask critical questions of another recipient possibly leading to the need for a duplicative second CID that increases costs for both the Bureau and the recipient overall. While the first recipient may believe that Bureau staff are being unreasonably strident, it is more likely that staff are in fact protecting the needs and interests of CID recipients as well as the public. These questions of timing, order, and logistics are best left to the CFPB professional staff's discretion and judgment and are not likely to be assisted with amendments to existing rules or policies.

Third, it is crucial that CFPB investigations move quickly. When financial institutions are violating the law, there are often thousands of vulnerable families that may be suffering from unwarranted fees, excessive interest, privacy violations, inaccurate credit reports, inappropriate payments, or other financial problems. Each day of delay in pursuing an investigation can impose real harm on consumers as well as their children and other dependents. Moreover, delayed investigations erode the public trust and faith in our government. Indeed, investigation subjects themselves often complain when investigations remain pending too long, even though they themselves may have asked for additional time to meet and confer or respond to a CID.

Fourth, we are concerned that the CFPB should not follow unhelpful developments currently underway at the Federal Trade Commission. The FTC recently changed its investigation procedures to extend the default return date for CIDs in consumer protection matters from 14 to 21 days for third parties and from 21 to 30 days for targets of investigations. We believe that this change to FTC

policy was unnecessary and will lead to delays in investigating violations of federal law. Instead, we support the traditional approach of imposing a default rule that requires prompt CID compliance with discretion given to professional staff to modify CID deadlines where appropriate.

CFPB leadership must not forget that delays in law enforcement investigations contributed to the 2008 financial crisis. The federal Financial Crisis Inquiry Commission ("FCIC") found that in the run-up to the 2008 crash, "enforcement actions came late in the day—often just as firms were on the verge of failure. In cases that the FCIC investigated, regulators either did not identify the problems early enough or did not act forcefully enough to compel the necessary changes."[36] Congress created the CFPB to prevent making this same mistake again. For these reasons, the signatories believe that existing enforcement office rules and procedures on the timeframe for meeting and conferring and petitioning to modify or set aside a CID should remain unchanged. If the CFPB leadership does make a change, the signatories believe the current Policy and Procedures Manual could be amended to provide greater emphasis on the need for quick investigations that respond forcefully to the most pressing consumer financial services problems.

6. The Bureau's taking of testimony from an entity, including whether 12 CFR 1080.6(a)(4)(ii), and/or the Bureau's processes should be modified to make expressly clear that the standards applicable to Federal Rule of Civil Procedure 30(b)(6) also apply to the Bureau's taking of testimony from an entity.

Federal Rule of Civil Procedure 30(b)(6) ("Rule 30(b)(6)")[37] and 12 CFR 1080.6(a)(4)(ii)[38] are very similar and include comparable provisions to protect the interests of a deposed party.

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[36] U.S. FIN. CRISIS INQUIRY COMM'N, *supra* note 28, at 302.

[37] Rule Rule 30(b)(6) states:

> (6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

FED. R. CIV. P. 30(b)(6).

[38] Sub-section 1080.6(a)(4) states:

> (4) Oral testimony.
>
> (i)Civil investigative demands for the giving of oral testimony shall prescribe a date, time, and place at which oral testimony shall be commenced, and identify a Bureau investigator who shall conduct the investigation and the custodian to whom the transcript of such investigation shall be submitted. Oral testimony in response to a civil investigative demand shall be taken in accordance with the procedures for investigational hearings prescribed by §§ 1080.7 and 1080.9 of this part.
>
> (ii) Where a civil investigative demand requires oral testimony from an entity, the civil investigative demand shall describe with reasonable particularity the matters for examination and the entity must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf. Unless a single individual is designated by the entity, the entity must designate the matters on which each designee will testify. The individuals designated must testify about information known or reasonably available to the entity and their testimony shall be binding on the entity.

Nonetheless, while both concern the taking of oral testimony, they serve separate and distinct purposes and are subject to completely different sets of governing procedures. To conflate the two in order to bind the CID investigatory process by the same rules that apply in a civil litigation discovery process would be totally inappropriate and would hinder unnecessarily the CFPB's exercise of its discretion in fulfilling its statutory obligations.

Both Rule 30(b)(6) and CID's are intended to provide for the use of oral testimony to deal with the problems caused by information asymmetry (i.e. where one party has virtually exclusive access to and control of relevant information and data). However, there are at least three key differences that distinguish the circumstances in which 12 CFR 1080.6(4) applies as compared to the circumstances where Rule 30(b)(6) applies.

First, 12 CFR 1080.6(4) applies solely to a preliminary investigative process whereas Rule 30(b)(6) only applies once civil litigation has been initiated. Rule 30(b)(6) always is part of an adversarial process. The corporate defendant's Rule 30(b)(6) representative frequently is an extremely important source of proof of liability for a plaintiff, especially where the defendant corporation has sole knowledge of the events that gave rise to the lawsuit and of its own practices. By comparison, CID testimony can be used by the CFPB to fulfill any and all of the five functions delegated to the agency as it deems appropriate once it has an opportunity to review the testimony provided. Its use is not limited to enforcement or the imposition of liability and the scope of its investigatory reach should not be similarly constrained.

Second, Rule 30(b)(6) is applied within the framework of a complete set of discovery rules established to effectively and fairly manage the unique aspects of civil litigation. Taking the strictures of Rule 30(b)(6) and applying them to a CFPB CID investigation without the balancing provisions that appear in other provisions of the Federal Rules of Civil Procedure (i.e. Rule 16, Rule 26 and Rule 37) unnecessarily will limit and hamper the CFPB's legitimate investigatory efforts.

Finally, Rule 30(b)(6) is applied under the supervision of a judicial authority who has the ability to monitor and insure that the discovery process is fair to both parties. However, in a CID investigation there is no authority to enforce the rule in order to ensure that the party controlling the information does not engage in abusive, dilatory or obfuscating practices such as "bandying," coaching the witness, failing to supplement or changing testimony. The CFPB needs strong authority to overcome these obstacles on its own.

Therefore, oral testimony pursuant to a CFPB CID should be treated similarly to, but not exactly the same as depositions governed by Rule 30(b)(6). Although they share many of the same goals, and include some of the same protections, they are not identical. Rather, CID's should retain the broad flexibility they currently enjoy under 12 CFR 1080.6(4) in order to enable the CFPB to efficiently and effectively engage in productive investigations within its jurisdiction. Rule 30(b)(6) need not, and should not, be explicitly incorporated into 12 CFR 1080.6(4).

7. The Bureau's processes for handling the inadvertent production of privileged information, including whether 12 CFR 1080.8(c) and/or whether the Bureau's processes should be modified in order to make expressly clear that the standards

12 C.F.R. 1080.6(4).

applicable to Federal Rule of Evidence 502 also apply to documents inadvertently produced in response to a CID.

The language of 12 CFR 1080.8(c)[39] is substantially similar to the comparable provisions of Federal Rule of Evidence 502(b).[40] Both are intended to provide a predictable, uniform set of standards under which parties can determine the consequences of an inadvertent disclosure of a communication or information covered by an evidentiary privilege or work-product protection. Both accord with the majority judicial view on whether such an inadvertent disclosure is a waiver.

There therefore appears to be no reason why the standards applicable to the Federal Rule of Evidence need to expressly be incorporated into the CFPB's current regulation governing the same topic. At best, it would be redundant and unnecessary. At worst, it could be confusing since such a step would leave open the question of whether the remaining Federal Evidentiary Rules are, or are not, applicable to the CFPB's CID's. Accordingly, 12 CFR 1080.8(c) should remain unaltered.

8. The rights afforded to witnesses by 12 CFR 1080.9, including limitations on the role of counsel described in 12 CFR 1080.9(b) in light of the statutory delineation of objections set forth in 12 U.S.C. 5562(c)(13)(D)(iii).

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[39] Subparagraph 1080.8(c) states:

> (c) Disclosure of privileged or protected information or communications produced pursuant to a civil investigative demand shall be handled as follows:
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> (1) The disclosure of privileged or protected information or communications shall not operate as a waiver with respect to the Bureau if:
>
> > (i) The disclosure was inadvertent;
> >
> > (ii) The holder of the privilege or protection took reasonable steps to prevent disclosure; and
> >
> > (iii) The holder promptly took reasonable steps to rectify the error, including notifying a Bureau investigator of the claim of privilege or protection and the basis for it.
>
> (2) After being notified, the Bureau investigator must promptly return, sequester, or destroy the specified information and any copies; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if he or she disclosed it before being notified; and, if appropriate, may sequester such material until such time as a hearing officer or court rules on the merits of the claim of privilege or protection. The producing party must preserve the information until the claim is resolved.
>
> (3) The disclosure of privileged or protected information or communications shall waive the privilege or protection with respect to the Bureau as to undisclosed information or communications only if:
>
> > (i) The waiver is intentional;
> >
> > (ii) The disclosed and undisclosed information or communications concern the same subject matter; and
> >
> > (iii) They ought in fairness to be considered together.

12 CFR 1080.8(c)

[40] Federal Rule of Evidence 502(b) states:

> b. Inadvertent Disclosure- When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:
>
> 1. the disclosure is inadvertent;
> 2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
> 3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

FED. R. EV. 502.

The differences between the rights afforded to witnesses in a CFPB CID deposition incorporated in the provisions of 12 CFR 1080.9(b),[41] as opposed to the statutory delineation of objections set forth in 12 U.S.C. 5562(c)(13)(D),[42] can be explained by the differences between the investigatory contexts in which the rules apply.

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[41] Subparagraph 1080.9(b) states:

> (b) Any witness compelled to appear in person at an investigational hearing may be accompanied, represented, and advised by counsel as follows:
>
> > (1) Counsel for a witness may advise the witness, in confidence and upon the initiative of either counsel or the witness, with respect to any question asked of the witness where it is claimed that a witness is privileged to refuse to answer the question. Counsel may not otherwise consult with the witness while a question directed to the witness is pending.
> >
> > (2) Any objections made under the rules in this part shall be made only for the purpose of protecting a constitutional or other legal right or privilege, including the privilege against self-incrimination. Neither the witness nor counsel shall otherwise object or refuse to answer any question. Any objection during an investigational hearing shall be stated concisely on the record in a nonargumentative and nonsuggestive manner. Following an objection, the examination shall proceed and the testimony shall be taken, except for testimony requiring the witness to divulge information protected by the claim of privilege or work product.
> >
> > (3) Counsel for a witness may not, for any purpose or to any extent not allowed by paragraphs (b)(1) and (2) of this section, interrupt the examination of the witness by making any objections or statements on the record. Petitions challenging the Bureau's authority to conduct the investigation or the sufficiency or legality of the civil investigative demand shall be addressed to the Bureau in advance of the hearing in accordance with § 1080.6(e). Copies of such petitions may be filed as part of the record of the investigation with the Bureau investigator conducting the investigational hearing, but no arguments in support thereof will be allowed at the hearing.
> >
> > (4) Following completion of the examination of a witness, counsel for the witness may, on the record, request that the Bureau investigator conducting the investigational hearing permit the witness to clarify any of his or her answers. The grant or denial of such request shall be within the sole discretion of the Bureau investigator conducting the hearing.
> >
> > (5) The Bureau investigator conducting the hearing shall take all necessary action to regulate the course of the hearing to avoid delay and to prevent or restrain disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language. Such Bureau investigator shall, for reasons stated on the record, immediately report to the Bureau any instances where an attorney has allegedly refused to comply with his or her obligations under the rules in this part, or has allegedly engaged in disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of the hearing. The Bureau will thereupon take such further action, if any, as the circumstances warrant, including actions consistent with those described in 12 CFR 1081.107(c) to suspend or disbar the attorney from further practice before the Bureau or exclude the attorney from further participation in the particular investigation.

12 CFR 1080.9(b).

[42] Subsection 5562(c)(13)(D) states:

> (D)Attorney representation
>
> (i)In general. Any person compelled to appear under a civil investigative demand for oral testimony pursuant to this section may be accompanied, represented, and advised by an attorney.
>
> (ii)Authority. The attorney may advise a person described in clause (i), in confidence, either upon the request of such person or upon the initiative of the attorney, with respect to any question asked of such person.

Specifically, the applicable scopes of the two provisions significantly are different, with the statutory provision applicable in a narrower, more focused, context (i.e. fair housing) than the general regulatory scheme. Therefore, allowing the more unlimited coaching of witnesses authorized by the statute in limited circumstances ("[t]he attorney may advise a person described in clause (i), in confidence, either upon the request of such person or upon the initiative of the attorney, with respect to any question asked of such person" as compared to "[c]ounsel for a witness may advise the witness, in confidence and upon the initiative of either counsel or the witness, with respect to any question asked of the witness where it is claimed that a witness is privileged to refuse to answer the question") to be applied to the CFPB's exercise of its broader investigatory responsibilities will unnecessarily and improperly inhibit the agency from fulfilling the full extent of its mandated duties.

Similarly, the difference in the scopes of the statutory and regulatory investigatory provisions is reflected in the different means in how the access to information is enforced. In the limited statutory context, where there is a broader right to coach and direct the witness not to answer during the course of taking oral testimony – and therefore the greater potential for abuse and obstruction – the statute explicitly provides that the CFPB may file a petition with a federal district court for an order compelling such person to answer questions. In the regulatory context, however, where the ability of counsel to coach a witness or direct them not to answer during the course of the taking of their oral testimony already is circumscribed within the applicable regulation, the need for separate enforcement mechanisms to insure proper access to relevant information is less necessary. Thus, the regulatory remedies are more limited and do not include the express right to seek judicial intervention.

Congress created a separate set of objections under 12 U.S.C. 5562(c)(13)(D) that are permitted in distinct and limited types of investigatory interrogations undertaken by the CFPB. Congress also authorized a separate means for enforcing the agency's rights in such investigations. To apply that separate set of objections to the CFPB's general investigatory authority, especially without the associated expanded enforcement rights provided in the statute, would be inappropriate. The rights afforded to witnesses by 12 CFR 1080.9, including limitations on the role of counsel described in 12 CFR 1080.9(b) should not be changed to adopt the statutory delineation of objections set forth in 12 U.S.C. 5562(c)(13)(D)(iii).

9. The Bureau's processes concerning meeting and conferring with recipients of CIDs, including, for example, negotiations regarding modifications and the delegation of authority to the Assistant Director of the Office of Enforcement and Deputy Assistant

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(iii)Objections. A person described in clause (i), or the attorney for that person, may object on the record to any question, in whole or in part, and such person shall briefly state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination, but such person shall not otherwise object to or refuse to answer any question, and such person or attorney shall not otherwise interrupt the oral examination.

(iv)Refusal to answer. If a person described in clause (i) refuses to answer any question—

(I)the Bureau may petition the district court of the United States pursuant to this section for an order compelling such person to answer such question; and

(II)if the refusal is on grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of section 6004 of title 18.

Directors of the Office of Enforcement to negotiate and approve the terms of satisfactory compliance with civil investigative demands and extending the time for compliance.

Under current CFPB Office of Enforcement rules and procedures, investigation subjects already have ample opportunity to request modifications to the substance and process of CIDs for good cause. Specifically, 12 C.F.R. 1080.6 and the Enforcement Office's Policies and Procedures Manual both authorize the Enforcement Director or a Deputy Enforcement Director to limit the scope of a CID, alter the terms of a CID, and approve the terms of satisfactory CID compliance for good cause.[43] Moreover, CID recipients are free to request and the Enforcement Director or Deputy Directors are free to grant time extensions for good cause.[44] Existing policy already provides that enforcement staff "should engage in negotiations with petitioner's counsel to the extent that the requests being made are reasonable."[45]

Current policies do require investigation subjects to ask for CID modifications in a writing that includes the factual and legal information necessary to support their request. This sensible policy helps both CID recipients and enforcement staff understand and focus on what modifications a CID recipient is requesting and why the modification may be necessary. The existing CFPB "good cause" standard for CID modification provides sufficient flexibility for enforcement staff to determine whether modification requests are appropriate. Providing further exceptions, limitations, appeals, or restrictions on the authority of enforcement staff would risk limiting the effectiveness of CFPB investigations. It could also expose investigation subjects to needless delay and uncertainty.

CFPB leadership must not allow investigation subjects to turn each CID into an extended invitation to negotiate, delay, appeal, obfuscate, or otherwise impede lawful federal investigations. Indeed, CFPB leadership should bear in mind that defense counsel responding to CFPB investigations may view CIDs served on their clients as an opportunity to generate billable hours at their clients' expense. Many attorneys that are likely to submit comments on the CFPB's CID policies have a strong financial incentive to slow down and increase the cost of CFPB investigations. Some consumer financial services defense attorneys engage in scare tactics and fear mongering that at times have inaccurately portrayed CFPB staff as unreasonable in order to convince their clients to invest in unnecessary legal fees. Providing additional levels of appeal, further opportunities for negotiation, and other avenues for favors or other special treatment, may in many circumstances actually end up working against CID recipients' interests by generating delay and higher costs. Existing policies provide CFPB staff the right tools to balance the interests of CID recipients with the need to enforce federal law on behalf of the public and other law-abiding businesses.

10. The Bureau's requirements for responding to CIDs, including certification requirements, and the Bureau's CID document submission standards.

The CFPB's CID document submission standards include routine instructions on how to deliver documents to the Bureau. These instructions include practical and uncontroversial instructions such as "all productions should be produced free of computer viruses" an "a cover letter should be included with each production." Generally, the CFPB's current document submission standards

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[43] 12 C.F.R. § 1080.6; POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 63.
[44] POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 63.
[45] *Id.*

require the producing party scan and produce paper productions electronically. This allows the Bureau to store produced records more efficiently, reducing costs to the Bureau as well as recipients. However, the CFPB's Policies and Procedures Manual does allow for paper submissions when necessary, and the Office of Enforcement retains the discretion to modify these submission standards when circumstances justify doing so.

Moreover, the Inspector General's recent audit found no problems with the Bureau's document submission standards.[46] If there were any significant problems with the Bureau's document submission standards, the interviews and detailed review of CIDs, CID submissions, and petitions to set aside CIDs conducted during the Inspector General's audit would have disclosed them.[47] Our organizations are confident that the Bureau's career enforcement staff are carefully and reasonably balancing the burden imposed on CID recipients with the government's need to obtain documents that may reveal evidence of illegal activity.

We are concerned that some aggrieved subjects of enforcement actions may attempt to use this RFI to encourage unreasonable reforms that would frustrate the ability of the United States to enforce its laws. It should come as no surprise that federal investigations can impose costs and burdens on CID recipients. This is an unfortunate, but inevitable, consequence of law enforcement. Our organizations believe that the key to successfully managing these burdens is hiring highly qualified enforcement staff, treating them well, compensating them appropriately, and empowering them to do their very best to promote justice with respect to consumers as well as CID recipients. Micromanaging CFPB professional staff is unlikely to produce better outcomes and will erode the ability of the Bureau to deter illegal activity.

11. The Bureau's processes concerning CID recipients' petitions to modify or set aside Bureau CIDs, including:

> **a. Whether it is appropriate for Bureau investigators to provide the Director with a statement setting out a response to the petition without serving that response on the petitioner.**
>
> **b. Whether petitions and the Director's orders should be made public, consistent with applicable laws; and**
>
> **c. The costs and benefits of the petition to modify or set aside process, vis-à-vis direct adjudication in Federal court, in light of the statutory requirement for the petition process and the fact that CIDs are not self-enforcing.**

The CFPB should not modify existing CFPB CID rules or the Policies and Procedures Manual to require professional enforcement staff to serve internal staff responses to petitions to modify or set aside on the petitioner. Enforcement staff should not be required to disclose the basis for their suspicion of legal wrongdoing at an early stage of an investigation. Conducting an effective investigation requires enforcement staff to exercise considerable judgment about the point at which to disclose information and legal theories to the subjects of investigations and other CID recipients. The CFPB leadership should not tie the hands of investigators by requiring them to share internal communication with CID recipients any time the recipient decides to petition to modify or set aside a CID. Indeed, such a requirement would turn the CID process on its head: by petitioning against the CID, it would be CID recipients that gather information from the Bureau, rather than the other way

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[46] *See* FED OIG CID EVALUATION REPORT, *supra* note 19, at executive summary.

[47] *Id.*, at 17.

around. Moreover, nothing prevents enforcement staff from sharing information relating to the basis of their legal theories and evidence prior to receiving a CID response when doing so makes sense within the strategic and tactical imperatives of an investigation.

Petitions and orders to modify or set aside CFPB CIDs should continue to be available to the public. Section 1080.6(g) of the CFPB's investigation rules states that the CFPB will make publicly available both the recipients' petition and the CFPB Director's order in response to the petition. The CFPB's approach in this regard is based on the longstanding practices of the FTC which also publishes petitions and the commission's response. Publication of petitions and the Bureau's response is necessary because it provides general transparency, allows future CID recipients to determine whether filing a petition is advisable, and how to effectively petition when it is appropriate to do so. The public has a right to know when the recipient of a federal CID is disputing the authority of the Bureau to investigate alleged violations of federal law. Over the long term, maintaining transparency in petitions to modify or set aside CIDs provides crucial sunlight that can avoid the potential for corruption, bribery, or special treatment. Under the current rules, petitioners can request confidentiality with the CFPB and ultimately seek relief in court to protect confidentiality. However, confidentiality should be highly disfavored and should not be granted without good cause. As recognized by the Inspector General, the CFPB has already instituted a process for redacting sensitive information from CID petitions when it is appropriate to do so.[48]

Additionally, if the CFPB were to extend confidentiality to CID petitions, it would encourage CID recipients to engage in dilatory and wasteful challenges. Those CID recipients that simply want additional time to respond to CIDs could confidentially file petitions to modify or set aside for the purposes of delay without facing public accountability for challenging the authority of the government to conduct a lawful investigation. The existing policy strikes a reasonable balance between the public need for transparency in government and the CID recipient's wishes to obscure the public's view of their efforts to avoid or limit the scope of federal investigations.

The existing process for petitioning to modify or set aside a CFPB CID should not be revised. Historically, it is well settled that federal agencies such as the CFPB are entitled to "wield broad power to gather information through the issuance of subpoenas."[49] As the U.S. Supreme Court has explained, under their "power of inquisition" agencies may use administrative subpoenas such as civil investigative demands to "investigate merely on suspicion that the law is being violated, or even just because [they] want[ ] assurance that it is not."[50] Courts generally defer to an agency's interpretation of the scope of its own investigation,[51] and place a "high burden" on the challenging party in order to prevent interference with federal agencies' investigations.[52]

The CFPB's existing rules and practices on challenges to CIDs make sense given the limits to judicial review of administrative CIDs. The Bureau's existing process is sufficient to allow courts to

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[48] FED OIG CID EVALUATION REPORT, *supra* note 19, at 12.
[49] Resolution Trust Corp. v. Thornton, 41 F.3d 1539, 1544 (D.C. Cir. 1994).
[50] U.S. v. Morton Salt Co., 338 U.S. 632, 642–43 (1950).
[51] *See* FTC v. Church & Dwight Co., 665 F.3d 1312, 1315–16 (D.C. Cir. 2011)
[52] *See* EEOC v. Fed. Exp. Corp., 558 F.3d 842, 848-49 (9th Cir. 2009) (upholding a challenge to the jurisdictional limits of an agencies administrative subpoena).

weigh in on CIDs under appropriate circumstances.[53] CID recipients should not have the right to immediately drag the CFPB into federal court every time a recipient wants to delay, challenge, or hinder an investigation. In the vast majority of circumstances, immediate judicial review of CIDs would be inappropriate, impose excessive costs on the Bureau and the recipient, and lead to unnecessary delays.

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[53] *See, e.g.,* CFPB v. Accrediting Council for Indep. Colleges and Schools, 854 F.3d 683, 691-92 (D.C. Cir. 2017).

April 26, 2018

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

Re: Request for Information ("RFI") Regarding the Bureau Civil Investigative Demands and Associated Processes (Docket No. CFPB-2018-001)

Dear Ms. Jackson:

Thank you for the opportunity to comment in response to the Consumer Financial Protection Bureau's (CFPB's) Request for Information ("RFI") regarding Civil Investigative Demands (CIDs) and associated processes.

Appleseed is a nonprofit network of seventeen public interest law and policy centers in the United States and Mexico working to break down barriers to equal opportunity. Through effective, evidence-based advocacy, we work to ensure that government advances the public interest, corporations treat consumers fairly, and all people can exercise their rights and enjoy equal opportunity. We, the undersigned Appleseed Centers, urge you to refrain from adopting changes to the CID process that would hinder the effectiveness of the CFPB.

The Consumer Financial Protection Bureau was created after other regulators failed to react swiftly and appropriately to severe consumer protection problems in the financial marketplace. These failures led to a devastating financial crisis that impacted the entire nation. The Consumer Bureau has fulfilled its mandate and has returned nearly $12 billion in relief to 29 million Americans. Effective enforcement of the law is a fundamentally important part of the Bureau's mission to create a fairer and safer financial system for all of us.

The CFPB has been a crucial actor in enforcing consumer protections in many of the states Appleseed also operates in. For example,

- In **Nebraska**, the CFPB fined First National Bank of Omaha a total of $35 million after federal regulates concluded some of the bank's practices deceptively or unfairly enrolled and charged customers for products they didn't get.
- In **Texas**, the CFPB sued RPM Mortgage for allegedly paying employees bonuses to place clients in loans with higher interest rates, earning tens of millions of dollars in payments from 2011 to 2013. RPM Mortgage agreed to refund $18 million to affected consumers, and pay an additional $2 million fine. This also impacted people in Arizona, California, Colorado, Oregon, and Washington.
- In **Kansas** and **Missouri**, the CFPB sued two attorneys who both operated "debt relief operations" for operating debt settlement scams that typically targeted people with credit card debt. This case is still active.

- In **Louisiana** and **New York**, the CFPB sued Top Notch Funding II, LLC for lying in loan offerings to consumers who were awaiting payment from settlements or victim compensation funds. The consumers included former National Football League (NFL) players suffering from neurological disorders, victims of the Deepwater Horizon oil rig disaster, and 9/11 first responders. In January of this year, a federal judge ordered Top Notch Funding to pay a total of $75,000.
- In **New Jersey**, the CFPB along with federal prosecutors sued Premier Consulting group, a debt-relief service provider, for allegedly collecting illegal advance fees from customers for settlement services. The CFPB also fined Pressler & Pressler in Parsippany and New Century Financial Services of Whippany, alleging that the firms were involved in more than 500,000 debt collection actions, many of which were based on "flimsy or non-existent evidence." Pressler & Pressler paid $1 million in fines and New Century was ordered to pay $1.5 million in fines.
- In **New Mexico**, the CFPB, working with the Navajo Nation Department of Justice, sued Southwest Tax Loans for tricking low-income individuals into taking out high-interest tax refund anticipation loans. The CFPB alleged the lenders misrepresented the loans' interest rates and failed to disclose that a consumer's tax refund was available.

These are just a few examples of efforts by the CFPB to protect the rights of consumers in states where Appleseed Centers are located. The Bureau must not adopt changes to its processes for using civil investigative demands that would hinder or delay the Bureau's important work investigating potential legal violations and hobble its crucial enforcement role. In particular:

- The Bureau must retain broad, flexible and nimble authority to investigate potential violations of the law and consumer harm.
- The ability to initiate investigations and to promulgate investigative demands must remain in the hands of senior professional staff and not be subject to political calculations.
- Bureau staff must retain the authority to initiate CIDs quickly and expect quick responses, without front-office bottlenecks or protracted appeal processes.
- Lawbreakers should not be given opportunities to delay, limit or hide evidence, or hamstring the Bureau.

Maintaining a robust, flexible and efficient investigation process is essential to the Consumer Bureau's mission, and the Bureau's efforts thus far have been very effective at protecting consumers from being taken advantage of by financial services companies.

Thank you for the opportunity to submit these comments.

Alabama Appleseed
Chicago Appleseed
Kansas Appleseed
Nebraska Appleseed
New Jersey Appleseed
South Carolina Appleseed
Texas Appleseed
Washington Appleseed

May 29, 2018

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

Via email: FederalRegisterComments@cfpb.gov
RE: Request for Information, CFPB External Engagement/Docket No. CFPB-2018-0005

Dear Ms. Jackson,

Appleseed wishes to provide the following comment in response to the Request for Information (RFI) regarding the Consumer Financial Protection Bureau's (CFPB) External Engagements.

Appleseed has been honored to support the Consumer Bureau's robust external engagement program and participate in meetings and events over the past six years.

Appleseed and some of our centers have participated in the CFPB's advisory board meetings, field hearings, town-halls, meetings with stakeholders, speaking engagements, and conferences. We have directed individuals to the CFPB consumer complaints system and its "Tell Your Story" website. We know first-hand the power of each of these external engagement tools and we whole-heartedly urge and endorse their continuation and expansion:

- Alabama Appleseed co-hosted a payday hearing in Birmingham, AL, with Director Richard Cordray and his senior team.
- Appleseed and Texas Appleseed joined Dallas and Houston hearings and town-halls.
- Ann Baddour, Texas Appleseed senior policy analyst, serves as chair of the CFPB Community Advisory Board formed pursuant to the Dodd-Frank Act.
- Appleseed provided information and opinions to the Ombudsman Office.

"External engagement"—open and ongoing, robust communication with external stakeholders—is vital to all the functions that Congress assigned the CFPB: supervision, enforcement, financial education, addressing consumer complaints, monitoring markets to identify risks to consumers, and issuing rules to implement consumer protection law.

Appleseed enthusiastically supports such engagement, and especially encourages the CFPB to continue the practice of face to face conversations by the director and his or her team with

individual consumers. Individuals can convey to the CFPB leadership where they experience financial difficulties, how they are treated, and what remedies actually work for them. We urge CFPB leadership, as well as staff across all levels of the agency, to dedicate time to engaging directly with consumers and their representatives, as well as other stakeholders.

Robust external engagement ensures that the CFPB can share information with consumers, industry participants, and the wide range of other entities interested in and affected by the CFPB's actions. Moreover, external engagement ensures that the CFPB's policymakers, consumer educators, attorneys, examiners, and other staff have the information they need to understand and appropriately address consumers' needs and experiences. Any engagement forum, from a one-on-one conversation to a large town-hall meeting to a social media exchange, can provide the CFPB with invaluable information about how the markets for consumer financial products and services operate and the risks that consumers may face, and this information is vital for the CFPB to develop and target its initiatives appropriately.

We urge continuation of the external engagement practices of the CFPB's first six years:

- Continue and expand the schedule of frequent and geographically diverse town-halls, field hearings and roundtables to engage the public.
- Attract diverse participants, including immigrants and low-income individuals, and facilitate their participation.
- Conduct topic-focused public events far in advance of proposed regulatory action: consumer debt, overdraft and fees, issues affecting military personnel, elder abuse, small business lending and similar topics.
- Retain CFPB complaint tool with public access to the data. Since its inception, the CFPB has collected more than 1 million consumer complaints. [1] They also provide important information to the CFPB and to the public, as the CFPB publishes complaint data that can help other consumers learn about consumer financial products and potential risks.
- Retain current "Tell Your Story" platform and develop new expanded customer access techniques so that consumers know about this platform and can use it, even if they are not tech-savvy.
- Expand small group meetings and conversations and appearances with expanded time for public to speak.
- Preserve and expand the CFPB's efforts to engage with consumers in languages other than English with both print and audio accessibility in these languages. Please do not reduce the number of languages in which public information is provided.
- Develop new mechanisms to reach a diverse set of stakeholders.
- Expand the agency's existing engagement practices and continue developing and refining ways to analyze and use the information that the CFPB receives through its external engagements.

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[1] [22] *Consumer Complaint Data Base*, Consumer Financial Protection CFPB (website visited April 26, 2018) https://www.consumerfinance.gov/data-research/consumer-complaints/

- Explore new mechanisms to engage with individual consumers. For example, the CFPB could organize “listening sessions,” which would allow consumers to engage in open ended discussions about financial services concerns with senior CFPB staff.

Public engagement has been and should remain a hallmark of the CFPB. Congress created this agency to protect consumers, and this consumer protection mandate requires a pro-active posture of public engagement.

Sincerely,

Annette LoVoi
Appleseed
Director of Financial Access and Asset Building
alovoi@appleseednetwork.org

June 7, 2018

Kristine M. Andreassen
Owen Bonheimer
Senior Counsels
Office of Regulations
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2018-0009 -- Request for Information Regarding Consumer Financial Protection Bureau Rulemaking Processes

Dear Ms. Andreassen and Mr. Bonheimer,

Appleseed submits these comments in response to the Consumer Financial Protection Bureau ("CFPB")'s Request for Information ("RFI") regarding its rulemaking processes. In its first several years of operation, the CFPB's rulemaking process has been inclusive, transparent, evidence-based and comprehensive. It is essential to preserve this robust process.

1. **The CFPB should maintain and expand opportunities for public input in its rulemaking process.**

We applaud the CFPB for embracing an inclusive approach to public outreach and including additional opportunities for public input in its rulemaking processes. The CFPB should continue its efforts to hear from consumers as much as possible to inform its rulemaking at all stages of the rulemaking process.

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The CFPB's field hearings and meetings provide a valuable avenue for the general public to share their experiences directly with the CFPB, and the agency should hold more field hearings and meetings with consumer groups to allow the public more direct access to the CFPB throughout the rulemaking process. The CFPB should continue to explore innovative ways to broaden opportunities for input, including online tools and social media. It is crucial that the CFPB preserve this strong tradition of inclusive public outreach because the agency needs information from a variety of different perspectives. Public input has helped the CFPB make informed decisions in its rulemaking, and outreach should be expanded to allow for even greater public participation.

In particular, we strongly urge the CFPB to seek broad public input in the early stages of identifying problems and potential solutions and as proposed rules are being developed. Once the CFPB has developed a Notice of Proposed Rulemaking ("NPRM"), we support continuation of the practice of first publishing the proposal on the CFPB website, before it is published in the Federal Register. This practice gives the public more time to respond, and often the public is more familiar with the CFPB website. We also strongly support publishing both proposed and final rules along with a press release, blog post, summaries, fact sheets, videos and other materials to make the rulemaking process more accessible and more comprehensible to a wider audience.

While the public should be encouraged to submit comments on a timely basis, the CFPB should not impose any hard rules against continuing input after the comment period closes. Many rulemakings take many years, during which new information can become available, new issues may arise, or the public may become newly aware about the importance of a rulemaking.

The CFPB should also be proactive about reaching out to consumer groups for additional input when new information has come to light, or circumstances have changed, and in particular when industry has provided new information. We also encourage the CFPB to hold more joint roundtables so that all parties can be in the room at the same time. These roundtables have encouraged helpful dialogue in the past.

2. **The CFPB should stay transparent in its rulemaking process to ensure that the agency stays accountable to the public.**

Since its beginning, the CFPB made a strong commitment to transparency so that its rulemaking process would be impartial and fully informed. For example, while the CFPB is required by law to meet with small business representatives before commencing rulemaking, the CFPB's commitment to transparency is demonstrated in

its practice of distributing the briefing materials to the general public before these meetings, which provide insight into what options the CFPB is considering and an opportunity for all sides to provide input before the rulemaking process begins.

3. **The CFPB should continue to rely on all types of objective empirical research to inform its decisions in rulemaking and should not politicize the analytical process.**

The CFPB has prioritized empirical research by integrating its Research and Markets team's impartial research into its rulemaking process. One major source of quantitative data used in this research is the information the CFPB collects through its examinations, enforcement actions, and consumer complaint database. It is important for the CFPB to continue collecting this data so that it can do its own empirical analysis, which preserves its impartiality.

Moreover, recognizing that numeric fields may not tell an entire story, the CFPB enhances its analysis with qualitative data and field insights. This qualitative data, including individual stories, is a fundamentally important part of meaningful research into the impact of consumer financial products and services, and must not be disregarded. Examples of consumer problems play a valuable role in alerting the CFPB to new issues, possible trends, emerging types of consumer harm, and gaps in or evasions of existing protections.

The CFPB rulemaking process is thoughtful and thorough. From beginning to end, the CFPB's rulemaking process provides all stakeholders with the opportunity to weigh in and allows for the CFPB to have data and information from a wide variety of sources in order to make informed decisions. This robust and responsive rulemaking process is effective in producing rules that carry out the consumer protection mission of the agency and should be maintained for the CFPB's future rules.

Sincerely,

Annette LoVoi

Appleseed, Director of Financial Access and Asset Building

STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
XAVIER BECERRA
ATTORNEY GENERAL

April 25, 2018

Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
E-Mail: FederalRegisterComments@cfpb.gov

Re: Request for Information re: Bureau Civil Investigative Demands and Associated Processes [Docket No. CFPB-2018-0001]

Dear Acting Director Mulvaney and Ms. Jackson:

On behalf of the undersigned Attorneys General, we write in support of the Consumer Financial Protection Bureau's (Bureau) historical and continued use of civil investigative demands. Civil investigative demands are an indispensable investigative tool and widely recognized as necessary for governmental entities to fulfill their legislative mandates. Their use is widespread throughout federal, state, and local government. Moreover, as our states' chief law enforcement officers, we have repeatedly witnessed the Bureau use its investigative authority in a fair and reasonable manner that seeks to limit the burdens on recipients while still achieving the Bureau's statutory and regulatory goals. We strongly oppose any curtailment of the Bureau's investigative authority, as it would significantly hinder the Bureau's ability to fulfill its mandate of promoting fairness, transparency, and competitiveness in the markets for financial products and services.

1. The Bureau's Implementation of Its Investigative Authority Was Non-Controversial and Based on Established Law Enforcement Practices

The Bureau has been statutorily authorized to conduct investigations since its founding, and its implementation of this authority proved non-controversial. In the wake of the last financial crisis, the Congress established the Bureau to "implement and, where applicable, enforce Federal financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[1] To enable the Bureau to

1 12 U.S.C. § 5511 (a).

achieve this mandate, the Congress specifically provided it with administrative subpoena authority and the ability to compel testimony.[2]

While the statutory grant of civil investigative authority did not require separate rulemaking, on July 28, 2011, the Bureau issued an Interim Final Rule for the Rules Relating to Investigations (Interim Final Rule).[3] In developing the Interim Final Rule, the Bureau examined the well-established investigative procedures of other federal law enforcement agencies, including the Federal Trade Commission (FTC) and the Securities Exchange Commission.[4] Given the similarities between the Bureau and the FTC, the Bureau drew heavily on the FTC's procedures in crafting its Interim Final Rule.[5] The Bureau also sought comments on its Interim Final Rule.[6]

The Interim Final Rule proved non-controversial. The Bureau received only seven responses to its invitation for comments.[7] Most of the commenters supported the Interim Final Rule, and where the commenters objected to portions of the Interim Final Rule, the Bureau addressed those comments and, when appropriate, modified the Interim Final Rule.[8]

On June 29, 2012, the Bureau published its final rules relating to investigations, which, like the Interim Final Rule, relied heavily on the well-established procedures of the FTC.[9] These rules remain in effect, and as set forth below, are an excellent example of the type of civil investigative procedures that have long benefited law enforcement and, by extension, the American public.

2. <u>Civil Investigative Subpoena Authority Is Common Throughout Federal, State, and Local Governments</u>

a. <u>The Legislative Grant of Civil Investigative Demand Authority Allows Agencies To Fulfill Their Mandates</u>

Without sufficient administrative subpoena authority, government agencies could not fulfill their legislative mandates.[10] As such, the Congress has granted administrative subpoena

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2 12 U.S.C. § 5562 (b).

3 Rules Relating to Investigations, 76 Fed. Reg. 45,168 (July 28, 2011).

4 *Ibid.*

5 *Ibid.*

6 *Id.* at p. 45,170.

7 Rules Relating to Investigations, 77 Fed. Reg. 39,101, 39,102 (June 29, 2012).

8 *Id.* at pp. 38,102-38,108.

9 *Id.* at p. 39,102 (final rule codified at 12 C.F.R. § 1080.1, et seq.).

10 See, e.g., Office of Legal Policy, United States Department of Justice, *Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities (DOJ Report)*, at p. 6 (2002), available at https://www.justice.gov/archive/olp/rpt_to_congress.pdf (citing Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process,* 47 Vand. L. Rev. 573, 584 (1994)).

authority to federal agencies in hundreds of instances.11 Moreover, administrative subpoena authority is common throughout agencies dedicated to the preservation of fair markets and the protections of consumers and investors. For over a century, the FTC has been authorized to issue subpoenas and compel testimony in the course of an investigation,12 and, as discussed above, the FTC's procedures served as a model for the Bureau's own investigative rules. Indeed, the Congress has determined that civil investigative authority is so necessary to the proper exercise of the Executive Branch's responsibilities that it is more common to find federal agencies with it than without.13

Nor do civil investigative demands exist only in the federal system. In California, for example, the Government Code empowers the head of each department in the state, including the Attorney General as the head of the Department of Justice, to issue subpoenas and to use other tools to investigate "all matters relating to the business activities and subjects under the jurisdiction of the department."14 This grant of civil investigative authority has been crucial to the California Attorney General's mission of protecting consumers and honest competitors and, when appropriate, prosecuting violations of state law. Like their counterparts at the CFPB, FTC and other federal agencies, California prosecutors have used this authority responsibly and with appropriate regard for the rights of investigative targets and third party witnesses.

Similarly, the New York Attorney General has broad authority to issue subpoenas and take testimony when investigating "repeated fraudulent or illegal acts or otherwise [] persistent fraud or illegality in the carrying on, conducting or transaction of business" or "[d]eceptive acts or practices in the conduct of any business." [15] Likewise, the Virginia Attorney General has authority to issue civil investigative demands to compel the production of documents, answers to written interrogatories, and oral testimony in connection with investigating suspected violations of consumer protection laws.16 In Maryland, "[i]n the course of any examination, investigation,

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11 *DOJ Report* at p. 5.

12 15 U.S.C. § 49; 16 C.F.R. § 2.1 et seq.

13 See *DOJ Report* at pp. 44-309 (compiling subpoena authorities submitted by federal agencies other than the Departments of Justice and Treasury). Congress has given such authority either through specific legislative grant or through the Inspector General Act of 1978.

14 Cal. Gov. Code §§ 11180(a), 11181.

15 *See* N.Y. Exec. Law § 63(12); N.Y. G.B.L. §§ 349(a), (f). New York courts have long recognized that these statutes grant the Attorney General "broad" investigative authority to issue subpoenas to "conduct investigations into possible violations of the law." *See Am. Dental Coop., Inc. v. Attorney-General*, 127 A.D.2d 274, 279 (1st Dep't 1987). The New York Attorney General Attorney General "is not required to demonstrate probable cause or [to] disclose the details of his investigation." *Id.* at 280. The subpoena must simply bear "a reasonable relation to the subject-matter under investigation and to the public purpose to be achieved." *Matter of LaBelle Creole Int'l v. Attorney General*, 10 N.Y.2d 192, 196 (1961) (citation omitted)

16 *See, e.g.*, Va. Code § 59.1-9.10 (Virginia Civil Investigative Demand statute within the Virginia Antitrust Act); Va. Code § 59.1-201.1 (Virginia Consumer Protection Act); Va. Code § 6.2-1629(B) (Virginia Mortgage Lenders and Mortgage Brokers Law); Va. Code § 59.1-516(B) (Virginia Telephone Privacy Protection Act); Va. Code § 57-59(C) (Virginia Solicitation

or hearing conducted by him, the Attorney General may subpoena witnesses, administer oaths, examine an individual under oath, and compel production of records, books, papers, contracts, and other documents."17 The New Mexico Attorney General may issue a Civil Investigative Demand for documents or recordings, which he believes to be 'relevant to the subject matter of an investigation of a probable violation' of the state's Unfair Trade Practices Act. .18

Moreover, New Mexico, Maryland, Pennsylvania and California, among other states, follow the principle laid out in *U.S. v. Morton Salt Co.*, 338 U.S. 632 (1950) which analogized executive investigative powers to those of a grand jury which "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." Id at 642-43. This is "official curiosity" standard set forth by the Court provides: "Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest."

b. Judicial Supervision Ensures that Recipients' Rights Are Protected

Federal courts ensure that the Bureau does not overstep its bounds in exercising its civil investigative demand authority. First, the recipient of a demand from the Bureau may petition a district court to set it aside.19 In addition, the Bureau's demands are not self-enforcing: should a recipient not comply with the demand, the Bureau must turn to a district court for enforcement.20

As a result of this judicial supervision, a recipient's rights are well-protected. Indeed, a recipient's refusal to comply with a civil investigative demand carries with it no penalty until and unless (1) the Bureau petitions a district court for enforcement, (2) the district court orders the recipient to comply with the demand, *and* (3) the recipient refuses to comply with the court order.21 As such, the Bureau's investigative authority allows the Bureau to achieve its mandate while still providing ample safeguards to protect recipients' rights. And while federal courts have not shied away from refusing to uphold investigative demands when they believe the Bureau has overstepped its bounds,22 courts for the most part have determined that the Bureau has used its investigative authority properly.23

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of Contributions Law).

17 Md. Code Ann., Comm. Law § 13-405(a).

18 NMSA 1978 Section 57-12-12.

19 12 U.S.C. § 5562(f).

20 12 U.S.C. § 5562(e).

21 12 U.S.C. § 5562.

22 See *CFPB v. Accrediting Council for Independent Colleges and Schools,* 854 F.3d 683 (D.C. Cir. 2017).

23 See, e.g., *CFPB v. Heartland Campus Solutions, ESCI*, No. 17-1502, 2018 WL 1089806 (W.D. Pa. Feb. 28, 2018) [upholding CID]; *CFPB v. Seila Law, LLC*, No. 8:17-cv-01081, 2017 WL 6536586 (C.D. Cal. Aug. 25, 2017) [upholding CID after modifying two defined terms contained therein]; *CFPB v. Future Income Payments*, 252 F. Supp.3d 961 (C.D. Cal. 2017)

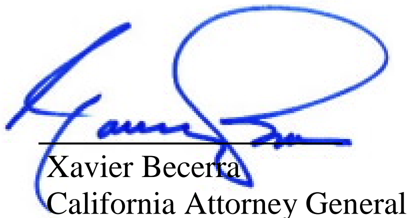
3. The Bureau Has Used Its Investigative Authority Responsibly and Effectively

As our states' chief law enforcement officers, each of the undersigned Attorneys General is familiar with the Bureau's use of its investigative subpoena authority in a manner that minimizes burdens on the recipient, while still allowing the Bureau to achieve its mandate. Our offices, for example, have witnessed firsthand the Bureau's responsible use of civil investigative demands in parallel investigations and/or prosecutions of (1) JPMorgan Chase & Co. for widespread debt-collection misconduct; (2) Ally Financial (formerly GMAC), Bank of America, Citibank, JPMorgan Chase & Co., and Wells Fargo relating to their illegal foreclosure practices; (3) Corinthian Colleges, Inc. for widespread misconduct related to student lending; 4) Rome Finance Company for charging military service members wildly inflated prices for goods through hidden finance charges and other deceptive practices; (5) companies that were alleged to have scammed 9/11 first responders suffering from cancer and other serious illnesses out of million dollars in compensation; and (6) a nationwide network of fly-by-night debt collection companies that had allegedly harassed, threatened, and deceived millions of consumers into paying inflated debts that they did not owe. In our experience, the CFPB has accommodated reasonable requests to narrow a CID's scope or to arrange a production schedule.

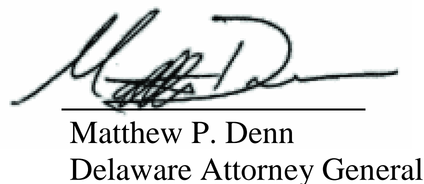
4. Conclusion

Because of its wide acceptance as an indispensable law enforcement tool, the authority to issue civil investigative demands is prevalent throughout all levels of American government. As our states' chief law enforcement officers, we have witnessed the Bureau use its investigatory subpoena authority in a manner that minimizes burdens on recipients while still allowing the Bureau to protect consumers and promote fair and transparent financial products and services. We oppose any effort to curtail the Bureau's civil investigative demand authority.

Sincerely,

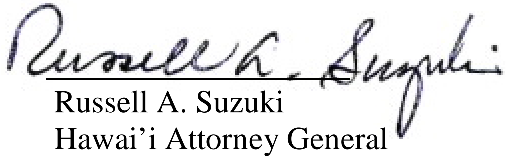


Xavier Becerra
California Attorney General

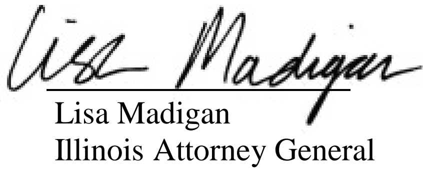


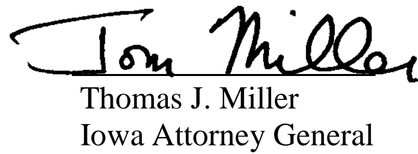
Matthew P. Denn
Delaware Attorney General

[upholding CID]; *CFPB v. Source for Public Data, LP*, No. 3:17-mc-16-G-BN, 2017 WL 2443135 (N.D. Tex. June 6, 2017) [upholding CID].


Russell A. Suzuki
Hawai'i Attorney General

Stephen H. Levins
Executive Director
Hawai'i Office of Consumer Protection


Lisa Madigan
Illinois Attorney General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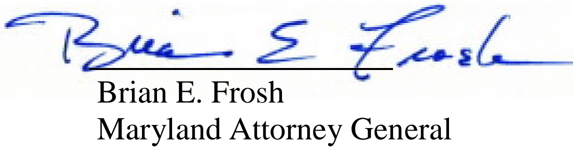
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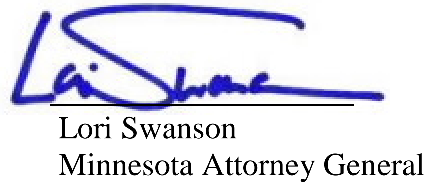
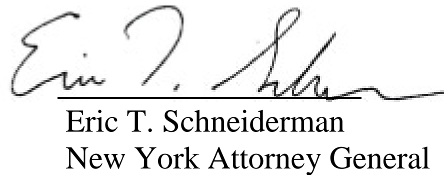

Lori Swanson
Minnesota Attorney General

Hector Balderas
New Mexico Attorney General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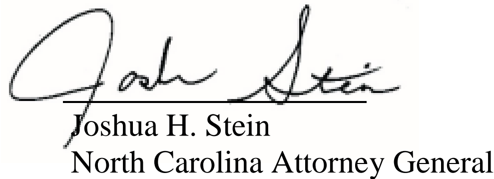
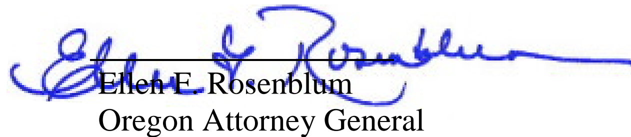
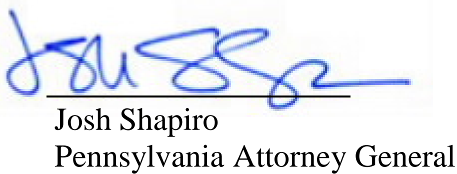

Joshua H. Stein
North Carolina Attorney General


Ellen F. Rosenblum
Oregon Attorney General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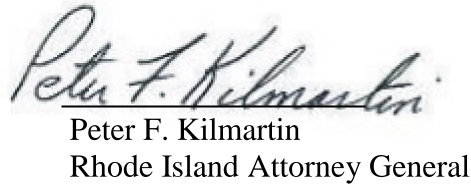
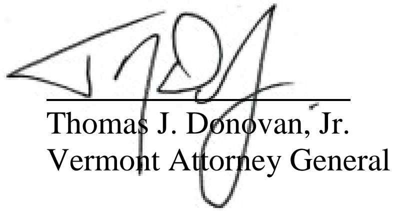
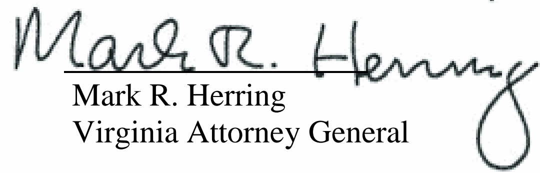
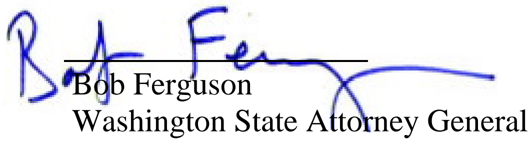
Pennsylvania Attorney General


Peter F. Kilmartin
Rhode Island Attorney General


Thomas J. Donovan, Jr.
Vermont Attorney General


Mark R. Herring
Virginia Attorney General


Bob Ferguson
Washington State Attorney General

Consumer Advisory Board
Consumer Lending Subcommittee
April 18, 2018

Subcommittee input on the Bureau of Consumer Financial Protection's (Bureau) Request for Information (RFI) on External Engagements and RFI on Adopted Regulations and New Rulemaking Authorities

Overview

On January 17, 2018, Acting Director Mulvaney issued a call for evidence[1] to ensure the Bureau is fulfilling its proper and appropriate functions to best protect consumers. In a series of Requests for Information (RFIs), the Bureau seeks comment on enforcement, supervision, rulemaking, market monitoring, and education activities. These RFIs will provide an opportunity for the public to submit feedback and suggest ways to improve outcomes for both consumers and covered entities.

During the April 18, 2018 Consumer Advisory Board (CAB) Consumer Lending subcommittee conference call, the subcommittee focused on providing feedback on two of the Call for Evidence RFIs, the RFI on External Engagements and the RFI on Adopted Regulations and New Rulemaking Authorities. The purpose of this document is to summarize subcommittee conversations on the two RFIs. This document does not reflect consensus by subcommittee members, but simply demonstrates the various member views and opinions. This summary document does not reflect the views of the Bureau.

Request for Information on External Engagements

- I've served on the CAB for over a year now. I'm on the industry side, but I've learned a lot from the stories of consumer advocates and I've incorporated a lot of their feedback into our thinking. I like the added transparency of these public subcommittee meetings and think it is a nice start. The research the Bureau has produced has been invaluable. On some of the topics the Bureau works on, it would be helpful if advisory group members are brought in earlier to the conversation.

- I have found the CAB to be very helpful. The three meetings a year have provided for a great opportunity to engage with the Bureau and give timely feedback. The CAB should continue to have lots of engagement with the Bureau's senior leaders and the Director. In terms of other types of engagements, I think the Bureau has done a fantastic job of getting feedback from many different stakeholders from across the country. I was personally part of a field hearing and it was so helpful to have both advocates and industry representatives come together to discuss the issues.

- The CAB is a great stage for meeting many different types of experts from industry to academia to advocacy. The Bureau's Project Catalyst is an extremely effective program for outreach to industry. Staff with the Project Catalyst program have been highly

[1] https://www.consumerfinance.gov/about-us/newsroom/acting-director-mulvaney-announces-call-evidence-regarding-consumer-financial-protection-bureau-functions/

available, open, and receptive to listening to feedback. In the spirit of transparency, the Bureau should consider allowing Project Catalyst to share a regular update on the takeaways they have received during their office hours with the public.

- This is my second year on the CAB. I have learned a lot just by sitting next to CAB members. It's a level of conversation that doesn't occur on a regular basis and is very important. I also think it is important that the CAB travel at least once a year into the field to hear the perspectives of different communities. Additionally, in 2002, I served on the Federal Reserve's advisory group. We raised issues we were seeing in the mortgage market with the Federal Reserve on a regular basis and we were told that the market would eventually correct itself. However, when we meet during CAB meetings, it feels like we are able to share this feedback and staff at the Bureau are listening and reacting.

- I was working in the last 90's on a foreclosure prevention project in New York. We had mostly African American women coming in who had clearly been targeted by predatory lending. As we gathered extensive information on these patterns, we tried to share with the seven federal banking regulators who might have been able to take action at the time that this was a systemic and growing problem and those federal regulators were dismissive.. The bank regulators were talking to banks and not looking at problems from a community or consumer perspective. The result of this regulatory inaction was that many communities were destroyed by the housing market collapse and the great recession. The CFPB is the first regulator to focus on the impact of bank and financial practices on communities and families, and has done great work to protect consumers. In terms of external engagements, the Bureau is very focused on getting feedback from so many different stakeholders groups – not just industry. The Bureau has been great about acting in real time. That's because the CFPB has had an open door policy for feedback and acted on that feedback. My hope is that the CFPB will continue to have an open door to all stakeholders and not just industry going into the future.

<u>Request for Information on Adopted Regulations and New Rulemaking Authorities</u>

- The following statement was read by a CAB member on behalf of another CAB member who was unable to attend the call. "The adopted rules RFI asks that any arguments for maintaining the status quo be supported by data on the benefits and costs of the rules. Assessing the costs and benefits of rules is critical to ensuring that the CFPB is making rules that are in the best interests of the society. It is also true that redundant cost: benefit analyses drain agency resources and impose unnecessary costs on taxpayers. The CFPB's rule-making RFI is an example of such redundancy. Before any rule is finalized, the CFPB assesses the benefits and costs to the financial industry and consumers of all proposed rules. That means that rules governing, for example HMDA reporting, payday loans and prepaid cards, have all gone through cost: benefit analysis already. In addition to the cost: benefit analysis that has been done prior to final rule-making, the Dodd-Frank Act requires that the CFPB assess most of its rules five years after implementation. The assessments must examine the costs and benefits of the rules to, in part, assure the public that the Bureau was accurate in its initial cost: benefit analyses and that the rules have been effective. Now the CFPB is invoking a third cost: benefit analysis to justify the

rules that are in effect. For many reasons, this is a wrongheaded move. First, it is redundant. Second, it will require pulling staff and money way from protecting consumers, which is the mission of the agency. Third, the current administration has lauded fiscal responsibility. For the Director of the OMB to charge taxpayers for unnecessary cost: benefit analysis is to repudiate the values of the people that elected this administration. Lastly, the stated purpose of the RFI on adopted rules appears disingenuous. The CFPB has brought no enforcement actions since November 2017, and has taken many steps to protect the financial services industry, including eviscerating the fair lending division, dropping enforcement actions, giving huge raises to the people who have been working to dismantle the agency, and soliciting input from industry—but not the public-- on prepaid cards. These actions suggest that acting director Mulvaney is absolutely committed to destroying the agency that he is known to call a sad, sick joke."

- I do think the increased transparency in the subcommittee meetings is important. The cost benefit analysis the Bureau has been doing is also important. However, it is also very difficult to do this. The Bureau should consider adding additional transparency to how the cost benefit analysis was conducted. It is difficult to weigh certain things with response to cost/benefits, i.e. what is the tangible value on a consumer getting a house? Additionally, and on a slightly different topic, there are certain market participants that operated on a lot of regulatory oversight, i.e. the big guys. But then there are financial technology companies that might not always get the same scrutiny. This creates regulatory disadvantages. There are industry standards that get developed over time that often go beyond the regulations. Federal regulators should look at plays that go around industry standards as well. Finally, any research the Bureau does should be backed up with data points that provide industry with the ability to replicate the same results.

- Speaking more generally about the RFIs, this particular RFIs feels like it has a more general anti-regulatory bent. Strong rules are critical to ensure there is a level and fair playing field for all Americans. When sound consumer financial rules are referred to as tyrannical by the Acting Director, it is an insult to families. These rules that the Bureau put out had hundreds of hours of research and thought put into them, and there was extensive engagement with all stakeholders. My hope moving forward is that the Bureau's new leadership isn't using these Call for Evidence RFIs to give industry a platform to undo the strong rules and processes that the CFPB has put into place.

Subcommittee Membership

- Subcommittee Chair Josh Zinner
- Kathleen Engel
- Max Levchin
- Ohad Samet
- Lisa Servon
- Dr. Howard Slaughter
- James Wehmann
- Chi Chi Wu

Additional CAB members that participated:

- Brent Neiser
- Ruhi Maker

Comments of

Allied Progress

Americans for Financial Reform

Center for Responsible Lending

Consumer Federation of America

National Association of Consumer Advocates

NAACP

New Yorkers for Responsible Lending

U.S. PIRG

Woodstock Institute

May 7, 2018

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

RE: Request for Information ("RFI") on CFPB Rules of Practice for Adjudication Proceedings (Docket No.: CFPB-2018-0002)

Dear Ms. Jackson:

The comments below are submitted in response to the Consumer Financial Protection Bureau's Request for Information ("RFI") Regarding the CFPB's Rules of Practice for Adjudication Proceedings (Docket No.: CFPB-2018-0002) 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.

The undersigned organizations frequently engage with the CFPB and vigorously support both its mission and independence. Many of our staff have significant experience in public enforcement of consumer protection laws. We appreciate the opportunity to submit these comments for your consideration

I. Overview

The CFPB was created in response to the 2008 financial crisis. This crisis was driven in large part by the failures of existing agencies that did not have the tools, the will, the foresight, or the speed to address

looming problems in the consumer credit markets. Reacting to market and regulatory failures that fueled this "Great Recession," Congress in 2010 enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (Dodd-Frank Act).

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] Congress gave the CFPB the authority and discretion to enforce consumer financial protections laws through two different means— filing an action in U.S. district court or initiating an adjudication proceeding before an Administrative Law Judge ("ALJ"). The flexibility in selecting from these different forums is essential to CFPBs effectiveness in fulfilling its mission to protect consumers.

Since its establishment, the CFPB has used its authority effectively 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] The CFPB has carried out much of this work through adjudication proceedings, whether through consent orders or contested adjudication proceedings. Constraining or diminishing the CFPB's flexibility to enforce through adjudications likely will place consumers at greater risk and delay their compensation for the harm caused by illegal practices.

A. The CFPB should continue to use its authority to enforce through adjudication

Federal court often involves lengthy pre-trial discovery and motion practice in a more crowded litigation docket, whereas adjudications often allow for a prompt resolution of pre-trial issues, including discovery. There are circumstances where action in federal court is the more appropriate means for the CFPB to enforce the law, as evidenced by the numerous CFPB actions filed in court. However, the discretion to enforce the law through adjudication ensures the CFPB has an efficient means by which to address ever-changing schemes that harm consumers and in some cases, to correct action or bring restitution to consumers quickly, minimizing the impact of the violation over a long period of time. Industry generally should be accustomed to the administrative forum, as it is a common avenue for enforcement by federal regulators.

The CFPB has developed extensive rules of practice governing the adjudication process.[4] These rules address many of the same fundamental aspects as the Federal Rules of Civil Procedure. However, the Rules of Practice also fulfill a statutory goal of the CFPA, by allowing for an expeditious resolution of matters through the administrative forum.

B. **The RFI seeks comment before the current Rules of Practice have been significantly tested.**

The RFI comes at a time when only a handful of adjudications have been meaningfully litigated under the rules which were adopted in their final form in June 2012.[5] The CFPB has initiated only eight

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[1] PHH Corp. v. CFPB, 881 F.3d 75, 77 (D.C. Cir. Jan. 31, 2018).
[2] H.R. Rep. No. 111-517, at 874 (2010) (Conf. Rep.); *see generally* PHH, at 77-78.
[3] Consumer Financial Protection Bureau, *Factsheet: 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*, CFPB (July 21, 2017).https://www.consumerfinance.gov/about-us/blog/six-years-serving-you/.
[4] Consumer Financial Protection Bureau, Rules of Practice for Adjudication Proceedings, 12 C.F.R. § 1081.101 et seq. ("Rules of Practice")
[5] Rules of Practice for Adjudication Proceedings, 77 FR 39057, (June 29, 2012), https://www.federalregister.gov/documents/2012/06/29/2012-14061/rules-of-practice-for-adjudication-proceedings.

adjudication proceedings through the filing of a Notice of Charges, rather than a Consent Order that resolves the matter. Of these eight cases, five were resolved shortly after filing through a stipulated consent order. Respondents have filed an answer to formally respond and contest the adjudication proceeding in only three cases, with one of these having been resolved through consent order shortly after respondent's answer. Thus, the CFPB's RFI seeks comment on rules which to date have rarely been put to use.

C. The CFPB should not alter the existing rules, especially to the detriment of consumers, based on comments from a handful of litigants that have practiced under the current rules.

The public record[6] in the limited number of contested proceedings provide scant evidence that the CFPB's Rules of Practice have raised of significant controversies or issues. Given the lack of contested adjudication proceedings, the CFPB should exercise caution in acting on the comments it receives, which are likely to be based largely on conjecture. Those industry participants who have been involved in adjudication proceedings and their counsel may take the CFPB's RFI as an invitation to voice concerns based largely on hypotheticals or single examples. However, consumers who have benefitted from these proceedings or could depend on them for recourse in the future understandably may lack awareness of the arcana of CFPB's adjudication procedure such that they might provide comment on how the rules benefit them. Further, it is too early to tell whether single examples demonstrate any pattern of a problem or simply the individual circumstances in one case. Ultimately, however, the Rules of Practice for adjudications will affect the CFPB's ability to protect consumers from harm in the future. Constraining the ability to enforce through adjudication proceedings at the expense of consumers would be a waste of the CFPB's resources and staff and a break with its mission of putting consumers' interests first.

Given this record, the RFI's suggestion that the CFPB consider limiting its use of adjudication proceedings to only those matters that are uncontested is troubling. The Dodd-Frank Act granted the CFPB the authority to bring adjudication proceedings or file actions in federal court in order to ensure that the CFPB has the necessary powers to accomplish its statutory duties. Retreating from the administrative forum would hamper the CFPB's efforts to enforce consumer financial protection laws and could potentially allow egregious abuses to persist for years when a more efficient remedy process is available. Congress clearly intended that the CFPB avail itself of the administrative enforcement process. The CFPB should not make hasty changes to its adjudication procedures based on the experience of less than a handful of litigants, but should continue to ensure that adjudication proceedings remain an effective and fair means of enforcing the law.

D. The CFPB should utilize the adjudication process more frequently in contested matters

We recommend that the Bureau increase the number of contested enforcement actions handled through adjudications. If anything, the Bureau has erred on the side of over-protecting the rights investigation subjects by turning to federal litigation even in situations where the overwhelming evidence supports a violation of law. Adjudication proceedings are particularly appropriate a defendant may be litigious, uncooperative or will attempt to tie the Bureau down in protracted litigation. Where evidence gathered during an investigation overwhelmingly points to a violation of law and there is little or no room for reasonable disagreement on the legality of an investigation subject's practices, federal litigation may prove an inefficient use of resources, especially where it allows a recalcitrant defendant to tie down

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[6] The Bureau provides free public access to its administrative adjudication proceedings, including dockets and pleadings. See https://www.consumerfinance.gov/policy-compliance/enforcement/actions/. This is in contrast to the federal courts which require access through PACER, a system which charges fees for searching records or downloading pleadings.

precious federal enforcement resources through tactics which are unlikely to affect the outcome save for the effect of justice delayed.

II. Response to Specific Questions in the RFI

1. Whether, as a matter of policy, the CFPB should pursue contested matters only in Federal court rather than through the administrative adjudication process;

In passing the Dodd-Frank Act, Congress made clear that the CFPB could pursue matters in adjudication proceedings and in federal court, whether the matter was to be resolved through a consent order or not.[7] To the extent the question suggests that the CFPB might abandon administrative enforcement process, it suggests that the CFPB is contemplating neglect of its duties to enforce Federal consumer financial protection laws. Further, this practice would be a departure from similar adjudication processes by the FTC and SEC.

Moreover, this inquiry suggests the CFPB would abandon enforcing the law in a forum that, if anything, has not been used enough. Of the 119 cases filed administratively by the CFPB, 111 were resolved through immediate entry of a Consent Order, six more settled shortly after filing, and all but two involved contested litigation. This track record suggests that the CFPB's use of the adjudication proceedings is judicious and, if anything, too cautious. The CFPB may well have erred on the side of not bringing contested matters in adjudication proceedings and instead litigating in federal courts, where lengthy discovery and motion practice delay final resolution. No doubt, there are reasons for bringing an action in court – the need for immediate injunctive relief, the involvement of a state or federal partner, the ability to gather additional facts through civil discovery process. However, these benefits come with the risk of inconsistent application of the law, a delay in final resolution, and heightened costs for both the CFPB and the litigant.

Enforcement through the CFPB's adjudication process, will help foster consistent development of the CFPB's legal authorities, by avoiding inconsistent or contradictory outcomes that might arise in different federal district courts. An ALJ conducts the adjudication proceedings and then provides a recommended decision to the Director. The ALJ is more likely to hear matters arising under the CFPB's authority more regularly than a judge in federal court. The final decision, rendered by the Director, is subject to appeal in a similar manner as final decisions of federal district court judges. Moreover, there is significant evidence that ALJs are no less disposed to rule against the government than federal court judges.[8]

At a minimum, it is dubious that proceeding to federal court in all contested cases will better protect the rights of the parties accused of violations of law. If the CFPB were to address contested matters solely through federal court, this would impose additional costs and delay on parties in resolving matters. It is likely these costs would not be borne equally by different institutions. For smaller institutions, these heightened costs could mean the difference between mounting a defense and settling. On the other hand, by choosing beforehand to impose on itself the costs of federal court litigation in contested matters, the CFPB would provide added leverage to larger financial institutions seeking to avoid further investigation or prosecution for suspected violations of law. Larger institutions could use the prospect of expensive, protracted federal litigation to extract a more favorable settlement from the CFPB. Under this regime,

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[7] See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 1053, 12 U.S.C. § 5563 (2010) (authorizing the Bureau to conduct adjudication proceedings and permitting parties to appeal any order except Consent Orders).
[8] See David Zaring, *Enforcement Discretion at the SEC*, 94 Tex. L. Rev. 1155, 1184-85 (2016).

consumers who were harmed by illegal practices would likely see less relief obtained through settlements or years of waiting for any resolution of any contested matter.

Rather than adopt a one-size-fits-all approach, the CFPB should continue to use its discretion to seek to enforce the law in the appropriate forum. The CFPB should aim for a balance that ensures full protection of consumer rights, affords fairness to litigants, avoids unnecessarily burdensome litigation process, promotes partnerships with state and federal regulators, and facilitates consistent application of the law.

2. The Rules' protection of the rights and interests of third parties;

Without more detail, it is very difficult to ascertain the scope of the term "third parties" in this inquiry. However, first and foremost among "third parties" should be those consumers who have been affected by the practices of the respondent in the adjudication. A prompt resolution which seeks to redress to the fullest extent possible the harms to these consumers from violations of the law should be the primary goal of any CFPB enforcement proceeding. The Rules of Practice can address this through ensuring that they do not create opportunities for industry respondents and their counsel to delay or bog down adjudications and ultimately weaken the CFPB's enforcement authority and its ability to seek restitution on behalf of consumers.

With respect to other "third parties," we note that various parts of the rules afford non-parties the same or similar rights they may have in federal court. For instance, witnesses are entitled to the same fees for attendance as are available in federal court in proceedings where the United States is a party.[9] The Rules of Practice provide that parties may seek leave to file an amicus brief, as is the case in federal court.[10] Third parties may also seek a protective order with respect to disclosure of confidential information obtained from them and are entitled to notification by any party that seeks to disclose such information.[11] While there may be industry "third parties" that might be affected by the CFPB's enforcement against their contractual counterparty or by some other relationship to the named respondents, this does not appear to be a difficulty unique to the administrative forum.

3. 12 CFR 1081.200(b)'s requirements for the contents of the CFPB's notice of charges;

The content requirements of § 1081.200(b) are very similar to those adopted by the SEC[12] and the FTC.[13] The CFPB's Notice of Charges generally have been fact-laden and include specific citations to all claims for which the CFPB seeks relief. To date, the CFPB has filed only eight Notice of Charges, only three of which resulted in the filing of an answer by the respondent. None of these answers allege the notice of charges was insufficiently pled in a manner typically addressed by rules regarding the content of complaints or other pleadings to initiate an action. Thus, it is unclear what basis the CFPB would have for significant modifying the existing requirements.

4. The policy, expressed in 12 CFR 1081.101 for administrative adjudication proceedings to be conducted expeditiously, including:

a. 12 CFR 1081.201(a)'s requirement that respondents file an answer to a notice of charges within 14 days;

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[9] See Consumer Financial Protection Bureau, Rules of Practice for Adjudication Proceedings, 12 C.F.R. § 1081.116.
[10] 12 C.F.R. § 1081.216.
[11] 12 C.F.R. § 1081.119.
[12] Securities and Exchange Commission, 17 C.F.R. § 201.200(b).
[13] Federal Trade Commission, Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 3.11(b).

There is little evidence to support altering § 1081.201(a), which is consistent with the FTC's rules and only modestly shorter than federal court. The time period provided is only seven days shorter than the time period allowed for under the Rules of Federal Civil Procedure. The shorter time-period for adjudication proceedings serves the policy of the Rules, stated in § 1081.101, to conduct proceedings "fairly and expeditiously."

Furthermore, it is unlikely that, upon service of a Notice of Charges from the CFPB, a respondent is unaware of the nature of the pending litigation. The CFPB usually initiates adjudication proceedings after an extensive investigative process, subject to the CFPB investigative rules.[14] In addition, the Office of Enforcement has a policy, while not mandatory, that provides for advance notice to a Respondent of the possible claims and bases for such action prior to filing any enforcement action.[15] Notably, the three adjudication proceedings that have been contested in any way have given scant indication that § 1081.201(a) affords respondents an unreasonably short time to answer the Notice of Charges. In one proceeding, the respondent filed a dispositive motion two days after filing of the Notice and one day after service.[16] In another, Respondent's counsel filed a motion for extension of time five days after service of the Notice of Charges. The motion requested that the Respondent have one additional week to respond, was unopposed by the CFPB, and promptly granted.[17] In the other matter, multiple parties filed answers within the 14-day period following service.[18]

Three cases hardly constitute a rigorous sample from which to draw conclusions. However, the most reasonable conclusion that can be drawn from these cases is that, given the nature of the CFPB's investigations, the timing requirements under § 1081.201(a) are appropriate and do not unduly burden respondents.

b. 12 CFR 1081.115(b)'s requirement that the hearing officer in administrative adjudications strongly disfavor motions for extensions of time except upon a showing of substantial prejudice;

Section 1081.115(b) provides a similar set of guidelines for granting extensions of time as under the FTC's and SEC's rules. It is also notable that to date, no request for an extension has been denied by a hearing officer in an adjudication proceeding. Thus, the concerns expressed by industry commenters to the Interim Final Rule, that the rule may impose unrealistic filing deadlines, have not yet borne out. Section 1081.115(b) requires that the hearing officer take into consideration several factors which provide ample guidance to avoid overly harsh denials of extension requests without opening the door to delay tactics aimed at hindering the objectives of § 1081.101. Moreover, in the few cases that have been litigated, the CFPB and the presiding ALJ have generally been accommodating of requests for an extension of time.

c. 12 CFR 1081.212(h)'s requirement that the hearing officer decide any motion for summary disposition within 30 days; and

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[14] Consumer Financial Protection Bureau, Rules Relating to Investigations, 12 C.F.R. Part 1080.
[15] CFPB Bulletin 2011-04, Notice and Opportunity to Respond and Advise (November 7, 2011, updated January 18, 2012), https://files.consumerfinance.gov/f/2012/01/Bulletin10.pdf.
[16] *See* Respondent's Motion to Dismiss, CFPB v. PHH, et al., No. 2014-CFPB-0002, (filed January 31, 2014) https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201402_cfpb_0002_motion-to-dismiss-alternative-for-summary-disposition.pdf.
[17] *See* Order Granting Motion for Extension of Time to Respond to CFPB's Notice of Charges, CFPB v. Integrity Advance, LLC and James Carnes, No. 2015-CFPB-0029 (November 30, 2015).
[18] *See* CFPB v. 3D Resorts-Bluegrass, LLC, No. 2013-CFPB-0002.

Section 1081.212 addresses dispositive motions before a hearing, the hearing officer's recommendation, and the ultimate decision by the Director. A 30-day time-frame for the hearing officer to decide the motions after full briefing by the parties appears consistent with the CFPB's stated policy goal to conduct adjudication proceedings fairly and expeditiously.[19] While also facilitating prompt resolution and, where the CFPB prevails, prompt remediation of consumer harm, a short period for the hearing officer to decide summary dispositions means that parties defending themselves against CFPB actions are able to more quickly obtain favorable judgment when the CFPB is not successful. As the CFPB noted in its final rule adopting the Rules of Practice, the timelines on decisions "should help ensure that a party ultimately determined to be entitled to dismissal is not required to engage in the adjudicative process for a lengthy period of time."[20] There appears to be no evidence from the record of the CFPB's adjudication proceedings thus far to adjust this requirement.

d. The CFPB's implementation of the requirement in 12 U.S.C. 5563(b)(1)(B) that hearings take place within 30 to 60 days of the notice of charges, unless the respondent seeks an extension of that time period;

Again, this question seeks comment on the effect of a process that has not been tested very often. As is contemplated by the statute,[21] the CFPB's rules provide for a later date to be determined at the scheduling conference required by § 1081.203(b)(1). To date there have been only two full adjudication hearings conducted by the CFPB. One of these hearings was commenced within the 60 day time-frame envisioned by the notice content requirements of the Dodd-Frank Act, while the other hearing was conducted more than 7 months after the notice of charges. In both cases, the timing of the hearing followed a scheduling conference where the CFPB and other parties were able to argue for an earlier or a later date. From these meager results, it appears the CFPB's adjudication procedures allow for significant flexibility to the hearing schedule by leaving to the ALJ the ability to determine a date and time for hearing, having heard the parties' concerns through the scheduling conference.

5. 12 CFR 1081.206's requirements that the CFPB make documents available for copying or inspection, including whether the CFPB should produce those documents in electronic form to respondents in the first instance, at the CFPB's expense;

This inquiry suggests that the Office of Enforcement currently does not provide documents in electronic form as part of its affirmative disclosure obligations under § 1081.206. However, the preamble to the 2012 Final Rule addressed this concern in direct response to a commenter:

> *The Bureau adopted the language regarding photocopying from the SEC Rules, but as indicated in the preamble to § 1081.206, the Bureau anticipates providing electronic copies of documents to respondents in most cases. The Bureau is retaining the language regarding photocopying in order to retain its discretion, particularly in cases where the safekeeping of documents subject to inspection and the cost of production may be of particular concern. The Bureau expects these cases to be rare.*[22]

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[19] *See* 12 C.F.R. § 1081.101.
[20] 77 FR 39057, at 39078.
[21] 12 U.S.C. §5563(b)(1)(B) (2018) ("…such hearing to be held not earlier than 30 days nor later than 60 days after the date of service of such notice, unless an earlier or a later date is set by the CFPB, at the request of any party so served.").
[22] *Id.*, at 39075.

The CFPB's Enforcement manual reiterates that providing documents in electronic form is to be the norm.[23] From review of the CFPB's dockets, it appears that the Office of Enforcement has adhered to this policy. The pleadings in the PHH case indicate the CFPB provided the affirmative disclosures electronically. While formally codifying this in the text of § 1081.206 may make this policy more clear to future litigants, the CFPB would be well-advised to take into account the concerns noted in the 2012 Final Rule before taking such a step.

6. 12 CFR 1081.208's requirements for issuing subpoenas, and whether counsel for a party should be entitled to issue subpoenas without leave of the hearing officer;

The 2012 Final Rule notes that "[t]he Bureau had considered whether to permit parties to issue subpoenas."[24] The CFPB declined to do so because a hearing officer can help ensure that subpoenas are not "unreasonable, oppressive, excessive in scope, or unduly burdensome."[25] Notably, virtually all subpoenas requests from respondents have been granted. The only outright denial of a request was without prejudice and due to errors in form. As with many aspects of this RFI, to the extent this question raises an issue, there is little or no evidence that there is a problem to address, at least as indicated by the limited sample of contest proceedings.

7. 12 CFR 1081.209(g)(3)'s provision that failure to object to a question or document at a deposition is, with some exception, not deemed a waiver of the objection;

Section 1081.209(g)'s provision is common among rules for federal agencies' adjudication proceedings. The CFPB's rules provide that objections shall be noted by the deposition officer, but limit rulings on the competency, materiality, or relevance of evidence to the ALJ when serving as the deposition officer. Sec. 1081.209(g)(3) then limits waiver of objection to situations where ground for the objection might have been avoided if the objection had been timely presented. The SEC and FTC similarly limit waiver of objection to testimony to instances where the objection is not timely made.[26]

8. 12 CFR 1081.210(b)'s limitation on the number of expert witnesses any party may call at a hearing, absent "extraordinary circumstances";

This inquiry again invites abandonment of a rule that has not yet been tested. The 2012 Final Rule noted that the limitation in § 1081.201(b) is consistent with FTC rules. The CFPB adopted § 1081.201(b) unchanged from the Interim Final Rule after receiving no comments and stating that the "limitation will provide the parties with a sufficient opportunity to present expert testimony without unduly delaying the proceedings."[27] To date, no adjudication proceeding has involved a motion for leave to call an additional expert witness above the five experts parties are already permitted to call. If any conclusion can be drawn

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[23] Consumer Fin. Protection Bureau, Office of Enforcement, Policies and Procedures Manual Version 3.0, https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-and-procedures-memo_version-3.0.pdf. ("However, the Office of Enforcement has committed to making documents available to the respondent as soon as possible (but in any event commencing no later than seven days after service of the notice of charges) and to producing the information in electronic format, unless electronic production is not feasible.")
[24] 77 FR 39057, at 39073
[25] *Id.*
[26] *See* Securities and Exchange Commission (SEC), Rules of Practice, 17 C.F.R. § 201.233(i) (2016) ("An objection to a deponent's competence - or to the competence, relevance, or materiality of testimony - is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time"), and Federal Trade Commission, Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 3.33(g) (2015) (stating that such objections as to competence, relevance or materiality are "not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.").
[27] 77 FR 39057, at 39076

from the history of the adjudication proceedings thus far, the rule seems appropriate and does not unduly burden litigants.

9. 12 CFR 1081.210(c)'s requirements for expert reports, including whether that paragraph should expressly incorporate the requirements of the Federal Rules of Civil Procedure relating to the required disclosures of expert witnesses;

It is not necessary or advisable for the Bureau to amend 12 CFR § 1081.210(c) to expressly incorporate the requirements of the Federal Rules of Civil Procedure relating to the required disclosures of expert witnesses. The Bureau's Rules of Practice for Adjudication Proceedings on this point are modeled on the FTC's rules.[28] Both the Bureau and the FTC's rules are very similar to the Federal Rules of Civil Procedure. All three sets of rules require that experts sign a report with complete statement of all opinions to be expressed with the expert's basis and reasons.[29] Each requires that expert reports include disclosure of facts or data considered by the expert.[30] Each requires that expert reports disclose any exhibits to be used at trial or an administrative hearing respectively.[31] Each requires disclosure of the witness's qualifications, including a list of all publications authored in the previous 10 years and previous cases in which the witness testified as an expert during the previous four years.[32] And, each requires that reports include a statement of the expert witness's compensation.[33] Given these similarities, the Bureau's Rules of Practice for Adjudication Proceedings are sufficient to provide a comparable level of notice and transparency to defendants as the Federal Rules of Civil Procedure.

However, taking the additional step of expressly tying the Bureau's rules to those used in each federal district court throughout the country would introduce an unnecessary new level of formality and complexity to interpreting these currently straightforward provisions. For example, federal district courts and circuit courts of appeal occasionally reach different results in interpreting the Federal Rules of Civil Procedure. Neither the Bureau's staff nor the administrative hearing officer should be expected to study the expert witness disclosure jurisprudence of every federal circuit. Indeed, smaller defendants with fewer resources should also prefer the flexibility of the Bureau's current expert disclosure rules. The point of an administrative enforcement system is to create a simpler, more flexible, and faster method of enforcing federal law. Expressly tying the Bureau's rules to the Federal Rules of Civil Procedure risks unproductive collateral litigation, delays, and added work for Bureau staff with little or no actual improvement in the administration of justice.

Moreover, in subparagraph (a)(2)(C)(i), the Federal Rules of Civil Procedure explicitly cross references the Federal Rules of Evidence.[34] But, the Bureau's Rules of Practice for Adjudication Proceedings expressly set out different rules of evidence for administrative hearings that are designed to facilitate the cases and fact finding suited to the Bureau's administrative enforcement mission. Thus, tying expert witness disclosures to the Federal Rules of Civil Procedure could risk importing certain elements of the Federal Rules of Evidence that may be in tension with the standards and procedures in 12 CFR § 1081.303.

Of course, nothing in existing Bureau rules prevents defendants from citing cases interpreting the Federal Rules of Civil Procedure as persuasive authority. And because the Bureau's rules on this point are

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[28] *See* 77 FR 39057, at 39076 ("This section of the Interim Final Rule is modeled after the FTC Rules, 16 CFR 3.31A.")
[29] *Compare* FED. R. CIV. P. § 26(2)(B)(i) *with* 12 CFR § 1081.210(c) and 16 CFR § 3.31A(c).
[30] *Compare* FED. R. CIV. P. § 26(2)(B)(ii) *with* 12 CFR § 1081.210(c) and 16 CFR § 3.31A(c).
[31] *Compare* Fed. R. Civ. P. § 26(2)(B)(iii) *with* 12 CFR § 1081.210(c) and 16 CFR § 3.31A(c).
[32] *Compare* FED. R. CIV. P. § 26(2)(B)(iv), (v) *with* 12 CFR § 1081.210(c) and 16 CFR § 3.31A(c).
[33] *Compare* FED. R. CIV. P. § 26(2)(B)(iv), (vi) *with* 12 CFR § 1081.210(c) and 16 CFR § 3.31A(c).
[34] FED. R. CIV. P. § (a)(2)(C)(i).

virtually identical to the FTC's rules, defendants also have the benefit of persuasive authority from the FTC's long-standing practices. Changing the Bureau's expert witness disclosure rules is unnecessary at this time and would be a distraction from other more pressing Bureau priorities.

10. 12 CFR 1081.212(e)'s instruction that extensions of the length limitation for motions for summary disposition are disfavored;

This question seeks comment on a provision that is similar to the SEC's rule[35] and more tolerating of extensions than the FTC's rule.[36] Section 1081.212(e) has not been the subject of any contention in adjudication proceedings to date and provides for 35-page limit for briefs in support and in opposition to a motion, with 10 pages allowed for the moving party's reply brief. While shorter page-limits than some local court rules allow, these limits seem to provide an adequate length for parties to present their arguments for and against motions.

11. 12 CFR 1081.303(b)'s rules pertaining to admissible evidence in administrative adjudications, including:

a. Whether, in general, the CFPB should expressly adopt the Federal Rules of Evidence; and

b. whether, if the CFPB does not expressly adopt the Federal Rules of Evidence, the acceptance of prior testimony hearsay evidence pursuant to 12 CFR 1081.303(b)(3) should comply with the requirements of Federal Rule of Evidence 804(b)(1);

The CFPB adopted § 1081.303(b) to establish rules of evidence that were "consistent with general administrative practice."[37] The Bureau's rules on this point are essentially the same as those set forth in the FTC and SEC Rules.[38] While it is to be expected that some litigants before the CFPB would prefer that the more extensive Federal Rules of Evidence be brought into adjudication proceedings, those rules might introduce complexity and added litigation that would likely delay final resolution. This would not be consistent with the expeditious proceedings contemplated under the Dodd-Frank Act.

12. The Rules' lack of authorization for parties to conduct certain discovery, including deposing fact witnesses or serving interrogatories; and

The 2012 Final Rule addressed a comment similar to this inquiry, noting:

> *The Bureau considered allowing third-party depositions or interrogatories but declined to do so because the need for these third-party discovery tools will likely be met through the discovery mechanisms that are available under the Final Rule, and because of the potential for third-party depositions and interrogatories to delay the proceedings.*

The 2012 Final Rule noted that parties could subpoena witnesses for testimony at the hearing, under § 1081.208, and depose the witness if unavailable for the hearing. Interrogatories, while a useful tool in civil litigation, also tend to be the subject of significant dispute. Thus, limiting testimony outside of trial

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[35] SEC Rules of Practice, 17 C.F.R. § 201.250(e) (2016) ("Requests for leave to file motions and accompanying documents in excess of 9,800 words are disfavored.")
[36] FTC Rules of Practice, 16 C.F.R. § 3.22(c) (2015) ("Documents that fail to comply with these provisions shall not be filed with the Secretary.").
[37] 77 FR 39057, at 39079.
[38] *Id.*

and not permit interrogatories helps facilitate the expeditious proceeding contemplated by the Dodd-Frank Act and by § 1081.201.

13. Whether respondents should be afforded the opportunity to stay a decision of the Director pending appeal by filing a supersedeas bond, consistent with Federal Rule of Civil Procedure 62(d).

Thus far, only one matter has involved a request for a stay on appeal under § 1018.407 to which this inquiry seems to apply. Though the Director denied the requested stay, he delayed the effectiveness of his order to allow the respondent to seek a stay from the Court of Appeals, which ultimately stayed the Director's order. It unclear what harm or disadvantage the CFPB believes may be occurring that merits reconsideration of the CFPB's previous determination not to provide what would be unique powers to obtain a stay.

Consumer Financial Protection Bureau
1700 G St., N.W.
Washington, DC 20552
Bureau of Consumer Financial Protection

Docket # - CFPB -2018-0006

Re: CFPB RFI # 6 - Request for Information Regarding Bureau Public Reporting Practices of Consumer Complaint Information

June 4, 2018

Dear Acting Director Mulvaney:

Thank you for the opportunity to respond to the Consumer Financial Protection Bureau's (CFPB) Request for Information (RFI) number 6 on the public reporting of consumer complaint information. The undersigned consumer protection, civil rights, fair lending, higher education and community groups welcome the opportunity to express our vigorous support of the CFPB's public complaint process and provide input on the value of public consumer complaint reporting, review, and analysis via the CFPB's complaint process.

The public complaint database is a tool that empowers individuals to inform and protect themselves in the marketplace. It helps consumers evaluate a company's practices as they decide where to take their business and creates incentives for companies to treat their customers fairly. It helps both consumers and businesses resolve problems when they arise and helps the market reward good products and services by providing consumers with the ability to publicly share their experiences. The complaint database also allows companies to identify and correct problems on their own without the impetus of a new rule or enforcement action.

The database can provide consumers, advocates and the Bureau with the substance required to prompt a review of business behavior that can detect and challenge abusive and discriminatory practices.

As noted in the RFI, the Dodd-Frank Wall Street Reform and Consumer Protection Act considers "collecting, investigating, and responding to consumer complaints"[1] such vital tasks that it is specifically enumerated as one of the six statutory "primary functions" of the Bureau.

CFPB's statutory obligations and functions

[1] Dodd-Frank 5511(c)2

As the sole federal financial regulator created for the purpose of consumer financial protection, the Bureau has rightly developed a robust, trustworthy complaint process that includes access to a public complaint database to meet its consumer protection mandate.

Providing consumers access to a public complaint database fulfills the Bureau's obligations to ensure that:

1) "consumers are provided with timely and understandable information to make responsible decisions about financial transactions"; and

2) consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination."[2]

These obligations, combined with the Bureau's statutory function of "collecting, researching, monitoring, and *publishing* information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers" all add up to a powerful argument for the vital role a public database plays in advancing the legally mandated work of the Bureau.

Additionally, the Bureau has a duty to compile and analyze borrower student loan complaints. Section 1035 of Dodd-Frank specifically mandates the CFPB's Student Loan Ombudsman to "attempt to resolve" consumers' private student loan complaints.

Our organizations represent the consumers, seniors, servicemembers, veterans, students and underrepresented communities across our nation who rely on the consumer protections that the CFPB was created to support and enforce. It is essential that the CFPB not retreat from its core mission to protect and inform consumers and to make our financial markets more fair, accountable, transparent and competitive.

The CFPB's public complaint reporting and analysis is not just useful; the Bureau's collection and dissemination of consumer complaint information is an indispensable resource for consumers to empower and protect themselves in the marketplace.

Public reporting practices

We commend and support the Bureau's public reporting practices and do not believe that it is appropriate to revise the bulk of the Bureau's public reporting practices. Any effort to inhibit data transparency would be contrary to the Bureau's objectives as laid out in Section 1021 of Dodd-Frank, as previously noted.

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[2] Dodd-Frank Section 1021

The CFPB makes information available in numerous formats to meet varying needs, diverse audiences, and statutory mandates. The Consumer Bureau:

- Creates and posts educational materials, often in multiple languages, to help consumers better understand complex and costly transactions such as a mortgage or home equity loan.
- Researches and reports publicly on topics that directly affect consumers' personal financial lives and their access to credit, such as its report on medical debt on credit reports and the impact on consumers' ability to access a loan.
- Produces required complaint-related annual and semi-annual reports and analyses for Congress and, until November 2017, released monthly complaint reports.

We urge the Bureau to resume regular publication of the monthly complaint reports, which were a resource for researchers, advocates, consumers, and customer-oriented companies to better understand complaint issues and outcomes.

The CFPB also provides public access to consumer complaints via its complaint database. The Bureau's public database – with first-hand details of consumers' financial complaints--provides a highly valuable tool for consumers who want to prevent problems, identify harmful business practices, and learn whether a company has a good record of resolving complaints. Complaint specifics are only available after consumers choose to share their personal dispute in the public database. No personally identifiable information is shared publicly.

The Bureau has gone to great lengths to protect consumers' personal information and to thoughtfully balance personal data protection with complaint data transparency. The Bureau has developed strict redaction, de-identification and opt-in consumer consent policies prior to publicly releasing complaint details.

Freedom of Information Act

In addition to the strong public policy argument for maintaining the public nature of the database, there is a simple practical argument as well: information in the CFPB Complaint database should remain publicly accessible because the data will become available in any case in light of requests by consumers and researchers under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Repeated requests for information under FOIA would compel the agency to publicly release complaint data.

FOIA requires that, once a record is subject to a FOIA request under 5 U.S.C. § 552(a)(3), that record must be made available to the entire public in an electronic format if the agency determines that it is or is "likely to become the subject of subsequent requests for substantially the same records" or if the record has "been

requested 3 or more times."[3] The agency's regulations also make clear that when a record must be made available electronically, it must appear on CFPB's website.[4]

The CFPB's own FOIA logs already identify repeated FOIA requests for consumer complaint records, and there will undoubtedly be more such requests should the consumer complaint database become unavailable on CFPB's website. There can be no question that records in the database are "likely to become the subject" of subsequent FOIA requests for the same or substantially the same records. The CFPB appears to acknowledge as much: Its Electronic FOIA Reading Room, where the CFPB compiles "records that are requested a significant number of times," already directs members of the public to the CFPB complaint database.[5]

Moreover, the Bureau is not the first, or the only, federal agency to release redacted narrative information. Upon receiving a FOIA request, the Federal Trade Commission releases redacted details from individual consumer complaints. The FTC does not use an opt-in method before releasing consumer complaint information, which makes the CFPB's policy more protective of complaint data than its sister agency. The Consumer Product Safety Commission also publishes detailed complaint data, with consumer consent and business responses.[6] The National Highway Traffic Safety Administration also provides public access to car safety complaints.[7]

Usefulness of complaint reporting and analysis

The Bureau's complaint process empowers consumers to detect and report unreasonable, unfair, deceptive, and abusive practices to alert others in advance of problems.

Public complaint reporting helps researchers, advocates and individuals begin to identify some fair lending issues and illegal discrimination in the areas of mortgage loan servicing, student loan servicing, and small business lending.

Access to firsthand consumer complaint information allows individuals to see what problems have come up repeatedly with certain products or services, or with particular companies, as well as to get a snapshot of what companies do or do not work to resolve consumer complaints. This data allows consumers to make more informed financial decisions.

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[3] 5 U5 U.S.C. § 552(a)(2)(D); 12 C.F.R. § 1070.11(c).
[4] (12 C.F.R. § 1070.13(b))
[5] https://www.consumerfinance.gov/foia-requests/foia-electronic-reading-room/.
[6] Consumer Product Safety Commission, *SaferProducts.gov*, https://www.saferproducts.gov/.
[7] National Highway Traffic Safety Administration, https://www.nhtsa.gov/recalls#vehicle

Database users can review the narrative details of a complaint, which are invaluable for consumers, researchers and other businesses to put the issues in context and allow the public to assess the validity of a complaint and draw their own conclusions. Examining complaint narratives provides consumers with critical information about the specific grievances people experience.

The CFPB's process facilitates responses to individual complaints, which helps to hold companies accountable. The fact that the complaint database is available to the public is the deterrent that some companies need to address complaints they would otherwise ignore, and the impetus for other firms to resolve complaints, where possible. After addressing the underlying issues in a complaint, consumer advocates have been asked by companies to inform the CFPB that the problem has been resolved, which illustrates the complaint database's effectiveness in motivating companies to resolve issues and deterring them from ignoring disputes.

Some firms privately admit that the mere existence of the public database has compelled them to improve customer service and internal dispute resolution processes, creating better outcomes for consumers *and* the company.

In many instances, when consumers have been unable to get a company to address their concerns, it is the act of filing a complaint with the CFPB that ultimately prompts a business to address the problem. For example, a company continuously denied a consumer's extensive attempts to resolve fraudulent activity on his bank account. This consumer tried to work directly with the bank for a year and a half, to no avail. After filing a complaint through the CFPB, he quickly received his money back. In another case, even after calling the company six separate times, a consumer was unable to reach anyone at the mortgage company to answer her questions about an error in the terms of her mortgage modification. Once her housing counselor helped her file a CFPB complaint, the company quickly contacted her and stayed in regular communication until the error was corrected and her questions were answered. The complaint database should be preserved as a public database precisely because it is an effective tool for consumers to get their complaints responded to and in some cases resolved.

Consumer-driven tools, such as the CFPB's online complaint database, use a free market approach to encourage companies to police themselves and lessen the need for government intervention. The visibility of complaint information gives companies an incentive to treat consumers fairly and correct problems promptly on their own, potentially avoiding regulatory or enforcement activity.

Recently the Bureau began collecting direct consumer feedback on how complaints have been handled. This additional detail affords the Bureau useful insight into where consumers have been satisfied with company responses and where breakdowns have occurred in the complaint resolution process. It also allows the Bureau to identify a pattern of problems and, where appropriate, use one of its

many tools to generate change based on the type and severity of the complaints and complaint outcomes.

Public access to the feedback portion of the system would enhance the complaint process and reward customer–focused companies with the chance to gain credit and credibility for avoiding and resolving complaints based on first-hand customer feedback. We'll discuss this further in the improvements section below.

It is in both the public's and government's best interest – and a key part of the CFPB's mission-- to use data to provide the public with "timely and understandable information to make responsible decisions about financial transactions" (Section 1021)

Authors Blair Levin of Brookings Institution and Larry Downes of Georgetown University maintain, *"Consumer-supplied information can reduce reliance on regulation and enforcement to protect consumers by encouraging market forces that reward better business practices...the bureau has embraced an uncontroversial economic view that the free market works best when all sides have complete information about one another."*

When government systems foster transparency and accountability, they result in more economical and efficient outcomes. The state of California is making use of a similar dynamic in turning to "peer-to-peer ratings" combined with state imposed safety standards to improve government efficiency. California's Public Utilities Commission relies on ride-share platforms to help ensure driver compliance and public safety *and* use driver and passenger ride-share ratings to help create less expensive, more efficient government oversight for ride-share users.[8]

The CFPB complaint information also has an important advantage over other online government complaints databases because the CFPB verifies the consumer's commercial relationship with the company and clearly discloses that consumer claims are not confirmed. It rightly leaves the validity of the complaint and complainant up to the reader to judge its value. If the CFPB database reveals that a company has hundreds of complaints posted about the same unfair or predatory practice, an individual can evaluate whether the company deserves its business. Readers may draw different conclusions from first-hand complaints, and they can learn from and be influenced by successful resolutions of problems, as well as the descriptions of the problems themselves.

There is no evidence that any public complaint data has caused harm to any individual company. While fears of reputational harm have been broadcast for years, not one company has been able to publicly claim actual damage directly linked to

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[8] (Washington Post oped – https://www.washingtonpost.com/news/innovations/wp/2018/05/02/we-need-more-not-fewer-government-yelps/?noredirect=on&utm_term=.ff8881fc81b6)

Bureau public complaint data, much less damage linked to inaccurate complaint data. The public benefits of the complaint database in providing transparency, accountability and understandable information to consumers far outweighs any concerns of unproven corporate fears.

Access to the public database and frequency of reporting

Any changes that would diminish the Bureau's public reporting practices of consumer complaint information, including public access to its online complaint database, would be a dereliction of the CFPB's duty to protect consumers and provide the most meaningful information possible for consumers to make wise financial decisions. Hiding complaint information harms consumers who are trying to make responsible financial decisions in a timely manner. Removing or limiting public access to the database would make the entire complaint process less effective because companies' bad behavior--and good behavior--would no longer be publicized, reducing both the deterrent effect and the incentive to respond to and resolve complaints.

As noted, since November 2017, the Bureau has stopped publishing monthly complaint reports. The Bureau should resume these regular reports and include more robust examples of the specific types of problems consumers are experiencing. Based on narrative data, reports could, for example, include the primary details in consumers' credit reporting complaints, such as "disputes remain unresolved about misidentified debts" or "incorrect account delinquencies are not removed from credit file even after dispute." To make the database more accessible, the Bureau should add a field to list each complaint in the public database by the name of the subsidiary company known to the consumer, in addition to the corporate parent name that is used to transmit the complaint to the responsible party.

Inclusion of specific complaint details, such as the names of companies subject to the most complaints, is "net beneficial" to the public which this agency was created to serve. If consumers are alerted to specific companies with chronic customer care problems, consumers can take this into account when deciding with which firms to do business. Companies can improve their own policies and practices by observing what bad practices their competitors engage in that result in consumer complaints and potentially improve their own competitive appeal.

The existence of the database is as much for the public as it is for the Bureau's benefit. Public complaint reporting should also be regarded as part of the Bureau's statutory obligation to educate the public on financial matters. Analysis of complaint information should be shared at regular intervals with the public. But this is no substitute for continuing to provide consumers with continued access to the complaint database to do their own review and evaluation of first-hand complaint information. The Bureau should also regularly report on complaint types, specific problems and specific companies which are the subject of the most complaints, as well as complaint outcomes.

Monthly reports should contain all information released in previous monthly reports and there should be increased efforts to raise awareness and understanding of the complaint reports. The Bureau could generate a semi-annual breakdown of statewide complaint data, similar to the October 2017 special report, with 50 states' data.

Financial companies should not be given the privilege of responding to CFPB reports prior to releasing the report to the public to avoid the appearance of undue influence by companies. However, we would support expansion of the company response options in the complaint process. Currently companies may only choose from nine standardized public responses to consumer complaints. We suggest expanding company responses to include corporate narratives, just as consumers are afforded that option.

Specific suggestions for improvements to the complaint process

We urge the Bureau to expand the use of the complaint feedback process to include public access. Since late 2017, the collection of feedback on the outcome of complaints makes the process far more valuable and accountable. This is an outstanding tool that allows consumers to better understand how companies respond to complaints, and allows businesses to both better understand their customers and more accurately measure customer service performance. Additionally, direct feedback helps the Bureau better recognize companies that are consistently providing excellent customer service and companies that are falling short. Firsthand feedback on complaint outcomes can alert the Bureau and businesses to remaining unresolved problems, communications breakdowns, and the potential existence of festering harmful trends.

Details from consumer feedback on complaint outcomes should be incorporated into the public database. The one element missing from this stage of the CFPB's excellent complaint process is the public reporting of direct consumer feedback. Consumer satisfaction or dissatisfaction in a complaint's outcome – and the *details why*--are precisely the kind of information consumers value to indicate if a company has a habit of standing behind its products and services.

Complaints should be transmitted from the Bureau to each company complained about. Depending on the financial product or service, only a portion - in some cases less than half of complaints received (only 47% of debt collection cases, for example) are transmitted by the CFPB to the aggravating company. This fails to achieve one of the Bureau's primary functions of "collecting, investigating, and responding to consumer complaints," nor does it provide the public with the vital information needed to help consumers make responsible financial decisions. Every effort must be made (including use of U.S. Postal mail) to ensure that a consumer's complaint reaches the company, even if the company is not connected to the portal, to increase the likelihood of resolution.

All consumer complaints received by the Bureau should be reported publicly. All complaints filed with the CFPB should become part of the public database, including complaints referred to other agencies or involved in a lawsuit. These complaints can include a note that they were referred to a specific agency or not addressed by the Bureau due to litigation, but the existence of these complaints should nonetheless be reported publicly. Complaint reports should include all complaints to allow researchers and the public to review the full complement of complaints received and evaluate how widespread a harmful practice may be.

All complaints should be listed by the specific company the consumer complained about, as well as by the parent company's name. The Bureau should list each complaint in the public database by the company name used by the consumer in the complaint, not only by the parent company's name. Reporting complaints by the company name that a consumer would recognize makes the complaint far more useful to the public in evaluating a company's practices and helps to hold the company accountable.

Complaint resolution details should be publicly reported. The Bureau should make it possible for consumers to see how individual companies are handling the complaints they receive in the database. A company "snapshot" could include an overview of response times, explanations and relief. Resolutions should be broken down by monetary relief, including dollar amounts received, combined with the type of complaint filed and company name. Non-monetary relief should report the specific actions taken by a company, such as, "Error removed from credit bureau records," "interest rate changed." A summary of resolution details could appear when a consumer hovers over a company name. Additional complaint resolution information--broken down by company--should be released in an annual specialty report.

Complaint explanation details should be publicly reported. The vast majority of consumers receive a private explanation in response to their complaints. Consumers have frequently reported that they are not provided with a meaningful company response to their complaint; receiving instead a nebulous, unresponsive reply. Details from company explanations should be transparent to the public and reported in summary form. The Bureau should compile company responses and provide the public with the primary explanations consumers are receiving. Response examples might include why a credit line was not increased or a loan was denied. Companies are required to provide complainants with *tailored* responses, rather than a stock, vague reply that does not address the consumer's concerns. In a monthly or specialty report, the Bureau should publically disclose companies' most common response examples, including vague replies. How a company typically responds to its customers' complaints is precisely the type of helpful information consumers can use when evaluating which businesses to engage with. Highly responsive companies would benefit from this public disclosure, even when the response is not in the consumer's favor.

The Bureau should improve the targeting of its scrubbing standard. While consumer privacy is imperative, sometimes too much information is redacted from complaint details (dates, times and numbers), and what data is removed often seems inconsistent. While personally identifiable information should remain redacted, details about the situation forming the basis of the complaint should be made publicly available so that consumers can better understand what happened.

Consumer complaint data should be made more accessible and more user-friendly. The Bureau should be commended for continuously seeking feedback from the public and for its constant improvements to the database, which are regularly published in updated release notes. For example, as recently reported, the interface has seen improved tools for filtering and visualizing complaints [Consumer Financial Protection Bureau, *Consumer Complaint Database Release Notes for 14 November 2017*, 14 November 2017, archived at https://web.archive.org/web/20180514030347/http://cfpb.github.io/api/ccdb/release-notes.html]. Nevertheless, the Bureau should continue to demand that its online database vendor Socrata create a more entry-level user-friendly interface so consumers can more intuitively select the most useful dataset views. Power users often simply download the dataset into their preferred analysis software. It makes sense to better optimize the online viewer for entry-level users—average consumers. The *Read Consumer Narratives* section is the most valuable option for consumers because it supplies complaint details. The *View Complaint Data* section is too similar to *Read Narratives* and should be made easier for consumers to sort or filter. Consumers will not know to convert data to columns in *View data in Socrata*, nor how to best review the columns.

The consumer complaint database should be made more accessible to small business owners. The complaint database should be more available as a tool for small business owners seeking to submit concerns about financial products and services. While individual consumers have filed approximately 1.4 million complaints with the Bureau, an estimated 911 small business-related complaints have been filed with the CFPB from 2011 through the first half of 2017, according to a review by the California Reinvestment Coalition. The Consumer Bureau could improve outreach and enhance its website to make clear that small business owners are welcome to file financial complaints. Making the complaint database more accessible to consumers who own small businesses would empower small business owners to apply this tool and help the CFPB exercise its existing authority to identify and enforce fair lending law, and to develop a critically needed small business data collection rule.

The Bureau should require timely, tailored company responses.
The Bureau should require all companies supervised by the CFPB to adequately respond to and attempt to resolve consumer complaints within the 15 and 60-day time frames. The CFPB should pursue companies that do not respond to or resolve consumer complaints and hold them more accountable. The Bureau could follow up

with unresponsive companies directly and press them to provide more detailed, tailored responses and resolutions, both publicly and privately.

Fair Lending office authority should be restored. Since the Office of Fair Lending was recently stripped of oversight and enforcement authority, consumer complaints about discriminatory lending and housing issues that fall under the CFPB's jurisdiction risk not being addressed as required by law. We recommend rearming the statutorily mandated CFPB Office of Fair Lending & Equal Opportunity with its original powers to investigate and oversee discriminatory lending.

Conclusion

It must be noted that the amount of time and attention required to adequately address these numerous RFIs has diverted valuable consumer agency and third party resources to respond to these requests for information. These RFIs are primarily an opportunity for financial firms to attempt to weaken CFPB oversight, consumer protection, public input and access to fair and affordable financial products and services. The number, extent and opacity of these requests have made it impossible for organizations and consumers around the country to publicize and respond to all of them. The Consumer Bureau should not engage in a counting game, nor discount the input our organizations and other consumer interests have provided simply because we cannot match the resources that industry can devote to responding to these voluminous requests.

The public consumer complaint database has served as a vital tool to make markets work better. It allows consumers to make better financial choices, encourages firms to improve their customer service, allows competitors to take notice of practices that they should avoid, and provides academics and other researchers with an important view of the marketplace.

We urge the Bureau to maintain public access to the complaint database and to include additional detailed data in its statutory reports to provide the most meaningful information possible for consumers to make responsible financial decisions.

Thank you for taking the time to thoughtfully review our comments.

Sincerely,

Alaska Public Interest Research Group
Allied Progress
American Federation of Teachers
Americans for Financial Reform
Arizona PIRG Education Fund
Association for Neighborhood and Housing Development
Atlanta Legal Aid Society Inc.

California Reinvestment Coalition
CALPIRG
Center for Digital Democracy
Center for NYC Neighborhoods
Center for Responsible Lending
Community Legal Services of Philadelphia
Connecticut Fair Housing Center
ConnPIRG
Consumer Action
Consumer Federation of America
Consumers for Auto Reliability and Safety
COPIRG
Demos
Florida PIRG
Generation Progress
Georgia PIRG
Georgia Watch
Heartland Alliance for Human Needs & Human Rights
Higher Ed, Not Debt
Howard Country Office of Consumer Protection
Illinois PIRG
Indiana Institute for Working Families
Indiana PIRG
Interfaith Center on Corporate Responsibility
Iowa PIRG
Legal Aid Society of the District of Columbia
Main Street Alliance
Maryland PIRG
MASSPIRG
Missouri PIRG
Montana Organizing Project
NAACP
National Association of Consumer Advocates
National Coalition for Asian Pacific American Community Development
National Community Reinvestment Coalition
National Consumer Law Center (on behalf of its low income clients)
National Consumers League
National Fair Housing Alliance
National Housing Resource Center
National Urban League
New York Legal Assistance Group
New Yorkers for Responsible Lending
NJPIRG
NMPIRG
Ohio PIRG
Oregon PIRG

PennPIRG
PIRG in Michigan

Privacy Rights Clearinghouse
Privacy Times
Public Citizen
Public Justice Center
Public Law Center
RIPIRG
Student Debt Crisis
Tennessee Citizen Action
The Institute for College Access & Success
TexPIRG
Tzedek DC
UnidosUS
U.S. PIRG
WASHPIRG
WISPIRG
Woodstock Institute
World Privacy Forum

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]

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[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

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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.

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[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/.

June 25, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2018-0012 -- Request for Information Regarding the Bureau's Inherited Regulations and Rulemaking Authorities

Dear Acting Director Mulvaney,

The 42 undersigned consumer, community, civil rights and legal services groups submit these comments in response to the Consumer Financial Protection Bureau's ("CFPB") Request for Information ("RFI") regarding its inherited regulations and rulemaking authorities.

Our top priorities are to address the serious problems posed by Property Assessed Clean Energy (PACE) loans and to address overdraft fee abuses.

The CFPB should implement the ability-to-repay provisions of the recently passed banking bill and clarify that PACE loans must generally comply with the regulations governing all mortgages.

We are deeply disappointed that the CFPB has abandoned plans to address overdraft fees. We urge it to move forward with appropriate regulation of overdraft fees by requiring routine overdraft credit to comply with Regulation Z and credit laws.

If the CFPB embarks on modernization of Regulation E, we also recommend improving fee disclosures for bank accounts, protection against unauthorized charges, and protections against compulsory use of electronic repayment of credit.

We urge the CFPB to undertake a long overdue update of Regulation CC to give consumers prompt access to checks deposited to prepaid accounts and via mobile devices.

We strongly oppose any effort to weaken Regulation B, implementing the Equal Credit Opportunity Act, by straying from the use of disparate impact analysis in assessing discrimination. Disparate impact is the statutory legal standard under the ECOA, notwithstanding the congressional action on the auto loan guidance, and any amendments that undercut that statutory standard would be outside the CFPB's authority.

With respect to other regulations, while many could undoubtedly be improved, we support the existing regulations, which are important to protecting consumers, and the CFPB definitely should not weaken them or create further loopholes or exemptions that would limit their effectiveness. Should the CFPB decide to review other regulations, we make suggestions regarding the regulations that implement the Truth in Lending Act, Truth in Savings Act, Real Estate Settlement Procedures Act, and Fair Credit Reporting Act.

1. Objections to the CFPB's Request for Information Process

We must first note our objections to the burdensome RFI process. The due date for this RFI, which covers every regulation and rulemaking authority that the CFPB has inherited, comes only six days after the deadline to comment on all of the regulations the CFPB has adopted and its new rulemaking authorities. The CFPB has ignored our request for an extension of time to respond to this particularly burdensome RFI and the earlier one on adopted regulations.

The amount of time and attention required to adequately address the CFPB's numerous RFIs on a multitude of subjects in a very short amount of time has diverted valuable consumer advocacy and third party resources to respond to these requests. The very structure of these RFIs, the nature of many of the questions, and the fact that many focus on processes known mostly to industry actors and their lawyers, favor financial institutions with greater resources at their disposal, and we are gravely concerned about any attempts to weaken consumer protection through this process.

These problems have prevented us from responding in more detail, seeking more input or signatories, or publicizing the comment opportunity more widely. The CFPB must not take a lack of comments on a particular regulation, or the limited number of comments from the public, as indicative of a lack of broad objections to changes the CFPB might make that would weaken its role in effectively protecting the consumer public. We also strongly urge the CFPB not to consider the current RFI as the sole opportunity to comment in advance of of any rulemakings concerning the inherited or adopted regulations or authorities.

These comments should also be read in conjunction with earlier comments by our groups and other organizations and consumers regarding the regulations the CFPB has adopted and its new rulemaking authorities. These comments only address rules or authorities that were inherited from other agencies.

2. Regulation B (Equal Credit Opportunity Act)

Regulation B implements the Equal Credit Opportunity Act (ECOA), the primary bulwark against discrimination in credit transactions. The ECOA prohibits discrimination against any applicant at any stage of a credit transaction on the basis of race, religion, national origin, sex, marital status or age. Regulation B sets out factors that may not be considered in determining creditworthiness or in closing an existing account and addresses the ways in which information concerning spouses may be reported to credit reporting agencies. Regulation B also limits what information can be sought in the application process, restricts when a spouse can be required to co-sign an application, provides for a required notice to applicants when action is taken on an application, and provides notice of an applicant's right to a copy of any appraisal concerning the value of their home. Regulation B remains a vital tool to combat discriminatory lending practices and should not be weakened.

We strongly oppose any effort to amend Regulation B to eliminate or discourage use of disparate impact analysis in assessing unlawful discrimination. The disparate impact standard under

ECOA is the law of the land. Courts have sustained disparate impact claims under the ECOA in every case we are aware of, and the Supreme Court recently endorsed the use of disparate impact under the Fair Housing Act. Disparate impact analysis is critical to uncovering broad patterns of discrimination that cannot be easily seen in individual cases and in addressing inequalities that persist as vestiges of historical discrimination and the resulting segregation in our society.

The recent congressional decision to block the auto loan guidance does not change the disparate impact standard under ECOA and Regulation B. It did not change the law.

Any effort to weaken the disparate impact standard would be outside of the CFPB's authority.

3. Regulation E (Electronic Fund Transfer Act)

Regulation E implements the Electronic Fund Transfer Act (EFTA) and protects consumers in connection with various forms of electronic payments and protections for accounts that hold funds that can be accessed electronically.

We are extremely disappointed that the CFPB has removed an overdraft fees rulemaking from the agency's semi-annual regulatory agenda. We do note that modernization of Regulation E is on the agenda, and we hope that addressing overdraft fee abuses will be part of that effort. We also make other suggestions below for modernizing Regulation E.

Our top Regulation E issue -- indeed, one of our top issues overall -- is to reform the treatment of overdraft fees. Overdraft fees drain $14 billion from working families every year, and nearly 80% of overdraft and nonsufficient fund fees are borne by only 9% of accounts, vulnerable families who tend to carry low balances averaging $350.

Overdraft fees imposed for more than an occasional courtesy are a form of credit and should be required to comply with credit laws and Regulation Z, rather than being regulated by Regulations E and DD. In particular, the CFPB should ban overdraft fees on one-time debit and ATM transactions unless overdraft credit is provided in compliance with Regulation Z. The Regulation E opt-in rules governing overdraft fees on one-time debit and ATM card transactions have not worked, as banks have actively deceived consumers to encourage opt ins.

Until overdraft credit is fully covered by Regulation Z, the CFPB should retain but strengthen the Regulation E opt-in rules by limiting overdraft fees to one a month and no more than six a year. In addition, consistent with the common law governing penalty fees in contracts, the CFPB should require fees to be reasonable and proportional to the cost to the institution of covering the overdraft.

With respect to bank accounts and electronic payments generally, the CFPB should:

- Require clear fee charts for bank accounts, available online, similar to the ones in the prepaid rule or those recommended by Pew Charitable Trusts.
- Improve the methods for providing periodic statements electronically to ensure that consumers see critical information such as fee totals.

- Specify and strengthen the authorization requirements for electronic payments and clarify that consumers have the right to revoke authorization of payments that are authorized in advance.
- Protect consumers from liability for fraudulent transfers in new, faster payments even when consumers are defrauded into initiating the payment.
- Reject calls to allow banks to impose liability for unauthorized transfers if the consumer is purportedly negligent, a standard that is not in the EFTA.
- Prevent coercive measures used by online lenders to evade the ban on compulsory use of electronic repayment as a condition of credit.
- Facilitate safe methods of allowing consumers to use their account data and stop banks from threatening consumers with loss of protection against unauthorized charges.

4. Regulation V (Fair Credit Reporting Act)

Regulation V implements many, but not all, of the provisions of the Fair Credit Reporting Act (FCRA). The FCRA provides critical protections when information is collected about consumers for use in credit, insurance, employment and other important purposes. While there are serious problems in the credit reporting area, many of these stem from failure to comply with existing rules rather than gaps in those rules. Thus, the most critical task for the CFPB is to ensure vigorous supervision of larger participant consumer reporting agencies and to enforce existing law.

While it would be helpful to issue regulations setting strong standards for accuracy and consumer access to their own reports, such rulemaking should only be conducted after a cautious, deliberative process that brings in the multitude of stakeholders. Moreover, we especially urge that FCRA regulations not be weakened.

To the extent that there are focused, limited improvements for Regulation V, we have the following suggestions:

- Adopt the Federal Trade Commission's FCRA Staff Report with Summary of Interpretations as an official interpretation of the FCRA.
- Prevent disputes or delays over medical insurance or billing from impacting consumers' credit reports and scores.
- Require employers to provide 35 days' notice, allowing time to address errors, prior to a final action taken in reliance on a consumer report.
- Eliminate overbroad exceptions to the requirement to notify consumers when a consumer report or credit score results in a higher price.

5. Regulation X (Real Estate Settlement Procedures Act)

a. Settlement Costs

The Real Estate Settlement Procedures Act (RESPA), implemented by Regulation X, is the primary federal law directly addressing residential mortgage settlements. RESPA was enacted after a report showing that settlement costs were more than 10% of the average purchase money

mortgage and that charges often were based on factors unrelated to the cost of providing the service. RESPA and Regulation X are intended to ensure that consumers in real estate transactions receive timely information about the nature and cost of the settlement process and to protect consumers from unnecessarily high settlement charges caused by certain abusive practices. This is accomplished through a combination of disclosure and restrictions on kickbacks and referral fees.

After more than 40 years, the mortgage industry has long been accustomed to Regulation X compliance and the rule continues to meet the needs of mortgage borrowers. We support Regulation X and oppose any effort to weaken its protections.

In particular, the regulations implementing the ban on kickbacks and referral fees are effective and should not be weakened. This rule is vital to RESPA's original purpose by preventing consumers from being steered into high-cost settlement services by hidden incentives.

If the CFPB does revisit the Regulation X provisions governing settlement costs and disclosures, we recommend that the bureau clarify that the rule applies to *all* manufactured homes titled as real property and that it limit the loophole for affiliated businesses.

b. Servicing

RESPA was amended in 1990 to address increasing consumer complaints about mortgage servicers. These amendments and the implementing rules in Regulation X generally require servicers to respond to consumer inquiries, correct account errors, disclose information relating to the transfer of servicing operations, and make timely payments out of escrow accounts. These rules have been effective in curbing some of the worst abuses, establishing minimum standards in the servicing industry, and making servicers more responsible to consumers. The CFPB made some minor revisions to these inherited rules in 2013 (which are now found in Subpart C of Regulation X), improving them further.

We oppose any effort to weaken the current protections. Should the CFPB revisit the inherited provisions of Regulation X, our top priorities are to:

- Eliminate or revise the exemptions from certain escrow account requirements when the borrower is more than thirty days delinquent in making mortgage payments or in a bankruptcy proceeding.
- Ensure that the error resolution process adequately protects borrowers from threatened foreclosure when the asserted error relates to the alleged default or grounds for foreclosure.
- Eliminate several of the exemptions that apply to reverse mortgages and home equity lines of credit.
- Restore the requirement that the transfer of servicing notice inform borrowers of their RESPA dispute rights, and provide additional information about account loan status.

6. Regulation Z (Truth in Lending Act)

a. PACE Loans

Serious problems have emerged in the rapidly growing market for Property Assessed Clean Energy (PACE) loans. These loans become part of the property tax assessment and are repaid through payment of taxes. PACE providers rely on a loophole to claim that these loans are not covered by Regulation Z or TILA, depriving homeowners of critical protections for large loans that are often unaffordable and jeopardize homes. PACE loans often have little connection to deep energy savings and are pushed aggressively by door-to-door contractors targeting seniors, frequently with false or deceptive claims about free government programs or savings that do not materialize.

Addressing the problems with PACE loans and closing the misinterpreted loophole in Regulation Z is is of critical importance. It is also a congressional priority: a provision directing the CFPB to adopt ability-to-repay rules for PACE loans is included in the bipartisan banking bill package recently passed by Congress and signed by President Trump. We urge the CFPB to swiftly enact the rules mandated by Congress and to ensure that PACE providers comply with the other mortgage protections required by Regulation Z, with appropriate modifications as necessary to address the unique structure of PACE loans.

As with other mortgages, property owners should be reviewed for their ability to repay the PACE loan while meeting other expenses prior to signing the contract and the commencement of any work. TILA-type pricing and term disclosures with additional PACE-tailored disclosures should be provided in writing three business days in advance of signing the contract unless there is a bona fide emergency confirmed in writing by the consumer. Door-to-door contractors should not be allowed to provide disclosures solely by showing the disclosures to the homeowner on the contractor's electronic tablet.

PACE contracts should provide for full amortization, with monthly payments made through the original mortgage lender, the PACE provider, or the government authority. Homeowners should receive monthly statements. The term of PACE assessments should not exceed the useful life of the improvement.

PACE rules and loan contracts should include provisions ensuring the borrower will have access to loss mitigation and tax foreclosure avoidance options.

As required in the recent banking bill, homeowners must have the right to pursue TILA remedies for any violations. Consumers should have seller-related defenses to repaying PACE loans, similar to the rights they have under the FTC's holder rule for other seller-related home improvement financing, in order to protect homeowners who are defrauded or deceived by a contractor when entering into a PACE contract. Government entities should be indemnified by PACE providers for any liability.

b. Credit Cards and Other Open-End Credit

Regulation Z contains several provisions that protect consumers when they use credit cards and other forms of open-end credit. Of special importance, the Credit CARD Act and its implementing provisions are a compelling example of how strong consumer protections benefit ordinary Americans and industry players alike. Since the Credit CARD Act, issuer practices have become more transparent and thus more competitive. Bait-and-switch interest rate hikes have been dramatically curtailed, late fees substantially reduced, and over-the-limit fees virtually disappeared. Consumers saved over $18 billion in just the first few years. Prices are down, access to affordable credit has not been reduced, responsible industry players have happier customers and do not have to compete in a race to the bottom for who can make more profits on the back-end.

Revising Regulation Z's open-end regulations is not a top priority. We especially oppose any effort to weaken the protections. Should the CFPB choose to revisit the open-end provisions of Regulation Z, our top priorities are to:

- Calculate the APR for open-end credit and closed-end credit in the same way, that is, include non-interest finance charges in the APR. Making the APR comparable across products provides a more complete and honest price tag that consumers can use to comparison shop. All fees also should be included in the advertising APR and the CFPB should restore the fee-inclusive effective APR disclosed on statements for open-end credit.
- Ban deferred interest promotions, which result in surprise retroactive interest charges.
- Extend unauthorized use protections to credit card convenience checks.

Home equity lines of credit are not covered by the TILA/RESPA integrated disclosure rules. Rather, they are governed by their own set of requirements, primarily found in Reg. Z § 1026.40. The Appendix G to Regulation Z provides extensive model forms to aid creditor compliance. The CFPB need not revisit this regime with one exception. As with other open-end transactions, the APR disclosed for HELOCs suffers from the same defect--it only reflects the interest rate and does not include non-interest finance charges. The CFPB should eliminate these differences in the event it reopens Regulation Z.

c. Mortgages, Auto Loans, Student Loans and Other Closed-End Credit

i. In General

While every regulation can be improved, and we have our own suggestions if the CFPB chooses to revisit Regulation Z, the closed-end credit provisions of Regulation Z are generally working well. We oppose any effort to weaken Regulation Z, add exemptions, or otherwise undercut the protections that it offers.

The TILA provisions that apply to closed-end credit primarily focus on disclosure of the credit terms (in addition to the mortgage-specific provisions, discussed below). The rules require disclosures in a uniform, consistent format so that consumers can compare credit terms and shop

for credit. In general, a reliance on disclosures alone is a weak approach to protecting consumers. Substantive rules to limit unaffordable credit and to prevent abuses are much more effective. Nonetheless, the TILA disclosure rules do provide an important function, and if any changes are made, the disclosures should be strengthened, not weakened.

If the CFPB decides to undertake revisions to the closed-end requirements of Regulation Z, we urge it to implement an all-in finance charge definition that incorporates all fees and other charges. The current rules allow a swiss-cheese approach, omitting some fees from the APR price tag, leading to evasions that make it difficult for consumers to understand the cost of credit or to comparison shop.

ii. Mortgage-Specific Provisions

Many of the Regulation Z provisions that govern mortgages have been amended or adopted by the CFPB and were addressed in our comments on adopted regulations. In addition, inherited regulations govern high-cost mortgages, remedies for TILA violations, and other aspects of mortgages.

The Regulation Z provisions implementing the Home Ownership Equity Protection Act (HOEPA) have worked well to discourage dangerous high-cost mortgages and should not be weakened. Prior to the enactment of HOEPA, scammers engaged in loan flipping and added dangerous features to mortgages that increased the cost of mortgages and jeopardized homes. HOEPA has successfully discouraged those practices. The Federal Reserve Board's higher-priced mortgage loan rules added in 2009 layered protections to the previously rogue subprime market and also are working well. It was this segment of the market that sparked the foreclosure crisis and these rules are essential to prevent future recklessness.

TILA's statutory remedies are also of high importance, and it would be outside of the CFPB's authority to weaken them. In particular, the consumer's right to rescind a mortgage under limited circumstances following the initial three-day cooling off period is critically important. This right is only available for a subset of the mortgage market: non-purchase mortgage loans secured by the consumer's principal dwelling. Despite these limitations, rescission plays an especially important role in protecting against creditor malfeasance. Without such a right, a creditor that misrepresented credit terms could trap a consumer in a loan as long as the misrepresentation remained undiscovered for the first three days.

7. Regulation CC (Expedited Funds Availability Act)

Regulation CC implements the Expedited Funds Availability Act (EFAA), which sets out timelines under which consumers must be given access to deposited funds. However, the regulation has not been updated in decades, and it is unclear what timelines apply to funds deposited to prepaid accounts or to checks deposited by uploading images via mobile devices.

The CFPB should update Regulation CC to treat deposits to prepaid accounts the same as deposits to checking accounts. It should also give consumers the same prompt access to checks

deposited through mobile devices as is required for ATM deposits. At most, a one-day delay should be imposed if necessary to prevent fraud or accidental double deposits.

8. Regulation DD (Truth in Savings Act)

Regulation DD implements the Truth in Savings Act, which governs disclosures and periodic statements for bank accounts and an annual percentage yield (APY) disclosure regarding the interest rate on savings accounts.

The CFPB should update Regulation DD to:

- Prevent banks from advertising "free checking" if the bank uses measures that result in a substantial amount of overdraft fee revenue;
- Require a box of clear fee disclosures that is also available online;
- Address fees on savings accounts that make interest disclosures deceptive or result in savings accounts that lose money.

9. Electronic disclosures and records

The CFPB asks whether aspects of the inherited regulations are "incompatible or misaligned with new technologies, including by limiting providers' ability to deliver, electronically, mandatory disclosures or other information that may be relevant to consumers …" This question fails to ask whether electronic disclosures can be improved for the benefit of consumers or whether information delivered electronically adequately protects all consumers.

We support clear, well-designed and tested electronic disclosures and information for consumers who elect to receive information in that format. But we note that it is important that information be provided in a form that consumers can keep, and some transactions are too complex to be adequately understood on mobile devices. We oppose removing the choice of paper disclosures, statements, records or other information for consumers who prefer to receive information on paper.

In 2007, the FRB exempted application disclosures for certain variable rate mortgage loans from E-Sign requirements. If the CFPB addresses electronic disclosures, we urge it to remove this exemption. There is no reason why creditors should not have to obtain consumer consent before providing a fairly long list of mandated information in electronic format at the application stage.

10. Other regulations

The CFPB has inherited several other regulations and rulemaking authorities. While there are undoubtedly improvements if the CFPB were to revisit them, we support the existing consumer protections and oppose any effort to weaken them.

* * *

Thank you for considering these comments.

Yours very truly,

Allied Progress
Americans for Financial Reform
Arizona Community Action Association
Arkansans Against Abusive Payday Lending
Atlanta Legal Aid Society, Inc.
Baltimore Neighborhoods, Inc
CASH Campaign of Maryland
Center for Economic Integrity
Center for NYC Neighborhoods
Center for Responsible Lending
Consumer Action
Consumer Federation of America
Equal Justice Society
Florida Alliance for Consumer Protection
Georgia Watch
Heartland Alliance for Human Needs & Human Rights
Housing Options & Planning Enterprises, INc.
Illinois People's Action
Jacksonville Area Legal Aid, Inc.
Leadership Conference on Civil and Human Rights
Legal Services NYC
Main Street Alliance
Maryland Consumer Rights Coalition
Mississippi Center for Justice
NAACP
National Association of Consumer Advocates
National Association of Social Workers
National Consumer Law Center (on behalf of its low income clients)
National Fair Housing Alliance
National Housing Law Project
Neighborhood Housing Services of Baltimore
New Jersey Citizen Action
People's Action Institute
Public Citizen
Public Counsel
Public Justice Center
Public Law Center
Texas Appleseed
U.S. PIRG
UnidosUS
West Virginia Center on Budget and Policy
Woodstock Institute

June 25, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2018-0012 -- Request for Information Regarding the Bureau's Inherited Regulations and Rulemaking Authorities -- **Regulation E and other nonlending regulations**

Dear Acting Director Mulvaney,

The undersigned consumer, community, civil rights and legal services groups submit these comments in response to the Consumer Financial Protection Bureau ("CFPB")'s Request for Information ("RFI") regarding its inherited regulations and rulemaking authorities.

These comments focus on Regulation E and other nonlending regulations. Many of our organizations have also joined other comments that discuss Regulation B (Equal Credit Opportunity Act), Regulation X (Real Estate Settlement Procedures Act), and Regulation Z (Truth in Lending Act), as well as electronic communications generally.

After noting our objections to this process in Section 1, these comments are organized as follows.

Section 2 focuses on the critical need to address abusive overdraft fee practices, along with other changes to modernize Regulation E. We are deeply disturbed that the CFPB has dropped the overdraft fees rulemaking from the bureau's regulatory agenda, and we strongly urge the CFPB to limit the number of overdraft fees that may be charged without compliance with Regulation Z and credit laws. We also urge the CFPB to improve fee disclosures for bank accounts; to enhance measures to protect consumers against unauthorized charges in new and existing payment systems; and to prevent evasions of the ban on compulsory use of electronic repayment of credit.

These comments also address the following regulations:

Section 3: Regulation DD (Truth in Savings Act)
Section 4: Regulation CC (Expedited Funds Availability Act)
Section 5: Regulation V (Fair Credit Reporting Act)

In general, we support these regulations and urge the CFPB not to weaken them. We do make suggestions for improving them if the CFPB decides to revisit these regulations. We note that Regulation CC in particular is in need of updating to address deposits to prepaid accounts and deposits made through mobile devices.

1. Objections to the CFPB's Request for Information Process

We must first note our objections to the burdensome RFI process. The amount of time and attention required to adequately address the CFPB's numerous RFIs on a multitude of subjects in a very short amount of time has diverted valuable consumer advocacy and third party resources to respond to these

requests. The very structure of these RFIs, the nature of many of the questions, and the fact that many focus on processes known mostly to industry actors and their lawyers, favor financial institutions with greater resources at their disposal, and we are gravely concerned about any attempts to weaken consumer protection through this process.

The CFPB has ignored our request for an extension of time to respond to this particularly burdensome RFI and the one on adopted regulations. These two RFIs require us to comment on dozens of regulations on many different subjects running many hundreds if not thousands of pages in length. Doing so barely a week after responding to a series of other RFIs has been especially difficult.

These problems have prevented us from responding in more detail, seeking more input or signatories, or publicizing the comment opportunity more widely. The CFPB must not take the limited number of comments from the public as indicative of a lack of broad objections to changes the CFPB might make that would weaken its role in effectively protecting the consumer public.

2. Regulation E: Electronic Fund Transfers

Regulation E implements the Electronic Fund Transfer Act and plays an increasingly important role in this age of digital payments and financial services. We understand that Regulation E modernization is on the CFPB's regulatory agenda.

If the CFPB updates Regulation E, it is critical to be faithful the statutory mandate that "the primary objective of this subchapter … is the provision of individual consumer rights."[1] In order to implement and enforce the statute and better protect consumers, we offer the following recommendations.

2.1. Regulate overdraft credit under Regulation Z.

We are disheartened by the CFPB's announced decision to drop an overdraft fee rulemaking from the Bureau's regulatory agenda. The Bureau's research, consistent with research by third parties, has clearly demonstrated the abusive nature of bank overdraft programs and the severe impact these fees—totaling an estimated $14 billion annually[2]—have on working families.

CFPB's research findings include the following:

- Nearly 80% of bank overdraft and non-sufficient funds (NSF) fees are borne by only 9% of accounts, who tend to carry low balances—averaging $350—and have relatively low monthly deposits.
- For one group of hard hit consumers, the median number of overdraft fees was 37, nearly $1,300 annually, meaning some pay much more.
- Overdraft fees on debit cards (which can easily be declined at no cost when the account lacks sufficient funds), can lead to extremely high cumulative fees for consumers.

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[1] 15 U.S.C. § 1693(b).

[2] Center for Responsible Lending, *Broken Banking: How Overdraft Fees Harm Consumers and Discourage Responsible Bank Products* (May 2016), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_broken_banking_may2016.pdf.

- Consumers whose debit cards could trigger overdrafts were more than 2.5 times more likely to have their accounts involuntarily closed than those who were not "opted in" to debit card overdraft at several study banks.

The diversion of cash needed for living expenses toward fees is alone enough to devastate a family living on the margins. But the consequences do not stop there. For some, overdraft fees prevent them from regaining their footing, marking a lasting economic setback. Overdrafts are the leading reason that consumers lose their checking accounts. The FDIC's 2013 survey of unbanked and underbanked households indicates that approximately 778,800 households, and well over a million adults, who once had bank accounts are currently unbanked primarily because of high or unpredictable fees. It is likely that in the majority of those cases the fees at issue were overdraft/NSF fees, as they are both the largest fee and comprise the majority of checking account service charge revenue.

Once ejected from the banking system, the ejecting financial institution reports the account holder to a database, like ChexSystems or Early Warning Service—a blacklist, essentially, where the consumer's name remains for five years, often preventing the consumer from being offered a checking or savings account with another financial institution. While there are no national data on the number of consumers on bank account blacklists, millions of consumers are affected, with one software company estimating that 2.3 million online applicants were denied accounts based on their screening CRA report in 2012 alone;[3] the large majority of consumers blacklisted are blacklisted because of overdrafts.

The costs of exclusion from the banking system can be profound. A banking relationship is important to household financial stability and asset-building. A checking account protects funds from physical risk, offers a relatively low-cost and convenient way to conduct routine financial transactions, provides mechanisms for savings, and, for many families, is the gateway to a broader banking relationship that includes access to reasonably priced credit.

Furthermore, overdraft fees have fueled the development of a profoundly dysfunctional checking account market. When consumers shop for a bank account, they are likely to consider factors like fixed monthly and annual costs of the account. Thus, they may choose an account that appears "free"—with no upfront monthly fee—but be unaware that they will pay more for the account due to overdraft charges than they would have on an account that has a modest monthly fee but more responsible overdraft fee practices. (We address deceptive "free checking" disclosures in the Regulation DD section below.) Instead, overdraft charges operate as "back-end" or "gotcha" fees that undermine consumer choice and a healthy market and fuel aggressive, deceptive marketing efforts to convince people to "opt-in," rather than transparent upfront price tags.

Today, some overdraft practices vary significantly by institution, but often not in ways transparent to the consumer. For example, at some banks CFPB studied, "opt-in" rates on point-of-service and ATM overdraft fees were 40%; at others, they were less than 10%. Further, for those customers that incur overdraft fees, consumers at some banks incur double the annual total fees than at other banks. These disparities underscore that opaque choices banks make about how to implement their overdraft program can have a dramatic impact on consumers.

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[3] National Consumer Law Center and Cities for Financial Empowerment Fund, *Account Screening Consumer Reporting Agencies: A Banking Access Perspective* (Oct. 2015) at 6, *available at* http://www.nclc.org/images/pdf/pr-reports/Account-Screening-CRA-Agencies-BankingAccess101915.pdf (internal citations omitted).

A similar dynamic—low upfront costs, high back-end, hidden costs—was once at play in the credit card market, where interest rates were often low, but back-end penalty fees were unrestrained. The CARD Act reined in abusive fees and penalty rates, and the market shifted toward more transparent, upfront pricing.

More upfront pricing for checking accounts would provide incentives for financial institutions to have more responsible checking account models, rather than one that preys upon those with the least resources. And it would likely still permit many to maintain "free" checking accounts—banks often waive fees for those with direct deposit, or other features—but it would make the distribution of costs far more closely correspond to receipt of services.

The CFPB should restore plans to address overdraft fee abuses. In particular, CFPB should:

- **Regulate overdrafts as credit under Regulation Z, subject to an ability-to-repay assessment and repayment through installments.** Overdraft fees have long enjoyed a regulatory pass in many respects because banks have posited that overdraft is not being used as credit but instead is merely an occasional courtesy. However, data showing that many consumers are charged many fees annually belies this argument. When financial institutions routinely pay a customer's transactions when the account lacks sufficient funds, the financial institution is clearly extending credit to that customer, and the product should be regulated as such. This means that it should only be extended based on a determination that the customer has the ability to repay it, and it should be repayable in manageable installments. Overdraft fees on debit card purchases and ATM transactions, in particular—which can easily be declined at no cost to the customer—should be entirely prohibited unless they are covered under Regulation Z.

- **Rein in excessive fees.** The size of the overdraft fee is the engine that drives overdraft abuses. It bears virtually no relation to the cost to the institution of covering the overdraft. The Credit CARD Act required that penalty fees on credit cards – including fees for exceeding the card's credit limit – be reasonable and proportional to the "violation." The Federal Reserve determined that this requirement included that the fee must be reasonable and proportional relative to the cost to the institution, and that the fee could not exceed the size of the violation. In the overdraft context, where overdrafts cost the institution very little, this would mean the fee should be significantly less than the average fee today, and should in no case exceed the size of the overdraft itself. Similarly, NSF fees are extraordinarily high in an era when processes are highly automated.

- **Limit overdraft fees to one fee per month, and six per year, and prohibit predatory posting practices.** Once an account has gone negative and the customer has incurred an overdraft fee, the customer should have sufficient time to bring the account back to positive before being charged additional fees. Again, the CARD Act limited over-the-limit fees to one per month, and the Federal Reserve determined in the credit card context that requiring "reasonable and proportional fees" meant that no more than one kind of penalty fee could be charged per single event or transaction. The closest parallel to the typical "violation" in the credit card context is the monthly statement cycle. Account holders struggling to keep their account positive often do not have the capacity to pay multiple fees, and this practice causes them a harm they cannot reasonably avoid. Thus, CFPB should limit fees to one fee per month, and six per year; prohibit

"sustained" or "extended" fees; and prohibit posting practices that result in unnecessary overdrafts and fees.

2.2. Improve Initial disclosures

The EFTA requires disclosure of fees before a consumer conducts an electronic fund transfer, and requires that all disclosures be "clear and readily understandable." Yet fee disclosures for bank accounts are far from that standard.

The CFPB should adopt model fee disclosure for bank accounts similar to the ones in the prepaid rule or those recommended by Pew Charitable Trusts.[4] As with the prepaid rule, the CFPB should develop both a short form disclosure that highlights the most commonly incurred fees, along with details about when they are incurred or may be waived, and also a longer form that provides a complete listing of all potential fees and charges. While it is not a substitute for full disclosure of fees through model fee disclosures, "just in time" fee disclosures, such as in-app pop ups that list a fee or fees before they are incurred and that provide options to avoid them, should also be created and tested.

The CFPB should develop model forms for different formats, including paper, websites, and mobile devices. Before they are shared, all model disclosures should undergo extensive consumer testing.

These fee disclosure forms should be provided on websites in a location that is clear and easily accessible for all accounts that may be opened online or that contain pricing information. The fee schedules should be prominent and easy to access before beginning the sign-up process or any personal information is collected from the consumer.

The CFPB should also consider model fee disclosures for domestic money transfer services that are not covered by the prepaid rule.

If any money transfer or stored value service involves virtual currencies and does not fully comply with Regulation E, the CFPB should require prominent disclosures of the risk of loss of funds.

2.3. Strengthen authorization requirements.

Regulation E provides rights against unauthorized transfers but currently provides little guidance for one-time or irregular transfers about what constitutes proper authorization. Authorization requirements are provided only for preauthorized transfers that are expected to recur at regular intervals.

Regulation E should be amended to include authorization requirements for all electronic transfers similar to those required for preauthorized transfers under Regulation E and for ACH transactions under NACHA rules. In general, for debits, the authorization should:

- Be in writing and signed or similarly authenticated by the consumer.
- Evidence both the consumer's identity and assent to the authorization.
- Be readily identifiable as an authorization and have clear and readily understandable terms.
- Identify the entity (in a clear and understandable way) that is authorized to debit the account.

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[4] *See* The Pew Charitable Trusts, Issue Brief: The Benefits of Uniform Checking Account Disclosures (Nov. 30, 2015), http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/11/the-benefits-of-uniform-checking-account-disclosures.

- Identify the specific account to be debited (subject to the rules on varying amounts, discussed below).
- Provide clear and readily understandable information about the amount and timing of the debit. It should not permit a debit at some nonspecific future point in time that might never occur, such as when a consumer defaults and loan principal is accelerated.

The CFPB should provide a model authorization form.

For recurring debits, the authorization form should give the consumer clear information about how long the debits are to continue.

Rules should make clear that debits may not be split up into smaller amounts after a payment is rejected.

The CFPB should also clarify Regulation E to prevent evasions of the rules governing preauthorized transfers that vary in amount and to help consumers anticipate and control those transfers. Consumers should have the option of specifying a maximum range for the debit and the option to choose advance notice of the amount of the debit.

The CFPB should also consider requiring that recurring debits be identified separately on account statements so that consumers can identify and remember those debits, and cancel or change them if they wish.

2.4. Clarify the right to revoke authorization.

Regulation E should make clear that, for ACH transactions and other transfers that are not expected to occur immediately after authorization, consumers have a right to revoke authorization. This right to revoke authorization is implicit in Regulation E today but should be made explicit.[5] As under NACHA rules, consumers should be allowed to revoke authorization if they provide notice within a reasonable time. If the authorization was collected directly from the provider of the electronic transfer, one business day should be deemed to be a reasonable time. If the authorization was collected from a merchant, three business days should be deemed a reasonable time.

As under NACHA rules, the authorization form should specify the right to revoke and the manner of revoking in a clear and readily understandable manner. Revocation should be permitted if communicated by any reasonable means, including the manner in which the authorization was obtained. At a minimum, the right to revoke should specify a physical address for mail, a telephone number and an email address that may be used to revoke authorization. This information should also be accessible on the company's website.

2.5. Protect the ban on compulsory use of electronic repayment as a condition of credit.

The EFTA and Regulation E prohibit creditors from conditioning credit on repayment by means of electronic fund transfers. This ban on compulsory use is critical for enabling consumers to maintain control over their funds and their deposit accounts. It also helps struggling consumers protect funds needed for necessities from lenders that attempt to take their repayment off of the top of an incoming

[5] *See* NCLC, Consumer Banking and Payments Law §5.8.4.2.

deposit, leaving insufficient funds for food, rent or medicine. The rule also gives lenders an incentive to underwrite for ability to repay.

Yet the statutory ban on compulsory use of electronic repayment is widely evaded by lenders that obscure the fact that electronic repayment cannot be required or that impose coercive conditions on payments by other means. The CFPB should clarify Regulation E to make sure that consumers understand their choice of payment methods and do not effectively have their choice taking away by coercive conditions.

The CFPB should require that creditors disclose consumers' choice of payment methods in a clear and readily understandable manner before a choice is selected. The disclosure must make clear alternative payment methods.

Regulation E allows creditors to give consumers a reduced APR or other cost-related incentive to choose electronic repayment. The CFPB should clarify that a discount must be modest and that the cost of choosing another method of payment cannot be so great that no reasonable consumer would choose that method. Acceptable discounts include those offered by credit unions that, for small dollar loans, charge 21% APR without electronic repayment and 19% APR with electronic repayment. For larger loans, such as mortgages or student loans, some lenders offer a reasonable discount of 0.25%. But charges such as a $100 fee or large increases in the interest rate are so great as to be coercive and to deprive reasonable consumers of a real choice.

As the current Regulation E interpretation provides, the incentive should be "cost-related."[6] A modest increase in cost is related to the risk to the lender of not receiving payment automatically yet does not discourage all consumers from choosing a different method of payment.

But lenders should not be allowed to artificially and deliberately slow down funding of a loan for a consumer who chooses not to repay electronically. For example, some high-cost online lenders will deliver funds electronically immediately if electronic repayment is chosen but will send a paper check that will not arrive for 7 to 10 days if the consumer chooses another means. Sending payment through the mail when the normal delivery method is electronic is merely a means of coercing the consumer. Slowing down funds delivery is especially coercive for lenders who cater to consumers who are likely to need funds quickly.

2.6. Improve electronic periodic statements.

As discussed at greater length below, the EFTA, Regulation E and the E-Sign Act together generally give consumers a right to paper periodic statements unless they choose to receive statements electronically. However, for consumers who choose electronic statements, and for prepaid accounts where the consumer has no choice, the CFPB should make those statements and the information they contain more accessible, clear and readily understandable.

Consumers who access their balances and transaction history through a website, mobile device or alerts may not understand that the full periodic statement contains additional information that should also be reviewed. Statements are especially important for the summary information and information about fees and charges that they contain. For example, bank account statements summarize total deposits, total

[6] Reg. E, Official Interpretations § 1005.10(e)(1)).

debits, total of overdraft and nonsufficient fund fees during both the statement period and the calendar year, and other fees itemized by type and dollar amount. Consumers may miss this information if they only view the easily accessible transaction information and not the full statement.

While traditional pdf statements that can be downloaded, saved and printed should continue to be available, the CFPB should also require providers to offer simpler access to the key information that statements contain through a method and form that consumers are more likely to actually see. Examples could include:

- The consumer's account dashboard on a website must display the summary information from the last statement;
- For consumers who have opted into alerts, alerts should be sent out once a month with the summary information;
- Transaction alerts should include fees and charges;
- Mobile apps should include access to statements formatted in a form easily readable through a mobile device.
- For consumers who opt in to this information, an email announcing the availability of a new periodic statement could include the summary information in the body of the email, as few consumers actually log in to see the statement.

These and other methods should be developed and consumer tested to increase the number of consumers who actually see and understand the key information in their periodic statements.

2.7. Prevent liability for fraudulent transfers in new, faster payments ("push payments")

In these days of increasing data breaches and identity theft, the protection provided to consumers by the EFTA and Regulation E against liability for unauthorized transfers is more important than ever. The CFPB should clarify and strengthen Regulation E to ensure that consumers can maintain confidence in existing and new electronic transfer systems and receive the protection mandated by Congress.

A number of new, faster payment systems have been launched or are under development. These systems may have security improvements over older payment methods and may make fraud and unauthorized charges less likely. One advantage of many of these systems is that they may require the consumer to take action to initiate ("push") a payment and may not allow an entity to debit ("pull") a payment from the consumer's account based only on a purported authorization.

While push payments can increase security, they do not eliminate the potential for fraudulent and unauthorized payments and in some cases may increase those risks. Today, telemarketing scammers may have to convince a consumer to visit a store in order to pay through an unusual payment method, such as a prepaid reload pack, gift card or wire transfer. This can impede fraud and raise red flags. But with faster payments, an imposter or other criminal can simply tell the consumer to pay quickly through a method that that consumer already uses from the convenience of her home.

We have already seen how faster payment systems can result in more widespread and faster fraud.[7] As one article noted, Zelle's national advertising campaign "sets an expectation that Zelle can be used like a credit card, and scammers have figured out how to exploit this trust."[8]

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[7] Stacy Cowley, New York Times, "Zelle, the Banks' Answer to Venmo, Proves Vulnerable to Fraud" (Apr. 22, 2018), https://www.nytimes.com/2018/04/22/business/zelle-banks-fraud.html; Lauren Saunders, American Banker, "Will

The mere fact that the consumer pushed a payment does not mean that the payment is authorized. If that purported authorization is obtained through fraud – such as by claiming that the recipient is the IRS, is a grandson, or is the electric company – the authorization is invalid just as it would be if the consumer provided his bank account and routing number to the scammer (on the telephone or through the internet) for an ACH debit (pull) transaction. Moreover, in some faster payment systems, even if the payment must be pushed, it can sometimes be pushed in response to a request for payment, which may be fraudulent.

The CFPB should clarify that consumers are protected if a purported authorization is obtained through fraud, regardless of the manner in which the purported authorization is obtained or manifested. This is consistent with the EFTA's mandate that "the burden of proof is upon the financial institution to show that the electronic fund transfer was authorized."[9]

Consumers should be able to assert their protection against unauthorized push payments in the logical place: against their own institution – the institution that holds the account that was unlawfully accessed. However, the consumer's institution should of course be entitled to recover against the institution that received the payment and enabled the scammer, directly or indirectly, to access the payment system.

Clarifying protection against unauthorized push payments is not only consistent with the mandate of Regulation E; it also will lead to better fraud prevention efforts by giving incentives to the players who are in the best position to design safe payment systems, and push financial institutions to better authenticate users of those systems.

Relying on warnings to consumers is an old fashioned and ineffective fraud prevention method that cannot be relied on to protect consumers in faster payment systems. Certainly, consumers should be warned only to push payments to entities or persons they know and trust. But scammers can be incredibly deceptive and convincing.

Putting fraud prevention incentives with financial institutions and service providers – both the consumer's institution and the receiving institution(s) – is far more likely to result in continuing improving methods of preventing fraud. These institutions can aggregate and share data, spot patterns and red flags, develop braking mechanisms in suspicious cases, and develop a variety of other practices all along the payment chain to prevent, spot and remedy fraud.

The payments industry is also far more able than a consumer to absorb the loss of a given fraudulent payment, and if the fraud is widespread, then the problem goes far beyond the consumer to the entities that allowed a scammer access to the payment system.

More information about fraudulent actors will also be available to everyone in the system if consumers have an incentive to report fraudulent push payments. If the answer from the consumer's bank is

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faster electronic payments mean faster fraud?"(Sept. 17, 2015), https://www.americanbanker.com/opinion/will-faster-electronic-payments-mean-faster-fraud.

[8] Kate Fitzgerald, Payment Source, "Are banks doing enough to protect Zelle users?" (Feb. 22, 2018), https://www.paymentssource.com/news/are-banks-doing-enough-to-protect-zelle-users-from-fraud.

[9] 15 U.S.C. § 1693g(b).

"Sorry, you authorized it," then the information will stop there and the receiving institution and payment system will not be able to spot bad actors and identify patterns.

Consumers will have more confidence in new, faster payment systems – which will benefit everyone who provides or uses those systems – if consumers know that they are protected from all types of fraud. Faster payment systems will suffer if they develop a reputation as hotbeds of fraud. Similar considerations have led to changes in Great Britain's faster payments system to allow scam victims to recover their money more easily.[10]

Robust protection against unauthorized charges has worked well to give consumers confidence in credit and debit cards. Today, the card networks are continually improving fraud detection and often spot fraudulent charges long before the consumer even realizes that fraud has occurred. This strong protection has been critical to preventing consumers from losing faith in cards with increasing news of data breaches and identity theft.

2.8. Enforce Regulation E error resolution rights for misdirected payments

The advent of multiple new ways to pay, such as using an app to make a person-to-person (P2P) payment, has introduced new opportunities for payments to be misdirected. Sometimes, the misdirected payment may result from user error, such as when a user transposes two numbers when entering an account number to establish a new payee.

More often, the system itself may facilitate or even cause the error. Zelle, a peer-to-peer payment service from Early Warning that enables bank-to-bank P2P transactions, uses phone numbers and email addresses to identify users. If a phone number is assigned to a new party's phone, but remains mapped to previous owner's bank account, any funds sent to that number will end up in the old owner's account, with the intended recipient having no idea where the money is. Similarly, some P2P services use account names, which the users pick, as identifiers. These aliases may be virtually indistinguishable from that of another user. For example, users so frequently send money to the wrong person that all the major P2P services have FAQs or other information about it on their or their affiliate's websites.[11]

The Regulation E definition of error includes "An incorrect electronic fund transfer to or from the consumer's account."[12] Yet despite this legal protection, consumers may be told that they must bear responsibility for the mistake.[13]

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[10] Vicky Shaw, Independent, "Bank transfer scam victims could get money back more easily under new plans" (Nov. 7, 2017), https://www.independent.co.uk/news/business/news/bank-transfer-scam-victims-could-get-money-back-more-easily-under-new-plans-a8041366.html.

[11] See for example: Venmo: https://help.venmo.com/hc/en-us/articles/209681208-I-paid-the-wrong-person-; Square: https://squareup.com/help/us/en/article/5691-how-to-cancel-a-cash-app-payment; Snapcash: https://support.snapchat.com/en-US/article/snapcash-issues; and this from Citizen Bank, as Zelle member bank: https://www.citizensbank.com/money-tips/checking/zelle-faqs.aspx

[12] 12 CFR § 1005.11(a)(1)(ii)

[13] Almost all providers ask users who have sent money to the wrong person to ask the recipient to send the money back. See for example: Venmo: https://help.venmo.com/hc/en-us/articles/209681208-I-paid-the-wrong-person-; Square: https://squareup.com/help/us/en/article/5691-how-to-cancel-a-cash-app-payment; Snapcash: https://support.snapchat.com/en-US/article/snapcash-issues; and this from Citizen Bank, as Zelle member bank: https://www.citizensbank.com/money-tips/checking/zelle-faqs.aspx. That may not be possible if the user does not know where the money went. See for example, this story from Brian Kemm, who sent money to his mother's

The Bureau should enforce Regulation E by ensuring that providers are following appropriate error resolution procedures when consumers report errors involving misdirected payments. While we believe that Regulation E is clear on this point already and that no regulatory changes are needed, to the extent there is any uncertainty, the CFPB should clarify it.

2.9. Reject calls to create a consumer negligence standard that is not in the EFTA.

Some in the payments industry have called for Regulation E to be amended to impose consumer liability for unauthorized charges if the consumer was purportedly negligent. That change would directly counter the rule of Regulation E today and would impose a standard that has no basis in the statute.

Regulation E makes clear that consumers still have protection even if they could be deemed negligent, such as by writing a PIN number on a debit card.[14] The official interpretation of Regulation E correctly states that, under the EFTA, the extent of the consumer's liability is determined solely by the consumer's promptness in in notifying the financial institution.[15] The CFPB is correct that "[o]ther factors may not be used as a basis to hold consumers liable."[16]

There is nothing in the EFTA that would support a contrary standard. The statute contains no qualifiers on the consumer's protection against unauthorized charges beyond (1) deadlines for reporting those charges, (2) an exception if the consumer authorized a person to use the access device (discussed below), and (3) an exception if the consumer benefited from the charge (making it less likely that the charge was truly unauthorized). The statute makes clear when consumers lose their protection, and it would be outside the CFPB's authority to open up a gaping hole for purportedly negligent transactions. To the contrary, the primary purpose of the EFTA is the creation of consumer rights and the statute is clear that protections cannot be waived.

Unauthorized transfers are far more likely to occur as a result of negligence on the part of financial institutions, merchants and other companies than by consumers. Data breaches, inadequate security and authentication systems, and lax protection of consumer's sensitive personal information can lead to fraud on a widespread basis in far greater numbers than trivial one-by-one losses due to consumers writing their PIN numbers on their cards and then losing them without reporting the loss promptly.

Moreover, a negligence standard would be abused and asserted against consumers even when no negligence occurred. Even today, financial institutions at times resist addressing unauthorized transfers by claiming that the consumer authorized the transfer, at times in ludicrous situations. For example, one bank refused to credit the account of a senior who was in a residential rehabilitation hospital when a card was used at bar and ATM across the country. On another occasion, a bank rejected the claim of a 74-year old senior whose account number was used on an online gaming site after the senior's data was subject to a data breach that she reported to the bank. Ordinary consumers who cannot file a lawsuit over small charges (and most likely are restricted by forced arbitration clauses) are powerless when

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mobile number only to have the funds go missing and be told by the bank there was nothing the bank could do: https://www.nytimes.com/2018/04/22/business/zelle-banks-fraud.html

[14] 15 U.S.C. § 1693g; Reg. E, Official Interpretations § 1005.6(b)-2.

[15] 15 U.S.C. § 1693g; Reg. E, Official Interpretations § 1005.6(b)-3.

[16] Consumer Fin. Prot. Bureau, CFPB Consumer Laws and Regulations: Electronic Fund Transfer ACT 23 (Oct. 2013), available at www.consumerfinance.gov (CFPB Supervision and Examination Manual; original emphasis).

banks reject their claims, and these problems would increase if banks could claim the consumer must have been negligent.

2.10. Enforce consumers' EFTA rights when consumers authorize access to their own data.

The Dodd-Frank Act gives consumers a right to access and use their own account information and other data.[17] In recent years, through the growth of services by data aggregators, consumers have been able to use that data for a variety of useful purposes, including avoiding fees, better managing their funds and multiple accounts, and finding more affordable and appropriate services that fit their unique needs.

Data aggregation does pose security and privacy risks. And not every service that seeks access to consumers' data will use that data in ways that ultimately benefit the consumer. Concerns about data aggregation have been discussed in other comments.[18]

In these comments, we limit ourselves to the concern that some financial institutions are violating the EFTA and Regulation E by telling consumers that they are not protected if they authorize a data aggregator or other entity to access the consumer's data.

We do not believe that amendments to Regulation E are necessary. But we urge the CFPB to enforce the EFTA and Regulation E by reminding institutions that liability protections are not waived or breached when consumers share access to their data. We also encourage the CFPB to work with the financial industry to develop and promote safe ways of sharing access to data.

Some institutions may include a provision in an account agreement that purports to waive liability protection if the consumer provides the account credentials or other information to a data aggregator. We understand that sharing of account credentials creates risks, and we applaud institutions that are developing safer ways of providing access to account data.

But EFTA rights may not be waived.[19] Any provision of an account agreement that purports to waive liability protection or other EFTA rights not only is void; that provision is itself a violation of the EFTA.[20]

Some banks may also believe that the sharing of account credentials brings any resulting unauthorized charges within the exception that transfers by "a person who was furnished the access device to the consumer's account by the consumer …."[21] However, that exception does not cover a rogue employee at a data aggregator or a criminal who obtains the credentials through a data breach; neither that employee nor the criminal were furnished the access device by the consumer.[22]

2.11. Clarify the time to dispute initial unauthorized charges on statements

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[17] 12 U.S.C. § 5533.

[18] *See, e.g.,* NCLC, Comments in Response to Requests for Information: Consumer Access to Financial Records, Docket No. CFPB-2016-0048 (Feb. 21, 2017), https://www.nclc.org/images/pdf/rulemaking/comments-response-data-aggregator.pdf (NCLC Consumer Access Comments).

[19] 15 U.S.C. §1683l; *see* NCLC, Consumer Banking and Payments Law §5.1.2a (Digital Library 2017).

[20] *See, e.g.,* Murphy v. Law Offices of Howard Lee Schiff, P.C., 2014 WL 710959 (D. Mass. Feb. 26, 2014); Baldukas v. B & R Check Holders, Inc., 2012 WL 7681733 (D. Colo. Oct. 2, 2012), adopted by 2013 WL 950847 (D. Colo. Mar. 8, 2013); NCLC, Consumer Banking and Payments Law §5.1.2a (2013).

[21] 12 C.F.R. §1005.2(m).

[22] For a longer discussion, see NCLC Consumer Access Comments, *supra.*

The EFTA and Regulation E limit consumers' protection against unauthorized charges or errors in certain circumstances if not reported promptly. Consumers have no protection against unauthorized charges that are not reported within 60 days of a periodic statement if – and only if – the charges "would not have occurred but for the failure of the consumer to report within sixty days."[23] A similar rule applies to charges that could have been prevented if the loss or theft of an access device is not reported within two business days.[24]

Yet some institutions have a policy of not permitting consumers to contest charges if not reported within 60 days. That policy violates the specific and careful language of the statute that removes liability protection only for charges that could have been prevented if reported within that time period. As noted above, EFTA rights may not be waived.

There is no specific deadline in the statute for contesting an unauthorized charge. But the one-year statute of limitations in the EFTA would limit consumers' rights.[25] The CFPB should reject any effort to impose a shorter deadline, whether in the account agreement or by bank policy.

It is important to note that the most widespread unauthorized charges may be small charges that are easily overlooked. Scammers and criminals know that large charges will be quickly noticed and disputed. But small charges of $5, $10 or $20 are harder to notice or identify as unauthorized. The difficulty of spotting such charges is compounded by the brief, cryptic identification of many charges appearing on a statement and by the growing number of charges on each statement as electronic payments are increasingly used even for small payments previously made in cash.

The one year limit provided by the statute of limitations, and the exemption for subsequent unauthorized charges that could have been prevented with prompt reporting, appropriately balance consumer protection with certainty and limits for financial institutions. The CFPB should not stray from this statutory scheme.

3. Regulation DD (Truth in Savings Act)

Regulation DD implements the Truth in Savings Act, which governs disclosures and periodic statements for bank accounts, including checking and savings accounts. Some of TISA's provisions overlap with those in Regulation E regarding disclosure of fees and provision of periodic statements. Those issues are discussed above.

As discussed above, we also urge the CFPB to restore plans to address overdraft fees abuses. As part of that effort, the CFPB should update the provisions of Regulation DD that govern advertising of "free checking." Regulation DD prohibits misleading or inaccurate advertisements, and prohibits advertisements that refer to an account as "free" or "no cost" if any maintenance or activity fee may be imposed. Banks that advertise "free checking" but derive substantial revenue from overdraft fees are engaging in misleading and inaccurate advertising. Banks should be prohibited from advertising "free checking" if the bank charges overdraft fees on ATM or one-time debit card transactions, otherwise encourages consumers to incur overdraft fees, or has a substantial amount of overdraft fee revenues.

[23] 15 U.S.C. § 1693g(a)(2).
[24] 15 U.S.C. § 1693g(a)(2).
[25] 15 U.S.C. § 1693m(g).

The CFPB should address fees that reduce savings and make any disclosures inherently deceptive. Regulation DD sets out the method of calculating and disclosing the interest rate, reflected as an annual percentage yield (APY). The APY disclosures are based entirely on the interest rates paid and do not account for fees charged. Yet some banks charge monthly fees on savings accounts. In this low interest rate environment, when balances are low, those fees can easily exceed any interest earnings. Not only does this make the APY deceptive, but it even makes the term "savings" misleading, as consumers can actually lose money if they put their funds in a savings account. This is exacerbated by the fact that some banks charge inactivity fees that can begin accruing even on accounts that are not dormant and abandoned. Consumers – especially those who struggle to but should be encouraged to save – should not be misled about the usefulness of a savings account.

4. Regulation CC (Expedited Funds Availability Act)

Regulation CC implements the Expedited Funds Availability Act (EFAA). The EFAA ensures that consumers have prompt access to deposited funds.

The EFAA and Regulation CC generally require that, for most checks deposited in person to an employee of the financial institution, consumers must be given access to the first $200 within one business day and another $200 by the second business day.[26] Funds availability may be delayed by one day for deposits made at a proprietary ATM of the financial institution and for five days for deposits to nonproprietary ATMs.[27] Consumers are entitled to full next day funds availability for in person or proprietary ATM deposits of certain low risk checks, including government checks and checks written on and deposited to the same institution.[28]

However, it is unclear whether prepaid accounts are encompassed within the "accounts" that are within the scope of Regulation CC. Some companies that offer prepaid cards place holds as long as 10 days on funds deposited to prepaid accounts.

Similarly, Regulation CC specifies the funds availability schedule for deposits made in person and at ATMs but does not explicitly address funds deposited by uploading an image through a mobile device by way of remote deposit capture (RDC). Regulation CC's definition of ATM is broad enough to encompass mobile apps used to permit RDC, and then the question arises whether RDC or the mobile app is a proprietary ATM or a nonproprietary one.[29] However, some financial institutions or other companies that offer RDC take the position that funds deposited by RDC are not covered by Regulation CC's funds availability schedule.

Consumers need the same prompt access to their check deposits whether those deposits are made to a prepaid account or a checking account and whether the deposit is made in person, at an ATM or through RDC. Indeed, consumers who hold prepaid accounts are more likely to be lower income or to

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[26] 12 U.S.C. § 4002(a)(2)(D). The CFPB should also update Regulation CC to reflect the inflation adjustment adopted by Congress in 2010. Regulation CC inaccurately states that only the first $100 must receive next day availability. 12 C.F.R. § 229.10(c)(1)(vii).

[27] Regulation CC, 12 C.F.R. §§ 229.10(c)(2), 229.12(f).

[28] 12 U.S.C. § 4002(a); Regulation CC, 12 C.F.R. § 229.10.

[29] *See* NCLC, Consumer Banking and Payments Law, § 4.5.2 (online edition).

struggle to make it paycheck to paycheck. Those consumers especially need prompt access to their funds.

We have been asking the FRB and the CFPB to update the funds availability schedule for nearly five years.[30] Prepaid accounts and RDC have been used for many years and it is long past time to update Regulation CC to encompass these technological changes.

The same availability schedule should apply to checks deposited to prepaid accounts and to those deposited to checking accounts. Similarly, we generally believe that the same schedule should apply to funds deposited through RDC as for deposits at the bank's ATMs. A check deposited by RDC is done so through an app or website provided by the consumer's bank, and is transmitted immediately.

However, we recognize that RDC deposits present fraud concerns. If – and only if – necessary to address serious fraud risks, the CFPB may wish to consider permitting a one day delay in funds availability from the schedule required for deposits at proprietary ATMs. As experience with RDC grows and fraud prevention techniques improve, hopefully any delay can be eliminated.

5. Regulation V (Fair Credit Reporting Act)

The Fair Credit Reporting Act (FCRA), implemented by Regulation V, provides critical protections when information is collected about consumers for use in providing credit, pricing insurance, considering employment and other uses. Consumers have no choice over the company that collects their information or provides consumer reports. Thus, competitive forces play a limited role in making sure that information is accurate, that consumers are dealt with fairly when errors are discovered, that consumers have access to their own information, and that information is used appropriately.

While there are serious problems in the credit reporting area, many of these stem from failure to comply with existing rules rather than gaps in those rules. Thus, the most critical task for the CFPB is to ensure vigorous supervision of larger participant consumer reporting agencies, as discussed in the consumer coalition comments to the Bureau's RFI on its Supervision Program. While we would urge that FCRA regulations be issued to set strong standards for accuracy and provide better access for consumers to their own reports, such rulemaking should only be conducted after a cautious, deliberative process that brings in the multitude of stakeholders to exchange data and feedback in thoughtful conversation. Moreover, we especially urge that FCRA regulations not be weakened.

To the extent there are focused, limited improvements for Regulation V that can be made without the benefit of a deliberative process, we have the following suggestions.

5.1. The CFPB Should Adopt the FTC Staff Summary

[30] NCLC et al., Supplemental comments to the Fed and CFPB, 12 CFR Part 229, Regulation CC, Docket No. R-1409 (submitted Sept. 18, 2013), http://www.nclc.org/images/pdf/rulemaking/comments-regulation_cc_rcc_efaa_9-18-2013.pdf, attached as Exhibit 3 at 27 ("Sept. 2013 Comments"); *see also* Comments of NCLC et al.
To FRB on Regulatory Review under the Economic Growth and Regulatory Paperwork Reduction Act of 1996, Docket ID OP-1491 (May 14, 2015),
http://www.nclc.org/images/pdf/banking_and_payment_systems/nclc_egrpra_fed_rule_review_comments_on_cra_reg_cc05142015.pdf.

One simple measure that the Bureau could take to ensure clarity and reduce confusion is to adopt the Federal Trade Commission's report entitled "40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations" (herein referred to as the "FTC Staff Summary"). The FTC Staff Summary replaced the prior FTC Statement of General Policy or Interpretation, also known as the FTC Staff Commentary. The FTC updated the Staff Summary in 2011 as part of handing off the authority over most of the FCRA to the CFPB.

For over 40 years, the FTC Staff Commentary was the cornerstone of regulatory guidance for the FCRA. Both consumer advocates and industry members relied on the FTC Staff Commentary in interpreting the FCRA. Even though the FTC never had plenary general rulemaking authority over the FCRA, the FTC Commentary was often regarded as persuasive by consumer advocates, industry, and the courts. Indeed, for nearly 30 years, the authors of the Fair Credit Reporting manual published by the National Consumer Law Center cited the FTC Staff Commentary dozens (if not hundreds) of times in its text.

The Bureau should adopt the FTC Staff Summary to avoid uncertainty in interpreting the FCRA. Such adoption will benefit both consumers and industry members, for whom guidance is essential for compliance purposes. Indeed, members of industry have also advocated for the Bureau to adopt the FTC Staff Summary.[31]

The absence of the FTC Staff Summary risks confusion and additional compliance costs as stakeholders are faced with a lack of authoritative interpretations of the FCRA. One example is the joint user exception. In the FTC Staff Summary, the exception for "joint users" of consumer reports was removed as a permissible purpose;[32] however, the Bureau Examination manual still includes the joint user exception.[33] Thus, it is unclear whether the joint user exception is still valid or not.

We recommend that the FTC Staff Summary be adopted in a wholesale fashion. Certainly, there are provisions that consumer advocates would urge be changed, as well as changes that industry would advocate. But revisiting the substance of the commentary at this time is not a priority for Bureau resources and would delay making the adoption of the commentary. A simple and fair way to deal with this is to first adopt the FTC Staff Summary, and then at a later point in time make any changes after notice and comment rulemaking or guidance.

5.2. Protect Consumers Who Dispute Medical Debt Due to Billing Errors or Insurance Disputes.

Medical debt can have a significant impact on a consumer's credit history. The Bureau's own research found that over half (52.1%) of debt collection entries on consumer credit reports were for medical debt and that nearly one in five consumers with credit reports had an entry for medical debt.[34]

Many times a medical bill will be sent to a debt collector as a result of a billing error or an insurance dispute (e.g., wrong code, inadequate documentation), which can be of extended duration. Some

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[31] Saltmarsh, Cleaveland, and Gund, Comment, 2012.
[32] FTC, 40 Years Staff Report Accompanying FTC Staff Summary 10–11.
[33] CFPB, "Joint User" Rule, CFPB Supervision and Examination Manual, at FCRA 10, updated March 2018, available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf.
[34] Consumer Fin. Prot. Bureau, Consumer credit reports: A study of medical and non-medical collections, at 5, Dec. 11, 2014.

providers will automatically refer a bill to a debt collector in as little as sixty or even thirty days even though the bills are ultimately paid by insurers.[35] This damages the consumer's credit history and credit score even after the bill is paid, as an account reported as a collection matter may remain on a credit report even after the balance is paid off.[36] These types of debt collection items say nothing about the consumer's creditworthiness.

Thus, we recommend that, if a consumer disputes a collection item on his or her credit report because it is the result of a billing error or insurance dispute, that debt should be specially marked as such with a specific code of "insurance/medical billing dispute." Furthermore, the CFPB should require that such debts be excluded from any credit score and not be considered by lenders. The CFPB has authority to adopt such a rule under Section 604(g)(2) of the FCRA, 15 USC § 1681b(g)(2), which prohibits creditors from using medical information in considering a consumer's eligibility for credit unless permitted by Regulation V.

Currently, Regulation V permits the consideration of medical debt. However, the CFPB has the authority to amend Regulation V, and to exclude consideration of medical debt that is the subject of provider-insurer billing errors and disputes. Permitting the consideration of this type of disputed debt, particularly when the dispute has nothing to do with credit worthiness, is to use the existence of a medical condition adversely in considering a consumer's eligibility for credit.

5.3. The CFPB should require employers to give 35 days between providing a copy of a credit report and any adverse action based the report.

Another measure that the Bureau could take to ensure clarity in consumer reporting is to amend Regulation V to set a firm time period between when an employer sends a pre-adverse action disclosure and when the employer may take the adverse action. This time frame should be 35 days so that, if the worker finds an error in the report, he or she has time to correct it.

Section 604(b)(3)(A) of the FCRA, 15 U.S.C. § 1681b(b)(3)(A), requires that, before an employer can take an adverse action based on a consumer report, the employer must send a copy of the actual report and the Summary of Rights to the worker, also known as the "pre-adverse action" disclosure. However, the FCRA does not set forth a definitive amount of time between the pre-adverse action disclosure and the adverse action.

Currently, the FTC Staff Summary provides that there be a "reasonable time" between the pre-adverse action disclosure and the adverse action.[37] Previously, an FTC Staff Opinion provided that the employer must send the pre-adverse action notice five days prior to taking the adverse action.[38] Neither of these options is adequate to protect workers, especially those harmed by an error or inaccuracy in a consumer report.

If there is an error in a consumer report, five days is simply not sufficient for an employee to correct the report. A consumer reporting agency has a full 30 days to correct an error in a consumer report—

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[35] *Id.* at 26.
[36] National Consumer Law Center, Collection Actions § 9.3.5.1 (4th ed. 2017), *updated at* www.nclc.org/library.
[37] FTC Staff Summary § 604(b)(3) item 5, at 52.
[38] Weisberg, FTC Informal Staff Opinion Letter (June 27, 1997).

twenty-five days past the five days that an employer could take the adverse action. And a "reasonable" time frame is no better for workers, as it still does not provide enough time for workers to have errors corrected. For example, the court in *Johnson v. ADP Screening* held that 14 days would meet a "reasonable" standard, even though the consumer did not have time to fix the error in that time frame.[39]

We recommend the Bureau set a clear, bright-line 35-day time period between the pre-adverse action notice and the adverse action. With 35 days, the consumer will have five days to discover the error and request its correction, and the background check agency will have 30 days to correct the report, so it will be possible to correct the error before the employer can take the adverse action based on the erroneous report.

5.4. The Bureau Should Eliminate the Credit Score Disclosure Exceptions to the Risk-Based Pricing Rule.

Under the FCRA, a creditor must send a risk-based pricing notice whenever, based on a consumer report (including a credit score), the creditor provides credit on terms that are materially less favorable than the most favorable material terms available to a substantial proportion of consumers. However, two currently existing exceptions to this risk-based pricing notice do not make sense in light of the credit score disclosure requirement of the Dodd-Frank Act.

When the FTC and Federal Reserve Board first issued regulations implementing the risk-based pricing notice in January 2010, they created exceptions in which a creditor is not required to provide a risk-based pricing notice if either: (1) the loan is secured by residential real property and the creditor provides a mortgage score disclosure to the consumer; or (2) the creditor provides every consumer with a copy of her credit score. 12 C.F.R. § 1022.74(d) and (e).

Subsequently, in July 2010, Congress passed the Dodd-Frank Act. Section 1110F of that Act amended the risk-based pricing notice requirement by requiring that, if the credit decision is based on a credit score, the creditor must provide the credit score that it actually used in the risk-based pricing notice.

When the FTC and FRB issued regulations to implement the Dodd-Frank score disclosure requirement, they kept the pre-existing credit score disclosure exceptions, despite the fact these exceptions no longer made sense in light of the Dodd-Frank Act. Prior to the Dodd-Frank Act, the fact that creditors could choose the credit score disclosure exception was justifiable in that consumers would be receiving a benefit—a free credit score—in lieu of the risk-based pricing notice. Indeed, the FTC and Board specifically cited this benefit as the reason for allowing the exception.[40]

However, with the addition of Dodd-Frank's credit score disclosure requirement, there is no longer any such tangible benefit to consumers who were subject to risk-based pricing. The exceptions should be removed, as they no longer meet the legal standard under Section 615(h)(6)(iii) of the FCRA, 15 U.S.C. §

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[39] Johnson v. ADP Screening and Selection Services, Inc., 768 F. Supp. 2d 979 (D. Minn. 2011).

[40] The FTC and Board stated: The credit score disclosure provides tangible value to consumers because free credit scores typically are not available to consumers in connection with non-mortgage transactions. Consumer reporting agencies and other sellers of credit scores typically charge consumers between $6 and $10 for a credit score. 73 Fed. Reg. 28,966, 28,983 (May 19, 2008).

1681m(h)(6)(iii), because they no longer represent classes of transactions for which the risk-based pricing notice will not significantly benefit consumers.

The problems with the pre-existing credit score disclosure exceptions are exacerbated by the fact that they do not require the disclosure of the credit score used by the creditor, but permit disclosure of a generic score. These provisions create a loophole to the Dodd-Frank credit score disclosure, which requires disclosure of the actual credit score "used by such person in making the credit decision." 15 U.S.C. § 1681m(h)(5)(E). A creditor that engages in risk-based pricing could avoid sending the risk-based pricing notice, instead sending a notice to all applicants that only discloses a generic score. This notice would not disclose the actual credit score upon which the creditor relies, and yet the creditor would be in compliance with the regulation. This contravenes both the letter and intent of Section 1100F of the Dodd-Frank Act, which was specifically written to require disclosure of the actual score used by the creditor.

In 2012, the FTC and Board stated they would not remove the pre-existing credit score disclosure exceptions in part because of the transfer of authority over the FCRA to the Bureau. Now that it is years after the transfer of authority has taken place, we recommend that the exceptions to the risk-based pricing notice for credit score disclosures be removed.

6. Regulation M (Consumer Leasing Act)

A high percentage of new motor vehicle sales are through leases and a surprisingly large number of used vehicles are also sold through leases. Other consumer product transactions also are leases covered under the Consumer Leasing Act, 15 USC 1667(1). The Act primarily sets out general standards for disclosure of the terms of the lease, what warranties accompany a lease, purchase options, what happens at lease termination, and the like.

Differences in both the operation and the terminology of lease transactions compared to credit sales led to much confusion in the marketplace, and the Consumer Leasing Act was intended to clarify the nature of lease transactions. The Act though just provides general standards, leaving the particulars to be provided by regulation.

Regulation M on Consumer Leasing as first enacted provided little specification for these general standards. This lack of specificity led to extensive litigation over whether lease disclosures complied with the Act and provided for little uniformity between different lessors' disclosure forms. The lack of uniformity made it difficult for consumers to comparison shop, and led to certain lessors drafting lease disclosures and engaging in advertising that took unfair competitive advantage against other leasing companies.

In 1996 and 1997, primarily in response to requests from the industry, the Federal Reserve Board extensively amended Regulation M to provide model disclosure forms and far more guidance as to the proper form of disclosure. These changes were generally supported by the leasing industry.

We support clear disclosures of leasing terms. While Regulation M could undoubtedly be improved should the CFPB choose to revisit it, it is not a priority, and we oppose any efforts to weaken the rule. The disclosures follow a standardized format allowing consumers to compare apples with apples. Most members of the industry appear to have little difficulty complying with Regulation M and there has been little litigation concerning Regulation M disclosure requirements.

* * *

Thank you for considering these comments.

Respectfully submitted,

Allied Progress
Americans for Financial Reform
Arizona Community Action Association
Arkansans Against Abusive Payday Lending
Atlanta Legal Aid Society, Inc.
CASH Campaign of Maryland
Center for NYC Neighborhoods
Consumer Action
Consumer Federation of America
Consumers Union
Equal Justice Society
Heartland Alliance for Human Needs & Human Rights
Housing Options & Planning Enterprises, INc.
Illinois People's Action
Main Street Alliance
Maryland Consumer Rights Coalition
Mississippi Center for Justice
National Association of Consumer Advocates
National Association of Social Workers
National Consumer Law Center (on behalf of its low income clients)
National Fair Housing Alliance
New Jersey Citizen Action
People's Action Institute
Public Counsel
Public Justice Center (Baltimore, MD)
Public Law Center (Santa Ana, CA)
Texas Appleseed
U.S. PIRG
West Virginia Center on Budget and Policy
Woodstock Institute

June 25, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Submitted via: http://www.regulations.gov

Re: Request for Information Regarding the CFPB's Inherited Regulations and Inherited Rulemaking Authorities, Docket No. CFPB-2018-0012, 12 CFR Chapter X

Dear Acting Director Mulvaney:

The undersigned civil rights, consumer, and other advocacy organizations submit these comments in response to the Consumer Financial Protection Bureau's (CFPB) Request for Information (RFI) concerning regulations and rulemaking authorities that it inherited. Our comments focus primarily on the importance of maintaining Regulation B (Reg B) and the use of the long-established disparate impact doctrine in enforcement actions, examinations, and complaint investigations that have Equal Credit Opportunity Act (ECOA) implications.

Our nation's mainstream financial marketplace can be difficult to maneuver for most consumers, but it has historically excluded or underserved women, consumers of color, and other marginalized communities. The reality for many consumers is that rarely, if ever, are they aware that they are being treated differently because of a protected characteristic when they apply for credit. In nearly all instances of a credit application process, consumers do not have access to information about how other similarly-situated consumers are treated that they can compare to their own experiences. As the rampant targeting of toxic mortgage loan products to lower-risk consumers of color in the lead up to the foreclosure crisis depicted, absent effective monitoring and accountability measures, lending institutions may not act in accordance with their requirements under civil rights statutes. The Bureau was charged with conducting ECOA oversight by the Dodd-Frank Wall Street Reform and Consumer Protection Act explicitly to provide this safety mechanism for the public.

Regrettably, the Bureau has moved to undermine the public purpose of the its complaint database,[1] taken steps to strip enforcement powers from the Office of Fair Lending and Equal Opportunity,[2] and disbanded the CFPB's statutorily required Consumer Advisory Board,[3] raising concern among consumer advocates that the Bureau will not effectively implement Regulation B.

[1] Cowley, Stacy. "Consumer Bureau Looks to End Public View of Complaints Database," New York Times. April 2018. Available at: https://www.nytimes.com/2018/04/25/business/cfpb-complaints-database-mulvaney.html.
[2] Berry, Kate. "CFPB's Mulvaney strips his fair-lending office of enforcement powers," American Banker. February 2018. Available at: https://www.americanbanker.com/news/cfpbs-mulvaney-strips-his-fair-lending-office-of-enforcement-powers.
[3] Engel, Kathleen and Judith Fox, "Mick Mulvaney fired us for advocating for consumers," CNN. June 2018. Available at: https://www.cnn.com/2018/06/08/opinions/mick-mulvaney-doing-the-financial-sectors-dirty-work-by-abolishing-cab/index.html.

The comments below discuss the history and intent of ECOA, the long-standing jurisprudence affirming the cognizability of the disparate impact doctrine, the covert nature of lending discrimination and the types of systemic barriers in the financial market that necessitate disparate impact enforcement, the need to maintain and fully enforce Regulation B, and the nearly singular role that the federal government plays in detecting and abating lending discrimination in all credit markets in the United States.

We submit these comments to remind Acting Director Mulvaney of the responsibilities that the CFPB has to **fully** enforce the Equal Credit Opportunity Act.

The Origins of ECOA

The Equal Credit Opportunity Act of 1974 was passed at a time when women applying for credit regularly faced discrimination and was done so in response to a growing movement to win the right to their financial independence.[4] Following several hearings from the National Commission on Consumer Finance (NCCF), ECOA was originally passed with protections against discrimination on the basis of sex and marital status.

Prior to the passage of ECOA, it was commonplace for lenders to wholly deny women credit opportunities, especially when they applied on their own. As a general matter, to obtain credit, women needed higher incomes, less obligations, and more consistent employment than their male counterparts.[5] Other institutional barriers kept women from further accumulating wealth through homeownership and other credit-based ventures. Testimony before the Senate Committee on Banking and Urban Affairs described over a dozen common practices which precluded women from accessing mainstream credit. Some of these included:

- Requiring newly married women to reapply for existing credit, whereas men only needed to sign a Truth in Lending disclosure statement;
- Refusing to provide credit to married women who would have otherwise been granted credit as single women;
- Refusing to account for a wife's income or arbitrarily discounting her income when applying as a couple with her husband;
- Refusing to consider alimony, child support, and other lawful sources of income in the underwriting process;
- Asking about and considering a woman's birth control practices;
- Considering employed women as dependents of their husbands regardless of their earnings; and

[4] Kreiswirth, Brian and Anna-Marie Tabor, "What you need to know about the Equal Credit Opportunity Act and how it can help you: Why it was passed and what it is," Consumer Financial Protection Bureau. October 2016. Available at: https://www.consumerfinance.gov/about-us/blog/what-you-need-know-about-equal-credit-opportunity-act-and-how-it-can-help-you-why-it-was-passed-and-what-it/.
[5] Cuomo, Andrew A, "Equal Credit Opportunity Act: How Much Can women Expect" *Journal of Legislation*, Vol. 8: Iss. 1, Article 8, pp. 124. 1981.

- Refusing to provide loans to married women without their husband's formal approval.[6]

While ECOA was originally passed to prohibit discrimination in credit transactions based on sex and marital status, Congress recognized the need to provide broader protections. In deliberations leading up to the passage of ECOA, many in Congress disagreed over whether a bill that provided additional protections beyond sex and marital status could pass. Some argued that the Civil Rights Act of 1866 and the Fair Housing Act already provided protections against race, color, and national origin discrimination regarding some forms of credit access. At the time of ECOA's passage, civil suits based on race or color in employment and housing-related transactions could indeed be made under the Civil Rights Act of 1866, but these were limited to claims in which a plaintiff had to present evidence of *intentional* discrimination to prevail in court.[7]

As of the National Commission on Consumer Finance's report and the related House hearings on ECOA, the government could only bring legal action on the basis of other protected classes for discrimination related to the financing of *housing*, but "no law enabled the federal government to bring actions to prevent discrimination in other areas of consumer credit or on behalf of a broader set of protected classes."[8] Ultimately, Congress definitively recognized the need to expand protections from discrimination in all credit transactions and for other protected classes, and in 1976, Congress expanded ECOA to provide protections on the basis of race, color, religion, national origin, age, source of income from public assistance, and religion. In these deliberations, it was evident that relying on existing authority that only allowed claims of intentional discrimination was not sufficient to ameliorate credit discrimination for people of color and other traditionally underserved groups, and that the federal government must play a central role in abating credit discrimination.

Disparate Impact Plays a Critical Role in Protecting Against Lending Discrimination

Disparate impact liability occurs when government or private actors unjustifiably pursue practices that have a disproportionately harmful effect on women, people of color, people with disabilities, families with children, and other groups protected by civil rights statutes. By focusing on the consequences of unfair housing practices, the disparate impact standard often helps screen out discrimination that is intentional, but subtle or concealed. Equally important, it eliminates practices that may be neutral on their face but nevertheless freeze in place the effects of prior discrimination.

In May 2018, Acting Director Mick Mulvaney issued a statement in which he suggested that the Bureau would be reviewing the use of disparate impact in light of the Supreme Court's recent decision in *Inclusive Communities Project v. Texas Dept. of Housing and Community Affairs*.[9] The statement indicates that "the Bureau is required by statute to enforce federal consumer

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[6] Senate Comm. On Banking, Housing and Urban Affairs, S. Rep. 93-278, 93rd Cong., 1st Sess., p. 17.

[7] Ritter, Dubravka, "Do we Still Need the Equal Credit Opportunity Act?," Federal Reserve Bank of Philadelphia, p. 8-9. 2012.

[8] *Id*. at 8.

[9] Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015).

financial laws consistently."[10] The Court's decision, ratifying disparate impact liability in the housing context, ultimately serves to buttress the agency's use of the doctrine under ECOA and other civil rights statutes.

Disparate impact is a hallmark of American civil rights jurisprudence. The Supreme Court, in deciding *Griggs v. Duke Power Co.* in 1971, unanimously allowed for disparate impact claims under Title VII of the Civil Rights Act of 1964.[11] This provided a powerful tool to those seeking to end the effects of systemic discrimination in the employment context. Chief Justice Burger famously wrote in *Griggs* that "the Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[12]

Since the *Griggs* decision, disparate impact liability has only become more central to civil rights litigation. All nine federal circuit courts extended disparate impact liability to the Fair Housing Act in the twenty years after its adoption.[13] Then in 2015, the Supreme Court ruled that disparate impact liability is cognizable under the Fair Housing Act in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, holding that it is instrumental to achieving the mission of the act. "Without disparate impact claims, States and others will be left with fewer crucial tools to combat the kinds of systemic discrimination that the Fair Housing Act was intended to address."[14]

Disparate Impact Liability Is Cognizable Under ECOA

Disparate impact under ECOA rests on the same principles as those found in the employment and housing civil rights statutes. As the legislative history of ECOA makes clear, the law proscribes both overt and disparate impact discrimination that results from neutral policies. The CFPB itself, in releasing a bulletin in 2012, cited a House Report that accompanied the passage of ECOA. The report stated that "[t]he availability of credit often determines an individual's effective range of social choice and influences such basic life matters as selection of occupation and housing."[15] A Senate Report prepared in conjunction with the passage of ECOA stated that "in determining the existence of discrimination ... courts or agencies are free to look at the effects of a creditor's practices as well as the motives or conduct in individual transactions. Thus, judicial constructions of anti-discrimination legislation in the employment field, in such cases as Griggs ..., are intended to serve as guides in the application of this Act, especially with respect to

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[10] "Statement of the Bureau of Consumer Financial Protection on enactment of S.J. Res. 57," Consumer Financial Protection Bureau. May 2018. Available at: https://www.consumerfinance.gov/about-us/newsroom/statement-bureau-consumer-financial-protection-enactment-sj-res-57/.
[11] 401 U.S. 424 (1971).
[12] *Id.* at 431.
[13] Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2519, 192 L. Ed. 2d 514 (2015).
[14] *Id.* at 2525.
[15] "CFPB Bulletin 2012-04 (Fair Lending)," Consumer Financial Protection Bureau. April 2012. Available at: https://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf.

the allocations of proof."[16] For these reasons, the CFPB should maintain its previous bulletin as related to disparate impact and ECOA.

Since 1980, federal courts have consistently recognized that disparate impact claims are cognizable under the Equal Credit Opportunity Act.[17] The federal appellate courts which have addressed the question—the Fifth, Sixth, and Ninth Circuits—have all held that disparate impact claims are cognizable under ECOA.[18] In addition, federal district courts in the First, Second, Third, Fourth, Seventh, Eighth, and Eleventh Circuits have uniformly held that disparate impact claims are cognizable under ECOA.[19] The result is that nationwide jurisprudence regarding ECOA and disparate impact is in unanimous agreement: the Equal Credit Opportunity Act allows for disparate impact claims in the context of lending and credit access.

The Supreme Court has recognized the power of disparate impact claims under Title VII in *Griggs*, the Age Discrimination in Employment Act in *Smith v. City of Jackson*, and most recently the Fair Housing Act in *Inclusive Communities*. When the same analysis applied by the Supreme Court to these comparable anti-discrimination laws in order to prohibit disparate impact discrimination is applied to ECOA it is clear that the same liability also is cognizable under the statute.[20]

The disparate impact standard is critical to ensuring optimum compliance with ECOA and providing victims of widespread discrimination with appropriate recourse. The Administrative Procedure Act requires the CFPB to avoid action that is arbitrary and capricious or otherwise not in accordance with law under statutory mandate and judicial interpretation.[21] Under the broad consensus in the courts, the CFPB risks acting arbitrarily, capriciously, and contrary to law if it changes a regulation that was developed in accordance with existing jurisprudence and that was subsequently applied by the courts.

Lending Discrimination is More Commonly Covert, Requiring the Disparate Impact Doctrine to Combat Unfair Practices

An examination of lending discrimination complaints in the early years after the passage of the Equal Credit Opportunity Act reveals patterns and acts of discrimination that were more overt, blatant, and easily detected. However, over time barriers to fair credit access have become more

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[16] S. REP. No. 94-589, *supra* n. 27.
[17] Cherry v. Amoco Oil Co., 490 F.Supp. 1026 (N.D. Ga. 1980).
[18] *See,* Golden v. City of Columbus, 404 F.3d 950, 963 n.11 (6th Cir. 2005); Miller v. Am. Express Co., 688 F.2d 1235, 1239-40 (9th Cir. 1982); Bhandari v. First Nat'l Bank of Commerce, 808 F.2d 1082, 1101 (5th Cir. 1987), vacated and remanded on other grounds, 492 U.S. 901 (1989).
[19] *See,* Barrett v. H & R Block, Inc., 652 F. Supp. 2d 104, 108 (D. Mass. 2009); Guerra v. GMAC LLC, 2:08-CV-01297-LDD, 2009 WL 449153 (E.D. Pa. Feb. 20, 2009); Dismuke v. Connor, 05-CV-1003, 2007 WL 4463567 (W.D. Ark. Dec. 14, 2007); Powell v. Am. Gen. Fin., Inc., 310 F. Supp. 2d 481, 487 (N.D.N.Y. 2004); Wide ex rel. Estate of Wilson v. Union Acceptance Corp., IP 02-0104-C-M/S, 2002 WL 31730920 (S.D. Ind. Nov. 19, 2002); Faulkner v. Glickman, 172 F.Supp.2d 732, 737 (D. Md. 2001); Church of Zion Christian Ctr., Inc. v. SouthTrust Bank of Alabama, CA 96-0922-MJ-C, 1997 WL 33644511 (S.D. Ala. July 31, 1997).
[20] Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc., 135 S.Ct. 2507 (2015); Smith v. City of Jackson, Mississippi, 544 U.S. 228 (2005).
[21] 5 U.S.C. § 706(2)(A).

veiled and entrenched in the existing consumer finance system, creating a greater need for the disparate impact doctrine. Because credit discrimination plays out in more clandestine ways and barriers to fair credit access are predominately manifested by systems and policies that severely limit options for underserved groups, borrowers must be able to use the full breadth of our fair lending laws to preserve their rights, provide them access to tools that will help them build and obtain wealth, create stable environments for their families, and develop strong, viable neighborhoods and communities.

Lending discrimination used to be stated policy. Indeed, when the federal government began its involvement in substantially supporting the credit markets through the creation of the Home Owners Loan Corporation in 1933, the Federal Housing Administration (FHA) in 1934, and the Federal National Mortgage Association (Fannie Mae) in 1938, the federal government established protocols, systems, guidelines, policies, and practices that required lending programs supported by the government to be administered in a racially discriminatory fashion. The Home Owners Loan Corporation developed so-called "redlining" maps that prohibited fair lending in communities of color.[22]

The FHA's underwriting guidelines restricted lending in communities of color and the agency promoted the proliferation of discriminatory real estate practices that encouraged residential segregation. In its first FHA manual, the agency instructed:[23]

> "**233**. The Valuator should investigate areas surrounding the location to determine whether or not incompatible racial and social groups are present, to the end that an intelligent prediction may be made regarding the possibility or probability of the location being invaded by such groups. If a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally leads to instability and a reduction in values. The protection offered against adverse changes should be found adequate before a high rating is given to this feature. Once the character of a neighborhood has been established it is usually impossible to induce a higher social class than those already in the neighborhood to purchase and occupy properties in its various locations."

FHA adhered to these blatantly discriminatory policies and practices until increased and more vigorous advocacy around the enforcement of the Fair Housing Act and the Equal Credit Opportunity Act forced the agency to change its stance.

More blatant forms of discrimination persisted for decades. For example, in one of the first fair lending cases, *Harrison v. Otto G. Heinzeroth Mortgage Company*,[24] a loan officer for Heinzeroth told the Harrisons, who wanted to purchase a home in the Old West End neighborhood, a predominately African-American neighborhood in Toledo, Ohio, that they would need to have a 50% down payment in order to purchase the home that they wanted

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[22] Squires, Gregory, "The Fight for Fair Housing: Causes, Consequences, and Future Implications of the 1968 Federal Fair Housing Act," Routledge. 2018.

[23] Federal Housing Administration, "Underwriting Manual: Underwriting and Valuation Procedure Under Title II of the National Housing Act With Revisions to February, 1938," (Washington, D.C.).

[24] Harrison v. Otto G. Heinzeroth Mortgage Company, 430 F. Supp. 893 (N.D. Ohio 1977).

because the neighborhood was a "bad" area. The Harrisons were told that if they would purchase a home in another (predominately White) neighborhood that they would only be required to place a 10% down payment. In another early case, *Laufman v. Oakley Building and Loan Company*, the Laufmans, seeking to purchase a home in the predominately African-American community of Avondale, Cincinnati, were told by the vice-president of the bank that despite their pristine credit, Oakley would deny the Laufman's loan because the Avondale community was "not under control."[25] In the vice-president's assessment, there were "good" and "bad" neighborhoods and you could tell the difference just by merely driving through them. Mr. Laufman probed Oakley's vice-president to tell him which neighborhoods in Cincinnati were good and which were bad: all the "bad" neighborhoods were predominately African-American or integrated, while all the "good" neighborhoods were predominately White.[26]

In one of the first fair lending cases to include a disparate impact argument, *Old West End Association v. Buckeye Federal Savings and Loan*,[27] the bank denied a loan for a home in a majority African-American neighborhood after it asserted that a bona fide independent appraisal valued the subject property at an amount that the lender viewed as being too high for the neighborhood. Plaintiffs prevailed in this case after demonstrating that the bank's "business justification" was inaccurate and provided statistical evidence that the bank's underwriting policies caused a clear discriminatory effect against communities of color. While the case included a disparate impact theory, the Old West End Association strongly believed that the bank discounted the independent appraisal because it intentionally did not want to make loans in the predominately African-American community.

Over the years, in the face of more fair lending scrutiny, practices have changed. Discrimination is much more subtle and hidden. NFHA's recent investigation into auto dealers' lending practices and behaviors provides a window into how customers are treated when they shop for loan products and why it is so hard to detect when discrimination occurs. As described in the detailed report[28] about this investigation, issued in January 2018, NFHA sent eight matched pairs of testers (16 consumers total), one White and one Non-White, to car dealerships in Virginia to inquire about the costs of purchasing a vehicle. Each matched pair inquired about the exact same vehicle in order to obtain car purchasing and loan quotes. In every pair, the Non-White tester was better qualified (i.e., had higher credit scores, lower debt-to-income rations, higher incomes, etc.) than his or her White counterpart.

The investigation revealed that when auto dealers have the authority to use their own discretion in the pricing of the vehicle and loan costs, there is an opportunity for discrimination to occur. The investigation found that, more often than not, auto dealers used their discretion to discriminate. Key findings included:

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[25] Laufman v. Oakley Building and Loan Company, 408 F. Supp. 489 (S.D. Ohio 1976).
[26] Nash, Andrew, "The Origins of Fair Lending Litigation." Available at: https://www.clearinghouse.net/chDocs/resources/caseStudy_AndrewNash_1228406481.pdf
[27] Old West End Association v. Buckeye Federal Savings and Loan, 675 F. Supp. 1100, 1103 (N.D. Ohio 1987).
[28] Rice, Lisa and Erich Schwartz, Jr., "Discrimination When Buying A Car: How the Color of Your Skin can Affect Your Car-Shopping Experience." 2018. Available at: http://nationalfairhousing.org/wp-content/uploads/2018/01/Discrimination-When-Buying-a-Car-FINAL-1-11-2018.pdf.

- In five of eight cases, Non-White testers who were more qualified than their White counterparts received more costly pricing options.
- Non-White testers who experienced discrimination would have paid an average of $2,662.56 more over the life of the loan than less-qualified White testers.
- In six of eight cases, White testers were offered more financing options than Non-White testers.
- Dealers offered to help bring down interest rates and car prices using incentives and rebates or by making phone calls to personal contacts for White testers more often than they did for Non-White testers.

While this investigation revealed stark and disturbing disparities, it would have been difficult for the consumers who were treated unfairly to discern that they were experiencing discrimination. All of the consumers received quotes and would have been able to purchase the vehicle that they were viewing. However, it would have been impossible for the Non-White testers, for example, to know that they were not being offered discounts or favors that would have brought down the cost of financing and that their White counterparts were being offered such discounts or favors. In each case, it would have been almost impossible for the consumers to know that the auto dealers had discretion to lower the cost of the financing unless the auto dealer offered that information. In this investigation, the auto dealer only offered that information to White consumers.

Lenders rarely tell consumers when they are not receiving favorable treatment or that they are not receiving favorable treatment for a discriminatory reason. Oftentimes, discrimination is not detected until after the consumer has received a loan and an independent entity – like a fair housing organization or a regulatory agency – conducts a statistical analysis or compliance review that uncovers the disparity. Indeed, in many fair lending cases brought under ECOA, the discriminatory conduct was only brought to light via a regulatory fair lending examination or compliance process, which requires lenders to thoroughly review policies, procedures, and outcomes for disparate outcomes.[29]

Proliferation of Systemic Barriers to Credit Access Necessitate the Use of Disparate Impact

Lending discrimination has not only become more subtle but it also manifests itself through systemic barriers that restrict fair lending access. These systemic structures and policies can only be tackled by using the disparate impact doctrine and this important tool must be available to help make lending markets more fair and efficient. These systemic barriers stymy markets, perpetuate blight, harm consumers, and stifle economic progress. The Urban Institute has conducted ongoing research, revealing that overly restrictive credit policies and outdated,

[29] *See e.g.,* United States v. Citizens Republic Bancorp, Inc. and Citizens Bank, 2011 WL 2014873 (E.D. Mich. 2011); United States v. Compass Bank, Civil Action No. 07-H-0102-S (N.D. Ala 2007); United States v. First American Bank, Civil Action No. 04C-4585 (N.D. Ill. 2004); United States v. Midwest BankCentre, Case No. 4:11-cv-01086 (E.D. Mo. 2011); United States v. PrimeLending, Case 3:10-cv-02494-P (N.D. Tex. 2010); United States v. SunTrust Mortgage, Case No. 3:12-cv-00397-REP (E.D. Va. 2012); United States v. Texas Champion Bank, Case No. Case 2:13-cv-00044 (S.D. Tex. 2013); United States v. C&F Mortgage Corporation, Case. No. 3:11-CV-00653 (E.D. Va. 2011); United States v. First United Bank, Case No. 3:15-cv-00144-L (N.D. Tex. 2015); United States v. AIG Federal Savings Bank and Wilmington Finance, Inc., Case No. 1:10-CV-00178 (D. Del. 2010).

inefficient systems have killed over 5 million loans since 2009.[30] Core Logic estimates that the market is producing a deficit of 250,000 loans to borrowers of color each year. These deficits represent billions of dollars in lost economic opportunity for communities, consumers, and markets.

There are a number of structures and policies that pose a discriminatory effect on consumer segments protected under the Equal Credit Opportunity Act. A discussion of just a few of these issues follows. It is imperative that the ability to use disparate impact remains intact, not just as an enforcement mechanism, but also as a policy-brokering tool to enable civil rights agencies, consumer protection groups, community-based lending institutions, and community development organizations to work with the primary and secondary lending markets to responsibly expand fair credit opportunities to underserved groups, which includes women, people with disabilities, senior citizens, people of color, residents of rural and urban communities, and returning veterans.[31]

Discriminatory Mark-Ups in Auto Lending

The Equal Credit Opportunity Act has been used to combat differential treatment in the auto lending space. The National Consumer Law Center (NCLC) was instrumental in tackling this area of discrimination in the 1990s and early 2000s. The NCLC recognized that auto lenders maintain policies which permit car dealers to "mark-up" the finance rates on loans based on subjective criteria unrelated to creditworthiness, and subsequently brought suit against several auto lenders alleging that mark-up policies had a disparate impact on African-American and Hispanic customers, who end up paying more for credit than White borrowers with similar credit ratings. The lawsuits, which exposed practices that had operated secretly for over 75 years and had resulted in higher-interest rate car loans for minorities, have transformed car financing practices across the industry and have led to settlements valued at over $100 million.[32]

Low Balance Loan Policies

Policies such as minimum loan and minimum value amounts have been proven to have a discriminatory effect on borrowers of color.[33] These policies also have a discriminatory effect on senior citizens. For example, in Virginia, 21% of senior households live in housing valued at $99,999 or lower as compared to approximately 13% for all owner-occupied housing units.[34] Minimum loan amounts cause severe restrictions in credit access for existing affordable homes. This negatively impacts the ability of hard-working families to secure stable housing. In many

[30] Goodman, Laurie, Jun Zhu and Bing Bai, "Overly Tight Credit Killed 1.1 Million Mortgages in 2015," Urban Institute. November 2016. Available at: https://www.urban.org/urban-wire/overly-tight-credit-killed-11-million-mortgages-2015.
[31] While some of these under-served groups might not be explicitly named as a protected class under the Equal Credit Opportunity Act, often many fair lending agreements which eliminate discriminatory policies and practices have the result of expanding lending opportunities to broader groups.
[32] "Case Index - Closed Cases," National Consumer Law Center. To read more about the NCLC's work in this space, see https://www.nclc.org/litigation/case-index-closed-cases.html#auto.
[33] *See*, Briceno v. United Guaranty Residential Insurance Co., No. 3:89 CV 7325 (N.D. Ohio).
[34] Burton, Jovan, "Senior Housing Study," Partnership for Housing Affordability. 2018. Available at: https://partnershipaffordablehousing.com/wp-content/uploads/2018/02/2018-Senior-Housing-Seminar.pdf.

cases, the cost of purchasing an affordable home is much more financially advantageous than obtaining rental housing, particularly when rental housing rates have been rising faster than increases in household income for a number of years.

Some lenders argue that the cost of loan originations makes the provision of low balance loans untenable. The Mortgage Bankers Association states that the average cost to originate a loan is $8,475.[35] However, the average cost would decrease if lenders were to make more loans, including lower-balance loans. Moreover, many industry experts agree that technological advancements can significantly lower the cost of loan origination.

Age of House Restrictions

Age-of-housing restrictions also have a discriminatory impact on protected classes under ECOA. Lenders and mortgage insurers have historically used age-of-house policies as a means of protection against using blighted or deteriorated housing stock as collateral. However, this type of policy is a blunt, ineffective means of ensuring that a home is in good condition. Interior or exterior appraisals are the best means of ensuring that a house is in quality condition and also has a less discriminatory effect.

Maternity Leave Policies

Maternity Leave policies have a discriminatory effect on women and have been found to violate fair lending laws.[36] These policies typically require a woman who is pregnant or on maternity leave to return to work for a period of time before the lender will close on a loan. The policies, as was the case in *Williams, et. al. v. Countrywide* - the first lawsuit of this kind to be brought alleging a disparate impact claim - typically do not account for a woman's income while she is on maternity leave. In that case, Mrs. Williams' income would have actually increased while she was on maternity leave and her income would have never been interrupted.

Over-Reliance on Outdated Credit Scoring Models

The use of outdated credit scoring models, as is the case with today's primary and secondary mortgage market, are locking millions of consumers out of the opportunity to obtain affordable credit and sustainable homeownership. A disproportionate percentage of these consumers are people of color.

The mechanisms for determining borrower risk are built upon incomplete data records that, by design, create and perpetuate discriminatory disparities. Our lending markets began with a fundamental assumption that there was a direct correlation between race and risk. That principle

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[35] "Independent Mortgage Bank Production Profits Down in Fourth Quarter 2017," MBA News, March 2018. Available at: https://www.mba.org/2018-press-releases/march/mba-news-(32318)-independent-mortgage-bank-production-profits-down-in-fourth-quarter-2017.

[36] See Williams v. Countrywide Home Loans, Inc., No. L-01-1473, 2002-Ohio-5499 (Ohio Ct. App. 2002). This matter was filed under the Ohio Revised Code, which contains anti-discrimination provisions similar to those contained in the Equal Credit Opportunity Act. In this case, the plaintiffs alleged that Countrywide's policy constituted a disparate impact and had a discriminatory effect against women.

has, unfortunately, been inculcated in the apparatuses that determine creditworthiness. While these credit-scoring and automated underwriting systems may not include variables that directly include race, national origin, or ethnicity as variables, they do contain factors that, either in isolation or in combination, serve as a proxy for race, national origin, or ethnicity. American communities are still impacted by systemic redlining practices conducted decades ago. Still today, there are a dearth of mainstream financial institutions in communities of color. A new analysis by Trulia[37] reveals that communities of color in Oakland, Houston, Atlanta, and Detroit have roughly 33% fewer traditional banking institutions than predominately White communities. Additionally, communities of color in these cities have twice as many non-traditional or alternative banking services (offering products like debt-relief services, payday loans, check-cashing services, and title loans) than do predominately White communities. This means that consumers of color are more likely to access credit from a non-traditional financial provider because these are the lenders who operate in the communities in which they live.

As a result, people of color are disproportionately represented among those who use non-traditional credit. Forty-six percent of African-American, 40% of Hispanic, and 38% of American Indian and Alaskan Native borrowers use alternative or non-traditional financial services. Comparatively, 18% of White borrowers use these services. In the lead up to the financial crisis, borrowers of color disproportionately were targeted for and received subprime loans, even when they qualified for prime credit. Moreover, consumers of color are less likely to have a credit card than their White counterparts. One study revealed that 47% of African-Americans and 30% of Hispanic borrowers did not have access to a credit card as compared to 20% of White consumers.[38]

Consumers who are not able to access credit from a traditional bank and who access credit from non-traditional creditors are paying a hefty price. Not only are they paying a higher price for credit and receiving more volatile products, but they are not reaping the full benefit of paying their obligations on time. Non-traditional financial service providers typically do not report good behavior to credit repositories. However, in a very perverse arrangement, if borrowers go into collections or default on their obligations, this negative information will likely get reported to those credit repositories.

Additionally, not accessing traditional credit from a depository institution can cause a consumer's credit score to be lowered and this practice likely disproportionately impacts borrowers of color. For example, obtaining credit from a finance company could lower a borrower's FICO® score by up to 20 points – even if the borrower pays the finance company's debt obligation on time.

As a result of the historical and current systemic disparities in our financial system, people of color and persons with disabilities are disproportionately credit invisible, score insufficient, or have artificially low credit scores. According to the Consumer Financial Protection Bureau

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[37] Young, Cheryl and Felipe Chacon, "50 Years After the Fair Housing Act – Inequality Lingers," Trulia Reports. April 2018. Available at: https://www.trulia.com/research/50-years-fair-housing/.

[38] "Report on the Economic Well-Being of U.S. Households in 2013," Board of Governors of the Federal Reserve System. 2013. Available at: https://www.federalreserve.gov/econresdata/2014-economic-well-being-of-us-households-in-2013-household-credit-behavior.htm#subsection-184-B14E9ACA.

(CFPB), 26 million American consumers – 11% of the adult population - are credit invisible. This does not mean that these consumers do not have credit, but it does mean that they do not have credit information that has been reported to the major credit repositories. An additional 8.3% (19 million consumers) do not have enough information on their credit profiles to generate a credit score. An analysis by the CFPB reveals that almost 30% of African-American and Hispanic adults are credit invisible or have an unscorable credit profile – compared to about 17% of White adults.[39]

Loan Level Pricing Adjustments

Government-sponsored enterprises (GSEs) employ Loan Level Pricing Adjustment (LLPA) matrices that have a discriminatory effect on consumers protected under ECOA. The matrices employ surcharges on borrowers who have lower credit scores, use non-traditional credit, and are non-wealthy and thus have less for down-payments.[40] For example, a borrower getting a typical mortgage loan with a 630 FICO score and who is putting 3% down to purchase his/her home will pay an additional 350 basis points based on the GSEs' LLPAs. This crude pricing system knocks too many underserved borrowers out of the GSE box.

The GSEs have consistently underperformed when it comes to providing investment capital, mortgage liquidity, or secondary housing finance support in communities of color and urban centers. Studies have shown that the GSEs' market share for loans to upper-income African-American borrowers are similar to their market share for loans to very low-income White borrowers.[41] Fannie's and Freddie's Loan Level Pricing Adjustments, that include an overreliance on outdated credit scoring mechanisms, coupled with higher pricing for low down-payment loans, have resulted in the GSEs purchasing few loans made to borrowers of color and/or loans made in communities of color. In 2014, even though they comprise 13% of the U.S. population, only 3.4% of the loans purchased by the GSEs were from African-American borrowers. In 2015, the share decreased to 3.12%. Additionally, while Hispanics comprise 17% of the U.S. population, in 2014, only 7.62% of loans purchased by the GSEs were made to Hispanics. In 2015, that share decreased to 7.46%.[42]

The Continued Need for Full Enforcement of Regulation B

The lending discrimination that the Equal Credit Opportunity Act is designed to eradicate has substantial effects on the lives of marginalized communities, necessitating that disparate impact claims be deemed cognizable under ECOA.

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[39] Brevoort, Kenneth P., Philipp Grimm, and Michelle Kambara, "Data Point: Credit Invisibles," Consumer Financial Protection Bureau Office of Research. May 2015.

[40] See the GSEs LLPAs at https://www.fanniemae.com/content/pricing/llpa-matrix.pdf.

[41] Bunce, Harold, and Randall Scheessele, "An Analysis of GSE Purchases of Mortgages for African-American Borrowers and Their Neighborhoods," Housing Finance Working Paper Series, U.S. Department of Housing and Urban Development. 2000. Available at: https://www.huduser.gov/publications/pdf/workpapr11.pdf.

[42] Squires, Gregory D, "The Fight for Fair Housing: Causes, Consequences, and Future Implications of the 1968 Federal Fair Housing Act," Routledge. 2018.

While the statute's original purpose was to combat discrimination against women on the basis of sex and marital status, studies show that much work remains to be done. A 2006 report from the Consumer Federation of America showed that women are disproportionately represented in the high-cost, subprime mortgage market at the national level.[43] Similarly, a 2013 report by the Woodstock Institute also confirmed that disparities between men and women exist in particular markets, in that case Chicago.[44] Likewise, a 2010 report from Work Life Law, a product of UC Hastings College of the Law, found that discrimination against women in the lending market on the basis of pregnancy or maternity leave was widespread.[45] *Williams v. Countrywide Home Loans, Inc.*, in which a pregnant woman alleged that Countrywide had refused to grant her a loan because her income would be reduced for several years while she raised her child, was the first case to address disparate impact against women on these bases.[46]

Because the lending market also contains pervasive racial discrimination against African-American and Hispanic borrowers, disparate impact liability under the Equal Credit Opportunity Act also serves to combat deeply entrenched disparities between White and non-White Americans. Despite ECOA's protections, more work must be done in this context as well. A 2014 study in The Journal of Real Estate Finance and Economics analyzed discrepancies in mortgage interest rates between particular groups and found that the typical African-American male receives an interest rate that is 8.9 basis points higher than his White male counterpart, while the typical African-American woman pay 26.5 basis points more than their White female counterparts.[47]

The American Bar Association has also noted similar discrepancies in a variety of other contexts within the lending market, including subprime mortgages disproportionately being marketed to African-American borrowers.[48] Disparate impact litigation under ECOA has been widely successful on the basis of race after the landmark decision in *Hargraves v. Capital City Mortg. Corp.*, in which African-American plaintiffs established a prima facie showing of disparate impact in their claims under ECOA.[49] Borrowers in *Hargraves* provided documentation regarding their area's historically segregated housing market and statistical evidence that Capital City Mortgage made a greater percentage of its loans in majority black census tracts than other

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[43] Fishbein, Allen and Woodall, Patrick. "Women are Prime Targets for Subprime Lending: Women are Disproportionately Represented in High-Cost Mortgage Market," Consumer Federation of America. December 2006. Available at: https://consumerfed.org/pdfs/WomenPrimeTargetsStudy120606.pdf.

[44] "Unequal Opportunity: Disparate Mortgage Origination Patterns for Women in the Chicago Area," Woodstock Institute. March 2013. Available at: http://www.woodstockinst.org/advocacy/comment-letters/new-research-finds-disparities-in-mortgage-lending-to-women/.

[45] "Discrimination in Mortgage Lending on the Basis of Pregnancy and Maternity Leave," Work Life Law, UC Hastings College of the Law. 2010. Available at: http://worklifelaw.org/publications/WLLMortgageDiscriminationBrief.pdf.

[46] Williams v. Countrywide Home Loans, Inc., No. L-01-1473, 2002-Ohio-5499 (Ohio Ct. App. 2002).

[47] Cheng, Ping, Zhenguo Lin, and Yingchun Liu. "Racial Discrepancy in Mortgage Interest Rates. The Journal of Real Estate Finance and Economics." July 2014. Available at: https://link.springer.com/article/10.1007/s11146-014-9473-0.

[48] Bailey, Nikitra, "Predatory Lending: The New Face of Economic Injustice," American Bar Association Human Rights Magazine, Vol. 32 No. 2. 2005. Available at: https://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol32_2005/summer2005/hr_summer05_predator.html.

[49] Hargraves v. Capital City Mortg. Corp., 140 F.Supp.2d 7 (D.D.C. 2000).

subprime lenders. Following *Hargraves*, lenders have been willing to settle disparate impact claims brought against them.[50]

The evidence is clear: discrepancies continue to exist within the lending space, most notably affecting women and non-White borrowers. Disparate impact liability under ECOA is a tool to address these pervasive injustices. For this reason, disparate impact must continue to be cognizable under the Equal Credit and Opportunity Act.

The CFPB and Other Federal Regulatory Agencies are Critical to Ensuring Equitable Access to Credit

Access to credit is a fundamental need for consumers in our society, and in order for consumers to meet their financial needs and for our economy to function effectively, it is important to ensure that all consumers have access to the credit for which they are qualified on fair terms, and without facing discrimination because of their race, national origin, etc. The Equal Credit Opportunity Act is an important tool for keeping our country's financial services market operating on fair and non-discriminatory terms. Government has an important role to play in protecting the rights of borrowers, preventing lending discrimination, and achieving redress for borrowers who face discriminatory lending practices. In order for the CFPB to play this role effectively, it is critical that the Bureau preserve, protect, and continue its vigorous enforcement of ECOA.

The importance of the CFPB's role in maintaining a financial services marketplace that is fair and free from discrimination cannot be overemphasized. The credit transaction is typically highly individualized and very personal. Borrowers normally do not have the opportunity to compare their experiences with those of other borrowers. This makes it very difficult for any particular borrower to know whether he or she has been treated fairly, or has been denied credit or offered credit on less favorable terms than other, similarly situated borrowers with different personal characteristics, such as race, sex, marital status, or other protected characteristics under ECOA. In addition, borrowers are unlikely to know about a lender's policies and practices that may work to deny them access to credit, or provide credit on less favorable terms than those offered to other, similarly situated borrowers. Even if a borrower does become aware of what appears to be discriminatory policies or practices, he or she may not know how to address the problem and may not have the resources to take effective action.

In contrast, in its role as a regulator the CFPB has access to the policies and practices that lenders employ and, by reviewing loan files, can identify instances in which those policies and practices have a disparate impact on protected classes of borrowers, even when the borrowers themselves may not realize that they have faced discrimination. For example, the GE Capital customers who either lived in Puerto Rico or lived elsewhere but indicated that they preferred to communicate in Spanish likely never realized that, even though they qualified for it, they had not been offered the

[50] *See e.g.*, United States v. GFI Mortgage Bankers, Inc., Case No. 1:12-CV-02502 (S.D.N.Y. 2012); United States v. Luther Burbank Savings, Case No. 2:12-CV-07809 (C.D. Cal. 2012); Smith v. DaimlerChrysler Services North America, LLC, 2005 WL 2739213 (D.N.J. 2005).

same credit card debt relief program that the lender offered to English-speaking customers.[51] Nor is it likely that the thousands of African-American, Hispanic, and Asian and Pacific Islander customers of American Honda Finance Corporation whom the Bureau found had been charged higher rates than White customers,[52] or the hundreds of thousands of such borrowers of color whom the Bureau found had been charged higher interest rates on car loans by Ally Bank and Ally Financial,[53] ever knew that they had been discriminated against. The same is undoubtedly the case for the African-American customers of BancorpSouth Bank, whose neighborhoods were redlined and who were charged higher rates for mortgages or denied them altogether compared to similarly-situated White borrowers, as the Bureau discovered in 2016.[54] Yet in all of these cases, the Bureau was able to identify the discriminatory policies and practices, require the institutions to change their policies and practices, and make sure that in the future all of their borrowers, regardless of race or national origin, would have access to credit on a fair and non-discriminatory basis. Without the CFPB's effective oversight and aggressive enforcement, the rights of these and other borrowers would not have been vindicated.

Equally important, in cases such as these and others where the Bureau has uncovered discriminatory practices, it has the resources and authority to make sure that borrowers whose rights under the Equal Credit Opportunity Act have been violated are made whole. This is demonstrated by the fact that, since its inception, the Bureau has won nearly $12 billion in relief for some 29 million borrowers whose rights have been violated by various lending institutions. This is the kind of scope and scale of relief that can only be achieved by a government agency watching out for the rights of consumers. In order to ensure that future borrowers whose rights may be violated obtain the relief that they need and deserve, the CFPB must preserve the Equal Credit Opportunity Act fully and continue to enforce it vigorously, both in cases of intentional discrimination and in cases where a lender's policies and practices have a discriminatory effect on protected classes of borrowers.

Consumers deserve a federal agency that is employing all available tools under the law to protect them from predatory and discriminatory practices in the marketplace. It is therefore imperative that the CFPB retain and fully use its existing Regulation B and disparate impact bulletin. Thank you for the opportunity to comment. Please contact Jorge Andres Soto at JSoto@nationalfairhousing.org should you have any questions about the content of these comments.

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[51] United States v. Synchrony Bank, f/k/a GE Capital Retail Bank, Case No. 2:14-cv-00454-BCW (D. Utah 2014).
[52] In the Matter of American Honda Finance Corporation, Consumer Financial Protection Bureau, File No. 2015-CFPB-0014 (July 2015).
[53] United States v. Ally Financial Inc. and Ally Bank, Case No. 2:13-cv-15180-AJT-MAR (E.D. Mich. 2013).
[54] United States of America et al v. BancorpSouth Bank, Case No. 1:16-CV-00118 (N.D. Miss. 2016).

Sincerely,

National Organizations
Americans for Financial Reform
Center for Responsible Lending
Consumer Action
Consumer Federation of America
Fair Housing Council of Orange County
Human Rights Campaign
Lawyers' Committee for Civil Rights Under Law
Main Street Alliance
NAACP
NAACP Legal Defense and Educational Fund, Inc.
National Association of Social Workers
National Center for Lesbian Rights
National Coalition for the Homeless
National Community Reinvestment Coalition
National Consumer Law Center (on behalf of its low income clients)
National Education Association
National Fair Housing Alliance
National LGBTQ Task Force
The Arc of the United States
The Leadership Conference on Civil and Human Rights
U.S. PIRG
World Privacy Forum

State and Local Organizations	**State**
Center for Fair Housing	Alabama
Arizona Community Action Association	Arizona
Arkansans Against Abusive Payday Lending	Arkansas
California Reinvestment Coalition	California
Fair Housing Advocates of Northern California	California
Greater Napa Valley Fair Housing Center	California
Housing and Economic Rights Advocates	California
Housing Equality Law Project (HELP)	California
The Cardoza Law Corporation	California
Equal Rights Center	District of Columbia
Jacksonville Area Legal Aid, Inc.	Florida
Atlanta Legal Aid Society, Inc.	Georgia

Metro Fair Housing Services, Inc.	Georgia
Savannah – Chatham County Fair Housing Council, Inc.	Georgia
Access Living of Metropolitan Chicago	Illinois
Chicago Area Fair Housing Alliance	Illinois
Heartland Alliance for Human Needs & Human Rights	Illinois
Housing Choice Partners	Illinois
Illinois People's Action	Illinois
South Suburban Housing Center	Illinois
Fair Housing Center of Central Indiana	Indiana
Greater New Orleans Fair Housing Action Center	Louisiana
Baltimore Neighborhoods, Inc	Maryland
CASH Campaign of Maryland	Maryland
Housing Options & Planning Enterprises, Inc.	Maryland
Public Justice Center	Maryland
Fair Housing Center of Southeast & Mid Michigan	Michigan
Fair Housing Center of Southwest Michigan	Michigan
Fair Housing Center of West Michigan	Michigan
Mississippi Center for Justice	Mississippi
Montana Fair Housing, Inc.	Montana
New Jersey Citizen Action	New Jersey
CNY Fair Housing, Inc.	New York
Long Island Housing Services, Inc.	New York
Fair Housing Resource Center, Inc.	Ohio
Miami Valley Fair Housing Center, Inc.	Ohio
The Fair Housing Center	Ohio
Greater Houston Fair Housing Center	Texas
North Texas Fair Housing Center	Texas
Texas Appleseed	Texas
Northwest Fair Housing Alliance	Washington
West Virginia Center on Budget and Policy	West Virginia

June 25, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2018-0012 -- Request for Information Regarding the Bureau's Inherited Regulations and Rulemaking Authorities – **electronic disclosures, statements, records and other communications**

Dear Acting Director Mulvaney,

The undersigned consumer, community, civil rights and legal services groups submit these comments in response to the Consumer Financial Protection Bureau ("CFPB")'s Request for Information ("RFI") regarding its inherited regulations and rulemaking authorities.

These comments focus electronic communications generally, including electronic disclosures, statements and records. Many of our organizations have also joined other comments that discuss specific regulations that the CFPB inherited.

While electronic communications may work well for many consumers, the CFPB needs to be cognizant of the limitations of electronic information and to enhance consumer choice for consumers who will be better served by paper statements, disclosures and records.

1. Objections to the CFPB's Request for Information Process

We must first note our objections to the burdensome RFI process. The amount of time and attention required to adequately address the CFPB's numerous RFIs on a multitude of subjects in a very short amount of time has diverted valuable consumer advocacy and third party resources to respond to these requests. The very structure of these RFIs, the nature of many of the questions, and the fact that many focus on processes known mostly to industry actors and their lawyers, favor financial institutions with greater resources at their disposal, and we are gravely concerned about any attempts to weaken consumer protection through this process.

The CFPB has ignored our request for an extension of time to respond to this particularly burdensome RFI and the one on adopted regulations. These two RFIs require us to comment on dozens of regulations on many different subjects running many hundreds if not thousands of pages in length. Doing so barely a week after responding to a series of other RFIs has been especially difficult.

These problems have prevented us from responding in more detail, seeking more input or signatories, or publicizing the comment opportunity more widely. The CFPB must not take the limited number of comments from the public as indicative of a lack of broad objections to changes the CFPB might make that would weaken its role in effectively protecting the consumer public.

2. All Regulations: Improve information provided electronically and respect consumers who prefer paper disclosures, statements and records

The CFPB asks for feedback on whether aspects of the adopted/inherited regulations are "incompatible or misaligned with new technologies, including by limiting providers' ability to deliver, electronically, mandatory disclosures or other information that may be relevant to consumers …."

This question covers a wide array of regulations and numerous provisions governing disclosures, records and other information. We do not have the capacity during this comment period to address this question in the context of specific regulations. If the CFPB is considering revisiting particular regulations, it should give notice to the public so that we can respond in more tailored fashion.

As a general matter, we support efforts to make electronic disclosures more noticeable, readable and understandable for consumers who access their information through electronic means. The CFPB considered electronic formats in developing the prepaid rule, and we have suggestions in the Regulation E sections of our comments, above. There may be other examples where statements or model forms that were developed for a paper context should be reformatted for the digital world.

However, we oppose giving providers more latitude to deliver disclosures, statements, records or other information electronically for consumers who prefer a paper format using postal mail. The CFPB also must remember that some products are too complex to be adequately disclosed on a mobile device, and not all electronic information can be saved and retained by the consumer. Moreover, use of electronic formats – such as door to door contractors selling PACE loans on tablets – can be used to prevent consumers from seeing or understanding important information, as discussed below.

Consumers must have the right to receive critical information in the manner that works for them. While electronic disclosures and statements sound eco-friendly, they are not for everyone. Paper versions have a number of advantages over electronic statements, discussed below and further in detail in a 2016 NCLC 2016 report.[1] Paper disclosures and statements must be available for free for consumers who want them, and consumers should not be coerced into electronic versions or steered into them by default if paper is the consumer's first choice.

Paper is a more reliable way of ensuring that the consumer actually sees the information, can digest it as time permits, and can retain important records. Millions of Americans -- particularly those who are lower-income, less educated, older, and households of color -- are on the other side of the "digital divide," lacking home broadband Internet access.[2]

Consumers who access information through mobile devices may especially need the right to receive information on paper. Lengthy or complicated disclosures are difficult to read or understand on mobile

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[1] Chi Chi Wu and Lauren Saunders, National Consumer Law Center, Paper Statements: An Important Consumer Protection, March 2016, available at https://www.nclc.org/media-center/report-paper-electronic-statements.html.

[2] John B. Horrigan and Maeve Duggan, Pew Research Center, Home Broadband 2015, Dec. 21, 2015, at http://www.pewinternet.org/2015/12/21/home-broadband-2015/ (noting that 59% of households with incomes below $20,000 do not have access to broadband Internet at home, compared to one-third (33%) of all households; about half of Hispanics (50%) and African Americans (46%) do not have home broadband Internet; over half (55%) of Americans 65 years or older do not have home broadband Internet).

devices because of their smaller size and formatting. Information provide on a website, through an app, alert or text message are unlikely to be able to save that information for recordkeeping.

Furthermore, even consumers with ready internet access on a computer may prefer paper disclosures and statements, because electronic documents are easy to overlook due to email overload, and electronic disclosures on websites may be overlooked. Especially with monthly statements, consumers may value a physical mail piece as a record-keeping tool and reminder to pay. Studies show that consumers prefer paper when a payment is due upon receipt.[3]

We would especially like to note the problems that electronic documents have posed for consumers who have been solicited for Property Assessed Clean Energy (PACE) loans. Contractors go door to door soliciting seniors and others for loans that are added to their tax bill. They frequently make misrepresentations and push people into signing electronically on the spot, without the time to read and consider what they are signing. Here is one example from a recent story about a 74-year old Social Security recipient on a fixed income in Chico, California:

> No paperwork exchanged hands. Kathryn reviewed all the legally binding documentation on a computer tablet and signed electronically. They didn't see everything printed out until Ernest asked and Kathryn received documents via email.
>
> "They told us about all this money we were going to save," Ernest said. "We do save on the electric bill; thing is, we're paying three times as much [with] this solar system as what our electric bill was!"
>
> Ernest said his household power costs $88 a month on average through PG&E; his monthly payments for the solar system are $268. Additionally, a 30 percent tax credit touted by the salespeople doesn't apply to the Hunleys.
>
> "If they'd have offered a hard copy of the contract and I'd have had time to sit down and read it," he added, "there's no way I'd ever have agreed to it."[4]

This story is emblematic of many others. We have documented several examples of senior homeowners and others with limited English proficiency who were pushed to enter into very problematic home improvement contacts and/or loan agreements on the spot through mobile tablets and esignatures.[5]

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[3] U.S. Post Office, Office of Inspector General, Will the Check Be in the Mail? An Examination of Paper and Electronic Transactional Mail, Report Number RARC-WP-15-006 (Feb. 9, 2015), *available at* https://www.uspsoig.gov/sites/default/files/document-library-files/2015/rarc-wp-15-006_0.pdf; Emmett Higdon, eBusiness & Channel Strategy Professionals, "Paperless Plight: Growing Resistance Outpaces Adoption Among US Bank Account Holders" at 2 (Nov. 1, 2010).

[4] Evan Tuchinsky, Chico News & Review, "Not as advertised: Lack of regulation over energy-efficiency program prompts crackdown" (May 24, 2018), https://www.newsreview.com/chico/not-as-advertised/content?oid=26315850

[5] National Consumer Law Center Issue Brief: Residential Property Assessed Clean Energy (PACE) Loans: The Perils of Easy Money for Clean Energy Improvements at 3 (Sept. 2017) ("Technology Meets the Hard Sell and attached stories 1, 7, 9, 10, 13 and 15), https://www.nclc.org/images/pdf/energy_utility_telecom/pace/ib-pace-stories.pdf.

The 2016 NCLC report includes examples of when electronic credit card statements caused consumers to forget to make a payment, and thus triggered late fees and adverse credit reporting consequences.[6] Electronic statements create barriers for consumers to access vital information because it takes effort to remember the task, find the free time, go to the correct webpage, remember their password, and download the document – as opposed to simply opening an envelope. As the Bureau's 2015 Credit CARD Act study documented, over half of consumers who opted for electronic credit card statements are not opening or reviewing these statements.[7]

Paper also provides a more permanent (and in some cases the only) record. If statements and disclosures are saved on a hard drive, computers can crash or become outdated. Consumers whose only online access is through a mobile device cannot save electronic records. The records that are available online (or even by phone) may not go as far back as they need. Consumers often lose electronic access to account records after an account is closed, but the records might still be necessary for tax returns, proof of purchase for warranties, and other purposes.

Paper statements, records and disclosures are especially important for older consumers, who are less likely to be completely comfortable online even if they have computer access. For those who face cognitive challenges due to aging, it may be more difficult to remember passwords, to keep on top of email, to know when a bill is due, and even to operate a computer. Electronic delivery may also make older consumers more vulnerable to phishing emails and scammers, increasing identity theft. Paper statements and disclosures also enable family members to more easily assist older consumers or piece together financial transactions.

Despite the importance of statements and the need to preserve consumer choice, providers have aggressively pushed consumers to receive their monthly statements for credit cards, bank accounts, and other financial accounts via electronic delivery. As documented in the 2016 NCLC report,[8] these efforts can be harmful to consumers. Such efforts are sometimes deceptive, with confusing web pages that make it appear that the consumer must consent to electronic statements in order to proceed to the next screen to see their account online. They sometimes lack a "no thanks" button or hide it in a barely visible location.

Financial institutions can substitute electronic delivery for paper statements, but only in compliance with the Electronic Signatures in Global and National Commerce Act (E-Sign) Act. If the law requires that a statement, disclosure or other record be made in writing, the E-Sign Act requires that: (1) the consumer must affirmatively consent to electronic delivery; (2) the financial institution must make certain disclosures to the consumer; (3) the consumer's consent must demonstrate that he or she has access to the equipment and programs necessary to receive, open, and read the relevant electronic documents; (4) the consumer must be given notice of the right to withdraw consent for electronic delivery,[9] and (5) electronic records must be in a form that is capable of being retained and reproduced.[10]

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[6] Chi Chi Wu and Lauren Saunders, National Consumer Law Center, Paper Statements: An Important Consumer Protection, March 2016, at 6.
[7] CFPB, 2015 Credit CARD Act study at 134.
[8] Chi Chi Wu and Lauren Saunders, National Consumer Law Center, Paper Statements: An Important Consumer Protection, March 2016, at 3.
[9] 15 U.S.C. § 7001(c)(1).
[10] 15 U.S.C. § 7001(e).

Thus, a consumer always has the right to withdraw consent if they find that electronic statements are not sufficient for their needs. An important aspect of the E-Sign Act is that it does not require any person to agree to use or accept electronic records or electronic signatures. We also note that viewing a disclosure on a tablet held by a sales person, as has happened in the PACE loan context, does not either show that the consumer has access to equipment to read a document nor that the record is capable of being retained and reproduced by the consumer.

While electronic communications may work well for many consumers, the CFPB needs to be cognizant of the limitations of electronic information and to protect consumers who want to keep paper statements, disclosures and records. Among other measures, the CFPB should enhance consumer choice and should not allow companies to charge a fee for paper statements that are required by federal law, though it may permit a modest discount, reflecting the actual cost of paper statements, for those who choose electronic communications.

Thank you for considering these comments.

Respectfully submitted,

Allied Progress
Americans for Financial Reform
Arizona Community Action Association
Arkansans Against Abusive Payday Lending
Atlanta Legal Aid Society, Inc.
CASH Campaign of Maryland
Center for NYC Neighborhoods
Consumer Action
Consumer Federation of America
Equal Justice Society
Georgia Watch
Heartland Alliance for Human Needs & Human Rights
Housing Options & Planning Enterprises, INc.
Illinois People's Action
Main Street Alliance
Maryland Consumer Rights Coalition
Mississippi Center for Justice
National Association of Consumer Advocates
National Association of Social Workers
National Consumer Law Center (on behalf of its low income clients)
National Fair Housing Alliance
New Jersey Citizen Action
People's Action Institute
Public Counsel
Public Justice Center
Texas Appleseed
U.S. PIRG
West Virginia Center on Budget and Policy
Woodstock Institute

June 25, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2018-0012 -- Request for Information Regarding the Bureau's Inherited Regulations and Rulemaking Authorities – **PACE loans**

Dear Acting Director Mulvaney:

The undersigned consumer, community, civil rights and legal services organizations submit these comments in response to the Consumer Financial Protection Bureau ("CFPB")'s Request for Information ("RFI") regarding its inherited regulations and rulemaking authorities. These comments focus on the urgency of adopting regulations explicitly incorporating Property Assessed Clean Energy (PACE) loans into the Truth in Lending Act's (TILA) Regulation Z mortgage protections.

Addressing the problems with PACE loans and closing the misinterpreted loophole in Regulation Z is our top priority rulemaking for the CFPB. It is also a priority of Congress: a provision directing the CFPB to adopt ability-to-repay rules for PACE loans is included in the bipartisan banking bill package recently passed by Congress in Public Law 115-174 and signed by President Trump. We note there also is widespread agreement among creditors of the importance of promulgating TILA PACE regulations. While the CFPB should preserve existing TILA regulations, we urge the CFPB to swiftly enact the rules mandated by Congress and to ensure that PACE providers comply with the other mortgage protections required by Regulation Z, with appropriate modifications as necessary to address the unique structure of PACE loans.

Many of our organizations have also joined other comments that discuss other inherited regulations and rulemaking authorities, including Regulation Z generally.

Section 307 of Public Law 115-174 amended TILA to require the CFPB to issue regulations implementing the statute's Ability to Repay and Qualified Mortgage requirements in 15 U.SC. § 1639c as they apply to PACE, including application of the provisions under 15 U.S.C. § 1640 for damages, defense to foreclosure and other remedies. Section 307 directs the CFPB to account for the unique nature of PACE loans, permits the CFPB to collect information and data necessary for issuing such rules, and mandates that it consult with state and local governments and bond-issuing authorities. The agency also should consult with consumer organizations. Accounting for the unique nature of PACE will allow the CFPB to ensure that defenses to tax lien collection actions are incorporated into the protections and that other TILA provisions are adapted as necessary to accommodate the role of government taxing authorities.

The CFPB already has the authority to clarify that TILA's mortgage protections apply to PACE loans and should do so while implementing section 307's requirements. The agency should do so expeditiously, as the rising abuses in the PACE market must be addressed before they spread.

Serious problems have emerged in the rapidly growing PACE market. PACE programs offer loans for energy efficient home improvements, such as solar panels, HVAC systems, and energy efficient windows. PACE loans are offered through home improvement contractors and are secured by a property tax lien. That property tax lien is collected through a property tax assessment, and it typically takes priority over any existing mortgage. PACE programs must be authorized by state and local governments, but PACE programs are privately run with little or insufficient government oversight.[1] Even if states and localities strengthen their oversight, there will remain a need to assure national standards of performance and enforcement to assure uniform and equitable treatment of consumers.

Over the last three years there has been a sharp increase in homeowners seeking assistance from legal services and other organizations in relation to PACE loans. It is becoming more apparent that the laudable goal of improving home energy efficiency is being undermined by the lack of adequate consumer protection for these loans. There are growing signs that unscrupulous home improvement contractors are selling unnecessary and unwanted home improvements, at times with little connection to deep energy savings and often overpromising the extent of resulting energy savings where any ensue, through misrepresentation and in some cases outright fraud. Weak PACE loan regulation enables these contractors to saddle homeowners with debt they cannot afford, putting their homes at risk of foreclosure.

To date, over 20 states have authorized residential PACE programs, but most have not implemented the programs. The program is most established in California, where serious consumer protection problems have emerged including the making of unaffordable loans, making loans without proper disclosure of loan terms, contractor high-pressure sales tactics and fraud, elder abuse, inflated home improvement costs, insufficient or minimal energy savings, and double-contracting on the same property.[2] The following story from the daughter of a California homeowner is unfortunately far too typical of the problems that we continue to see with PACE loans:

> *My elderly mother suffered a number of medical issues earlier this year, resulting in an extended stay in hospitals and nursing homes, and now in assisted living. She had some falls and was also diagnosed with cognitive impairment and probable vascular dementia. I've had to take over her financial affairs, including the sale of her house ….*
>
> *During the title search, the realtors uncovered two property tax liens, one for HERO ($22K) and one for PACE ($49K)…. The buyer was willing to assume the HERO assessment, but not the PACE assessment. I am now faced with paying off the $49K out*

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[1] For example, the California statute's ability to repay requirement does not require that the analysis be done prior to the signing of the contract. Missouri and Florida's active programs do not have ability to repay requirements or other consumer protections

[2] *See* Residential Property Assessed Clean Energy (PACE) Loans: The Perils of Easy Money for Clean Energy Improvements, National Consumer Law Center (Sept. 2017), *available at* https://www.nclc.org/images/pdf/energy_utility_telecom/pace/ib-pace-stories.pdf.

of the proceeds from the sale of the house -- this money was to pay for nearly a year of her care in the assisted living facility.

…. They never completed the interconnect agreement with the Department of Water and Power, so the panels aren't even working…. I also don't understand how my Mom would've qualified to borrow the money, as she clearly cannot afford the payments on her SSI income. In addition to the solar panels, there was other work done that I believe was "upsold." To add insult to injury, the interest rate exceeds 8% (APR exceeds 9%).

This is such a bad deal, all the way around. I'm sure my mother didn't understand what she was getting herself into ….[3]

Concerns are just beginning to emerge in the more recent programs in Missouri and Florida.

The CFPB's PACE regulations for a Qualified Mortgage PACE loan should include the following elements.

Ability to repay. As with other closed-end obligations secured by real property, property owners should be reviewed for their ability to repay the PACE loan while meeting other expenses prior to signing the contract and the commencement of any work. All mortgage liens, including other recorded and, where available, unrecorded PACE loans, should be included in this analysis. Debt and income verification must be based on reliable third-party records. Affordability thresholds must be established based on data. The CFPB should clarify that, in addition to the QM standard established for PACE, the overall ability to repay rules also apply to PACE.

Advanced Disclosure. TILA pricing and term disclosures, modified as necessary and with additional PACE-tailored disclosures, should be provided in writing free of charge three business days in advance of signing the contract unless there is a bona fide personal financial emergency confirmed in writing by the consumer. The rules should specify limited criteria for the emergency exception, including the size of the loan, to avoid evasions.

Electronic Disclosure Protections. Door-to-door contractors should not be allowed to satisfy disclosure requirements solely through helping the consumer to view the disclosures on an electronic tablet concurrently with signing the contract. Disclosures should be provided in a form the consumer can keep and can review during the three day right to cancel period. Disclosures and copies may be provided by email only if the consumer voluntarily chooses that option and only with full compliance with the E-Sign Act, including demonstration by the consumer that they are able to access records electronically. Providers should be prohibited from

[3] This text is from the email the National Consumer Law Center received from the homeowner's daughter. (On file with National Consumer Law Center). This story is also included in Residential Property Assessed Clean Energy (PACE) Loans: The Perils of Easy Money for Clean Energy Improvements, National Consumer Law Center (Sept. 2017), *available at* https://www.nclc.org/images/pdf/energy_utility_telecom/pace/ib-pace-stories.pdf.

assisting the consumer in creating an email account or demonstrating ability to access electronic records on the provider's electronic device.

Right to Cancel. Homeowners should have a three business-day right to cancel. No contractor work can begin until this period expires. Waiver only should be available in case of bona fide emergency meeting specified criteria with a handwritten request from the homeowner.

Loan Term Limitations and Monthly Statements. PACE loans should be repaid through monthly payments made to the mortgage servicer on the property (if there is an escrow account), the PACE provider, or the government authority. Homeowners should receive monthly statements from one of those entities, based on the requirements for periodic statements in 12 C.F.R. § 1026.41. Regulations implementing 15 U.S.C. § 1639c should be extended to PACE loans to ensure that contracts do not include forced arbitration clauses, class action waivers, or releases or waivers of rights or claims. Rules should provide that Qualified Mortgage PACE loans must be fully amortizing and must not include prepayment penalties.

Reasonable Property Valuation. The provisions in 12 C.F.R. § 1026.42 dealing with valuation independence should be applied with appropriate modifications to PACE loan transactions.

Lien Status Clarity. PACE loans only should qualify for QM status where they either have subordinate lien status or, where not provided for under state law, measures to result in a similar outcome. First lien holders must be absolutely protected and held harmless, including having no reduction in their proceeds, such as a reduced sales price in the event of foreclosure. As with other QM criteria, subordinating the PACE lien helps to enforce the ability-to-repay requirement, as it gives the creditor an incentive to ensure that the consumer can afford to repay the PACE loan on top of the existing mortgage.

Hardship Protections. PACE rules should include provisions ensuring the borrower will have access to the CFPB's loss mitigation procedures to avoid tax lien foreclosures.

Remedies. As required in Public Law 115-174, homeowners must have the right to pursue TILA remedies for any violations, including individual and class damages and defense to foreclosure. In order to account for the unique structure of PACE loans and to protect consumers from fraud and misrepresentations by contractors, the CFPB should protect homeowners from liability on PACE loans when there are seller-related defenses in a similar fashion as for other seller-related home improvement financing. PACE providers should indemnify government entities for any liability.

The PACE loan market is still young and it is critical to address abuses now before the problems become too entrenched, widespread and difficult to address.

We note that PACE loans have also posed a number of other problems that we have not focused on in these comments, including making it difficult for consumers to refinance or sell their

homes without unexpectedly having to pay off a PACE lien that they were assured ran with the land. These issues and the superior lien status of most PACE loans have created problems not only for homeowners but also for realtors and mortgage lenders. The widespread agreement among both consumer and industry participants gives further weight to the importance of making PACE loan regulations a priority for the CFPB. We urge the agency to hear from stakeholders and then swiftly issue a proposed rule.

Sincerely,

Allied Progress
Americans for Financial Reform
Arizona Community Action Association
Arkansans Against Abusive Payday Lending
Atlanta Legal Aid Society, Inc.
Bet Tzedek Legal Services (CA)
CASH Campaign of Maryland
Center for NYC Neighborhoods
Consumer Action
Consumer Federation of America
Consumers Union
Florida Alliance for Consumer Protection
Georgia Watch
Heartland Alliance for Human Needs & Human Rights
Housing and Economic Rights Advocates (CA)
Housing Options & Planning Enterprises, Inc. (MD)
Illinois People's Action
Jacksonville Area Legal Aid, Inc.
Legal Aid Society of San Diego, Inc.
Low-Income Energy Affordability Network (MA)
Main Street Alliance
Maryland Consumer Rights Coalition
Mississippi Center for Justice
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low income clients)
National Fair Housing Alliance
National Housing Law Project
Neighborhood Housing Services of Baltimore
New Jersey Citizen Action
Pennsylvania Utility Law Project
(cont’d)

People's Action Institute
Public Citizen
Public Counsel (CA)
Public Justice Center (MD)
Public Law Center (CA)
Public Utility Law Project of New York
Texas Appleseed
The Utility Reform Network (CA)
U.S. PIRG
West Virginia Center on Budget and Policy
Woodstock Institute

June 25, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2018-0012 -- Request for Information Regarding the Bureau's Inherited Regulations and Rulemaking Authorities -- **Regulation Z (TILA), X (RESPA) and FTC mortgage rules**

Dear Acting Director Mulvaney,

The undersigned consumer, community, civil rights and legal services groups submit these comments in response to the Request for Information ("RFI") issued by the Consumer Financial Protection Bureau ("CFPB") regarding its inherited regulations and rulemaking authorities.

These comments focus on the aspects of the following regulations that the CFPB has inherited and has not changed: Regulation Z (Truth in Lending Act), Regulation X (Real Estate Settlement Procedures Act), Regulation N (FTC rules on mortgage acts and practices), and Regulation O (FTC rules on mortgage assistance relief services). Many of our organizations have also joined comments on other inherited regulations, including comments governing electronic payments, credit reporting, fair lending, Property Assessed Clean Energy (PACE) loans, and other topics.

In general, we support these regulations and urge the CFPB not to weaken them. While there can always be improvements to any rules, these rules are working well overall. In light of the other work presently before the CFPB, updating these regulations is not a current priority and we urge the CFPB to spend its limited resources on other topics at this time.

If the CFPB chooses to revisit the open-end credit provisions of Regulation Z, we urge it to ban deferred interest credit cards, close loopholes that omit fees from the finance charge and APR, and protect consumers from unauthorized use of convenience checks. If it chooses to reopen Regulation Z's closed-end credit provisions, we urge it to implement an all-in finance charge definition, prevent evasion of disclosure requirements by improperly treating extensions of credit as open-end, and improve protections for reverse mortgages.

If the CFPB opens the settlement services provisions of Regulation X for amendments, it should clarify the application to manufactured homes and should tighten the restrictions on affiliated business agreements. If it opens Regulation X's servicing provisions, it should: 1) remove an exception from the requirement to give the borrower an annual escrow statement; 2) ensure that the error resolution process protects borrowers from foreclosure when the error relates to the alleged default or grounds for foreclosure; 3) require the transfer of servicing notice to inform borrowers of their dispute rights and give them more information about the status of the account; and 4) repeal exemptions for home equity lines of credit and reverse mortgages.

1. Objections to the CFPB's Request for Information Process

We must first note our objections to the burdensome RFI process. The amount of time and attention required to adequately address the CFPB's numerous RFIs on a multitude of subjects in a very short amount of time has diverted valuable consumer advocacy and third party resources to respond to these requests. The very structure of these RFIs, the nature of many of the questions, and the fact that many focus on processes known mostly to industry actors and their lawyers, favor financial institutions with greater resources at their disposal, and we are gravely concerned about any attempts to weaken consumer protection through this process.

The CFPB has ignored our request for an extension of time to respond to this particularly burdensome RFI and the one on adopted regulations. These two RFIs require us to comment on dozens of regulations on many different subjects running many hundreds if not thousands of pages in length. Doing so less than a week after responding to the RFI on the CFPB's adopted regulations, many of which are of great importance to consumers, has been especially difficult.

These problems have prevented us from responding in more detail, seeking more input or signatories, or publicizing the comment opportunity more widely. The CFPB must not take the limited number of comments from the public as indicative of a lack of broad objections to changes the CFPB might make that would weaken its role in effectively protecting the consumer public.

2. Regulation Z (Truth in Lending Act): Inherited Rules

2.1. Credit Cards

2.1.1. Introduction: The Credit CARD Act and its implementing regulations demonstrate that consumer protection benefits everyone.

The Credit CARD Act and its implementing provisions in Regulation Z have resulted in enormous benefits for consumers. The Act and its corresponding Regulation Z provisions are a compelling example of how strong consumer protections benefit ordinary Americans and industry alike. After the passage of the Credit CARD Act in 2009 and the adoption of implementing Regulation Z provisions in 2010, consumers saw numerous benefits from the Act: interest rate hikes were dramatically curtailed, late fees were substantially reduced, and over-the-limit fees virtually disappeared.[1] Consumers saved $16 billion in late and over-the-limit fees from 2011 to 2014.[2] They also saved $2.1 billion in interest rate reductions in the first few years after the Act's passage.[3]

[1] Jennifer Faulkner, Office of the Comptroller of Currency, The CARD Act—One Year Later: Impact on Pricing and Fees (Feb. 22, 2011).
[2] *See* Consumer Financial Protection Bureau, Consumer Credit Card Market Report 10 (Dec. 3, 2015), *available at* http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf (hereinafter "CFPB 2015 CARD Act Report").
[3] Consumer Fin. Prot. Bureau, CARD Act Report: A Review of the Impact of the CARD Act on the Consumer Credit Card Market 72 (Oct. 1, 2013), available at https://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf (hereinafter "CFPB 2013 CARD Act Report").

The CFPB has estimated that, for cardholders who carry a balance, the total cost of credit fell 150 basis points from the end of 2008 to the end of 2012, due in large part to the reductions in fees caused by the Credit CARD Act.[4] By 2015, the total cost of credit card had fallen another 40 basis points.[5] The Act has resulted in the APR becoming a more useful indicator of what consumers can expect to pay to own and use a credit card.[6] In general, the Act created a market "in which the costs incurred by consumers are driven more by APR and annual fees and less by back-end penalty fees and APR repricing."[7]

Prior to the Credit CARD Act, the card industry defended its questionable practices by arguing that lack of regulation benefited consumers because it resulted in fewer annual fees, lower interest rates, and rich reward programs.[8] The industry predicted that re-regulating rates and fees would raise costs and limit credit for the majority of consumers in order to help financially distressed borrowers.[9]

These arguments proved to be hollow. After the passage of the Credit CARD Act, lenders raised annual fees by only a modest amount,[10] and credit card solicitations were no less favorable[11] or abundant than before the Credit CARD Act.[12] In general, the Credit CARD Act did not result in any reduction in access to credit.[13] Americans had access to nearly $3.5 trillion in credit card lines as of early 2015, a 10% increase since 2012.[14] Both the interest rates disclosed to consumers and the rates they actually paid dropped after the effective date of the Credit CARD Act.[15]

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[4] *Id*. at 33.
[5] CFPB 2015 CARD Act Report at 77.
[6] CFPB 2013 CARD Act Report at 70.
[7] *Id.* at 37.
[8] Jonathan Orszag & Susan Manning, COMPASS, An Economic Assessment of Regulating Credit Card Fees and Interest Rates 14–15 (Sept. 2007). This report was commissioned by the American Bankers Association.
[9] *Id.* at 5.
[10] CFPB 2013 CARD Act Report at 23 (annual fees increased by less than $2 and increased in incidence by a modest 0.75%); Nick Bourke & Ardie Hollifield, Pew Health Group, Two Steps Forward: After the Credit CARD Act, Credit Cards are Safer and More Transparent—But Challenges Remain (July 2010), available at www.pewtrusts.org. *See also* CFPB 2015 CARD Act Report at 70 (percentage of accounts assessed an annual fee was below pre-CARD Act levels in 2015).
[11] Andrea McKenna, Increased Competition, Less Fallout from CARD Act Than Expected, Mintel Says, PaymentsSource.com (Aug. 4, 2010), available at www.paymentssource.com.
[12] Josh Frank, Center for Responsible Lending, Credit Card Clarity: CARD Act Reform Works (Feb. 16, 2011), available at www.responsiblelending.org.
[13] CFPB 2015 CARD Act Report at 10 (account volume has grown every year since implementation of the Credit CARD Act). *See also* Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney, & Johannes Stroebel, Regulating Consumer Financial Products: Evidence from Credit Cards, 130 The Quarterly Journal of Economics 1, 15 (2015) ("we estimate that the CARD Act had a precise zero effect on credit limits and ADB [average daily balances]. We also estimate a zero effect on the number of new accounts.").
[14] CFPB 2015 CARD Act Report at 108. Even deep subprime consumers had a 4% increase in their available credit since 2012. *Id.*
[15] Josh Frank, Center for Responsible Lending, Credit Card Clarity: CARD Act Reform Works (Feb. 16, 2011), available at www.responsiblelending.org. *See also* Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney, & Johannes Stroebel, Regulating Consumer Financial Products: Evidence from Credit Cards, 130 The Quarterly Journal of Economics 1, 15 (2015) ("we find no evidence of an anticipatory increase in interest charges prior to the CARD Act, and no evidence of a sharp or gradual increase following the CARD Act implementation periods").

The Credit CARD Act also proved popular with American consumers. The majority of consumers familiar with the Act have reported that it has been good for them, and 60% of consumers in general believe that their monthly statements have been clearer and easier to read.[16] And last but not least, the benefits of the Act have *not* resulted a corresponding huge hit to the revenues of credit card companies, which remained highly profitable after the Credit CARD Act.[17]

Moreover, informal conversations with industry players reflect a near universal acknowledgement that the Credit CARD Act and implementing regulations have been positive for the credit card industry. The rules create a level playing field, rewarding responsible companies and stopping a race to the bottom with back-end fees. Companies receive fewer complaints and have a better overall relationship with their customers. While problems remain in the credit card industry, the Credit CARD Act and regulations have had an overwhelmingly positive impact on both consumers and the industry.

2.1.2. The CFPB should ban deferred interest promotions.

Deferred interest promotions are one of the biggest credit card abuses that remains after the enactment of the Credit CARD Act. We urge the CFPB, as we have many times before, to ban this deceptive and costly practice. Deferred interest promotions entice consumers with promises of “no interest for 12 months,” but there is a significant condition that can trap unwary consumers. Unlike true “0% APR” deals, interest is actually accruing during the promotional period for deferred interest products, and will be waived only if the consumer completely repays the entire balance by the end of the promotional period. Consumers who fail to do so will be assessed a large lump sum interest charge going back to the date that they bought the item, even on amounts that have been paid off. For example, if a consumer buys a $2,500 stereo system on June 1, 2018 using a one-year 24% deferred interest plan, then pays off all but $100 by June 1, 2019, the lender will add to the next bill nearly $400 in interest on the entire $2,500 dating back one year.

Deferred interest plans make money by taking advantage of consumers who are unaware of how the plans work or who meet with an unexpected difficulty in repaying the balance in full. They are inherently deceptive, and many consumers have trouble understanding their complex structure. Other consumers miscalculate the end of the promotional period, or expect to be able to pay the balance in full but for a variety of reasons find that they cannot. In any of these circumstances, the consumer is hit with an enormous, retroactive application of interest that causes significant injury, is unexpected and unavoidable, and is not outweighed by the creditors’ desire to profit from these tricks and traps.

Indeed, the only reason that creditors make deferred interest offers instead of a true 0% promotional rate offer (without retroactively imposed interest) is to trap a certain percentage of consumers. At one point, the Federal Reserve Board actually banned these plans, noting

[16] CFPB 2013 CARD Act Report at 21–28; Synovate, Consumer Perceptions and Reactions to the CARD Act (Feb. 22, 2011), available at www.consumerfinance.gov.

[17] CFPB 2015 CARD Act Report at 19 (“the credit card business continues to be the most profitable bank lending business, with returns more than four times higher than the average return on assets”).

"disclosure may not provide an effective means for consumers to avoid the harm caused by these plans."[18]

In both its 2015 and 2013 Credit CARD Act studies, the CFPB conducted extensive analyses of deferred interest promotions, documenting the host of problems presented by these products. The CFPB found that deferred interest plans were especially harmful to vulnerable subprime consumers, 40% of whom were unable to pay off their balances in time to avoid deferred interest, and thus were socked with a lump sum retroactive charge.[19] NCLC has also issued its own report on deferred interest promotions, which describes their numerous problems,[20] including:

- **Inherent deception.** Many consumers do not understand the complicated and confusing nature of these promotions. The CFPB has observed that "there are significant indications that the lack of transparency in this market contributes to avoidable consumer costs."[21]

- **Minimum payments don't pay off the balance.** Consumers who make only the minimum payment – often thinking they are doing what they need to do to avoid interest – will inevitably be hit with retroactively assessed interest.

- **"Life Happens."** Even consumers who understand deferred interest promotions are at risk. They may expect to be able to pay off the balance by the end of the promotional period, but a job loss or other financial emergency could intervene – imposing a huge lump sum of retroactive interest when families can least afford it.

- **High APRs.** Deferred interest credit cards typically carry very high interest rates, with an average of 24% and as high as 29.99%, compared to a typical APR of 14% for mainstream credit cards.

- **Impact on the most vulnerable.** The CFPB found that more than 40% of subprime consumers were unable to pay off their balances in time to avoid deferred interest, and thus were socked with a lump sum retroactive charge. In contrast, nearly 90% of superprime consumers avoid getting hit with deferred interest. Thus, better-off consumers get the benefit of interest-free financing, while credit card lenders profit disproportionally from financially constrained consumers.

- **Difficulty avoiding retroactive interest when consumers make other purchases.** If a consumer uses the card to make another purchase, problems can arise with applying the consumer's payments to the different balances. Payment allocation is extremely complex and fraught with pitfalls, and it can be nearly impossible to pay off a deferred interest balance while minimizing interest charges.

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[18] 74 Fed. Reg. 5498, 5528 (Jan. 9, 2009).
[19] CFPB 2015 CARD Act Report at 167.
[20] Chi Chi Wu, National Consumer Law Center, Deceptive Bargain: The Hidden Time Bomb of Deferred Interest Credit Cards, Dec. 2015, at https://www.nclc.org/issues/deceptive-bargain.html.
[21] CFPB 2015 CARD Act Report at 10.

Deferred interest promotions are widespread. According to a survey by WalletHub, about one-third (23 out of 75) of the largest retailers offered deferred interest plans.[22] Yet even members of industry have recognized the problems with deferred interest products. In March 2017, Walmart announced it was ending its use of deferred interest plans, and instead offering truly 0% promotional APRs. Walmart stated it was doing so in order to "save our customers money and help remove unnecessary hassle or burden."[23] Credit card issuers have also stayed out of the deferred interest business. For example, Capital One sold off the Best Buy card portfolio that it acquired from HSBC and does not offer deferred interest cards.[24]

It is well past time for the CFPB to take action on deferred interest. There is plenty of evidence that deferred interest is unfair, deceptive, and abusive. Furthermore, the CFPB has clear authority under the Truth in Lending Act to eliminate the Regulation Z exceptions that permit deferred interest. Specifically, the CFPB should eliminate the exceptions for deferred interest plans in the Official Commentary §§ 1026.55(b)(1)-3.i and 1026.54(a)(1)-2.i.

These exceptions were established by the Federal Reserve Board in its regulations implementing the Credit CARD Act. Without these exceptions, deferred interest would violate the Truth in Lending Act itself, specifically the prohibition against double cycle billing in Section 127(j), 15 U.S.C. § 1637(j). This section provides that a finance charge cannot be assessed as a result of the loss of any time period within which the consumer may repay a balance without incurring a finance charge based on any balances from prior billing cycles. This language specifically prohibits deferred retroactive interest plans, which impose a finance charge based on balances from prior billing cycles if the consumer does not repay the entire balance within the specified time period. For further discussion on the regulatory history and legal issues involving deferred interest promotions, see our report *Deceptive Bargain: The Hidden Time Bomb of Deferred Interest Credit Cards*.[25]

2.1.3. The CFPB should restore a fee-inclusive APR price tag for credit cards and other forms of open-end credit.

The CFPB has noted in its semi-annual regulatory agenda that it expects to modernize or streamline the open-end credit provisions of TILA. As part of that process, the CFPB should mandate an APR disclosure that includes the impact of fees on the cost of credit.

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[22] Alina Comoreanu, 2016 Deferred Interest Study: The Retailers with the Sneakiest Financing Offers, Nov. 1, 2016, *available at* https://wallethub.com/edu/deferred-interest-study/25707/.
[23] Daniel Eckert, Walmart, Blog Post - We're Taking a New Approach to Our Credit Card – Here's Why, May 4, 2017, *available at* http://blog.walmart.com/business/20170504/were-taking-a-new-approach-to-our-credit-card-heres-why.
[24] *See* Danielle Douglas, Washington Post, "Capital One sells Best Buy credit card portfolio to Citigroup" (Feb. 19, 2013) (quoting analyst as saying, "From what we've heard from Capital One, strategically it seems the two parties had a difference of opinion and felt it was best to terminate the contractual obligation."), *available at* https://www.washingtonpost.com/business/economy/capital-one-sells-best-buy-credit-card-portfolio-to-citigroup/2013/02/19/9b4ba18a-7ab6-11e2-a044-676856536b40_story.html?utm_term=.cd9c67aa746f.
[25] Chi Chi Wu, National Consumer Law Center, Deceptive Bargain: The Hidden Time Bomb of Deferred Interest Credit Cards, Dec. 2015, at https://www.nclc.org/issues/deceptive-bargain.html.

Currently, the only APR disclosure required for credit cards and other open-end credit under Regulation Z is an APR consisting solely of periodic interest. 12 C.F.R. § 1026.14(b). This APR does not include the impact of any fees, whether they be finance charges or not, on the cost of credit for a credit card. This is despite the fact that TILA requires disclosure of a fee-inclusive or "effective" APR.[26]

The requirement to disclose the effective APR was eliminated by the Federal Reserve Board in 2010. Eliminating the effective APR disclosure abandoned a core principle of the Truth in Lending Act. It was contrary to one of the fundamental reasons that Congress enacted TILA, *i.e.*, to create a standard disclosure of the cost of credit that would promote informed shopping. The effective APR was the only disclosure in open-end credit that reflected the price imposed by fees and non-periodic interest finance charges. Its existence and calculation are specifically mandated by TILA for open-end credit. By eliminating it, the FRB contravened the explicit requirements of TILA.

The FRB eliminated the effective APR because its focus group testing found that consumers were confused by it and did not understand it. But if consumers were confused by the effective APR, the proper response would have been to improve the disclosure, not eliminate it.[27] The solution should have been to improve the price tag, not tear it off. Indeed, in the October 2013 study, the CFPB developed a measure somewhat similar to the effective APR for its own research purposes, a "Total Cost of Credit."[28] This measure attempts to capture an "all-in cost of credit." A similar measure could be developed for credit card and other open-end credit disclosures.

For example, the CFPB could require an effective APR for periodic statements that consists of a rolling 12-month average of the calculation in 15 U.S.C. § 1606(a)(2). A rolling average would address the phenomenon of a high effective APR in the month that a fee is imposed, which is what sometimes led to consumer confusion. For an account that has been opened for less than 12 months, this rolling effective APR could be pro-rated.

The CFPB should also require a fee-inclusive APR for applications and solicitations. Restoring the effective APR would make TILA disclosures more meaningful and truthful. Here are examples of deceptive or nonexistent APR disclosures:

- First Premier Bank charges 36% periodic interest and discloses a 36% APR. But a fee-inclusive APR should include the $95 pre-account opening fee charged by First Premier

[26] 15 U.S.C. § 1606.

[27] Indeed, it is no wonder that consumers were confused by the effective APR – in its comments to the Board's 2005 Advanced Notice of Proposed Rulemaking, the Center for Responsible Lending noted the confusion generated by inconsistent terminology around both the rate-only APR (the "corresponding" or "nominal APR" or "corresponding nominal APR") and the fee-inclusive APR, which could also be labeled with different adjectives, such as "effective APR" or "historic APR" or "actual APR."

[28] Consumer Financial Protection Bureau, CARD Act Report: A review of the impact of the CARD Act on the consumer credit card market, Oct. 1, 2013, at 19, 32-33, *available at* http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf.

and other fees, which results in a 416% APR as calculated under 15 U.S.C. § 1606(a)(2) based on full use of the $300 credit line.[29]

- Elevate does not disclose any APR on its Elastic line of credit, and the sample payment schedule even obscures the number of payments. Its website displays a 10% monthly cash advance fee (or 5% bimonthly), but the full APR with all charges is closer to 100%.[30]
- Bank payday loans ("deposit advance products") often disclosed no APR or if they did, calculated a sample one assuming a 30-day repayment period, when in fact most loans were repaid in fewer than 14 days upon the next paycheck deposit. Thus, the sample APR was less than half what it should have been.[31]

Restoring the effective APR would also remove incentives for payday lenders and other high cost lenders to convert their predatory loan products into open-end credit. It would require a more meaningful and truthful APR disclosure for products such as the line of credit offered by CashNetUSA.com. In Utah, CashNetUSA discloses an APR of 299%.[32] However, this does not include the 15% "Transaction Fee" imposed each time a borrower obtains a cash advance. Combining the Transaction Fee with the periodic interest translates into an effective APR of 480%.

The CFPB has several options for fee-inclusive APR disclosures in applications and solicitations. It could require disclosure of a "typical APR" that consists of an average of historical effective APRs for a certain time period in a certain credit portfolio. Or it could develop an "Energy Star" type rating that is similarly based on the average of historical effective APRs. The CFPB could also limit the requirement for a "typical APR" to certain categories of credit, such as those that have fee income that is more than a small percentage of the revenue from periodic interest.

2.1.4. The CFPB should protect consumers from unauthorized use of credit card convenience checks.

The CFPB should eliminate the exception for convenience checks from the unauthorized use protections of the Truth in Lending Act. This exception was established by the Federal Reserve Board in 2008 in the Official Commentary § 1026.12(b)-4.

The Board justified this decision based on its belief that "it was unnecessary to extend the unauthorized use protections to convenience checks because convenience check transactions are generally subject to the Uniform Commercial Code (UCC) provisions governing checks, and thus a consumer generally would not have any liability for a forged check ..."[33] However, the UCC permits banks to hold consumers partially liable for unauthorized use under a comparative

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[29] It would be even higher if the effective APR included the $75 annual fee, which is currently not considered a finance charge under Regulation Z. If the $75 were to be included, the effective APR for the month in which the account was opened would be 955%.

[30] https://www.elastic.com/what-it-costs/.

[31] As noted in another section of these comments, single payment loans should be treated as closed-end credit, not open-end credit.

[32] https://www.cashnetusa.com/rates-and-terms.html.

[33] 72 Fed. Reg. 32,948, 32,959 (June 14, 2007).

negligence standard.[34] TILA's unauthorized use protections provide far stronger protections for consumers than does the UCC.

Furthermore, the convenience check is merely a mechanism for initiating a credit card transaction, like a telephone or computer. Even though neither a telephone nor a computer is a credit card, purchases made by telephone or Internet are both covered by the unauthorized use protections. It seems anomalous that if a thief uses only the credit card number, without more, the unauthorized use protection applies, but the simple fact that the number is on a check takes the transaction outside this protection.

A complaint received by NCLC demonstrates why convenience checks should be regulated as credit cards under TILA. Ms. X, a victim of domestic violence, fled the marital home on September 9, 2011 and obtained a protective order. Subsequently, her abusive husband intercepted two convenience checks and used them to charge $7,000 to two of Ms. X's individual credit card accounts. The card issuers, Chase and Bank of America, refused to treat this theft as unauthorized use, despite the fact that Ms. X even had a protective order against Mr. X on the date of the charge showing that Ms. X was not in the marital home at the time.

Unfortunately, Chase and Bank of America were not required to treat this theft as unauthorized use because of the exception for convenience checks. This legal loophole was confusing to even an attorney representing Ms. X; thus, an average consumer would be even less likely to understand that a convenience check is exempted from the unauthorized use protections of TILA. To prevent consumer confusion and ensure uniform protections for all devices accessing a credit card account, the CFPB should eliminate this exception.

2.2. General Regulation Z Requirements for Closed-End Credit

2.2.1. Regulation Z has been amended to address industry concerns and should not be weakened.

The Truth in Lending Act (TILA), under which Regulation Z was promulgated, was enacted in 1968.[35] In its current form it includes requirements regarding all forms of consumer credit, unless specifically exempted. This section addresses general Regulation Z requirements regarding closed-end credit. Installment loans and automobile financing are examples of closed-end credit to which these requirements apply. Many also apply to closed-end mortgage credit, but there are some variations for mortgage transactions (for example, in the rules about disclosure of variable rates and about the fees that must be included in the calculation of the finance charge). In addition, as discussed in a later section of these comments, disclosure requirements for most mortgage transactions are different from those for non-mortgage transactions, and a number of additional disclosures that are required for those transactions.

Regulation Z was first adopted in 1969, effective July 1, 1969.[36] It was extensively revised in 1981 to simplify it, ease creditor compliance burdens, and conform it to statutory amendments.[37]

[34] U.C.C. § 3-406.
[35] Pub. L. No. 90-321, 82 Stat. 146 (May 29, 1968).
[36] 34 Fed. Reg. 2002 (Feb. 11, 1969).

TILA and Regulation Z contain several provisions designed to grant creditors numerical leeway when disclosing the most important cost of credit numbers—the APR and the finance charge.[38] Moreover, TILA provides for statutory defenses to liability for creditors, including good faith conformity with rulings and official interpretations, use of model forms, bona fide errors, and correction of errors.[39] Regulation Z adds a faulty calculation tool defense to this list.[40]

While every regulation can be improved, and we have our own suggestions if the CFPB chooses to revisit Regulation Z's closed-end provisions, they are working well overall and are a lower priority for revisions than other work before the CFPB. We especially oppose any effort to weaken Regulation Z, add exemptions, or otherwise undercut the protections that it offers.

The TILA provisions that apply generally to closed-end credit focus on disclosure of the credit terms. The rules require that those terms be disclosed to consumers in a uniform, consistent format so that consumers can compare credit terms and shop for credit. The theory behind the disclosure requirements is that by comparing credit terms and shopping for credit, consumers will create market pressure for creditors to offer more attractive terms.[41]

In general, a reliance on disclosures alone is a weak approach to protecting consumers. Substantive rules to limit unaffordable credit and to prevent abuses are much more effective. Nonetheless, the TILA disclosure rules do provide an important function and should be strengthened, not weakened.

Prior to the enactment of TILA, consumers had no easy way to compare credit terms or determine how much credit would really cost. Creditors could disclose their interest rates—if they disclosed them at all—in deceptively non-uniform ways. For example, if a lender disclosed an 8% interest rate calculated by the add-on method on a $1000 one-year loan, it would actually amount to an APR of 14.45%--even if the lender did not add any fixed-charge fees on top of the interest rate.[42] Regulation Z's disclosure requirements are essential to prevent a return to this chaotic and opaque market.

Regulation Z's general disclosure provisions for closed-end credit are not lengthy or complex. In the statute, they appear in only four sections—1631, 1632, 1634, and 1638. In Regulation Z, they appear in sections 1026.4 and 1026.17-1026.22. These rules are not burdensome on creditors. Indeed, the credit markets have been applying the 1981 simplified regime for thirty-seven years.

On the other hand, uniform and consistent disclosure of the cost of credit is essential to consumers. The math behind the numbers is daunting for most consumers and credit terms are

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[37] 46 Fed. Reg. 20848 (Apr. 7, 1981), *implementing* the Truth in Lending Simplification and Reform Act (Title VI of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96-221).
[38] 15 U.S.C. § 1606(c); Reg. Z §§ 1026.18(d), 1026.22(a).
[39] 15 U.S.C. §§ 1604(b), 1640(b), (c), (d).
[40] Reg. Z § 1026.22(a)(2).
[41] 15 U.S.C. § 1602(a) (purposes of TILA).
[42] *See* National Consumer Law Center, Consumer Credit Regulation § 5.3.2.1 (2d ed. 2015), *updated at* www.nclc.org/library.

not easily understandable. The greater the uniformity of disclosures—not just in the calculation rules but also in language, prominence, and order of presentation—the more likely consumers are to understand them and be able to compare the terms offered by creditors. Carefully crafted requirements are essential to the goal of achieving this uniformity.

Precise rules are also helpful for industry, so that companies know exactly what is required of them and each company that offers consumer credit does not have to draft language, devise disclosure forms, or obtain legal advice to resolve ambiguities. From 1968 until 2011 when the Federal Reserve Board had responsibility for Regulation Z, on many occasions industry representatives on the FRB's Consumer Advisory Committee commented that they prefer as much clarity and specificity as possible to enhance compliance and limit potential liability.

The CFPB should approach the question of revising Regulation Z with caution. Regulation Z's requirements are interdependent, so every change made has the potential of causing a chain of other consequences.

Any revisions to disclosure requirements must also build in systematic consumer testing. The FRB pioneered consumer testing as part of its reworking of the disclosure requirements for open-end credit pursuant to the Credit Card Accountability, Responsibility, and Disclosure Act of 2009,[43] and the CFPB put its combined TILA and RESPA mortgage loan disclosures through several rounds of consumer testing before finalizing the rule.[44] Consumer testing has often revealed widespread and serious misunderstanding of newly-drafted disclosures that regulators thought would be clear.

Finally, any revisions of Regulation Z that would affect auto finance—and most of the closed-end non-mortgage disclosure rules do affect auto finance—should be a joint rulemaking with the Federal Reserve Board (FRB), which retains jurisdiction over Regulation Z as it applies to a major segment of the auto finance market. It would enormously increase the complexity of the disclosure rules, and decrease their usefulness to consumers, if different rules applied to auto finance based on whether the consumer was dealing with an auto finance company or a buy-here-pay-here (BHPH) dealer, both of which are governed by the CFPB version of Regulation Z, as opposed to a non-BHPH auto dealer that is governed by the FRB's version.[45] So far, the FRB version and the CFPB version of these rules have stayed in sync, and the CFPB should not take any steps that would undermine that coordination.

2.2.2. The CFPB should implement an all-in finance charge definition and fully fee-inclusive APR.

If the CFPB chooses to revisit Regulation Z, we have a number of suggestions for ways it can be improved. We discuss two of those suggestions here. First, if the CFPB reopens the general closed-end credit disclosure requirements, we urge it to implement an all-in finance charge

[43] *See* 74 Fed. Reg. 5244, 5246-5250 (Jan. 29, 2009) (describing the testing methods and other research conducted before and during the rulemaking process).
[44] *See* 78 Fed. Reg. 79,730, 79,741-44 (Dec. 31, 2013) (describing the testing methods and other research conducted before and during the rulemaking process).
[45] 12 U.S.C. § 5519.

definition and a fully fee-inclusive APR. While the closed-end APR disclosure is far better than the one for open-end credit, it nonetheless has loopholes that are exploited by some lenders and that undermine TILA's primary goals of capturing the full cost of credit in the APR that is disclosed to consumers.

To achieve this goal, the APR should include *all* of the costs of credit. Otherwise, it is not an accurate representation of the true cost of credit, and does not allow the consumer to make apples-to-apples comparisons between credit offers. The current rules allow a swiss-cheese approach, that is, some fees are in and some are not.

The failure to mandate an all-in finance charge has been a longstanding concern of Congress and the Federal Reserve Board (FRB) dating back to at least 1995. At that time, Congress directed the FRB to study the issue.[46] The resulting FRB report suggested further debate. A 1998 joint HUD/FRB report again discussed the pros and cons of an all-in approach and recommended a hybrid methodology—the "required cost of credit test." Under this test, the finance charge would include the costs the consumer is required to pay to get the credit. This issue lay dormant until 2009. At that time, the FRB published a proposal to replace the current rule with a more inclusive approach based on several significant rationales discussed below. The FRB did not finalize this proposal prior to the transfer of its TILA rulemaking authority to the CFPB.[47] The CFPB revived this issue in 2012. After receiving comments, it decided in 2013 to postpone further consideration for at least five years and pending further data collection.[48] It is now five years later.

Allowing creditors to exclude significant components of the cost of credit from the calculation of the APR undermines the goals of the APR disclosure for several reasons, including those articulated by the FRB: 1) excluding certain fees undermines the effectiveness of the APR as a measure of the cost of credit; 2) the numerous exclusions from the finance charge encourage lenders to shift the cost of credit to the excluded fees or hide them in the cash price of goods or services; and 3) complexity of rules increases regulatory burden and litigation risk for lenders.[49]

Areas in which we see particular problems regarding APR disclosures include:

- *Disproportionately large application fees.* For example, Kinecta Federal Credit Union discloses a 15% APR on the payday loans it offers through Nix, but the $37.95 application fee on a 14-day $400 loan results in a true APR of over 260%.
- *Credit insurance and other add-on products.* Regulation Z only requires credit insurance to be included in the APR if it is mandatory. But some lenders steer virtually all borrowers into believing that credit insurance and other add-on products are required. In addition, most credit insurance products primarily benefit the creditor, both because the creditor receives substantial commissions and other compensation from selling the product and because, if the borrower makes a claim, the insurance proceeds go to pay off the debt.

[46] *See* 78 Fed. Reg. 79,730, 79,774 (Dec. 31, 2013) (describing this history).
[47] 78 Fed. Reg. at 79,774.
[48] 78 Fed. Reg. at 79,778-80.
[49] 78 Fed. Reg. at 79,774.

2.2.3. The CFPB should prevent evasions of TILA disclosure requirements through the open-end credit loophole.

As discussed above under open-end credit, Regulation Z's disclosure rules for open-end credit have big gaps that often prevent the APR from accurately reflecting the cost of credit. In addition to closing those loopholes so that the APRs for open- and closed-end credit are more uniform, the CFPB should prevent evasions through spurious open-end credit. For example, any credit that is required to be repaid in one or two payments should be deemed closed end credit. Advances that are repaid on a fixed schedule with fixed payments should also be disclosed in a way that is consistent with closed-end loan disclosures.

Preventing spurious use of open-end credit or disparities between open- and closed-end rules would simplify disclosures, make them more meaningful, and enhance comparison shopping. Creditor compliance would be simplified, litigation burdens reduced, and manipulations designed to avoid consumer protections would be avoided.

2.3. Regulation Z Requirements for Closed-End Mortgage Credit[50]

2.3.1. History of FRB and CFPB rulemaking for closed-end mortgages.

When Congress enacted TILA in 1968, it applied broadly to both mortgage and non-mortgage credit, subject to statutory exemptions. The FRB finalized Regulation Z in 1969.[51] At that time, Regulation Z contained two sections that specified the disclosure rules for all closed-end credit, sections 226.6 and sections 226.8. These sections were the ancestors of the current sections 1026.17 and 1026.18. The right of rescission that applies to some mortgage loans was housed in section 226.9 and now appears in sections 1026.15 (open-end) and 1026.23 (closed-end).

After its original enactment of TILA, Congress responded to particular concerns that arose regarding mortgage lending in 1994 (high cost loan abuses and reverse mortgages), 2008 (early disclosures for credit secured by a dwelling), 2009 (notification of transfer of ownership of the note; the identity of and contact information for the assignee; duty of servicers of securitized mortgage loan), and 2010 (the Dodd-Frank Act).

The FRB was busy during the same period until the transfer of its jurisdiction to the CFPB in 2011. The FRB both implemented Congressional amendments and mandated additional disclosures and protections for slices of the mortgage market, such as variable rate mortgages in 1987[52] and higher-priced mortgage loans in 2008.[53] This collection of regulations, both general and specific, makes up the "inherited" closed-end mortgage loan disclosure requirements.

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[50] This section does not discuss the TILA/RESPA integrated disclosure rules, which cover a large segment of the mortgage lending market, because they are rules adopted, not inherited by the CFPB.
[51] 34 Fed. Reg. 2002 (Feb. 11, 1969).
[52] 52 Fed. Reg. 48,665 (Dec. 24, 1987).
[53] 73 Fed. Reg. 44,522 (July 30, 2008).

As discussed in the next subsection, the inherited closed-end mortgage loan disclosure requirements have now been largely displaced by the TILA/RESPA integrated disclosure rules that the CFPB crafted after the Dodd-Frank Act was enacted. However, the inherited disclosure rules still apply to some categories of mortgage loans. In addition, as discussed below, Regulation Z's rescission rules for mortgage loans continue to apply generally, regardless of which set of disclosure rules applies to a particular loan.

2.3.2. The CFPB should not weaken the inherited disclosure rules for mortgage loans.

As noted in the preceding section, disclosure requirements for most mortgage transactions are found in regulations adopted since 2010, primarily the TILA/RESPA integrated disclosure rules. Those rules were addressed in our comments on the CFPB's adopted regulations. However, a few categories of closed-end mortgage transactions are subject to older, inherited disclosure rules (many of which also apply to non-mortgage credit).

Reverse mortgages make up the main category of mortgages covered by the inherited disclosure rules,[54] including some rules that were crafted specially for reverse mortgages.[55] Another section of these comments discusses Regulation Z's reverse mortgage provisions.

A second category of mortgage credit that is not subject to the new TILA/RESPA integrated disclosure rules is qualifying mortgage loans provided through housing assistance loan programs for low- and moderate-income households.[56] In addition, the TILA/RESPA integrated disclosure rules do not apply to manufactured-home financing unless it is secured by a manufactured home that is a dwelling and is also secured by real property.[57]

As discussed in more detail in section 2.2.1 of these comments, the CFPB should approach revisions to its inherited disclosure rules with caution. Those provisions are interlocking, so changes that appear small have the potential of causing a chain of other consequences. In addition, the FRB retains rulemaking authority over Regulation Z as applied to major segments of the auto financing industry, so a joint rulemaking would be necessary in order to coordinate the two versions of the inherited disclosure requirements. Moreover, the CFPB should not proceed without consumer testing. For all of these reasons, the CFPB should not revisit the inherited disclosure rules for mortgages at this time.

2.3.3. The CFPB should not weaken the inherited rules regarding the right to rescind a mortgage transaction.

The inherited parts of Regulation Z covering mortgages include the right to cancel. Consumers have an absolute right to cancel a mortgage during a three-day cooling-off period.[58] Thereafter,

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[54] *See* prefatory clause of 12 C.F.R. § 1026.18 (stating that the requirements of this section do not apply to mortgage transactions that are subject to § 1026.19(e) and (f)).
[55] See 15 U.S.C. § 1648(a); Reg. Z § 1026.33(b).
[56] Reg. Z § 1026.3(h) (providing that these loans are not subject to § 1026.19(e) and (f); as a result, they are not excluded from the disclosure requirements of § 1026.18 by that section's prefatory clause).
[57] Official Interpretations § 1026.18-3; 78 Fed. Reg. 79,730, 79,795-96 (Dec. 31, 2013).
[58] 15 U.S.C. § 1635.

a consumer may rescind the loan for up to three years only if the lender has failed to properly and accurately provide certain material disclosures.

The extended right to rescind when material disclosures are faulty is important for encouraging compliance with the Act's material disclosure requirements.[59] The rescission rights are also important to enforcing Congress's ban on dangerous terms and preventing consumers from being locked into high-cost loans.

In closed-end transactions, there is a short list of material disclosures that trigger the extended right to rescind. These disclosures have been deemed critical to the consumer: the primary cost of credit disclosures (the APR and the finance charge), the amount financed, the total of payments, and the payment schedule. Discrepancies between the creditor's disclosure of this numerical information and the accurate numbers, however, do not trigger rescission if they do not exceed generous tolerances.[60] In the context of a high-cost mortgage transaction, the information contained in the HOEPA notice is also considered "material," as is the presence of any of the contract terms prohibited by HOEPA. In the context of a higher-priced mortgage transaction, a prepayment penalty clause also triggers the extended right of rescission.[61]

TILA's rescission remedy is available only in consumer credit transactions that are secured by the consumer's principal dwelling and that do not finance the purchase of the home. Cash-out, refinance, and home improvement financing loans are examples of covered transactions. Congress made significant changes to the rescission rules in 1995 when the tolerances for errors in the finance charge disclosures were expanded.

The TILA rescission provisions reflect Congress's desire to keep homeowners from placing their homes in jeopardy without a clear understanding of the risks and benefits of the transaction.[62] The rescission right is statutory and cannot be taken away by regulation. Moreover, the lending industry has functioned in this environment for decades. There is no need for the CFPB to reopen the rescission provisions of Regulation Z.

2.3.4. If the CFPB revisits the inherited closed-end mortgage credit rules, we suggest changes to the special rules governing reverse mortgages.

Reverse mortgages allow older borrowers to convert a portion of their home equity into cash without the immediate need for repayment of the loan. In 1994, Congress recognized that disclosures tailored to reverse mortgage products should be mandated and added section 1648 to TILA.[63] The additional information required for reverse mortgages includes a pre-closing notice

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[59] *See* WMC Mortgage L.L.C. v. Baker, 2012 WL 628003, at *14 n.22 (E.D. Pa. Feb. 28, 2012) (comparing the purpose of the three-day right with that of the extended right to rescind).

[60] Reg. Z §§ 1026.22(a); 1026.18(d)(1)(i); 1026.23(g); 1026.23(h)(2) (finance charge tolerance when lender has initiated foreclosure is smaller--$35).

[61] Reg. Z § 1026.23(a)(3)(ii).

[62] U.S. Rep. No. 368, 96th Cong., 2d Sess. 28, reprinted in 1980 U.S.C.C.A.N. 236, 264 ("This provision was enacted to give the consumer the opportunity to reconsider any transaction which would have the serious consequence of encumbering the title to his home.").

[63] Pub. L. No. 90-

containing a good faith projection of closing cost, itemization of loan terms, an explanatory table, and a statement that the borrower is not obligated to complete the transaction.[64]

Currently, almost all reverse mortgages are federally-insured Home Equity Conversion Mortgages (HECMs), overseen by the U.S. Department of Housing and Urban Development (HUD). The agency issued final rules on January 19, 2017, that updated the regulations governing the HECM program.[65] Aside from HUD's regulations, all reverse mortgages are subject to RESPA and fair lending laws, as well as to TILA.

If the CFPB undertakes revisions of Regulation Z, we urge it to further strengthen the rules and add substantive protections for older homeowners, especially for those who may take out non-HECM proprietary loans in the future. Disclosures are inadequate to protect vulnerable older adults from the well-documented abuses associated with reverse mortgages. Moreover, providing safe harbors for reckless industry practices would encourage abusive lending.

The CFPB should use its authority to identify and ban unfair, deceptive and abusive practices and add protections to prevent the eviction of non-borrowing spouses after the death of the borrower-spouse; prohibit cross-selling of other financial products; require independent counseling provided by individuals employed by HUD-approved counseling organizations; require new and earlier disclosures tailored to reverse mortgages; and ban deceptive marketing and solicitation.

3. Regulation X (Real Estate Settlement Procedures Act)

3.1. Mortgage settlement provisions of Regulation X

3.1.1. The ban on kickbacks and referral fees is effective and should not be weakened.

RESPA, as implemented by Regulation X, is the primary federal law directly addressing residential mortgage settlements.[66] RESPA was enacted as the result of a congressionally mandated investigation into settlement costs.[67] In 1972 HUD and the VA jointly released a report showing that settlement costs were more than 10% of the average purchase money mortgage.[68] The report also found that settlement charges often were based on factors unrelated to the cost of providing the service.[69] RESPA and Regulation X are intended to ensure that consumers in real estate transactions receive timely information about the nature and cost of the

[64] Reg. Z § 1026.33.
[65] *See* 82 Fed. Reg. 7094 (Jan. 19, 2017).
[66] For RESPA purposes, "settlement means the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan." Reg. X, 12 C.F.R. § 1024.2(b) (emphasis in original). Settlement is also called "closing" and "escrow" in some parts of the country. Reg. X, 12 C.F.R. § 1024.2(b). See generally Office of the Comptroller of the Currency, Comptroller's Handbook, Real Estate Settlement Procedures Act (Apr. 2015), available at http://occ.gov (handbook summarizing RESPA for bank examiners).
[67] Elizabeth Renuart & Jen Douglas, The Limits of RESPA: An Empirical Analysis of the Effects of Mortgage Cost Disclosures, 21 Hous. Pol'y Debate 481, 483–486 (Sept. 2011), available at http://papers.ssrn.com.
[68] *Id.*
[69] *Id.*

settlement process and to protect consumers "from unnecessarily high settlement charges caused by certain abusive practices."[70]

RESPA and Regulation X accomplish these purposes through a combination of disclosure requirements and substantive restrictions. The key substantive restrictions are prohibitions of kickbacks, referral fees, and splitting of fees except for services actually performed.[71] These prohibitions are vital to RESPA's original purpose. Kickbacks, fee splitting, and referral fees are almost impossible for consumers to detect, so comparison shopping will not be enough for self-protection—especially where these practices were once widespread.

The statute and regulation were carefully crafted to make exceptions for practices that the drafters deemed reasonable accommodations to the realities of the mortgage settlement industry. In particular, the statute and the rule provide for referrals between affiliated businesses[72] and specify the payments that such businesses can exchange without violating the statute.[73] To fall within this exception, service providers must meet certain disclosure requirements and, generally, allow the consumer to choose another provider.

There has been some criticism of the CFPB's investigations into whether some companies' marketing services agreements (MSAs) violate the ban on referral fees.[74] Regulation X does not prohibit MSAs *per se*. As explained by a California district court, the question is "whether marketing and promotion are just euphemisms for prohibited referrals."[75] Any claim that Regulation X needs to be reopened in order to allow legitimate MSAs that are not covers for illegal referrals is unfounded.

After more than 40 years, the mortgage industry has long been accustomed to Regulation X compliance, and the rule continues to meet the needs of mortgage borrowers. With the exception of the TILA/RESPA integrated disclosures (discussed in our adopted regulations comments), there have been few changes to Regulation X's origination provisions in recent years. And we see no need for any other changes. The rule remains relevant and effective as it currently stands.

3.1.2. If the CFPB opens Regulation X for amendments, it should clarify the application to manufactured homes and should tighten the restrictions on affiliated business agreements.

While we do not recommend opening Regulation X for amendments, if the CFPB does so, it should consider two changes.

First, the CFPB should clarify that Regulation X applies to all manufactured homes titled as real property—something the Act already does, but which the regulation muddies. RESPA's definition of "federally related mortgage loan" includes loans secured by manufactured homes

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[70] Pub. L. No. 93-533, § 2(a), 88 Stat. 1724 (1974) (codified at 12 U.S.C. § 2601(a)).
[71] 12 U..S.C. § 2607; 12 C.F.R. § 1024.14.
[72] *See* 12 U.S.C. § 2602(7) (defining "affiliated business arrangement").
[73] 12 U.S.C. § 2607(c); 12 C.F.R. § 1024.15.
[74] *See* Kate Berry, *CFPB Takes Aim at Referral Fees*, Am. Banker, Mar. 19, 2015, *available at* www.americanbanker.com.
[75] Henson v. Fid. Nat'l Fin., Inc., 18 F. Supp. 3d 1006, 1014 (C.D. Cal. 2014).

that are titled as real property, without regard to whether the loan is secured by land. Regulation X, however, modifies the definition to require a lien on land. When the regulation was adopted there was no explanation for this addition and there is no rational basis for it. For many reasons, the buyer of a manufactured home may choose to encumber just the home, without also encumbering the land on which it sits. Moreover, manufactured homes can be titled as real estate in a number of states even when they are on land that the homeowner does not own, in which case a lien on the land is not even possible. The CFPB should abandon this distinction and clarify that the regulation applies to all manufactured homes titled as real property.

Second, the affiliated business rule is a gaping loophole in RESPA's otherwise strong ban on referral fees and kickbacks. The statute clearly allows affiliated business arrangements, but Regulation X should more strictly regulate them. Service providers know that consumers have difficulty shopping for settlement services and must accept whatever the provider offers. As a result, merely disclosing the arrangement is not enough. The CFPB should ensure that the arrangement is legitimate and not merely a cover for illegal conduct.

3.2. Inherited Servicing Provisions of Regulation X

3.2.1. The inherited mortgage servicing rules provide important protections for consumers.

As originally enacted in 1974, the Real Estate Settlement Procedures Act (RESPA) focused primarily on giving consumers in real estate transactions timely information on the nature and costs of the settlement process. Only one aspect of mortgage servicing, the management of escrow accounts, was addressed in the 1974 Act. It requires servicers to properly calculate the amount required to be deposited in escrow accounts and provide annual statements to borrowers.[76]

The Cranston-Gonzalez National Affordable Housing Act of 1990 expanded the scope of RESPA by more broadly addressing mortgage servicer practices.[77] These amendments to RESPA came in response to numerous reports of consumer complaints about mortgage servicing problems, particularly those related to the transfer of servicing.[78] The amendments generally require servicers to respond to borrower inquiries and correct account errors, disclose information relating to the transfer of servicing operations, and make timely payments out of escrow accounts.

The Department of Housing and Urban Development (HUD) was the agency originally designated to issue regulations under RESPA. The initial rules issued by HUD, found in Regulation X, were inherited by the CFPB when rulemaking authority for RESPA was transferred. For the most part, these inherited rules properly implemented the pre-Dodd-Frank Act statutory servicing provisions and have been effective in curbing some of the worst servicer

[76] 12 U.S.C. § 2609.
[77] Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4079 (1990) (codified at 12 U.S.C. § 2605).
[78] U.S. Gen. Accounting Office, Report, Home Ownership—Mortgage Servicing Transfers Are Increasing and Causing Borrower Concern (1989); Wanger v. EMC Mortg. Corp., 127 Cal. Rptr. 2d 685 (Cal. Ct. App. 2002).

abuses, establishing minimum standards in the servicing industry, and making servicers more responsible to consumers.

The CFPB made some minor revisions and improvements to the inherited servicing rules as part of the 2013 RESPA and TILA Servicing Rule.[79] Some further improvements to the rules should be made, including the removal of several exemptions from coverage that had been adopted by HUD, as discussed below. However, the consumer protections in the inherited servicing rules should not be eroded.

3.2.2. The inherited rules should be preserved, but if changes are considered, certain provisions should be strengthened consistent with the consumer protection purposes of RESPA.

Most of the inherited Regulation X servicing rules are consistent with the provisions of RESPA. In fact, HUD's approach was often to repeat the statutory language, almost verbatim, in Regulation X. While this was unnecessary, there is no reason for the CFPB to reconsider most of the inherited rules and they should be preserved.

If changes are considered by the CFPB, we urge the CFPB to strengthen the following rules consistent with the consumer protection purposes of RESPA. If the CFPB does consider reopening the rule, we would be happy to provide more detail about the need for these improvements and their legal basis.

3.2.2.1. The CFPB should remove exemptions for escrow account requirements based on borrower default or bankruptcy.

The annual escrow account statement required by RESPA section 2609 gives the borrower a summary of all of the account deposits and disbursements made during the prior year. It also notifies the borrower of any surpluses, shortages, and deficiencies that exist and the action the servicer intends to take in response. Despite the mandatory language found in RESPA and the lack of any statutory exemption, HUD provided in Regulation X that a servicer is exempt from providing a borrower with an annual escrow statement if the borrower is more than thirty days overdue in payments at the time the servicer conducts the escrow analysis.[80] This exemption also applies when the mortgage account is in foreclosure or when the borrower is in a bankruptcy proceeding.[81]

This exemption is inconsistent with both the purpose behind RESPA's escrow disclosure provision and the policy of promoting homeownership through loss mitigation efforts aimed at avoiding foreclosure. For borrowers who are experiencing temporary financial difficulties and barely more than a month behind in payments, the exemption deprives them of critical information about their accounts, such as the new monthly payment amount, which may ultimately cause them to fall further behind. The exemption for borrowers in default should be

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[79] The inherited provisions are now found in Subpart C of Regulation X.
[80] Reg. X, 12 C.F.R. § 1024.17(i)(2).
[81] *Id*.

eliminated, or, if amended, should not apply to borrowers who are less than six months in arrears or are seeking a loss mitigation option.

The current exemption is even less rational in the bankruptcy setting, in which HUD failed to distinguish between borrowers who are current with their mortgage payments at the time of the bankruptcy filing and intend to remain current, with those who are in default.[82] Nor does the rule treat differently borrowers who are curing a mortgage default in a Chapter 13 bankruptcy. The CFPB should eliminate the bankruptcy exemption entirely or replace it with an exemption similar to that recently adopted by the CFPB with respect to bankruptcy periodic mortgage statements.[83]

Another exemption created by HUD deals with the duty of servicers to make timely payments out of escrow. RESPA section 2605(g) requires a servicer to make payments from an escrow account for taxes, insurance, and other charges in a timely manner as such payments become due. This provision requires timely disbursements out of escrow in order to protect borrowers from being charged interest and penalty fees for late tax and insurance payments, and to ensure that borrowers' insurance coverage does not lapse. When HUD issued regulations to implement the timely escrow payment requirement, it again created an exemption from the statutory mandate. Regulation X provides that the obligation does not apply when the borrower's mortgage payment is more than 30 days overdue--even if there are sufficient funds in the escrow account to cover the payment from escrow.[84]

The exemption was partially overridden by the CFPB as part the 2013 Servicing Rule, in implementing the force-placed insurance requirements under the Dodd-Frank Act. Servicers have a duty to disburse funds in a timely manner to pay the borrower's hazard insurance premium charges unless the servicer is unable to disburse funds from the borrower's escrow account.[85] However, the change does not apply to disbursements for property taxes, homeowner association fees and other payments from escrow that are not for hazard insurance. Because the exemption is triggered when a borrower is barely more than a month behind on payments, often the servicer has enough borrower funds in the escrow account to pay the taxes and other charges when they come due. At a minimum, the exemption should not apply when there are sufficient funds in the borrower's escrow account to make the payment.

3.2.2.2. The CFPB should ensure that the error resolution process protects borrowers from foreclosure when the error relates to the alleged default or grounds for foreclosure.

As part of 1990 amendments to RESPA, Congress created a robust procedure for borrowers to dispute account errors made by servicers, by sending a qualified written request. If the error relates to a payment dispute, Congress made clear that the borrower should not suffer any

[82] As evidence that the bankruptcy exemption was not well-reasoned, it is worth noting that former § 3500.17(i)(2) did not include any discussion of bankruptcy when first promulgated under the notice and comment rulemaking procedure. Prior to the regulation's effective date, however, HUD added the bankruptcy exemption as a "technical correction" to the rule language without soliciting comment. *See* 60 Fed. Reg. 8812 (Feb. 15, 1995).
[83] Reg. Z, 12 C.F.R. § 1026.41(e)(5)(i).
[84] Reg. X, 12 C.F.R. §§ 1024.17(k)(1), 1024.17(k)(2).
[85] Reg. X. 12 C.F.R. § 1024.17(k)(5)(i).

adverse consequences while the dispute is being resolved. During the sixty-day period beginning upon receipt by a servicer of a qualified written request or notice of error relating to a payment dispute, the servicer cannot give any adverse information to a credit reporting agency concerning the payments subject to the request.[86]

However, HUD undermined this protection by providing in Regulation X that a servicer's receipt of a notice of error does not prevent it from taking the more drastic step of pursuing collection remedies during the sixty-day period—including foreclosure on the borrower's home.[87] This inherited provision of Regulation X was retained by the CFPB in the reissuance of regulations dealing with error resolution in the 2013 RESPA Servicing Rule, except with respect to a notice of error based on the servicer's noncompliance with the loss mitigation dual tracking protections under sections 1024.41(f), 1024.41(g), or 1024.41(j).[88]

HUD based its ill-conceived provision on a misinterpretation of RESPA section 2615, which states the uncontroversial proposition that nothing in RESPA affects the "validity or enforceability" of loan agreements or mortgages in connection with federally related mortgage loans. But section 2615 cannot possibly mean that mortgage contract provisions that squarely conflict with RESPA are nevertheless enforceable. The more logical construction of section 2615 in the context of the entire statutory scheme is that it is intended to serve the same function as a severability clause in a contract. In other words, if a mortgage contract contains a provision that RESPA makes illegal, the contract as a whole nevertheless remains valid and enforceable even though the individual provisions that violate RESPA are not enforceable. Congress could not possibly have intended that a servicer would be permitted to foreclose on a borrower before responding to a borrower's notice of error that asserts that the loan is not in default or that the servicer has no grounds under the mortgage or applicable state law to foreclose.

3.2.2.3. The transfer of servicing notice should inform borrowers of their dispute rights, and provide additional information about account loan status.

If the servicing of a mortgage is transferred after the mortgage loan is made, RESPA requires that the transferor and transferee servicers give the borrower a written notice containing important information about the transfer.[89] Much of the information in the notice is required by RESPA, though HUD added some additional information when implementing the requirement in Regulation X. Unfortunately, the CFPB removed a critical disclosure from the transfer notice when revising this inherited rule.

Mortgage servicing errors, particularly those relating to payment application, generally are more likely to occur at the time of servicing transfer. In fact, evidence of borrower complaints about servicing transfers was what originally prompted Congress to add the first servicing requirements

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[86] 12 U.S.C. § 2605(e)(3); Reg. X, 12 C.F.R. § 1024.35(i).
[87] Reg. X, 12 C.F.R. § 1024.21(e)(4)(ii) (vacated and replaced by 12 C.F.R. § 1024.35(i)(2), effective Jan. 10, 2014).
[88] Reg. X, 12 C.F.R. § 1024.35(i)(2) ("Except as set forth in this section with respect to an assertion of error under paragraph (b)(9) or (10) of this section, nothing in this section shall limit or restrict a lender or servicer from pursuing any remedy it has under applicable law, including initiating foreclosure or proceeding with a foreclosure sale.").
[89] 12 U.S.C. § 2605(b)(3).

to RESPA in 1990.[90] Because of this potential for errors, there is perhaps no better time to inform borrowers of the right under RESPA section 2605(e) to dispute account errors and obtain account information than at the time of servicing transfer. Thus, it is not surprising that HUD had initially required in Regulation X that the servicing transfer notice include a statement of the borrower's rights in connection with error resolution, including any exclusive address for sending qualified written requests.[91]

However, the CFPB removed this requirement from Regulation X as part of the 2013 RESPA Servicing Rule. The CFPB stated that "detailed information about the error resolution and information request process may not always be optimally located in the transfer notice" and that borrowers should be informed of this process "through mechanisms that do not necessarily depend on the transfer of servicing."[92] The CFPB suggested that servicers should develop policies and procedures to inform borrowers, noting the adoption of section 1024.38(b)(5). However, the CFPB did not mandate any process or method that servicers must use to inform borrowers of dispute or information rights. Significantly, neither the periodic billing statement (§ 1026.41) or the early intervention notice (§ 1024.39) rule requires the servicer to inform the borrower of the right to dispute errors or obtain account information. In fact, none of the mandatory contacts with borrowers require disclosure of these rights.

The CFPB should not assume that consumers are aware of their RESPA rights or that they will exercise these rights if they are merely provided servicer contact information on a monthly statement that they can use if they have "questions." If they rely upon this contact information, borrowers may incorrectly assume that an inquiry or dispute may be made orally by calling the servicer, or that a letter sent to one of the many servicer addresses on various notices, rather than the servicer's exclusive address, will be valid.

The reasons given by the CFPB for this deletion were not compelling at the time, and have proven to be even less convincing in light of continuing problems with servicing transfers. The decision to delete this information from the transfer notice should be reconsidered by the CFPB. In addition, since it is so common for errors in crediting of payments to arise when servicing is transferred, the CFPB should require transfer notices to provide specific information that will enable errors to be identified and corrected, including a statement as to whether the transferee servicer deems the borrower to be current with payments as of the effective date of the transfer.

3.2.2.4. The exemptions for reverse mortgages and HELOCs should be repealed or revised.

Despite unambiguous statutory language, HUD construed the 1990 RESPA amendments as not applying to home equity lines of credit (HELOCs) covered by TILA and Regulation Z.[93] Several

[90] U.S. Gen. Accounting Office, Report, Home Ownership—Mortgage Servicing Transfers Are Increasing and Causing Borrower Concern (1989).
[91] Reg. X, former 12 C.F.R. § 1024.21(d)(3)(vii) (vacated and replaced by § 1024.33(b)(4), effective Jan. 10, 2014).
[92] 78 Fed. Reg. 10730 (Feb. 14, 2013).
[93] Regulation X stated that it did not apply to "subordinate lien loans or open-end lines of credit (home equity plans) covered by the Truth in Lending Act and Regulation Z, including open-end lines of credit secured by a first lien." Former Reg. X, 12 C.F.R. § 1024.21(a) (removed effective January 10, 2014).

courts had held that this exemption in the regulation was not entitled to deference because it clearly conflicts with the RESPA.[94]

With the transfer of rulemaking authority from HUD to the CFPB, the CFPB had an opportunity to repeal this exemption. However, the CFPB elected to retain an exemption for HELOCs.[95] Our comments to the adopted servicing regulations discuss why this exemption should be repealed. We again urge the CFPB to reconsider the retention of the HELOC exemption in Regulation X for the reasons stated in our comments for the adopted regulations.

The definition of "federally related mortgage loan" in Regulation X includes reverse mortgages or home equity conversion mortgages.[96] Thus, reverse mortgages are generally subject to the RESPA requirements. However, Regulation X exempts the servicer of a reverse mortgage from the requirements relating to (1) general servicing policies, procedures, and requirements,[97] and (2) early intervention contacts with borrowers about loss mitigation, continuity of contact with borrowers, and evaluation of applications for loss mitigation options.[98]

The exemption leaves reverse mortgage borrowers with few protections from servicing abuses in several critical areas, including loss mitigation. While reverse mortgage servicers typically evaluate borrowers for loss mitigation after a default on property charges, they are not required to comply with the procedural requirements of the loss mitigation rule. The exemption also prevents reverse mortgage borrowers from seeking redress for violations of the CFPB's procedural requirements for evaluation of loss mitigation applications. There is no logical reason to exclude reverse mortgage servicers from the rules governing loss mitigation, continuity of contact, and early intervention, and the exemption should be repealed.

4. Mortgage Assistance Relief Services Rule (Regulation O, 12 C.F.R. Part 1015)

4.1. The MARS Rule Provides Vital Protection to Distressed Homeowners.

The Mortgage Assistance Relief Services (MARS) rule prohibits various forms of misconduct associated with for-profit services that claim to help homeowners avoid foreclosure. The Federal Trade Commission adopted the Mortgage Assistance Relief Services (MARS) rule nearly a decade ago. Since then, rulemaking authority has passed to the CFPB, but the FTC retains shared enforcement authority. The MARS rule has proven extremely valuable for protecting desperate homeowners from charlatans trying to bilk them of their last dollar.

The MARS rule was adopted near the peak of the last foreclosure crisis as a new breed of

[94] Hawkins-El v. First Am. Funding, L.L.C., 891 F. Supp. 2d 402, 408 (E.D.N.Y. 2012) (HELOC is subject to RESPA qualified written request provisions despite contrary Regulation X exemption), *aff'd*, 529 Fed. Appx. 45 (2d Cir. 2013); Cortez v. Keystone Bank, 2000 WL 536666, at *11 (E.D. Pa. May 2, 2000). *See also* MorEquity, Inc. v. Naeem, 118 F. Supp. 2d 885, 901 n. 7 (N.D. Ill. 2000) (noting in dicta that regulation conflicts with RESPA).
[95] Reg. X, 12 C.F.R. § 1024.31 (defining "mortgage loan" for purposes of Subpart C of Regulation X not to include "open-end lines of credit (home equity plans").
[96] Reg. X, 12 C.F.R. § 1024.2 (subsection 1(ii)(F) of definition of "federally related mortgage loan").
[97] Reg. X, 12 C.F.R. §§ 1024.30(b)(2), 1024.38.
[98] Reg. X, 12 C.F.R. §§ 1024.30(b)(2), 1024.39 through 1024.41.

scammer took advantage of desperate homeowners. At that time thousands of homeowners sought loan modifications from their mortgage servicers in hopes of avoiding foreclosure. Servicers, however, were overwhelmed and understaffed, frequently botching their response to modification requests and often dragging their feet for months. Scammers—and some well-meaning but unqualified individuals—stepped in, claiming that they could act as intermediaries between the homeowner and servicer for a hefty fee. They claimed that they had special skills or contacts that would enable them to arrange a loan modification for the homeowner. But, far more often than not, they did nothing but take the homeowner's money without delivering the promised assistance.

4.2. The MARS Rule Should Remain Intact.

Even though the foreclosure crisis has abated, the MARS rule remains necessary. Foreclosure rescue scams were problematic before the crisis and continue to be so. Legal advocates inform us that they regularly hear from consumers who have been bilked by these scams. The FTC's website shows a steady flow of enforcement actions under the MARS rule.[99]

The rule has not been a burden on law-abiding businesses. In 2011 the FTC announced that it would not enforce the rule's disclosure requirements and advance-fee ban against law-abiding real estate agents.[100] The CFPB has continued that policy.[101] Furthermore, as far as we can determine, nobody has responded or objected to either agency's request for renewed Paperwork Reduction Act clearance for the MARS rule's information collection requirements.[102] Therefore we believe that there is no need to limit the scope of the rule or any of its requirements.

4.3. The CFPB Should Increase MARS Enforcement.

While the FTC has actively enforced the MARS rule since it became effective, the CFPB has been more lax. This is a problem for the public because the FTC has inadequate resources to properly police the market.

In particular, we recommend focusing enforcement efforts on MARS providers that claim to be legal service providers. A review of the FTC's list of enforcement actions and of the consumer complaints we have received indicates that many of the MARS scams falsely advertise that they are affiliated with an attorney or otherwise provide legal assistance. We are not referring to

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[99] *See* https://www.ftc.gov/news-events/media-resources/consumer-finance/mortgage-relief-scams.

[100] Enforcement Policy Statement on Real Estate Professionals and the Mortgage Assistance Relief Services (MARS) Rule (July 14, 2011), available at https://www.ftc.gov/public-statements/2011/07/enforcement-policy-statement-real-estate-professionals-mortgage-assistance.

[101] Bureau of Consumer Financial Protection, Identification of Enforceable Rules and Orders , 76 Fed. Reg. 43569, 43570 (July 21, 2011) (stating that the CFPB will abide by the "official commentary, guidance, and policy statements" of the transferring agency for all rules that ares being transferred to CFPB's jurisdiction; list includes FTC's MARS rule).

[102] *See* 82 Fed. Reg. 8425 (Jan. 25, 2017) (two comments filed but not publicly posted to regulations.gov; stating "On November 17, 2016, the FTC sought public comment on the information collection requirements associated with Regulation O. 81 FR 81140. No germane comments were received."); 80 Fed. Reg. 43762 (July 23, 2015) (no comments filed); 80 Fed. Reg. 25282 (May 4, 2015) (one comment filed but not publicly posted to regulations.gov); 77 Fed. Reg. 25439 (Apr. 30, 2012) (no comments filed); 77 Fed. Reg. 2685 (Jan. 19, 2012) (only one nongermane comment filed).

ordinary law firms or nonprofit legal services providers that act in the ordinary course of an attorney-client relationship. Instead, we see advertisements for organizations that either have no attorney on staff or that have a ratio of hundreds to thousands of clients per attorney. Such organizations use any attorney staff as a fig leaf even though the attorneys are not assisting their customers, not providing legal assistance, and not adequately supervising the nonattorney staff. This usually results in blatant violations of the MARS rule's ban on taking payment before delivering the promised relief. We urge the CFPB to take more aggressive action against this type of MARS provider.

5. The FTC Mortgage Advertising Rule

5.1 History of the adoption of the mortgage advertising rule

The Mortgage Advertising Rule, currently found at 12 C.F.R. Part 1014, was originally adopted pursuant to Section 626 of the Omnibus Appropriations Act of 2009.[103] As amended in 2010 by the Credit CARD Act,[104] the statute mandated the FTC to initiate a rulemaking proceding "relat[ing] to unfair or deceptive acts or practices regarding mortgage loans."[105]

The FTC issued two rules pursuant to this authority: the Mortgage Assistance Relief Services rule discussed in the preceding section, and the Mortgage Advertising Rule discussed here.

The FTC published an advance notice of proposed rulemaking and a call for comments on the Mortgage Advertising Rule in 2009[106] and a notice of proposed rulemaking in 2010.[107] It issued the final rule in 2011,[108] numbering it as 16 C.F.R. § 321.3.

The statutory authority for the FTC to adopt this rule was identified as one of the enumerated statutes that was transferred to the CFPB by the Dodd-Frank Act.[109] On December 16, 2001, the

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[103] Pub. L. 111-8, Sec. 626(a), March 11, 2009, 123 Stat 524 ("Within 90 days after the date of enactment of this Act, the Federal Trade Commission shall initiate a rulemaking proceeding with respect to mortgage loans in accordance with section 553 of title 5, United States Code. Any violation of a rule prescribed under this subsection shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices.").
[104] Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act of 2009), PL 111-24, § 511(a) May 22, 2009, 123 Stat 1734. This is an uncodified provision that appears as a note to 15 U.S.C. 1638.
[105] The provision reads:
(1) Within 90 days after the date of enactment of this Act, the Federal Trade Commission shall initiate a rulemaking proceeding with respect to mortgage loans in accordance with section 553 of title 5, United States Code. Any violation of a rule prescribed under this subsection shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices. Such rulemaking shall relate to unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services.
(2) Paragraph (1) shall not be construed to authorize the Federal Trade Commission to promulgate a rule with respect to an entity that is not subject to enforcement of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) by the Commission.
[106] 74 Fed. Reg. 26118 (June 1, 2009).
[107] 75 Fed. Reg. 60352 (Sept. 30, 2010).
[108] 76 Fed. Reg. 43826 (July 22, 2011).
[109] 12 U.S.C. § 5481(12)(Q).

CFPB published the rule without substantive change as an interim final rule, renumbering it as 12 C.F.R. Part 1014.[110] This rule, along with a number of other inherited rules, was published without change as a final rule in 2016.[111]

5.2. The CFPB should not reopen the mortgage advertising rule.

The mortgage advertising rule begins with a general prohibition of "any material misrepresentation, expressly or by implication, in any commercial communication, regarding any term of any mortgage credit product."[112] It then lists 19 examples of topics on which misrepresentations are forbidden.[113] It also prohibits waiver of its requirements.[114] There is no private cause of action to enforce this rule, so it is enforced solely by federal and state governmental agencies. Since deceptive practices have been prohibited by the FTC Act for decades,[115] the primary function of the rule is to provide more specificity to law-abiding businesses about the types of misstatements they should avoid, and to guide and enhance enforcement.

Mortgage lending has, of course, changed since the adoption of this rule in 2011, but those changes do not show a need to amend the rule. First, the list of examples in the rule is quite thorough, so changes in mortgage lending are unlikely to lead to misrepresentations that would not be encompassed by one of the examples. But amendments to the rule would be unnecessary in any event because the rule, with its general prohibition followed by examples, was drafted so that it could apply to newly-emerging misrepresentations without needing to be amended.

The FTC's promulgation of the rule was not controversial, drawing only 22 comments. In adopting the rule, the FTC took a balanced approach. It declined to make certain changes proposed by industry commenters, but it also rejected a number of proposals from a group of

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In addition, this rulemaking authority was repeated in a later section of the Dodd-Frank Act, 12 U.S.C. § 5538, which reads:

(a)(1) The Bureau of Consumer Financial Protection shall have authority to prescribe rules with respect to mortgage loans in accordance with section 553 of Title 5. Such rulemaking shall relate to unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services. Any violation of a rule prescribed under this paragraph shall be treated as a violation of a rule prohibiting unfair, deceptive, or abusive acts or practices under the Consumer Financial Protection Act of 2010 and a violation of a rule under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices.

(2) The Bureau of Consumer Financial Protection shall enforce the rules issued under paragraph (1) in the same manner, by the same means, and with the same jurisdiction, powers, and duties, as though all applicable terms and provisions of the Consumer Financial Protection Act of 2010 were incorporated into and made part of this subsection.

(3) Subject to subtitle B of the Consumer Financial Protection Act of 2010, the Federal Trade Commission shall enforce the rules issued under paragraph (1), in the same manner, by the same means, and with the same jurisdiction, as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made part of this section.

[110] 76 Fed. Reg. 78130 (Dec. 16, 2011).

[111] 81 Fed. Reg. 25323 (April 28, 2016).

[112] 12 C.F.R. § 1014.3.

[113] 12 C.F.R. § 1014.3(a) through (s).

[114] 12 C.F.R. § 1014.4.

[115] 15 U.S.C. § 45(a).

state consumer credit regulators--the Conference of State Bank Supervisors, the American Council of State Savings Supervisors, and the National Association of Consumer Credit Administrators--to include stronger provisions in the rule. These regulators had asked the FTC to include disclosure requirements in the rule, to require mortgage brokers to disclose that they are not lenders, to provide in the rule that providing substantial or support to those engaged in deceptive mortgage advertising is a violation, to require disclosures and the loan contract to be in a language other than English when a lender advertises in that other language, and to require that advertisers retain records for three to four years.[116] The FTC did not adopt any of these suggestions.

While the rule could have been stronger if the FTC had adopted the suggestions of the state consumer credit regulators, it represents a balanced approach. Reopening this rulemaking proceeding should not be a priority of the CFPB at this time. Instead, we recommend that the CFPB focus on the higher-priority topics that we have highlighted in our other comments in response to the CFPB's series of RFIs. If the CFPB chooses to reopen the rule, however, we recommend that the CFPB give further consideration to adoption of the recommendations of the state regulators.

* * *

Thank you for considering these comments.

Yours very truly,

Allied Progress
Americans for Financial Reform
Arizona Community Action Association
Arkansans Against Abusive Payday Lending
Atlanta Legal Aid Society, Inc.
CASH Campaign of Maryland
Center for NYC Neighborhoods
Center for Responsible Lending
Consumer Action
Consumer Federation of America
Equal Justice Society
Florida Alliance for Consumer Protection
Heartland Alliance for Human Needs & Human Rights
Housing Options & Planning Enterprises, Inc.
Illinois People's Action
Main Street Alliance
Maryland Consumer Rights Coalition
Mississippi Center for Justice
National Association of Consumer Advocates
National Association of Social Workers
National Consumer Law Center (on behalf of its low income clients)

[116] 76 Fed. Reg. 43826 (July 22, 2011).

National Fair Housing Alliance
National Housing Law Project
Neighborhood Housing Services of Baltimore
New Jersey Citizen Action
People's Action Institute
Public Counsel
Public Justice Center
Public Law Center
Texas Appleseed
U.S. PIRG
West Virginia Center on Budget and Policy

June 25, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2018-0012 -- Request for Information Regarding the Bureau's Inherited Regulations and Rulemaking Authorities -- **Regulation Z (TILA), X (RESPA) and FTC mortgage rules**

Dear Acting Director Mulvaney,

The undersigned consumer, community, civil rights and legal services groups submit these comments in response to the Request for Information ("RFI") issued by the Consumer Financial Protection Bureau ("CFPB") regarding its inherited regulations and rulemaking authorities.

These comments focus on the aspects of the following regulations that the CFPB has inherited and has not changed: Regulation Z (Truth in Lending Act), Regulation X (Real Estate Settlement Procedures Act), Regulation N (FTC rules on mortgage acts and practices), and Regulation O (FTC rules on mortgage assistance relief services). Many of our organizations have also joined comments on other inherited regulations, including comments governing electronic payments, credit reporting, fair lending, Property Assessed Clean Energy (PACE) loans, and other topics.

In general, we support these regulations and urge the CFPB not to weaken them. While there can always be improvements to any rules, these rules are working well overall. In light of the other work presently before the CFPB, updating these regulations is not a current priority and we urge the CFPB to spend its limited resources on other topics at this time.

If the CFPB chooses to revisit the open-end credit provisions of Regulation Z, we urge it to ban deferred interest credit cards, close loopholes that omit fees from the finance charge and APR, and protect consumers from unauthorized use of convenience checks. If it chooses to reopen Regulation Z's closed-end credit provisions, we urge it to implement an all-in finance charge definition, prevent evasion of disclosure requirements by improperly treating extensions of credit as open-end, and improve protections for reverse mortgages.

If the CFPB opens the settlement services provisions of Regulation X for amendments, it should clarify the application to manufactured homes and should tighten the restrictions on affiliated business agreements. If it opens Regulation X's servicing provisions, it should: 1) remove an exception from the requirement to give the borrower an annual escrow statement; 2) ensure that the error resolution process protects borrowers from foreclosure when the error relates to the alleged default or grounds for foreclosure; 3) require the transfer of servicing notice to inform borrowers of their dispute rights and give them more information about the status of the account; and 4) repeal exemptions for home equity lines of credit and reverse mortgages.

1. Objections to the CFPB's Request for Information Process

We must first note our objections to the burdensome RFI process. The amount of time and attention required to adequately address the CFPB's numerous RFIs on a multitude of subjects in a very short amount of time has diverted valuable consumer advocacy and third party resources to respond to these requests. The very structure of these RFIs, the nature of many of the questions, and the fact that many focus on processes known mostly to industry actors and their lawyers, favor financial institutions with greater resources at their disposal, and we are gravely concerned about any attempts to weaken consumer protection through this process.

The CFPB has ignored our request for an extension of time to respond to this particularly burdensome RFI and the one on adopted regulations. These two RFIs require us to comment on dozens of regulations on many different subjects running many hundreds if not thousands of pages in length. Doing so less than a week after responding to the RFI on the CFPB's adopted regulations, many of which are of great importance to consumers, has been especially difficult.

These problems have prevented us from responding in more detail, seeking more input or signatories, or publicizing the comment opportunity more widely. The CFPB must not take the limited number of comments from the public as indicative of a lack of broad objections to changes the CFPB might make that would weaken its role in effectively protecting the consumer public.

2. Regulation Z (Truth in Lending Act): Inherited Rules

2.1. Credit Cards

2.1.1. Introduction: The Credit CARD Act and its implementing regulations demonstrate that consumer protection benefits everyone.

The Credit CARD Act and its implementing provisions in Regulation Z have resulted in enormous benefits for consumers. The Act and its corresponding Regulation Z provisions are a compelling example of how strong consumer protections benefit ordinary Americans and industry alike. After the passage of the Credit CARD Act in 2009 and the adoption of implementing Regulation Z provisions in 2010, consumers saw numerous benefits from the Act: interest rate hikes were dramatically curtailed, late fees were substantially reduced, and over-the-limit fees virtually disappeared.[1] Consumers saved $16 billion in late and over-the-limit fees from 2011 to 2014.[2] They also saved $2.1 billion in interest rate reductions in the first few years after the Act's passage.[3]

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[1] Jennifer Faulkner, Office of the Comptroller of Currency, The CARD Act—One Year Later: Impact on Pricing and Fees (Feb. 22, 2011).

[2] *See* Consumer Financial Protection Bureau, Consumer Credit Card Market Report 10 (Dec. 3, 2015), *available at* http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf (hereinafter "CFPB 2015 CARD Act Report").

[3] Consumer Fin. Prot. Bureau, CARD Act Report: A Review of the Impact of the CARD Act on the Consumer Credit Card Market 72 (Oct. 1, 2013), available at https://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf (hereinafter "CFPB 2013 CARD Act Report").

The CFPB has estimated that, for cardholders who carry a balance, the total cost of credit fell 150 basis points from the end of 2008 to the end of 2012, due in large part to the reductions in fees caused by the Credit CARD Act.[4] By 2015, the total cost of credit card had fallen another 40 basis points.[5] The Act has resulted in the APR becoming a more useful indicator of what consumers can expect to pay to own and use a credit card.[6] In general, the Act created a market "in which the costs incurred by consumers are driven more by APR and annual fees and less by back-end penalty fees and APR repricing."[7]

Prior to the Credit CARD Act, the card industry defended its questionable practices by arguing that lack of regulation benefited consumers because it resulted in fewer annual fees, lower interest rates, and rich reward programs.[8] The industry predicted that re-regulating rates and fees would raise costs and limit credit for the majority of consumers in order to help financially distressed borrowers.[9]

These arguments proved to be hollow. After the passage of the Credit CARD Act, lenders raised annual fees by only a modest amount,[10] and credit card solicitations were no less favorable[11] or abundant than before the Credit CARD Act.[12] In general, the Credit CARD Act did not result in any reduction in access to credit.[13] Americans had access to nearly $3.5 trillion in credit card lines as of early 2015, a 10% increase since 2012.[14] Both the interest rates disclosed to consumers and the rates they actually paid dropped after the effective date of the Credit CARD Act.[15]

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[4] *Id*. at 33.
[5] CFPB 2015 CARD Act Report at 77.
[6] CFPB 2013 CARD Act Report at 70.
[7] *Id.* at 37.
[8] Jonathan Orszag & Susan Manning, COMPASS, An Economic Assessment of Regulating Credit Card Fees and Interest Rates 14–15 (Sept. 2007). This report was commissioned by the American Bankers Association.
[9] *Id.* at 5.
[10] CFPB 2013 CARD Act Report at 23 (annual fees increased by less than $2 and increased in incidence by a modest 0.75%); Nick Bourke & Ardie Hollifield, Pew Health Group, Two Steps Forward: After the Credit CARD Act, Credit Cards are Safer and More Transparent—But Challenges Remain (July 2010), available at www.pewtrusts.org. *See also* CFPB 2015 CARD Act Report at 70 (percentage of accounts assessed an annual fee was below pre-CARD Act levels in 2015).
[11] Andrea McKenna, Increased Competition, Less Fallout from CARD Act Than Expected, Mintel Says, PaymentsSource.com (Aug. 4, 2010), available at www.paymentssource.com.
[12] Josh Frank, Center for Responsible Lending, Credit Card Clarity: CARD Act Reform Works (Feb. 16, 2011), available at www.responsiblelending.org.
[13] CFPB 2015 CARD Act Report at 10 (account volume has grown every year since implementation of the Credit CARD Act). *See also* Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney, & Johannes Stroebel, Regulating Consumer Financial Products: Evidence from Credit Cards, 130 The Quarterly Journal of Economics 1, 15 (2015) ("we estimate that the CARD Act had a precise zero effect on credit limits and ADB [average daily balances]. We also estimate a zero effect on the number of new accounts.").
[14] CFPB 2015 CARD Act Report at 108. Even deep subprime consumers had a 4% increase in their available credit since 2012. *Id.*
[15] Josh Frank, Center for Responsible Lending, Credit Card Clarity: CARD Act Reform Works (Feb. 16, 2011), available at www.responsiblelending.org. *See also* Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney, & Johannes Stroebel, Regulating Consumer Financial Products: Evidence from Credit Cards, 130 The Quarterly Journal of Economics 1, 15 (2015) ("we find no evidence of an anticipatory increase in interest charges prior to the CARD Act, and no evidence of a sharp or gradual increase following the CARD Act implementation periods").

The Credit CARD Act also proved popular with American consumers. The majority of consumers familiar with the Act have reported that it has been good for them, and 60% of consumers in general believe that their monthly statements have been clearer and easier to read.[16] And last but not least, the benefits of the Act have *not* resulted a corresponding huge hit to the revenues of credit card companies, which remained highly profitable after the Credit CARD Act.[17]

Moreover, informal conversations with industry players reflect a near universal acknowledgement that the Credit CARD Act and implementing regulations have been positive for the credit card industry. The rules create a level playing field, rewarding responsible companies and stopping a race to the bottom with back-end fees. Companies receive fewer complaints and have a better overall relationship with their customers. While problems remain in the credit card industry, the Credit CARD Act and regulations have had an overwhelmingly positive impact on both consumers and the industry.

2.1.2. The CFPB should ban deferred interest promotions.

Deferred interest promotions are one of the biggest credit card abuses that remains after the enactment of the Credit CARD Act. We urge the CFPB, as we have many times before, to ban this deceptive and costly practice. Deferred interest promotions entice consumers with promises of "no interest for 12 months," but there is a significant condition that can trap unwary consumers. Unlike true "0% APR" deals, interest is actually accruing during the promotional period for deferred interest products, and will be waived only if the consumer completely repays the entire balance by the end of the promotional period. Consumers who fail to do so will be assessed a large lump sum interest charge going back to the date that they bought the item, even on amounts that have been paid off. For example, if a consumer buys a $2,500 stereo system on June 1, 2018 using a one-year 24% deferred interest plan, then pays off all but $100 by June 1, 2019, the lender will add to the next bill nearly $400 in interest on the entire $2,500 dating back one year.

Deferred interest plans make money by taking advantage of consumers who are unaware of how the plans work or who meet with an unexpected difficulty in repaying the balance in full. They are inherently deceptive, and many consumers have trouble understanding their complex structure. Other consumers miscalculate the end of the promotional period, or expect to be able to pay the balance in full but for a variety of reasons find that they cannot. In any of these circumstances, the consumer is hit with an enormous, retroactive application of interest that causes significant injury, is unexpected and unavoidable, and is not outweighed by the creditors' desire to profit from these tricks and traps.

Indeed, the only reason that creditors make deferred interest offers instead of a true 0% promotional rate offer (without retroactively imposed interest) is to trap a certain percentage of consumers. At one point, the Federal Reserve Board actually banned these plans, noting

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[16] CFPB 2013 CARD Act Report at 21–28; Synovate, Consumer Perceptions and Reactions to the CARD Act (Feb. 22, 2011), available at www.consumerfinance.gov.

[17] CFPB 2015 CARD Act Report at 19 ("the credit card business continues to be the most profitable bank lending business, with returns more than four times higher than the average return on assets").

"disclosure may not provide an effective means for consumers to avoid the harm caused by these plans."[18]

In both its 2015 and 2013 Credit CARD Act studies, the CFPB conducted extensive analyses of deferred interest promotions, documenting the host of problems presented by these products. The CFPB found that deferred interest plans were especially harmful to vulnerable subprime consumers, 40% of whom were unable to pay off their balances in time to avoid deferred interest, and thus were socked with a lump sum retroactive charge.[19] NCLC has also issued its own report on deferred interest promotions, which describes their numerous problems,[20] including:

- **Inherent deception.** Many consumers do not understand the complicated and confusing nature of these promotions. The CFPB has observed that "there are significant indications that the lack of transparency in this market contributes to avoidable consumer costs."[21]

- **Minimum payments don't pay off the balance.** Consumers who make only the minimum payment – often thinking they are doing what they need to do to avoid interest – will inevitably be hit with retroactively assessed interest.

- **"Life Happens."** Even consumers who understand deferred interest promotions are at risk. They may expect to be able to pay off the balance by the end of the promotional period, but a job loss or other financial emergency could intervene – imposing a huge lump sum of retroactive interest when families can least afford it.

- **High APRs.** Deferred interest credit cards typically carry very high interest rates, with an average of 24% and as high as 29.99%, compared to a typical APR of 14% for mainstream credit cards.

- **Impact on the most vulnerable.** The CFPB found that more than 40% of subprime consumers were unable to pay off their balances in time to avoid deferred interest, and thus were socked with a lump sum retroactive charge. In contrast, nearly 90% of superprime consumers avoid getting hit with deferred interest. Thus, better-off consumers get the benefit of interest-free financing, while credit card lenders profit disproportionally from financially constrained consumers.

- **Difficulty avoiding retroactive interest when consumers make other purchases.** If a consumer uses the card to make another purchase, problems can arise with applying the consumer's payments to the different balances. Payment allocation is extremely complex and fraught with pitfalls, and it can be nearly impossible to pay off a deferred interest balance while minimizing interest charges.

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[18] 74 Fed. Reg. 5498, 5528 (Jan. 9, 2009).
[19] CFPB 2015 CARD Act Report at 167.
[20] Chi Chi Wu, National Consumer Law Center, Deceptive Bargain: The Hidden Time Bomb of Deferred Interest Credit Cards, Dec. 2015, at https://www.nclc.org/issues/deceptive-bargain.html.
[21] CFPB 2015 CARD Act Report at 10.

Deferred interest promotions are widespread. According to a survey by WalletHub, about one-third (23 out of 75) of the largest retailers offered deferred interest plans.[22] Yet even members of industry have recognized the problems with deferred interest products. In March 2017, Walmart announced it was ending its use of deferred interest plans, and instead offering truly 0% promotional APRs. Walmart stated it was doing so in order to "save our customers money and help remove unnecessary hassle or burden."[23] Credit card issuers have also stayed out of the deferred interest business. For example, Capital One sold off the Best Buy card portfolio that it acquired from HSBC and does not offer deferred interest cards.[24]

It is well past time for the CFPB to take action on deferred interest. There is plenty of evidence that deferred interest is unfair, deceptive, and abusive. Furthermore, the CFPB has clear authority under the Truth in Lending Act to eliminate the Regulation Z exceptions that permit deferred interest. Specifically, the CFPB should eliminate the exceptions for deferred interest plans in the Official Commentary §§ 1026.55(b)(1)-3.i and 1026.54(a)(1)-2.i.

These exceptions were established by the Federal Reserve Board in its regulations implementing the Credit CARD Act. Without these exceptions, deferred interest would violate the Truth in Lending Act itself, specifically the prohibition against double cycle billing in Section 127(j), 15 U.S.C. § 1637(j). This section provides that a finance charge cannot be assessed as a result of the loss of any time period within which the consumer may repay a balance without incurring a finance charge based on any balances from prior billing cycles. This language specifically prohibits deferred retroactive interest plans, which impose a finance charge based on balances from prior billing cycles if the consumer does not repay the entire balance within the specified time period. For further discussion on the regulatory history and legal issues involving deferred interest promotions, see our report *Deceptive Bargain: The Hidden Time Bomb of Deferred Interest Credit Cards*.[25]

2.1.3. The CFPB should restore a fee-inclusive APR price tag for credit cards and other forms of open-end credit.

The CFPB has noted in its semi-annual regulatory agenda that it expects to modernize or streamline the open-end credit provisions of TILA. As part of that process, the CFPB should mandate an APR disclosure that includes the impact of fees on the cost of credit.

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[22] Alina Comoreanu, 2016 Deferred Interest Study: The Retailers with the Sneakiest Financing Offers, Nov. 1, 2016, *available at* https://wallethub.com/edu/deferred-interest-study/25707/.
[23] Daniel Eckert, Walmart, Blog Post - We're Taking a New Approach to Our Credit Card – Here's Why, May 4, 2017, *available at* http://blog.walmart.com/business/20170504/were-taking-a-new-approach-to-our-credit-card-heres-why.
[24] *See* Danielle Douglas, Washington Post, "Capital One sells Best Buy credit card portfolio to Citigroup" (Feb. 19, 2013) (quoting analyst as saying, "From what we've heard from Capital One, strategically it seems the two parties had a difference of opinion and felt it was best to terminate the contractual obligation."), *available at* https://www.washingtonpost.com/business/economy/capital-one-sells-best-buy-credit-card-portfolio-to-citigroup/2013/02/19/9b4ba18a-7ab6-11e2-a044-676856536b40_story.html?utm_term=.cd9c67aa746f.
[25] Chi Chi Wu, National Consumer Law Center, Deceptive Bargain: The Hidden Time Bomb of Deferred Interest Credit Cards, Dec. 2015, at https://www.nclc.org/issues/deceptive-bargain.html.

Currently, the only APR disclosure required for credit cards and other open-end credit under Regulation Z is an APR consisting solely of periodic interest. 12 C.F.R. § 1026.14(b). This APR does not include the impact of any fees, whether they be finance charges or not, on the cost of credit for a credit card. This is despite the fact that TILA requires disclosure of a fee-inclusive or "effective" APR.[26]

The requirement to disclose the effective APR was eliminated by the Federal Reserve Board in 2010. Eliminating the effective APR disclosure abandoned a core principle of the Truth in Lending Act. It was contrary to one of the fundamental reasons that Congress enacted TILA, *i.e.*, to create a standard disclosure of the cost of credit that would promote informed shopping. The effective APR was the only disclosure in open-end credit that reflected the price imposed by fees and non-periodic interest finance charges. Its existence and calculation are specifically mandated by TILA for open-end credit. By eliminating it, the FRB contravened the explicit requirements of TILA.

The FRB eliminated the effective APR because its focus group testing found that consumers were confused by it and did not understand it. But if consumers were confused by the effective APR, the proper response would have been to improve the disclosure, not eliminate it.[27] The solution should have been to improve the price tag, not tear it off. Indeed, in the October 2013 study, the CFPB developed a measure somewhat similar to the effective APR for its own research purposes, a "Total Cost of Credit."[28] This measure attempts to capture an "all-in cost of credit." A similar measure could be developed for credit card and other open-end credit disclosures.

For example, the CFPB could require an effective APR for periodic statements that consists of a rolling 12-month average of the calculation in 15 U.S.C. § 1606(a)(2). A rolling average would address the phenomenon of a high effective APR in the month that a fee is imposed, which is what sometimes led to consumer confusion. For an account that has been opened for less than 12 months, this rolling effective APR could be pro-rated.

The CFPB should also require a fee-inclusive APR for applications and solicitations. Restoring the effective APR would make TILA disclosures more meaningful and truthful. Here are examples of deceptive or nonexistent APR disclosures:

- First Premier Bank charges 36% periodic interest and discloses a 36% APR. But a fee-inclusive APR should include the $95 pre-account opening fee charged by First Premier

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[26] 15 U.S.C. § 1606.

[27] Indeed, it is no wonder that consumers were confused by the effective APR – in its comments to the Board's 2005 Advanced Notice of Proposed Rulemaking, the Center for Responsible Lending noted the confusion generated by inconsistent terminology around both the rate-only APR (the "corresponding" or "nominal APR" or "corresponding nominal APR") and the fee-inclusive APR, which could also be labeled with different adjectives, such as "effective APR" or "historic APR" or "actual APR."

[28] Consumer Financial Protection Bureau, CARD Act Report: A review of the impact of the CARD Act on the consumer credit card market, Oct. 1, 2013, at 19, 32-33, *available at* http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf.

and other fees, which results in a 416% APR as calculated under 15 U.S.C. § 1606(a)(2) based on full use of the $300 credit line.[29]

- Elevate does not disclose any APR on its Elastic line of credit, and the sample payment schedule even obscures the number of payments. Its website displays a 10% monthly cash advance fee (or 5% bimonthly), but the full APR with all charges is closer to 100%.[30]
- Bank payday loans ("deposit advance products") often disclosed no APR or if they did, calculated a sample one assuming a 30-day repayment period, when in fact most loans were repaid in fewer than 14 days upon the next paycheck deposit. Thus, the sample APR was less than half what it should have been.[31]

Restoring the effective APR would also remove incentives for payday lenders and other high cost lenders to convert their predatory loan products into open-end credit. It would require a more meaningful and truthful APR disclosure for products such as the line of credit offered by CashNetUSA.com. In Utah, CashNetUSA discloses an APR of 299%.[32] However, this does not include the 15% "Transaction Fee" imposed each time a borrower obtains a cash advance. Combining the Transaction Fee with the periodic interest translates into an effective APR of 480%.

The CFPB has several options for fee-inclusive APR disclosures in applications and solicitations. It could require disclosure of a "typical APR" that consists of an average of historical effective APRs for a certain time period in a certain credit portfolio. Or it could develop an "Energy Star" type rating that is similarly based on the average of historical effective APRs. The CFPB could also limit the requirement for a "typical APR" to certain categories of credit, such as those that have fee income that is more than a small percentage of the revenue from periodic interest.

2.1.4. The CFPB should protect consumers from unauthorized use of credit card convenience checks.

The CFPB should eliminate the exception for convenience checks from the unauthorized use protections of the Truth in Lending Act. This exception was established by the Federal Reserve Board in 2008 in the Official Commentary § 1026.12(b)-4.

The Board justified this decision based on its belief that "it was unnecessary to extend the unauthorized use protections to convenience checks because convenience check transactions are generally subject to the Uniform Commercial Code (UCC) provisions governing checks, and thus a consumer generally would not have any liability for a forged check ..."[33] However, the UCC permits banks to hold consumers partially liable for unauthorized use under a comparative

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[29] It would be even higher if the effective APR included the $75 annual fee, which is currently not considered a finance charge under Regulation Z. If the $75 were to be included, the effective APR for the month in which the account was opened would be 955%.
[30] https://www.elastic.com/what-it-costs/.
[31] As noted in another section of these comments, single payment loans should be treated as closed-end credit, not open-end credit.
[32] https://www.cashnetusa.com/rates-and-terms.html.
[33] 72 Fed. Reg. 32,948, 32,959 (June 14, 2007).

negligence standard.[34] TILA's unauthorized use protections provide far stronger protections for consumers than does the UCC.

Furthermore, the convenience check is merely a mechanism for initiating a credit card transaction, like a telephone or computer. Even though neither a telephone nor a computer is a credit card, purchases made by telephone or Internet are both covered by the unauthorized use protections. It seems anomalous that if a thief uses only the credit card number, without more, the unauthorized use protection applies, but the simple fact that the number is on a check takes the transaction outside this protection.

A complaint received by NCLC demonstrates why convenience checks should be regulated as credit cards under TILA. Ms. X, a victim of domestic violence, fled the marital home on September 9, 2011 and obtained a protective order. Subsequently, her abusive husband intercepted two convenience checks and used them to charge $7,000 to two of Ms. X's individual credit card accounts. The card issuers, Chase and Bank of America, refused to treat this theft as unauthorized use, despite the fact that Ms. X even had a protective order against Mr. X on the date of the charge showing that Ms. X was not in the marital home at the time.

Unfortunately, Chase and Bank of America were not required to treat this theft as unauthorized use because of the exception for convenience checks. This legal loophole was confusing to even an attorney representing Ms. X; thus, an average consumer would be even less likely to understand that a convenience check is exempted from the unauthorized use protections of TILA. To prevent consumer confusion and ensure uniform protections for all devices accessing a credit card account, the CFPB should eliminate this exception.

2.2. General Regulation Z Requirements for Closed-End Credit

2.2.1. Regulation Z has been amended to address industry concerns and should not be weakened.

The Truth in Lending Act (TILA), under which Regulation Z was promulgated, was enacted in 1968.[35] In its current form it includes requirements regarding all forms of consumer credit, unless specifically exempted. This section addresses general Regulation Z requirements regarding closed-end credit. Installment loans and automobile financing are examples of closed-end credit to which these requirements apply. Many also apply to closed-end mortgage credit, but there are some variations for mortgage transactions (for example, in the rules about disclosure of variable rates and about the fees that must be included in the calculation of the finance charge). In addition, as discussed in a later section of these comments, disclosure requirements for most mortgage transactions are different from those for non-mortgage transactions, and a number of additional disclosures that are required for those transactions.

Regulation Z was first adopted in 1969, effective July 1, 1969.[36] It was extensively revised in 1981 to simplify it, ease creditor compliance burdens, and conform it to statutory amendments.[37]

[34] U.C.C. § 3-406.
[35] Pub. L. No. 90-321, 82 Stat. 146 (May 29, 1968).
[36] 34 Fed. Reg. 2002 (Feb. 11, 1969).

TILA and Regulation Z contain several provisions designed to grant creditors numerical leeway when disclosing the most important cost of credit numbers—the APR and the finance charge.[38] Moreover, TILA provides for statutory defenses to liability for creditors, including good faith conformity with rulings and official interpretations, use of model forms, bona fide errors, and correction of errors.[39] Regulation Z adds a faulty calculation tool defense to this list.[40]

While every regulation can be improved, and we have our own suggestions if the CFPB chooses to revisit Regulation Z's closed-end provisions, they are working well overall and are a lower priority for revisions than other work before the CFPB. We especially oppose any effort to weaken Regulation Z, add exemptions, or otherwise undercut the protections that it offers.

The TILA provisions that apply generally to closed-end credit focus on disclosure of the credit terms. The rules require that those terms be disclosed to consumers in a uniform, consistent format so that consumers can compare credit terms and shop for credit. The theory behind the disclosure requirements is that by comparing credit terms and shopping for credit, consumers will create market pressure for creditors to offer more attractive terms.[41]

In general, a reliance on disclosures alone is a weak approach to protecting consumers. Substantive rules to limit unaffordable credit and to prevent abuses are much more effective. Nonetheless, the TILA disclosure rules do provide an important function and should be strengthened, not weakened.

Prior to the enactment of TILA, consumers had no easy way to compare credit terms or determine how much credit would really cost. Creditors could disclose their interest rates—if they disclosed them at all—in deceptively non-uniform ways. For example, if a lender disclosed an 8% interest rate calculated by the add-on method on a $1000 one-year loan, it would actually amount to an APR of 14.45%--even if the lender did not add any fixed-charge fees on top of the interest rate.[42] Regulation Z's disclosure requirements are essential to prevent a return to this chaotic and opaque market.

Regulation Z's general disclosure provisions for closed-end credit are not lengthy or complex. In the statute, they appear in only four sections—1631, 1632, 1634, and 1638. In Regulation Z, they appear in sections 1026.4 and 1026.17-1026.22. These rules are not burdensome on creditors. Indeed, the credit markets have been applying the 1981 simplified regime for thirty-seven years.

On the other hand, uniform and consistent disclosure of the cost of credit is essential to consumers. The math behind the numbers is daunting for most consumers and credit terms are

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[37] 46 Fed. Reg. 20848 (Apr. 7, 1981), *implementing* the Truth in Lending Simplification and Reform Act (Title VI of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96-221).
[38] 15 U.S.C. § 1606(c); Reg. Z §§ 1026.18(d), 1026.22(a).
[39] 15 U.S.C. §§ 1604(b), 1640(b), (c), (d).
[40] Reg. Z § 1026.22(a)(2).
[41] 15 U.S.C. § 1602(a) (purposes of TILA).
[42] *See* National Consumer Law Center, Consumer Credit Regulation § 5.3.2.1 (2d ed. 2015), *updated at* www.nclc.org/library.

not easily understandable. The greater the uniformity of disclosures—not just in the calculation rules but also in language, prominence, and order of presentation—the more likely consumers are to understand them and be able to compare the terms offered by creditors. Carefully crafted requirements are essential to the goal of achieving this uniformity.

Precise rules are also helpful for industry, so that companies know exactly what is required of them and each company that offers consumer credit does not have to draft language, devise disclosure forms, or obtain legal advice to resolve ambiguities. From 1968 until 2011 when the Federal Reserve Board had responsibility for Regulation Z, on many occasions industry representatives on the FRB's Consumer Advisory Committee commented that they prefer as much clarity and specificity as possible to enhance compliance and limit potential liability.

The CFPB should approach the question of revising Regulation Z with caution. Regulation Z's requirements are interdependent, so every change made has the potential of causing a chain of other consequences.

Any revisions to disclosure requirements must also build in systematic consumer testing. The FRB pioneered consumer testing as part of its reworking of the disclosure requirements for open-end credit pursuant to the Credit Card Accountability, Responsibility, and Disclosure Act of 2009,[43] and the CFPB put its combined TILA and RESPA mortgage loan disclosures through several rounds of consumer testing before finalizing the rule.[44] Consumer testing has often revealed widespread and serious misunderstanding of newly-drafted disclosures that regulators thought would be clear.

Finally, any revisions of Regulation Z that would affect auto finance—and most of the closed-end non-mortgage disclosure rules do affect auto finance—should be a joint rulemaking with the Federal Reserve Board (FRB), which retains jurisdiction over Regulation Z as it applies to a major segment of the auto finance market. It would enormously increase the complexity of the disclosure rules, and decrease their usefulness to consumers, if different rules applied to auto finance based on whether the consumer was dealing with an auto finance company or a buy-here-pay-here (BHPH) dealer, both of which are governed by the CFPB version of Regulation Z, as opposed to a non-BHPH auto dealer that is governed by the FRB's version.[45] So far, the FRB version and the CFPB version of these rules have stayed in sync, and the CFPB should not take any steps that would undermine that coordination.

2.2.2. The CFPB should implement an all-in finance charge definition and fully fee-inclusive APR.

If the CFPB chooses to revisit Regulation Z, we have a number of suggestions for ways it can be improved. We discuss two of those suggestions here. First, if the CFPB reopens the general closed-end credit disclosure requirements, we urge it to implement an all-in finance charge

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[43] *See* 74 Fed. Reg. 5244, 5246-5250 (Jan. 29, 2009) (describing the testing methods and other research conducted before and during the rulemaking process).
[44] *See* 78 Fed. Reg. 79,730, 79,741-44 (Dec. 31, 2013) (describing the testing methods and other research conducted before and during the rulemaking process).
[45] 12 U.S.C. § 5519.

definition and a fully fee-inclusive APR. While the closed-end APR disclosure is far better than the one for open-end credit, it nonetheless has loopholes that are exploited by some lenders and that undermine TILA's primary goals of capturing the full cost of credit in the APR that is disclosed to consumers.

To achieve this goal, the APR should include *all* of the costs of credit. Otherwise, it is not an accurate representation of the true cost of credit, and does not allow the consumer to make apples-to-apples comparisons between credit offers. The current rules allow a swiss-cheese approach, that is, some fees are in and some are not.

The failure to mandate an all-in finance charge has been a longstanding concern of Congress and the Federal Reserve Board (FRB) dating back to at least 1995. At that time, Congress directed the FRB to study the issue.[46] The resulting FRB report suggested further debate. A 1998 joint HUD/FRB report again discussed the pros and cons of an all-in approach and recommended a hybrid methodology—the "required cost of credit test." Under this test, the finance charge would include the costs the consumer is required to pay to get the credit. This issue lay dormant until 2009. At that time, the FRB published a proposal to replace the current rule with a more inclusive approach based on several significant rationales discussed below. The FRB did not finalize this proposal prior to the transfer of its TILA rulemaking authority to the CFPB.[47] The CFPB revived this issue in 2012. After receiving comments, it decided in 2013 to postpone further consideration for at least five years and pending further data collection.[48] It is now five years later.

Allowing creditors to exclude significant components of the cost of credit from the calculation of the APR undermines the goals of the APR disclosure for several reasons, including those articulated by the FRB: 1) excluding certain fees undermines the effectiveness of the APR as a measure of the cost of credit; 2) the numerous exclusions from the finance charge encourage lenders to shift the cost of credit to the excluded fees or hide them in the cash price of goods or services; and 3) complexity of rules increases regulatory burden and litigation risk for lenders.[49]

Areas in which we see particular problems regarding APR disclosures include:

- *Disproportionately large application fees.* For example, Kinecta Federal Credit Union discloses a 15% APR on the payday loans it offers through Nix, but the $37.95 application fee on a 14-day $400 loan results in a true APR of over 260%.
- *Credit insurance and other add-on products.* Regulation Z only requires credit insurance to be included in the APR if it is mandatory. But some lenders steer virtually all borrowers into believing that credit insurance and other add-on products are required. In addition, most credit insurance products primarily benefit the creditor, both because the creditor receives substantial commissions and other compensation from selling the product and because, if the borrower makes a claim, the insurance proceeds go to pay off the debt.

[46] *See* 78 Fed. Reg. 79,730, 79,774 (Dec. 31, 2013) (describing this history).
[47] 78 Fed. Reg. at 79,774.
[48] 78 Fed. Reg. at 79,778-80.
[49] 78 Fed. Reg. at 79,774.

2.2.3. The CFPB should prevent evasions of TILA disclosure requirements through the open-end credit loophole.

As discussed above under open-end credit, Regulation Z's disclosure rules for open-end credit have big gaps that often prevent the APR from accurately reflecting the cost of credit. In addition to closing those loopholes so that the APRs for open- and closed-end credit are more uniform, the CFPB should prevent evasions through spurious open-end credit. For example, any credit that is required to be repaid in one or two payments should be deemed closed end credit. Advances that are repaid on a fixed schedule with fixed payments should also be disclosed in a way that is consistent with closed-end loan disclosures.

Preventing spurious use of open-end credit or disparities between open- and closed-end rules would simplify disclosures, make them more meaningful, and enhance comparison shopping. Creditor compliance would be simplified, litigation burdens reduced, and manipulations designed to avoid consumer protections would be avoided.

2.3. Regulation Z Requirements for Closed-End Mortgage Credit[50]

2.3.1. History of FRB and CFPB rulemaking for closed-end mortgages.

When Congress enacted TILA in 1968, it applied broadly to both mortgage and non-mortgage credit, subject to statutory exemptions. The FRB finalized Regulation Z in 1969.[51] At that time, Regulation Z contained two sections that specified the disclosure rules for all closed-end credit, sections 226.6 and sections 226.8. These sections were the ancestors of the current sections 1026.17 and 1026.18. The right of rescission that applies to some mortgage loans was housed in section 226.9 and now appears in sections 1026.15 (open-end) and 1026.23 (closed-end).

After its original enactment of TILA, Congress responded to particular concerns that arose regarding mortgage lending in 1994 (high cost loan abuses and reverse mortgages), 2008 (early disclosures for credit secured by a dwelling), 2009 (notification of transfer of ownership of the note; the identity of and contact information for the assignee; duty of servicers of securitized mortgage loan), and 2010 (the Dodd-Frank Act).

The FRB was busy during the same period until the transfer of its jurisdiction to the CFPB in 2011. The FRB both implemented Congressional amendments and mandated additional disclosures and protections for slices of the mortgage market, such as variable rate mortgages in 1987[52] and higher-priced mortgage loans in 2008.[53] This collection of regulations, both general and specific, makes up the "inherited" closed-end mortgage loan disclosure requirements.

[50] This section does not discuss the TILA/RESPA integrated disclosure rules, which cover a large segment of the mortgage lending market, because they are rules adopted, not inherited by the CFPB.
[51] 34 Fed. Reg. 2002 (Feb. 11, 1969).
[52] 52 Fed. Reg. 48,665 (Dec. 24, 1987).
[53] 73 Fed. Reg. 44,522 (July 30, 2008).

As discussed in the next subsection, the inherited closed-end mortgage loan disclosure requirements have now been largely displaced by the TILA/RESPA integrated disclosure rules that the CFPB crafted after the Dodd-Frank Act was enacted. However, the inherited disclosure rules still apply to some categories of mortgage loans. In addition, as discussed below, Regulation Z's rescission rules for mortgage loans continue to apply generally, regardless of which set of disclosure rules applies to a particular loan.

2.3.2. The CFPB should not weaken the inherited disclosure rules for mortgage loans.

As noted in the preceding section, disclosure requirements for most mortgage transactions are found in regulations adopted since 2010, primarily the TILA/RESPA integrated disclosure rules. Those rules were addressed in our comments on the CFPB's adopted regulations. However, a few categories of closed-end mortgage transactions are subject to older, inherited disclosure rules (many of which also apply to non-mortgage credit).

Reverse mortgages make up the main category of mortgages covered by the inherited disclosure rules,[54] including some rules that were crafted specially for reverse mortgages.[55] Another section of these comments discusses Regulation Z's reverse mortgage provisions.

A second category of mortgage credit that is not subject to the new TILA/RESPA integrated disclosure rules is qualifying mortgage loans provided through housing assistance loan programs for low- and moderate-income households.[56] In addition, the TILA/RESPA integrated disclosure rules do not apply to manufactured-home financing unless it is secured by a manufactured home that is a dwelling and is also secured by real property.[57]

As discussed in more detail in section 2.2.1 of these comments, the CFPB should approach revisions to its inherited disclosure rules with caution. Those provisions are interlocking, so changes that appear small have the potential of causing a chain of other consequences. In addition, the FRB retains rulemaking authority over Regulation Z as applied to major segments of the auto financing industry, so a joint rulemaking would be necessary in order to coordinate the two versions of the inherited disclosure requirements. Moreover, the CFPB should not proceed without consumer testing. For all of these reasons, the CFPB should not revisit the inherited disclosure rules for mortgages at this time.

2.3.3. The CFPB should not weaken the inherited rules regarding the right to rescind a mortgage transaction.

The inherited parts of Regulation Z covering mortgages include the right to cancel. Consumers have an absolute right to cancel a mortgage during a three-day cooling-off period.[58] Thereafter,

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[54] *See* prefatory clause of 12 C.F.R. § 1026.18 (stating that the requirements of this section do not apply to mortgage transactions that are subject to § 1026.19(e) and (f)).
[55] See 15 U.S.C. § 1648(a); Reg. Z § 1026.33(b).
[56] Reg. Z § 1026.3(h) (providing that these loans are not subject to § 1026.19(e) and (f); as a result, they are not excluded from the disclosure requirements of § 1026.18 by that section's prefatory clause).
[57] Official Interpretations § 1026.18-3; 78 Fed. Reg. 79,730, 79,795-96 (Dec. 31, 2013).
[58] 15 U.S.C. § 1635.

a consumer may rescind the loan for up to three years only if the lender has failed to properly and accurately provide certain material disclosures.

The extended right to rescind when material disclosures are faulty is important for encouraging compliance with the Act's material disclosure requirements.[59] The rescission rights are also important to enforcing Congress's ban on dangerous terms and preventing consumers from being locked into high-cost loans.

In closed-end transactions, there is a short list of material disclosures that trigger the extended right to rescind. These disclosures have been deemed critical to the consumer: the primary cost of credit disclosures (the APR and the finance charge), the amount financed, the total of payments, and the payment schedule. Discrepancies between the creditor's disclosure of this numerical information and the accurate numbers, however, do not trigger rescission if they do not exceed generous tolerances.[60] In the context of a high-cost mortgage transaction, the information contained in the HOEPA notice is also considered "material," as is the presence of any of the contract terms prohibited by HOEPA. In the context of a higher-priced mortgage transaction, a prepayment penalty clause also triggers the extended right of rescission.[61]

TILA's rescission remedy is available only in consumer credit transactions that are secured by the consumer's principal dwelling and that do not finance the purchase of the home. Cash-out, refinance, and home improvement financing loans are examples of covered transactions. Congress made significant changes to the rescission rules in 1995 when the tolerances for errors in the finance charge disclosures were expanded.

The TILA rescission provisions reflect Congress's desire to keep homeowners from placing their homes in jeopardy without a clear understanding of the risks and benefits of the transaction.[62] The rescission right is statutory and cannot be taken away by regulation. Moreover, the lending industry has functioned in this environment for decades. There is no need for the CFPB to reopen the rescission provisions of Regulation Z.

2.3.4. If the CFPB revisits the inherited closed-end mortgage credit rules, we suggest changes to the special rules governing reverse mortgages.

Reverse mortgages allow older borrowers to convert a portion of their home equity into cash without the immediate need for repayment of the loan. In 1994, Congress recognized that disclosures tailored to reverse mortgage products should be mandated and added section 1648 to TILA.[63] The additional information required for reverse mortgages includes a pre-closing notice

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[59] *See* WMC Mortgage L.L.C. v. Baker, 2012 WL 628003, at *14 n.22 (E.D. Pa. Feb. 28, 2012) (comparing the purpose of the three-day right with that of the extended right to rescind).
[60] Reg. Z §§ 1026.22(a); 1026.18(d)(1)(i); 1026.23(g); 1026.23(h)(2) (finance charge tolerance when lender has initiated foreclosure is smaller--$35).
[61] Reg. Z § 1026.23(a)(3)(ii).
[62] U.S. Rep. No. 368, 96th Cong., 2d Sess. 28, reprinted in 1980 U.S.C.C.A.N. 236, 264 ("This provision was enacted to give the consumer the opportunity to reconsider any transaction which would have the serious consequence of encumbering the title to his home.").
[63] Pub. L. No. 90-

containing a good faith projection of closing cost, itemization of loan terms, an explanatory table, and a statement that the borrower is not obligated to complete the transaction.[64]

Currently, almost all reverse mortgages are federally-insured Home Equity Conversion Mortgages (HECMs), overseen by the U.S. Department of Housing and Urban Development (HUD). The agency issued final rules on January 19, 2017, that updated the regulations governing the HECM program.[65] Aside from HUD's regulations, all reverse mortgages are subject to RESPA and fair lending laws, as well as to TILA.

If the CFPB undertakes revisions of Regulation Z, we urge it to further strengthen the rules and add substantive protections for older homeowners, especially for those who may take out non-HECM proprietary loans in the future. Disclosures are inadequate to protect vulnerable older adults from the well-documented abuses associated with reverse mortgages. Moreover, providing safe harbors for reckless industry practices would encourage abusive lending.

The CFPB should use its authority to identify and ban unfair, deceptive and abusive practices and add protections to prevent the eviction of non-borrowing spouses after the death of the borrower-spouse; prohibit cross-selling of other financial products; require independent counseling provided by individuals employed by HUD-approved counseling organizations; require new and earlier disclosures tailored to reverse mortgages; and ban deceptive marketing and solicitation.

3. Regulation X (Real Estate Settlement Procedures Act)

3.1. Mortgage settlement provisions of Regulation X

3.1.1. The ban on kickbacks and referral fees is effective and should not be weakened.

RESPA, as implemented by Regulation X, is the primary federal law directly addressing residential mortgage settlements.[66] RESPA was enacted as the result of a congressionally mandated investigation into settlement costs.[67] In 1972 HUD and the VA jointly released a report showing that settlement costs were more than 10% of the average purchase money mortgage.[68] The report also found that settlement charges often were based on factors unrelated to the cost of providing the service.[69] RESPA and Regulation X are intended to ensure that consumers in real estate transactions receive timely information about the nature and cost of the

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[64] Reg. Z § 1026.33.
[65] *See* 82 Fed. Reg. 7094 (Jan. 19, 2017).
[66] For RESPA purposes, "settlement means the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan." Reg. X, 12 C.F.R. § 1024.2(b) (emphasis in original). Settlement is also called "closing" and "escrow" in some parts of the country. Reg. X, 12 C.F.R. § 1024.2(b). See generally Office of the Comptroller of the Currency, Comptroller's Handbook, Real Estate Settlement Procedures Act (Apr. 2015), available at http://occ.gov (handbook summarizing RESPA for bank examiners).
[67] Elizabeth Renuart & Jen Douglas, The Limits of RESPA: An Empirical Analysis of the Effects of Mortgage Cost Disclosures, 21 Hous. Pol'y Debate 481, 483–486 (Sept. 2011), available at http://papers.ssrn.com.
[68] *Id*.
[69] *Id*.

settlement process and to protect consumers "from unnecessarily high settlement charges caused by certain abusive practices."[70]

RESPA and Regulation X accomplish these purposes through a combination of disclosure requirements and substantive restrictions. The key substantive restrictions are prohibitions of kickbacks, referral fees, and splitting of fees except for services actually performed.[71] These prohibitions are vital to RESPA's original purpose. Kickbacks, fee splitting, and referral fees are almost impossible for consumers to detect, so comparison shopping will not be enough for self-protection—especially where these practices were once widespread.

The statute and regulation were carefully crafted to make exceptions for practices that the drafters deemed reasonable accommodations to the realities of the mortgage settlement industry. In particular, the statute and the rule provide for referrals between affiliated businesses[72] and specify the payments that such businesses can exchange without violating the statute.[73] To fall within this exception, service providers must meet certain disclosure requirements and, generally, allow the consumer to choose another provider.

There has been some criticism of the CFPB's investigations into whether some companies' marketing services agreements (MSAs) violate the ban on referral fees.[74] Regulation X does not prohibit MSAs *per se*. As explained by a California district court, the question is "whether marketing and promotion are just euphemisms for prohibited referrals."[75] Any claim that Regulation X needs to be reopened in order to allow legitimate MSAs that are not covers for illegal referrals is unfounded.

After more than 40 years, the mortgage industry has long been accustomed to Regulation X compliance, and the rule continues to meet the needs of mortgage borrowers. With the exception of the TILA/RESPA integrated disclosures (discussed in our adopted regulations comments), there have been few changes to Regulation X's origination provisions in recent years. And we see no need for any other changes. The rule remains relevant and effective as it currently stands.

3.1.2. If the CFPB opens Regulation X for amendments, it should clarify the application to manufactured homes and should tighten the restrictions on affiliated business agreements.

While we do not recommend opening Regulation X for amendments, if the CFPB does so, it should consider two changes.

First, the CFPB should clarify that Regulation X applies to all manufactured homes titled as real property—something the Act already does, but which the regulation muddies. RESPA's definition of "federally related mortgage loan" includes loans secured by manufactured homes

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[70] Pub. L. No. 93-533, § 2(a), 88 Stat. 1724 (1974) (codified at 12 U.S.C. § 2601(a)).
[71] 12 U..S.C. § 2607; 12 C.F.R. § 1024.14.
[72] *See* 12 U.S.C. § 2602(7) (defining "affiliated business arrangement").
[73] 12 U.S.C. § 2607(c); 12 C.F.R. § 1024.15.
[74] *See* Kate Berry, *CFPB Takes Aim at Referral Fees*, Am. Banker, Mar. 19, 2015, *available at* www.americanbanker.com.
[75] Henson v. Fid. Nat'l Fin., Inc., 18 F. Supp. 3d 1006, 1014 (C.D. Cal. 2014).

that are titled as real property, without regard to whether the loan is secured by land. Regulation X, however, modifies the definition to require a lien on land. When the regulation was adopted there was no explanation for this addition and there is no rational basis for it. For many reasons, the buyer of a manufactured home may choose to encumber just the home, without also encumbering the land on which it sits. Moreover, manufactured homes can be titled as real estate in a number of states even when they are on land that the homeowner does not own, in which case a lien on the land is not even possible. The CFPB should abandon this distinction and clarify that the regulation applies to all manufactured homes titled as real property.

Second, the affiliated business rule is a gaping loophole in RESPA's otherwise strong ban on referral fees and kickbacks. The statute clearly allows affiliated business arrangements, but Regulation X should more strictly regulate them. Service providers know that consumers have difficulty shopping for settlement services and must accept whatever the provider offers. As a result, merely disclosing the arrangement is not enough. The CFPB should ensure that the arrangement is legitimate and not merely a cover for illegal conduct.

3.2. Inherited Servicing Provisions of Regulation X

3.2.1. The inherited mortgage servicing rules provide important protections for consumers.

As originally enacted in 1974, the Real Estate Settlement Procedures Act (RESPA) focused primarily on giving consumers in real estate transactions timely information on the nature and costs of the settlement process. Only one aspect of mortgage servicing, the management of escrow accounts, was addressed in the 1974 Act. It requires servicers to properly calculate the amount required to be deposited in escrow accounts and provide annual statements to borrowers.[76]

The Cranston-Gonzalez National Affordable Housing Act of 1990 expanded the scope of RESPA by more broadly addressing mortgage servicer practices.[77] These amendments to RESPA came in response to numerous reports of consumer complaints about mortgage servicing problems, particularly those related to the transfer of servicing.[78] The amendments generally require servicers to respond to borrower inquiries and correct account errors, disclose information relating to the transfer of servicing operations, and make timely payments out of escrow accounts.

The Department of Housing and Urban Development (HUD) was the agency originally designated to issue regulations under RESPA. The initial rules issued by HUD, found in Regulation X, were inherited by the CFPB when rulemaking authority for RESPA was transferred. For the most part, these inherited rules properly implemented the pre-Dodd-Frank Act statutory servicing provisions and have been effective in curbing some of the worst servicer

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[76] 12 U.S.C. § 2609.
[77] Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4079 (1990) (codified at 12 U.S.C. § 2605).
[78] U.S. Gen. Accounting Office, Report, Home Ownership—Mortgage Servicing Transfers Are Increasing and Causing Borrower Concern (1989); Wanger v. EMC Mortg. Corp., 127 Cal. Rptr. 2d 685 (Cal. Ct. App. 2002).

abuses, establishing minimum standards in the servicing industry, and making servicers more responsible to consumers.

The CFPB made some minor revisions and improvements to the inherited servicing rules as part of the 2013 RESPA and TILA Servicing Rule.[79] Some further improvements to the rules should be made, including the removal of several exemptions from coverage that had been adopted by HUD, as discussed below. However, the consumer protections in the inherited servicing rules should not be eroded.

3.2.2. The inherited rules should be preserved, but if changes are considered, certain provisions should be strengthened consistent with the consumer protection purposes of RESPA.

Most of the inherited Regulation X servicing rules are consistent with the provisions of RESPA. In fact, HUD's approach was often to repeat the statutory language, almost verbatim, in Regulation X. While this was unnecessary, there is no reason for the CFPB to reconsider most of the inherited rules and they should be preserved.

If changes are considered by the CFPB, we urge the CFPB to strengthen the following rules consistent with the consumer protection purposes of RESPA. If the CFPB does consider reopening the rule, we would be happy to provide more detail about the need for these improvements and their legal basis.

3.2.2.1. The CFPB should remove exemptions for escrow account requirements based on borrower default or bankruptcy.

The annual escrow account statement required by RESPA section 2609 gives the borrower a summary of all of the account deposits and disbursements made during the prior year. It also notifies the borrower of any surpluses, shortages, and deficiencies that exist and the action the servicer intends to take in response. Despite the mandatory language found in RESPA and the lack of any statutory exemption, HUD provided in Regulation X that a servicer is exempt from providing a borrower with an annual escrow statement if the borrower is more than thirty days overdue in payments at the time the servicer conducts the escrow analysis.[80] This exemption also applies when the mortgage account is in foreclosure or when the borrower is in a bankruptcy proceeding.[81]

This exemption is inconsistent with both the purpose behind RESPA's escrow disclosure provision and the policy of promoting homeownership through loss mitigation efforts aimed at avoiding foreclosure. For borrowers who are experiencing temporary financial difficulties and barely more than a month behind in payments, the exemption deprives them of critical information about their accounts, such as the new monthly payment amount, which may ultimately cause them to fall further behind. The exemption for borrowers in default should be

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[79] The inherited provisions are now found in Subpart C of Regulation X.
[80] Reg. X, 12 C.F.R. § 1024.17(i)(2).
[81] *Id*.

eliminated, or, if amended, should not apply to borrowers who are less than six months in arrears or are seeking a loss mitigation option.

The current exemption is even less rational in the bankruptcy setting, in which HUD failed to distinguish between borrowers who are current with their mortgage payments at the time of the bankruptcy filing and intend to remain current, with those who are in default.[82] Nor does the rule treat differently borrowers who are curing a mortgage default in a Chapter 13 bankruptcy. The CFPB should eliminate the bankruptcy exemption entirely or replace it with an exemption similar to that recently adopted by the CFPB with respect to bankruptcy periodic mortgage statements.[83]

Another exemption created by HUD deals with the duty of servicers to make timely payments out of escrow. RESPA section 2605(g) requires a servicer to make payments from an escrow account for taxes, insurance, and other charges in a timely manner as such payments become due. This provision requires timely disbursements out of escrow in order to protect borrowers from being charged interest and penalty fees for late tax and insurance payments, and to ensure that borrowers' insurance coverage does not lapse. When HUD issued regulations to implement the timely escrow payment requirement, it again created an exemption from the statutory mandate. Regulation X provides that the obligation does not apply when the borrower's mortgage payment is more than 30 days overdue--even if there are sufficient funds in the escrow account to cover the payment from escrow.[84]

The exemption was partially overridden by the CFPB as part the 2013 Servicing Rule, in implementing the force-placed insurance requirements under the Dodd-Frank Act. Servicers have a duty to disburse funds in a timely manner to pay the borrower's hazard insurance premium charges unless the servicer is unable to disburse funds from the borrower's escrow account.[85] However, the change does not apply to disbursements for property taxes, homeowner association fees and other payments from escrow that are not for hazard insurance. Because the exemption is triggered when a borrower is barely more than a month behind on payments, often the servicer has enough borrower funds in the escrow account to pay the taxes and other charges when they come due. At a minimum, the exemption should not apply when there are sufficient funds in the borrower's escrow account to make the payment.

3.2.2.2. The CFPB should ensure that the error resolution process protects borrowers from foreclosure when the error relates to the alleged default or grounds for foreclosure.

As part of 1990 amendments to RESPA, Congress created a robust procedure for borrowers to dispute account errors made by servicers, by sending a qualified written request. If the error relates to a payment dispute, Congress made clear that the borrower should not suffer any

[82] As evidence that the bankruptcy exemption was not well-reasoned, it is worth noting that former § 3500.17(i)(2) did not include any discussion of bankruptcy when first promulgated under the notice and comment rulemaking procedure. Prior to the regulation's effective date, however, HUD added the bankruptcy exemption as a "technical correction" to the rule language without soliciting comment. *See* 60 Fed. Reg. 8812 (Feb. 15, 1995).
[83] Reg. Z, 12 C.F.R. § 1026.41(e)(5)(i).
[84] Reg. X, 12 C.F.R. §§ 1024.17(k)(1), 1024.17(k)(2).
[85] Reg. X. 12 C.F.R. § 1024.17(k)(5)(i).

adverse consequences while the dispute is being resolved. During the sixty-day period beginning upon receipt by a servicer of a qualified written request or notice of error relating to a payment dispute, the servicer cannot give any adverse information to a credit reporting agency concerning the payments subject to the request.[86]

However, HUD undermined this protection by providing in Regulation X that a servicer's receipt of a notice of error does not prevent it from taking the more drastic step of pursuing collection remedies during the sixty-day period—including foreclosure on the borrower's home.[87] This inherited provision of Regulation X was retained by the CFPB in the reissuance of regulations dealing with error resolution in the 2013 RESPA Servicing Rule, except with respect to a notice of error based on the servicer's noncompliance with the loss mitigation dual tracking protections under sections 1024.41(f), 1024.41(g), or 1024.41(j).[88]

HUD based its ill-conceived provision on a misinterpretation of RESPA section 2615, which states the uncontroversial proposition that nothing in RESPA affects the "validity or enforceability" of loan agreements or mortgages in connection with federally related mortgage loans. But section 2615 cannot possibly mean that mortgage contract provisions that squarely conflict with RESPA are nevertheless enforceable. The more logical construction of section 2615 in the context of the entire statutory scheme is that it is intended to serve the same function as a severability clause in a contract. In other words, if a mortgage contract contains a provision that RESPA makes illegal, the contract as a whole nevertheless remains valid and enforceable even though the individual provisions that violate RESPA are not enforceable. Congress could not possibly have intended that a servicer would be permitted to foreclose on a borrower before responding to a borrower's notice of error that asserts that the loan is not in default or that the servicer has no grounds under the mortgage or applicable state law to foreclose.

3.2.2.3. The transfer of servicing notice should inform borrowers of their dispute rights, and provide additional information about account loan status.

If the servicing of a mortgage is transferred after the mortgage loan is made, RESPA requires that the transferor and transferee servicers give the borrower a written notice containing important information about the transfer.[89] Much of the information in the notice is required by RESPA, though HUD added some additional information when implementing the requirement in Regulation X. Unfortunately, the CFPB removed a critical disclosure from the transfer notice when revising this inherited rule.

Mortgage servicing errors, particularly those relating to payment application, generally are more likely to occur at the time of servicing transfer. In fact, evidence of borrower complaints about servicing transfers was what originally prompted Congress to add the first servicing requirements

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[86] 12 U.S.C. § 2605(e)(3); Reg. X, 12 C.F.R. § 1024.35(i).
[87] Reg. X, 12 C.F.R. § 1024.21(e)(4)(ii) (vacated and replaced by 12 C.F.R. § 1024.35(i)(2), effective Jan. 10, 2014).
[88] Reg. X, 12 C.F.R. § 1024.35(i)(2) ("Except as set forth in this section with respect to an assertion of error under paragraph (b)(9) or (10) of this section, nothing in this section shall limit or restrict a lender or servicer from pursuing any remedy it has under applicable law, including initiating foreclosure or proceeding with a foreclosure sale.").
[89] 12 U.S.C. § 2605(b)(3).

to RESPA in 1990.[90] Because of this potential for errors, there is perhaps no better time to inform borrowers of the right under RESPA section 2605(e) to dispute account errors and obtain account information than at the time of servicing transfer. Thus, it is not surprising that HUD had initially required in Regulation X that the servicing transfer notice include a statement of the borrower's rights in connection with error resolution, including any exclusive address for sending qualified written requests.[91]

However, the CFPB removed this requirement from Regulation X as part of the 2013 RESPA Servicing Rule. The CFPB stated that "detailed information about the error resolution and information request process may not always be optimally located in the transfer notice" and that borrowers should be informed of this process "through mechanisms that do not necessarily depend on the transfer of servicing."[92] The CFPB suggested that servicers should develop policies and procedures to inform borrowers, noting the adoption of section 1024.38(b)(5). However, the CFPB did not mandate any process or method that servicers must use to inform borrowers of dispute or information rights. Significantly, neither the periodic billing statement (§ 1026.41) or the early intervention notice (§ 1024.39) rule requires the servicer to inform the borrower of the right to dispute errors or obtain account information. In fact, none of the mandatory contacts with borrowers require disclosure of these rights.

The CFPB should not assume that consumers are aware of their RESPA rights or that they will exercise these rights if they are merely provided servicer contact information on a monthly statement that they can use if they have "questions." If they rely upon this contact information, borrowers may incorrectly assume that an inquiry or dispute may be made orally by calling the servicer, or that a letter sent to one of the many servicer addresses on various notices, rather than the servicer's exclusive address, will be valid.

The reasons given by the CFPB for this deletion were not compelling at the time, and have proven to be even less convincing in light of continuing problems with servicing transfers. The decision to delete this information from the transfer notice should be reconsidered by the CFPB. In addition, since it is so common for errors in crediting of payments to arise when servicing is transferred, the CFPB should require transfer notices to provide specific information that will enable errors to be identified and corrected, including a statement as to whether the transferee servicer deems the borrower to be current with payments as of the effective date of the transfer.

3.2.2.4. The exemptions for reverse mortgages and HELOCs should be repealed or revised.

Despite unambiguous statutory language, HUD construed the 1990 RESPA amendments as not applying to home equity lines of credit (HELOCs) covered by TILA and Regulation Z.[93] Several

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[90] U.S. Gen. Accounting Office, Report, Home Ownership—Mortgage Servicing Transfers Are Increasing and Causing Borrower Concern (1989).
[91] Reg. X, former 12 C.F.R. § 1024.21(d)(3)(vii) (vacated and replaced by § 1024.33(b)(4), effective Jan. 10, 2014).
[92] 78 Fed. Reg. 10730 (Feb. 14, 2013).
[93] Regulation X stated that it did not apply to "subordinate lien loans or open-end lines of credit (home equity plans) covered by the Truth in Lending Act and Regulation Z, including open-end lines of credit secured by a first lien." Former Reg. X, 12 C.F.R. § 1024.21(a) (removed effective January 10, 2014).

courts had held that this exemption in the regulation was not entitled to deference because it clearly conflicts with the RESPA.[94]

With the transfer of rulemaking authority from HUD to the CFPB, the CFPB had an opportunity to repeal this exemption. However, the CFPB elected to retain an exemption for HELOCs.[95] Our comments to the adopted servicing regulations discuss why this exemption should be repealed. We again urge the CFPB to reconsider the retention of the HELOC exemption in Regulation X for the reasons stated in our comments for the adopted regulations.

The definition of "federally related mortgage loan" in Regulation X includes reverse mortgages or home equity conversion mortgages.[96] Thus, reverse mortgages are generally subject to the RESPA requirements. However, Regulation X exempts the servicer of a reverse mortgage from the requirements relating to (1) general servicing policies, procedures, and requirements,[97] and (2) early intervention contacts with borrowers about loss mitigation, continuity of contact with borrowers, and evaluation of applications for loss mitigation options.[98]

The exemption leaves reverse mortgage borrowers with few protections from servicing abuses in several critical areas, including loss mitigation. While reverse mortgage servicers typically evaluate borrowers for loss mitigation after a default on property charges, they are not required to comply with the procedural requirements of the loss mitigation rule. The exemption also prevents reverse mortgage borrowers from seeking redress for violations of the CFPB's procedural requirements for evaluation of loss mitigation applications. There is no logical reason to exclude reverse mortgage servicers from the rules governing loss mitigation, continuity of contact, and early intervention, and the exemption should be repealed.

4. Mortgage Assistance Relief Services Rule (Regulation O, 12 C.F.R. Part 1015)

4.1. The MARS Rule Provides Vital Protection to Distressed Homeowners.

The Mortgage Assistance Relief Services (MARS) rule prohibits various forms of misconduct associated with for-profit services that claim to help homeowners avoid foreclosure. The Federal Trade Commission adopted the Mortgage Assistance Relief Services (MARS) rule nearly a decade ago. Since then, rulemaking authority has passed to the CFPB, but the FTC retains shared enforcement authority. The MARS rule has proven extremely valuable for protecting desperate homeowners from charlatans trying to bilk them of their last dollar.

The MARS rule was adopted near the peak of the last foreclosure crisis as a new breed of

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[94] Hawkins-El v. First Am. Funding, L.L.C., 891 F. Supp. 2d 402, 408 (E.D.N.Y. 2012) (HELOC is subject to RESPA qualified written request provisions despite contrary Regulation X exemption), *aff'd*, 529 Fed. Appx. 45 (2d Cir. 2013); Cortez v. Keystone Bank, 2000 WL 536666, at *11 (E.D. Pa. May 2, 2000). *See also* MorEquity, Inc. v. Naeem, 118 F. Supp. 2d 885, 901 n. 7 (N.D. Ill. 2000) (noting in dicta that regulation conflicts with RESPA).

[95] Reg. X, 12 C.F.R. § 1024.31 (defining "mortgage loan" for purposes of Subpart C of Regulation X not to include "open-end lines of credit (home equity plans").

[96] Reg. X, 12 C.F.R. § 1024.2 (subsection 1(ii)(F) of definition of "federally related mortgage loan").

[97] Reg. X, 12 C.F.R. §§ 1024.30(b)(2), 1024.38.

[98] Reg. X, 12 C.F.R. §§ 1024.30(b)(2), 1024.39 through 1024.41.

scammer took advantage of desperate homeowners. At that time thousands of homeowners sought loan modifications from their mortgage servicers in hopes of avoiding foreclosure. Servicers, however, were overwhelmed and understaffed, frequently botching their response to modification requests and often dragging their feet for months. Scammers—and some well-meaning but unqualified individuals—stepped in, claiming that they could act as intermediaries between the homeowner and servicer for a hefty fee. They claimed that they had special skills or contacts that would enable them to arrange a loan modification for the homeowner. But, far more often than not, they did nothing but take the homeowner's money without delivering the promised assistance.

4.2. The MARS Rule Should Remain Intact.

Even though the foreclosure crisis has abated, the MARS rule remains necessary. Foreclosure rescue scams were problematic before the crisis and continue to be so. Legal advocates inform us that they regularly hear from consumers who have been bilked by these scams. The FTC's website shows a steady flow of enforcement actions under the MARS rule.[99]

The rule has not been a burden on law-abiding businesses. In 2011 the FTC announced that it would not enforce the rule's disclosure requirements and advance-fee ban against law-abiding real estate agents.[100] The CFPB has continued that policy.[101] Furthermore, as far as we can determine, nobody has responded or objected to either agency's request for renewed Paperwork Reduction Act clearance for the MARS rule's information collection requirements.[102] Therefore we believe that there is no need to limit the scope of the rule or any of its requirements.

4.3. The CFPB Should Increase MARS Enforcement.

While the FTC has actively enforced the MARS rule since it became effective, the CFPB has been more lax. This is a problem for the public because the FTC has inadequate resources to properly police the market.

In particular, we recommend focusing enforcement efforts on MARS providers that claim to be legal service providers. A review of the FTC's list of enforcement actions and of the consumer complaints we have received indicates that many of the MARS scams falsely advertise that they are affiliated with an attorney or otherwise provide legal assistance. We are not referring to

[99] *See* https://www.ftc.gov/news-events/media-resources/consumer-finance/mortgage-relief-scams.
[100] Enforcement Policy Statement on Real Estate Professionals and the Mortgage Assistance Relief Services (MARS) Rule (July 14, 2011), available at https://www.ftc.gov/public-statements/2011/07/enforcement-policy-statement-real-estate-professionals-mortgage-assistance.
[101] Bureau of Consumer Financial Protection, Identification of Enforceable Rules and Orders , 76 Fed. Reg. 43569, 43570 (July 21, 2011) (stating that the CFPB will abide by the "official commentary, guidance, and policy statements" of the transferring agency for all rules that ares being transferred to CFPB's jurisdiction; list includes FTC's MARS rule).
[102] *See* 82 Fed. Reg. 8425 (Jan. 25, 2017) (two comments filed but not publicly posted to regulations.gov; stating "On November 17, 2016, the FTC sought public comment on the information collection requirements associated with Regulation O. 81 FR 81140. No germane comments were received."); 80 Fed. Reg. 43762 (July 23, 2015) (no comments filed); 80 Fed. Reg. 25282 (May 4, 2015) (one comment filed but not publicly posted to regulations.gov); 77 Fed. Reg. 25439 (Apr. 30, 2012) (no comments filed); 77 Fed. Reg. 2685 (Jan. 19, 2012) (only one nongermane comment filed).

ordinary law firms or nonprofit legal services providers that act in the ordinary course of an attorney-client relationship. Instead, we see advertisements for organizations that either have no attorney on staff or that have a ratio of hundreds to thousands of clients per attorney. Such organizations use any attorney staff as a fig leaf even though the attorneys are not assisting their customers, not providing legal assistance, and not adequately supervising the nonattorney staff. This usually results in blatant violations of the MARS rule's ban on taking payment before delivering the promised relief. We urge the CFPB to take more aggressive action against this type of MARS provider.

5. The FTC Mortgage Advertising Rule

5.1 History of the adoption of the mortgage advertising rule

The Mortgage Advertising Rule, currently found at 12 C.F.R. Part 1014, was originally adopted pursuant to Section 626 of the Omnibus Appropriations Act of 2009.[103] As amended in 2010 by the Credit CARD Act,[104] the statute mandated the FTC to initiate a rulemaking proceding "relat[ing] to unfair or deceptive acts or practices regarding mortgage loans."[105]

The FTC issued two rules pursuant to this authority: the Mortgage Assistance Relief Services rule discussed in the preceding section, and the Mortgage Advertising Rule discussed here.

The FTC published an advance notice of proposed rulemaking and a call for comments on the Mortgage Advertising Rule in 2009[106] and a notice of proposed rulemaking in 2010.[107] It issued the final rule in 2011,[108] numbering it as 16 C.F.R. § 321.3.

The statutory authority for the FTC to adopt this rule was identified as one of the enumerated statutes that was transferred to the CFPB by the Dodd-Frank Act.[109] On December 16, 2001, the

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[103] Pub. L. 111-8, Sec. 626(a), March 11, 2009, 123 Stat 524 ("Within 90 days after the date of enactment of this Act, the Federal Trade Commission shall initiate a rulemaking proceeding with respect to mortgage loans in accordance with section 553 of title 5, United States Code. Any violation of a rule prescribed under this subsection shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices.").

[104] Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act of 2009), PL 111-24, § 511(a) May 22, 2009, 123 Stat 1734. This is an uncodified provision that appears as a note to 15 U.S.C. 1638.

[105] The provision reads:
(1) Within 90 days after the date of enactment of this Act, the Federal Trade Commission shall initiate a rulemaking proceeding with respect to mortgage loans in accordance with section 553 of title 5, United States Code. Any violation of a rule prescribed under this subsection shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices. Such rulemaking shall relate to unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services.
(2) Paragraph (1) shall not be construed to authorize the Federal Trade Commission to promulgate a rule with respect to an entity that is not subject to enforcement of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) by the Commission.

[106] 74 Fed. Reg. 26118 (June 1, 2009).

[107] 75 Fed. Reg. 60352 (Sept. 30, 2010).

[108] 76 Fed. Reg. 43826 (July 22, 2011).

[109] 12 U.S.C. § 5481(12)(Q).

CFPB published the rule without substantive change as an interim final rule, renumbering it as 12 C.F.R. Part 1014.[110] This rule, along with a number of other inherited rules, was published without change as a final rule in 2016.[111]

5.2. The CFPB should not reopen the mortgage advertising rule.

The mortgage advertising rule begins with a general prohibition of "any material misrepresentation, expressly or by implication, in any commercial communication, regarding any term of any mortgage credit product."[112] It then lists 19 examples of topics on which misrepresentations are forbidden.[113] It also prohibits waiver of its requirements.[114] There is no private cause of action to enforce this rule, so it is enforced solely by federal and state governmental agencies. Since deceptive practices have been prohibited by the FTC Act for decades,[115] the primary function of the rule is to provide more specificity to law-abiding businesses about the types of misstatements they should avoid, and to guide and enhance enforcement.

Mortgage lending has, of course, changed since the adoption of this rule in 2011, but those changes do not show a need to amend the rule. First, the list of examples in the rule is quite thorough, so changes in mortgage lending are unlikely to lead to misrepresentations that would not be encompassed by one of the examples. But amendments to the rule would be unnecessary in any event because the rule, with its general prohibition followed by examples, was drafted so that it could apply to newly-emerging misrepresentations without needing to be amended.

The FTC's promulgation of the rule was not controversial, drawing only 22 comments. In adopting the rule, the FTC took a balanced approach. It declined to make certain changes proposed by industry commenters, but it also rejected a number of proposals from a group of

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In addition, this rulemaking authority was repeated in a later section of the Dodd-Frank Act, 12 U.S.C. § 5538, which reads:
(a)(1) The Bureau of Consumer Financial Protection shall have authority to prescribe rules with respect to mortgage loans in accordance with section 553 of Title 5. Such rulemaking shall relate to unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services. Any violation of a rule prescribed under this paragraph shall be treated as a violation of a rule prohibiting unfair, deceptive, or abusive acts or practices under the Consumer Financial Protection Act of 2010 and a violation of a rule under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices.
(2) The Bureau of Consumer Financial Protection shall enforce the rules issued under paragraph (1) in the same manner, by the same means, and with the same jurisdiction, powers, and duties, as though all applicable terms and provisions of the Consumer Financial Protection Act of 2010 were incorporated into and made part of this subsection.
(3) Subject to subtitle B of the Consumer Financial Protection Act of 2010, the Federal Trade Commission shall enforce the rules issued under paragraph (1), in the same manner, by the same means, and with the same jurisdiction, as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made part of this section.
[110] 76 Fed. Reg. 78130 (Dec. 16, 2011).
[111] 81 Fed. Reg. 25323 (April 28, 2016).
[112] 12 C.F.R. § 1014.3.
[113] 12 C.F.R. § 1014.3(a) through (s).
[114] 12 C.F.R. § 1014.4.
[115] 15 U.S.C. § 45(a).

state consumer credit regulators--the Conference of State Bank Supervisors, the American Council of State Savings Supervisors, and the National Association of Consumer Credit Administrators--to include stronger provisions in the rule. These regulators had asked the FTC to include disclosure requirements in the rule, to require mortgage brokers to disclose that they are not lenders, to provide in the rule that providing substantial or support to those engaged in deceptive mortgage advertising is a violation, to require disclosures and the loan contract to be in a language other than English when a lender advertises in that other language, and to require that advertisers retain records for three to four years.[116] The FTC did not adopt any of these suggestions.

While the rule could have been stronger if the FTC had adopted the suggestions of the state consumer credit regulators, it represents a balanced approach. Reopening this rulemaking proceeding should not be a priority of the CFPB at this time. Instead, we recommend that the CFPB focus on the higher-priority topics that we have highlighted in our other comments in response to the CFPB's series of RFIs. If the CFPB chooses to reopen the rule, however, we recommend that the CFPB give further consideration to adoption of the recommendations of the state regulators.

* * *

Thank you for considering these comments.

Yours very truly,

Allied Progress
Americans for Financial Reform
Arizona Community Action Association
Arkansans Against Abusive Payday Lending
Atlanta Legal Aid Society, Inc.
CASH Campaign of Maryland
Center for NYC Neighborhoods
Center for Responsible Lending
Consumer Action
Consumer Federation of America
Equal Justice Society
Florida Alliance for Consumer Protection
Heartland Alliance for Human Needs & Human Rights
Housing Options & Planning Enterprises, Inc.
Illinois People's Action
Main Street Alliance
Maryland Consumer Rights Coalition
Mississippi Center for Justice
National Association of Consumer Advocates
National Association of Social Workers
National Consumer Law Center (on behalf of its low income clients)

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[116] 76 Fed. Reg. 43826 (July 22, 2011).

National Fair Housing Alliance
National Housing Law Project
Neighborhood Housing Services of Baltimore
New Jersey Citizen Action
People's Action Institute
Public Counsel
Public Justice Center
Public Law Center
Texas Appleseed
U.S. PIRG
West Virginia Center on Budget and Policy

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Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Request for Information: Civil Investigative Demands and Associated Processes

Docket No. **CFPB-2018-001**

April 18, 2018

Dear Ms. Jackson:

Thank you for the opportunity to comment on the Consumer Financial Protection Bureau's (CFPB's) Request for Information ("RFI") regarding Civil Investigative Demands (CIDs) and associated processes.

Consumer Action (www.consumer-action.org) has been a champion of underrepresented consumers since 1971. A national, nonprofit 501(c)3 organization, Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers and regulators to advance consumer rights and promote industry-wide change, particularly in the fields of consumer protection, credit, banking, housing, privacy, insurance and telecommunications.

The Consumer Financial Protection Bureau was created after other regulators failed to combat widespread predatory practices in the financial marketplace. These failures led to a devastating financial crisis that impacted the entire nation. The Consumer Bureau has regularly used exhaustive analysis and the thoughtful engagement of all interested parties as it fulfills its mandate. So far the CFPB has returned nearly $12 billion in relief to 29 million Americans.

The CFPB must not adopt changes to its processes for using civil investigative demands that would hurt or delay the Bureau's important work investigating potential legal violations. In particular:

- The Bureau must retain broad and flexible authority to investigate potential violations of the law and consumer harm.
- The ability to initiate investigations and to promulgate investigative demands must remain in the hands of senior professional staff and not be subject to political calculations.
- Bureau staff must retain the authority to initiate CIDs quickly and expect quick responses, without front-office bottlenecks or protracted appeal processes.
- Lawbreakers should not be given opportunities to delay, limit or hide evidence, or hamstring the Bureau.

Companies that have violated the law and abused the public trust will be eager to exploit any changes that the Bureau makes. Maintaining a robust, flexible and efficient investigation process is essential to the Consumer Bureau's mission.

Thank you for the opportunity to submit these comments.

Sincerely,

Linda Sherry
Director, National Priorities
Consumer Action

Linda.sherry@consumer-action.org

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 thirty-four undersigned consumer, community, civil rights, and legal services groups submit these comments in response to the Consumer Financial Protection Bureau's (CFPB's) Request for Information ("RFI") regarding Bureau enforcement processes.

The Consumer Bureau must retain efficient and effective law enforcement processes to deter violations of the law and provide restitution to consumers harmed by illegal consumer financial services practices. The bureau's investigation procedures must not involve political calculations, hinder the ability to act quickly when there is ongoing consumer harm, or give lawbreakers tools to delay, hide evidence, or hamstring the Bureau's investigations, litigation, or settlement negotiations. We elaborate on four main points below.

1. The severe consumer protection failures that led to the creation of the Bureau provide strong evidence that the Bureau should retain a firm and aggressive law enforcement program.

The CFPB was created in response to the severe financial crisis that devastated the nation and American families in 2008. This crisis began with fundamental problems in the mortgage and other consumer credit markets but spread to the entire economy, harming individuals and businesses alike. The financial marketplace was rife with deceptive, unfair, and abusive practices. Those practices did immense damage to countless consumers, while helping bring on a financial and economic meltdown in which tens of millions of Americans lost homes, jobs, assets, savings and economic security. Responsible businesses large and small also suffered from the fallout created by irresponsible companies.

Until the CFPB opened its doors in 2011, the responsibility of standing up for the fair treatment of consumers by banks and other lenders had been scattered across half a dozen federal regulators, and was often neglected. Other financial companies, such as debt collectors, credit reporting agencies and payday lenders, had faced little or no real federal

oversight. The clear inadequacy of that arrangement, and the enormous harm consumers suffered as a result, led Congress to establish an agency expressly dedicated to this one task.

The CFPB was created in order to have the focus, tools, information, speed, and flexibility to address existing and emerging problems in consumer financial markets. Congress held over 100 hearings and had extensive debate about possible ways to prevent similar consumer protection failures. Congress carefully considered how to craft an agency that would be independent of financial interests and politics, focus on consumer protection, and have the means and flexibility to address new problems quickly and responsibly as they arise. Many aspects of the Consumer Bureau's structure, including its investigative tools and procedures, were designed to serve these goals.

2. The Consumer Bureau has already built an effective and fair consumer law enforcement office.

Since it was established, the Consumer Bureau has wisely used its authority to protect the public. The agency's enforcement cases have resulted in nearly $12 billion in relief for American families. Approximately 29 million Americans—almost 10 percent of the adult American population—have received some form of restitution in Bureau enforcement cases. Over 90 percent of this restitution came in cases where the defendant engaged in a deceptive act or practice. Nevertheless, in over two hundred enforcement cases, the Bureau has had very few losses or set-backs in litigation. Independent federal judges have agreed with nearly every position taken by the CFPB's enforcement office when given the opportunity to do so. Our organizations believe that some members of the financial services industry lobby have unfairly characterized the Bureau's enforcement track record. We support the Bureau's mission and believe that enforcement staff must continue to receive the resources and authority they need to do their job.

Bureau leadership should also bear in mind that some comments the Bureau receives about its law enforcement processes may originate from companies that were ultimately found to have broken the law or mistreated consumers. The Bureau should bear in mind that some businesses and individuals will attempt to exploit any changes to the Bureau's enforcement processes. If the Bureau makes it more difficult for enforcement staff to hold wrongdoers accountable for illegal business practices, some businesses will take advantage of these changes in bad faith. Both consumers, and businesses that are committed to lawful business practices, should prefer an efficient, effective Bureau enforcement program.

3. Bureau enforcement staff should have flexibility and discretion over how they conduct investigations and litigation.

We believe that the Bureau's current enforcement processes are appropriate. Many of the changes that the RFI questions appear to contemplate could unduly delay investigations or

litigation, allowing consumer harm to continue. The Bureau should not modify its procedures in a way that could give lawbreakers tools to thwart the Bureau's work on behalf of the public. Existing Bureau policies and procedures already provide sufficient guidance on how to communicate, whether to use the Notice and Opportunity to Respond and Advise process, and when staff should meet with investigation subjects. Bureau leadership should not micromanage day-to-day operations of the Enforcement Office in a way that creates delays or limits the effectiveness of staff. Our organizations believe Bureau investigations should proceed as quickly as possible. However, we also believe that investigations should not be closed or hindered simply because uncovering evidence of illegal conduct in some cases takes longer than expected. Moreover, we are concerned that financial institutions may use changes in the Bureau's enforcement processes to lobby for special treatment, favors, or other inappropriate accommodations. Bureau leadership should bear in mind that families harmed by unlawful financial practices too often do not have a voice in consumer law enforcement cases.

Every defendant in a CFPB enforcement matter has the right to seek review by a judge. Bureau policies and procedures should not be revised to create further decision-making hurdles that decrease the likelihood of enforcement actions or create administrative bottlenecks in pursuing justice. Similarly, Bureau staff should have considerable discretion in determining when coordinating enforcement efforts with other state and federal agencies is appropriate. In some cases, coordinating enforcement actions can lead to broader, more effective relief for consumers. But in others, the costs and complexity of coordinated enforcement can slow down relief and create lowest-common-denominator cases that leave many borrowers insufficiently compensated. Bureau leadership should focus on recruiting and retaining talented, dedicated career professionals that will engage in steady, effective law enforcement in the long-term.

4. The Bureau should not adopt policies that could limit the ability of Bureau staff to obtain remedies that benefit the public.

We are concerned that a civil money penalty matrix could artificially tie the hands of Bureau staff and diminish their ability to negotiate settlements on behalf of American consumers. Although other federal banking regulators have adopted a penalty matrix, prudential regulators also failed to engage in sufficient enforcement efforts to prevent the financial crisis. Similarly, we believe that Bureau consent orders and monetary relief provisions should not impose additional burdens on harmed consumes in demonstrating that they may be entitled to relief. The burden and cost of providing relief to harmed consumers should be borne by the businesses that violated the law rather than the consumers that suffered as a result of those violations. The Bureau's standard consent order template prior to 2018 has been sufficient to balance consumer and defendant rights. Any changes to the Bureau's

procedures that would minimize restitution or civil money penalties would harm the public and lead to less efficient use of public resources.

* * *

All companies and individuals have a civic duty to cooperate with law enforcement investigations. Although we believe the Bureau works to minimize the burden of investigations, any investigation can impose some costs. This is inevitable if the Consumer Bureau is to fulfill its role in protecting the public. Maintaining a robust, flexible, and efficient enforcement processes is essential to the Consumer Bureau's mission. We urge the Bureau to refrain from altering its enforcement processes in a way that will inhibit the ability of the Enforcement Office to protect American consumers from illegal consumer financial practices. Thank you for the opportunity to submit these comments.

Sincerely,

Allied Progress

Americans for Financial Reform

Arizona Community Action Association

California Reinvestment Coalition

Center for Economic Integrity

Center for Popular Democracy

Center for Responsible Lending

Connecticut Fair Housing Center

Consumer Action

Consumer Federation of America

Delaware Community Reinvestment Action Council, Inc.

Demos

Georgia Watch

Heartland Alliance for Human Needs & Human Rights

Interfaith Center on Corporate Responsibility

Jacksonville Area Legal Aid, Inc.

Kentucky Equal Justice Center

Maryland Consumer Rights Coalition

Montana Organizing Project

National Association of Consumer Advocates

National Consumers League

National Fair Housing Alliance

New Jersey Citizen Action

The North Dakota Economic Security and Prosperity Alliance

Public Citizen

Public Good Law Center

Reinvestment Partners

South Carolina Appleseed Legal Justice Center

South Carolina Christian Action Council

Tennessee Citizen Action

Texas Appleseed

Tzedek DC

U.S. PIRG

Woodstock Institute

July 2, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2018-0013 -- Request for Information Regarding Bureau Guidance and Implementation Support, 83 Fed. Reg. 13959 (Apr. 2, 2018)

Dear Acting Director Mulvaney,

The undersigned consumer, civil rights and community groups submit this comment on the CFPB's guidance and implementation support program. In summary, our views are as follows:

- We support steps that maximize industry compliance with consumer protection statutes and regulations. As a whole, the agency's guidances have promoted this result, so we encourage the CFPB to continue to issue guidances and compliance aids.
- Another benefit of the CFPB's program is that it has provided guidance while formal rulemaking is planned or underway but not yet completed. The guidance program gives the agency some nimbleness and enables it to point industry in the right direction while formal rulemaking is being completed.
- Guidance documents such as FAQs and quick reference summaries are likely to help businesses comply with the laws and regulations that the CFPB administers. This is particularly true for small businesses, but even if a business has a large compliance staff, FAQs and quick reference summaries can help that staff gain an overview of a rule's requirements and find relevant parts of a rule. FAQs, quick reference summaries, and the like are helpful to consumers, consumer advocates, and the general public for the same reasons.
- All guidances of all types, whether an official interpretation, an FAQ, a webinar, or something else, should be readily accessible to the public in an easily searchable form.
- The CFPB should not issue advice to individual companies, whether informally or by way of advisory opinions, and whether written or oral. But the CFPB may answer simple inquiries that merely involve directing companies to existing laws or documents or restating settled law without offering new interpretations or application to specific company facts.

These views are spelled out in more detail below.

1. Objections to the CFPB's Request for Information Process

We must first note our objections to the burdensome RFI process. The amount of time and attention required to adequately address the CFPB's numerous RFIs on a multitude of subjects in a very short amount of time has diverted valuable consumer advocacy and third party resources to respond to these requests. The very structure of these RFIs, the nature of many of the questions, and the fact that many focus on processes known mostly to industry actors and their lawyers, favor financial institutions with greater resources at their disposal, and we are gravely concerned about any attempts to weaken consumer protection through this process.

The CFPB ignored our request for an extension of time to respond to the particularly burdensome RFIs regarding adopted and inherited regulations, which were due on June 19, 2018 and June 25, 2018, respectively. The current RFI comment is due less than a week after those comments, which required us

to comment on dozens of regulations on many different subjects running many hundreds if not thousands of pages in length.

These problems have prevented us from responding in more detail, identifying and commenting on more issues, seeking more input or signatories, or publicizing the comment opportunity more widely. The CFPB must not take the failure to comment on a particular issue, or a limited number of comments from the public, as indicative of a lack of broad objections to changes the CFPB might make that would weaken its role in effectively protecting the consumer public.

2. We Support the CFPB's Issuance of Guidances and Compliance Aids.

In the seven years of its existence, the CFPB has done an exemplary job of crafting rules that protect consumers from marketplace abuses while impinging as little as possible on legitimate business operations. However, rules will benefit consumers only if industry understands and complies with them. Guidances and compliance aids promote compliance with the consumer protection laws and rules that fall within the CFPB's jurisdiction. We support the CFPB's program of issuing these guides because they promote compliance with the laws and rules that benefit consumers.

Consumers, responsible companies, and government agencies all benefit when there is widespread compliance and full implementation of a law. For example, the Credit CARD Act abolished tricks and traps that were commonplace among credit cards and were creating a race to the bottom that made it hard for companies with transparent up-front pricing to compete. If there had not been broad abandonment of the tricks and traps that the Credit CARD Act abolished, consumers might not have realized these benefits, companies that complied with the law would have been at a competitive disadvantage, and government agencies would have had to expend substantial resources to enforce the law.

Guidances are especially helpful with respect to the statutes that fall within the CFPB's jurisdiction because these statutes and the rules under them can be complex. Some deal with topics--such as disclosure of consumer credit terms-- that are inherently complex. Others are complex because the CFPB has taken such pains to minimize the number of entities that must comply with the rule. For example, the CFPB crafted a series of eight exemptions from the Dodd-Frank Act's requirement that a creditor obtain an appraisal before extending a higher-cost loan.[1] The rule would have been much simpler if it applied to every mortgage lender, but the CFPB made the judgment that the gains that would come from fine-tuning the rule outweighed the additional complexity that would cause.

Guidances and other compliance aids help businesses comply with CFPB rules. Even for large businesses, these aids can help their legal departments get an initial grasp of the scope of a rule and its relevance for the business. Guidance documents that provide a roadmap for creating forms and setting up systems to comply with a new rule enhance the efficiency of businesses large and small, by making it unnecessary for each one to tread the same ground. And they are particularly helpful for small businesses that may not have in-house legal staff. Guidances can deal with practical questions that a business faces when implementing a new rule in a way that a formal rule or an official interpretation cannot.

Guidances and other compliance aids are also useful to consumers and other members of the public. A guidance document can be more concise, and more in the form of a summary, and it can avoid highly technical language and arcane legal or economic terms. Consumers who are trying to understand their rights or determine what the standards are for businesses they are dealing with are far more likely to find useful basic information if a guidance, a summary, or a FAQ document is available than if they have

[1] 12 C.F.R. § 1026.35(c).

to locate and read the relevant rules. A CFPB guidance document is unlikely to be sufficient to enable a consumer to litigate the issue, but it is very likely to help the consumer frame the question and find the right entity to which to make a complaint.

Even though attorneys are trained to be able to read and analyze complex regulations, guidances are helpful to them, too. First, not all attorneys are familiar with consumer law. Guidances, summaries, and FAQs can be particularly helpful to non-specialist attorneys who are seeking to determine whether there is a law or regulation on a particular topic. Even for attorneys who focus on consumer law, these documents can make it easier to find relevant provisions of regulations and confirm the attorney's understanding of a regulation. Giving a big-picture summary of a regulation in a guidance or summary document can make it easier for a consumer law specialist to absorb and understand the regulation.

The CFPB's guidances have also proven helpful in filling in the gap between the time a statute becomes effective and the time rulemaking is complete. Businesses may have to comply with the statute even before the rules are finalized. Guidances can help businesses do so. In addition, a guidance can help a business chart a path that will make it easier for it to comply with regulations once they are finalized.

Guidances can also serve the purpose of putting businesses on notice of the practices that the agency's enforcement and supervision divisions consider to be violations. This information is, of course, invaluable to businesses. Businesses also benefit when an agency puts this guidance into a publicly-available document, because then a business that disagrees with the agency's position knows about it and has the opportunity to persuade the agency to revise it. When the agency informs businesses that it will consider certain practices that are harmful to consumers to be violations, consumers also benefit because then businesses are likely to avoid those practices.

3. Any responses the CFPB provides to individual inquiries should be limited and surrounded by safeguards.

The RFI asks a number of questions about how the CFPB should handle individual inquiries. To what extent should CFPB employees provide oral responses? What balance should the CFPB strike between responding to individual inquiries and preparing more systematic written guidance? Should the CFPB institute a program of advisory opinions?

We have serious concerns about any program of responding to individual inquiries. As noted above and discussed further below, we strongly oppose a program of advisory opinions. But even with less formal responses, there are dangers that agency staff might give quick responses that are not fully thought out or that conflict with other responses to the same or related questions. Providing a response without having received input from other stakeholders could easily lead to ill-informed decisions and bad policy choices. We have seen many occasions when a company seeks a waiver or a favorable ruling from an agency, and spins the facts in a way that will mislead the agency unless it affirmatively seeks the perspective of the other side. There are particularly grave concerns when a business seeks an advisory opinion as a way of co-opting ongoing or threatened litigation.

On the other hand, we understand that the CFPB does not want to be perceived as, and should not be, an impenetrable, non-responsive bureaucracy. The CFPB also benefits from hearing questions from the entities that are affected by the statutes it administers and the rules it adopts. By clearing up confusion on the part of businesses, the CFPB can foster compliance with statutes and rules that benefit consumers.

Given these competing concerns, we recommend that the CFPB limit its responses to individual inquiries and maintain the following safeguards:

No advice. The CFPB should not be providing legal advice to companies that it regulates. Responses to inquiries should, at most, be limited to pointing companies to existing laws, regulations and

public documents, not providing private advice to interpret them. The CFPB can do companies a service simply by helping them identify existing resources. But it is inappropriate for the CFPB to engage in an informal process to interpret the law or to do so in a private exchange in the context of just one company's concerns.

Tracking and review. The CFPB should have a system for tracking and reviewing the types of inquiries it receives about its rules and policies, other than very routine requests that can be resolved merely by explaining agency procedures or referring the caller to written materials. If the CFPB is getting a significant number of questions about the same issue, it should flag that issue and determine whether it should issue a more formal, publicly-available guidance document.

Level of input from stakeholders. Whenever the agency decides to address an issue that is not clearly answered in existing laws, interpretations or materials, it should obtain input from other stakeholders. Otherwise, it makes itself susceptible to a one-sided process that could be tainted by slanted portrayal of the facts, an exaggeration of the problem, or failure to appreciate concerns on the other side. Obtaining input also makes it far less likely that the agency will overlook some key issues that will require it to revoke and redo its guidance.

There are many ways that the agency can obtain input from stakeholders, including in-person or telephonic roundtables, published requests for information, and surveys. The agency should not adopt a one-size-fits-all approach to obtaining responses from stakeholders, but should tailor the approach to the importance of the issue, its novelty and complexity, the potential for varying views, and any timing considerations.

4. The CFPB Should Not Issue Advisory Opinions.

While we support the issuance of guidances, we oppose the institution of an advisory opinion program. Agency advisory opinions pose numerous problems, including the dangers of providing advice on an individual situation without considering all ramifications and the broader context; the risks of one-sided information and input; a nontransparent process; and the burden of responding to numerous requests.

Advisory opinions typically address an issue in a particular context rather than looking at it in a more systematic way. Because they are often tied to a specific context, they can raise more questions than they answer. The agency will serve the public better if it avoids issuing advisory opinions in response to individual issues, but instead looks at the bigger picture and addresses issues in a more general and comprehensive way.

Advisory opinions also pose a severe risk of a one-sided process. They tend to be available only to industry; the agency has not asked whether consumers, consumer advocates or consumer attorneys could obtain advisory opinion. Absent formal notice and comment, the process of considering and issuing an advisory opinion would also be inherently slanted. The facts would be shaped by the industry question and input, and it is unlikely that consumers, consumer advocates or the general public would have sufficient opportunity to provide another perspective or raise issues that would not be raised by industry.

Issuing advisory opinions can also complicate any effort to research the law. For many of the statutes that fall within the CFPB's jurisdiction, anyone who is trying to research a question must already look at the statute, the regulations, and a set of official interpretations. To add yet another body of opinions that would have to be searched would make determining the law that much more complex. This is particularly true since advisory opinions are unlikely to be codified in an organized, systematic way. They may not be indexed, and they may not be included in the on-line legal research databases that contain the statute, the regulation, and the official interpretations.

Advisory opinions are also problematic because they are often sought by companies facing, threatened, feared or pending litigation or as an after-the-fact blessing for illegal actions. If the CFPB wishes to make its views known regarding an issue that is in litigation, it should intervene in the litigation or file an amicus brief, rather than issue an advisory opinion at the behest of one party. If the agency wants to issue an official interpretation to prevent future litigation, it should do so through the formal notice and comment rulemaking process

During the first twelve years after the Truth in Lending Act was passed, the Federal Reserve Board, which then had rulemaking authority under it, issued a welter of Official Board Interpretations, informal staff interpretations, and official staff interpretations. Some were published in the Federal Register, but others were available only through looseleaf legal publications. The result has been described as a "regulatory morass."[2] Only after Congress enacted the Truth in Lending Simplification Act in 1980 did the FRB replace this mass of opinion letters with a single, organized, carefully-crafted set of Official Interpretations. We urge the CFPB not to start down a path that might lead to the same level of complexity.

Finally, the process of responding to individual inquiries with advisory opinions would take significant bureau resources, would encourage a flood of one-at-a-time questions, and would divert attention from more careful and systematic efforts to update regulations in light of the full context with full public input.

5. The CFPB should commit itself to seeking broad input from stakeholders when it issues guidances.

We urge the CFPB to adopt a broad program of seeking input from stakeholders whenever it issues a guidance document that is not subject to formal notice-and-comment rulemaking. Methods include surveys, roundtables, less formal meetings, and requests for information.

The CFPB should have a system in place to identify persons and entities who may be affected by proposed guidance documents. It should make sure to reach out to trade groups or other organizations that speak for persons who may be affected, but it should remember that there may be affected entities that are not part of any organization.

The agency should take particular care to obtain the perspective of consumers and consumer groups. The implications of a request from industry may not be clear, and the CFPB should always hear from both sides. The agency must take into account the fact that consumer groups have much lower budgets and staffing than industry members. The agency should reach out to consumers and consumer groups directly, and it may be necessary to take special steps to make it possible for consumers and consumer groups to provide their input. For example, it may be necessary for the CFPB to travel outside of Washington, DC.

6. All guidance documents should be made public in a form that is readily searchable.

A potential problem with guidance documents is that, even though they are intended to make the law clearer, they can have the counter-effect of making it more complicated to determine what the law is. Typically, guidance documents are not codified. Legal research databases may not include them. There may or may not be an overall index to them.

These potential problems are not reasons to stop issuing guidance documents. But the CFPB should take care to post all of its guidance documents in an organized, easily-searchable way. It should also have an internal system for reviewing guidance documents to make sure they are consistent with each

[2] National Consumer Law Center, Truth in Lending § 1.5.3.1 (9th ed. 2015), *updated at* www.nclc.org/library.

other and consistent with the statute and rules and any amendments thereto. It should review its guidance documents regularly to delete any that are obsolete or duplicative.

* * *

Thank you for considering these views.

Respectfully submitted,

Alabama Appleseed Center for Law & Justice
Allied Progress
Americans for Financial Reform
Arizona Community Action Association
Arkansans Against Abusive Payday Lending
Atlanta Legal Aid Society, Inc.
California Reinvestment Coalition
Center for Economic Integrity
Center for Responsible Lending
Connecticut Fair Housing Center
Consumer Action
Consumer Federation of America
Equal Voice Action
Florida Alliance for Consumer Protection
Heartland Alliance for Human Needs & Human Rights
Jacksonville Area Legal Aid, Inc.
Legal Services NYC
Main Street Alliance
Maryland Consumer Rights Coalition
Massachusetts Communities Action Network
Michigan Legal Services
Mississippi Center for Justice
NAACP
National Association of Consumer Advocates
National Community Reinvestment Coalition
National Consumer Law Center (on behalf of its low income clients)
National Fair Housing Alliance
New Yorkers for Responsible Lending (NYRL)
Public Citizen
Public Justice Center
Public Law Center
Tennessee Citizen Action
Texas Appleseed
Tzedek DC
U.S. PIRG
Virginia Citizens Consumer Council
West Virginia Center on Budget and Policy
Western New York Law Center

July 2, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2018-0013 -- Request for Information Regarding Bureau Guidance and Implementation Support, 83 Fed. Reg. 13959 (Apr. 2, 2018)

Dear Acting Director Mulvaney,

The undersigned consumer, civil rights and community groups submit this comment on the CFPB's guidance and implementation support program. In summary, our views are as follows:

- We support steps that maximize industry compliance with consumer protection statutes and regulations. As a whole, the agency's guidances have promoted this result, so we encourage the CFPB to continue to issue guidances and compliance aids.
- Another benefit of the CFPB's program is that it has provided guidance while formal rulemaking is planned or underway but not yet completed. The guidance program gives the agency some nimbleness and enables it to point industry in the right direction while formal rulemaking is being completed.
- Guidance documents such as FAQs and quick reference summaries are likely to help businesses comply with the laws and regulations that the CFPB administers. This is particularly true for small businesses, but even if a business has a large compliance staff, FAQs and quick reference summaries can help that staff gain an overview of a rule's requirements and find relevant parts of a rule. FAQs, quick reference summaries, and the like are helpful to consumers, consumer advocates, and the general public for the same reasons.
- All guidances of all types, whether an official interpretation, an FAQ, a webinar, or something else, should be readily accessible to the public in an easily searchable form.
- The CFPB should not issue advice to individual companies, whether informally or by way of advisory opinions, and whether written or oral. But the CFPB may answer simple inquiries that merely involve directing companies to existing laws or documents or restating settled law without offering new interpretations or application to specific company facts.

These views are spelled out in more detail below.

1. Objections to the CFPB's Request for Information Process

We must first note our objections to the burdensome RFI process. The amount of time and attention required to adequately address the CFPB's numerous RFIs on a multitude of subjects in a very short amount of time has diverted valuable consumer advocacy and third party resources to respond to these requests. The very structure of these RFIs, the nature of many of the questions, and the fact that many focus on processes known mostly to industry actors and their lawyers, favor financial institutions with greater resources at their disposal, and we are gravely concerned about any attempts to weaken consumer protection through this process.

The CFPB ignored our request for an extension of time to respond to the particularly burdensome RFIs regarding adopted and inherited regulations, which were due on June 19, 2018 and June 25, 2018, respectively. The current RFI comment is due less than a week after those comments, which required us

to comment on dozens of regulations on many different subjects running many hundreds if not thousands of pages in length.

These problems have prevented us from responding in more detail, identifying and commenting on more issues, seeking more input or signatories, or publicizing the comment opportunity more widely. The CFPB must not take the failure to comment on a particular issue, or a limited number of comments from the public, as indicative of a lack of broad objections to changes the CFPB might make that would weaken its role in effectively protecting the consumer public.

2. We Support the CFPB's Issuance of Guidances and Compliance Aids.

In the seven years of its existence, the CFPB has done an exemplary job of crafting rules that protect consumers from marketplace abuses while impinging as little as possible on legitimate business operations. However, rules will benefit consumers only if industry understands and complies with them. Guidances and compliance aids promote compliance with the consumer protection laws and rules that fall within the CFPB's jurisdiction. We support the CFPB's program of issuing these guides because they promote compliance with the laws and rules that benefit consumers.

Consumers, responsible companies, and government agencies all benefit when there is widespread compliance and full implementation of a law. For example, the Credit CARD Act abolished tricks and traps that were commonplace among credit cards and were creating a race to the bottom that made it hard for companies with transparent up-front pricing to compete. If there had not been broad abandonment of the tricks and traps that the Credit CARD Act abolished, consumers might not have realized these benefits, companies that complied with the law would have been at a competitive disadvantage, and government agencies would have had to expend substantial resources to enforce the law.

Guidances are especially helpful with respect to the statutes that fall within the CFPB's jurisdiction because these statutes and the rules under them can be complex. Some deal with topics--such as disclosure of consumer credit terms-- that are inherently complex. Others are complex because the CFPB has taken such pains to minimize the number of entities that must comply with the rule. For example, the CFPB crafted a series of eight exemptions from the Dodd-Frank Act's requirement that a creditor obtain an appraisal before extending a higher-cost loan.[1] The rule would have been much simpler if it applied to every mortgage lender, but the CFPB made the judgment that the gains that would come from fine-tuning the rule outweighed the additional complexity that would cause.

Guidances and other compliance aids help businesses comply with CFPB rules. Even for large businesses, these aids can help their legal departments get an initial grasp of the scope of a rule and its relevance for the business. Guidance documents that provide a roadmap for creating forms and setting up systems to comply with a new rule enhance the efficiency of businesses large and small, by making it unnecessary for each one to tread the same ground. And they are particularly helpful for small businesses that may not have in-house legal staff. Guidances can deal with practical questions that a business faces when implementing a new rule in a way that a formal rule or an official interpretation cannot.

Guidances and other compliance aids are also useful to consumers and other members of the public. A guidance document can be more concise, and more in the form of a summary, and it can avoid highly technical language and arcane legal or economic terms. Consumers who are trying to understand their rights or determine what the standards are for businesses they are dealing with are far more likely to find useful basic information if a guidance, a summary, or a FAQ document is available than if they have

[1] 12 C.F.R. § 1026.35(c).

to locate and read the relevant rules. A CFPB guidance document is unlikely to be sufficient to enable a consumer to litigate the issue, but it is very likely to help the consumer frame the question and find the right entity to which to make a complaint.

Even though attorneys are trained to be able to read and analyze complex regulations, guidances are helpful to them, too. First, not all attorneys are familiar with consumer law. Guidances, summaries, and FAQs can be particularly helpful to non-specialist attorneys who are seeking to determine whether there is a law or regulation on a particular topic. Even for attorneys who focus on consumer law, these documents can make it easier to find relevant provisions of regulations and confirm the attorney's understanding of a regulation. Giving a big-picture summary of a regulation in a guidance or summary document can make it easier for a consumer law specialist to absorb and understand the regulation.

The CFPB's guidances have also proven helpful in filling in the gap between the time a statute becomes effective and the time rulemaking is complete. Businesses may have to comply with the statute even before the rules are finalized. Guidances can help businesses do so. In addition, a guidance can help a business chart a path that will make it easier for it to comply with regulations once they are finalized.

Guidances can also serve the purpose of putting businesses on notice of the practices that the agency's enforcement and supervision divisions consider to be violations. This information is, of course, invaluable to businesses. Businesses also benefit when an agency puts this guidance into a publicly-available document, because then a business that disagrees with the agency's position knows about it and has the opportunity to persuade the agency to revise it. When the agency informs businesses that it will consider certain practices that are harmful to consumers to be violations, consumers also benefit because then businesses are likely to avoid those practices.

3. Any responses the CFPB provides to individual inquiries should be limited and surrounded by safeguards.

The RFI asks a number of questions about how the CFPB should handle individual inquiries. To what extent should CFPB employees provide oral responses? What balance should the CFPB strike between responding to individual inquiries and preparing more systematic written guidance? Should the CFPB institute a program of advisory opinions?

We have serious concerns about any program of responding to individual inquiries. As noted above and discussed further below, we strongly oppose a program of advisory opinions. But even with less formal responses, there are dangers that agency staff might give quick responses that are not fully thought out or that conflict with other responses to the same or related questions. Providing a response without having received input from other stakeholders could easily lead to ill-informed decisions and bad policy choices. We have seen many occasions when a company seeks a waiver or a favorable ruling from an agency, and spins the facts in a way that will mislead the agency unless it affirmatively seeks the perspective of the other side. There are particularly grave concerns when a business seeks an advisory opinion as a way of co-opting ongoing or threatened litigation.

On the other hand, we understand that the CFPB does not want to be perceived as, and should not be, an impenetrable, non-responsive bureaucracy. The CFPB also benefits from hearing questions from the entities that are affected by the statutes it administers and the rules it adopts. By clearing up confusion on the part of businesses, the CFPB can foster compliance with statutes and rules that benefit consumers.

Given these competing concerns, we recommend that the CFPB limit its responses to individual inquiries and maintain the following safeguards:

No advice. The CFPB should not be providing legal advice to companies that it regulates. Responses to inquiries should, at most, be limited to pointing companies to existing laws, regulations and

public documents, not providing private advice to interpret them. The CFPB can do companies a service simply by helping them identify existing resources. But it is inappropriate for the CFPB to engage in an informal process to interpret the law or to do so in a private exchange in the context of just one company's concerns.

Tracking and review. The CFPB should have a system for tracking and reviewing the types of inquiries it receives about its rules and policies, other than very routine requests that can be resolved merely by explaining agency procedures or referring the caller to written materials. If the CFPB is getting a significant number of questions about the same issue, it should flag that issue and determine whether it should issue a more formal, publicly-available guidance document.

Level of input from stakeholders. Whenever the agency decides to address an issue that is not clearly answered in existing laws, interpretations or materials, it should obtain input from other stakeholders. Otherwise, it makes itself susceptible to a one-sided process that could be tainted by slanted portrayal of the facts, an exaggeration of the problem, or failure to appreciate concerns on the other side. Obtaining input also makes it far less likely that the agency will overlook some key issues that will require it to revoke and redo its guidance.

There are many ways that the agency can obtain input from stakeholders, including in-person or telephonic roundtables, published requests for information, and surveys. The agency should not adopt a one-size-fits-all approach to obtaining responses from stakeholders, but should tailor the approach to the importance of the issue, its novelty and complexity, the potential for varying views, and any timing considerations.

4. The CFPB Should Not Issue Advisory Opinions.

While we support the issuance of guidances, we oppose the institution of an advisory opinion program. Agency advisory opinions pose numerous problems, including the dangers of providing advice on an individual situation without considering all ramifications and the broader context; the risks of one-sided information and input; a nontransparent process; and the burden of responding to numerous requests.

Advisory opinions typically address an issue in a particular context rather than looking at it in a more systematic way. Because they are often tied to a specific context, they can raise more questions than they answer. The agency will serve the public better if it avoids issuing advisory opinions in response to individual issues, but instead looks at the bigger picture and addresses issues in a more general and comprehensive way.

Advisory opinions also pose a severe risk of a one-sided process. They tend to be available only to industry; the agency has not asked whether consumers, consumer advocates or consumer attorneys could obtain advisory opinion. Absent formal notice and comment, the process of considering and issuing an advisory opinion would also be inherently slanted. The facts would be shaped by the industry question and input, and it is unlikely that consumers, consumer advocates or the general public would have sufficient opportunity to provide another perspective or raise issues that would not be raised by industry.

Issuing advisory opinions can also complicate any effort to research the law. For many of the statutes that fall within the CFPB's jurisdiction, anyone who is trying to research a question must already look at the statute, the regulations, and a set of official interpretations. To add yet another body of opinions that would have to be searched would make determining the law that much more complex. This is particularly true since advisory opinions are unlikely to be codified in an organized, systematic way. They may not be indexed, and they may not be included in the on-line legal research databases that contain the statute, the regulation, and the official interpretations.

Advisory opinions are also problematic because they are often sought by companies facing, threatened, feared or pending litigation or as an after-the-fact blessing for illegal actions. If the CFPB wishes to make its views known regarding an issue that is in litigation, it should intervene in the litigation or file an amicus brief, rather than issue an advisory opinion at the behest of one party. If the agency wants to issue an official interpretation to prevent future litigation, it should do so through the formal notice and comment rulemaking process

During the first twelve years after the Truth in Lending Act was passed, the Federal Reserve Board, which then had rulemaking authority under it, issued a welter of Official Board Interpretations, informal staff interpretations, and official staff interpretations. Some were published in the Federal Register, but others were available only through looseleaf legal publications. The result has been described as a "regulatory morass."[2] Only after Congress enacted the Truth in Lending Simplification Act in 1980 did the FRB replace this mass of opinion letters with a single, organized, carefully-crafted set of Official Interpretations. We urge the CFPB not to start down a path that might lead to the same level of complexity.

Finally, the process of responding to individual inquiries with advisory opinions would take significant bureau resources, would encourage a flood of one-at-a-time questions, and would divert attention from more careful and systematic efforts to update regulations in light of the full context with full public input.

5. The CFPB should commit itself to seeking broad input from stakeholders when it issues guidances.

We urge the CFPB to adopt a broad program of seeking input from stakeholders whenever it issues a guidance document that is not subject to formal notice-and-comment rulemaking. Methods include surveys, roundtables, less formal meetings, and requests for information.

The CFPB should have a system in place to identify persons and entities who may be affected by proposed guidance documents. It should make sure to reach out to trade groups or other organizations that speak for persons who may be affected, but it should remember that there may be affected entities that are not part of any organization.

The agency should take particular care to obtain the perspective of consumers and consumer groups. The implications of a request from industry may not be clear, and the CFPB should always hear from both sides. The agency must take into account the fact that consumer groups have much lower budgets and staffing than industry members. The agency should reach out to consumers and consumer groups directly, and it may be necessary to take special steps to make it possible for consumers and consumer groups to provide their input. For example, it may be necessary for the CFPB to travel outside of Washington, DC.

6. All guidance documents should be made public in a form that is readily searchable.

A potential problem with guidance documents is that, even though they are intended to make the law clearer, they can have the counter-effect of making it more complicated to determine what the law is. Typically, guidance documents are not codified. Legal research databases may not include them. There may or may not be an overall index to them.

These potential problems are not reasons to stop issuing guidance documents. But the CFPB should take care to post all of its guidance documents in an organized, easily-searchable way. It should also have an internal system for reviewing guidance documents to make sure they are consistent with each

[2] National Consumer Law Center, Truth in Lending § 1.5.3.1 (9th ed. 2015), *updated at* www.nclc.org/library.

other and consistent with the statute and rules and any amendments thereto. It should review its guidance documents regularly to delete any that are obsolete or duplicative.

* * *

Thank you for considering these views.

Respectfully submitted,

Alabama Appleseed Center for Law & Justice
Allied Progress
Americans for Financial Reform
Arizona Community Action Association
Arkansans Against Abusive Payday Lending
Atlanta Legal Aid Society, Inc.
California Reinvestment Coalition
Center for Economic Integrity
Center for Responsible Lending
Connecticut Fair Housing Center
Consumer Action
Consumer Federation of America
Equal Voice Action
Florida Alliance for Consumer Protection
Heartland Alliance for Human Needs & Human Rights
Jacksonville Area Legal Aid, Inc.
Legal Services NYC
Main Street Alliance
Maryland Consumer Rights Coalition
Massachusetts Communities Action Network
Michigan Legal Services
Mississippi Center for Justice
NAACP
National Association of Consumer Advocates
National Community Reinvestment Coalition
National Consumer Law Center (on behalf of its low income clients)
National Fair Housing Alliance
New Yorkers for Responsible Lending (NYRL)
Public Citizen
Public Justice Center
Public Law Center
Tennessee Citizen Action
Texas Appleseed
Tzedek DC
U.S. PIRG
Virginia Citizens Consumer Council
West Virginia Center on Budget and Policy
Western New York Law Center

June 19, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2018-0011 -- Request for Information Regarding the Bureau's Adopted Regulations and New Rulemaking Authorities – **New Authority to Write Debt Collection Rules**

Dear Acting Director Mulvaney:

The 46 undersigned consumer, community, civil rights and legal services groups submit these comments in response to the Consumer Financial Protection Bureau ("CFPB")'s Request for Information ("RFI") regarding its adopted regulations and new rulemaking authorities. In these comments, we focus on the CFPB's new authority to write debt collection rules.

1. Summary

Abusive debt collection practices have been a problem for decades. Debt collection is consistently near the top--and usually at the top--of complaints at the Federal Trade Commission and now at the CFPB. Violations of the 1977 Fair Debt Collection Practices Act ("FDCPA") remain routine. The advent of the debt buyer industry has exacerbated old problems and created new ones, as many consumers now face collection activities against the wrong person, for the wrong amount, by the wrong party, or for debt that is so old that records are lost or the consumer cannot be legally sued.

Congress gave the CFPB new authority to write regulations under the FDCPA. Any such rules must stay faithful to the statutory purposes, including: "to eliminate abusive debt collection practices" and "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."

As the CFPB undertakes a rulemaking concerning communications, it must focus on ending harassing communication, protecting consumer privacy, and increasing consumer control over collection communications. In particular, the CFPB should:

- Limit calls to one a week (with up to three attempted calls);
- Require collectors to obey the consumer's oral request to stop calling;
- Ensure that newer communication technologies respect privacy, do not abuse or harass, and comply with the FDCPA;
- Prohibit the collection of time-barred debt or adopt very strict limits that prohibit suits on "revived" debt and limit communications to writings that include clear disclosures that the consumer cannot be sued.

Any new disclosures should build upon existing FDCPA disclosures and be tested for comprehension by the least sophisticated consumer.

The CFPB should reject calls from some in the collection industry for a "right to cure" violations of the FDCPA before consumers may exercise their rights under the statute. There is no right in the statute to have one free bite at violating the Act, there is no authority to add one, and to do so would encourage violations and harm both consumers and law-abiding collectors.

We provide more detail on these recommendations and several others below.

2. Background

More than 40 years after the enactment of the Fair Debt Collection Practices Act, consumers still experience a variety of abusive collection practices by debt collectors, including repeated or continuous collection calls; false or illegal threats; false representations about the alleged debt; efforts to collect debts with insufficient documentation; privacy violations concerning the alleged debt; and misleading collection practices related to time-barred debt.

The prevalence of abusive collection practices is reflected in the volume of consumer complaints. Debt collection is a leading source of consumer complaints to the Consumer Financial Protection Bureau (CFPB),[1] the Federal Trade Commission ("FTC"),[2] the Better Business Bureau,[3] and others.[4] In 2017, the most common category of debt collection complaints, cited by nearly two out of every five complaints, was "attempts to collect debt not owed."[5] In addition to receiving complaints from consumers, the CFPB has also surveyed consumers about their experiences with debt collection. The results of this survey indicated that respondents had experienced a variety of debt collection abuses, including 53% of respondents that were contacted about a debt in the year prior who "indicated that the debt was not theirs, was owed by a family member, or was for the wrong amount."[6]

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[1] Consumer Fin. Protection Bur., Annual Report 2018: Fair Debt Collection Practices Act (Mar. 2018), *available at* http://files.consumerfinance.gov ("In 2017, the Bureau handled approximately 84,500 debt collection complaints, making it one of the most prevalent topics of complaints about consumer financial products or services received by the Bureau.").

[2] Fed. Trade Comm'n, Consumer Sentinel Network Data Book 2017 (608,535 complaints, or 22.74% of all complaints).

[3] U.S. Better Bus. Bureau, 2016 Statistics Sorted by Complaints, *available at* www.bbb.org (in 2016 it received 16,817 complaints and more than three million inquiries about collection agencies). *See also* Emma Fletcher and Rubens Pessanha, BBB Institute for Marketplace Trust, 2016 BBB Scam Tracker Annual Risk Report: A New Paradigm for Understanding Scam Risk, *available at* www.bbb.org (the Better Business Scam Tracker received reports of a number of debt-related scams in 2016, including tax collection scams (7902), debt collection scams (2798), and credit repair/debt relief scams (487)).

[4] CFA & NACPI, 2016 Consumer Complaint Survey Report (July 27, 2017), *available at* www.consumerfed.org (investigators who survey state and local consumer protection agencies to ask about their top complaints found that credit and debt complaints ranked fourth).

[5] Consumer Fin. Protection Bur., Annual Report 2018: Fair Debt Collection Practices Act (Mar. 2018), *available at* http://files.consumerfinance.gov.

[6] Consumer Fin. Protection Bur., Consumer Experiences with Debt Collection: Findings from the Bureau's Survey of Consumer Views on Debt (Jan. 2017), *available at* https://files.consumerfinance.gov/f/documents/201701_Bureau_Debt-Collection-Survey-Report.pdf.

Debt collection is also an industry that touches the lives of millions of Americans every year. In 2016, 33% of Americans with a credit report had at least one debt in collection.[7] In predominantly nonwhite zip codes, the share with debt in collection reached 45%.[8] In 2017, the CFPB estimated that more than 70 million Americans were contacted about a debt in collection in the prior year.[9]

The CFPB has announced a rulemaking under the FDCPA and the current review of new rulemaking authorities provides an ideal opportunity for the CFPB to address the serious deficits in protections against abusive debt collection practices.

There is a long history of advocates bringing these issues to the attention of the CFPB, including responses[10] to the ideas presented in the CFPB's Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking Outline of Proposals under Consideration and Alternatives Considered ("SBREFA Outline") and other issues related to the debt collection rulemaking.[11] We will not attempt in these comments to address every issue.

These comments are intended to briefly highlight some critical opportunities to enhance consumer protection in the areas of communication practices and consumer disclosures, which the CFPB has identified as issues that may be addressed in a debt collection rulemaking.[12]

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[7] Urban Institute, Debt in America: An Interactive Map (Apr. 2018), *available at* http://apps.urban.org/features/debt-interactive-map/.

[8] *Id.*

[9] Consumer Fin. Protection Bur., Bureau Survey Finds Over One-In-Four Consumers Contacted By Debt Collectors Feel Threatened (Jan. 12, 2017), *available at* consumerfinance.gov/about-us/newsroom/Bureau-survey-finds-over-one-four-consumers-contacted-debt-collectors-feel-threatened/.

[10] *See, e.g.,* Group Letter to Director Cordray (Mar. 17, 2017), *available at* nclc.org/images/pdf/debt_collection/sbrefa-fdcpa-lep-lttr-03172017.pdf (responding to SBREFA Outline); National Consumer Law Center, Comments to the Consumer Financial Protection Bureau on its Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking Outline of Proposals under Consideration and Alternatives Considered (Feb. 28, 2017), *available at* nclc.org/images/pdf/debt_collection/debt-coll-sbrefa-cmmnts-02282017.pdf; Melissa Stegman and Lisa Stifler, Center for Responsible Lending, Initial Analysis of Consumer Financial Protection Bureau's Proposed Outline to Address Debt Collection Abuses (Sept. 2016), *available at* responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_debt_collection_cfpb_sep2016.pdf.

[11] *See, e.g.,* National Consumer Law Center, Debt Collection Rulemaking at the Bureau, *available at* nclc.org/issues/debt-collection-rulemaking-at-the-Bureau.html (collecting comments, press releases, letters, issue briefs, and white papers); Center for Responsible Lending, Comments to the Consumer Financial Protection Bureau on its Advance Notice of Proposed Rulemaking (Feb. 28, 2014), *available at* responsiblelending.org/sites/default/files/nodes/files/research-publication/CRL_Comments_to_ANPR_on_Debt_Collection_2-28-2014_Final.pdf.

[12] Debt Collection Rule (Spring 2018), *available at* reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=3170-AA41 ("The Bureau is preparing a proposed rule focused on FDCPA collectors that may address such issues as communication practices and consumer disclosures.").

3. Any Debt Collection Rules Must Be Guided by the Purposes of the FDCPA

Any debt collection rules developed by the CFPB should be guided by the purposes behind the FDCPA, including "eliminat[ing] abusive debt collection practices by debt collectors" and "insur[ing] that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."[13] Congress also clearly identified "invasions of individual privacy" as a harm that the FDCPA was intended to address[14] and, indeed, did address in numerous sections of the statute.[15]

Additionally, courts have consistently upheld a number of other important principles when interpreting the FDCPA, including: protection of the least sophisticated (or unsophisticated) consumer,[16] the liberal interpretation of the FDCPA as a remedial statute,[17] and strict liability of debt collectors who violate the statute.[18] These principles should also guide the provisions of any debt collection rules.

It would be better to have no rule at all than to enact debt collection regulations that would negate these purposes.

4. Substantiation of Collection Information Is Critical to Protecting Consumers from Collection of Debt Not Owed

Debt collectors continue to cause consumers serious problems by attempting to collect from the wrong person, for the wrong amount, or by the wrong collector that are related to inadequate substantiation of collection information. As such, there is still a critical need for:

- Enhanced substantiation requirements;
- Improved collector responses to consumer disputes; and
- Prevention of lawsuits and default judgments based on faulty or inadequate documentation.

These ideas are discussed in detail in responses to the SBREFA Outline by consumer advocates.[19]

5. Any Rules about Collection Communications Need to Focus on 1) Ending Harassing Communication, 2) Protecting Consumer Privacy, and 3) Increasing Consumer Control over Collection Communications

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[13] 15 U.S.C. § 1692(e).

[14] 15 U.S.C. § 1692(a).

[15] *See, e.g.,*15 U.S.C.§§ 1692b, 1692c(b), 1692d(3), 1692d(4), 1692f(7), 1692f(8).

[16] *See* National Consumer Law Center, Fair Debt Collection 3.2.1 (9th ed. 2018), updated at www.nclc.org/library.

[17] *Id.* at 3.2.5.

[18] *Id.* at 3.2.4.

[19] *Supra*, n.10.

5.1. In General

In the CFPB's recent survey of consumer experiences with debt collection, 75% of consumers who requested that the creditor or debt collector stop contacting them reported that the contact did not stop.[20] This research shows a pervasive refusal to comply with this key consumer protection. The CFPB should enact regulations that enforce and strengthen collectors' legal obligations to comply with any cease communication requests,[21] whether written or oral. Additional strategies for preventing harassment specific to the method of communication are discussed below.

Consumer privacy is a critical concern when discussing regulations related to debt collection communications. Privacy is relevant to particular methods of communication (discussed below) and in the CFPB's proposal to allow limited content messages in the CFPB's SBREFA Outline.

As discussed in the response to the SBREFA Outline,[22] these limited content messages would violate 1692c(b) and consumer privacy. The CFPB should abandon this proposal.

The CFPB should increase consumer control over the debt collection process by clearly articulating the FDCPA requirement that communications cease when the consumer indicates that the communications are inconvenient.[23]

If the consumer says that a particular method of communicating is inconvenient (i.e., when a consumer says stop calling, texting, emailing, etc.), the collector must stop contacting the consumer with that method of communication. But other types of communication may still be appropriate.

The CFPB should further clarify that collectors must comply with communication preferences whether expressed orally or in writing.[24] When a consumer is dealing with a harassing phone call, she should be able to say "stop calling" and have the collector stop all future calls.

Debt collection regulations can also promote consumers' ability to advocate for themselves by requiring all collectors with online payment portals to allow consumers to express communication and language preferences, submit disputes, and ask questions about the alleged debt online.

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[20] Consumer Fin. Protection Bur., Consumer Experiences with Debt Collection: Findings from the Bureau's Survey of Consumer Views on Debt 35 (Jan. 2017), *available at* s3.amazonaws.com/files.consumerfinance.gov/f/documents/201701_Bureau_Debt-Collection-Survey-Report.pdf.

[21] 15 U.S.C. § 1692c(c).

[22] National Consumer Law Center, Comments to the Consumer Financial Protection Bureau on its Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking Outline of Proposals under Consideration and Alternatives Considered (Feb. 28, 2017), *available at* nclc.org/images/pdf/debt_collection/debt-coll-sbrefa-cmmnts-02282017.pdf

[23] 15 U.S.C. § 1692c(a)(1).

[24] *See, id.* (does not require consumer to provide information in writing).

Regardless of the communication method, the CFPB should clarify that FDCPA disclosure requirements[25] and privacy protections[26] always apply to all communications by debt collectors.

5.2. Phone Calls

Collectors should be prohibited from making more than three attempted phone calls per week per consumer, resulting in no more than one live conversation. Each time the collector causes the phone to ring counts as a phone call. This bright line should be used to establish violations of the FDCPA[27] absent explicit consumer consent to additional calls.

Collectors attempting to obtain location information from third parties[28] should be prohibited from attempting to contact third parties more than one time per week.

The CFPB should prohibit debt collectors from spoofing their numbers, and explicitly require the displayed number on the incoming call to be a toll free number that the consumer can use to return the collection call.

Collectors who know (or should know) that they are contacting someone at work should be required to ask if it is convenient for the consumer to talk at work. If the consumer says no, the collector should cease calling the consumer at work.

Collectors should be required to include opt-out mechanisms for all automated calls (e.g., "Press 1 to opt-out to prevent future calls at this number.").

The CFPB should support enforcement of the Telephone Consumer Protection Act's requirements for consent before debt collectors can make automated calls to cell phones.

5.3. Voicemails

As the law requires, collectors should be prohibited from leaving voicemail messages unless the voicemail is clearly set up to be heard only by the consumer or the consumer has specifically consented.

5.4. Email

The CFPB should study experiences with the opt-in email model in the New York debt collection regulations[29] to see if this is a viable model for the debt collection rulemaking.

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[25] 15 U.S.C.§§ 1692d(6), 1692e(11).

[26] *See, e.g.,* 15 U.S.C.§§ 1692b, 1692c(b), 1692d(3), 1692d(4), 1692f(7), 1692f(8).

[27] 15 U.S.C. § 1692d(5).

[28] 15 U.S.C. § 1692c(b).

[29] 23 NYCRR § 1.6.

Due to the lack of privacy in most workplace email systems and absent explicit consumer consent to receive emails at work from the debt collector, regulations should prohibit collectors from emailing consumers at an email address that the collector knows (or should know) is a workplace email.

While no numerical cap on emails is needed, the CFPB should require all collectors who use email to include in every email a link to allow the consumer to opt out of any future emails. This could be done through a familiar "unsubscribe" feature.

Collectors must comply with the E-Sign Act if they want to send the validation notice[30] by email. The CFPB should clarify that E-Sign consent does not transfer from the prior creditors, debt collectors, or debt buyers. The CFPB should also refuse to exempt validation notices from the E-Sign consent requirement.

5.5. Text Messages

The CFPB should require all collectors who use text messages to include a statement saying "Text STOP to opt-out of future text messages" every time it texts a new phone number.

Because it may not be possible for the collector to provide all necessary disclosures in the first text message,[31] the CFPB should prescribe a time frame during which these initial disclosures must be made in a series of text messages (e.g., sent within 60 seconds of initiating or responding to a text conversation).

As discussed above, the CFPB should prohibit spoofing the number of an incoming text message and ensure that the consumer can use the listed number to respond to the debt collector.

The CFPB should also clarify that the presumptive time for convenient text messages is between 8:00 am and 9:00 pm.

Due to the possibility of incurring charges for receiving text messages, collectors should be required to use free-to-end-user text messaging only.

5.6. Social Media

Regulations should prohibit collectors from sending communications about debts to consumers on social media platforms where the communication can be viewed by others (e.g. posting to a Facebook Timeline, tweeting at someone on Twitter, responding to a blog post, or posting in chat rooms that can be viewed by others).

The CFPB should also prohibit collectors from using deceptive methods to get consumers to connect with collectors on social media (e.g. using a false name or picture to get a consumer to "friend" the collector).

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[30] 15 U.S.C. § 1692g(a).

[31] *See also* 15 U.S.C.§§ 1692d(6), 1692e(11).

6. New Disclosures Should Build Upon Existing FDCPA Disclosures and Ensure Comprehension by the Least Sophisticated Consumer

The FDCPA currently provides for certain types of consumer disclosures.[32] These disclosures represent the minimum requirements. CFPB regulations could build upon these requirements but not eliminate them.

Any disclosures considered by the CFPB should be consumer tested with a focus on ensuring comprehension by the least sophisticated consumer.[33] Testing should evaluate comprehension of the proposed disclosure as part of the document as a whole rather than in isolation.

6.1. Validation Notice[34]

The CFPB should clarify that each collector must send a validation notice even if prior debt collectors also sent validation notices. Otherwise a creditor might effectively avoid the verification requirement by hiring a short-term debt collector who sends the validation notice and then hiring a second debt collector who claims that the validation notice requirements were satisfied by the first collector's notice.

As described in the SBREFA Outline, the CFPB should move forward with the creation of a model validation notice and statement of rights that would provide consumers with enhanced information about the debt and about their rights in debt collection.

The CFPB should improve language access for consumers with limited English proficiency by providing a translation in Spanish on the reverse of the model validation notice and statement of rights. Alternatively, where translations into other languages have been provided by the CFPB, a translation into one of these other languages should be substituted for Spanish when the debt collector knows (or should know) that this is the consumer's preferred language.

6.2. Disclosures Related to Credit Reporting

The CFPB should prohibit "parking" debts on a credit report by requiring the collector to communicate with the consumer about the alleged debt before reporting to a consumer reporting agency and to inform consumers that they intend to report it to a consumer reporting agency (CRA).

Collectors should be required to disclose that a debt is obsolete and cannot be reported to a CRA. As proposed in the SBREFA Outline, the CFPB should require collectors to obtain written acknowledgement from the consumer before accepting payment on a debt that is both time-barred and obsolete.

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[32] *See* 15 U.S.C. §§ 1692d(6), 1692e(11), 1692g(a).

[33] *See, e.g.,* National Consumer Law Center, Fair Debt Collection ¶ 3.2.1 (9th ed. 2018), updated at

www.nclc.org/library (discussing application of the least sophisticated or unsophisticated consumer standard to the FDCPA).

[34] 15 U.S.C.§ 1692g(a).

6.3. <u>Time-Barred Debt</u>

Collecting time-barred debts causes substantial injury to consumers, particularly the least sophisticated consumers, who do not understand that the statute of limitations has run or that they have a legal defense. Such injury is not reasonably avoidable by consumers due to the complexity involved in understanding what a statute of limitations is, which limitations period applies to their debt, and when the relevant period has run. Moreover, attempts to collect time-barred debt mislead consumers who will reasonably believe that the collector has a legally-enforceable right to collect the amount sought. Efforts to collect time-barred debt can also be abusive because collectors may take advantage of the consumer's lack of understanding that a payment on a time-barred debt could be used to revive the debt and the ability to bring suit.

Disclosures about time-barred debts are not sufficient to protect the least sophisticated consumer from the range of abusive and deceptive practices that some collectors engage in when collecting time-barred debts. Instead, the CFPB should prohibit all efforts to collect on time-barred debt. The risks that any communications will be deceptive and will be misunderstood by the consumer and will result in injury are simply too great.

Alternatively, if the CFPB allows continued collection of time-barred debt it should enhance consumer protections by: prohibiting deceptive offers to "settle" a time-barred debt that imply that the collector still has the ability to file a lawsuit; forbidding suits on a "revived" debt; requiring repetition of a time-barred debt disclosure in each communication; limiting collection of time-barred debts to written communications that can be monitored and that included tested disclosures that enable consumers to understand the time-barred nature of their debt; prohibiting oral collection efforts, which will be inherently deceptive and abusive and cannot be easily reviewed or monitored; and prohibiting the sale or transfer of time-barred debts, as the buyers of such debts are more likely to lack accurate information on the debt and the consumer and to engage in deceptive abusive practices.

6.4. <u>Litigation Disclosure</u>

Lawsuits are a common method of debt collection. In one study, the CFPB found that 15 percent of consumers who had been contacted about a debt were sued in a collection lawsuit in the past year.[35] The CFPB has proposed requiring a litigation disclosure to provide additional information to consumers about debt collection in the hope that this will avoid some default judgments against consumers.[36]

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[35] Consumer Fin. Protection Bur., Consumer Experiences with Debt Collection: Findings from the Bureau's Survey of Consumer Views on Debt (Jan. 2017), *available at* https://files.consumerfinance.gov/f/documents/201701_Bureau_Debt-Collection-Survey-Report.pdf.

[36] Additional strategies for preventing default judgments are discussed at National Consumer Law Center, Comments to the Consumer Financial Protection Bureau on its Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking Outline of Proposals under Consideration and Alternatives Considered 57-59 (Feb. 28, 2017), *available at* nclc.org/images/pdf/debt_collection/debt-coll-sbrefa-cmmnts-02282017.pdf.

In order to maximize the effectiveness of a litigation disclosure requirement, the CFPB should develop a model litigation disclosure letter. The letter should provide information about how to: locate information about debt collection, find an attorney to defend the consumer in court (both legal services and private attorneys), and find information about representing oneself in court.

Collectors should be required to provide this letter to a consumer no more than 60 and no less than 15 days before litigation is initiated. In any conversations after the litigation disclosure has been sent, collectors should be required to inform the consumer of the date when the collector intends to file a lawsuit, to confirm receipt of letter, and to re-send it to proper address if not yet received.

7. **The CFPB Should Reject Collection Industry Proposals that Would Harm Consumers**

7.1. No Right to Cure

Some in the collection industry have asked the CFPB to create a right to "cure" FDCPA violations in the debt collection rulemaking. However, the FDCPA does not provide for a right to cure, the CFPB does not have the legal authority to create one, and no such proposal was included in the SBREFA Outline. Moreover, requiring a pre-suit notice would burden consumers' ability to enforce their FDCPA rights. If a right to cure were implemented, collectors could simply wait until they were sued to stop violating the law and then claim that they had cured the violation.[37]

7.2. Do Not Let "First-Party Collectors" Do an End Run Around the FDCPA

The CFPB should produce a report on first-party collections as it relates to medical debt collections, credit cards, and other areas. Using the findings from this report, the CFPB should draft regulations to: define when a debt in in default under 1692a(6)(F)(iii); clarify that there is no "de facto employee" exemption from the definition of debt collector under 1692a(6)(A); and define who is an "officer or employee of a creditor" under 1692a(6)(A).

* * *

We have listed our recommendations above without substantial elaboration in an effort to be brief. We encourage you to revisit our prior submissions on the debt collection rulemaking and to engage with consumers and consumer advocacy organization as you develop a debt collection rule.

Yours very truly,

Allied Progress
Americans for Financial Reform
Arizona Community Action Association
Arkansans Against Abusive Payday Lending
Arkansas Community Organizations

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[37] *See* Romero v. Dep't Stores Nat'l Bank, 2018 WL 1079728 (9th Cir. Feb. 28, 2018) (rejecting debt collector's argument that it cured violations of a California statute when it ceased calling consumer after it was sued).

Atlanta Legal Aid Society, Inc.
Brooklyn Coop Federal Credit Union
Center for Justice & Democracy
Center for NYC Neighborhoods
Center for Responsible Lending
Connecticut Veterans Legal Center
Consumer Action
Consumer Advocacy and Protection Society (CAPS)
Consumer Federation of America
Consumers Union
East Bay Community Law Center
Florida Alliance for Consumer Protection
Georgia Watch
Heartland Alliance for Human Needs & Human Rights
Interfaith Center on Corporate Responsibility
Jacksonville Area Legal Aid, Inc.
Kentucky Equal Justice Center
Legal Aid Foundation of Chicago
Maryland Consumer Rights Coalition
Mobilization for Justice
Mountain State Justice
NAACP
National Association of Consumer Advocates
National Association of Consumer Bankruptcy Attorneys (NACBA)
National Center for Law and Economic Justice
National Consumer Law Center (on behalf of its low-income clients)
National Fair Housing Alliance
North Carolina Justice Center
People's Action Institute
Public Good Law Center
Public Justice Center
Public Law Center
Tennessee Citizen Action
Texas Appleseed
The One Less Foundation
Tzedek DC
U.S. PIRG
Virginia Poverty Law Center
West Virginia Center on Budget and Policy
Woodstock Institute
World Privacy Forum

June 19, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2018-0011 -- Request for Information Regarding the Bureau's Adopted Regulations and New Rulemaking Authorities: **Prepaid Accounts Rule**

Dear Acting Director Mulvaney,

The forty-two undersigned consumer, community, civil rights and legal services groups submit these comments in response to the Consumer Financial Protection Bureau ("CFPB")'s Request for Information ("RFI") regarding its adopted regulations and new rulemaking authorities. **In these comments we urge you not to revisit or delay the prepaid accounts rule (Regulations E and Z) that is scheduled to go into effect in 2019.** We have joined other comments on other regulations.

The Bureau invested considerable time and effort in research, outreach, and consideration of public input in formulating the prepaid rule. We note that there are numerous suggestions from consumer organizations that the bureau did not follow. On the other hand, the bureau made many changes to accommodate industry concerns, including two rounds of amendments and delays in the effective date.
While neither we nor anyone else got everything we wanted in the rule, it is time for it to go into effect and not to further delay or complicate implementation of the important protections the rule provides.

We especially urge you not to revisit the Regulation Z rules governing overdraft credit features. The bureau should have banned overdraft fees altogether, but the rules do prevent unaffordable features that add high fees to cards aimed at credit-impaired consumers.

While we urge you not to reopen the rule, we do make some suggestions below regarding additional guidance that may be helpful to clarify whether safe bank accounts ("checkless checking") are covered and to prevent evasions of the rule by accounts offered by nonbank entities that could pose as checkless checking.

1) <u>The prepaid rule provides important protections</u>

The CFPB's prepaid account rule is an important, common sense rule that provides clear fee disclosures, access to account information, fraud and error protection, and protection against inappropriate and dangerous overdraft and credit features for this rapidly growing market. The rule brings prepaid accounts out of the shadows and recognizes the important role they play in

bringing access to banking services to underserved communities. The rule has been widely supported, with few exceptions, in both consumer and industry circles.

Each of the core elements of the rule provides important protections:

Prepaid cards and mobile versions will receive the same basic protection from fraud, unauthorized charges and errors that debit cards receive today. The payment landscape is changing rapidly, but the need for protections against fraud and errors is critical regardless of the way money is held and moves. The rule appropriately uses a broad and flexible definition of "prepaid accounts," including physical plastic cards and funds in newer types of mobile or internet-based accounts. This flexibility allows the rule to evolve and not to become outdated the moment it is finalized. An overly rigid view of the "accounts" that were covered under the 1974 Electronic Fund Transfer Act (EFTA) kept prepaid cards unprotected for far too long. The CFPB made accommodations to industry concerns about consumer fraud by providing an exception from the requirement for provisional credit until the card is registered.

***Consumers will receive a simple, uniform fee chart so they can avoid hidden fees and comparison shop*.** A short chart of key fees will be on the outside of the package and provided online before purchase. More details are on a longer chart inside the package and online at the URL provided on the package. The CFPB engaged in consumer testing of model forms and balanced a number of competing concerns in designing the short- and long-form disclosures. The CFPB designed these disclosures to be ones that consumers actually see, understand and use, not merely fine print that meets a technical disclosure requirement.

The uniform format and required elements are essential to ensure that consumers will see the fees that they are most likely to incur and that they will be able to comparison shop across different products that can be used to hold funds and make payments. Yet the requirements also provide flexibility and deter manipulation by requiring that other fees be disclosed on the short-form for particular companies if they generate a high amount of revenue. While it is not possible to design a single form that perfectly achieves uniformity, consumer awareness, relevance, flexibility and fair competition across a number of different products and services, the CFPB has done a remarkable job of balancing different concerns and achieving those goals.

***The package will warn consumers if the funds do not have deposit insurance*.** Most prepaid accounts have FDIC or NCUA insurance, but those that do not must carry a statement on the outside of the package. The statement will provide important information to consumers about the safety of their funds if the company fails and will encourage providers to obtain deposit insurance.

***Basic account information will be free*.** In exchange for relief from the EFTA requirement of periodic statements, the prepaid account provider must provide key account information for free. Balances must be available by telephone without charge. Transaction information going back 12 months must be free online. Transaction information for the previous 24 months may be requested up to once per month without charge. Issuers may charge for regular monthly

paper statements. These rules relieve the burden on institutions of mailing regular monthly statements while ensuring that consumers can easily obtain key information about their accounts without charge.

The rule protects choice of how to receive funds for employees and government benefit recipients. If an employer uses payroll cards or a government agency pays non-needs-tested benefits through a prepaid card, it must first give employees or benefit recipients fee information and a choice about how to receive the funds. If the consumer does not choose another pay method, the payroll or benefit card must come with a clear fee disclosure and a statement that the person does not have to accept the card and can ask about other options. These rules fulfill the statutory requirement of the EFTA that no person may be required to have an account at a particular institution as a condition of receipt of wages or government benefits. The rules protect people from high-fee cards and make sure that they have a choice of how to receive their money in the way that is affordable and works best for them.

Cards with credit features will appropriately comply with credit laws to protect people from unaffordable and deceptive overdraft features. Cards that have overdraft or credit features must disclose that fact on the package. That is a critical piece of information, as many consumers choose prepaid accounts precisely because they wish to avoid problems with overdraft fees and credit. If the card has a credit feature (even if optional), the rule appropriately requires compliance with the laws governing credit, including the rules that govern other credit cards. The creditor must determine that the consumer is able to repay the credit. Fees in the first year are limited to 25% of the credit line but there is no limit on the interest rate. Payments may be due no more frequently than once a month, 21 days after a statement (which may be electronic). The creditor cannot require the consumer to let the creditor take payments automatically out of the account, but consumers may choose to pay automatically. These protections appropriately apply to any prepaid account that is linked to a credit feature, even if that feature is styled as overdraft protection, which is a form of credit. This issue is discussed in more detail below. The CFPB worked to relieve regulatory burden by providing an exception sought by providers of mobile wallets that do not store funds and that may contain credit cards that already comply with credit laws.

Fees will be more transparent and competition will lower fees by having fee schedules publicly available on the company's website and online at the CFPB. Consumers who are comparison shopping, online sites that help consumers find accounts, and researchers who are analyzing the prepaid market will be able to find fee information easily. Sunshine will promote competition and will lower fees.

2) <u>The prepaid rule should go into effect as scheduled and should not be revisited at this time.</u>

Consumers have waited far too long for protections for prepaid accounts. Prepaid cards have been around for more than a decade without the basic protections that debit cards receive. The effective date – originally a full year after finalization of the rule – has been twice delayed, and

the current April 1, 2019 effective date is into the fifth year since this rulemaking began. The rule must go into effect as scheduled with no further extensions or changes.

The CFPB has already twice amended the rule to address industry concerns about unintended effects. Those amendments caused further delays and impacted industry efforts to change systems to comply with the rule. The CFPB has already gotten extensive input at several stages of this rulemaking process, including after the rule was initially final.

Any further delays or changes would harm both consumers and the prepaid industry. Consumers would have to wait even longer for essential protections and would risk losing protections if the rule is weakened. Industry participates are deep into efforts to comply with the rule; indeed, many were already ready to comply with the April 1, 2018 effective date. Any changes, however minor, will require that compliance systems be revisited and will burden industry. Even changes that appear to impact only a small slice of the market could impact business strategies and features in other parts of the market.

We especially urge the CFPB to reject any calls to revisit or eliminate the requirements for cards that have credit features, including overdrafts. As we explained at greater length in our original comments,[1] overdraft fees have absolutely no place on prepaid cards. While 98% of prepaid cards are true to their purpose and are actually "prepaid," a few cards, primarily payday lender prepaid cards and a small number of payroll cards used by low-wage employers, have overdraft fees. These cards exploit the struggling consumers who turn to prepaid cards to control their expenses.

Contrary to the claim that overdraft features help consumers make ends meet at the end of the month, the cycle of overdrafting leaves consumers with *less liquidity* at the end of the month, not more. Studies have shown that consumers who opt in to overdraft "protection" frequently overdraft repeatedly to cover the hole from the previous overdraft, with many paying an average of one overdraft fee every month.[2] Overdraft features simply mean a cycle of overdrafting with more fees and less money.

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[1] *See* Comments of Americans for Financial Reform et al on proposed prepaid card amendments to Regulation E, Docket No. CFPB-2014-0031 or RIN 3170-AA22(Mar. 23, 2015), http://ourfinancialsecurity.org/wp-content/uploads/2015/03/AFR-March-2015-Comment-Letter-to-CFPB-on-Prepaid-Cards-1.pdf.

[2] The studies both focused on NetSpend's general use prepaid cards, which have $15 overdraft fees, compared to the $25 overdraft fees that NetSpend has on its Skylight payroll cards used in Kansas and Missouri. The first study found that consumers who used the overdraft service paid an average of $14.62 per month more in fees for their accounts than other consumers. *See* Fumiko Hayashi & Emily Cuddy, Fed. Reserve Bank of Kansas City, "General Purpose Reloadable Prepaid Cards: Penetration, Use, Fees, and Fraud Risks," Table 5.2 at 68 (Feb. 2014) ("Kansas Fed, GPR Report"), http://www.kc.frb.org/publicat/reswkpap/pdf/rwp14-01.pdf. The second study, which focused on a narrower category of consumers who had more regular income, found that the median consumer who opted in to overdraft protection paid $9.12 per month in overdraft fees (or 7.3 overdraft fees per year), and that a quarter of overdrafters paid a minimum of $14.84 per month in overdraft fees (11.9 overdraft

Fidelity to the statutory requirements of the Truth in Lending Act (TILA) requires that overdraft features be covered as credit under Regulation Z. Overdraft credit meets the clear definition of credit under TILA. The exemption that the Federal Reserve Board adopted over a decade ago was aimed at the truly occasional courtesy of covering a check written previously that would otherwise bounce, not automated credit features triggered in real time on transactions that could otherwise be denied with no fee.[3]

That narrow TILA exemption has exploded in the bank account market into a huge loophole that has created enormous problems. The most vulnerable consumers pay hundreds if not thousands of dollars that they need for expenses and many lose their bank accounts altogether. The fees also pose problems for banks, distorting the pricing of bank accounts, creating conflict and confusion with consumers, making it difficult for banks that do not push back-end fees to compete with a clear, up-front price, and causing banks to become accustomed to a business model driven by abusive overdraft fees.

While the CFPB should have banned overdraft fees altogether on prepaid accounts, it appropriately declined to expand an exemption loophole in Regulation Z to a new market that was not yet wedded to overdraft fees. There is only one major prepaid company, NetSpend (a subsidiary of TSYS) that has overdraft fees, and only about 2% of cards in the CFPB's study have overdraft fees. Prepaid cards are the product that consumers turn to after they have problems with overdraft fees or have lost their accounts altogether. Overdraft fees on bank accounts are the reason the prepaid industry exists.

It would harm not only consumers but also the prepaid industry to change the rule in any way that made overdraft fees more allowable. Back-end overdraft fees would distort pricing and undermine the CFPB's efforts to make prices transparent – just like overdraft fees have made it difficult for banks to charge an honest monthly fee and have led most to offer deceptively named "free checking" that is supported by overdraft revenue. Loosening the rules on overdraft fees would also disadvantage companies that charge an honest up-front price and treat vulnerable customers right. For example, Steve Streit, the CEO of Green Dot, told investors: "our strong conviction is that charging overdraft fees, and especially charging such fees to low-income Americans, is wrong. And so for that reason, Green Dot does not do it."[4] Yet, before the CFPB rules were finalized, Green Dot was getting pressure from investors to add overdraft fees.

The prepaid rules will encourage companies to develop savings and budget tools, not to push people into spending more than they have and overdrafting. The rules do not stop people from

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fees per year). *See* Fumiko Hayashi and Emily Cuddy, Federal Reserve Bank of Kansas City, "Recurrent Overdrafts: A Deliberate Decision by Some Prepaid Cardholders?" (October 2014) ("Kansas Fed, Recurrent Overdrafts"), http://www.kansascityfed.org/publicat/reswkpap/pdf/rwp14-08.pdf.

[3] *See* 69 Fed. Reg. 31,760, 31,761 (June 7, 2004).

[4] Transcript, GDOT-Q2 2013 Green Dot Corporation Earnings Conference Call (July 30, 2013).

being offered credit, and do not even prevent credit from being loaded onto or linked to a prepaid card, as long as the consumer affirmatively accesses the credit first rather than drawing on it indirectly through overdrafts. Indeed, the CFPB rejected our recommendation to strengthen the proposed rule by covering all linked credit and instead narrowed the credit products covered in the final rule.

The credit provisions in the rule are a compromise that should be left intact and not weakened further.

We also urge the bureau to reject any call to narrow the definition of "prepaid account" in order to exempt newer fintech products. The CFPB wisely designed a rule that would not be outdated before it even took effect. The rule appropriately covers not only physical plastic cards but also newer forms of prepaid accounts that operate online and through mobile devices. Whatever form the prepaid account takes, consumers need to understand the fees, have access to account information, receive basic protection against unauthorized charges and errors, and be covered by credit protections when credit is extended. The CFPB has already amended the rule to address concerns raised by mobile wallet providers and it is time to allow the rule to go into effect.

3) The CFPB should provide guidance on the distinction between safe bank accounts ("checkless checking") and prepaid accounts to provide clarity to industry and avoid evasions.

While we do not believe that further amendments to the prepaid rule are necessary at this time, it would be helpful to provide more guidance on the distinction between the safe bank accounts aka "checkless checking" accounts that are not covered by the rule, and prepaid accounts, which are.

This is important for two reasons. First, banks that have long offered safe bank accounts that they did not view as prepaid accounts are seeking clarity. Second, it is essential that prepaid accounts not be allowed to evade the prepaid rule simply by styling themselves as checkless checking accounts.

As discussed in greater detail below, the only type of "checkless checking" accounts that should be allowed to be considered "checking accounts" exempt from the rule are ones that:

- Meet the core standards for safe accounts: no overdraft or nonsufficient funds (NSF) fees;
- Are individual demand accounts offered, opened and serviced directly at a bank or credit union;
- Are available through the financial institution's branches.

All of these elements, not just the second, are necessary to avoid evasions and to limit any exemption to bank accounts that were long offered directly by financial institutions in full compliance with Regulation E.

The prepaid rule does not cover an account (other than a payroll card account, government benefit card account, or account labeled or marketed as "prepaid") that is "a checking account, a share draft account, or a NOW account."[5] The CFPB's Small Entity Compliance Guide states:

> Checking accounts, share draft accounts, and NOW accounts are not prepaid accounts under this prong of the definition even if they do not offer check-writing capabilities (e.g., a "checkless" checking account). For purposes of this test, the ability to issue preauthorized checks drawn on the account does not by itself qualify the account as a checking, share draft, or NOW account.[6]

This guidance document is not a rule and does not change the requirements of the rule. But it does create the potential for confusion and evasion if prepaid cards simply start calling themselves checkless checking to avoid the rule.[7]

Any interpretation that the term "checking account" covers an account without checks must be construed very narrowly to avoid gutting the rule. At best, the term must be limited to safe bank accounts that have long been offered directly by financial institutions, in full compliance with Regulation E (not the payroll card rules), as a way to avoid the problems that checks pose with their overdrafts and overdraft fees.

On January 1, 2011, the FDIC launched a Model Safe Accounts Pilot. The pilot was a case study designed to evaluate the feasibility of financial institutions offering safe, low-cost transactional and savings accounts that are responsive to the needs of underserved consumers. The FDIC developed a Model Safe Accounts Template.[8] The most central element of the template is that the accounts can have "No overdraft or NSF fees."

Although prepaid cards already existed at the time of the FDIC pilot program, the program was only for accounts offered directly by insured financial institutions. Nine financial institutions participated in the pilot:

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[5] 12 CFR 1005.2(b)(3)(i)(D)(3).

[6] *Prepaid Rule, Small Entity Compliance Guide* at 12, 13 (June, 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201706_cfpb_prepaid-small-entity-compliance-guide.pdf. *See also* 81 Fed. Reg. 83974 (Nov. 22. 2016).

[7] In addition to payroll cards, government benefits cards, and accounts marketed or labeled as prepaid, the rule defines a prepaid account as an account:
"(1) That is issued on a prepaid basis in a specified amount or not issued on a prepaid basis but capable of being
loaded with funds thereafter,
"(2) Whose primary function is to conduct transactions with multiple, unaffiliated merchants for goods or services, or at automated teller machines, or to conduct person-to person transfers, and
"(3) That is not a checking account, share draft account, or negotiable order of withdrawal account." 12 C.F.R. § 1005.2(b)(3)(i)(D) (effective April 1, 2019).

[8] https://www.fdic.gov/consumers/template/template.pdf.

Bath Savings Institution
Citibank
Cross County Savings Bank
First State Bank
ING DIRECT
Liberty Bank and Trust Company
Pinnacle Bank
South Central Bank
Webster Five Cents Savings Bank

All of the accounts were individual demand deposit accounts.

Building on the FDIC Pilot Program, on October 27, 2015, the Cities for Financial Empowerment Fund launched updated Bank On National Account Standards.[9] The standards support local Bank On coalition efforts to expand access to safe and appropriate financial products and services through low-cost, low-fee, no-overdraft financial products.[10] While the Bank On standards encompass both checkless checking accounts and prepaid accounts, among the required features are:

- Transaction account at a banking institution
- No overdraft or NSF fees; structurally not possible
- Free and unrestricted branch access for customer service
- Free in branch deposit capability
- Free paper monthly statements (or electronic with consumer consent)[11]

Several accounts have now been certified as meeting these standards, and the accounts are available at all branches of these financial institutions:

Bank of America Safe Balance Banking Account
First Commonwealth Bank SmartPay Card
First National Bank Access Debit Account
Chase Liquid
KeyBank Hassle-Free Account
Citi Access Account
U.S. Bank Safe Debit Account

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[9] http://joinbankon.org/wp-content/uploads/2017/05/CFE-Fund_Bank-On-2017-NAS-Press-Release-final.pdf.
[10] *See* Ian McKendry, American Banker, Big Banks Sign On to Safer Account Standards for Underserved (Oct. 27, 2015).
[11] Cities for Financial Empowerment Fund Bank On National Account Standards (2017-2018), http://joinbankon.org/wp-content/uploads/2017/05/Bank-On-National-Account-Standards-2017-2018-final.pdf.

Dart Bank Bank On Checking Account
Wells Fargo EasyPay Card
Independent Bank IntroChecking Account
Iberia Bank Ability Banking Account
Old National Bank EZ Access Checking Account
The First, A National Banking Association First AID Checking Account[12]

Some of these accounts, such as the Wells Fargo card, are styled as prepaid cards, but most are styled as bank accounts.

These safe bank accounts have been in development for many years as a way to help people avoid overdraft fees and access safe bank accounts. They were not created as a device to evade the prepaid rule. These individual accounts have long complied with Regulation E. They do not have any features that bring them within the scope of the Regulation Z provisions of the prepaid rule as the accounts do not offer any form of credit feature.

These safe bank accounts could benefit from the simple and uniform fee disclosures provided in the rule, and we have no objection to covering checkless checking accounts under the prepaid rule. But our primary concern is to ensure that any accommodation for these accounts not turn into an evasion used to permit overdraft fees on prepaid cards.

The mere use of a debit card bank identification number (BIN) and an individual rather than pooled account structure is not a basis to avoid the requirements of the prepaid rules. That distinction has no basis in the prepaid rule. It is also a distinction that is invisible and immaterial to the consumer and does not change the need for the protections under the rule. Nor does the use of a debit card BIN and individual account, standing alone, make an account that does not have traditional checks a "checking account" that is exempt from the rule.

"Checkless checking" accounts should only be considered "checking accounts" if they meet the criteria for the traditional safe bank accounts that banks have long offered in compliance with Regulation E. The CFPB should issue guidance to make clear that an account without checks can be considered a "checking account" only if:

(1) It is solely offered and marketed by a financial institution, including through all of its branches, not through nonbank entities. An account that is designed, marketed, offered or serviced by a company in the prepaid business is not a checking account. Nor is a card that is issued by a bank but is not offered in its branches and instead is marketed and serviced by a nonbank entity.

(2) The account is a safe bank account does not have overdraft fees or NSF fees. Any checkless checking account that can have overdraft fees is an evasion product. Banks did

[12] http://joinbankon.org/coalitionmap/.

not offer such accounts outside of the prepaid card business prior to promulgation of the overdraft rule.

(3) The account is not a prepaid card as defined in Regulation II (which requires prepaid cards to have limited functionality, with funds accessible solely through the card, in order to be exempt from the limits on interchange fees). Bank prepaid cards are still clearly prepaid cards.

Any broader interpretation that allows accounts without checks to be considered "checking accounts" opens up a wide loophole that will swallow the prepaid rule and eviscerate the careful protections the CFPB has adopted.

Thank you for considering our comments.

Yours very truly,

Allied Progress
Americans for Financial Reform
Arkansans Against Abusive Payday Lending
Atlanta Legal Aid Society, Inc.
Brooklyn Coop Federal Credit Union
Center for Economic Integrity
Center for NYC Neighborhoods
Center for Responsible Lending
Connecticut Legal Services, Inc.
Consumer Action
Consumer Advocacy and Protection Society (CAPS)
Consumer Federation of America
Consumers Union
East Bay Community Law Center
Florida Alliance for Consumer Protection
Georgia Watch
Heartland Alliance for Human Needs & Human Rights
Interfaith Center on Corporate Responsibility
Jacksonville Area Legal Aid, Inc.
Kentucky Equal Justice Center
Maryland Consumer Rights Coalition
Montana Organizing Project
NAACP
National Association of Consumer Advocates
National Center for Law and Economic Justice
National Consumer Law Center, on behalf of its low-income clients
National Consumers League
National Fair Housing Alliance

The One Less Foundation
People's Action Institute
Public Good Law Center
Public Justice Center
Public Law Center
Reinvestment Partners
Tennessee Citizen Action
Texas Appleseed
Tzedek DC
U.S. PIRG
Virginia Poverty Law Center
West Virginia Center on Budget and Policy
Woodstock Institute
World Privacy Forum

June 19, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2018-0011 -- Request for Information Regarding the Bureau's Adopted Regulations and New Rulemaking Authorities: **Remittances Rule**

Dear Acting Director Mulvaney,

The undersigned consumer, community, civil rights and legal services groups submit these comments in response to the Consumer Financial Protection Bureau ("CFPB")'s Request for Information ("RFI") regarding its adopted regulations and new rulemaking authorities. **In these comments we urge you not to revisit or weaken the CFPB's remittance rule.** We have joined other comments on other regulations.

I. Introduction

The undersigned organizations support the CFPB's remittance rule and urge the bureau not to revisit or weaken it.[1] "A 'remittance transfer' means the electronic transfer of funds requested by a sender to a designated recipient that is sent by a remittance transfer provider."[2]

The experience of our organizations is that the remittance rule is working and is protecting money sent abroad and the financial security of U.S. residents who send this money. Prior to the remittance rule, customers had inadequate up-front information about fees and exchange rates needed to compare the cost of different services. Our surveys show that consumers now have more confidence when sending remittances. Moreover, the volume of remittances us up but the cost is down since the CFPP rule was adopted. The average cost of sending remittances has fallen to 5.67% in 2018 down from 6.75% in 2013.

Immigrants are more likely to be taken advantage of and less likely to feel empowered to assert their legal rights than other members of our society.[3] Therefore, they are more vulnerable to both the mistakes and the deliberate malfeasance of those with whom they do business. Congress passed the statute requiring consumer protections for remittances in Section 1073, the Dodd-Frank Act, in a deliberate attempt to provide more protections to all remittance senders, including immigrants.[4]

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[1] 12 C.F.R. § 1005.30 –36.
[2] 12 C.F.R. § 1005.30.
[3] *See generally,* Ruben J. Garcia, *Marginal Workers: How Legal Fault Lines Divide Workers and Leave Them Without Protection*, NYU Press, Sept. 13, 2013; *7 Ways immigrants enrich our economy and society,* http://www.nclr.org/issues/immigration/resources/facts?gclid=CO3l4OHyg9QCFV6Bswod3KQOoQ.
[4] 15 U.S.C.A. § 1693o-1 (West).

These regulations are required to be issued by statute, and much of what is in the regulations is specified in the statute.

II. Background

Section 1073 of the 2010 Dodd-Frank regulatory reform legislation added a new section to the Electronic Funds Transfer Act dealing with international consumer remittances to increase the transparency of the remittance process and mandate uniform disclosures so that consumers are better able to compare different remittance providers and make the most informed choice about which provider to use.

Simply put, the remittance rule requires that costs be disclosed prior to payment for the transaction and requires proof of payment after the transaction. Low-income individuals and immigrants should not be denied transparency and disclosures available with many financial products; nor should a $66 billion per year financial industry affecting largely low-income immigrants be unregulated.

A. Pre-Transaction Disclosures: Pricing for Amount Delivered, Fee Details and Exchange Rate

The focus of Section 1073 and the subsequent remittance rule is to require that certain disclosures be made prior to and after a customer orders a funds transfer. Information to be disclosed prior to the transfer includes:[5]

i. The amount that will be transferred to the recipient in the currency in which the transaction is funded.
ii. Any fees imposed and any taxes collected on the remittance transfer by the remittance transfer provider.
iii. The total amount of the transaction [sum of items (a) and (b)].
iv. The exchange rate used by the provider for the remittance transfer.
v. The amount that will be received by the designated recipient in the currency in which the funds will be received.
vi. A statement indicating that there might be fees associated with the transfer that are collected by a person on the receiving end that may result in the recipient receiving less than the amount disclosed in paragraph (e).

B. Post-Transaction Disclosures: Proof of Purchase, Availability of Funds, Rights and Recourse.

The customer must receive a receipt post-payment that includes the information noted above, along with some additional information including the following:[6]

i. The date in the foreign country on which funds will be available to the designated recipient.
ii. The name and, if provided by the sender, the telephone number and/or address of the designated recipient.

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[5] 15 U.S.C.A. § 1693o-1(a)(2) (West)
[6] *Id.*

iii. A statement about the rights of the sender regarding the resolution of errors and cancellation related to the transaction.
iv. The name, telephone number(s), and web site of the remittance transfer provider.
v. A statement that the sender can contact the state agency that licenses or charters the remittance transfer provider with respect to the remittance transfer and the CFPB for questions or complaints about the remittance transfer.

C. Language Requirements

Disclosures must be in English and (if applicable) either in (a) each of the foreign languages principally used by the remittance transfer provider to advertise, solicit, or market remittance transfer services at the office in which a sender conducts a transaction or asserts an error; or (b) the foreign language primarily used by the sender with the remittance transfer provider to conduct the transaction, provided that such foreign language is principally used by the remittance transfer provider to advertise, solicit, or market remittance transfer services.[7]

III. The Rule is Working.

Our organizations have been studying immigrant access to financial services, including consumer remittances, for over ten years. For example, Texas Appleseed worked to afford access for immigrants to financial institutions and foster transparency in international remittance markets, with a focus on the U.S.-Mexico market.[8]

Appleseed's most recent survey **"Sending Money: The Path Forward"** proves that the remittance rule is working and is protecting money sent abroad and the financial security of U.S. residents who send this money. Prior to the remittance rule, customers had inadequate up-front information about fees and exchange rates needed to compare the cost of different services.

"Sending Money: The Path Forward" is based on data from a survey of international remittance customers' preferences and behavior administered by Appleseed in five states from September 2015 through December 2015. Appleseed Centers in Connecticut, Kansas, Nebraska, Texas and Washington surveyed a total of 702 customers about their typical remittance transactions, comparison shopping behaviors, past problems with remittances, knowledge of their rights, and overall confidence in remittance services.

Among the report's key findings proving that the rule works are:[9]

- **Consumers are receiving pricing disclosures**. About 84% of consumers confirmed that they receive written disclosures before completing their transactions, and 83% reported that they understand the disclosures either "well" or "very well." Similarly, 72% of consumers confirmed that they received written receipts following transactions.

[7] 15 U.S.C.A. § 1693o-1(b) (West)
[8] Texas adopted remittance consumer protections in 2003.
[9] Appleseed, *Sending Money: The Path Forward* http://appleseednetwork.org (2016).

- **Customers are choosing lower fees**. More than *half* of customers compare fees between money transfer services and always choose the service that has the lowest fee and *two-thirds always or sometimes* choose the service with the lower fee.

- **Consumers report stable or decreasing prices.** Three of four remittance senders report that prices remained stable (69%) or decreased (6%).

- **Consumers say their confidence has improved over last year or stayed the same**. When asked if they had experienced a *shift* in confidence over the past year, 18% of customers reported that their confidence had improved, 74% reported no change in confidence, and only 1% reported that their confidence had worsened. Consumers say that receiving a statement of rights on how to correct errors was the single best predictor of confidence in remittance services.

- **Language matters**. If information is also provided in the consumer's primary language, the survey showed an association with greater attention to fees and exchange rates on the disclosures.

IV. Additional Arguments in Support of the Current Rule

A. The remittance rule is a compromise and the CFPB declined to adopt several provisions that consumer groups wanted, while making several provisions or changes in response to industry requests.

The evidence provided in Appleseed's **"Sending Money: The Path Forward"** report shows that the CFPB issued fair and achievable regulations based on balanced and effective rulemaking. The CFPB heard and addressed industry and consumer concerns, weighed and carefully factored this information into the final regulations, which mandate that specific information be provided to consumers in a uniform manner so they can make informed choices.[10]

The CFPB issued final regulations in February 2012, with an original effective date of February 2013.[11] The regulations were subsequently amended several times in response to issues raised by industry representatives as they developed policies, procedures, and systems to comply.[12]

Over the objections of advocates representing these immigrants and other remittance senders, the CFPB allowed a number of significant exceptions to the mandates in the statute.

Exceptions to the rule include:

i. Excluding persons providing 100 or fewer transfers a year from the definition of remittance transfer provider (and therefore not subject to federal regulations)[13] and modifying some of the requirements addressing senders ordering transfers in advance;[14]

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[10] Appleseed, *Sending Money: The Path Forward* http://appleseednetwork.org (2016).
[11] 77 Fed. Reg. 6194-01 (Feb. 7, 2012).
[12] *See, e.g.*, 78 Fed. Reg. 30662 (May 22, 2013); 81 Fed. Reg. 25325 (Apr. 28, 2016); 81 Fed. Reg. 70320 (Oct. 12, 2016)

ii. Allowing estimates to be provided regarding disclosures to the sender of certain fees and taxes that will be imposed on the transfer;[15]
iii. Revising when an error in the resolution process has occurred if a sender provides incorrect information;[16] and
iv. Extending an exemption for banks regarding estimated disclosures of amounts expected to be received by the recipient.[17]

B. Serious public complaints against money transfer companies persist even with the protections of the remittance rule.

We recommend that the CFPB consult its own complaint database for proof that consumers continue to cite problems with money transfers that the remittance rule addresses. Such information should be retained in a public format to enable the public, companies, and the CFPB to analyze complaints by geography, by service, among immigrants from particular countries, or other factors. The successes of the complaint database should be noted (e.g., over 1.1 million complaints received, the amount of money returned to consumers, and cessation of problems).

We have reviewed approximately 1000 complaints and report that complaints allege the following:

1. Most Common Complaint is Delay in Remittance Delivery

The most common complaint is that though remittance transfer providers must indicate when the funds will be available to the recipient, the funds fail to be there by that date. Oftentimes, the consumer would contact the company or bank and would either get no response or would have to stay on the telephone line for hours to get their situation resolved.

One remittance transfer provider stated in its disclosures that the money would be available overseas in just minutes yet failed to do so for 72 hours causing the consumer to miss paying emergency bills. Another company rejected a remittance with no notice whatsoever, causing an elderly couple to go to the bank many times to try to get their money.

Other customers complained that money does not reach its intended destination; one customer complains that a bank closed a complaint without resolving the issue.

2. There are also Delays in Sending Remittances

In one case, a consumer was told that his/her money would be transferred five minutes after he/she got a confirmation call. The call never came and customer service was unresponsive. Another consumer complained that a company hid how long the transfer would take in the fine print (despite the requirement that disclosures must be "clear and conspicuous"), speculating that the company used the money for its own purposes for the eight days before it was transferred (i.e., benefitting from a "float").

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[13] 12 C.F.R. § 1005.30. Money transmitters generally are licensed and regulated by individual states.
[14] 12 C.F.R. § 1005.36
[15] 12 C.F.R. § 1005.32
[16] 12 C.F.R. § 1005.11
[17] 12 C.F.R. § 1005.32

3. Receiving Less Money in Foreign Currency than Originally Disclosed

Another common problem was that consumers would receive less money in foreign currency than they were informed by the remittance transfer provider. In some cases the exchange rate was not noted up front as required. One company gave fewer pesos than disclosed by the remittance transfer provider. Other companies provided a lower than anticipated market exchange rate that cost the consumer about $25 - $30. One company did not disclose that the exchange rate would be different if the consumer used a credit card. In multiple cases the consumer received less money because the consumer's requests for the kind of currency they wanted to send was ignored.

4. Refusal to Refund

A company refused to refund funds sent to a consumer when the wrong person picked up a remittance despite the sender providing correct recipient information. There are additional complaints that upon cancellation or decline of an order, the money does not quickly come back to the account from which it came.

5. Other Complaints

There were many other complaints filed by consumers. Complaints arising from crypto-currencies are also fairly common. Another consumer reports being told that a company would not do business with the consumer without any explanation**.**

C. Remittance prices have declined.

The average cost of sending remittances from the U.S. fell to 5.67% as of the first quarter 2018, down from 6.91% in the first quarter of 2012.[18] The CFPB issued final regulations in February 2012.

D. The remittance rule has not harmed the market for remittances.

The volume of remittances sent from the U.S. has consistently increased year to year since 2010 (below in millions of U.S. dollars):[19]

2010	2011	2012	2013	2014	2015	2016
50,776	50,556	52,652	55,669	58,882	62,501	66,649

The industry has already largely come into compliance with the remittance rule and should not bear the cost of revamping procedures again. The remittance rule affords a level playing field for

[18] The World Bank, *Remittance Prices Worldwide*, https://remittanceprices.worldbank.org/sites/default/files/rpw_report_march2018.pdf (last accessed June 11, 2018).
[19] World Bank, *Migration and Remittances Data*, http://www.worldbank.org/en/topic/migrationremittancesdiasporaissues/brief/migration-remittances-data (last accessed May 31, 2018).

companies – regardless of corridors served, technology and method of transmission – and subjects companies to the same baseline rules.

IV. Conclusion

For the foregoing reasons, the Consumer Financial Protection Bureau should not re-examine the remittance rule.

Thank you for considering these comments.

Allied Progress
Americans for Financial Reform
Appleseed Foundation
Arkansans Against Abusive Payday Lending
Atlanta Legal Aid Society, Inc.
Brooklyn Coop Federal Credit Union
Center for NYC Neighborhoods
Consumer Action
Consumer Federation of America
East Bay Community Law Center
Florida Alliance for Consumer Protection
Georgia Watch
Heartland Alliance for Human Needs & Human Rights
Interfaith Center on Corporate Responsibility
Jacksonville Area Legal Aid, Inc.
Kentucky Equal Justice Center
Maryland Consumer Rights Coalition
NAACP
National Association of Consumer Advocates
National Center for Law and Economic Justice
National Consumer Law Center (on behalf of its low-income clients)
National Fair Housing Alliance
The One Less Foundation
People's Action Institute
Public Justice Center
Tennessee Citizen Action
Texas Appleseed
Tzedek DC
U.S. PIRG
UnidosUS
Virginia Poverty Law Center
West Virginia Center on Budget and Policy
Woodstock Institute

June 19, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2018-0011 -- Request for Information Regarding the Bureau's Adopted Regulations and New Rulemaking Authorities

Dear Acting Director Mulvaney,

The 44 undersigned consumer, community, civil rights and legal services groups submit these comments in response to the Consumer Financial Protection Bureau ("CFPB")'s Request for Information ("RFI") regarding its adopted regulations and new rulemaking authorities.

Overall, we support the CFPB's's adopted regulations and urge the agency not to revisit any of them at this time, including the regulations governing various aspects of the mortgage lending process, remittances and prepaid accounts. The agency invested considerable time and effort in research, outreach, and consideration of public input in formulating these regulations. No regulation is perfect and the agency balanced many competing interests. We note that there were numerous suggestions from consumer organizations that the agency did not follow and many accommodations the agency made to industry concerns, including some that we opposed. Nonetheless, these regulations should have time to work and the agency should assess them through the regularly scheduled review process.

We do urge the CFPB to repeal the regulation permitting pre-account opening fees that are used to evade the credit card fee harvester provisions of the Credit CARD Act.

The CFPB has announced a rulemaking on debt collection addressing communications and disclosures. Our top priorities are to urge the CFPB to limit collector calls to one call a week, to require collectors to obey an oral request to stop calling, and to prohibit collection of time-barred debt. The agency should not use this rulemaking to give abusive collectors a get-out-of-jail-free card that insulates them from liability.

1. Objections to the CFPB's Request for Information Process

We must first note our objections to the burdensome RFI process. The amount of time and attention required to adequately address the CFPB's numerous RFIs on a multitude of subjects in a very short amount of time has diverted valuable consumer advocacy and third party resources to respond to these requests. The very structure of these RFIs, the nature of many of the questions, and the fact that many focus on processes known mostly to industry actors and their lawyers, favor financial institutions with greater resources at their disposal, and we are gravely concerned about any attempts to weaken consumer protection through this process.

The CFPB has ignored our request for an extension of time to respond to this particularly burdensome RFI and the one on inherited regulations. These two RFIs require us to comment on dozens of regulations on many different subjects running many hundreds if not thousands of pages in length. Doing so barely a week after responding to a series of other RFIs has been especially difficult.

These problems have prevented us from responding in more detail, seeking more input or signatories, or publicizing the comment opportunity more widely. The CFPB must not take the limited number of comments from the public as indicative of a lack of broad objections to changes the CFPB might make that would weaken its role in effectively protecting the consumer public.

2. Adopted Mortgage Regulations

The regulations that the CFPB has adopted in the mortgage area were undertaken at the direction of Congress and in response to a severe foreclosure crisis. Fundamental problems in every aspect of the mortgage market spread to the entire economy and harmed individuals and businesses alike. Reckless, unfair and abusive practices were rife throughout the mortgage process from marketing to origination to servicing. Those practices did immense damage to countless consumers, while helping bring on a financial and economic meltdown in which tens of millions of Americans lost homes, jobs, assets, savings and economic security. Responsible businesses large and small also suffered from the damage created by irresponsible companies.

Below we summarize briefly the important regulations that the CFPB has adopted in the mortgage area that we urge the CFPB to retain.

Mortgage servicing (Regulations X and Z)

The 2013 Servicing Rule under the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA) and the 2016 Mortgage Servicing Final Rule have made a significant, positive impact in the lives of homeowners by providing better access to loan information and by helping to prevent avoidable foreclosures. The rules require fair and common sense procedures surrounding force-placed insurance, servicing transfers, and review of borrowers for loss mitigation. The rule has helped align the incentives of servicers with investors, homeowners, and communities. 70% of consumer advocates who responded to a survey stated that the new rules have increased the frequency of homeowners being properly evaluated for loss mitigation.

The CFPB should reject calls by the mortgage industry to preempt state servicing and foreclosure laws that give greater protection to consumers than RESPA. RESPA does not preempt such laws and the CFPB does not have the authority to do so. Current Regulation Z and the official interpretation implement the balance between state and federal regulation of mortgage servicers as Congress intended. These provisions should be retained in their current form and assessed through the regularly scheduled review process.

Know-before-you-owe disclosures (TILA/RESPA Integrated Disclosures)

The know-before-you-owe rule provides consumers essential information when shopping for mortgages, combining in a single form the disclosures required by the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA). Integrating the requirements of two different statutes was a challenge, and the new form is a major improvement that helps consumers understand the key terms of their mortgages and helps them comparison shop. The provisions limiting deviance from estimated disclosures and providing final disclosures three business days before closing prevent bait-and-switch tactics and enable borrowers to check for errors or surprises. The disclosures were finalized after extensive testing. Piecemeal revision of these rules would be a mistake, as they were carefully crafted, their requirements are interdependent, and the market has invested considerable effort in creating compliance systems. They should be reviewed only on the regular review schedule.

Loan originator compensation, escrows and appraisals

The limits on loan originator compensation contained in the Dodd-Frank Act and in the CFPB's rule are important consumer protections that have fundamentally improved the mortgage market and reduced the incentives of mortgage originators to benefit themselves financially by placing borrowers in more expensive loans. Most importantly, the rule does not permit a loan originator to be compensated based on the terms of a mortgage loan or a proxy for the terms of the loan (other than compensation based on a fixed percentage of the loan amount). The rule has helped eliminate predatory compensation practices that fueled the financial crisis. The rule should remain fully intact. This is especially critical with high-cost and higher-risk loans. Thus, we urge the CFPB to draw the exemption required by section 107 of Public Law No. 115-174 for certain employees of manufactured home retailers as narrowly as possible to protect homeowners and the market.

The CFPB's escrow rule implemented the Dodd-Frank Act requirement to establish a five-year minimum period during which escrows must be established and maintained for higher-priced mortgages. The CFPB also implemented a statutorily-permissible exemption to the escrow requirement for creditors operating in rural or underserved areas. Escrow accounts protect consumers by ensuring that they have funds for recurring homeownership-related expenses, such as property taxes and insurance premiums. These provisions should be preserved in order to maintain the ability for homeowners to keep up with their mortgages while meeting related obligations. While section 108 of Public Law No. 115-174 expands the small creditor escrow exemption for creditors with at least one loan in a rural or underserved area, to protect homebuyers and taxpayers the CFPB should not go beyond the statutory mandate.

In partnership with five other federal regulatory agencies, the CFPB adopted the Higher-Priced Mortgage Loans Appraisal Rule in 2013 and adopted additional exemptions in 2014. The appraisal rule helps to ensure that mortgage loans are properly and accurately collateralized. This protects lenders, by ensuring that loans are adequately secured, and borrowers, by preventing them from borrowing more than their homes are worth. The lack of adequate regulation in the appraisal market was a significant factor causing the housing market crash and the appraisal rule must not be weakened. Section 103 of Public Law 115-174 expands the exemptions under this rule to any loan in a federally designated rural area with a balance of less than $400,000. In order to prevent undersecured loans, no further expansions should be provided.

Ability-to-repay and qualified mortgages rules

The ability-to-repay and qualified mortgage (QM) rules under TILA were promulgated to implement the new mortgage requirements adopted by Congress in 2010. The ability-to-repay provisions ensure that borrowers who are taking out mortgages or refinancing are likely to be able to afford the loan. These provisions were adopted in light of the reckless "no doc" and other shoddy practices that led many people to lose their homes and ruined their financial lives. The QM rules provide streamlined compliance provisions for loans that do not carry risky attributes, such as interest-only payments or exploding interest rates.

These rules have restored sense to the market by ensuring that lenders have an incentive to make loans homeowners can afford and to make safe loans. The CFPB has balanced the need for robust affordability requirements with flexibility for smaller institutions. While section 101 of Public Law No. 115-174 expands the small creditor exemption for loans held in portfolio, the CFPB should implement this requirement as narrowly as possible, in order to preserve access to affordable mortgage loans. Any other changes to the QM rule should similarly be narrowly crafted and should follow a regular process of notice and comment to consider the impact of any changes both on responsible underwriting that supports consumers and the costs of compliance and access to credit.

High-cost mortgages

In the Dodd-Frank Act, Congress expanded the Home Ownership and Equity Protection Act to protect American homeowners from the most reckless loan products the lending industry created in the years leading up to the foreclosure crisis. The CFPB faithfully implemented these provisions regarding greater coverage of high-cost loans and limits on features of such loans, including balloon payments, modification and deferral fees, prepayment penalties, late fees, acceleration clauses, and financing of points and fees. These rules steer lenders away from high-cost loans with dangerous or abusive features and encourage less expensive and safer loans.

3. Prepaid Accounts Rule

The CFPB's prepaid account rule is an important, common sense rule that provides clear fee disclosures, access to account information, fraud and error protection, and protection against inappropriate and dangerous overdraft and credit features for this rapidly growing market. The rule closes a gap in protections and gives consumers greater confidence to turn to prepaid accounts. The CFPB wisely drafted the rule to adapt to an evolving market by not limiting the rule to physical plastic cards and by including newer mobile and fintech transaction accounts that hold consumer deposits.

Consumers have waited a long time for the rule and industry has invested a lot of effort into compliance, originally scheduled for April 1, 2018 and now for April 1, 2019. The CFPB should not revisit the rule and definitely should not weaken any of the provisions, especially those governing overdraft fees.

The CFPB should, however, issue guidance to ensure that any "checkless checking" accounts that are outside the scope of the rule are limited to safe bank accounts, without overdraft fees, that are offered directly by financial institutions, not evasion products offered by nonbank prepaid companies.

4. Remittances Rule

The CFPB enacted the remittance rule at the direction of Congress to implement the provisions of the Dodd-Frank Act. The remittance rule provides important protections for consumers, promoting the transparency necessary to make good financial decisions for themselves and their families. Generally, the remittance rule guarantees that individuals will be told the exchange rate and exactly how much will be received upon delivery, as well as the time for delivery. For workers who are supporting their families in another country, it is vital that they be provided accurate information about the full cost of using remittance services to send money to their loved ones so that they can make the best financial choice. The rule also enables remittance senders to resolve disputes, errors and unauthorized transfers.

The CFPB should not revisit or weaken the remittance rule. We also urge the CFPB to ensure that (a) consumers receive accurate information regardless of the provider used to send funds abroad, and (b) the promises made to consumers about costs and times for funds availability are enforced. Consumer complaints to the CFPB indicate that too often consumers believe that they are sending enough money to pay for an important bill, but deceptive exchange rates and transaction costs eat away at the actual amount that their family receives.

5. Credit Card Fee Harvester Rule Governing Pre-Account Opening Fees

The 2009 Credit CARD Act contains a "fee harvester card" provision that capped fees in the first year of a card at 25% of the credit line. The provision is aimed at abusive low-balance cards that advertised low APRs but came with numerous fees that dramatically increased the cost while cutting into available credit. One company, First Premier Bank, began evading the rule by charging pre-account opening fees and then sued the CFPB over the regulation. To settle the litigation, the CFPB changed the rule. First Premier now charges $170 in up-front fees, with a purported APR of 36%, on a card that claims to offer $300 in credit but in fact net of the fees offers only $130 in available credit. However, when the CFPB changed the rule it overlooked its broader rulemaking authority under TILA. It should now use that authority to restore the original rule as enacted by the Federal Reserve Board.

6. New Rulemaking Authority Over Debt Collection

Abusive debt collection practices have been a problem for decades. Debt collection is consistently near the top--and usually at the top--of complaints at the Federal Trade Commission and now at the CFPB. Violations of the 1977 Fair Debt Collection Practices Act (FDCPA) remain routine. The advent of the debt buyer industry has exacerbated old problems and created new ones, as many consumers now face collection activities against the wrong person, for the wrong amount, by the wrong party, or for debt that is so old that records are lost or the consumer cannot be legally sued.

Congress gave the CFPB new authority to write regulations under the FDCPA. Any such rules must stay faithful to the statutory purposes, including: "to eliminate abusive debt collection practices" and "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."

As the CFPB undertakes a rulemaking concerning communications, it must focus on ending harassing communication, protecting consumer privacy, and increasing consumer control over collection communications. In particular, the CFPB should:

- Limit calls to one a week (with up to three attempted calls);
- Require collectors to obey the consumer's oral request to stop calling;
- Ensure that newer communication technologies respect privacy, do not abuse or harass, and comply with the FDCPA;
- Prohibit the collection of time-barred debt or adopt very strict limits that prohibit suits on "revived" debt and limit communications to writings that include clear disclosures that the consumer cannot be sued.

Any new disclosures should build upon existing FDCPA disclosures and be tested for comprehension by the least sophisticated consumer.

The CFPB should reject calls from some in the collection industry for a "right to cure" violations of the FDCPA before consumers may exercise their rights under the statute. There is no right in the statute to have one free bite at violating the Act, there is no authority to add one, and to do so would encourage violations and harm both consumers and law-abiding collectors.

7. Electronic disclosures and other information

The CFPB asks whether aspects of the adopted regulations are "incompatible or misaligned with new technologies, including by limiting providers' ability to deliver, electronically, mandatory disclosures or other information that may be relevant to consumers …"

We support clear, well-designed and tested electronic disclosures and information for consumers who elect to receive information in that format, while noting that it is important that information be provided in a form that consumers can keep and some transactions are too complex to be adequately understood on mobile devices. We oppose removing the choice of paper disclosures, statements, records or other information for consumers who prefer to receive information on paper.

* * *

Thank you for considering our comments.

Yours very truly,

Allied Progress

Americans for Financial Reform
Arkansans Against Abusive Payday Lending
Arkansas Community Organizations
Atlanta Legal Aid Society, Inc.
Brooklyn Coop Federal Credit Union
California Reinvestment Coalition
Center for NYC Neighborhoods
Center for Responsible Lending
Consumer Action
Consumer Federation of America
East Bay Community Law Center
Empire Justice Center
Florida Alliance for Consumer Protection
Georgia Watch
Heartland Alliance for Human Needs & Human Rights
Interfaith Center on Corporate Responsibility
Jacksonville Area Legal Aid, Inc.
Kentucky Equal Justice Center
LAF Chicago
Legal Aid Society of the District of Columbia
Legal Services NYC
Maryland Consumer Rights Coalition
Mississippi Center for Justice
Mobilization for Justice Inc.
NAACP
National Association of Consumer Advocates
National Center for Law and Economic Justice
National Community Reinvestment Coalition
National Consumer Law Center
National Fair Housing Alliance
New Yorkers for Responsible Lending
North Carolina Justice Center
People's Action Institute
Public Justice Center
Tennessee Citizen Action
Texas Appleseed
THE ONE LESS FOUNDATION
Tzedek DC
U.S. PIRG

UnidosUS (formerly NCLR)
Virginia Poverty Law Center
West Virginia Center on Budget and Policy
Woodstock Institute
World Privacy Forum

July 9, 2018

Comment Intake
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Docket No. CFPB-2018-0015 (Request for Information Regarding Bureau Financial Education Programs)

Dear Acting Director Mulvaney and Others:

The below-signed consumer protection, civil rights, and housing advocacy organizations appreciate the opportunity to comment on the Consumer Financial Protection Bureau's (CFPB) financial education programs. CFPB's consumer financial education programs are a very valuable component of a broader system of consumer financial education and the CFPB should continue its efforts to provide consumers with useful financial information and education. Consumer financial education, however, is just one of several consumer protection tools that are available to the CFPB. The CFPB must continue to utilize the Bureau's other tools, including its enforcement and rulemaking authority, as appropriate, to fully protect consumers in accordance with the CFPB's mission. Our comments include steps the Bureau should take to improve its existing consumer financial education efforts.

I. CFPB's Financial Education Programs Are a Valuable Piece of the Overall Financial Education System

The CFPB's consumer financial education programs are an important piece of the overall consumer financial education system. CFPB takes a generalized approach to financial education by providing materials that are meant to be broadly distributed, such as guides for specific financial decisions (such as *Buying a House*, *Paying for College*, and *Planning for Retirement*). CFPB's financial education materials cover a range of important topics such as mortgages, student loans, debt collection, and credit reporting, and target both the general population and specific groups such as older Americans, service members, and students.

The CFPB's materials are useful to a broad audience and function as an excellent complement to the more individualized financial education that is taught by financial and HUD-approved housing counseling organizations. Financial and HUD-approved housing counseling organizations work one-on-one with consumers and provide individualized guidance based on each consumer's individual circumstances. The different approaches taken by CFPB and financial and HUD-approved housing counseling agencies complement each other perfectly. The CFPB is able to reach a wide audience and provide general financial education on specific topics that is targeted to specific audiences. Meanwhile, financial and HUD-approved counseling agencies are able to address holistically consumers' overall financial well-being. Ideally, as will be addressed more below, CFPB's financial education would also guide those consumers who could benefit from more individualized attention to HUD-approved housing counseling agencies.

II. Financial Education Is Not a Substitute for CFPB's Other Consumer Protection Efforts

While consumer financial education is valuable and necessary to help consumers make informed financial decisions and better understand their financial transactions, financial education is not a substitute for other consumer protection efforts for which CFPB is responsible. Most notably, financial education must never be treated as a substitute for strong regulation of the industries CFPB is charged with overseeing nor for strong enforcement actions against bad actors.

Financial education is a consumer-facing tool. As carried out by CFPB, financial education serves two major purposes: to help consumers better understand complex financial transactions (such as purchasing a home) and to more generally help consumers realize financial success (by, for example, educating consumers on preparing for retirement).

This consumer-facing work is distinct from—not a substitute for—the work CFPB does to regulate the industries it is charged with supervising, or punishing bad actors that fail to follow those regulations. Strong regulation is necessary to protect against dangerous and abusive practices. For example, in the wake of the financial and foreclosure crises, CFPB promulgated strong qualified mortgage regulations that largely prohibit mortgage lenders from selling the types of predatory, abusive, and dangerous loan products that were proven causes of the financial and foreclosure crises. Likewise, strong enforcement is necessary to punish bad actors and to disincentivize improper behavior.

No amount of financial education can prepare consumers for financial success in the absence of strong guard rails, in the form of regulation, and financial education cannot protect consumers against unscrupulous actors in the absence of strong enforcement against those who do not follow the rules.

III. CFPB Financial Education Programs: Successes and Areas for Improvement

CFPB should be applauded for much of its financial education efforts. There are also some areas in which improvements can and should be made.

A. Financial Education Successes

There are number of areas of CFPB's financial education programs that deserve to be recognized for the positive impact they have had for U.S. consumers.

1. CFPB's Multi-Language Glossary of Financial Terms

As advocates who often work on behalf of people with limited English proficiency (LEP), we recognize the fundamental importance of making financial education resources available in languages other than English. To help meet this need, CFPB has created very useful glossaries of financial terms in both Spanish and Chinese. These glossaries are an excellent first step in providing financial education in ways that are accessible to LEP consumers.

CFPB should continue its efforts to provide financial education to LEP consumers, and expand the Bureau's materials and information so that they are available in additional languages commonly spoken by LEP consumers. First, the glossary of financial terms should be made available in additional languages commonly spoken by people with limited English proficiency, starting with the six other languages

currently reflected on the CFPB's website.[1] . Additionally, CFPB should provide more financial education materials in languages other than English. We look forward to working with CFPB staff to expand its offerings of financial education materials in languages other than English.

2. Know Before You Owe

The improvements that were made by CFPB to the *Know Before You Owe* mortgage disclosures to homebuyers are another example of the CFPB's successes in financial education. The improved *Know Before You Owe* disclosure forms replaced those previously required that were often duplicative and confusing. CFPB's new *Know Before You Owe* disclosures, which include a Loan Estimate that is provided by the lender within 3 days after a mortgage application is submitted and a Closing Disclosure that is provided at least 3 days prior to closing, provide consumers clear information and a better understanding of loan costs, monthly payments, risky loan features, and differences between estimated and final loan costs.

Know Before You Owe is an example of the type of financial education at which CFPB excels; providing clear, easy to use and understand tools that help consumers make informed financial decisions. We appreciate CFPB's efforts in this regard and encourage CFPB to continue to pursue similar measures.

B. Financial Education Areas for Improvement

There are also areas in which CFPB can improve its financial education efforts, particularly around how CFPB works with other financial education providers such as HUD-approved housing counseling agencies.

1. CFPB's Financial Education Programs Should Guide Consumers to Additional Financial Education Resources, Such as HUD-Approved Housing Counseling Agencies

As was discussed earlier, CFPB's approach to financial education, which focuses on providing generalized education materials aimed at broad audiences, are an excellent complement to the more personalized financial education that is provided through one-on-one counseling and group education. Particularly with respect to one-on-one counseling, such as that provided by HUD-approved counseling agencies, many of the consumers who benefit from CFPB's generalized financial education programs can benefit from more individualized attention.

All one-on-one counseling that is provided by a HUD-approved counseling agency includes an in-depth look at the household's personal finances, including understanding debt and income, credit score, and household budgeting. Counselors also work with clients to develop a plan to address any areas that are in need of improvement, such as improving credit scores or increasing savings. Not only does this counseling help consumers meet their housing needs, it helps prepare them for long-term financial success.

CFPB's financial education programs should include aggressive efforts to direct consumers who can benefit from more individualized financial education to appropriate resources, especially HUD-approved housing counseling agencies. Whereas financial and housing counseling agencies that are not HUD-approved may not be required to meet any quality or consumer protection standards, HUD-approved

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[1] https://www.consumerfinance.gov/

housing counseling agencies are well-regulated, including certification and continuing education requirements. This makes HUD-approved counseling agencies (and any other similarly regulated non-profit agencies) the ideal providers of financial counseling and education for those consumers who need more personalized financial education needs.

2. CFPB's Find a Housing Counselor Tool Should Be Searchable by Language

CFPB's online Find a Housing Counselor tool is a significant improvement over the existing HUD tool. Importantly, while the HUD tool provides consumers a list of agencies in the state sorted alphabetically by city, the CFPB tool allows consumers to find the 10 agencies that are located closest to their zip code. This was a valuable improvement that helps consumers more easily identify agencies in their area. However, consumers with limited English proficiency are not able to search by which languages are spoken at the agency, despite the fact that languages spoken is a data field in the directory. Therefore, the CFPB tool may be of limited use to a LEP consumer, since that borrower may only be able to locate ten agencies in their area that do not speak their preferred language. Similarly, having the search tool available in a variety of languages would allow LEP consumers to search for a housing counselor in their preferred language.

To address this, CFPB should add the ability to search the database both by zip code and by languages spoken and provide the tool in different languages.

3. Consumer Relief Payments Made to CFPB Should Be Used to Fund HUD-Approved Housing Counseling

In order to bolster financial education, CFPB should provide funds that it receives in the form of Consumer Relief settlements to HUD-approved housing counseling agencies. New and diverse funding sources are needed to ensure that HUD-approved counseling agencies are able to provide that one-on-one and group education services that are a critical component of a successful financial education regime for American consumers. This funding should be especially focused on preventative counseling and education that will help consumers identify and avoid dangerous financial products and bad actors such as those who are subject to CFPB enforcement actions.

4. CFPB's Financial Education Programs Should Be Expanded to Focus on Additional Populations

CFPB's financial education work currently focuses on the general public; servicemembers; veterans and their families; older Americans; students; and underserved consumers. These audiences and communities are a good starting point for reaching the consumers served by financial and HUD-approved housing counseling organizations and financial capability providers. In addition, the CFPB should consider including the following communities in its financial education work:

- Immigrants;
- Parents and caregivers;
- Information and guides for people who rent a home;
- Students in middle school and high school;
- Information and guides that are specific to communities of color;
- Family members and caregivers of people with mental and physical disabilities.

In conclusion, we must note our strong objection to CFPB's recent reliance on a burdensome RFI process. The amount of time and attention required to adequately address the CFPB's numerous RFIs on a multitude of subjects in a very short amount of time has diverted valuable consumer advocacy and third party resources to respond to these requests. The very structure of these RFIs, the nature of many of the questions, and the fact that many focus on processes known mostly to industry actors and their lawyers, favor financial institutions with greater resources at their disposal, and we are gravely concerned about any attempts to weaken consumer protection through this process.

Sincerely,

National Organizations
Allied Progress
Americans for Financial Reform
Cambridge Credit Counseling
Community Reinvestment Solutions, Inc.
Consumer Action
Consumer Credit and Budget Counseling
Consumer Federation of America
eHome America
Guidewell Financial Solutions
HomeFree-USA
National Caucus and Center for Community Economic Development
National Coalition for Asian Pacific American Community Development
National Community Reinvestment Coalition
National Consumer Law Center (on behalf of its low income clients)
National Fair Housing Alliance
National Housing Resource Center
National NeighborWorks Association
Navicore Solutions
UnidosUS
U.S. PIRG
Woodstock Institute

Statewide and Local Organizations	City/Town:	State:
ACT Lawrence	Lawrence	MA
Affordable Housing Partnership of the Capital Region	Albany	NY
AGORA Community Services Corporation	Chicago	IL
Allston Brighton Community Development Corporation	Brighton	MA
Arizona Community Action Association	Phoenix	AZ
Arizona PIRG Education Fund	Phoenix	AZ

Asian Services In Action, Inc.	Akron	OH
Avenue CDC	Houston	TX
BCL of Texas	Dallas & Austin	TX
Blackstone Valley Community Action Program	North Providence	RI
Bridgeport Neighborhood Trust Inc.	Bridgeport	CT
Bucks County Housing Group	Warminster	PA
Buffalo Urban League	Buffalo	NY
Campesinos Sin Fronteras	Somerton	AZ
Catholic Charities Chemung/Schuyler	Elmira	NY
CCCS of Buffalo	Buffalo	NY
Center for Economic Integrity	Tucson	AZ
Center for NYC Neighborhoods	New York	NY
Centre for Homeownership & Economic Development Corporation	Hillsborough	NC
CFORM/Covenant Community Development Corp.	Tupelo	MS
Chautauqua Home Rehabilitation & Improvement Corporation	Mayville	NY
Chestnut Credit Counseling Services	Bloomington	IL
Chicago Urban League	Chicago	IL
Chicanos Por La Causa	Phoenix	AZ
Church Community Housing	Newport	RI
Citizens' Housing and Planning Association	Boston	MA
Clarifi	Philadelphia	PA
Coastal Enterprises Inc.	Brunswick	ME
Consumer Credit Counseling Service of Northern Illinois, Inc.	Woodstock	IL
Desire Community Housing Corporation	New Orleans	LA
Douglas County Housing Partnership	Lone Tree	CO
Durham Regional Financial Center	Durham	NC
Eastside Community Development Corporation	Baltimore	MD
El Centro de la Raza	Seattle	WA
Empire Justice Center	Albany	NY
Empire State Consumer Project	Rochester	NY
Empowering and Strengthening Ohio's People	Cleveland	OH
Fair Housing Council of Northern NJ	Hackensack	NJ
Fair Housing Resource Center, Inc.	Painesville	OH
Family Housing Advisory Services	Omaha	NE
Fifth Ward Community Redevelopment Corporation	Houston	TX
Florida Alliance for Consumer Protection	Tallahassee	FL
Fort Wayne Urban league	Fort Wayne	IN
Four Directions Development Corporation	Orono	ME
Frontier Housing, Inc.	Morehead	KY
Good Neighbor Foundation-Homeownership Center	Franklin	TN
Goldenrule Housing & Community Development Corp., Inc.	Sanford	FL
Greater Kansas City Housing Information Center	Kansas City	MO
Greater Phoenix Urban League	Phoenix	AZ
Green Forest CDC	Decatur	GA
GS Community Ventures	College Park	GA

Haven Neighborhood Services	Los Angeles	CA
Heartland Alliance for Human Needs & Human Rights	Chicago	IL
Holmes Unlimited, LLC	Wichita Falls	TX
HOME, Inc.	Des Moines	IA
HomeOwnership Center, Inc.	Elkins	WV
Home Ownership Resource Center of Lee County, Inc.	Fort Myers	FL
Homes on the Hill, CDC	Columbus	OH
HomesFund	Durango	CO
HomeSmart NY	New York	NY
HomeSource East Tennessee	Knoxville	TN
Horizons, A Family Service Alliance	Cedar Rapids	IA
Housing Action Illinois	Chicago	IL
Housing Assistance Program of Essex County, Inc.	Elizabethtown	NY
Housing Channel	Fort Worth	TX
Housing Options & Planning Enterprises, Inc.	Oxon Hill	MD
Housing Partnership	Dover	NJ
Housing Resources of Western Colorado	Grand Junction	CO
Inland Fair Housing and Mediation Board	Ontario	CA
Jersey Counselling & Housing Development, Inc.	Camden	NJ
Kennebec Valley Community Action Program	Waterville	ME
La Casa de Don Pedro	Newark	NJ
La Fuerza Unida	Glen Cove	NY
Latino Economic Development Center	Washington	DC
Lawrence CommunityWorks, Inc.	Lawrence	MA
Legal Services NYC	New York	NY
Lifelines Counseling Services	Mobile	AL
LifeStyles of Maryland Foundation, Inc.	La Plata	MD
Little Haiti Housing Association, Inc. d.b.a HACDC	Miami	FL
Long Island Housing Services, Inc.	Bohemia	NY
Lorain County Urban League	Elyria	OH
Louisville Urban League	Louisville	KY
Margert Community Corporation	Far Rockaway	NY
Massachusetts Affordable Housing Alliance	Dorchester	MA
Massachusetts Association of CDCs	Boston	MA
Merrimack Valley Housing Partnership	Lowell	MA
Minneapolis Urban League	Minneapolis	MN
Mobilization for Justice, Inc.	New York	NY
Monroe Union County CDC	Monroe	NC
Montana Organizing Project	Billings	MT
Montebello Housing Development Corporation	Montebello	CA
Morningstar Urban Development, Inc.	Decatur	GA
National Council on Agricultural Life & Labor Research Fund, Inc. (NCALL)	Dover	DE
North Carolina Housing Coalition	Raleigh	NC
Neighborhood Economic Development Corporation	Springfield	OR

Neighborhood House, Inc.	Wilmington	DE
Neighborhood Housing Services of Chicago	Chicago	IL
Neighborhood Housing Services of Greater Cleveland	Cleveland	OH
Neighborhood Housing Services of Staten Island	Staten Island	NY
Neighborhood Nonprofit Housing Corporation	Logan	UT
Neighborhood Housing Services of the Inland Empire	San Bernardino	CA
Neighborhood Partnership Housing Services, Inc.	Rancho Cucamonga	CA
NeighborWorks Salt Lake	Salt Lake city	UT
NeighborWorks Southern New Hampshire	Manchester	NH
Neighborhood of Affordable Housing	East Boston	MA
Nevada Partners	North Las Vegas	NV
New Economics for Women	Los Angeles	CA
New Jersey Citizen Action	Trenton	NJ
New Level CDC	Nashville	TN
New York Mortgage Coalition	New York	NY
New Yorkers for Responsible Lending (NYRL)	Albany	NY
Newtown Community Development Corporation	Tempe	AZ
Northwest Side Housing Center	Chicago	IL
Opportunities Credit Union	Winooski	VT
Our Casas Resident Council, Inc.	San Antonio	TX
Parkview Services	Shoreline	WA
Pro Home, Inc.	Taunton	MA
Rockaway Development & Revitalization Corporation	Far Rockaway	NY
Safeguard Credit Counseling	Northport	NY
Sconiers Homeless Preventive Organization, Inc.	Riverdale	GA
Shalom Center for T.R.E.E. of Life	Los Angeles	CA
South Carolina Appleseed Legal Justice Center	Columbia	SC
South Suburban Housing Center	Homewood	IL
Take Charge America, Inc.	Phoenix	AZ
Tennessee Citizen Action	Nashville	TN
Texas Legal Services Center	Austin	TX
The Development Corporation	Baltimore	MD
The Fair Housing Council of Riverside County	Riverside	CA
The HomeOwnership Center	Dayton	OH
Trinity Empowerment Consortium	Palmetto	FL
U SNAP BAC NON PROFIT HOUSING CORP.	Detroit	MI
Urban League of Greater Pittsburgh	Pittsburgh	PA
Urban League of Metropolitan Seattle	Seattle	WA
Urban League of San Diego County	San Diego	CA
Urban League of Union County	Elizabeth	NJ
Ventura County Community Development Corporation	Oxnard	CA
Vermont Affordable Housing Coalition	Burlington	VT
Virginia Citizens Consumer Council	Elliston	VA
Willamette Neighborhood Housings Services	Corvallis	OR

Working In Neighborhoods	Cincinnati	OH
WSOS Community Action Commission	Fremont	OH

Comments

to the Consumer Financial Protection Bureau

in response to

Request for Information Regarding the CFPB's Adopted Regulations and New Rulemaking Authorities

Docket No. CFPB-2018-0011

83 Fed. Reg. 12,286 (Mar. 21, 2018)

Submitted by

Americans for Financial Reform

Center for Responsible Lending

Consumer Action

Consumer Federation of America

Housing Clinic, Jerome N. Frank Legal Services Organization, at Yale Law School

National Consumer Law Center (on behalf of its low-income clients)

National Housing Law Project

June 19, 2018

Introduction

The undersigned organizations submit these comments in response to the agency's Request for Information on adopted regulations. This submission focuses on housing-related regulations promulgated by the Consumer Financial Protection Bureau (CFPB) since its inception and strongly supports preservation of these essential rules.

The CFPB began its work in the wake of a foreclosure crisis that devastated homeowners, communities, and the economy. The percentage of all outstanding residential mortgage loans in the nation ninety days or more delinquent or in foreclosure peaked at 9.67% (or almost 4.3 million loans) by the end of 2009.[1] As more and more homes went into foreclosure, the effects of this disaster triggered devastation in the broader economy.[2] As of the beginning of 2011, over twenty-six million Americans had no jobs, could not find full-time work, or had given up looking for work.[3] Almost four million families had lost their homes to foreclosure. Nearly $11 trillion in household wealth had vanished, including retirement accounts and life savings.[4]

While many of the housing rules were required by Congress, the CFPB endeavored to tailor the rules to ensure they took into account the needs of smaller institutions, rural areas, and underserved borrowers. These regulations ensure that incentives for lenders and servicers are better aligned with those of borrowers, investors, and the broader market.

These comments address seven housing-related rules that the CFPB has adopted or substantially amended:

- The Mortgage Servicing Rule, 12 C.F.R. §§ 1024.1 to 1021.41, 1026.17 to 1026.20, 1026.36, 1026.39, 1026.41
- The Ability to Repay and Qualified Mortgage Rule, 12 C.F.R. § 1026.43
- The TILA-RESPA Integrated Disclosure Rule, 12 C.F.R. §§ 1026.19, 1026.37, and 1026.38
- The Loan Originator Compensation Rule, 12 C.F.R. § 1026.36
- The Higher-Priced Loan Escrow Rule, 12 C.F.R. § 1026.35(b)
- The Higher-Priced Loan Appraisal Rule, 12 C.F.R. § 1026.35(c)
- The High-Cost (HOEPA) Mortgage Rule, 12 C.F.R. § 1026.32

As spelled out in detail in consumer groups' earlier comments regarding the CFPB's rulemaking process, the CFPB took great care in crafting all of these rules. The rules put in place critical safeguards to prevent a return to the market dysfunctions that led to the 2008 mortgage meltdown and the resulting foreclosure crisis. They provide key consumer protections for

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[1] Mortgage Bankers Association, National Delinquency Survey, Q1 2007, Q4 2009. This data is derived from the "seriously delinquent" columns. "Seriously delinquent includes mortgage loans that are ninety days or more delinquent or are in foreclosure.

[2] Kathleen C. Engel & Patricia A. McCoy, The Subprime Virus: Reckless Credit, Regulatory Failure, and Next Steps 142-148 (2011).

[3] Fin. Crisis Inquiry Comm'n, The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States, xv (2011) [hereinafter FCIC Final Report], *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf (last visited Aug. 31, 2011).

[4] *Id.*

mortgage borrowers that make the market safer for consumers and more stable for all market participants. These rules should not be opened at this time; the CFPB should allow the implementation periods to continue in order to better assess their effect at a later time. Any adjustments to the rules should aim to preserve the balance between consumer rights and industry flexibility in the current provisions.

Before moving on to our analysis, we first state our objection to the CFPB's current RFI process. The very structure of these RFIs, the nature of many of the questions, and the fact that many of the RFIs focus on processes known mostly to industry actors and their lawyers, favor financial institutions over consumers. In particular, the rapid issuance of successive RFIs and the short timeline for responses favor the financial services industry, which has significant resources at its disposal. In addition, covered persons are more likely to have familiarity with many of the topics addressed by the RFIs. The primary mission of the CFPB is to protect consumers, who have a strong interest in the rules and processes for which the CFPB is responsible, but significantly fewer resources to respond to these requests and less access to data, leading to a need for more time to respond. We are gravely concerned that these RFIs provide the industry with the opportunity to attempt to weaken the effectiveness of the strong systems and procedures the CFPB has put into place to carry out its consumer protection mandate. Rather, time would be better spent researching and investigating abusive financial practices that harm consumers and put the economy at risk and using the CFPB's authority to ensure financial markets are fair, transparent, and help consumers to save and build wealth.

1. The Mortgage Servicing Rules (Regulations X and Z)

1.1. The mortgage servicing rules provide important protections for consumers and promotes fairness in the market.

The 2013 RESPA and TILA Servicing Rule and the 2016 Mortgage Servicing Final Rule have made a significant, positive impact in the lives of homeowners and have contributed to preventing avoidable foreclosures. Following in the wake of the foreclosure crisis, the rules are intended to preserve homeownership for borrowers in distress and to limit the losses of investors and guarantors. The rules have also made significant improvements to many of the general servicing requirements under RESPA.

In a survey of consumer advocates conducted by NCLC in June 2017, 85% of respondents believed the rule had benefited homeowners, and 86% believed it had helped more homeowners avoid foreclosure.[5] The rule has improved transparency and accountability in the loss mitigation process and in other areas of servicing, such as force-placed insurance. While further improvements to the rule are needed, as discussed below, the rule has helped align the incentives of servicers with investors, homeowners, and communities and should not be eroded.

[5] There were 233 respondents to the survey from 41 states. Of the respondents, 171 were housing counselors, 49 were attorneys, and 13 were employees of other nonprofits. *See* detailed discussion of survey results in Section III, Comments of the National Consumer Law Center in Response to the Notice of Assessment of 2013 RESPA Servicing Rule and Request for Public Comment (Docket No. CFPB-2017-0012), July 10, 2017.

1.1.1. The requirement to provide periodic mortgage statements, promptly credit payments, and provide prompt payoff statements enables borrowers to keep their mortgages current.

These common sense rules regarding clear communication with borrowers about their loan have already helped a significant number of borrowers remain current or cure a default. In the absence of regular mortgage statements, too often borrowers lacked the information they needed to quickly address a delinquency situation before it got out of hand. The decision to provide statements even to borrowers in and post-bankruptcy whose actions reflect a decision to maintain their home provides this information to the borrowers who need it most. Applying payments as of the date of receipt, to prevent spiraling late fees, and giving accurate and prompt payoff statements also facilitates performance by borrowers.

1.1.2 The rules help borrowers obtain loan information and correct servicing errors.

The improvements made to the RESPA process for sending a Qualified Written Request have allowed more borrowers to access information and correct problems with the servicing of their loans. In a survey of consumer advocates conducted in June 2017, sixty-five percent of respondents said borrowers have been more able to obtain servicing information and correct servicing errors due to the final servicing rule.[6]

1.1.3. The rules facilitate loss mitigation and prevents avoidable foreclosures.

Eighty-six percent of respondents to NCLC's 2017 survey agreed with the statement, "The CFPB's mortgage servicing rules have allowed me to help more homeowners avoid foreclosure and obtain loss mitigation than I could have without them." Over half of respondents believed the rule had reduced the frequency of dual tracking (58%), improved transparency and predictability (62%), and made it more likely that a denial letter would provide a specific reason for the denial (52%). Nearly 70% of respondents believed the rules had increased the frequency of borrowers being evaluated for all available loss mitigation options and allowed more homeowners to save their homes from avoidable foreclosures.

1.2. It is crucial that the CFPB not erode the mortgage servicing rules.

The CFPB should preserve the crucial protections of the mortgage servicing rules in light of the significant benefits they provide to consumers. An assessment of the costs and benefits of the rules would be out of alignment if it did not put appropriate weight on the ways the rule has improved outcomes for consumers. To some extent, these benefits will be difficult to measure because we do not have data about the harms incurred before the rules were in place and because loss mitigation data are still to a great extent not publically available. Although it is difficult to quantify the extent to which the servicing rule has increased positive outcomes from loss mitigation applications, successful loan modifications and other loss mitigation offers are one part of this benefit. Survey data from consumer advocates show that nearly 70% of advocates believe the rules have allowed more homeowners to save their homes from affordable foreclosures, and

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[6] *Id*.

nearly 70% say that the rules have increased the frequency of borrowers being evaluated for all available loss mitigation options. Borrowers have also benefited from clearer communication and better access to information about their loans due to the force-placed insurance, periodic statements, and request for information (RFI) and notice of error (NOE) rules.

1.2.1. Further exemptions from the servicing rules based on institution type or size are not warranted.

The CFPB should maintain the current coverage of the servicing rules and not create new exemptions. "Small servicers" are already exempt from several of the requirements imposed on servicers by the 2013 TILA and RESPA Servicing Rule. A small servicer is defined in part as a servicer that services, together with any affiliates, 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee.[7]

Advocates who assist borrowers with loss mitigation and foreclosure defense find it difficult to determine whether a particular servicer is subject to the exemption. We continue to urge the CFPB to create a registry of servicers who claim to be covered by the small servicer definition, which could be accessed on the CFPB's website.

But most importantly, the small servicer exemption as set forth in the original 2013 rule appropriately balances the interests of consumers with those of truly small servicing entities. The benefits to consumers of being protected by the servicing rule, in the form of greater transparency and access to reasonable loss mitigation procedures, are easily significant enough to justify the costs for entities which are currently required to comply.

1.2.2. Contrary to arguments advanced by certain mortgage industry players, the servicing rules have been a net benefit for homeowners, and reports of adverse consequences are significantly exaggerated.

1.2.2.1. The CFPB should look behind industry claims regarding servicing cost increases and their causes.

The mortgage servicing industry often claims that regulatory compliance in general, and the servicing rules in particular, are a significant driver of rising servicing costs. To the extent that the CFPB relies on such industry data, we urge the CFPB to look behind these claims and demand greater data transparency.

It is not disputed that handling defaulted loans involves much greater discretion, expertise, and manpower, and therefore servicing such loans involves greater costs. MBA data indicate that the annual cost of servicing non-performing loans has gone from $482 per loan in 2008 to $2,386 per loan in 2015. The component parts of these servicing costs are not publicly known. Therefore, it cannot be determined whether increased costs are driven by regulatory compliance or by aged technology and inefficient "siloed" operations. Even within the industry, it is well known that lack of investment in technology has led to "redundant, inefficient, incompatible systems that are increasingly costly to maintain."

When viewed out of context, the aggregate "cost per loan" for servicing a loan in default does not provide meaningful information. Primarily because of the servicers' own decisions, the

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[7] 12 C.F.R. § 1026.41(e)(4)(ii)(A).

length of default periods increased dramatically during the past six to seven years. Servicers largely imposed these delays and the ensuing costs on themselves. Any attempt to tie changes in servicers' costs to the Bureau's rules is likely to be based on conjecture and needs to be documented in great detail. Similarly, the frequency of loan modifications and the impact of modifications on borrowers' payments were very different in the three years before 2013 and in the years since then. These differences had much to do with the volume of loans in default and the financial circumstances of the borrowers facing foreclosure at a given time. To be reliable, any evaluation technique must isolate the effect of the rules from all the other factors affecting the volume and nature of loss mitigation demands as the foreclosure crisis grew and subsided. A better approach would be to focus on data collection for the future, when the long-term delinquency and foreclosure trends will hopefully be more stable.

While servicing costs have undoubtedly increased over the years, we urge the CFPB to take a closer look at industry data before using it to justify any changes to the existing rules. While increased compliance costs may have had an impact on cost to service and thus been a factor in reducing profitability, this is only one of several factors that have impacted pricing and liquidity in the MSR market. Other factors have included the Basel III standards, interest rate policy, capital requirements, fair value accounting rules, and the rise of non-bank servicers. The value of Mortgage Servicing Rights increased by up to 25% in the last three months of 2016 due in large part to interest rate changes.[8] It is impossible to isolate the impact of regulatory requirements on liquidity in light of these other significant factors. But regardless, the market for Mortgage Servicing Rights remains a large and liquid market with routine and active trading.

Moreover, in evaluating the costs and benefits of the servicing rules, the CFPB should take into account the costs and benefits to all parties involved—not just borrowers and servicers but also parties such as investors and court systems. Of note, foreclosures are particularly expensive for all parties—lenders and servicers expend more resources in dealing with foreclosed property compared to modifying a loan, the borrower suffers extreme financial and personal harm in losing their home, and foreclosures have substantial negative economic effects on the surrounding neighborhood. Increasing investment in high-quality servicing and loan modifications provides significant benefits compared to expediting foreclosures.

Further, prior to the rule, servicing practices were chaotic and lacked meaningful oversight The servicing industry had no standards or systems for dealing with the massive level of mortgage defaults caused by the mortgage meltdown. Miscommunication, lost documents, and inconsistent decisions were the rule. Fundamental errors about the status of a loan were commonplace, and any systems for correcting them were inadequate. Unnecessary foreclosures were causing great losses for investors and significantly increasing courts' workloads. The chaotic non-system also meant that foreclosure cases had to be redone, which imposed more costs on everyone – including foreclosure courts. The servicing rules have brought order, predictability, and standardization to a system that was highly dysfunctional, benefiting many parties in addition to servicers and borrowers. Moreover, the revisions to the origination rules have eliminated a great deal of product risk and reduced delinquencies not associated with borrower credit risk, thus greatly reducing the volume of loans needing default servicing.

[8] Kroll Bond Rating Agency, "Mortgage Servicing Rights: Rising Yields are Good," U.S. Financial Institutions Research (Mar. 2, 2017)

Finally, concerns about successor servicer liability have also been overstated. It is true that a transferee servicer is responsible for having access to the material documents that make up a loan file, and that the transfer of these documents to a transferee servicer may in rare instances occur where a transferor servicer does not have key loan documents. However, nothing in the mortgage servicing rule makes a transferee servicer liable for violations of Regulation X or Z made by the prior servicer, and there is no evidence that purported "successor liability" has had any significant impact on the market for mortgage servicing rights.

1.2.2.2 The rule promotes necessary information for borrowers seeking loss mitigation.

Borrowers have benefited significantly from the loss mitigation communications that servicers are required to send pursuant to Regulation X, and any suggestion from the servicing industry that the required letters are redundant or confusing should be viewed with skepticism. The early intervention letters and written notices regarding loss mitigation options (§1024.39) serve an important function in informing struggling borrowers that options may be available and prompt action is important.[9] Borrowers who apply for loss mitigation need clear communication regarding the documents necessary to make an application complete (§1024.41(b)(2)) and confirmation when all such documentation has been received (§1024.41(c)(3)). They need written denial letters, when a denial is made, that state the specific reason for the denial (§1024.41(d)).

Servicers have suggested that the five-business-day timeframe for sending a notice under 1024.41(b)(2) is not sufficient for servicers to review the loss mitigation application and identify any additional information that is needed. Consumer advocates confirm that quite often the (b)(2) notices sent by servicers are incomplete, and lead to additional piecemeal requests for documents that could have been requested at the outset. If the CFPB considers lengthening the timeframe for sending the (b)(2) notice to, at most, ten business days, then the CFPB should demand strict compliance with the requirement in (b)(2) that the servicer identify ***all*** information and documents needed to complete the application. There would be no reason to fail to identify necessary documentation if a servicer is allowed ten business days to comply; and the end goal of keeping the total loss mitigation review period tight in order to avoid unnecessary foreclosures must be preserved.

1.2.2.3. Regulation X provisions related to Requests for Information and Notices of Error appropriately balance the needs of borrowers and burden on servicers.

The improved standards and procedures for handling Requests for Information (RFIs) and Notices of Error (NOEs) have enabled many borrowers to correct problems with the servicing of their mortgage loans before such problems jeopardize the retention of their homes. Borrowers have obtained information about the application of payments, escrow calculations, loss mitigation reviews, and countless other issues with greater success than was possible before the 2013 changes to Regulation X. In NCLC's 2017 survey of consumer advocates, sixty-five

[9] However, once a borrower has submitted a loss mitigation application and the servicer has sent the response required by § 1024.41(b)(2), indicating that the application has been received and informing the borrower whether or not it is complete, the servicer should cease sending automated solicitations to apply for loss mitigation. It is confusing, and creates a host of problems, when a borrower receives a letter inviting him or her to fill out and return "the enclosed application for loss mitigation" while a pending application is already under review.

percent of respondents said that borrowers have been more able to obtain servicing information and correct servicing errors due to the RESPA rule.[10]

Some in the servicing industry have attempted to argue that the NOE and RFI rules allow for broad and burdensome requests, but this concern has already been adequately addressed. The CFPB has already thoughtfully considered this issue and exempted servicers from responding to requests that are overbroad or duplicative.[11] The fact that servicers sometimes fail to correct errors or respond to requests properly the first time does not make a subsequent communication duplicative or unduly burdensome. Moreover, the timelines for response are extremely reasonable and allow servicers to extend the time when necessary. If the servicer seeks an extension, the standard six-week (thirty business days) response window is extended to a full nine weeks (forty-five business days). The requests that require a faster response than the standard timeframe, such as a Request for Information seeking the identity of the owner of loan are reasonable because the information sought should be readily available.

1.2.2.4. The dual tracking restrictions in Regulation X are essential to preventing unnecessary foreclosures, and must be preserved.

The practice of dual tracking--initiating or conducting a foreclosure despite a pending loss mitigation application--extracts a severe toll on borrowers, investors, and communities. The CFPB has put in place reasonable rules limiting this practice when a complete application is received before the first legal filing is made to commence foreclosure (limiting the initiation of foreclosure) or more than thirty-seven days before a foreclosure sale (limiting the conduct of the sale).

Some industry commenters have suggested that the rules are difficult for servicers to comply with because time is needed to evaluate whether an application is, in fact, complete at any point and they may feel compelled to halt foreclosure activity when a borrower's application is not yet complete. In the context of a judicial foreclosure that has been initiated prior to the receipt of a complete application, the framework of the rules is logical and fair. A servicer is not required to immediately dismiss the foreclosure lawsuit or to refrain from litigating the case.[12] The only actions that are prohibited (if an application becomes complete more than thirty-seven days before foreclosure) are moving for judgment of sale or actually conducting a sale.[13] Servicers can communicate with their foreclosure counsel to ensure that they do not violate the 1024.41(g) prohibition without undue difficulty.

Contrary to some comments, the dual tracking provisions do not come into play with properties that are vacant or abandoned. Borrowers do not expend the time and effort necessary to arrive at a complete application for a property they have abandoned.

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[10] See detailed discussion of survey, Comments of the National Consumer Law Center in Response to the Notice of Assessment of 2013 RESPA Servicing Rule and Request for Public Comment (Docket No. CFPB-2017-0012), July 10, 2017.

[11] 12 C.F.R. §§ 1024.35(g)(1)(i) and (ii); 1024.36(f)(1)(iv).

[12] Official Interpretation 1024.41(g)-2.

[13] 12 C.F.R. 1024.41(g)

The impact of the dual tracking rule is significant. In NCLC's 2017 survey of consumer advocates, nearly 70% of respondents believed that the rules have allowed more homeowners to save their homes from avoidable foreclosures.

There is no magic number or percent of homeowners who would need to obtain a foreclosure avoidance option because of the rule in order to consider the rule a success. Indeed, the percent who do receive approval for loss mitigation after getting a dual-tracking hold is likely still artificially low due to wrongful denials by servicers and the fact that many borrowers lack representation. The dual tracking rule is as narrowly tailored as possible to prevent foreclosure sales from being carried out when homeowners are still under review for, and are in fact eligible for, home-saving alternatives.

1.2.2.5. The successor in interest rule should be preserved in its final form.

The CFPB's rule protecting successors in interest, which took effect April 19, 2018, gives homeowners recovering from the death of a family member or a divorce a much better chance of being able to preserve their homes. Historically, homeowners who are on title to the property but not on the loan have faced challenges obtaining information about the loan and gaining access to loss mitigation options. The new protections are crucial both for successors who obtained their ownership interest through the death of the borrower as well as those who obtained their interest through a divorce. Even when the original borrower is still living, the successor who is the grantee of the home has a need for information and access to loss mitigation. The CFPB has already provided that required notices and statements need not be sent twice; sending such notices to a successor in interest and not also to the borrower would be sufficient to comply with the rule. NCLC is contacted nearly every week by advocates representing successors who became the owner of the home through a divorce or separation agreement and have struggled to obtain loss mitigation or information about the mortgage secured by their home, who have a much better fighting chance of saving their home now that the rule is in effect.

1.2.3. The CFPB does not have authority to promulgate a regulation or interpretation allowing RESPA rules to preempt state laws that afford greater protections to consumers.

1.2.3.1. 12 C.F.R. §1024.5(c) and its Official Interpretation define the appropriate balance between RESPA and state consumer protection laws.

State laws define the rights and obligations of mortgage lenders and borrowers. Not surprisingly, many state statutes and other local laws apply to servicers who regularly enforce the terms of mortgages. This is particularly true when the servicers use state laws to foreclose. Under its RESPA authority, the CFPB has also adopted rules that apply to certain activities of mortgage servicers. 12 C.F.R. §§1024.30 – 1024.41 (Regulation X, Subpart C).

Some commenters have asked the CFPB to revisit, and potentially annul, the rules and interpretations that define the relationship between the CFPB's adopted mortgage servicing rules and state laws. This relationship is defined by statute, rule, and an Official Interpretation of the rule, all of which provide that the RESPA mortgage servicing rules must not be construed in any

way that preempts state laws that provide greater protections to consumers.[14] By law, the CFPB does not have the discretion to revisit this standard, and it should be retained.

The CFPB lacks statutory authority to promulgate a rule or interpretation allowing a RESPA rule to preempt state laws that gives *greater* protection to consumers. Such a rule or interpretation would be contrary to a federal statute, 12 U.S.C. § 5551. The attempt to promulgate such a rule would be an invalid agency action subject to being stricken by the courts under the Administrative Procedure Act.[15]

The statute now codified at 12 U.S.C. § 5551 was enacted as part of the Dodd-Frank Act. As section 1041 of the Act, it was contained in Subchapter D, a Subchapter captioned "Preservation of State Law." The section addresses the relationship between the CFPB's authority and state law. The statute provides:

> **(2) Greater protection under State law.** For purposes of this subsection, a statute, regulation, order, or interpretation in effect in any State is not inconsistent with the provisions of this title if the protection that such statute, regulation, order, or interpretation affords to consumers is greater than the protection provided under this title. A determination regarding whether a statute, regulation, order, or interpretation in effect in any State is inconsistent with the provision of this title may be made by the Bureau on its own motion or in response to a nonfrivolous petition initiated by any interested person. 12 U.S.C. § 5551(a)(2).

This mandate for deference to state laws that provide greater protections for consumers carried forward the similar provision that had been part of RESPA since 1974, when the statute applied to a more limited range of mortgage settlement issues.[16]

The related rule, 12 C.F.R. § 1024.5(c), states that the CFPB has the authority to determine whether a state law is preempted as in conflict with a RESPA rule. However, the rule goes on to state, "The Bureau may not determine that a State law or regulation is inconsistent with any provision of RESPA or this part, if the Bureau determines that such law or regulation gives greater protection to the consumer." 12 C.F.R. §1024.5(c)(2)(i). The CFPB's mortgage servicing rules are thus a floor, and the states are free to do more to protect homeowners in the areas where the RESPA rules apply. The CFPB's Official Interpretation of § 1025.5(c) says essentially the same thing.[17]

Notably, the Official Interpretation expressly states that the adopted RESPA rules should not be construed "to preempt the entire field of regulation" of servicer practices covered by the rules. This interpretation is unavoidable given the statute and the regulation's express limitation of

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[14] 12 U.S.C. § 5551(a)(2), 12 C.F.R. §1024.5(c), and Official Interpretation 1024.5(c)(1).

[15] 5 U.S.C. § 706(2)(A),(C).

[16] 12 U.S.C. §2616. *See* Washington Mutual Bank FA v. Superior Court, 75 Cal. App. 4th 773, 781-84 (1999); Perkins v. Johnson, 551 F. Supp. 2d 1246, 1255 (D. Colo. 2008).

[17] "Coverage of RESPA; Relation to State laws. *Paragraph 5(c)(1).* 1. State laws that are inconsistent with the requirements of RESPA or Regulation X may be preempted by RESPA or Regulation X. State laws that give greater protection to consumers are not inconsistent with and are not preempted by RESPA or Regulation X. In addition, nothing in RESPA or Regulation X should be construed to preempt the entire field of regulation of the practices covered by RESPA or Regulation X, including the regulations in Subpart C with respect to mortgage servicers or mortgage servicing."

conflict preemption to cases where the RESPA rule conflicts with a state law that affords *less* protection to consumers.

1.2.3.2 RESPA's deference to state laws is grounded in sound and necessary policy considerations.

A mortgage is a creature of state law. State contract law determines the existence and enforceability of a mortgage. Under the laws of most states, a mortgage also conveys an interest in real property. Any federal regulation that affects foreclosures of mortgages must recognize the primacy of state contract and property law.[18]

RESPA's long-standing deference to state laws is appropriate, and it is typical of other federal laws that affect the state foreclosure process. For example, the Bankruptcy Code, like RESPA, may preempt state property and contract law in certain circumstances. However, the Bankruptcy Code's preemption of state mortgage laws has always been construed narrowly, requiring an express Congressional directive. The well-settled rule is that even in bankruptcy the rights of mortgagors and mortgagees are determined by state law.[19]

The major federal programs that insure or guarantee most of the residential mortgages in the United States similarly defer to state foreclosure laws. Congress could have authorized loans insured under the National Housing Act to be foreclosed under federal standards, in derogation of state foreclosure laws. However, Congress and federal agencies have consistently chosen not to do so. For example, the statute that authorizes foreclosures of mortgages directly granted by the UDSA Rural Housing Service requires that in foreclosing the Government "shall follow the foreclosure procedures of the State in which the property involved is located to the extent such procedures are more favorable to the borrower than the foreclosure procedures that would otherwise be followed by the Secretary."[20] HUD's guidelines for foreclosures of FHA-insured mortgages state that "HUD expects Mortgagees to comply with all federal, state and local laws when proceeding with a foreclosure and pursuing a possessory action."[21] For GSE loans, the enterprises have similar requirements.[22]

Disruption of state foreclosure laws by federal regulations could have serious unintended consequences. Federal interference could unsettle titles to properties conveyed through foreclosure sales. States with non-judicial foreclosures systems that rely on compliance with

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[18] BFP v. Resolution Trust Corp., 511 U.S. 531, 541-42 (1994).

[19] Butner v. U.S., 440 U.S. 48, 54 (1979). *See also e.g.* 11 U.S.C. § 1322(c)(1) (a chapter 13 bankruptcy debtor may cure a mortgage default on a residence "until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy [*i.e.* state] law").

[20] 42 U.S.C. § 1475(b).

[21] HUD Handbook 4000.1, III.A.2.r (Rev. Dec. 30, 2016) (pp. 679-80). The FHA foreclosure guidelines in Handbook 4000.1, Part III.A.2 include extensive guidance as to how servicers of FHA-insured loans can comply with both the RESPA servicing guidelines, state laws (including foreclosure mediation), and FHA's own loss mitigation requirements.

[22] *See e.g.* Freddie Mac Single Family Servicing Guide § 9301.2 (Mar. 2, 2016) (when foreclosing servicers must comply with, *inter alia,* "[a]pplicable federal, State and local laws and customs."

state statutes and the terms of mortgages to assure conveyance of valid title through foreclosure sales would be most vulnerable.[23]

State courts interpreting state laws routinely decide whether a foreclosure sale conveyed valid title to property.[24] In certain states, a servicer's failure to serve a particular notice, whether required by a state statute or by the underlying loan documents, can lead to invalidation of a foreclosure sale.[25] Under several states' laws, the failure to engage in loss mitigation may be treated as a breach of contract and be the basis for invalidating a foreclosure sale.[26] Exercise of a broad federal preemptive power under RESPA would undercut, or at a minimum make uncertain, the basic elements of state foreclosure laws. These laws have historically served as guideposts to assure that good title is conveyed through foreclosure sales.[27] The likely consequence of substantial RESPA preemption of state foreclosure laws would be decades of confusion about whether non-judicial foreclosure sales conveyed valid title to purchasers. Such clarity is important for all stakeholders.

As matters stand now, when servicers need to conduct a foreclosure, they hire local attorneys who are familiar with each state's foreclosure laws. These attorneys can ensure that foreclosure sales convey good title. At the same time, states can regulate mortgage servicers, and do so in ways that are innovative and more protective of their consumers than the minimal RESPA requirements. States can ensure that their innovative laws function consistently with the requirements of state property law. One federal agency cannot perform this task for fifty different states.

1.2.3.3 State laws offer key consumer protections and do not conflict with the federal RESPA requirements.

During the foreclosure crisis, a number of states and localities created innovative laws and programs to assist homeowners and reduce foreclosures. These new laws cut back on unnecessary foreclosures in demonstrable ways and set examples for best practices that should be retained for the future. For example, since the foreclosure crisis began, foreclosure mediation programs went into effect in almost half of the states. Studies of these programs indicate that they produced positive results for a substantial number of consumers.[28] The Connecticut

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[23] Elizabeth Renuart, Property Title Trouble in Non-Judicial Foreclosure States: The Ibanez Time Bomb?, 4 William & Mary Bus. L. Rev. 111 (2013) (discussing vulnerability of non-judicial foreclosures to defects related to failure to comply with state laws affecting transfer of loan documents).

[24] *See, e.g.*, Bevilacqua v. Rodriguez, 955 N.E. 2d 884 (Mass. 2011).

[25] *See, e.g.*, Pinti v. Emigrant Mortg. Co., Inc., 33 N.E. 3d 1213 (Mass. 2015).

[26] *See, e.g.*, Fonteno v. Wells Fargo Bank, N.A., 228 Cal. App. 4th 1358, 1371 (2014).

[27] Preemption of state foreclosure laws was carefully limited under the 2013 RESPA mortgage servicing rules. The only significant preemption occurs in the provision requiring a delay of 120 days from default before the commencement of foreclosure proceedings. 12 C.F.R. § 1024.41(f). Notably, this preemption of contrary state laws applies *before* any actual foreclosure proceedings begin, minimizing interference with core foreclosure requirements under state law. In addition, consistent with the RESPA statute, the provision does not preempt a state law that is more protective of the consumer.

[28] National Consumer Law Center, *Rebuilding America: How States Can Save Millions of Homes Through Foreclosure Mediation* (Feb. 2012), *available at* www.nclc.org; Federal Reserve Bank of Boston, *State Foreclosure Prevention Efforts in New England: Mediation and Assistance* (Fed. Reserve Bank of Boston Research Report 11-3,

mediation program, as one example, has consistently seen high borrower participation rates and produced well-documented successful outcomes.[29] Data provided by the Connecticut courts covering the period from July 2008 through December 31, 2016 showed that of 25,969 completed mediations, seventy percent resulted in settlements in which the borrowers stayed in their homes.[30] Significantly, eighty-five percent of the cases that settled with an agreement for the borrower to stay in the home involved a loan modification. A study of the Philadelphia settlement conference program also showed that high numbers of borrowers avoided foreclosures and the program operated within existing foreclosure time frames without delaying foreclosures.[31]

Foreclosure mediation programs set their own time frames for review of loss mitigation options. The RESPA rules provide timelines for servicers to process loss mitigation applications only in limited instances, namely for a borrower's first complete loss mitigation application to a servicer. The RESPA rules are not inconsistent with the more general procedures that apply in the mediation programs. When applicable, the RESPA rules trigger enforceable legal rights for borrowers. They promote effective loss mitigation reviews because they set minimal procedural standards when no other rules apply. The mediation systems build upon and supplement the procedural requirements and enforceable standards set by the RESPA rules.

The mediation programs also supplement RESPA by directing borrowers to counselors and other trained advocates who facilitate efficient communication between homeowners and servicers. This is consistent with the objectives of the RESPA loss mitigation rules. Attorneys who have worked with thousands of homeowners over many years in connection with the foreclosure mediation programs report that the existence of both the RESPA and the mediation program rules has not confused homeowners. For example, in Philadelphia, a steering committee made up representatives from the courts, the City, homeowners' attorneys, and lenders' counsel meets regularly to review problems and issues arising in the mediation program. A problem of conflicts or confusion involving the RESPA rules and the mediation program rules has never come up. Any suggestions to the contrary appear to be the product of unfounded conjecture.

To the extent that state statutes, such as the California Homeowners' Bill of Rights ("HBOR") provide greater procedural rights for homeowners seeking loss mitigation help, this does not interfere with the functioning of the RESPA rules. California is a non-judicial foreclosure state where foreclosures proceed relatively quickly and without any court oversight. A state law that allows consumers more time to apply for loss mitigation or appeal a servicer's decision that is required by the RESPA floor helps prevent avoidable foreclosures is appropriate here.

Sept. 2011), *available at* www.bos.frb.org; Center for American Progress, *Walk the Talk, Best Practices on the Road to Automatic Foreclosure Mediation* (Nov. 2010), *available at* www.americanprogress.org.

[29] Extensive analysis of Connecticut mediation case data can be found in the program's annual reports. See Office of the Chief Court Administrator, *Report to the General Assembly, Connecticut Foreclosure Mediation Program* (March 1, 2017).

[30] Office of the Chief Court Administrator, *Report to the General Assembly, Connecticut Foreclosure Mediation Program,* App. E, p. 54 (March 1, 2017).

[31] The Philadelphia Reinvestment Fund, *Philadelphia Residential Mortgage Foreclosure Diversion Program: Initial Report and Findings* (June 2011), *available at* www.trfund.com;

The CFPB should reject any proposal to modify or annul the preemption limitations that are essential parts of the RESPA statute, regulations, and Official Interpretation. Decisions regarding this important issue must not be based on hypothetical scenarios that lack factual support.

1.2.4. New technologies and electronic communications are allowed in some circumstances under the rule, and this need not be adjusted.

The CFPB has drawn the appropriate line between mandating certain disclosures by mail and allowing others to be sent by electronic communication. For example, good faith efforts to establish live contact may include sending an electronic communication encouraging the borrower to establish live contact with the servicer, and promptly informing borrowers of loss mitigation options may also be done through electronic communications. On the other hand, the written notice regarding loss mitigation must be sent by mail once in a 180 day period. This balance is appropriate because sending a notice by mail is still the most reliable way to ensure the borrower sees it, and it is helpful to have loss mitigation information in hard copy.

1.3. The rule should be preserved as-is, but if changes are considered, there are ongoing problems with servicing transfers, the complete application rule, and the duplicative application carve-out that should be addressed.

If any changes are considered to the servicing rule, the following areas require attention to strengthen the rule consistent with the consumer protection purposes of RESPA.

1.3.1. Servicing Transfers.

We have repeatedly urged the CFPB to adopt a comprehensive regulatory framework for addressing the many servicing problems that occur at or near the time of a transfer of servicing. These problems are often caused by servicers' inability to communicate with each other adequately and reconcile account records. While the issuance of 12 U.S.C. § 1024.41(k) as part of the 2016 Mortgage Servicing Final Rule was a step in the right direction, regulations affecting systemic transfer problems have not been adopted:

- The adopted regulations do not go far enough in helping borrowers avoid unwarranted or unnecessary costs from getting the runaround when loss mitigation is pending at the time of servicing transfer. The CFPB should explicitly prohibit servicers from making duplicative and burdensome requests for information and documents that have been previously provided to a transferor servicer.

- The adopted regulations do not require that borrowers be given essential information at the time of transfer, such as whether the transferee servicer is aware of a pending loss mitigation application and will continue with the evaluation process. Transferee servicers should be required to send borrowers written notice about the status of their loss mitigation application following a transfer of servicing.

- The adopted regulations do not go far enough to protect borrowers when a transferee servicer fails to honor loss mitigation offers that have already been

accepted by the borrower before the servicing transfer. Transferee servicers should be required to accept and honor all loss mitigation offers that have been accepted by the borrower and to promptly convert trial loan modification agreements to permanent agreements.

- The CFPB's supervisory and enforcement proceedings have highlighted serious problems in the boarding of loans from one servicer to another, based in part on the incompatibility of servicer systems of record. This has caused borrowers to be charged improper fees, have their payments misapplied, be improperly denied loss mitigation options, and be subjected to wrongful foreclosure proceedings. The CFPB should define industry-wide standards and protocols to ensure the compatibility of transferred data as between servicers.

1.3.2. Complete Application Rule.

Critical borrower protections under the CFPB's loss mitigation rule are triggered only upon the servicer's receipt of a borrower's "complete" application.[32] Reliance on submission of a complete application confounds attempts to address dual-tracking and wrongful foreclosures due to the lack of an objective standard for when an application is complete and inconsistent implementation by servicers. Moreover, it creates exactly the wrong incentive—to drag out the application process in order to increase servicers' default servicing fee income. It has also generated unnecessary litigation, as borrowers seek court determinations that servicers have improperly treated applications as incomplete. We have repeatedly requested that the CFPB abandon this flawed rule and replace it with one based on an initial submission of a loss mitigation package, similar to the "Initial Package" under the former HAMP program. We have also pointed out that the CFPB's continued reliance on a complete application to trigger essential borrower protections risks making the CFPB's loss mitigation rules obsolete under new loss mitigation protocols, such as Fannie Mae and Freddie Mac's "Flex Modification" program, in which borrowers often do not submit applications.

1.3.3. Duplicative Request Rule.

As we have stated in prior comments, the most significant limitation on the borrower's procedural rights under the loss mitigation rule is that a servicer is not required to comply with section 1024.41 if a borrower has been evaluated previously by that servicer for loss mitigation options for the borrower's mortgage loan account.[33] This exclusion from the application of section 1024.41 undermines the effectiveness of the CFPB's loss mitigation rule and presents challenges for borrowers and their advocates. Oftentimes, a second or third application results in a loss mitigation offer – either because the borrower's circumstances have changed or because the servicer failed to evaluate the prior application properly. Servicers typically accept and process additional applications, so the exclusion has had no effect in limiting servicer costs. The only function it serves is to provide a free pass in litigation to servicers who violate the CFPB's rules. The CFPB's amendment made in the 2016 Servicing Rule, to allow a loss mitigation

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[32] Reg. X, 12 C.F.R. § 1024.41(b)(1).

[33] Reg. X, 12 C.F.R. § 1024.41(i).

request to be covered by the rules if the borrower has at some point cured the default since the prior request, is inadequate and fails to address the significant problems with the exclusion we have identified on numerous occasions.

1.4. Certain additional issues should be addressed in the mortgage servicing rule.

The following are additional areas in which the mortgage servicing rule could be strengthened and streamlined.

1.4.1 Successors in Interest.

The CFPB has taken an important step forward by amending the servicing rules to address problems faced by successors in interest trying to preserve their homes. However, the amendments made in the 2016 Servicing Rule deprive successors of any enforcement rights until the servicer has "confirmed" the successor's status, a process that is fully controlled by the servicer. Successors must be able to enforce their rights once they have provided documentation establishing their identity and ownership interest in the home. Our prior comments have urged the CFPB to prevent abuse and delay by giving successors certain limited enforcement rights during the confirmation process.

1.4.2 Force-Placed Insurance.

In responding to force-placed insurance abuses, one of the provisions in the 2013 RESPA Servicing Rule requires servicers to advance homeowners' insurance premiums for borrowers with escrow accounts and reinstate the homeowner's insurance coverage rather than force-place insurance.[34] We strongly supported the adoption of this rule, but also pointed out that many homeowners who have force-placed insurance imposed do not have escrow accounts. We urged the CFPB to expand the rule to cover borrowers without escrow accounts. We have also requested that the CFPB amend the rule dealing with the cost of force-placed insurance to ban all forms of kickbacks and non-monetary compensation.

1.4.3 Error Resolution Rights.

The 2013 RESPA Servicing Rule permits servicers to proceed with foreclosures during the response period for a notice of error. Foreclosures may proceed even if there is a payment dispute that goes to the very right of the servicer to declare the account in default. We believe the CFPB missed an opportunity in the 2013 rule to implement two provisions of RESPA that are intended to assist borrowers avoid foreclosure: the error resolution procedure under § 2605(e) and the prohibition in § 2605(k)(1)(C) preventing a servicer from "fail[ing] to take timely action to respond to a borrower's requests to correct errors relating to … avoiding foreclosure." To fully implement these provisions, we have previously requested that the CFPB amend § 1024.35(h)(i) to provide that a servicer shall not proceed with a foreclosure proceeding if a borrower has sent a notice of error (1) challenging the alleged basis for the default or grounds for foreclosure or (2) asserting that the servicer has not properly evaluated a loss mitigation application, until such

[34] Reg. X. 12 C.F.R. § 1024.17(k)(5)(i).

time as the servicer has conducted a reasonable investigation of the notice of error and provided a response in accordance with § 1024.35(e).

1.4.4. HELOC Exemption.

We have on numerous occasions requested that the CFPB reconsider its decision to exempt home equity lines of credit (HELOCs) from coverage of the 2013 Servicing Rule. The scope of the Subpart C provisions of Regulation X (§§ 1024.30 through 1024.41) apply to "mortgage loans,"[35] and that term is defined as federally related mortgage loans, but does "not include open-end lines of credit (home equity plans)."[36] Thus, a servicer does not need to comply with the Subpart C requirements if the mortgage loan is a HELOC, even if the HELOC is a first lien (and the borrower's only mortgage) on the property.

Servicers have ample experience regarding loss mitigation on HELOCs since HELOCs in first lien position were eligible for HAMP review. The exemption was retained based on the erroneous assumption that TILA's protections for open-end credit under the Fair Credit Billing Act (FCBA) provide equivalent protections to those under RESPA. Unlike a credit card transaction, however, borrowers put their homes at risk in a HELOC. A default on a credit card debt, by comparison, which may generally be discharged in a bankruptcy, does not put the home in immediate jeopardy.

Moreover, the FCBA was not designed to address a mortgage loan product that is secured by a lien on the borrower's residence. Rather, it is primarily intended to deal with billing errors related to the use of an open-end credit account to finance retail purchases of goods and services. Only two of the billing errors that can be asserted under the FCBA involve issues that are similar to the errors listed under Regulation X, § 1024.35(b). Thus, most of the listed errors under § 1024.35(b), such as disputes about escrow account disbursements or the accuracy of payoff statements, cannot be asserted under the FCBA. In addition, RESPA applies not only to billing error inquiries but to any request for information relating to the servicing of a federally related mortgage loan, whereas the while the FCBA billing error notice provision applies only to billing errors.

1.4.5. Small Servicer Exemption.

"Small servicers" are exempt from several of the requirements imposed on servicers by the 2013 TILA and RESPA Servicing Rules. A small servicer is defined in part as a servicer that services, together with any affiliates, 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee.[37] As noted in section 1.2.1 above, advocates who assist borrowers with loss mitigation and foreclosure defense find it difficult to determine whether a particular servicer meets the exemption definition based on publicly available information. We have requested that the CFPB create a registry of servicers who claim to be covered by the small servicer definition, which could be accessed on the CFPB's website. While information reported on the registry would not be controlling as to whether the entity is, in fact, a small servicer, it would give advocates the opportunity to check whether an entity is claiming to be exempt.

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[35] Reg. X. 12 C.F.R. § 1024.30(a).

[36] Reg. X. 12 C.F.R. § 1024.31 (definition of "mortgage loan").

[37] 12 C.F.R. § 1026.41(e)(4)(ii)(A).

Public notice about small servicers would also reduce the number of complaints to the CFPB and other parties.

1.4.6. Reverse Mortgage Exemption.

Reverse mortgages are currently exempt from almost all provisions of the servicing rule. Other than the ability to send a notice of error or request for information, reverse mortgage borrowers have few protections from servicing abuses. Reverse mortgage servicers typically evaluate borrowers for loss mitigation after a default on property charges. There is no logical reason to exclude reverse mortgage servicers from the rules governing loss mitigation, continuity of contact, and early intervention.

1.4.7. Borrowers with Limited English Proficiency.

The lack of protections for borrowers with limited English proficiency (LEP) in the servicing (and origination) markets raises significant fair lending concerns. We have urged the CFPB to consider additional rulemaking and other steps it can take to require servicers and other market participants to effectively meet the needs of LEP borrowers. We have noted that the CFPB should assess the extent to which borrowers with limited English proficiency (LEP) are able to access the market. Collection, tracking, and transfer of language preference are essential both to assessing and providing access.[38]

1.4.8. Mandate Affordable Loan Modifications.

At all times during the CFPB's consideration of mortgage servicing rules, we have urged the CFPB to mandate affordable loan modifications consistent with investor interests for qualified borrowers facing hardship. Without broad, transparent minimum standards, discretionary reviews under the current rules create the potential for discriminatory results. The lack of alignment between servicers' incentives and the interests of investors and homeowners makes it unlikely that servicers across the market will offer sustainable modifications now that HAMP has ended. A loan modification mandate could require outcomes that an overall benefit to the investor as well (NPV positive) at either the loan or portfolio level. It should require terms that are more affordable (for example, by reducing payments) and more sustainable (where there is a reasonable basis to believe the change in terms will improve long-term performance).

2. Ability-to-Repay and Qualified Mortgage Rule

Making mortgage loans without evaluating the borrower's ability to repay the loan was one of the prime drivers of the surge of unsustainable mortgage lending that produced the mortgage meltdown. When Congress passed the Dodd-Frank Act, it created a requirement that mortgage

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[38] For a discussion of the Bureau's authority and recommendations for improving access, see Americans for Financial Reform, *Issue Brief: The CFPB and Other Federal Agencies Should Adopt Strong Language Access Protections for Homeowners and Other Consumers* (May 2016), *available at* http://ourfinancialsecurity.org/wp-content/uploads/2016/05/AFR_LEP_Issue_Brief_05.26.2016.pdf.

lenders reasonably evaluate the borrower's repayment ability, with a special category of "qualified mortgages" that were presumed to meet the ability to repay test because they are deemed free of unsafe features.[39] The Act directed the CFPB to prescribe rules to implement the exception for qualified mortgages.[40] The CFPB published the final Ability to Repay rule in January 2013.[41] These rules have restored sense to the market by ensuring that lenders have an incentive to make loans that homeowners can afford and that are safe for the market. In its regulatory implementation, the CFPB has balanced the need for robust affordability requirements with flexibility for smaller institutions. The agency should not further revise the rule at this time beyond a narrow implementation of the expansion of the small creditor portfolio exemption in Public Law No. 115-174.

2.1 The Ability-to-Repay and Qualified Mortgage rule protects consumers and the market and is consistent with the purposes of both Dodd-Frank and the Truth in Lending Act.

As the CFPB noted in its publication of the final rule, Dodd-Frank's mortgage protections were a response to "an unprecedented cycle of expansion and contraction . . . ."[42] The mortgage market is the largest consumer financial services market in the country, and this activity triggered the most severe recession since the Great Depression. Fueled by a "steady deterioration of credit standards in mortgage lending," trends included loans based solely on collateral, loans to borrowers with no documentation of income, and higher cost loans to borrowers who would have qualified for prime loans.[43] After a long period of housing price appreciation, housing prices began to decline at the same time unemployment rose precipitously and the effects of these lending patterns emerged more openly. The abuses wreaked havoc on families, communities, investors and the market. They disproportionately undermined wealth accumulation in communities of color.[44] The rates of serious delinquencies for subprime and Alt-A mortgage products climbed from 10 percent in 2006, to 20 percent in 2007, to more than 40 percent in 2010.[45] In 2012, the Federal Reserve estimated that the resulting fall in housing prices resulted in approximately $7 trillion in household wealth losses.[46]

Dodd-Frank's requirement that creditors reasonably evaluate a borrower's ability to repay a mortgage loan aligns the interests of creditors, investors, and borrowers, serving as a bulwark against future mortgage market instability. The CFPB's implementation of that rule strikes the right balance between protecting consumers and allowing for a robust market. It satisfies the purposes of Dodd-Frank and the Truth in Lending Act.

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[39] 15 U.S.C. § 1639c.

[40] 15 U.S.C. § 1639c(b)(3).

[41] 78 Fed. Reg. 6408 (Jan. 30, 2013).

[42] *Id.* at 6410.

[43] *Id.*

[44] *See, e.g.,* James H. Carr et al., *The Foreclosure Crisis and its Impact on Communities of Color: Research and Solutions,* National Community Reinvestment Coalition (Sept. 2011), *available at* https://schar.gmu.edu/sites/default/files/faculty-staff/cv/ncrc_foreclosurewhitepaper_2011.pdf.

[45] 78 Fed. Reg. 6408, 6411 (Jan. 30, 2013)(citing CoreLogic data).

[46] *Id.*

The Truth in Lending Act, passed in 1968, was enacted by Congress to promote the informed use of credit to enhance economic stability and competition. Congress amended it over time to address abusive mortgage lending practices. In 1994, Congress amended TILA and established substantive protections against mortgage lending abuses in the high-cost loan market through the Home Ownership and Equity Protection Act. (HOEPA).[47] The Federal Reserve Board then issued implementing regulations, including HOEPA's ability to repay requirement.[48] In 2001, the Board made significant additional changes to the HOEPA regulation to cover more loans and further limit abuses.[49] After a series of hearings, in 2008 the Board again expanded HOEPA's protections.[50] Dodd Frank's goals echoed and expanded upon these purposes, emphasizing access to fair, transparent and competitive markets.

The CFPB's Ability-to-Repay and Qualified Mortgage regulations not only implement Congressional intent but also animate TILA and Dodd-Frank's purposes, by providing clear safe lending rules while allowing flexibility for smaller institutions. The CFPB has balanced the need for robust affordability requirements with flexibility for smaller institutions and should not make revisions to the rule at this time.

2.2 The CFPB should craft the exemption mandated by Public Law No. 115-174 narrowly and should not expand any other exemptions to the rule.

The protections put in place by Dodd-Frank rule are of great importance to consumers and the economy as a whole. A number of lenders are already exempt from key provisions of these rules. Watering the protections down by exempting additional parts of the mortgage origination market would invite a return to the unsustainable lending practices that led to the market crash described in the preceding section.

The history of the CFPB's rulemaking shows that it has already taken sufficient account of any need for exemptions from the rule. The CFPB issued its initial rule implementing these Dodd-Frank requirements on January 10, 2013.[51] At the same time, it proposed a number of exemptions to the rule.[52] On June 12, 2013, the CFPB published a final rule creating a series of new exemptions, all generally supported by industry comments.[53] The new rule created a number of exemptions for non-profit and governmental lenders that were not controversial. Moving beyond the non-profit and government realm, the final rule also contained several provisions focused on small creditors, defined as creditors with up to $2 billion in assets that (along with affiliates) who originate no more than 500 first-lien mortgages covered under the ability-to-repay rules per year. The CFPB had previously exercised authority under the Dodd-Frank Act to allow certain balloon-payment mortgages to be designated as qualified mortgages if they were originated and held in portfolio by small creditors operating predominantly in rural or underserved areas. In this final rule, the CFPB also adopted an additional category of qualified mortgages for certain loans originated and held in portfolio for at least three years by small

[47] Public Law 103-325, 108 Stat. 2160.

[48] 60 Fed. Reg. 15463 (Mar. 24, 1995).

[49] 66 Fed. Reg. 65604 (Dec. 20, 2001).

[50] 73 Fed. Reg. 44527 (July 3, 2008).

[51] 78 Fed. Reg. 6407 (Jan. 30, 2013)

[52] 78 Fed. Reg. 6621 (Jan. 30, 2013).

[53] 78 Fed. Reg. 35,430 (June 12, 2013).

creditors, even if they do not operate predominantly in rural or underserved areas. These loans are not subject to a specific debt-to-income ratio as they would be under the general qualified mortgage definition.

On October 2, 2015, the CFPB returned to the question of exemptions, publishing a final rule that again revised the definitions of small creditor, and rural and underserved areas.[54] These amendments expanded the group of creditors who qualified for small-creditor status and were broadly supported by industry comments. Specifically, the final rule raised the loan origination limit for determining eligibility for small-creditor status from 500 to 2000 originations of covered transactions secured by a first lien. In addition, it excluded originated loans held in portfolio by the creditor and its affiliates from that limit. The final rule also established a grace period from calendar year to calendar year to allow a creditor that exceeded the origination or asset limit in the preceding calendar year to operate, in certain circumstances, as a small creditor with respect to transactions with applications received before April 1 of the current calendar year. The rule also included in the calculation of the $2 billion asset limit for small-creditor status the assets of the creditor's affiliates that regularly extended covered transactions.

The rule also modified the definitions of rural and underserved. It expanded the definition of ''rural'' by adding census blocks that are not in an urban area as defined by the U.S. Census CFPB (Census CFPB) to an existing county-based definition. It also added two new safe harbor provisions related to the rural or underserved definition for creditors that rely on automated tools.

On March 3, 2016, the CFPB further expanded the opportunity for a creditor to qualify for the rural or underserved areas exemption. It adopted a procedural rule that allowed a creditor to ask the CFPB to designate as rural an area that had not previously been so designated.[55]

On May 24, 2018, Congress passed Public Law No. 115-174, which, among other things, amended the Ability-to-Repay standard to provide a broader small creditor portfolio exemption from certain aspects of the Qualified Mortgage rule for institutions with assets up to $10 billion. We recommend that the CFPB include affiliates in the asset threshold and that it draw the new regulation as narrowly as possible to ensure that larger institutions are not inadvertently covered by the new exemption. We also urge the CFPB to craft the exemptions required by the Public Law from Dodd-Frank's appraisal and escrow requirements as narrowly as possible. Rollbacks in these requirements will inadvertently run afoul of the goals of the Ability-to-Repay standard by reducing requirements that allow consumers to have an accurate estimate of the value of the home they are financing compared to the loan amount and by undermining their ability to stay current on taxes and insurance.

2.3 The rule has not interfered with access to credit.

The CFPB's QM rule and Ability-to-Repay rule sets out common sense standards that protect the market and consumers from high-risk, unsustainable loans by ensuring borrowers have an ability to repay the loans they receive. In the run-up to the foreclosure crisis, irresponsible mortgage lending that ignored borrowers' ability to repay their loans resulted in a foreclosure tsunami that

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[54] 80 Fed. Reg. 59944 (Oct 2, 2015). *See also* 80 Fed. Reg. 7770 (Feb. 11, 2015) (proposing these changes and calling for comments).

[55] 81 Fed. Reg. 11099 (Mar 3, 2016).

disproportionately impacted communities of color—eviscerating a generation of wealth building and nearly destroying the economy. The data show that the QM rule has not had a negative impact on the market and there has been a modest but steady increase in lending.[56]

Financial institutions, including small banks, are continuing to recover from the worst financial downturn since the Great Depression. Mortgage lending, in particular, continues to steadily improve. Small banks are playing an important and growing role in the recovery. Contrary to theories that the Dodd-Frank Act has stifled growth, the financial sector has had record profits. In 2016 U.S. financial institutions had total annual profits of $171.3 billion, the highest level since 2013.[57] Financial institutions continue to soar and enjoyed record high profitability in the first quarter of 2018.[58]

The profitability of community banks has also rebounded strongly and meets pre-recession levels. In 2010, less than 78 percent of community banks were profitable. By the end of 2015, over 95 percent of community banks were profitable.[59] The most recent FDIC report from the first quarter of 2018 notes that the percentage of unprofitable institutions sank to 4.6 percent, which is the "lowest percentage since the first quarter of 1996."[60] This FDIC report also notes that net income of community banks jumped 17.7 percent from the first quarter of 2017.[61] To the extent there may be concerns about smaller lenders, many have noted that the recent statutory roll back of Dodd-Frank is likely to result to a significant acceleration in mergers and acquisitions of smaller institutions, regardless of the Ability to Repay requirements.

Credit unions have also continued to grow while recovering from the financial crisis. Credit union membership has been steadily growing in recent years. In 2016, credit unions added 4.7 million new members, which amounted to "the biggest annual increase in credit union history and four times the pace set a decade earlier."[62] In a recent report using data from February 2018, membership rose 4.6 percent from the previous year.[63] Operating costs for credit unions have

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[56] CRL Analysis, HMDA 2016 data, *available at* https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-2016hmda-policy-brief-sep2017.pdf.

[57] Wall Street Journal, U.S. Banking Industry Annual Profit Hit Record in 2016 (Feb 28, 2017), *available at*: https://www.wsj.com/articles/u-s-banking-industry-annual-profit-hit-record-in-2016-1488295836.

[58] Federal Deposit Insurance Corporation, FDIC-Insured Institutions Report 56 Billion in Net Income in First Quarter of 2018 (2018), *available at* https://www.fdic.gov/news/news/press/2018/pr18030.html. See also CNN Money, American Banks just had their most Profitable Quarter Ever (2018), *available at* http://money.cnn.com/2018/05/22/investing/banks-record-profits-fdic-deregulation-bill/index.html.

[59] Federal Deposit Insurance Corporation, Core Profitability of Community Banks 1985-2015 1 (2016), *available at* https://www.fdic.gov/bank/analytical/quarterly/2016_vol10_4/article1.pdf.

[60] Federal Deposit Insurance Corporation, Quarterly Banking Profile: First Quarter 2018, *available at* https://www.fdic.gov/bank/analytical/quarterly/2018-vol12-2/fdic-v12n2-1q2018.pdf.

[61] Id. At 19.

[62] CUNA Mutual Group, Credit Union Trends Report (2017), *available at* https://www.cunamutual.com/resource-library/publications/credit-union-trends-report.

[63] CUNA Mutual Group, Credit Union Trends Report (April 2018), *available at* https://www.cunamutual.com/-/media/cunamutual/about-us/credit-union-trends/public/apr_2018_cu_trends_report.pdf.

also fallen in the period since Dodd-Frank was passed and were down to 3.08 percent in 2018 from a high of 3.59 percent in 2008.[64]

While the number of small lenders, including community banks and credit unions, has decreased over the years, this cannot be reasonably attributed to Dodd-Frank or CFPB regulations. The number of community banks has declined every single year since 1984.[65] FDIC research concludes that community bank profitability since 2008 has overwhelmingly been driven by macroeconomic conditions, not regulations.[66] The FDIC study first takes a wide look at regulations that include Dodd-Frank, but also Basel III capital standards. The study states that "regulation is just one among many noneconomic factors that may contribute to structural change in community bank profitability," but concludes that 80 percent of variation in profitability is due to macroeconomic factors, and the other 20 percent includes not just changing regulations, but also "the rise of nonbank lending, competition from larger banks, and changes in loan portfolios and other business practices."[67]

Smaller lenders play an important role in extending access to credit, and it is noteworthy that lending has also rebounded from the depths of the crisis. After falling from June 2008 to November 2010, outstanding consumer loans have steadily increased at $3.7 trillion in December 2016, which well exceeds pre-crisis levels.[68] Small banks have posted increases in commercial lending in all but one quarter compared to levels at the time of passage of Dodd-Frank in 2010.[69] Furthermore, the FDIC's quarterly community bank performance data for the fourth quarter of 2016 shows that community banks hold 43 percent of all small loans to businesses and that they increased lending by $6.4 billion (2.2 percent) compared to 2015, twice the rate of other banks.[70]

Finally, mortgage lending has also steadily recovered since the crisis. Community banks and small lenders play an important and growing role in the mortgage market in particular. In 2015, mortgage lenders originated 850,085 more loans[71] than they did in 2012, a 37 percent increase. Loans originated by smaller lenders with assets under $1 billion saw the biggest increase during this period (48 percent) while the largest institutions, those with assets over $10 billion, saw a 1

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[64] National Credit Union Administration, NCUA Chart Pack (2016), *available at* https://www.ncua.gov/analysis/Pages/industry/fact-sheets.aspx. See also National Credit Union Administration, NCUA Chart Pack (March 2018), *available at* https://www.ncua.gov/analysis/Pages/call-report-data/reports/chart-pack/chart-pack-2018-q1.pdf.

[65] Federal Deposit Insurance Corporation, Community Banking Study 1 (2012), *available at* https://www.fdic.gov/regulations/resources/cbi/report/cbi-full.pdf.

[66] FDIC, Core Profitability of Community Banks *supra* note 4.

[67] Id at 42.

[68] Federal Reserve, Total Consumer Credit Owned and Securitized, Outstanding *available at* https://fred.stlouisfed.org/series/TOTALSL.

[69] Federal Reserve, Total Value of Loans for All Commercial and Industry Loans, Small Domestic Banks *available at* https://fred.stlouisfed.org.

[70] Federal Deposit Insurance Corporation, Quarterly Banking Profile, Community Bank Performance, Fourth Quarter (2016), *available at* https://www.fdic.gov/bank/analytical/qbp/2016dec/qbpcb.html.

[71] CRL Analysis of HMDA Data 2012-2015. Loan analysis limited to: home purchase, owner-occupied, 1-4 family units, 1st lien loans, *available at* http://www.responsiblelending.org/media/new-hmda-data-shows-mortgage-market-continues-exclude-consumers-color-and-low-wealth-families. See also CRL 2016 HMDA analysis, *supra* note 2.

percent decline. Credit unions alone originated $41.7 billion in first-lien mortgage loans in the third quarter of 2016, an increase of 22 percent over the same period in the previous year.[72]

Small lenders also saw their market share in mortgage lending increase over this time period. The market share of the smallest lenders with assets under $1 billion increased from 54 percent in 2012 to 58 percent in 2015. In contrast, the market share of the largest lenders with assets over $10 billion, decreased from 31 percent in 2012 to 22 percent in 2015.[73]

2.4 The rule should not be re-opened at this time, and any future changes should limit exemptions while ensuring that protections are maintained for riskier products.

The CFPB should not re-open the rule at this time, but instead should monitor implementation and further collect data on its impact, including on the increasingly expanding market of non-QM lending. If the CFPB does re-open the rule, however, the Qualified Mortgage rule should maintain its limited approach to institutional exemptions but carve out riskier products, such as high-cost mortgages and land installment contracts. Moreover, the CFPB should actively study how to incorporate predictive residual income measures into the ability to repay analysis.

- *Riskier products should be carved out of the Qualified Mortgage presumption.* Under Dodd-Frank, the Qualified Mortgage receives a presumption of affordability exactly because it is considered to be a safer product. However, some products are inherently unsafe and should not be granted such a presumption. High-cost mortgages have warranted additional protections for over two decades. Congress confirmed the need for such protections when it affirmed these protections and lowered the thresholds in Dodd-Frank. High-cost mortgages should be excluded from the Qualified Mortgage presumption. Moreover, land installment contracts, which constitute credit under TILA, are inherently abusive, denying homeowners the opportunity to fairly build equity while requiring them to bear all the risk. Land installment contracts do not warrant the Qualified Mortgage presumption.

- *Institutional exemptions must remain narrow.* As noted above, the statute and the CFPB's existing rules already provide a number of accommodations for smaller institutions, allowing them to originate Qualified Mortgage loans on a more flexible basis. Moreover, Congress has passed Public Law No. 115-174, which includes an expansion of the small creditor portfolio exemption. This and any future exemptions should be narrowly drawn to ensure that market incentives promote origination of affordable mortgages even as the market returns to a period of expansion and innovation.

Residual income measures should be incorporated into the ability to repay analysis alongside debt-to-income ratios. While Dodd-Frank itself identifies residual income along with debt-to-income ratio as a measure for affordability, the regulation does not yet incorporate this crucial concept. Increasingly, researchers are examining a means to update this measure, to ensure it can be predictive of affordability in the contemporary market. While a debt-to-income ratio standard

[72] CUNA Mutual Group, Credit Union Trends Report (2016), *available at* https://www.cunamutual.com/resource-library/publications/credit-union-trends-report.

[73] CRL Analysis *supra* note 76.

offers some level of surety, it is weak in identifying affordability problems in lower-income borrowers who simply have limited cash on hand. We urge the CFPB's researchers to work with outside analysts to develop a residual income measure that can be incorporated into the rule.

3. Truth in Lending and Real Estate Integrated Disclosures

3.1 History behind Congressional directive to the CFPB to combine disclosures under these two statutes

In 2010, Congress directed the Consumer Financial Protection Bureau (CFPB) to create "a single, integrated disclosure" form combining the existing HUD-1 settlement statement and TILA disclosure form.[74] But the overlap between RESPA's required settlement cost disclosures and TILA's cost of credit disclosures was recognized as confusing long before then.[75] Earlier efforts to combine the forms formally started in 1996 when Congress directed HUD and the FRB to simplify and improve these disclosures and combine them into a single format.[76] The agencies submitted a report to Congress in which they recommended that Congress amend these statutes in specific ways.[77] Congress took no action to implement the suggested changes. In 2009, the FRB took matters into its own hands and proposed significant changes to the TILA disclosures and stated that it would work with HUD "towards" integrating the two disclosure regimes.[78]

Before the FRB could finalize this proposal, Congress passed the Dodd-Frank Act in 2010. In that Act, Congress amended both TILA and RESPA[79] and directed the CFPB to create "a single, integrated disclosure" form combining the existing HUD-1 settlement statement and TILA disclosure form.[80] Congress did not mandate the nature or form of the changes other than to state that: "Such forms shall conspicuously and clearly itemize all charges imposed on the borrower and all charges imposed on the seller in the connection with the settlement and shall indicate whether any title insurance premiums included in the borrower's such charges covers or insures the lender's interest in the property, the borrower's interest, or both."[81]

In 2011, the CFPB embarked on an extensive project to fulfill this Congressional mandate. The process included consumer testing in the form of a qualitative study[82] that led to the publication

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[74] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1098, 124 Stat. 1376 (July 21, 2010), *codified at* 15 U.S.C. § 1604(b).

[75] 78 Fed. Reg. 79,730, 79, 79,738 (Dec. 31, 2013) (describing this history).

[76] Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. No. 104-208 (1996).

[77] Bd. Of Governors of the Fed. Reserve Sys. & U.S. Dep't of Hous. and Urban Dev., *Joint Report to the Congress Concerning Reform to the Truth in Lending Act and the Real Estate Settlement* (1998). *See* 78 Fed. Reg. at 79,739 (summarizing this Report).

[78] 78 Fed. Reg. at 79,739.

[79] 15 U.S.C. § 1604(a); 12 U.S.C. § 2603.

[80] 15 U.S.C. § 1604(a).

[81] 12 U.S.C. § 2603(a).

82 Kleimann Commc'n Grp., Know Before You Owe: Evolution of the Integrated TILA-RESPA Disclosures (2012), available at www.consumerfinance.gov. *See* NCLC Comments on 77 Fed. Reg. 51,116 (Aug. 23, 2012) (critiquing Kleimann study), available at

of proposed forms followed by a quantitative study to validate the effectiveness of its proposal.[83] In addition, the agency utilized a web-based initiative known as "Know Before You Owe" to directly solicit input on the forms from the general public.[84]

Two years later, on December 31, 2013, the CFPB finalized the forms and the accompanying regulations.[85] According to the CFPB, the primary purpose of the integrated early disclosures "is to inform consumers of the cost of credit when they have bargaining power to negotiate for better terms and time to compare to other financing options.".[86] The new regime commenced on October 3, 2015, for applications received on or after that date.[87]

3.2 The CFPB should not re-open the Integrated Disclosure rules

As discussed in more detail in the Comments filed by NCLC and other consumer groups to the Request for Information Regarding the Bureau Rulemaking Processes (Docket No. CFPB-2018-0009), the CFPB put an extensive amount of time and effort developing the proposed TILA-RESPA Integrated Disclosure rules (hereinafter "Integrated Disclosure" or "TRID" rules), including conducting consumer testing and focus groups to get direct feedback from consumers on whether the disclosure was accessible and useful. The CFPB also solicited input from the public, including consumer advocates and industry participants. The agency did not favor consumer concerns more than those of industry members, but properly focused on the question of whether consumers could understand disclosures intended to convey key information.

Use of the Integrated Disclosures is no more burdensome than the prior disclosure regime. Most of the information required was previously required on the old disclosure forms. And the mortgage industry has by now adapted to the new forms. Similarly, HousingWire stated in April 2016, "it appears that, despite the initial hiccups and headaches, lenders now have this whole TRID thing figured out, as the time to close a loan fell to a 12-month low in March."[88]

MBA's mortgage credit availability index is at its highest level since June 2011, when it began tracking data.[89] The Urban Institute similarly finds that mortgage credit is more available today than it was before the integrated disclosures became mandatory.[90] "Mortgage credit availability in the GSE channel—Fannie Mae and Freddie Mac—has been at the highest level since its low

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https://www.nclc.org/images/pdf/foreclosure_mortgage/predatory_mortgage_lending/comments-to-cfpb-tila-respa-integration.pdf.

[83] Kleinman Commc'n Grp., Know Before You Owe: Quantitative Study of the Current and Integrated TILA-RESPA Disclosures (Nov. 20, 2013), available at www.consumerfinance.gov; 77 Fed. Reg. 51116 (Aug 23, 2012).

[84] *See generally* CFPB Know Before You Owe website, available at https://www.consumerfinance.gov/know-before-you-owe/.

[85] 78 Fed. Reg. 80,225 (Dec. 31, 2013).

[86] *Id.*

[87] *Id.*

[88] https://www.housingwire.com/articles/36851-is-trid-hysteria-over-time-to-close-drops-to-12-month-low.

[89] Index hit 180.6 in May 2018 https://www.mba.org/news-research-and-resources/research-and-economics/single-family-research/mortgage-credit-availability-index; historical chart: https://www.housingwire.com/articles/40919-mba-mortgage-credit-loosens-as-conventional-programs-become-more-available

[90] https://www.urban.org/policy-centers/housing-finance-policy-center/projects/housing-credit-availability-index

in 2011."[91] Closing costs have declined since 2013,[92] and a survey by the American Land Title Association shows that "a significantly larger portion of homebuyers are actually reviewing their mortgage documents prior to closing than they were before TRID's implementation . . . ."[93]

While there were difficulties during the transition period, defects related to the new disclosures have declined dramatically. In the first quarter of 2016, one financial compliance company reported that "legal/regulatory/compliance" defects had jumped from 25.9% of critical defects before the integrated disclosure rule to 50% of all critical defects.[94] But the most recent data shows that number as having dropped to 9.96%[95]-- even lower than before the integrated disclosures were required.

Small creditors are already exempt from the integrated disclosure rules. Anyone who made five or fewer non-HOEPA[96] mortgages in the previous year is not required to provide the integrated disclosures or any other TILA disclosures.[97] Many transactions secured by manufactured homes are also not subject to the integrated disclosure requirements because they are legally considered personal property.[98] The CFPB has also granted a partial exemption for certain mortgage loans provided through housing assistance loan programs for low- and moderate-income households from the TILA/RESPA integrated disclosure requirements.[99] There is no further need to create exemptions from the integrated disclosure requirements.

Congress's recent enactment of the Economic Growth, Regulatory Relief, and Consumer Protection Act on May 24, 2018, is yet another reason why the agency should not reopen the Integrated Disclosure rule.[100] In that Act, Congress amended TILA in several ways but did not amend the statute regarding the TILA/RESPA integrated disclosure.[101] Congress, did, however, express the "sense of Congress" and stated that the CFPB should:

> endeavor to provide clearer, authoritative guidance on—

[91] Id.

[92] Bankrate.com National Survey of Closing Costs 2013-2017.

[93] Ben Lane, HousingWire, TRID works: More homebuyers actually review mortgage documents (May 16, 2016), available at https://www.housingwire.com/articles/37040-trid-works-more-homebuyers-actually-review-mortgage-documents.

[94] ARMCO Releases Inaugural Mortgage QC Industry Trends Report, ARMCO press release (Sept. 6, 2016), available at http://www.armco.us/about-us/news/press-release/ARMCO-Releases-Inaugural-Mortgage-QC-Industry-Trends-Report. The company attributed this increase to the new disclosure requirements, but the legal/regulatory/compliance defect category includes far more than just the disclosures.

[95] ARMCO Q3 2017 ARMCO Mortgage QC Industry Trends, available at https://www.armco.us/knowledge/mortgage-qc-industry-report-2017-q3.

[96] High-cost loans subject to the Home Ownership Equity Protection Act.

[97] *See* National Consumer Law Center, Truth in Lending § 2.3.3 (9th ed. 2015), *updated at* www.nclc.org/library

[98] National Consumer Law Center, Truth in Lending § 5.11.2.1a (9th ed. 2015), *updated at* www.nclc.org/library (integrated disclosures do not apply to "[c]onsumer credit that is secured by personal property that is a dwelling but that is not also secured by real property.").

[99] Reg. Z § 1026.3(h); Official Interpretations § 1026.3(h).

[100] Pub. L. No. 115-174 (2018).

[101] Pub. L. No. 115-174, §§ 101-103, 107, 108, 109, 307.

(1) the applicability of the Integrated Disclosure Rule to mortgage assumption transactions;

(2) the applicability of the Integrated Disclosure Rule to construction-to-permanent home loans, and the conditions under which those loans can be properly originated; and

(3) the extent to which lenders can rely on model disclosures published by the Bureau of Consumer Financial Protection without liability if recent changes to regulations are not reflected in the sample Integrated Disclosure Rule forms published by the Bureau of Consumer Financial Protection.[102]

Congress took this opportunity to revisit TILA and directed the CFPB to "endeavor" to provide clearer guidance on three specific topics related to the Integrated Disclosure rules. The CFPB should not stray beyond this "sense of Congress" and engage in further rulemaking to amend the Integrated Disclosure rules. Congress could have chosen to amend the statute itself or instruct the CFPB to issue regulations if it had so desired.

If, however, the CFPB decides to re-open the existing Integrated Disclosure rules, we strongly urge the agency to make four changes: 1) move the APR to the first page of both the loan estimate and closing disclosure and make the interest rate less conspicuous; 2) eliminate exceptions to the finance charge definition; 3) eliminate the use of "informational" loan estimates; and 4) prohibit creditors from providing a closing disclosure earlier than four days before the original closing.[103]

4. Loan Originator Compensation Rule

4.1. The Loan Originator Compensation Rule has played a key role in protecting consumers and the mortgage market.

The limits on loan originator compensation contained in the Dodd-Frank Act and in the CFPB's rule are important consumer protections that fundamentally improved the mortgage market and reduced the incentives that mortgage originators had to benefit themselves financially by placing borrowers in more expensive loans.

According to the CFPB, prior to the mortgage crisis, training and qualification standards for loan originators varied widely.[104] Borrowers often paid brokers an upfront fee and were under the impression that the broker would obtain the best possible loan for the borrower. Yet, the borrower was unaware that the lender was paying a commission – or a yield spread premium – to the originator. The premium increased with the interest rate or other loan terms. These deceptive practices grossly inflated the cost of a mortgage, even when borrowers qualified for a better deal.

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[102] Pub. L. No. 115-174, § 109(b)

[103] These concerns are described in more detail in the Comments filed by NCLC and other consumer groups to the Request for Information Regarding the Bureau Rulemaking Processes (Docket No. CFPB-2018-0009).

[104] Final Rule, Loan Originator Compensation Requirements under the Truth in Lending Act, 78 Fed. Reg. 11279, 11280 (Feb. 15, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-02-15/pdf/2013-01503.pdf.

Yield spread premiums caused families to be steered into loans that cost more than was appropriate and that they could not afford over the long run. Leading up to the crisis, yield spread premiums were a major culprit in the number of borrowers of color that were steered into high-priced subprime mortgages.[105] Not only did these borrowers end up paying more, the high-cost terms of the mortgages often ultimately resulted in loss of the home to foreclosure. When a borrower loses a home to foreclosure, society pays the price in the drop in surrounding property values and lost tax revenue.[106]

The CFPB's rule regulates how compensation is paid to a loan originator in most closed-end mortgage transactions. Most importantly, it does not permit a loan originator to be compensated based on the terms of a mortgage loan or a proxy for the terms of the loan (other than compensation based on a fixed percentage of the loan amount). The rule also imposes qualification standards on loan originators. Loan originators must be licensed and registered if required under the SAFE Act or other state or federal law. Furthermore, loan originators who are not required to be licensed must be trained on the state and federal legal requirements that apply to their loan origination activities.

The rule also implements other key provisions of the Dodd-Frank Act, including prohibiting mandatory arbitration clauses in contracts, prohibiting contracts from being interpreted to waive federal statutory causes of action, and prohibiting financing of lump-sum credit insurance premiums or fees.

4.2. The CFPB should not erode the rule.

The Dodd-Frank Act and the CFPB's final rule have made the mortgage marketplace safer and more transparent. The rule has helped eliminate predatory compensation practices and should remain fully intact. Indeed, if the rule had been in place prior to the housing crisis, borrowers in the subprime market would have received fairer and more affordable, sustainable loans. Any attempt to erode the rule would have costly and disastrous consequences for consumers and the overall market.

Furthermore, in implementing the rule, the CFPB carefully balanced industry and consumer concerns. For instance, although the final rule generally prohibits loan originator compensation from being reduced to offset the cost of a change in transaction terms (i.e., a pricing concession), the final rule permits loan originators to reduce their compensation to defray certain unexpected increases in estimated settlement costs. This exception was adopted over the objections of many consumer advocates. Additionally, the final rule generally prohibits loan originator compensation based upon the profitability of a transaction or a pool of transactions. However, over objections

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[105] *See* Debbie Gruenstein Bocian, Keith S. Ernst, and Wei Li, *Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages*, Center for Responsible Lending (May 31, 2006), *available at* https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/rr011-Unfair_Lending-0506.pdf.

[106] *See* 2013 Update: The Spillover Effects of Foreclosures, Center for Responsible Lending (Aug. 19, 2014), *available at* https://www.responsiblelending.org/mortgage-lending/research-analysis/2013-crl-research-update-foreclosure-spillover-effects-final-aug-19-docx.pdf; Daniel Hartley, The Impact of Foreclosures on the Housing Market, Federal Reserve Bank of Cleveland (Oct. 27, 2010), *available at* https://www.clevelandfed.org/newsroom-and-events/publications/economic-commentary/economic-commentary-archives/2010-economic-commentaries/ec-201015-the-impact-of-foreclosures-on-the-housing-market.aspx.

from many consumer advocates, the final rule clarified the application of this prohibition to various kinds of retirement and profit-sharing plans. For example, mortgage-related business profits can be used to make contributions to certain tax-advantaged retirement plans, such as a 401(k) plan, and to make bonuses and contributions to other plans that do not exceed ten percent of the individual loan originator's total compensation.

Section 107 of Public Law No. 115-174 establishes an exemption for most manufactured home dealers from the definition of a "mortgage originator," meaning dealers do not have to comply with the loan originator compensation provisions. Although the new law also requires that dealers disclose their affiliation with a lender and not directly negotiate loan terms, this provision significantly weakens consumer protections due to the interrelationship between manufactured home dealers and financers. We urge the CFPB not to weaken these protections any further.

5. Higher-Priced Escrow Rule

5.1. The escrow rule has played a key role in protecting consumers in higher-priced loans.

Escrow accounts protect consumers by ensuring that they have funds for recurring homeownership-related expenses, such as property taxes and insurance premiums. This is especially critical with high-cost and higher-risk loans. Prior to passage of the Dodd-Frank Act, creditors were required to set up and administer escrow accounts for higher-priced mortgage loans for a minimum of one year. The Dodd-Frank Act expanded the applicable time period from one year to five years, and the CFPB's escrow rule implements this requirement. Additionally, the rule clarified that one does not have to escrow insurance payments for homeowners in common interest communities where the governing body is required to purchase master insurance policies.

5.2. The CFPB should not erode the rule.

Both the Dodd-Frank Act and the CFPB's escrow rule took industry concerns into account and exempted certain types of transactions from the escrow requirement. The rule creates an exemption from the escrow requirement for small creditors that operate in rural or underserved areas.[107] The rural-or-underserved test extends eligibility to small creditors that originated at least one covered loan secured by a first lien on a property located in a rural or underserved area in the preceding calendar year.

Section 108 of Public Law No. 115-174 creates new exemptions from the escrow requirement for higher-priced mortgage loans. The new Act requires the CFPB to exempt by regulation from this requirement any insured depository institution or credit union with assets of $10 billion or less, that has extended fewer than 1,000 first mortgages on a principal residence, and that meets three additional requirements, including having made at least one mortgage loan in a rural area.

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[107] Final Rule, Escrow Requirements Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 4725 (Jan. 22, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-01-22/pdf/2013-00734.pdf. TILA Higher-Priced Mortgage Loans (HPML) Escrow Rule, Small Entity Compliance Guide (March 2016), *available at* https://files.consumerfinance.gov/f/201603_cfpb_tila-hpml-escrow_compliance-guide.pdf.

Unexpected costs and mortgage defaults happen all too often where escrow protections are weakened. Weakening escrow protections is risky for both prospective homebuyers and the general taxpayer. It is also a direct threat to sustainable homeownership. We urge the CFPB to draw the exemption required by the new Act as narrowly as possible to protect homebuyers and taxpayers.

6. Higher-Priced Loan Appraisal Rule

6.1. The appraisal rule has played a key role in protecting consumers and lenders from the perils of inflated mortgage loans.

An accurate appraisal helps to ensure that mortgage loans are properly and accurately collateralized. This protects both lenders, through adequate collateral for their loans, and borrowers, by preventing them from borrowing more than their homes are worth. The lack of adequate regulation in the appraisal market was a significant factor causing the housing market crash.[108] In fact, between 2000-2007, a coalition of appraisal organizations produced a petition, signed by 11,000 appraisers that stated lenders were pressuring them to artificially inflate home prices, and would only give business to appraisers that complied.[109]

As required by the Dodd-Frank Act, the CFPB and five other federal regulatory agencies adopted the Higher-Priced Mortgage Loans (HPML) Appraisal Rule in 2013.[110] Mortgage loans are HPML if they are secured by a borrower's principal dwelling and have interest rates above certain thresholds. Lenders that originate covered loans must abide by important rules, including using a licensed or certified appraiser who certifies that the appraisal complies with the Uniform Standards of Professional Appraisal Practice and the Financial Institutions Reform, Recovery and Enforcement Act; having the appraiser physically visit the property and view the interior and produce a written appraisal report; obtaining an additional appraisal at the originator's own expense if the property's seller acquired the dwelling within the past 180 days and is reselling it for a price that exceeds certain thresholds; providing a disclosure within three business days of application that explains the consumer's appraisal rights; and giving consumers free copies of the appraisal reports at least three days before the transaction consummates.

The agencies exempted from the rule's requirements reverse mortgages, bridge loans for 12 months or less, loans for initial construction of a dwelling (not limited to loans of 12 months or less), and qualified mortgage (QM) loans meeting the CFPB's definition in 12 C.F.R. 1026.43(e).[111]

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[108] Financial Crisis Inquiry Report, Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States. Submitted by The Financial Crisis Inquiry Commission Pursuant to Public Law 111-21, January 2011, 17-19.

[109] *Id.* at 18.

[110] *See* Final Rule, Appraisals for Higher-Priced Mortgage Loans, 78 Fed. Reg. 10367 (Feb. 13, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-02-13/pdf/2013-01809.pdf; TILA Higher-Priced Mortgage Loans (HPML) Appraisal Rule, Small Entity Compliance Guide, *available at* https://files.consumerfinance.gov/f/201401_cfpb_tila-hpml_appraisal-rule-guide.pdf.

[111] Lenders must assess the borrower's ability to repay for nearly all closed-end residential mortgage loans. One way a lender can follow the ability-to-repay rule is by making a qualified mortgage. All QM loans must have points and fees less than or equal to 3% of the loan amount, no risky features, and a maximum loan term less than or equal to 30 years.

6.2. The CFPB should not erode the rule.

In 2014, the agencies adopted additional exemptions to the rule.[112] These apply to extensions of credit of $25,000 or less, indexed every year for inflation; certain types of refinancing products commonly referred to as streamlined refinances; and certain covered HPMLs secured by manufactured housing. In addition, the agencies broadened the exemption from the appraisal rule for qualified mortgages beyond the CFPB's QM definition to include any transaction that falls under the statutory QM criteria.[113] These expanded exemptions provide evidence that the regulators already have endeavored to accommodate industry demands.

Section 103 of Public Law No. 115-174 amends Title XI of the Financial Institutions, Reform, Recovery and Enforcement Act (FIRREA) and exempts certain mortgages from the requirement that there be an appraisal of the real estate collateral. The new exemption applies to mortgages in a rural area where no appraiser is reasonably available, and where certain other conditions are met. The exclusion does not apply to high-cost loans, and there are limits on the sale of mortgages covered by the exclusion. We urge the CFPB to bear in mind the predatory appraisal practices leading up to the financial crisis, and not take any actions to weaken the appraisal rule beyond the exemptions explicitly required by the Public Law.

7. Home Ownership and Equity Protection Act

7.1. Significance of HOEPA and its expansion by Congress in the Dodd-Frank Act.

The Home Ownership and Equity Protection Act (HOEPA) was enacted in 1994 as an amendment to TILA to address abusive practices in refinancing and home equity mortgage loans with high interest rates or high fees. Loans that meet the Act's high-cost coverage tests are governed by special disclosure requirements and restrictions on loan terms. In addition, specific acts or practices are restricted or banned.[114] Congress also invested the Federal Reserve Board with the specific authority to issue regulations banning additional acts or practices that it finds to be unfair, deceptive, designed to evade the Act's protections, or are abusive lending practices arising in the refinancing context.[115]

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[112] *See* Supplemental Final Rule, Appraisals for Higher-Priced Mortgage Loans, 78 Fed. Reg. 78519 (Dec. 26, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-12-26/pdf/2013-30108.pdf (effective date of Jan. 18, 2014).

[113] For example, this exemption includes transactions that are covered by the CFPB's Ability-to-Repay Rule and are QMs defined under any final rule that the CFPB, HUD, or other federal agencies may adopt under authority at 15 U.S.C. 1639c. In addition, transactions that are not covered by the CFPB's Ability-to-Repay Rule may still be eligible for the exemption if they are insured, guaranteed, or administered by HUD, VA, or USDA and meet the QM criteria under rules issued by the corresponding agency. *See* TILA Higher-Priced Mortgage Loans (HPML) Appraisal Rule, Small Entity Compliance Guide, at 7, *available at* https://files.consumerfinance.gov/f/201401_cfpb_tila-hpml_appraisal-rule-guide.pdf.

[114] 15 U.S.C. § 1639.

[115] 15 U.S.C. § 1639(p) (formerly § 1639(l)).

Starting as early as 2003, "Federal Reserve staff began to 'observe deterioration of credit standards' in the origination of non-traditional mortgages. Yet, the Federal Reserve Board failed to meet its responsibilities under HOEPA, despite persistent calls for action."[116] Signs of a looming foreclosure catastrophe in the subprime mortgage market began to emerge in the beginning of 2007. Well-documented causes include the collapse of the housing bubble fueled by low interest rates, easy credit, negligible regulation, and toxic mortgages.[117] Based on these reports and testimony from extensive hearings, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) in part to address "the spectacular failure of the prudential regulators to protect average American homeowners from risky, unaffordable, 'exploding' adjustable rate mortgages, interest only mortgages, and negative amortization mortgages."[118] This Act expanded the coverage of HOEPA to regulate more loans and restricted or banned additional acts or practices, such as balloon payments, modification and deferral fees, prepayment penalties, late fees, acceleration clauses, and the financing of points and fees.[119]

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[116] S. Rep. No. 111-176, at 15 (2010) (Report regarding The Restoring American Financial Stability Act of 2010) (quoting from Banking Committee document, ''Mortgage Market Turmoil: A Chronology of Regulatory Neglect" prepared by the staff of the Banking Committee, March 22, 2007.).

[117] Fin. Crisis Inquiry Comm'n, The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States, xvi (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf. More specifically, the Commission found: widespread failures in financial regulation and supervision by key federal agencies; failures of corporate governance and heightened risk-taking; excessively leveraged financial institutions and high consumer debt-loads; deterioration of mortgage-lending standards; loosening of due diligence standards applied in the securitization process; the re-packaging and sale of questionable mortgage-backed securities into collateralized debt obligations and the sale of credit default swaps to hedge against the collapse of the securities; failures of the credit rating agencies; and an unprepared government that responded inconsistently to the crisis. *Id.* at xviii-xxvii (summary). See also *FDIC Oversight: **Examining and Evaluating the Role of the Regulator during the Financial Crisis and Today: Hearing before the Subcommittee on Financial Institutions and Consumer Credit** of the House Fin. Servs. Comm.* May 26, 2011, 5-12 (testimony of Sheila C. Bair) (identifying the roots of the financial crisis—excessive reliance on debt and financial leverage, misaligned incentives in financial markets, failures and gaps in financial regulation, and erosion of market discipline due to "too big to fail"), *available at* http://financialservices.house.gov/UploadedFiles/052611bair.pdf (last visited June 14, 2018).

[118] S. Rep. No. 111-176, at 15 (2010) (Report regarding The Restoring American Financial Stability Act of 2010).

[119] 15 U.S.C. § 1602(bb)(1) (general definition of "high-cost" mortgage, accounting for introductory rate, and treatment of mortgage insurance), 2(B) (limits on agency changes to APR trigger) (4)(B) (compensation to mortgage originator counted as point and fee), 4(D)-(F) (insurance premiums, debt cancellation/suspension fees, and prepayment fees and penalties as points and fees), (5) (calculation of points and fees for open-end consumer credit plans); 15 U.S.C. § 1639 (addressing content and timing of disclosures; prepayment penalties; limitations after default; balloon payments; negative amortization; prepaid payments; ability to repay; payments under home improvement contracts; recommended default; late fees; acceleration of debt; financing points and fees; consequence of failure to comply; discretionary authority of the Bureau; evasions and structuring of transactions; modification and deferral fees; payoff statements; pre-loan counseling; and corrections of unintentional violations.

15 U.S.C. § 1602(dd) (treatment of discount points as points and fees).

15 U.S.C. § 1639(c) (changes to prepayment penalties prohibition), (e) (changes to balloon payment prohibition), (j) (prohibition against recommending or encouraging default), (k) (protections related to late fees), (l) (limitation on scope of acceleration clauses), (m) (restriction on financing of points and fees), (r) (prohibitions on evasions, restructuring of transactions, and reciprocal arrangements), (s) (ban on modification and deferral fees), (t) (provision of payoff statements), (u) (disclosures related to and provision of pre-loan counseling), (v) (creditor or assignee corrections and unintentional errors).

The major HOEPA rulemaking initiated by the CFPB addressed these Congressional amendments. The agency proposed to implement these amendments on August 15, 2012, and finalized the changes on January 31, 2013,[120] pursuant to its authority under TILA and the Dodd-Frank Act.[121]

For the most part, the CFPB faithfully followed the statutory language in the Dodd-Frank Act. The agency, however, used its exemption authority[122] to create two exemptions from HOEPA for initial construction loans and for loans originated by a Housing Finance Agency or by the U.S. Department of Agriculture's Rural Development Section 502 Direct Loan program.[123] In addition, the CFPB clarified inconsistencies in the statute and the existing regulations where supported by industry comments.[124]

The importance of HOEPA cannot be overstated. Due to the heightened regulation of loan terms and creditor practices in the high-cost market, the number of high-cost loans has declined. Creditors prefer to originate loans under the triggers to avoid the reputational stigma and liability risks associated with making these loans.[125] The data suggest that higher-risk borrowers who might otherwise have been given HOEPA loans are now receiving mortgage credit that is subject to the separate protections for "higher-priced" loans at a lower cost.[126]

Consumers are protected because they are not subjected to the practices that led to the original enactment of HOEPA--protections that were significantly expanded by the Dodd-Frank Act. Beyond the new prohibitions and expanded coverage, the Dodd-Frank counseling requirement should result in more consumers avoiding high-cost loans when offered by the small number of creditors that currently offer those products.[127]

7.2. Subsequent HOEPA regulatory changes.

The CFPB initiated three rulemaking processes to address a handful of substantive issues following the publication of the final rule implementing Dodd-Frank amendments on January 31, 2013. All of the resulting changes to the regulations and commentary were supported by the lending industry.

First, the CFPB issued a final rule on October 1, 2013, in response to industry requests for guidance regarding the treatment of third party paid charges and creditor-paid charges for

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[120] 77 Fed. Reg. (Aug. 15, 2012) (proposed); 78 Fed. Reg. 6856 (Jan. 31, 2013) (final).

[121] 12 U.S.C. §5481(12), (14); 15 U.S.C. § 1604(a).

[122] This authority is found in 15 U.S.C. § 1639(p).

[123] Reg. Z § 1026.32(a)(2).

[124] Examples include: when amounts must be payable to be included in the definition of points and fees, 78 Fed. Reg. at 6891-92; the operation of the 30- and 60-day periods listed in section 1639(v) in which consumers may select a remedy, 78 Fed. Reg. at 6869-70; or, calculating the total loan amount for purposes of the points and fees trigger by starting with the amount financed, rather than the principal amount of the loan as proposed and then deducting the financed points and fees, 78 Fed. Reg. at 6914-15.

[125] 78 Fed. Reg. at 6858, 6942, 6945.

[126] See also discussion below.

[127] 78 Fed. Reg. at 6943-44 (discussing the size of the HOEPA market).

purposes of the points and fees calculation.[128] Also, the agency extended the exception that allows all small creditors, regardless of whether they operate predominantly in "rural" or "underserved" areas, to continue originating balloon high-cost mortgages if the loans meet the requirements for qualified mortgages. This change was supported by trade associations, credit unions, and other industry advocates.[129]

Next, the CFPB announced an interim final rule on October 23, 2013 that fixed a gap in the January 31 regulations regarding when pre-origination counseling must occur for a certain subcategory of mortgage loans, primarily those secured by manufactured homes.[130] The CFPB's Federal Register notice did not mention whether this change originated from concerns raised by the manufactured housing industry, but it was clearly a response to a problem that would hamper lenders making these loans. The rule was issued as an interim final rule prior to the receipt of comments from the public, along with a request for comments.[131]

Finally, another interim final rule implemented a change Congress made in December 2015 that allowed the CFPB to expand the scope of the small rural lender exemptions from various provisions in Regulation Z.[132] Published on March 25, 2016, this change was clearly driven by industry criticism the CFPB received over time that also likely led to the Congressional amendment.[133]

7.3. Future revisions to the HOEPA regulations are unnecessary.

7.3.1. In 2018, Congress amended HOEPA and TILA where it considered necessary; the CFPB should refrain from changing what Congress chose to leave unchanged.

Congress enacted and the President signed the Economic Growth, Regulatory Relief and Consumer Protection Act on May 24, 2018.[134] In this Act, Congress took the opportunity to revisit HOEPA and the Dodd-Frank provisions related to TILA. The CFPB may need to implement the specific Congressional amendments, but it should refrain from amending what Congress chose to leave unchanged.

Relevant to HOEPA loans, the Act amends TILA's timing requirement for the special high-cost mortgage disclosure by providing that where the creditor makes a second offer of a mortgage loan that has a lower APR than the first offer, consummation of that second offer can take place immediately after the disclosures, rather than waiting at least three days.[135] Wisely, the Act also

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[128] 78 Fed. Reg. 60,382, 60,408 (Oct. 1, 2013).

[129] 78 Fed. Reg. 60,414.

[130] 78 Fed. Reg. 62,993 (Oct. 23, 2013).

[131] The agency did seek comments to be filed following the publication date of the rule and before its effective date.

[132] 81 Fed. Reg. 16,074 (Mar. 25, 2016).

[133] 80 Fed. Reg. 7770, 7774 (Feb. 11, 2015) (Amendments Relating to Small Creditors and Rural or Underserved Areas Under the Truth in Lending Act (Regulation Z). The Bureau discussed comments from industry prior to this rulemaking and noted that the consumer comments did not support amendments proposed. *Id.* at 7778-81.

[134] Pub. L. No. 115-174 (2018).

[135] Pub. L. No. 115-174, § 109.

excludes HOEPA loans from a new exemption from appraisal requirements for mortgages in a rural area where no appraiser is available, and certain other conditions are met.[136]

Beyond these modifications, Congress enacted only a few changes to the Dodd-Frank Act that are quite limited in scope, underscoring its intent to retain the numerous protections it considered essential to protect consumers and the nation from the consequences of reckless lending practices.[137]

7.3.2. The Dodd-Frank HOEPA amendments have no restricted credit.

The data that is available shows that neither HOEPA itself nor the Dodd-Frank amendments to HOEPA have restricted access to credit by the consumers that HOEPA is intended to protect. Instead, those provisions have resulted in beneficial changes to the mortgage market, replacing the highest-cost loans to which HOEPA applies with above-prime but considerably less expensive loans that the CFPB's regulations categorize as "higher cost."

Well before the mortgage crisis, loans with such high APRs or such high points and fees that they were subject to HOEPA had declined from the peak of 35,980 loans in 2005 (a 53% increase from 2004)[138] to 11,269 in 2007.[139] Since the onset of the foreclosure crisis in 2009, HOEPA loan originations reached their lowest point in 2015 (1,194) but rose to 3,149 following the date in 2014 when the Dodd-Frank Act expanded coverage to include purchase loans. This change does not appear to have restricted credit to consumers.

Attorneys working with homeowners shortly after HOEPA was originally passed noted that loans that formerly had been above the HOEPA thresholds were replaced with loans clearly designed to fall below the triggers. The peak years of this "subprime" market occurred in 2004-2006.[140] When the mortgage meltdown hit, the dollar volume of subprime originations plummeted, as was true for prime mortgages.[141] In 2009, the Federal Reserve Board issued

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[136] Pub. L. No. 115-174, § 103(d).

[137] Specifically, Congress passed only targeted changes to the broader set of TILA protections. For example, it created a new safe harbor from the general ability-to-repay standards for certain mortgages held in portfolio by banks with less than $10 billion in assets. Pub. L. No. 115-174, § 101. It exempted manufactured housing retailers and their employees from consumer protections applicable to loan originators. § 107. The Act created exemptions from the escrow provisions for higher-priced mortgage loans by requiring the CFPB to exempt any insured depository institutions or credit union with assets of $10 billion or less, that has extended fewer than 1,000 first mortgages on a principle residence, and that meets three additional requirements, including having made at least one mortgage loan in a rural area. § 108. Finally, it exempts mortgages from appraisal requirements made in a rural area where no appraiser is available and certain other conditions are met. § 103.

[138] Federal Reserve Board Bulletin, *Higher-Priced Home Lending and the 2005 HMDA Data* A132-133, A 147 (2006) (Table 4) (total reported mortgage loans originated: 15,611,711), *available at* www.federalreserve.gov/publications/bulletin.htm. The 2006 HMDA data included 15,172 HOEPA loans out of 13,969,965. Federal Reserve Board Bulletin, *The 2006 HMDA Data* A132-133, A 147 (Dec. 2007) (Table 4), *available at* www.federalreserve.gov/publications/bulletin.htm. Note that lenders were not required to report HOEPA loans as a separate category until 2004.

[139] See Chart 1 at the end of this section.

[140] The dollar volume of subprime loans during this period was, in billions: 2004—$401.46; 2005--$507.65; and. 2006--$483.05. Mortgage Finance Publications, The 2008 Mortgage Market Statistical Annual, Vol. I, at 3 (2008).

[141] Subprime dollar volume dropped from $23 billion in 2008 to $4 billion in 2009 and remained at that level through 2014. Total origination volume dropped from $3.945 trillion in 2003 (the high) to $1.24 trillion in 2014. Mortgage Finance Publications, The 2015 Mortgage Market Statistical Annual, at 12 (2015).

regulations that layered lighter regulation on "higher-priced" mortgage loans than it did on HOEPA loans.[142] These rules govern much of the former "subprime" market. The number of higher-priced loans were dropping before this effective date, not surprising since the foreclosure crisis began in 2007 and was still virulent by 2010. Nonetheless, the number of higher-priced originations rose from the low of 221,613 in 2010 to 465,204 in 2017.[143] This data suggests that mortgage credit remains available both for prime and non-prime, without the need to resort to the highest-priced loans subject to HOEPA.

Loans to purchase, refinance, or improve manufactured homes require more explanation to understand the HMDA data regarding this segment of the market. The reliance on manufactured housing as primary residences increased significantly from 1991 to 1998.[144] Indeed, manufactured housing shipments as a percentage of all new site-built homes sold peaked in 1995 at 33.8%. The manufactured housing bubble burst following 1995, several years before the broader mortgage market meltdown, and has yet to return to the pre-1995 levels. Since 2007, for example, this percentage has ranged between 11% and 14.4%.[145] The causes of both the meltdown in the manufactured housing market and the later meltdown of the entire mortgage market included similar risky lending practices.[146]

By 2000, loan defaults and repossessions increased dramatically and inventory at dealerships stagnated.[147] The flood of repossessed homes that occurred between 1999 and 2002 accounted, at least in part, for the decreased sales and sale prices.[148] Many dealers went out of business. Secondary market players, including Fannie Mae and Freddie Mac, incurred huge losses and have been reluctant to re-enter this market.[149] As of 2014, most manufactured housing loans

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[142] These rules were effective for most provisions on October 9, 2009 The escrow provisions did not take effect until April 1, 2010 for all higher-priced loans other than for manufactured home loan. The escrow rule was effective on October 1, 2010 for manufactured home loans.

[143] See Chart 2 at the end of this section.

[144] Ann. M. Burkhart, *Bringing Manufactured Housing into the Real Estate Financing System*, 37 Pepp. L. Rev. 427, 437 (2010).

[145] *Id*. at 437 (providing data up to 2008); U.S. Census Bureau, U.S. Shipments of New Manufactured Homes 2015-2018, *available*

at www.census.gov/data/tables/time-series/econ/mhs/latest-data.html; U.S. Census Bureau, Single-Family Site-Built Homes Sold By Region, *available at* www.census.gov/construction/nrs/historical_data/index.html (including data from 1963-2017).

[146] Ann. M. Burkhart, *Bringing Manufactured Housing into the Real Estate Financing System*, 37 Pepp. L. Rev. 427, 437-439 (2010) (describing these practices and the resulting decline in capital once sales began to stagnate and lenders saturated the market).

[147] *See also* Consumer Fin. Prot. Bureau, Manufactured-housing consumer finance in the United States 6-7 (Sept. 2014), *available at* files.consumerfinance.gov/f/201409_cfpb_report_manufactured-housing.pdf ("Poor manufactured-home loan quality drove high defaults. For example, in the year 2000 alone, more than 75,000 consumers had their manufactured homes repossessed, about 3.5 times the typical number during the 1990s. Between the beginning of 1999 and the end of 2002, repossessed inventory grew more than fourfold to $1.3 billion.").

[148] Ann. M. Burkhart, *Bringing Manufactured Housing into the Real Estate Financing System*, 37 Pepp. L. Rev. 427, 440 (2010).

[149] *Id*. at 441.

were not sold to the secondary market and were held in portfolio.[150] "Today, more than a decade after this collapse, production and sales remain at depressed levels, and the secondary market is extremely limited."[151]

Without a robust secondary market and in light of the slow recovery of this market, it is not surprising that manufactured home loans dipped from 2007 (214,030) to 2011 (93,091). Since the passage of the Dodd-Frank Act, the market has risen, with some fits and starts to 129,427 in 2017.[152] The higher-priced segment of this market exhibits a similar trend and accounts for a large percentage of the entire manufactured housing finance market.[153] Manufactured home HOEPA loans remain minuscule at 821 in 2017, compared with 71,423 higher-priced loans.[154]

This evidence shows that both the HOEPA and higher-priced mortgage regulations are doing their job. Consumers with credit issues are not plagued by the most expensive mortgage loans containing onerous terms. They can, however, access the less expensive higher-priced market and obtain loans with slightly higher interest rates than conventional loans and can rely on the protections contained in applicable ability-to-repay, escrow, and appraisal rules, as well as those protections governing the broader closed-end mortgage market. These developments are welcome in light of the increase in originations of more expensive mortgage loans.

In addition, since at least 2014, non-bank lenders and riskier mortgage loans have begun to return to the market. For example, non-bank mortgage lenders represented almost half of all mortgage originations in 2016, up from twenty percent in 2007, and made almost half of all loans sold to Fannie Mae and Freddie Mac.[155] Meanwhile, these lenders accounted for seventy-five percent of all FHA and VA insured loans in 2016.[156] These trends are not surprising since FHA, VA, RHS loans and loans sold to Fannie Mae and Freddie Mac can more easily meet the safe harbor protection for qualified mortgages, even if they are higher-priced loans.[157]

Some nonbank mortgage lenders also make loans that do not meet the strict qualified mortgage underwriting standards set forth in the Dodd-Frank Act.[158] Wall Street investors, such as private

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[150] Consumer Fin. Prot. Bureau, Manufactured-housing consumer finance in the United States 37 (Sept. 2014), *available at* files.consumerfinance.gov/f/201409_cfpb_report_manufactured-housing.pdf.

[151] *Id*. at 6-7.

[152] See Chart 3 at the end of this section.

[153] Id.

[154] Compare Chart 1 with Chart 3, below.

[155] You Suk Kim, et al., *Liquidity crisis in the mortgage market* 3 (Brookings Paper on Economic Activity 2018), *available at* www.brookings.edu/project/brookings-papers-on-economic-activity.

[156] *Id*. at 3-4.

[157] 15 U.S.C. § 1639c(b)(3)(B)(ii); Reg. Z § 1026.43(e)(4)(ii)(1), (iii).

[158] Brad Finkelstein, *Carrington to start offering subprime mortgages*, Nat'l Mortgage New (Apr. 3, 2018), www.nationalmortgagenews.com (describing Carrington Mortgage Services' decision to enter the subprime market; its subprime program is aimed at borrowers with credit scores as low as 500; Carrington is a servicer and a large FHA and VA lender); Alexis Leondis & Jody Shenn, *Western Asset Bespoke Mortgages Feeding Non-Agency Demand*, Bloomberg (June 9, 2014), www.bloomberg.com (identifying Caliber Home Loans, Inc. as one such lender). *Cf.* Rachel Witkowski, *Underwriting Standards Loosened to Precrisis Levels, OCC Warns*, Am. Banker, Dec. 9, 2015, *available at* www.americanbanker.com (noting OCC concerns about more lax underwriting standards in the indirect consumer loan (bank loans to finance the purchase of goods) and credit card contexts).

equity firms, hedge funds, and mutual fund companies, are buying subprime, Alt-A, and interest-only loans and placing those loans into private funds that are sold to institutional investors and wealthy clients, thus creating a demand for these products.[159] Several lenders reportedly are now offering higher loan-to-value loans and low-credit score programs to target borrowers who have been unable to purchase a home.[160] Other products, such as equity purchase contracts,[161] also are appearing.

7.4 The CFPB should not re-open the HOEPA rules.

As shown above and in the Comments filed by NCLC and other consumer groups to the Request for Information Regarding the Bureau Rulemaking Processes (Docket No. CFPB-2018-0009), the CFPB faithfully followed the statutory language amending HOEPA in the Dodd-Frank Act during the original rulemaking in 2012-13. As a rule, the CFPB adopted consumer comments only if the industry expressed similar concerns or the industry was silent. In the subsequent rulemakings addressing the HOEPA regulations, the agency implemented clarifications, provided guidance, or filled gaps that industry requested. In the most recent rulemaking, the industry wanted and got an easy-to-meet definition of rural lender for purposes of expanding access to exemptions from certain consumer protections despite consumer objections. Finally, Congress just amended HOEPA in May of this year in a very limited way. No further regulatory action is necessary other than to possibly address these limited changes.

If the CFPB decides to re-open the existing HOEPA rules, we strongly urge the agency to end the disparity between protections for open-end and closed-end mortgagors that have arisen because Congress extended the HOEPA coverage to include home equity lines of credit (HELOC). Congress did not, however, address the question of whether the HELOC APR should include finance charges, as does the closed-end mortgage loan APR trigger. Failing to make the APRs comparable for purposes of the APR trigger would undermine these improvements by increasing a pre-existing and dangerous gap between the rules for open and closed-end mortgages. Creating an apples-to-apples comparison between the cost of HELOCs and closed-end mortgage loans would further the expressed purpose of TILA…" to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."[162] The existing gap encourages lenders to seek the path of least resistance by making HELOCs instead of closed-end loans in order to avoid the more stringent rules for closed-end credit. Thus, while the addition of

[159] *See, e.g.*, Kirsten Grind, *Crisis-Era Mortgage Attempts a Comeback*, Wall St. J., Feb. 1, 2016 (discussing investor appetite for Alt A low-documentation loans); Arleen Jacobius, *Firms Resurrect Non-Agency RMBS Market*, Pensions & Investments, Sept. 19, 2016, *available at* www.pionline.com; Alexis Leondis & Jody Shenn, *Western Asset Bespoke Mortgages Feeding Non-Agency Demand*, Bloomberg, June 9, 2014, www.bloomberg.com (discussing investor appetite for interest-only loans with higher debt-to-income ratios).

[160] Aly J. Yale, *Borrower FICO Scores Hit 8-year Low*, MReports (May 25, 2017), *available at* www.themreport.com/daily-dose/05-25-2017/borrower-fico-scores-hit-8-year-low-fico-scores-lowest-non-bank-lenders (these lenders include Royal Pacific Funding, Opes Advisors, Sierra Pacific, Sun West, Flagstar Bank, Ditech Financial, and Castle Mortgage).

[161] Kevin Wack, *Startup Offers to Buy Home Equity, Instead of Lending Against It*, American Banker (Sept. 13, 2016) (describing the downside for homeowners).

[162] 15 U.S.C. § 1602(a).

open-end credit to HOEPA's purview was a constructive change, parity in APR treatment should be addressed.

Chart 1: Origination of HOEPA loans 2007-2017 (number of loans) (source: HMDA)[163]

YEAR	ALL HOEPA LOANS (other than manufactured housing loans)	MANUFACTURED HOME HOEPA LOANS	TOTAL
2017	2,328 (1,235) [164]	821 (273)	3,149
2016	1,584 (653)	253 (100)	1,837
2015	991 (616)	203 (104)	1,194
2014	921 (674)	306 (165)	1,227
2013	1,254[165]	557	1,811
2012	1,385	729	2,114
2011	1,546	791	2,337
2010	2,260	1,041	3,301
2009	4,337	1,985	6,322
2008	6,119	2,264	8,383
2007	9,275	1,994	11,269

[163] This chart reflects HMDA data available at the CBFP's website at www.consumerfinance.gov/data-research/hmda/explore. This search tool provides data from 2007 through 2017. The results are derived from applying the following filters for each of the years 2007 to and including 2017: year, all originated mortgages, property type—1 to 4 family but not including manufactured housing (middle column) or only manufactured home loans (right column); owner-occupied as principal dwelling; loan purpose—purchase (2014-2017 only), home improvement, refinancing (2007-2013); loan type—conventional, FHA, VA, FSA/RHS; lien status—first and subordinate; HOEPA—yes.

[164] The number in parentheses reflects the number of non-purchase loans included in the total. Note: HOEPA did not cover purchase loans before 2014.

[165] These numbers represent non-purchase loans as HOEPA did not cover purchase loans before 2014.

Chart 2: Origination of higher-priced mortgage loans 2007-2017 (number of loans) (source: HMDA) [166]

YEAR	ALL HIGHER-PRICED MORTGAGE LOANS (including manufactured home loans)
2017	465,204
2016	424,739
2015	395,488
2014	461,113
2013	350,821
2012	244,421
2011	231,865
2010	221,613
2009	443,610
2008	731,009
2007	1,678,071

[166] This chart reflects HMDA data available at the CFPB's website at www.consumerfinance.gov/data-research/hmda/explore. This search tool provides data from 2007 through 2017. The results are derived from applying the following filters for each of the years 2007 to and including 2017: year, property type—1 to 4 family including manufactured housing; owner-occupied as principal dwelling; loan purpose—purchase, home improvement, refinancing; loan type—conventional, FHA, VA, FSA/RHS; lien status—first and subordinate; HPML—yes.

Chart 3: Origination of higher-priced and all prime[167] manufactured home loans 2007-2017 (number of loans) (source: HMDA) [168]

YEAR	ALL HIGHER-PRICED MANUFACTURED HOME LOANS	ALL MANUFACTURED HOME LOANS
2017	71,423	129,427
2016	64,528	120,002
2015	60,987	111,915
2014	56,161	101,933
2013	50,209	114,516
2012	51,257	104,716
2011	46,353	93,091
2010	51,474	102,347
2009	61,219	128,148
2008	94,948	171,647
2007	105,099	214,030

[167] "Prime" refers to all mortgage loans, excluding higher-priced or high-cost mortgage loans.

[168] This chart reflects HMDA data available at the CFPB's website at www.consumerfinance.gov/data-research/hmda/explore. This search tool provides data from 2007 through 2017. The results are derived from applying the following filters for each of the years 2007 to and including 2017: year, all originated mortgage loans; property type—manufactured housing; owner-occupied as principal dwelling; loan purpose—purchase, home improvement, refinancing; loan type—conventional, FHA, VA, FSA/RHS; lien status—first and subordinate; HPML—yes (middle column); neither HPML or HOEPA checked (right column).

Comments of

Americans for Financial Reform

Center for Responsible Lending

The Consumer Federation of America

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

U.S. Public Interest Research Group

March 27, 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-2 018-0001; Document Number: 2018-05783--Request for Information Regarding Consumer Financial Protection Bureau Civil Investigative Demands and Associated 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-2018-001) 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.

The undersigned frequently engage with the CFPB and vigorously support both its mission and its independence. Many of our staff have significant experience in public enforcement of consumer protection laws. We appreciate the opportunity to submit these comments for your consideration

The CFPB was created in response to the 2008 financial crisis. Inattention by other regulatory agencies, along with limitations on their authority, contributed significantly to the crisis that destabilized the American economy and caused grave hardship to American families. Reacting to market and regulatory failures that fueled this "Great Recession," Congress in 2010 enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank Act").

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. Congress intended the CFPB to be an independent agency with broad and flexible CID authority to support its investigatory and public enforcement duties

Congress created the CFPB in 2010 after more than 100 hearings and extensive debate about the causes of the 2008 financial crisis and the ways in which the government could prevent a similar crisis in the future.[4] When it did so, Congress "gave the new agency a focused mandate to improve transparency and competitiveness in the market for consumer financial products."[5]

Congress concluded that with this singular focus on consumers, the CFPB could serve American households more effectively than other regulators. In the past, "[f]ederal bank regulators had given short shrift to consumer protection."[6] "Congress concluded that [the] 'failure by the prudential regulators to give sufficient consideration to consumer protection … helped bring the financial system down.'"[7] "All told, nearly $11 trillion in household wealth … vanished" in the 2008 financial crisis.[8] "In Congress's view, the 2008 crash represented a failure of consumer protection."[9]

Congress responded to these failures by consolidating in the CFPB "authorities to protect household finance that had previously been scattered among separate agencies in order to … ensure accountability."[10] It also gave the CFPB important new authority.

The CFPB is the first federal regulator to supervise credit reporting agencies—companies whose data fuel many of consumers' most important financial transactions.[11] More generally, Congress

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[1] PHH Corp. v. CFPB, -- F.3d --, 2018 WL 627055, *1 (D.C. Cir. Jan. 31, 2018).
[2] H.R. Rep. No. 111-517, at 874 (2010) (Conf. Rep.); *see generally PHH*, 2018 WL 627055, at *3-4.
[3] CFPB, *Factsheet, 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*, CFPB (July 21, 2017).https://www.consumerfinance.gov/about-us/blog/six-years-serving-you/.
[4] *See* Dodd-Frank Act, § 1011, 124 Stat. at 1964 (12 U.S.C. § 5491); S. Rep. No. 111-176, at 44 (2010).
[5] *PHH*, 2018 WL 627055, at *3; *see also* 12 U.S.C. § 5511(a).
[6] *PHH*, 2018 WL 627055, at *3.
[7] *Id.*. (ellipsis in original) (quoting S. Rep. No. 111-176, at 166).
[8] *Id.* (internal brackets and quotation marks omitted).
[9] *Id.*
[10] *Id.* (internal quotation marks and brackets omitted); 12 U.S.C. § 5581(b).
[11] *See CFPB to Supervise Credit Reporting*, CFPB (July 16, 2012), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-to-superivse-credit-reporting/; *see generally* 12 U.S.C. § 5481(15)(A)(ix).

made the CFPB the first federal regulator to supervise both banks and non-bank financial companies, including mortgage companies, private student lenders, and payday lenders.[12] With this "level playing field" approach, Congress aimed to ensure that consumers would receive the same level of protection and companies the same level of regulation, in either sector of the market.[13]

Congress also paid careful attention to the CFPB's structure. Vital to the new agency's success, Congress concluded, was its independence.[14] Other financial regulators had been "overly responsive to the industry they purported to police."[15] 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."[16]

Within this context, Congress assigned the CFPB five key functions. In addition to support activities, the CFPB is charged with the responsibility for: (1) "collecting, investigating, and responding to consumer complaints"; (2) supervising financial companies and taking enforcement action to address violations of the law; (3) "issuing rules, orders, and guidance" to implement consumer protection law; (4) "conducting financial education programs," and (5) researching and monitoring the markets for consumer financial products and services.[17]

To fulfill these functions independently and effectively, the CFPB has the authority to issue pre-complaint investigative demands, often referred to as Civil Investigative Demands ("CID" or "CIDs") to gather the critical facts and data needed to inform its judgments. The undersigned consumer organizations strongly believe the CFPB needs to retain broad and flexible CID investigatory discretion in order to meet the ever-evolving range of challenges within its mandate. It is from this perspective that we respond to the specific questions raised in the RFI concerning the CFPB's use of CIDs and in the exercise of its investigatory duties.

B. The CFPB recently received a successful independent review of its CID procedures—further revisions are duplicative and unnecessary.

In 2017, the Board of Governors of the Federal Reserve System and Consumer Financial Protection Bureau Office of the Inspector General conducted an independent audit of the CFPB's CID rules and policies.[18] This evaluation included a review of the CFPB's records management policy,

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[12] *See* 12 U.S.C. §§ 5514-15; S. Rep. 111-176, at 167–169; CFPB, *Semi-Annual Report of the Consumer Financial Protection Bureau* 70 (Spring 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201706_cfpb_Semi-Annual-Report.pdf.
[13] S. Rep. 111-176, at 11, 167-68, 229; *see also* 12 U.S.C. § 5511(b)(4).
[14] *See* S. Rep. No. 111-176, at 10-11, 161, 163; H.R. Rep. No. 111-517, at 874. Congress also provided exacting direction about other aspects of the new agency's organization. The Dodd-Frank Act required specific offices and units and an advisory board, 12 U.S.C. §§ 5493(a)(5), (b)-(g), 5494, 5535, specified personnel rules, *id.* § 5493(a)(1)-(4), and described how employees could be transferred from other agencies, *id.* § 5584.
[15] *PHH*, 2018 WL 627055, at *1.
[16] 156 Cong. Rec. S5871 (daily ed. July 15, 2010).
[17] 12 U.S.C. § 5511(c)(1)-(6).
[18] BD. OF GOVERNORS OF THE FED. RES. SYS. AND CONSUMER FIN. PROTECTION BUREAU OFF. OF INSPECTOR GEN., THE CFPB GENERALLY COMPLIES WITH REQUIREMENTS FOR ISSUING CIVIL INVESTIGATIVE DEMANDS BUT CAN IMPROVE CERTAIN GUIDANCE AND CENTRALIZE RECORDKEEPING,

the file plans for the Office of Enforcement and Office of the Director's records, and every petition to modify or set aside CIDs filed from June 2012 to June 2017.[19] The evaluation also included a sample of CIDs and CID responses.[20] Additionally, the Inspector General conducted over a dozen interviews with CFPB officials as well as contextually appropriate interviews of related officials at the Department of Justice and the Federal Trade Commission.[21]

After this detailed, professional, and thorough review of the CFPB's CID procedures, the Inspector General concluded that the CFPB generally complies with the Dodd-Frank Act and the CFPB's own policies and procedures manual. Moreover, the Inspector General found that "the CFPB often uses modifications and extensions of time to alleviate some of the potential burden associated with CID requests."[22] The Inspector General noted that the CFPB enforcement staff were cooperative and responsive to the evaluation and thanked the CFPB's career, professional staff for their help.[23] The Inspector General did make a handful of constructive suggestions on recordkeeping and providing notice to CID recipients. The CFPB's Enforcement Office immediately responded favorably to these recommendations and began adopting them.[24]

The Inspector General's independent review is strong evidence that further revisions to the CFPB's CID policies and practices are unnecessary. The Inspector General's evaluation shows that the CFPB's CID procedures are working well; are in line with the practices at other federal law enforcement agencies; and, should not be further reformed or altered at this time. Conducting a second review of the CFPB's CID polices within a year is entirely unnecessary and a waste of resources.

Moreover, this RFI should not be used as a pretext for slowing federal investigations or holding off on sending CIDs in light of the fact that the CFPB *already completed an audit of CID practices* just six months ago. Additionally, our organizations are concerned that this Request for Information may be politically motivated and calibrated simply to allow companies found violating federal law and other special interests to air grievances related to the CID process. We are concerned that the decision to issue an RFI on CID processes following the Inspector General's successful audit is a waste of time and encourage CFPB leadership to instead focus on protecting consumers from unfair, deceptive, and abusive financial practices in the marketplace.

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

1. The Bureau's processes for initiating investigations, including 12 CFR 1080.4's delegation of authority to initiate investigations to the Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement.

EVALUATION REPORT 2017-SR-C-015 (2017), https://oig.federalreserve.gov/reports/cfpb-civil-investigative-demands-sep2017.pdf (hereinafter FED OIG CID EVALUATION REPORT).

[19] *Id.* at 17.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 10.

[23] *Id.*, executive summary memorandum.

[24] *Id.* at 20.

The signatories believe the current process for initiating investigations is appropriate. 12 CFR § 1080.4 delegates to the Assistant Director and Deputy Assistant Directors of the Office of Enforcement the discretion to open investigations. Currently, the Enforcement Office's policies and procedures manual requires that "the Enforcement Director must approve the opening of any new investigation."[25] In addition, existing Enforcement Office policies require that a panel of career professional staff headed by an issue expert from the Enforcement Office's Policy and Strategy Team ("PST") weigh in with a recommendation prior to any investigation opening decision.[26] This process already guarantees that a panel of issue experts act as a check on ill-advised investigation proposals.

We believe the current CFPB rules and procedures provide an appropriate level of management control over professional enforcement staff. In particular, we believe the CFPB should not require more senior CFPB staff approval to begin investigations, as such a step would place investigation approvals at a level of managerial control too far removed from professional enforcement attorneys and investigators. An added level of bureaucratic managerial control would risk chilling professional enforcement staff, possibly discouraging them from opening investigations and recommending certain types of investigations and legal theories.

Moreover, requiring higher level approvals prior to initiating investigations could prevent enforcement staff from responding to new and unexpected harmful practices that emerge with new forms of commerce. A critical lesson of the financial crisis of 2008 was that federal consumer financial law enforcement was too slow to respond and to deferential to banking industry preferences and legal opinions.[27] To protect the public interest, the CFPB's career enforcement staff must have the latitude to investigate suspected illegal activity whenever it occurs.

Requiring senior management approval also risks slowing down the process for commencing investigations and bottlenecking the Bureau's law enforcement work. Consumers have a right to expect that the federal law enforcement staff working on their behalf will move expeditiously to resolve suspicion of illegal activity. Large financial institutions can cause tremendous consumer harm in short periods of time. The necessity of opening enforcement investigations must not be stacked in

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[25] 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-and-procedures-memo_version-3.0.pdf [hereinafter "POLICIES AND PROCEDURES MANUAL VERSION 3.0].

[26] The current CFPB Enforcement Office Policy and Procedures Manual requires:

> The Opening Memo should be shared with the appropriate Issue Team for Issue Team and PST input. The Issue Team and PST should, within a week of receipt of the Opening Memo, provide the case team with feedback about whether they believe the investigation should be opened and how this investigation fits into the Enforcement Strategic Plan and articulated priorities. The Issue Team and PST feedback may be oral and informal, but should also include a short written recommendation to the Enforcement Front Office about whether to proceed with opening the investigation. That written recommendation should be no more than one page long, and should be provided in a document separate from the Opening Memo.

POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26,

[27] *See, e.g.,* U.S. FIN. CRISIS INQUIRY COMM'N, FINANCIAL CRISIS INQUIRY REPORT, 15 (2011), http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf (discussing whistleblowers who were "infuriated at the slow pace of enforcement and at prosecutors' lack of response to a problem that was wreaking economic havoc . . . .").

queue behind competing political duties, public appearances, educational activities, responding to Congressional oversight, and other responsibilities of senior levels of management.

Instead the decision to open enforcement investigations should remain at a managerial level below political staff with career enforcement professionals in order to prevent conflicts of interest, partisanship, and the appearance of impropriety. Political staff simply may be distracted by their public duties and lack the focus needed for making timely and reflective decisions on opening investigations. Furthermore, political staff are more likely to be deterred from opening necessary investigations because these decisions could impede future electoral campaign fundraising, appointment or confirmation to top level political posts, or transition into the lucrative management positions in large financial institutions following public service. The public must have confidence that law enforcement investigations will not be affected by public relations, electoral politics, or campaign finance. Keeping the authority to open investigations at the career enforcement level avoids the appearance of impropriety and promotes public confidence. Moreover, it is in the best interests of senior political management to have investigation opening decisions in the hands of staffers who are relatively immune to potential political repercussions of investigating the largest financial institutions in the world.

If the Bureau makes any changes to its investigation opening procedures, the signatories recommend revising the Enforcement Office Policies and Procedures Manual to allow the Deputy Assistant Directors of the Office of Enforcement to open investigations without requiring approval from the Assistant Director of the Office of Enforcement.[28] Such a change would be consistent with the existing regulations which explicitly provide for this delegation of authority.[29]

2. The Bureau's processes for the issuance of CIDs, including the non-delegable authority of the Director, Assistant Director of the Office of Enforcement, and the Deputy Assistant Directors of the Office of Enforcement to issue CID.

The signatories believe that the current process for issuing CIDs is appropriate. 12 CFPR § 1080.6 provides discretion to the Assistant Director and Deputy Assistant Directors of the Office of Enforcement to issue CIDs.[30] Current office policies require CID forms be "signed by the Enforcement Director or a Deputy Enforcement Director."[31] This procedure strikes the appropriate balance between managerial control and the potential for slowing enforcement investigations.

Furthermore, the CFPB should not require a higher level of senior management approval prior to issuing CIDs. As with the decision to open investigations, professional enforcement staff need flexibility, discretion, and speed to provide a nimble, 21st century response to illegal activity. Slowing down investigations by requiring career staff to obtain buy-in from more senior leaders would lead to slower investigations, fewer investigations, less deterrence of illegal activity and more harm to the American public.

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[28] *Cf* POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 37,

[29] 12 CFR § 1080.4 ("The Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement have the nondelegable authority to initiate investigations.").

[30] 12 CFR § 1080.6.

[31] POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 57,

Moreover, requiring sign-off from more senior managers for sending CIDs could harm the subjects of investigations themselves. For example, some publicly traded consumer finance businesses disclose the existence of CFPB investigations in their securities disclosures. Slowing down the investigation process by requiring more red-tape and hurdles in issuing CIDs could force investigation subjects to disclose investigations more frequently and for longer periods of time.

The signatories believe that the current rules and process on issuing CIDs is working well and should not be changed.

3. Specific steps that the Bureau could take to improve CID recipients' understanding of investigations, whether through the notification of purpose included in each CID or through other avenues, including facilitating a better understanding of the specific types of information sought by the CID.

Current Bureau practices strike the right balance between CID recipients' need for understanding investigations and the Bureau's need to uncover evidence of illegal activity. Existing regulations and CFPB Enforcement Office Policies *already* require enforcement staff to provide notice to CID recipients of the purpose of CIDs in the "Notification of Purpose" section of the standard office CID form.[32] Under existing policy, enforcement staff "are required to describe the nature of the conduct constituting the alleged violation under investigation and the applicable provisions of law."[33] The undersigned believe this existing policy is more than sufficient to provide notice to CID recipients. Further levels of red tape, bureaucratic detail, or instructions to CFPB enforcement staff could interfere with their ability to effectively investigate suspicious activity.

CFPB leadership should bear in mind that many investigation subjects are hostile to CFPB investigations because the subjects are engaged in violations of the law. While some investigation subjects are forthcoming and cooperative in investigations, other subjects may engage in spoliation of evidence, concealment, and obfuscation in order to frustrate the federal government's legitimate law enforcement goals. In order to hold businesses and individuals accountable for their illegal activity, CFPB enforcement staff need the flexibility to craft CIDs for both cooperative and uncooperative recipients alike. Making Bureau investigators provide even more information than existing policies already require might inadvertently divulge information that bad actors could use to obstruct the investigation.

Furthermore, some investigation subjects may prefer that the Bureau not provide more detailed disclosures regarding the purpose of the CID. For example, the Bureau must often serve CIDs on third parties that are not currently under investigation in order to gather information about whether an investigation subject may be violating the law. Revealing to the third party the nature and purpose of the CID could expose the investigation subject to inadvertent reputational harm prior to an adjudication of liability. If CFPB leadership requires further disclosure of the purpose of CIDs, this information should be very general in nature and limited to the importance of law enforcement and the rule of law generally, as CID recipients have a civic duty to cooperate with law enforcement.

Finally, in 2017, pursuant to the recommendation of the Office of the Inspector General of the Federal Reserve Board of Governors and a D.C. Circuit Court of Appeals decision, the Bureau

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[32] 12 CFR § 1080.5; POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 58,

[33] POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 58,

both revised its Policy and Procedures Manual and officially reminded enforcement staff of the importance of providing notice regarding the subject matter of CIDs. Further adjustment of the Bureau's CID policies in this area is unnecessary.[34]

4. The nature and scope of requests included in Bureau CIDs, including whether topics, questions, or requests for written reports effectively achieve the Bureau's statutory and regulatory objectives, while minimizing burdens, consistent with applicable law, and the extent to which the meet and confer process helps achieve these objectives.

The CFPB's existing procedures adequately achieve the Bureau's objectives while minimizing burdens on CID recipients. For example, the CFPB Office of Enforcement's Policies and Procedures Manual already provides that:

> [A] CID for the production of documentary material or tangible things should describe each class of material requested with definiteness and certainty. A reasonable return date for the material should be provided. CID recipients should comply with the detailed instructions relating to the productions of documents, including the Document Submission Standards.[35]

Moreover, the CFPB's existing meet and confer procedures are sensible and effective. Under the current policies and procedures, the recipient of a CID normally is required to attend a meeting with CFPB staff to discuss any of the recipient's questions and concerns regarding the CID. This meeting, which can occur face-to-face or over the phone, is a proactive step the CFPB has integrated into its enforcement policies that helps promote communication, identify problems, and avoid unnecessary disputes. While federal law enforcement investigations by their nature lead to contention and stress, the CFPB's meet and confer process strikes a reasonable balance in helping recipients respond to CIDs without burdening CFPB enforcement staff with procedures, disclosures, meetings, or delays that might slow down prosecution of the public interest.

CFPB leadership should bear in mind that some financial institutions and their attorneys may attempt to misuse their contacts with CFPB Enforcement Office managers and professional staff in order to lobby for a favorable investigation outcome, changes to current regulations or policies, or other forms of special treatment. Unlike investigation subjects and their attorneys, ordinary American consumers do not have the benefit of extended face-time with CFPB enforcement staff. Enforcement policies and procedures should not be amended in a way that allows investigation subjects to waste time, create needless correspondence, demand useless concessions, extensions, or other special favors.

Furthermore, for every investigation subject that may be violating the law, there are likely dozens of law-abiding companies that are suffering from a competitive disadvantage. Businesses that are complying with the law have a right to expect that CFPB political leadership will not allow the investigation process to be manipulated for purposes unconnected to law enforcement investigations. The purpose of meet and confer meetings is to allow the CFPB's investigation to move forward in an expeditious and fair manner. The CFPB must not amend its procedures to allow contact or discussions that run the risk of interfering with the law enforcement purpose and mission.

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[34] CFPB v. Accrediting Council for Indep. Colleges and Schools, 854 F.3d 683, 685 (D.C. Cir., 2017)

[35] POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 58.

5. The timeframes associated with each step of the Bureau's CID process, including return dates, and the specific timeframes for meeting and conferring, and petitioning to modify or set aside a CID.

Existing CID timeframes strike a reasonable balance between the interests of the CFPB and CID recipients. Several observations are in order: First, many CIDs are relatively simple, specific, and do not require significant costs or time for a response. For example, some CIDs merely request business records from a third party that easily are retrieved and readily available. It is critical that the Bureau's rules and procedures not be amended to create needless delay in law enforcement where there are no legitimate compliance concerns from CID recipients. The existing rules and procedures sensibly set an expectation of brisk compliance and grant professional staff the discretion to extend times for responding as necessary.

Some CID recipients, and their attorneys, may prefer additional time irrespective of whether it is truly necessary. In some circumstances, CID recipients may try to abuse requests for additional time in order to engage in spoliation of evidence, obscure computer records, or conceal assets that could be used to provide restitution to victims of illegal activity. Enforcement staff need the flexibility and discretion to exercise their professional judgment on how to balance the best interests of both the public as well as CID recipients. Although the CPFB likely will receive many comments from well-funded financial institutions and their counsel on this point, the primary focus of the Bureau should remain on ensuring that the public is protected from illegal activity by covered persons, related persons, and their service providers.

Second, investigations often require cumulative, as opposed to simultaneous, CIDs. This is to say that CFPB staff must often send a CID to a recipient in order to gather information necessary to ask the right questions of and request the needed documents from a subsequent recipient. Delaying one CID may lead to delays in a whole sequence of dependent CIDs. Any one given CID recipient may not understand that their delays can cause the Bureau to fail to ask critical questions of another recipient possibly leading to the need for a duplicative second CID that increases costs for both the Bureau and the recipient overall. While the first recipient may believe that Bureau staff are being unreasonably strident, it is more likely that staff are in fact protecting the needs and interests of CID recipients as well as the public. These questions of timing, order, and logistics are best left to the CFPB professional staff's discretion and judgment and are not likely to be assisted with amendments to existing rules or policies.

Third, it is crucial that CFPB investigations move quickly. When financial institutions are violating the law, there are often thousands of vulnerable families that may be suffering from unwarranted fees, excessive interest, privacy violations, inaccurate credit reports, inappropriate payments, or other financial problems. Each day of delay in pursuing an investigation can impose real harm on consumers as well as their children and other dependents. Moreover, delayed investigations erode the public trust and faith in our government. Indeed, investigation subjects themselves often complain when investigations remain pending too long, even though they themselves may have asked for additional time to meet and confer or respond to a CID.

Fourth, we are concerned that the CFPB should not follow unhelpful developments currently underway at the Federal Trade Commission. The FTC recently changed its investigation procedures to extend the default return date for CIDs in consumer protection matters from 14 to 21 days for third parties and from 21 to 30 days for targets of investigations. We believe that this change to FTC

policy was unnecessary and will lead to delays in investigating violations of federal law. Instead, we support the traditional approach of imposing a default rule that requires prompt CID compliance with discretion given to professional staff to modify CID deadlines where appropriate.

CFPB leadership must not forget that delays in law enforcement investigations contributed to the 2008 financial crisis. The federal Financial Crisis Inquiry Commission ("FCIC") found that in the run-up to the 2008 crash, "enforcement actions came late in the day—often just as firms were on the verge of failure. In cases that the FCIC investigated, regulators either did not identify the problems early enough or did not act forcefully enough to compel the necessary changes."[36] Congress created the CFPB to prevent making this same mistake again. For these reasons, the signatories believe that existing enforcement office rules and procedures on the timeframe for meeting and conferring and petitioning to modify or set aside a CID should remain unchanged. If the CFPB leadership does make a change, the signatories believe the current Policy and Procedures Manual could be amended to provide greater emphasis on the need for quick investigations that respond forcefully to the most pressing consumer financial services problems.

6. The Bureau's taking of testimony from an entity, including whether 12 CFR § 1080.6(a)(4)(ii), and/or the Bureau's processes should be modified to make expressly clear that the standards applicable to Federal Rule of Civil Procedure 30(b)(6) also apply to the Bureau's taking of testimony from an entity.

Federal Rule of Civil Procedure 30(b)(6) ("Rule 30(b)(6)")[37] and 12 CFR 1080.6(a)(4)(ii)[38] are very similar and include comparable provisions to protect the interests of a deposed party.

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[36] U.S. FIN. CRISIS INQUIRY COMM'N, *supra* note 28, at 302.

[37] Rule 30(b)(6) states:

> (6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

FED. R. CIV. P. § 30(b)(6).

[38] Sub-section 1080.6(a)(4) states:

> (4) Oral testimony.
>
> (i)Civil investigative demands for the giving of oral testimony shall prescribe a date, time, and place at which oral testimony shall be commenced, and identify a Bureau investigator who shall conduct the investigation and the custodian to whom the transcript of such investigation shall be submitted. Oral testimony in response to a civil investigative demand shall be taken in accordance with the procedures for investigational hearings prescribed by §§ 1080.7 and 1080.9 of this part.
>
> (ii) Where a civil investigative demand requires oral testimony from an entity, the civil investigative demand shall describe with reasonable particularity the matters for examination and the entity must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf. Unless a single individual is designated by the entity, the entity must designate the matters on which each designee will testify. The individuals designated must testify about information known or reasonably available to the entity and their testimony shall be binding on the entity.

Nonetheless, while both concern the taking of oral testimony, they serve separate and distinct purposes and are subject to completely different sets of governing procedures. To conflate the two in order to bind the CID investigatory process by the same rules that apply in a civil litigation discovery process would be totally inappropriate and would hinder unnecessarily the CFPB's exercise of its discretion in fulfilling its statutory obligations.

Both Rule 30(b)(6) and CID's are intended to provide for the use of oral testimony to deal with the problems caused by information asymmetry (i.e. where one party has virtually exclusive access to and control of relevant information and data). However, there are at least three key differences that distinguish the circumstances in which 12 CFR 1080.6(4) applies as compared to the circumstances where Rule 30(b)(6) applies.

First, 12 CFR § 1080.6(4) applies solely to a preliminary investigative process whereas Rule 30(b)(6) only applies once civil litigation has been initiated. Rule 30(b)(6) always is part of an adversarial process. The corporate defendant's Rule 30(b)(6) representative frequently is an extremely important source of proof of liability for a plaintiff, especially where the defendant corporation has sole knowledge of the events that gave rise to the lawsuit and of its own practices. By comparison, CID testimony can be used by the CFPB to fulfill any and all of the five functions delegated to the agency as it deems appropriate once it has an opportunity to review the testimony provided. Its use is not limited to enforcement or the imposition of liability and the scope of its investigatory reach should not be similarly constrained.

Second, Rule 30(b)(6) is applied within the framework of a complete set of discovery rules established to effectively and fairly manage the unique aspects of civil litigation. Taking the strictures of Rule 30(b)(6) and applying them to a CFPB CID investigation without the balancing provisions that appear in other provisions of the Federal Rules of Civil Procedure (i.e. Rule 16, Rule 26 and Rule 37) unnecessarily will limit and hamper the CFPB's legitimate investigatory efforts.

Finally, Rule 30(b)(6) is applied under the supervision of a judicial authority who has the ability to monitor and insure that the discovery process is fair to both parties. However, in a CID investigation there is no authority to enforce the rule in order to ensure that the party controlling the information does not engage in abusive, dilatory or obfuscating practices such as "bandying," coaching the witness, failing to supplement or changing testimony. The CFPB needs strong authority to overcome these obstacles on its own.

Therefore, oral testimony pursuant to a CFPB CID should be treated similarly to, but not exactly the same as depositions governed by Rule 30(b)(6). Although they share many of the same goals, and include some of the same protections, they are not identical. Rather, CID's should retain the broad flexibility they currently enjoy under 12 CFR § 1080.6(4) in order to enable the CFPB to efficiently and effectively engage in productive investigations within its jurisdiction. Rule 30(b)(6) need not, and should not, be explicitly incorporated into 12 CFR § 1080.6(4).

7. The Bureau's processes for handling the inadvertent production of privileged information, including whether 12 CFR § 1080.8(c) and/or whether the Bureau's processes should be modified in order to make expressly clear that the standards

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12 C.F.R. § 1080.6(4).

applicable to Federal Rule of Evidence § 502 also apply to documents inadvertently produced in response to a CID.

The language of 12 CFR § 1080.8(c)[39] is substantially similar to the comparable provisions of Federal Rule of Evidence § 502(b).[40] Both are intended to provide a predictable, uniform set of standards under which parties can determine the consequences of an inadvertent disclosure of a communication or information covered by an evidentiary privilege or work-product protection. Both accord with the majority judicial view on whether such an inadvertent disclosure is a waiver.

There therefore appears to be no reason why the standards applicable to the Federal Rule of Evidence need to expressly be incorporated into the CFPB's current regulation governing the same topic. At best, it would be redundant and unnecessary. At worst, it could be confusing since such a step would leave open the question of whether the remaining Federal Evidentiary Rules are, or are not, applicable to the CFPB's CID's. Accordingly, 12 CFR § 1080.8(c) should remain unaltered.

8. The rights afforded to witnesses by 12 CFR 1080.9, including limitations on the role of counsel described in 12 CFR 1080.9(b) in light of the statutory delineation of objections set forth in 12 U.S.C. 5562(c)(13)(D)(iii).

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[39] Subparagraph 1080.8(c) states:

(c) Disclosure of privileged or protected information or communications produced pursuant to a civil investigative demand shall be handled as follows:

(1) The disclosure of privileged or protected information or communications shall not operate as a waiver with respect to the Bureau if:

(i) The disclosure was inadvertent;

(ii) The holder of the privilege or protection took reasonable steps to prevent disclosure; and

(iii) The holder promptly took reasonable steps to rectify the error, including notifying a Bureau investigator of the claim of privilege or protection and the basis for it.

(2) After being notified, the Bureau investigator must promptly return, sequester, or destroy the specified information and any copies; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if he or she disclosed it before being notified; and, if appropriate, may sequester such material until such time as a hearing officer or court rules on the merits of the claim of privilege or protection. The producing party must preserve the information until the claim is resolved.

(3) The disclosure of privileged or protected information or communications shall waive the privilege or protection with respect to the Bureau as to undisclosed information or communications only if:

(i) The waiver is intentional;

(ii) The disclosed and undisclosed information or communications concern the same subject matter; and

(iii) They ought in fairness to be considered together.

12 CFR § 1080.8(c)

[40] Federal Rule of Evidence 502(b) states:

b. Inadvertent Disclosure- When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

1. the disclosure is inadvertent;
2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

FED. R. EV. § 502.

The differences between the rights afforded to witnesses in a CFPB CID deposition incorporated in the provisions of 12 CFR § 1080.9(b),[41] as opposed to the statutory delineation of objections set forth in 12 U.S.C. § 5562(c)(13)(D),[42] can be explained by the differences between the investigatory contexts in which the rules apply.

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[41] Subparagraph 1080.9(b) states:

> (b) Any witness compelled to appear in person at an investigational hearing may be accompanied, represented, and advised by counsel as follows:
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> > (1) Counsel for a witness may advise the witness, in confidence and upon the initiative of either counsel or the witness, with respect to any question asked of the witness where it is claimed that a witness is privileged to refuse to answer the question. Counsel may not otherwise consult with the witness while a question directed to the witness is pending.
> > (2) Any objections made under the rules in this part shall be made only for the purpose of protecting a constitutional or other legal right or privilege, including the privilege against self-incrimination. Neither the witness nor counsel shall otherwise object or refuse to answer any question. Any objection during an investigational hearing shall be stated concisely on the record in a nonargumentative and nonsuggestive manner. Following an objection, the examination shall proceed and the testimony shall be taken, except for testimony requiring the witness to divulge information protected by the claim of privilege or work product.
> > (3) Counsel for a witness may not, for any purpose or to any extent not allowed by paragraphs (b)(1) and (2) of this section, interrupt the examination of the witness by making any objections or statements on the record. Petitions challenging the Bureau's authority to conduct the investigation or the sufficiency or legality of the civil investigative demand shall be addressed to the Bureau in advance of the hearing in accordance with § 1080.6(e). Copies of such petitions may be filed as part of the record of the investigation with the Bureau investigator conducting the investigational hearing, but no arguments in support thereof will be allowed at the hearing.
> > (4) Following completion of the examination of a witness, counsel for the witness may, on the record, request that the Bureau investigator conducting the investigational hearing permit the witness to clarify any of his or her answers. The grant or denial of such request shall be within the sole discretion of the Bureau investigator conducting the hearing.
> > (5) The Bureau investigator conducting the hearing shall take all necessary action to regulate the course of the hearing to avoid delay and to prevent or restrain disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language. Such Bureau investigator shall, for reasons stated on the record, immediately report to the Bureau any instances where an attorney has allegedly refused to comply with his or her obligations under the rules in this part, or has allegedly engaged in disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of the hearing. The Bureau will thereupon take such further action, if any, as the circumstances warrant, including actions consistent with those described in 12 CFR 1081.107(c) to suspend or disbar the attorney from further practice before the Bureau or exclude the attorney from further participation in the particular investigation.

12 CFR § 1080.9(b).

[42] Subsection 5562(c)(13)(D) states:

> (D)Attorney representation
> (i)In general. Any person compelled to appear under a civil investigative demand for oral testimony pursuant to this section may be accompanied, represented, and advised by an attorney.
> (ii)Authority. The attorney may advise a person described in clause (i), in confidence, either upon the request of such person or upon the initiative of the attorney, with respect to any question asked of such person.

Specifically, the applicable scopes of the two provisions significantly are different, with the statutory provision applicable in a narrower, more focused, context (i.e. fair housing) than the general regulatory scheme. Therefore, allowing the more unlimited coaching of witnesses authorized by the statute in limited circumstances ("[t]he attorney may advise a person described in clause (i), in confidence, either upon the request of such person or upon the initiative of the attorney, with respect to any question asked of such person" as compared to "[c]ounsel for a witness may advise the witness, in confidence and upon the initiative of either counsel or the witness, with respect to any question asked of the witness where it is claimed that a witness is privileged to refuse to answer the question") to be applied to the CFPB's exercise of its broader investigatory responsibilities will unnecessarily and improperly inhibit the agency from fulfilling the full extent of its mandated duties.

Similarly, the difference in the scopes of the statutory and regulatory investigatory provisions is reflected in the different means in how the access to information is enforced. In the limited statutory context, where there is a broader right to coach and direct the witness not to answer during the course of taking oral testimony – and therefore the greater potential for abuse and obstruction – the statute explicitly provides that the CFPB may file a petition with a federal district court for an order compelling such person to answer questions. In the regulatory context, however, where the ability of counsel to coach a witness or direct them not to answer during the course of the taking of their oral testimony already is circumscribed within the applicable regulation, the need for separate enforcement mechanisms to insure proper access to relevant information is less necessary. Thus, the regulatory remedies are more limited and do not include the express right to seek judicial intervention.

Congress created a separate set of objections under 12 U.S.C. § 5562(c)(13)(D) that are permitted in distinct and limited types of investigatory interrogations undertaken by the CFPB. Congress also authorized a separate means for enforcing the agency's rights in such investigations. To apply that separate set of objections to the CFPB's general investigatory authority, especially without the associated expanded enforcement rights provided in the statute, would be inappropriate. The rights afforded to witnesses by 12 CFR 1080.9, including limitations on the role of counsel described in 12 CFR § 1080.9(b) should not be changed to adopt the statutory delineation of objections set forth in 12 U.S.C. § 5562(c)(13)(D)(iii).

9. The Bureau's processes concerning meeting and conferring with recipients of CIDs, including, for example, negotiations regarding modifications and the delegation of authority to the Assistant Director of the Office of Enforcement and Deputy Assistant

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(iii)Objections. A person described in clause (i), or the attorney for that person, may object on the record to any question, in whole or in part, and such person shall briefly state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination, but such person shall not otherwise object to or refuse to answer any question, and such person or attorney shall not otherwise interrupt the oral examination.

(iv)Refusal to answer. If a person described in clause (i) refuses to answer any question—

(I)the Bureau may petition the district court of the United States pursuant to this section for an order compelling such person to answer such question; and

(II)if the refusal is on grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of section 6004 of title 18.

Directors of the Office of Enforcement to negotiate and approve the terms of satisfactory compliance with civil investigative demands and extending the time for compliance.

Under current CFPB Office of Enforcement rules and procedures, investigation subjects already have ample opportunity to request modifications to the substance and process of CIDs for good cause. Specifically, 12 C.F.R. 1080.6 and the Enforcement Office's Policies and Procedures Manual both authorize the Enforcement Director or a Deputy Enforcement Director to limit the scope of a CID, alter the terms of a CID, and approve the terms of satisfactory CID compliance for good cause.[43] Moreover, CID recipients are free to request and the Enforcement Director or Deputy Directors are free to grant time extensions for good cause.[44] Existing policy already provides that enforcement staff "should engage in negotiations with petitioner's counsel to the extent that the requests being made are reasonable."[45]

Current policies do require investigation subjects to ask for CID modifications in a writing that includes the factual and legal information necessary to support their request. This sensible policy helps both CID recipients and enforcement staff understand and focus on what modifications a CID recipient is requesting and why the modification may be necessary. The existing CFPB "good cause" standard for CID modification provides sufficient flexibility for enforcement staff to determine whether modification requests are appropriate. Providing further exceptions, limitations, appeals, or restrictions on the authority of enforcement staff would risk limiting the effectiveness of CFPB investigations. It could also expose investigation subjects to needless delay and uncertainty.

CFPB leadership must not allow investigation subjects to turn each CID into an extended invitation to negotiate, delay, appeal, obfuscate, or otherwise impede lawful federal investigations. Indeed, CFPB leadership should bear in mind that defense counsel responding to CFPB investigations may view CIDs served on their clients as an opportunity to generate billable hours at their clients' expense. Many attorneys that are likely to submit comments on the CFPB's CID policies have a strong financial incentive to slow down and increase the cost of CFPB investigations. Some consumer financial services defense attorneys engage in scare tactics and fear mongering that at times have inaccurately portrayed CFPB staff as unreasonable in order to convince their clients to invest in unnecessary legal fees. Providing additional levels of appeal, further opportunities for negotiation, and other avenues for favors or other special treatment, may in many circumstances actually end up working against CID recipients' interests by generating delay and higher costs. Existing policies provide CFPB staff the right tools to balance the interests of CID recipients with the need to enforce federal law on behalf of the public and other law-abiding businesses.

10. The Bureau's requirements for responding to CIDs, including certification requirements, and the Bureau's CID document submission standards.

The CFPB's CID document submission standards include routine instructions on how to deliver documents to the Bureau. These instructions include practical and uncontroversial instructions such as "all productions should be produced free of computer viruses" an "a cover letter should be included with each production." Generally, the CFPB's current document submission standards

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[43] 12 C.F.R. § 1080.6; POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 63.
[44] POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 63.
[45] *Id.*

require the producing party scan and produce paper productions electronically. This allows the Bureau to store produced records more efficiently, reducing costs to the Bureau as well as recipients. However, the CFPB's Policies and Procedures Manual does allow for paper submissions when necessary, and the Office of Enforcement retains the discretion to modify these submission standards when circumstances justify doing so.

Moreover, the Inspector General's recent audit found no problems with the Bureau's document submission standards.[46] If there were any significant problems with the Bureau's document submission standards, the interviews and detailed review of CIDs, CID submissions, and petitions to set aside CIDs conducted during the Inspector General's audit would have disclosed them.[47] Our organizations are confident that the Bureau's career enforcement staff are carefully and reasonably balancing the burden imposed on CID recipients with the government's need to obtain documents that may reveal evidence of illegal activity.

We are concerned that some aggrieved subjects of enforcement actions may attempt to use this RFI to encourage unreasonable reforms that would frustrate the ability of the United States to enforce its laws. It should come as no surprise that federal investigations can impose costs and burdens on CID recipients. This is an unfortunate, but inevitable, consequence of law enforcement. Our organizations believe that the key to successfully managing these burdens is hiring highly qualified enforcement staff, treating them well, compensating them appropriately, and empowering them to do their very best to promote justice with respect to consumers as well as CID recipients. Micromanaging CFPB professional staff is unlikely to produce better outcomes and will erode the ability of the Bureau to deter illegal activity.

11. The Bureau's processes concerning CID recipients' petitions to modify or set aside Bureau CIDs, including:

a. Whether it is appropriate for Bureau investigators to provide the Director with a statement setting out a response to the petition without serving that response on the petitioner.

b. Whether petitions and the Director's orders should be made public, consistent with applicable laws; and

c. The costs and benefits of the petition to modify or set aside process, vis-à-vis direct adjudication in Federal court, in light of the statutory requirement for the petition process and the fact that CIDs are not self-enforcing.

The CFPB should not modify existing CFPB CID rules or the Policies and Procedures Manual to require professional enforcement staff to serve internal staff responses to petitions to modify or set aside on the petitioner. Enforcement staff should not be required to disclose the basis for their suspicion of legal wrongdoing at an early stage of an investigation. Conducting an effective investigation requires enforcement staff to exercise considerable judgment about the point at which to disclose information and legal theories to the subjects of investigations and other CID recipients. The CFPB leadership should not tie the hands of investigators by requiring them to share internal communication with CID recipients any time the recipient decides to petition to modify or set aside a CID. Indeed, such a requirement would turn the CID process on its head: by petitioning against the CID, it would be CID recipients that gather information from the Bureau, rather than the other way

[46] *See* FED OIG CID EVALUATION REPORT, *supra* note 19, at executive summary.
[47] *Id.*, at 17.

around. Moreover, nothing prevents enforcement staff from sharing information relating to the basis of their legal theories and evidence prior to receiving a CID response when doing so makes sense within the strategic and tactical imperatives of an investigation.

Petitions and orders to modify or set aside CFPB CIDs should continue to be available to the public. Section 1080.6(g) of the CFPB's investigation rules states that the CFPB will make publicly available both the recipients' petition and the CFPB Director's order in response to the petition. The CFPB's approach in this regard is based on the longstanding practices of the FTC which also publishes petitions and the commission's response. Publication of petitions and the Bureau's response is necessary because it provides general transparency, allows future CID recipients to determine whether filing a petition is advisable, and how to effectively petition when it is appropriate to do so. The public has a right to know when the recipient of a federal CID is disputing the authority of the Bureau to investigate alleged violations of federal law. Over the long term, maintaining transparency in petitions to modify or set aside CIDs provides crucial sunlight that can avoid the potential for corruption, bribery, or special treatment. Under the current rules, petitioners can request confidentiality with the CFPB and ultimately seek relief in court to protect confidentiality. However, confidentiality should be highly disfavored and should not be granted without good cause. As recognized by the Inspector General, the CFPB has already instituted a process for redacting sensitive information from CID petitions when it is appropriate to do so.[48]

Additionally, if the CFPB were to extend confidentiality to CID petitions, it would encourage CID recipients to engage in dilatory and wasteful challenges. Those CID recipients that simply want additional time to respond to CIDs could confidentially file petitions to modify or set aside for the purposes of delay without facing public accountability for challenging the authority of the government to conduct a lawful investigation. The existing policy strikes a reasonable balance between the public need for transparency in government and the CID recipient's wishes to obscure the public's view of their efforts to avoid or limit the scope of federal investigations.

The existing process for petitioning to modify or set aside a CFPB CID should not be revised. Historically, it is well settled that federal agencies such as the CFPB are entitled to "wield broad power to gather information through the issuance of subpoenas."[49] As the U.S. Supreme Court has explained, under their "power of inquisition" agencies may use administrative subpoenas such as civil investigative demands to "investigate merely on suspicion that the law is being violated, or even just because [they] want[ ] assurance that it is not."[50] Courts generally defer to an agency's interpretation of the scope of its own investigation,[51] and place a "high burden" on the challenging party in order to prevent interference with federal agencies' investigations.[52]

The CFPB's existing rules and practices on challenges to CIDs make sense given the limits to judicial review of administrative CIDs. The Bureau's existing process is sufficient to allow courts to

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[48] FED OIG CID EVALUATION REPORT, *supra* note 19, at 12.
[49] Resolution Trust Corp. v. Thornton, 41 F.3d 1539, 1544 (D.C. Cir. 1994).
[50] U.S. v. Morton Salt Co., 338 U.S. 632, 642–43 (1950).
[51] *See* FTC v. Church & Dwight Co., 665 F.3d 1312, 1315–16 (D.C. Cir. 2011)
[52] *See* EEOC v. Fed. Exp. Corp., 558 F.3d 842, 848-49 (9th Cir. 2009) (upholding a challenge to the jurisdictional limits of an agencies administrative subpoena).

weigh in on CIDs under appropriate circumstances.[53] CID recipients should not have the right to immediately drag the CFPB into federal court every time a recipient wants to delay, challenge, or hinder an investigation. In the vast majority of circumstances, immediate judicial review of CIDs would be inappropriate, impose excessive costs on the Bureau and the recipient, and lead to unnecessary delays.

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[53] *See, e.g.,* CFPB v. Accrediting Council for Indep. Colleges and Schools, 854 F.3d 683, 691-92 (D.C. Cir. 2017).

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Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
Via email: *FederalRegisterComments@cfpb.gov*

Re: Request for Information, CFPB External Engagement
Docket No. CFPB-2018-0005

May 29, 2018

Dear Acting Director Mulvaney:

In response to the Consumer Financial Protection Bureau's (CFPB) Request for Information (RFI) number 5 on its external engagements, Consumer Action[1] writes to vigorously support the Consumer Bureau's long-standing efforts to engage consumers and advocates to obtain feedback on the financial challenges facing their communities, and to ensure that the public is aware of the various agency resources available to assist consumers.

External Engagement is fundamental to carrying out the CFPB's mission to ensure that "consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[2] The CFPB's External Engagement fosters outreach and promotes transparency and accountability. We urge the CFPB to maintain its commitment to direct and frequent engagement with consumers, their representatives and the financial companies that serve them.

The CFPB engages with the public on consumer financial issues to ensure that consumers and others have meaningful opportunities to provide input from varied perspectives. Public engagement gives a voice to those who might otherwise be overlooked by the regulatory process.

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[1] Consumer Action has been a champion of underrepresented consumers since 1971. A national, nonprofit 501(c)3 organization, Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers and regulators to advance consumer rights and promote industry-wide change particularly in the fields of consumer protection, credit, banking, housing, privacy, insurance and utilities. www.consumer-action.org

[2] 12 U.S.C. Section 5511(a).

To date, The CFPB's engagement has helped to increase the public's understanding of financial issues and listen to all parties' viewpoints to help create a safer, fairer marketplace. The CFPB conducts outreach in a myriad of ways: It has held 47 meetings of its advisory boards, 33 field hearings, and 15 town halls in more than 40 cities throughout the nation. It is vital for the agency to sustain and extend the external engagement that has been a hallmark of the Bureau's first six years. Robust external engagement ensures that the CFPB can share information with consumers, industry participants, and a wide range of others interested in and affected by CFPB actions. Moreover, external engagement ensures that the CFPB's policymakers, consumer educators, attorneys, examiners, and other staff have the information they need to understand and appropriately address consumers' needs, experiences and concerns. These public interactions allow the Bureau to receive essential input and help to hold the consumer agency accountable.

We would encourage the CFPB to expand its outreach further into culturally, linguistically and economically diverse areas, giving all consumers greater access and input into the one agency devoted to consumer financial protection.

The CFPB's four advisory groups--the Consumer Advisory Board (CAB), the Community Bank Advisory Council, the Credit Union Advisory Council, and the Academic Research Council—have been and should continue to be essential elements of External Engagement. We recommend that the CFPB increase the frequency of their meetings, and convene meetings for each advisory group at least three times per year to ensure that conversations and dialogue can address the most current and pressing issues. We support transparency: Meetings should continue to be advertised and summarized publicly, and broadcast in full, whenever possible. Additionally, we recommend that at least one of these meetings for each of these groups take place outside of Washington. Though we recognize the value that industry representatives can bring to the CAB and its advisory mission, we recommend that a majority of the CAB be composed of individual consumers, consumer advocates, scholars, or others whose work focuses on protecting consumers. As a body charged with advising the CFPB on its consumer protection functions, the CAB should be led by and primarily consist of members whose work is focused on consumer protection. Further, the CFPB already sustains two industry-based advisory boards related to community banks and credit unions. The CFPB's field hearings or town halls should be continued and we urge transparency.

We are concerned however, by a recent lack of public input: The agency has held no public events since its change in leadership. Acting Director Mulvaney has held very few external meetings, at least with consumers and their representatives, and is in direct contrast to the extensive number of meetings held under former Director Cordray.

Also alarming is the acting director's indications that he may restrict public access to the consumer complaint database. The public complaint database is an essential tool to engage, inform and protect the public, all key to the Bureau's mission.

We strongly support the CFPB's direct engagement with consumers through its complaint tool. Since its inception, the CFPB has collected more than one million consumer

complaints. The complaint process is designed to achieve tailored responses directly from companies to consumers, and where possible complaint resolutions. The public database also provides important information to the CFPB, and to the public, that can help alert consumers to potential risks and prevent future problems. Also important are other CFPB engagement tools, such as the *Tell Your Story* section of the website. We urge the CFPB to explore additional mechanisms, such as "listening sessions," to allow consumers to engage in open, informal discussions about financial services concerns with senior CFPB staff. The CFPB has some experience with events like these in the industry context, through "Project Catalyst." Similar opportunities for consumers could yield valuable insight for the Bureau and help consumers better understand how the CFPB works for them.

The CFPB must foster a culture that promotes public engagement with consumers. It is essential that the CFPB commit to maintaining varied forms of external engagement, including roundtables, the public complaint database and informal feedback sessions with consumers and their advocates. Throughout the years, CFPB External Affairs and Community Affairs staff have been exceptional. Public engagement has been and should remain a hallmark of the CFPB.

The amount of time and attention required to adequately address these numerous RFIs has diverted valuable consumer group and consumer agency resources to respond to these requests for information. These RFIs are primarily an opportunity for financial firms to attempt to weaken CFPB oversight, consumer protection, public input and access to fair and affordable financial products and services. Nevertheless, we thank you for taking the time to thoughtfully review our comments.

Sincerely,

Ruth Susswein
Consumer Action, Deputy Director National Priorities

ConsumersUnion®

POLICY & ACTION FROM CONSUMER REPORTS

June 7, 2018

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

RE: Request for Information Regarding Bureau Rulemaking Processes [Docket No. CFPB-2018-0009]

Dear Ms. Jackson:

Consumers Union,[1] the advocacy division of Consumer Reports, writes in response to the Consumer Financial Protection Bureau's (CFPB) Request for Information (RFI) on the Bureau's rulemaking process.[2] The CFPB is seeking public input as it assesses the overall efficiency and effectiveness of this process.[3]

Consumers Union has participated, through public notice and comment, in several rulemaking efforts at the CFPB. We have found these rulemakings to be meticulous and detailed, and to provide appropriate opportunities for comment and further input from a wide range of stakeholders at numerous points in the proceedings. We urge the Bureau to maintain this inclusive and deliberative approach that has produced reasoned rules that protect consumers while allowing for continued innovation in the marketplace.

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[1] Consumers Union is the advocacy division of Consumer Reports, an expert, independent, non-profit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. Consumers Union works for pro-consumer policies in the areas of financial services, as well as telecommunications, health care, food and product safety, energy, telecommunications, privacy and data security, and competition and consumer choice, among other issues, in Washington, DC, in the states, and in the marketplace. Consumer Reports is the world's largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its magazine, website, and other publications.

[2] The RFI Regarding Bureau Rulemaking Processes is available at: https://www.gpo.gov/fdsys/pkg/FR-2018-03-09/pdf/2018-04824.pdf.

[3] *Id.*

Background – The Importance of the CFPB

The CFPB was established following the financial crisis a decade ago, when Congress recognized a gap in consumer protection and enforcement that allowed unfair, deceptive, and abusive practices in the financial sector to proliferate. Over the years, the CFPB has taken essential steps, long overdue, to protect consumers in this marketplace. Since it was launched in 2011, the CFPB has won almost $12 billion in refunds and relief for an estimated 29 million Americans[4] who were harmed by financial companies. Notable achievements by the CFPB on behalf of consumers include:

- Ensuring mortgages are affordable, by adopting rules to prevent the kind of reckless lending practices by banks that led to a record number of Americans losing their homes and that triggered the country's deep recession in 2008;
- Taking on deceptive credit card marketing, by ordering credit card companies to pay back $3.48 billion to consumers who had been defrauded into accepting unnecessary and costly add-on products and services, such as debt protection and credit monitoring;
- Providing prepaid card users with strong protections, by adopting rules that require prepaid card issuers to provide better fee disclosures, as well as the same robust protections limiting a consumer's financial exposure to unauthorized and fraudulent use that come with traditional debit and credit cards;
- Challenging abusive student loan practices, such as by suing Navient, the nation's largest student loan servicer, for giving borrowers inaccurate information, processing payments incorrectly, and failing to take appropriate action to address consumer complaints;
- Protecting consumers from deceptive reverse mortgage ads that tricked consumers into believing they could not lose their homes with a reverse mortgage; and
- Combating misleading credit score ads and promotions, by holding TransUnion and Equifax accountable for deceiving consumers about the usefulness and cost of the credit scores they marketed.

These achievements were possible, in large part, because of the CFPB's ability to listen to and gain insight from a wide range of experts, consumers, and other stakeholders whose diverse experiences and perspectives help inform its work. And that input is reflected in the Bureau's rulemakings to date. Maintaining and enhancing the CFPB's rigorous and transparent rulemaking process is critical to ensuring that these achievements can continue.

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[4] See, Factsheet, Consumer Financial Protection Bureau: By the numbers (July 2017).

Discussion

Public Outreach is Essential

As we noted in response to a previous RFI, the external engagements conducted by the CFPB ensure that consumers and other interested parties have visibility into the Bureau's work, and have meaningful opportunities for public input. That in turn ensures that the CFPB's work is informed by regular input from varied perspectives representing distinct points of view. Public engagements give a voice to individuals and communities who might otherwise have difficulty accessing the regulatory process. They increase the public's understanding of financial issues and the role the CFPB plays in ensuring a safe marketplace.[5]

The CFPB has relied on these engagements to great effect in developing rules. For the Payday loan rule, for example, the Bureau spent five years gathering information, including through:

> field hearings, and hundreds of meetings with both consumer and industry stakeholders on the issues raised by small-dollar lending. In addition to meeting with lenders and other market participants, trade associations, consumer groups, community groups, and others, the Bureau has engaged with individual faith leaders and coalitions of faith leaders from around the country to gain their perspective on how these loans affect their communities and the people they serve. And the Bureau has met frequently with Federal, State, and Tribal officials to consult and share information about these kinds of loans and their consequences for consumers.[6]

Similarly, in developing the Prepaid rule, which was finalized in 2016, the Bureau started with an Advanced Notice of Proposed Rulemaking, on which it received 220 comments.[7] It then began to conduct:

> extensive and significant additional outreach and research following the Prepaid ANPR as part of its efforts to study and evaluate prepaid products. The Bureau's pre-proposal outreach included meetings with industry, consumer groups, and nonpartisan research and advocacy organizations. The Bureau also conducted market research, monitoring, and related actions pursuant to section 1022(c)(4) of the Dodd-Frank Act, which allows the Bureau to gather information from time to time regarding the organization, business

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[5] *See*, Comments to the CFPB on Request for Information Regarding Bureau External Engagement (May 29, 2018).

[6] Payday, Vehicle Title, and Certain High-Cost Installment Loans (Payday Loan Rule). Text of the CFPB rule on payday loans is available at: http://files.consumerfinance.gov/f/documents/201710_cfpb_final-rule_payday-loans-rule.pdf.

[7] Advance Notice of Proposed Rulemaking, https://www.federalregister.gov/documents/2012/05/24/2012-12565/electronic-fund-transfers-regulation-e.

conduct, markets, and activities of covered persons and service providers to aid the Bureau's market monitoring efforts. Further, the Bureau obtained information directly from consumers through focus groups and consumer testing.[8]

The Bureau's development of its arbitration rule is another particularly apt example. As detailed in Parts III and IV of the discussion in the published final rule,[9] the CFPB conducted an extremely thorough examination of the use of forced arbitration clauses in consumer financial service contracts, soliciting and accepting input from the full range of parties and perspectives, in a particularly deliberative and inclusive multi-stage process, with extensive public outreach soliciting further comment at each stage. These public outreaches included:

- an April 2012 request for information on proposals for the study directed by Congress in section 1028 of the Dodd-Frank Act;
- a 168-page preliminary report on the ongoing study in December 2013, with a detailed roadmap of the Bureau's plans for future work;
- invitations to interested stakeholders for in-person meetings in February 2014;
- notices in June 2013 for a proposed consumer survey, soliciting feedback, followed by meetings in July 2013, and two focus groups, and another notice in May 2014 soliciting further comment on the proposed survey; a 700-page Report to Congress on the study in March 2015;
- a series of roundtables with interested stakeholders following release of the report;
- a Small Business Review Panel convened in October 2015, to discuss proposals under consideration, with a detailed outline of proposals and questions published in advance, as well as other roundtables and meetings with interested stakeholders during this period;
- a report on the Small Business Review Panel findings in December 2015;
- a public field hearing in early May 2016; and
- following publication of the proposed rule in late May 2016, an additional three-month public comment period, during which more than 100,000 comments were received and numerous stakeholders met with Bureau officials to present their views.

This outreach and consultation is essential to the CFPB's development of rules that are appropriate to the marketplace, and we urge the Bureau to continue this diligent and focused information gathering that can be useful to all of the Bureau's work, including rulemaking.

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[8] Prepaid Accounts Under the Electronic Fund Transfer Act (regulation E) and the Truth in Lending Act (Regulation Z) (Prepaid rule). The prepaid rule is available on the Federal Register at: https://www.federalregister.gov/documents/2016/11/22/2016-24503/prepaid-accounts-under-the-electronic-fund-transfer-act-regulation-e-and-the-truth-in-lending-act.

[9] Arbitration Agreements. The Final Rule is available on the Federal Register at: https://www.federalregister.gov/documents/2017/07/19/2017-14225/arbitration-agreements#citation-420-p33246.

Requests for Information Are Useful if Well-Targeted and Deliberate

With respect to Requests for Information, we agree that they can be useful for "gathering information on market conditions or issues, particularly regulatory options" as noted in this RFI. Consumers Union has commented on numerous such RFIs in the past, including on the use of alternative data and modeling techniques in the credit process,[10] consumer use of reverse mortgages,[11] mobile financial services,[12] an initiative on safe student banking,[13] and the need for clear rules regarding student loan servicing.[14] All of these RFI processes enabled stakeholders from all perspectives to provide input to the Bureau as it considered questions about the consumer impact of practices in the financial marketplace.

We do caution, however, against issuing multiple RFIs in quick succession — as the Bureau is now doing — seeking comment on all aspects of the Bureau's work. This recent spate of RFIs stand in contrast to the deliberate pace of past Bureau requests for information. As part of a call for evidence described by the Bureau as being intended to "to ensure the Bureau is fulfilling its proper and appropriate functions to best protect consumers", the Bureau issued 12 requests for information over the course of less than three months at the start of this yar. Of those, six remain open as of June 5. This rapid pace does not leave enough time for full input by stakeholders, nor does it allow for thorough consideration by the CFPB. In contrast, in all of 2017, the Bureau issued 10 requests for information. The rush of recent RFIs seems to indicate a departure from the deliberate, considered pace of years past.

Final Rules Have Reflected Thoughtful Consideration

We have been impressed with the quality of the final rules issued by the Bureau. They have reflected thoughtful consideration of the comments submitted by the public and stakeholders, and have established clear and workable rules for the marketplace. And the Bureau has been

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[10] *See*, CU Response to the CFPB's Request for Alternative Data in the Credit Process (August 1, 2017), https://consumersunion.org/research/cu-response-to-the-cfpbs-request-for-information-on-the-use-of-alternative-data-in-the-credit-process/.

[11] *See*, Comments to the CFPB on Request for Information Regarding Consumer Use of Reverse Mortgages (August 31, 2012), https://consumersunion.org/research/comments-to-the-consumer-financial-protection-bureau-on-request-for-information-regarding-consumer-use-of-reverse-mortgages/.

[12] *See*, CU Comment to the CFPB Regarding the Use of Mobile Financial Services (MFS)(September 10, 2015), https://consumersunion.org/wp-content/uploads/2014/09/CU_comments_CFPB_mobile_finance.pdf.

[13] *See*, CU Comments to the CFPB on a "Safe Student Account Scorecard" (March 30, 2015), https://consumersunion.org/wp-content/uploads/2015/03/CU_Ltr_CFPB_Safe_Student_Account_Scorecard.pdf.

[14] *See*, CU Comments to the CFPB on Student Loan Servicing Practices (July 3, 2015) https://consumersunion.org/wp-content/uploads/2015/07/CFPB_RFI_servicing_0715.pdf.

willing to make adjustments even after the issuance of the final rule, in response to reasonable concerns.

The final rule for prepaid accounts exemplifies the Bureau's flexibility and responsiveness. For more than a decade, Consumers Union advocated for consumer protections on prepaid cards. After a four-year process, the Bureau issued rules that extend a number of important protections to prepaid accounts, including uniform fee disclosures; protection against errors and loss, similar to legal safeguards currently available for debit and credit cards; prompt dispute resolution rights; free and easy access to account information; and clear rules of the road for the extension of credit.

As announced in October 2016, the prepaid rule was to be generally effective in October 2017. However, in April 2017, the Bureau, responding to industry feedback, extended the date to April 2018. A short while later, also in response to industry feedback, the Bureau re-opened aspects the rule for consideration, including error resolution rights for unregistered prepaid cards and linking credit cards to digital wallets. As Director Richard Cordray said at the time: "Today's request for comment shows we are listening closely to feedback on our rules to decide whether certain adjustments will help to achieve that goal."[15] Six months later, the Bureau published its changes to the rule, which included adjusting error resolution rights to exclude cards that had not completed registration; clarifying rules to provide greater flexibility in instances where credit cards are linked to digital wallets that store funds; and extending the final date for compliance by a year to April 2019.[16] As this example illustrated, the Bureau has shown that it can act quickly to address providers' concerns while still ensuring effective, protective rules for financial products and services.

Conclusion

As the RFI process moves forward, we urge the CFPB to keep its mission foremost in view: "implementing and enforcing Federal consumer financial law, for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[17]

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[15] Consumer Financial Protection Bureau press release, June 15, 2017, CFPB Seeks Comment on Proposed Changes to Prepaid Rule, Proposal Would Adjust Error Resolution Requirements and Provide More Flexibility for Credit Cards Linked to Digital Wallets, https://www.consumerfinance.gov/about-us/newsroom/cfpb-seeks-comment-proposed-changes-prepaid-rule/.

[16] Consumer Financial Protection Bureau press release, January 25, 2018, CFPB Finalizes Changes to Prepaid Accounts Rule, https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-changes-prepaid-accounts-rule/.

[17] 12 U.S.C. 5511(a).

We look forward to working with the CFPB to ensure that any changes to its rulemaking processes are carefully considered and advance the critical mission of the CFPB.

Sincerely,

Anna Laitin
Director, Financial Policy

June 7, 2018

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

RE: Request for Information Regarding Bureau Rulemaking Processes [Docket No. CFPB-2018-0009]

Dear Ms. Jackson:

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[4] See, Factsheet, Consumer Financial Protection Bureau: By the numbers (July 2017).

Discussion

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> extensive and significant additional outreach and research following the Prepaid ANPR as part of its efforts to study and evaluate prepaid products. The Bureau's pre-proposal outreach included meetings with industry, consumer groups, and nonpartisan research and advocacy organizations. The Bureau also conducted market research, monitoring, and related actions pursuant to section 1022(c)(4) of the Dodd-Frank Act, which allows the Bureau to gather information from time to time regarding the organization, business

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[5] *See*, Comments to the CFPB on Request for Information Regarding Bureau External Engagement (May 29, 2018).

[6] Payday, Vehicle Title, and Certain High-Cost Installment Loans (Payday Loan Rule). Text of the CFPB rule on payday loans is available at: http://files.consumerfinance.gov/f/documents/201710_cfpb_final-rule_payday-loans-rule.pdf.

[7] Advance Notice of Proposed Rulemaking, https://www.federalregister.gov/documents/2012/05/24/2012-12565/electronic-fund-transfers-regulation-e.

conduct, markets, and activities of covered persons and service providers to aid the Bureau's market monitoring efforts. Further, the Bureau obtained information directly from consumers through focus groups and consumer testing.[8]

The Bureau's development of its arbitration rule is another particularly apt example. As detailed in Parts III and IV of the discussion in the published final rule,[9] the CFPB conducted an extremely thorough examination of the use of forced arbitration clauses in consumer financial service contracts, soliciting and accepting input from the full range of parties and perspectives, in a particularly deliberative and inclusive multi-stage process, with extensive public outreach soliciting further comment at each stage. These public outreaches included:

- an April 2012 request for information on proposals for the study directed by Congress in section 1028 of the Dodd-Frank Act;
- a 168-page preliminary report on the ongoing study in December 2013, with a detailed roadmap of the Bureau's plans for future work;
- invitations to interested stakeholders for in-person meetings in February 2014;
- notices in June 2013 for a proposed consumer survey, soliciting feedback, followed by meetings in July 2013, and two focus groups, and another notice in May 2014 soliciting further comment on the proposed survey; a 700-page Report to Congress on the study in March 2015;
- a series of roundtables with interested stakeholders following release of the report;
- a Small Business Review Panel convened in October 2015, to discuss proposals under consideration, with a detailed outline of proposals and questions published in advance, as well as other roundtables and meetings with interested stakeholders during this period;
- a report on the Small Business Review Panel findings in December 2015;
- a public field hearing in early May 2016; and
- following publication of the proposed rule in late May 2016, an additional three-month public comment period, during which more than 100,000 comments were received and numerous stakeholders met with Bureau officials to present their views.

This outreach and consultation is essential to the CFPB's development of rules that are appropriate to the marketplace, and we urge the Bureau to continue this diligent and focused information gathering that can be useful to all of the Bureau's work, including rulemaking.

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[8] Prepaid Accounts Under the Electronic Fund Transfer Act (regulation E) and the Truth in Lending Act (Regulation Z) (Prepaid rule). The prepaid rule is available on the Federal Register at: https://www.federalregister.gov/documents/2016/11/22/2016-24503/prepaid-accounts-under-the-electronic-fund-transfer-act-regulation-e-and-the-truth-in-lending-act.

[9] Arbitration Agreements. The Final Rule is available on the Federal Register at: https://www.federalregister.gov/documents/2017/07/19/2017-14225/arbitration-agreements#citation-420-p33246.

Requests for Information Are Useful if Well-Targeted and Deliberate

With respect to Requests for Information, we agree that they can be useful for "gathering information on market conditions or issues, particularly regulatory options" as noted in this RFI. Consumers Union has commented on numerous such RFIs in the past, including on the use of alternative data and modeling techniques in the credit process,[10] consumer use of reverse mortgages,[11] mobile financial services,[12] an initiative on safe student banking,[13] and the need for clear rules regarding student loan servicing.[14] All of these RFI processes enabled stakeholders from all perspectives to provide input to the Bureau as it considered questions about the consumer impact of practices in the financial marketplace.

We do caution, however, against issuing multiple RFIs in quick succession — as the Bureau is now doing — seeking comment on all aspects of the Bureau's work. This recent spate of RFIs stand in contrast to the deliberate pace of past Bureau requests for information. As part of a call for evidence described by the Bureau as being intended to "to ensure the Bureau is fulfilling its proper and appropriate functions to best protect consumers", the Bureau issued 12 requests for information over the course of less than three months at the start of this yar. Of those, six remain open as of June 5. This rapid pace does not leave enough time for full input by stakeholders, nor does it allow for thorough consideration by the CFPB. In contrast, in all of 2017, the Bureau issued 10 requests for information. The rush of recent RFIs seems to indicate a departure from the deliberate, considered pace of years past.

Final Rules Have Reflected Thoughtful Consideration

We have been impressed with the quality of the final rules issued by the Bureau. They have reflected thoughtful consideration of the comments submitted by the public and stakeholders, and have established clear and workable rules for the marketplace. And the Bureau has been

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[10] *See*, CU Response to the CFPB's Request for Alternative Data in the Credit Process (August 1, 2017), https://consumersunion.org/research/cu-response-to-the-cfpbs-request-for-information-on-the-use-of-alternative-data-in-the-credit-process/.

[11] *See*, Comments to the CFPB on Request for Information Regarding Consumer Use of Reverse Mortgages (August 31, 2012), https://consumersunion.org/research/comments-to-the-consumer-financial-protection-bureau-on-request-for-information-regarding-consumer-use-of-reverse-mortgages/.

[12] *See*, CU Comment to the CFPB Regarding the Use of Mobile Financial Services (MFS)(September 10, 2015), https://consumersunion.org/wp-content/uploads/2014/09/CU_comments_CFPB_mobile_finance.pdf.

[13] *See*, CU Comments to the CFPB on a "Safe Student Account Scorecard" (March 30, 2015), https://consumersunion.org/wp-content/uploads/2015/03/CU_Ltr_CFPB_Safe_Student_Account_Scorecard.pdf.

[14] *See*, CU Comments to the CFPB on Student Loan Servicing Practices (July 3, 2015) https://consumersunion.org/wp-content/uploads/2015/07/CFPB_RFI_servicing_0715.pdf.

willing to make adjustments even after the issuance of the final rule, in response to reasonable concerns.

The final rule for prepaid accounts exemplifies the Bureau's flexibility and responsiveness. For more than a decade, Consumers Union advocated for consumer protections on prepaid cards. After a four-year process, the Bureau issued rules that extend a number of important protections to prepaid accounts, including uniform fee disclosures; protection against errors and loss, similar to legal safeguards currently available for debit and credit cards; prompt dispute resolution rights; free and easy access to account information; and clear rules of the road for the extension of credit.

As announced in October 2016, the prepaid rule was to be generally effective in October 2017. However, in April 2017, the Bureau, responding to industry feedback, extended the date to April 2018. A short while later, also in response to industry feedback, the Bureau re-opened aspects the rule for consideration, including error resolution rights for unregistered prepaid cards and linking credit cards to digital wallets. As Director Richard Cordray said at the time: "Today's request for comment shows we are listening closely to feedback on our rules to decide whether certain adjustments will help to achieve that goal."[15] Six months later, the Bureau published its changes to the rule, which included adjusting error resolution rights to exclude cards that had not completed registration; clarifying rules to provide greater flexibility in instances where credit cards are linked to digital wallets that store funds; and extending the final date for compliance by a year to April 2019.[16] As this example illustrated, the Bureau has shown that it can act quickly to address providers' concerns while still ensuring effective, protective rules for financial products and services.

Conclusion

As the RFI process moves forward, we urge the CFPB to keep its mission foremost in view: "implementing and enforcing Federal consumer financial law, for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[17]

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[15] Consumer Financial Protection Bureau press release, June 15, 2017, CFPB Seeks Comment on Proposed Changes to Prepaid Rule, Proposal Would Adjust Error Resolution Requirements and Provide More Flexibility for Credit Cards Linked to Digital Wallets, https://www.consumerfinance.gov/about-us/newsroom/cfpb-seeks-comment-proposed-changes-prepaid-rule/.

[16] Consumer Financial Protection Bureau press release, January 25, 2018, CFPB Finalizes Changes to Prepaid Accounts Rule, https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-changes-prepaid-accounts-rule/.

[17] 12 U.S.C. 5511(a).

We look forward to working with the CFPB to ensure that any changes to its rulemaking processes are carefully considered and advance the critical mission of the CFPB.

Sincerely,

Anna Laitin
Director, Financial Policy

ConsumersUnion®

POLICY & ACTION FROM CONSUMER REPORTS

May 25, 2018

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

RE: Request for Information Regarding Bureau External Engagement [Docket No. CFPB-2018-0005]

Dear Ms. Jackson:

Consumers Union[1] the advocacy division of Consumer Reports, writes in response to the Consumer Financial Protection Bureau's (CFPB) Request for Information (RFI) on its public and non-public external engagements.[2] We strongly support the CFPB's external engagements as a proven conduit for the CFPB to learn first-hand about the financial challenges faced by individuals and their communities, and to detect harmful trends in the marketplace.

The CFPB is seeking comments on all aspects of conducting future external engagements, including, among other things, strategies for seeking public and private feedback from diverse external stakeholders, and strategies for distributing information about external engagements to maximize awareness and participation.[3] External engagement is a cornerstone of the CFPB's ability to carry out its mission of "ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[4] provides opportunities for the CFPB to explain the rationale for its decisions, solicit feedback on CFPB proposals, disperse information, and inform the public about steps taken to police the marketplace to protect consumers from unsafe financial products and services. It promotes transparency and accountability. The public can evaluate for itself whether the CFPB is working to accomplish its mission.

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[1]Consumers Union is the advocacy division of Consumer Reports, an expert, independent, non-profit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. Consumers Union works for pro-consumer policies in the areas of financial services, as well as telecommunications, health care, food and product safety, energy, telecommunications, privacy and data security, and competition and consumer choice, among other issues, in Washington, DC, in the states, and in the marketplace. Consumer Reports is the world's largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its magazine, website, and other publications.

[2]The RFI on supervision processes is available at: https://files.consumerfinances.gov/f/documnts/cfpb_rfi_external engagements_022018.pdf

[3]Id. at page 6.

[4]See, 12 U.S.C. Section 5511(a).

For these reasons, we urge the CFPB to maintain its commitment to keeping a robust, direct, and ongoing engagement with the American public.[5]

Background – The Importance of the CFPB

The CFPB was established following the financial crisis a decade ago, when Congress recognized a gap in consumer protection and enforcement that allowed unfair, deceptive, and abusive practices in the financial sector to proliferate. Over the years, the CFPB has taken essential steps, long overdue, to protect consumers in this marketplace. Since it was launched in 2011, the CFPB has won almost $12 billion in refunds and relief for an estimated 29 million Americans who were harmed by financial companies, and has helped to resolve nearly one million consumer complaints involving problems with mortgages, credit cards, car loans, bank accounts, debt collection, and a variety of other issues.[6] Notable achievements by the CFPB for consumers include:

- Ensuring mortgages are affordable, by adopting rules to prevent the kind of reckless lending practices by banks that led to a record number of Americans losing their homes and that triggered the country's deep recession in 2008;
- Taking on deceptive credit card marketing, by ordering credit card companies to pay back $3.48 billion to consumers who had been defrauded into accepting unnecessary and costly add-on products and services, such as debt protection and credit monitoring;
- Providing prepaid card users with strong protections, by adopting rules that require prepaid card issuers to provide better fee disclosures, as well as the same strong protections limiting a consumer's financial exposure to unauthorized and fraudulent use that come with traditional debit and credit cards;
- Challenging abusive student loan practices, such as by suing Navient, the nation's largest student loan servicer, for giving borrowers inaccurate information, processing payments incorrectly, and failing to take appropriate action to address consumer complaints;
- Protecting consumers from deceptive reverse mortgage ads that tricked consumers into believing they could not lose their homes with a reverse mortgage; and
- Combating misleading credit score ads and promotions, by holding TransUnion and Equifax accountable for deceiving consumers about the usefulness and cost of the credit scores they marketed.

These achievements were possible, in large part, because of the CFPB's ability to listen to and gain insight from experts, consumers, and other stakeholders whose diverse experiences and perspectives help inform its work. Maintaining and enhancing the CFPB's public engagements is critical to ensuring that these achievements continue.

Discussion

- External Engagements Work

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[5]See, "Open Government", Consumer Financial Protection Bureau (2017).
[6]See, Factsheet, Consumer Financial Protection Bureau: By the numbers (July 2017).

Listening and responding to consumers is central to the CFPB's mission.[7] Engaging with the public on consumer financial issues ensures that consumers and other interested parties have visibility into the CFPB's work and have meaningful opportunities to express their views. That in turn ensures that the CFPB's work is informed by regular input from varied perspectives representing distinct points of view.[8] Moreover, public engagements give a voice to individuals and communities who might otherwise have difficulty accessing the regulatory process. It increases the public's understanding of financial issues and the role the CFPB plays in ensuring a safe marketplace.

Since its inception, the CFPB has held nearly 50 open meetings, field hearings, town halls, and roundtable discussions, in more than 41 different locations throughout the country.[9] In addition, the CFPB's Office of Servicemember Affairs has visited 176 military installations providing tips and advice for servicemembers, veterans, and their families as they face financial decisions throughout the military lifecycle.[10] These kinds of meetings foster an open and transparent dialogue between the CFPB and the public that allows for the free exchange of viewpoints and constructive public discourse on financial products and services. If the CFPB is not doing enough to protect consumers in the marketplace, the CFPB will hear about it at these meetings. The CFPB will be held accountable.

We therefore support the CFPB's public engagements goals and encourage the CFPB to do more to enhance its public outreach. We urge the CFPB to increase its presence in urban, rural, culturally and economically diverse areas, giving a voice to all Americans who rely on financial products and services for their financial well-being. The CFPB should work with state and local community groups to select locations and meeting times that will maximize participation.

- Advisory Boards – The Eyes and Ears of the Marketplace

Congress did not want the Bureau to carry out its mission in isolation, keeping only its own counsel. It wanted a more formal channel of public outreach and communication to ensure actual engagement with the public. To that end, Congress directed the Director of the CFPB to establish a Consumer Advisory Board (CAB) "to advise and consult with the Bureau in the exercise of its functions under the Federal consumer financial laws, and to provide information on emerging practices in the consumer financial products or services industry, including regional trends, concerns, and other relevant information."[11]

The CAB provides external feedback on a range of topics, including consumer engagements, policy development, and research. It also obtains input from external stakeholders on some of the most challenging issues faced in the marketplace, including tools for measuring financial well-being, ways to prevent and respond to elder financial abuse, and reaching limited-English-

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[7]See, "Report of the Consumer Financial Protection Bureau Pursuant to Section 1017(e)(4) of the Dodd-Frank Act, December 30, 2013.
[8]See, "The CFPB Strategic plan, budget, and performance plan and report, February 2016.
[9]See, "Report of the Consumer Financial Protection Bureau Pursuant to Section 1017(e)(4) of the Dodd-Frank Act, December 30, 2013.
[10]Id.
[11]Dodd-Frank Act Pub. L No. 111-203, Section 1014(a). The Consumer Advisory Board was chartered and established in September 2012.

speaking consumers.[12] CAB membership is open to the public and is diverse in gender, ethnicity and geography. Importantly, through the CAB, the CFPB obtains feedback on whether its current work is on track, and gathers intelligence to ensure that its future efforts are appropriately directed.

Accordingly, we strongly support the mission and goals of the CAB. We urge the CFPB to use the CAB and other resources[13] to aggressively survey the country to identify problems, explore solutions, seek input from stakeholders, and address financial concerns before they cause consumers and the marketplace harm. We further urge the CFPB to increase the frequency of CAB meetings, continue to have CAB meetings open to the public, and continue to make the CAB materials available to the public.

- Public Consumer Complaint Database Increases Transparency and Accountability for All

The CFPB is the first federal agency solely focused on consumer financial protection, and consumer complaints are instrumental to that work.[14] The CFPB's Office of Consumer Response hears directly from consumers about the challenges they face in the marketplace, brings their concerns to the attention of financial companies, and assists in addressing the complaints. And, with the consumer's permission, the CFPB can publicly post complaint narratives that describe, in the consumers' own words, their experiences in the marketplace. The narratives put the complaint in context, and allow members of the public to assess the validity of the complaint and draw their own conclusions. For many consumers, filing a complaint with the CFPB is the last resort after they attempted, but failed, to get their complaint resolved on their own. Over a million people have filed complaints with the CFPB, and of those, approximately 97% receive a quick response from the company -- due in large part to the CFPB's involvement.[15]

The Consumer Complaint Database (Database) is an essential tool in public engagement. It, too, promotes transparency and accountability for the benefit of all stakeholders. Consumers use the Database to evaluate products and make better choices;[16] the industry uses The Database to identify and correct lapses in customer satisfaction; and regulators use it to help determine their regulatory priorities. Consumers Union fought for the creation and continued sustainability of this Database. We strongly urge The CFPB to keep the Database open to the public.

In addition, we urge the CFPB to continue publication of its Monthly Complaint Report, last published in October 2017, the Special Edition Monthly Complaint Report, and other special complaint reports. These reports provide a snapshot analysis of consumer complaint trends, and highlight complaints received about a particular product, from consumers in a particular

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[12] See, "Semi-annual report of the Consumer Financial Protection Bureau (October 15-March 31, 2016).

[13]Also see, The Community Bank Advisory Council (CBAC), The Academic Research Council, and the Credit Union Advisory Council (CUAC). The CFPB has organized 47 meetings of its advisory boards/councils.

[14]See, "CFPB Monthly Complaint Report, Vol 24, June 2017.

[15]See, cfpb.gov, last visited on May 25, 2017.

[16]See, Consumers Union, "The CFPB's Consumer Complaint Database Shines a Light on the Financial Services Industry."

state or city. The reports are an invaluable resource for consumers, researchers, regulators, and companies on what is going on in the marketplace. We will be providing detailed comments on this issue in a response to the RFI on public reporting practices.[17]

- Technology Increases Public Engagement

The use of technology is an effective, cost-saving way to engage the public. We support the CFPB's use of online outreach and social media to elicit comments on proposed rules, worksheets and disclosures.[18] For example, the CFPB used the internet to elicit feedback on its integrated Truth-in-Lending Act (TILA) and Real Estate Settlement Procedures Act (RESPA) forms.[19] The Bureau received over 150,000 visits to its "Know Before You Owe" website, and over 27,000 text box comments and emails on the form. Readers had the chance to submit comments on the sample form online, and also in response to an October 2011 blog entry on the form.[20] The comments were helpful in suggesting how to fix flaws in the prototype forms. For student loans, the CFPB blogged and posted a sample financial aid worksheet to its website for public comment. Over 20,000 consumers viewed the draft form online.[21] After reviewing the comments, the CFPB posted a summary of the feedback online and transmitted it to the Department of Education.[22] Later, the CFPB released the Financial Aid Comparison Shopper, an interactive online worksheet that helps families compare the cost of college education and financial aid offers across schools.[23] Over 3,270 colleges voluntarily adopted the worksheet.[24]

In addition, the CFPB effectively used social media to elicit early feedback on its prepaid card rule, overdraft protection, certifications and designation of financial planners and advisors, and other consumer protection issues.[25]

These are but a few examples of how the CFPB has used technology for public outreach and engagement. We urge the CFPB to continue to build upon its commitment to using technology as an efficient and useful tool for enhancing public engagement.

Conclusion

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[17]Request for Information Regarding Bureau Public Reporting Practices of the Consumer Complaint Information, Docket No. CFPB -2018-0006.

[18]See, Patricia McCoy, "Public Engagement in Rulemaking: The Consumer Financial Protection Bureau's New Approach, Boston College Law School. (2012).

[19]See, CFPB, "Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (regulation Z): Proposed Rule with Request for Public Comment, at 29-32 (2012).

[20]See, See, Rohit Chopra, "Know Before You Owe: Let's Tackle Student Loans, CFPB (October 26, 201).

[21] Id.

[22] See, Rohit Chopra, Your Feedback on Know Before You Owe: Student Loans, CFPB (Jan. 27, 2012), http://www.consumerfinance.gov/blog/your-feedback-on-know-before-you-owe-student-loans/.

[23]CFPB Press Release, "Consumer Financial Protection Bureau Releases Financial Aid Comparison Shopper (April 11, 2012), http://www.consumerfinance.gov/blog/paying -for-college-help-us-make-it-easier-for-you-to-choose/

[24]See, Factsheet, CFPB by the numbers (2017).

[25] See, Patricia McCoy, supra.

The CFPB's public engagement activities help it shape policy, set priorities, develop regulatory options, and evaluate the effectiveness of its regulatory choices. It increases public awareness and promotes transparency and accountability. The public can determine for itself if the CFPB is fulfilling its mission. As the RFI process moves forward, we urge the CFPB to keep its mission foremost in view: "implementing and enforcing Federal consumer financial law, for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[26]

We look forward to working with you to ensure that any changes to the CFPB external engagement mandate are carefully considered and advance the important mission of the CFPB.

Sincerely,

Pamela Banks
Senior Policy Counsel
Consumers Union

Sincerely,

Christina Tetreault
Senior Staff Attorney
Consumers Union

[26] 12 U.S.C. Section 5511(a).

POLICY & ACTION FROM CONSUMER REPORTS

April 19, 2018

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

RE: Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes [Docket No. CFPB-2018-0001]

Dear Ms. Jackson:

Consumers Union, the advocacy division of Consumer Reports,[1] writes in response to the Consumer Financial Protection Bureau's Request for Information (RFI) on its use of civil investigative demands and their critical role in enabling the agency to achieve its mission and objectives.

As many federal law enforcement agencies have long recognized, the ability to obtain information from an investigatory target is an essential enabling those agencies to fulfill their statutory missions to enforce the law. The CFPB is one of many agencies that obtains its information through civil investigative demands (CIDs).[2] The CFPB has used its CID authority appropriately and successfully in recent years to uncover evidence of widespread misconduct at large banks, loan servicers, for-profit colleges and other companies subject to CFPB jurisdiction. Without its CID authority, it is not clear that these violations would ever have come to light. This RFI asks whether CIDs are imposing undue burdens on entities who receive CIDs. We urge the CFPB to carefully review any comments received and to consider the many benefits that CIDs provide to consumers, law enforcement, and a fair and even-handed marketplace. It is essential to ensure that CIDs remain an effective tool for enforcing the law and upholding the agency's core mission: to protect consumers from harmful financial practices that violate the law.

The mission of the CFPB is spelled out in the law establishing it: "The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair,

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[1] Consumers Union is the advocacy division of Consumer Reports. Consumers Union works for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves, focusing on the areas of financial services, as well as telecommunications, health care, food and product safety, energy, and competition and consumer choice, among others. Consumer Reports is the world's largest independent product-testing organization. Using its more than 60 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

[2] *See, e.g.*, 15 U.S.C. § 57b-1, 15 U.S.C. § 1312, 31 U.S.C. § 3733 (2018).

transparent, and competitive."[3] In the nearly seven years since the CFPB opened its doors, action in service of this mission has improved the market for consumer financial products, benefiting both American consumers and responsible providers.

Congress set five specific objectives for the Consumer Financial Protection Bureau. The CFPB is to ensure that "(1) consumers are provided timely and understandable information to make responsible decisions about financial transactions; (2) consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination; (3) outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens; (4) Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and (5) markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation."[4]

In working to meet these objectives, the CFPB conducts financial education programs; collects, investigates, and facilitates responses to consumer complaints; researches and publishes information on how markets for consumer financial products are functioning, identifying both risks to consumers as well as the proper functioning of such markets; supervises covered entities, taking appropriate enforcement action to address violations of Federal consumer financial law; and issues rules, orders, and guidance implementing Federal consumer financial law. For consumers, these efforts mean more educated financial decisions, fewer risks in the marketplace, help in getting much-needed resolution to problems, and protections under law that ensure they are treated fairly.

The CFPB was established following the financial crisis a decade ago, when Congress recognized a gap in consumer protection and enforcement that allowed unfair, deceptive, and abusive practices in the financial sector to proliferate. Over the last seven years, the CFPB has taken essential steps to protect consumers in this marketplace.

Since it was launched in 2011, the CFPB has won almost $12 billion in refunds and relief for an estimated 29 million Americans who were harmed by financial companies, and has helped to resolve nearly one million consumer complaints involving problems with mortgages, credit cards, car loans, bank accounts, debt collection, and a variety of other issues. Additional notable achievements by the CFPB for consumers include:

- Ensuring mortgages are affordable, by adopting rules to prevent the kind of reckless lending practices by banks that led to a record number of Americans losing their homes and triggered the country's deep recession in 2008;
- Taking on deceptive credit card marketing, by ordering credit card companies to pay back $3.48 billion to consumers who were defrauded into accepting unnecessary and costly add-on products and services, such as debt protection and credit monitoring;
- Providing prepaid card users with strong protections by adopting rules that require prepaid card issuers to provide better fee disclosures, as well as the same strong protections limiting a consumer's financial exposure to unauthorized and fraudulent use that come with traditional debit and credit cards;
- Challenging abusive student loan practices, such as by suing Navient, the nation's largest student loan servicer, for giving borrowers inaccurate information, processing payments incorrectly, and failing to take action to address consumer complaints;

[3] Pub. L. 111–203, title X, § 1021, 124 Stat. 1979 (July 21, 2010).

[4] *Id.*

- Protecting consumers from deceptive reverse mortgage ads that tricked consumers into believing they could not lose their homes with a reverse mortgage; and
- Combating misleading credit score ads and promotions, by holding TransUnion and Equifax accountable for deceiving consumers about the usefulness and cost of the credit scores they marketed.

The CFPB's CID authority, found in 12 U.S.C. section 5562, is modeled closely on the CID authority of the Department of Justice under the Antitrust Civil Process Act of 1962[5] and that of the Federal Trade Commission under section 20 of the FTC Act.[6] As with its use in DOJ and FTC investigations, this provision clarifies the CFPB's authority, when it "has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to a violation," to obtain the information it needs to satisfactorily determine whether a violation has been committed. The availability of this authority has enabled the agency to obtain the needed information while minimizing legal uncertainty that would lead to unnecessary litigation or other burden on the entities involved.

The CFPB issued CIDs over the course of several months to obtain compelling evidence of systematic failures at Navient, the nation's largest servicer of both federal and private education loans. According to its SEC filings, Navient received CIDs from the CFPB and state attorneys general between December 2013 through August 2015 regarding its loan servicing practices.[7] The resulting CFPB complaint charged Navient and its affiliated debt collection arm, Pioneer Credit Recovery, with failing or misleading borrowers at every stage of repayment: incorrectly applying payments; steering borrowers into interest-accruing forbearances instead of affordable alternative repayment plans; frustrating borrowers' attempts to renew affordable repayment plans; and harming borrowers' credit histories, among other things.[8]

The Wells Fargo "fake account scandal" is another key example of the effectiveness of the CID authority in enabling the CFPB to stop harmful financial misconduct and obtain redress for harmed consumers. The CFPB's probe into Wells Fargo's sale practices uncovered a massive scheme to sign existing customers up for additional banking and credit card accounts without their knowledge or consent -- resulting in $185 million in fines, with restitution back to harmed consumers.[9] In its consent order with the bank, announced in September 2016, the CFPB

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[5] 15 U.S.C. §§ 1311-1314.

[6] 15 U.S.C. § 57b-1 (added 1980).

[7] Supplement to the Remarketing Prospectus for SLM Student Loan Trust 2005-8 (filed Jan. 19, 2017), *available at* https://www.sec.gov/Archives/edgar/data/1338038/000091412117000069/sl36487583-ex99_1.htm (notifying SEC and investors of litigation that could affect value of student loan-backed securities).

[8] Complaint at 1-5, Consumer Fin. Protection Bureau v. Navient Corp., Case No. 17-cv-00101 (filed M.D. Penn. Jan. 18, 2017), *available at* https://files.consumerfinance.gov/f/documents/201701_cfpb_Navient-Pioneer-Credit-Recovery-complaint.pdf.

[9] *See* Consent Order, Consumer Fin. Protection Bureau v. Wells Fargo Bank, N.A. (filed Sept. 8, 2016), *available at* https://files.consumerfinance.gov/f/documents/092016_cfpb_WFBconsentorder.pdf (setting $100 million fine to be paid to CFPB); Press Release, Consumer Financial Protection Bureau Fines Wells Fargo $100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts (Sept. 8, 2016), *available at* https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/ (announcing additional $85 million to be paid to state and local agencies).

revealed that Wells Fargo's misconduct caused more than two million unauthorized accounts to be opened, with many of the customers incurring unexpected fees on those unauthorized accounts.[10]

The CFPB's investigative activities also uncovered an illegal predatory lending scheme at Corinthian Colleges, a massive for-profit college chain that aggressively marketed its career training programs to students and encouraged them to take out expensive private loans to pay for tuition.[11] According to its SEC filings, Corinthian tried repeatedly to set aside CIDs that the CFPB issued in 2012 and 2013.[12] However, the agency's persistence was crucial in uncovering widespread predatory lending and illegal debt collection practices at the company. The agency uncovered internal communications in which Corinthian employees described their target student demographic as having "low self-esteem," and "minimal understanding of basic financial concepts," among other things - indicating their interest in recruiting students from vulnerable populations.[13] The CFPB brought suit against Corinthian in September 2014, and a few months later announced a $480 million settlement negotiated in cooperation with the Department of Education to provide debt relief to harmed students.[14]

As far as we are aware, the CFPB has used its CID authority in an appropriately measured way. And as with the DOJ and FTC authority, there are processes available to entities who receive a CID, to work with the CFPB to further tailor a request more precisely to the relevant and useful information in its possession, custody, or control, or to petition the court to narrow the scope of a CID or to disallow it in its entirety. We believe these are sufficient procedural safeguards against inappropriate use.

Conclusion

The Bureau has stated that it has begun this call for evidence in order to "ensure the Bureau is fulfilling its proper and appropriate functions to best protect consumers." As this process moves forward, we urge the Bureau to keep its mission foremost in view: of implementing and enforcing Federal consumer financial law "for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."

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[10] *See* Consent Order, *supra* note 9, at 5-7.

[11] Complaint at 3-4, Consumer Fin. Protection Bureau v. Corinthian Colleges, Inc., Case No. 14-cv-07194 (filed N.D. Ill. Sept. 16, 2014), *available at* https://files.consumerfinance.gov/f/201409_cfpb_complaint_corinthian.pdf.

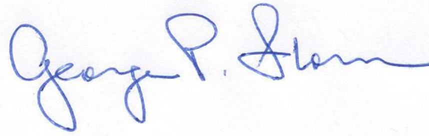
[12] Form 8-K at 16-17, Corinthian Colleges, Inc. (Aug. 12, 2014), *available at* https://www.sec.gov/Archives/edgar/data/1066134/000110465914060150/a14-18886_18k.htm.

[13] Complaint at 2-3, Consumer Fin. Protection Bureau v. Corinthian Colleges, Inc., Case No. 14-cv-07194 (filed N.D. Ill. Sept. 16, 2014), *available at* https://files.consumerfinance.gov/f/201409_cfpb_complaint_corinthian.pdf.

[14] Agreement at 1, ECMC Group, Inc.'s purchase of certain Corinthian Colleges, Inc. assets (Feb. 2, 2015), *available at* https://files.consumerfinance.gov/f/201502_cfpb_bulletin_cfpb-ecmc-agreement.pdf (letter from CEO of ECMC to CFPB Director Cordray, confirming debt relief as condition for sale of Corinthian campuses to ECMC).

We look forward to working with you to ensure that any changes are carefully considered and advance the important mission of the CFPB.

Sincerely,



Suzanne Martindale
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Consumers Union

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Comments of Financial Regulation and Consumer Protection Scholars on Docket No. CFPB-2018-0002

May 7, 2018

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

Dear Ms. Jackson:

The Consumer Financial Protection Bureau (the "Bureau") has requested, in its notice dated February 5, 2018, "comments and information from interested parties to assist the Bureau in considering whether and how to amend the Bureau's Rules of Practice for Adjudication Proceedings." 83 Fed. Reg. 5055 (Feb. 5, 2018), Docket No. CFPB-2018-0002.

We are lawyers and law professors, some of whom have studied administrative adjudication by financial regulators, and the principal drafters of our comment have no financial or other relationship with parties that have participated in the Bureau's administrative proceedings. We can provide evidence that can inform the Bureau's assessment of where to direct its regulatory reform resources. Many of the below signatories also have experience in public enforcement of consumer protection laws. We appreciate the opportunity to submit these comments for your consideration.

David Zaring,
Associate Professor of Legal Studies & Business Ethics, The Wharton School

Jayme Wiebold
Penn Law '18

William Black
Associate Professor of Economics and Law, University of Missouri-Kansas City

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Professor of Law, Santa Clara University School of Law

Introduction

In our view, the Bureau should put its limited regulatory reform resources to use in other, more pressing areas. We write to make three main points.

First, the Bureau has not made much use of its Administrative Law Judge (ALJ) program – and indeed, for a long time did not have its own ALJ. To begin, the Bureau borrowed an ALJ from the Securities and Exchange Commission. It has utilized administrative adjudication in eight contested matters in its entire history. All but two of these cases were settled, for, in the case of Auto Cash Leasing, a $10,000 civil monetary penalty,[1] in the case of Interstate Lending, a $4,000 civil monetary penalty,[2] in the case of Oasis Title Loans, a $20,000 civil monetary penalty,[3] in the case of Phoenix Title Loans, a $40,000 civil monetary penalty,[4] in the case of Presto Auto Loans, a $125,000 civil monetary penalty,[5] and in the case of 3D Resorts-Bluegrass, a $1 civil monetary penalty and a restitution order that could amount to $50,000.[6] These modest penalties were accompanied by other commitments from the defendants, but the sums involved do not raise the prospect of great hardships. There has been only one large award in the history of the Bureau's administrative proceedings – PHH Corp. was ordered to pay restitution and disgorgement in the amount of $6,442,399,[7] an award increased on review by the director, which in turn was reversed by the D.C. Circuit at both the panel and *en banc* level. *See* PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 83 (D.C. Cir. 2018).

Diverting regulatory reform resources to solve purported problems in a program that is utilized so rarely by the Bureau would be an inefficient use of the Bureau's limited, and very valuable, time. Indeed, there has not yet been a chance to see whether the current rules are good ones. Once more cases are sent to administrative adjudication, a more informed decision can be made about whether and how to reform the process. In the meantime, the Bureau would be poorly served by choosing to invest its resources in reforming a program that it barely makes use of, that

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[1] The CFPB's order may be found at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/20170130_cfpb_2016-CFPB-0017_Document-026.pdf.

[2] The CFPB's order may be found at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201612_cfpb_0018-Document030-12202016.pdf.

[3] The CFPB's order may be found at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/2016-CFPB-0019_Document_017_11012016.pdf.

[4] The CFPB's order may be found at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201703_cfpb_2016-CFPB-0020_Document-027.pdf.

[5] The CFPB's order may be found at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201612_cfpb_0021-Document027-12202016.pdf.

[6] The CFPB's order may be found at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201312_cfpb_consent-order_3dresorts-bluegrass.pdf.

[7] The CFPB's order may be found at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201411_cfpb_recommend-decision-final_205.pdf.

has been adequately policed through judicial review, and where it can, at the Director's discretion, reduce Bureau usage still further.

Second, even though they are rarely utilized by the Bureau, administrative proceedings are not a miscarriage of justice that requires attention in the first place. Empirical studies of ALJ decision-making in financial regulation matters, one of which one of us conducted, show that defendants win about as often before ALJs as they do in federal court. *See* David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1184-85 (2016). And decades of precedent establish the principle that the lengthy process afforded defendants in formal administrative proceedings is comparable to that of federal court and is adequate under the law. ALJ cases are resolved more quickly, as a general matter, than district court cases, but the Supreme Court has consistently held that those cases are comparable with regard to the quality of process provided. we expand upon this point in the discussion below.

Third, if the Bureau does wish to devote its resources to reforming its administrative proceedings, we have reviewed those rules and the questions in the Bureau's request for information, and recommend one small change. We find its proceedings to be consistent with the way those proceedings work in other agencies. The SEC has, however, recently extended the length of time for decision from four to eight months. A longer timeline, while still being short and efficient for all parties, gives the defendant more time to prepare the case. The Bureau could do something similar with its own rocket docket, though it may be that section 1081.400, which permits a 300 day timeframe without Director approval, meets this need. We expand on this point in the discussion section below.

Discussion

Formal administrative proceedings vary somewhat between agencies, but all such proceedings must meet the minimum requirements of the Administrative Procedure Act, and so broadly involve an impartial decisionmaker, the opportunity to present evidence, a hearing, cross-examination, and a panoply of other procedural rights. As the Bureau has observed, "The APA is designed to guarantee the decisional independence of administrative law judges and ensure fairness in administrative proceedings before federal government agencies."[8] ALJs conduct hearings "in a manner similar to federal bench trials," giving parties the opportunity to submit briefs, and preparing decisions that contain proposed findings of fact and conclusions of law.[9]

The Supreme Court has confirmed that procedural protections offered by administrative hearings are comparable to federal district court procedures. *See e.g.*, Fed. Mar. Comm'n v. S.C. Ports Auth., 535 U.S. 743, 758 (2002) ("[T]he role of the ALJ . . . is similar to that of an Article III judge."); Butz v. Economou, 438 U.S. 478, 513 (1978) ("[T]he role of the modern . . . administrative law judge . . . is 'functionally comparable' to that of a judge."). The Court has held that the fact that proceedings that are brought inside an agency before an ALJ indicate that the requirements of due process are satisfied rather than violated. *See e.g.*, Marshall v. Jerrico, Inc., 446 U.S. 238, 248–52 (1980) (holding that a civil penalty system permitting payment of

[8] CFPB, Administrative Adjudication Proceedings, https://www.consumerfinance.gov/administrative-adjudication-proceedings/ (last visited April 17, 2018).
[9] Office of Administrative Law Judges, U.S. SEC & Exchange Commission, https://www.sec.gov/alj (last visited Mar. 28, 2018).

fines assessed by an administrative law judge to a federal agency did not violate due process because it was "the administrative law judge, not the [Employment Standards Administration], who performs the function of adjudicating child labor violations"); Withrow v. Larkin, 421 U.S. 35, 58 (1975) (broadly affirming the consistency of agency adjudicative procedures with due process). Moreover, there is no evidence that ALJs treat defendants unfairly.

While the CFPB has a relatively short history using ALJs, the SEC has used ALJs for many decades. Thus, studies of SEC ALJs are illustrative as the Bureau evaluates its ALJ rules. These studies have uniformly found that SEC ALJs are impartial and are not more favorable to the SEC than federal judges are.

One of us conducted a study of a five-year sample of SEC ALJ cases. *See* David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1184-85 (2016). According to a regression analysis, no one ALJ was more or less likely to rule for the SEC than any other SEC ALJ. And while the agency lost only a handful of cases during that period, in either administrative proceedings or in federal court, the ALJs did not award the SEC the full relief the agency had sought in 29% of cases. The results of the SEC study are consistent with the rule-of-thumb rate for victories by any federal agency in federal court which, when various studies are pooled, comes out to about 69%. David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 170 (2010). The 71% success rate for administrative proceedings, in other words, was right in line with the success rate of most agencies in federal court.

We can be even more specific: the record for cases brought in federal court by the SEC is very similar to the agency's record in administrative proceedings. A comparison between the cases brought by the SEC in the Southern District of New York during the five years following the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act and administrative proceedings the SEC commenced against defendants during the same period are revealing. The district, which covers Manhattan, is ground zero for securities enforcement in the federal courts. The judges have extensive experience with securities fraud cases, both civil and criminal, and some of the judges have a reputation for putting the agency through its paces. Of the 119 such reported cases in the district, the SEC success rate was high; it received a positive result in 111 of the tracked cases, a 92% win rate.

Over the sample period, these results make the SEC look like a comparably victorious enforcer regardless of the forum in which it chose to pursue enforcement; there is no statistically significant distinction between the rates of success. With 8 failures in Manhattan district court in the five years following the passage of Dodd-Frank, and only 6 losses in the 168 enforcement proceedings the SEC brought before its ALJs during the same period, a 96% win rate, there is little evidence that the forum chosen by the SEC resulted in stark advantages for the agency either way.

Other empirical studies of the ALJs have also found no evidence of bias towards the agency. *See* Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315 (2017); Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 FORDHAM L. REV. 1143, 1178 (2016) ("there is no statistically significant difference between the SEC's success rate before ALJs and its success rate in federal court").

All the evidence suggests, in sum, that defendants receive abundant process in formal administrative proceedings, and that they do as well in those proceedings as they do in federal court. There is no injustice in administrative proceedings in general that would be solved by increasing the procedural burdens on those proceedings. Nor has the Bureau utilized enforcement proceedings in contested cases frequently enough to reveal any problems with those proceedings, making a redo premature.

We finish with some specific comments addressing some of the Bureau's specific questions, and describe why most of the rules should not be altered. In the final comment, we propose one modest change that might be worth the Bureau's consideration if it does decide to revisit the administrative proceedings rules:

1. The Bureau has asked whether "a policy of proceeding in federal court in all instances would be preferable." Administrative proceedings benefit both the Bureau and other agencies when it comes to recording settlements and processing uncontested enforcement actions. In these cases, administrative proceedings can serve as an efficient alternative for vindicating agency policy without the expense and complications of going to federal court. These cost savings inure to respondents as well as to agencies.

Although it has only diverted eight initially contested cases to administrative proceedings, the Bureau has filed 110 stipulation and consent orders before ALJs during this period; these cases were settled the day they were brought, and therefore required little process from the agency adjudicator. The SEC, for its part, has relied on its administrative law judges to handle settlements and enforcement actions against nonreporting companies, or to process follow-on civil sanctions, after court convictions for violations of the securities laws. This sort of routine enforcement work makes up the bulk of what those agency ALJs do. The Bureau would benefit from having the option of pursuing administrative cases in these contexts even if it decided to handle contested and other enforcement matters in federal court. At the very least, this option should be preserved. But of course, in addition to uncontested cases, administrative proceedings can be useful in contested actions as well. As mentioned above, administrative proceedings provide the Bureau with an option that will save both the Bureau and the defendant time and resources, while still providing the defendant sufficient due process.

2. The Bureau has asked whether it should "expressly adopt the Federal Rules of Evidence" and in particular the hearsay rule. Anyone who has appeared before an adjudicator knows that the adjudicator can discount third party evidence, and no one thinks that the hearsay rule, as expressed in the Federal Rules of Evidence, with all of its exceptions, is a paragon of consistency. The Bureau sensibly adopted section 1081.303(b) to establish rules of evidence that were "consistent with general administrative practice." It would be far better to retain the usual rules of evidence that non-jury adjudications employ.

3. Permitting defendants to be "afforded the opportunity to stay a decision of the Director pending appeal by filing a *superseadeas* bond, consistent with Federal Rule of Civil Procedure 62(d)" poses two different problems, depending upon the meaning of the inquiry. If the point of such a change would be to permit litigants to avoid Director review of a preliminary decision by an ALJ, the amendment would not be consistent with the separation of powers doctrines expressed by cases such as Free Enterprise Fund v. Public Company Accounting Oversight

Board, 130 S. Ct. 3138 (2010), which stood for the proposition that executive officers accountable to the President had to make the final decisions in administrative adjudications. Staying an interim executive branch action before an officer of the United States could review the decision would unconstitutionally permit the courts to review enforcement actions before politically accountable executive branch officers had a chance to conduct their own review of the initial decisions made in those actions. Similar problems would be posed if the stay of a Director decision would be automatic, under the agency's rules, upon the posting of a bond. On the other hand, if the amendment of the rules is meant to make the *superseadeas* bond more available in judicial proceedings reviewing the Director's decision, then the Federal Rules of Civil and Appellate Procedure would apply, and the Bureau's own administrative proceedings rules would be irrelevant.

4. The Bureau asks whether there should be changes to the requirements that the Bureau make documents available to the party for inspection, and whether there should be changes to the requirements for issuing subpoenas, specifically whether counsel for a party should be entitled to issue subpoenas without leave of the hearing officer. These provisions both work to ensure that administrative proceedings are fair and efficient. The production rule ensures that defendants have access to all materials the Bureau relied on in its investigation. This renders the traditional discovery process unnecessary, and therefore the subpoena power much less useful. The hearing officer's input on a subpoena request ensures that frivolous requests do not delay the process, and presents very minimal due process concerns because the party already has access to all the same information that the Bureau possesses.

5. The Bureau asks whether it should revise the limitations on the number of expert witnesses that may be called as provided in 12 CFR 1081.210(b). As discussed above, it is well established that the administrative hearings at the SEC afford defendants appropriate due process, including limits on the number of expert witnesses that may be called. Expert witnesses are sometimes valuable, but can increase the complexity and costs of proceedings for all parties, their use should accordingly be measured. The long history of ALJ utilization of experts, at the SEC and elsewhere, in proceedings that the Supreme Court has reviewed dozens of times without complaint, suggests that there is no concern that limitations on expert witnesses infringe on due process rights. The Bureau also asks whether it should incorporate the Federal Rules of Civil Procedure in regards to the required disclosures of expert witnesses. It is reasonable to expect an ALJ to have the legal competence necessary to understand an expert witness' function and qualifications without recourse to the full panoply of procedures required by the court procedural rules.

6. Regulated industry has indicated that it finds mandatory arbitration to be an attractive way to resolve consumer disputes. In many ways, the benefits of efficiency and cost that accrue to mandatory arbitration also accrue when the CFPB enforces claims through ALJs. Both processes would seem to ultimately lower costs to consumers and regulated industry.

7. A benefit to both the agency and regulated industry is the fast nature of administrative proceedings. The Bureau's rules call for proceedings to commence within 30 to 60 days of the notice of charges, and currently disfavors motions for extensions of time. If the Bureau does decide to re-examine its procedural rules, it might lengthen the window for this process to guarantee that the proceedings are resolved within a year, rather than within six months. The

SEC doubled the length of time between complaint and hearing to eight months from four.[10] It did so after complaints that defendants had insufficient time to prepare for litigation, while the agency could spend unlimited time investigating a case before filing. On the other hand, formal proceedings that last too long are expensive and burdensome for both defendants and the agency. Finally, it may be that section 1081.400, which permits a 300 day timeframe for the resolution of administrative proceedings without Director approval, meets this need, though the question has come up so infrequently, that it is not entirely clear (it is true, however, that in one case, administrative proceedings did not commence until seven months after the filing of the complaint). It might be appropriate to ensure that administrative proceedings are resolved within one year.

Conclusion

For the foregoing reasons, the Bureau should not revisit its administrative proceedings regulations. Administrative adjudication in and of itself is not a problematic process, but rather is a process that provides sufficient due process and saves both sides time and expense. Further, the Bureau should not choose to invest its resources in reforming a program that it barely makes use of, that has been adequately policed through judicial review, and where it can reduce Bureau usage further at the Director's discretion. Please do not hesitate to get in touch with David Zaring if you have any questions about this comment, or wish to enlarge upon the issues therein in any way.

[10] 17 C.F.R. § 201.360.

May 29, 2018

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

Via email: *FederalRegisterComments@cfpb.gov*

RE: Request for Information, CFPB External Engagement/Docket No. CFPB-2018-0005

Dear Ms. Jackson,

On behalf of the undersigned, we offer the following comment in response to the Request for Information (RFI) regarding the Consumer Financial Protection Bureau's (CFPB) External Engagements.

Congress created the CFPB following widespread abuse of consumers by financial companies that led to the financial crash of 2008. Congress assigned the new agency a singular consumer protection mission and directed it to focus on six key functions: supervising entities for compliance with the law, taking enforcement action to address violations, conducting financial education, addressing consumer complaints, monitoring markets to identify risks to consumers, and issuing rules to implement consumer protection law.[1]

"External engagement"—ongoing, robust communication with external stakeholders—is vital to all of these functions. As organizations attuned to consumer interests, we enthusiastically support such engagement, and especially encourage CFPB conversation with individual consumers. Our organizations and members participate regularly in civic discourse, and we believe strongly in the value of the information that individual consumers and their representatives can provide to the CFPB's policymaking and decision-making processes.

The CFPB has built a tradition and culture of robust public engagement.

From its inception through November, 2017, external engagements have figured as a hallmark of the CFPB. The CFPB has organized 47 meetings of its advisory boards, 33 field hearings, and 15 town halls in more than 40 cities. In addition, the CFPB has thoughtfully and routinely engaged with stakeholders through a range of other important mechanisms. These include meetings with stakeholders, speaking engagements, and conferences. Also, to engage with individual consumers and other stakeholders on a daily basis, the CFPB has established a consumer complaints system, its "Tell your story" website, [2] and social media accounts. [3]

The CFPB's culture of engagement began early. In the first months of the CFPB, Treasury Special Advisor Elizabeth Warren noted: "Members of the CFPB team and I sat in on foreclosure court in Miami,

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[1] 12 USC § 5511(b), (c)
[2] *Your Money. Your Story*. CONSUMER FINANCIAL PROTECTION BUREAU (website visited May 4, 2018) https://www.consumerfinance.gov/your-story/
[3] *Consumer Financial Protect, by the numbers,* CONSUMER FINANCIAL PROTECTION CFPB (website visited April 16, 2018) https://files.consumerfinance.gov/f/documents/201701_cfpb_CFPB-By-the-Numbers-Factsheet.pdf

met with victims of predatory lending in San Antonio and the Mission District of San Francisco, and held a roundtable in Columbus, Ohio. We have listened to the diverse voices of the Chicago community at Lakeview Lutheran Church and the concerns of consumer advocates in Little Rock, Arkansas. The stories we have heard from so many people across the country have only deepened our conviction that better consumer financial protection is urgently needed."[4]

And, as the CFPB has grown, it has continued to engage, regularly and deeply, with the diverse set of stakeholders that care about and are affected by the consumer protection activities it engages in as a function of its mandate.

The CFPB's organization appropriately reflects the importance of external engagement across many sectors. Its Division of External Affairs includes offices focused on outreach to the nonprofit sector, financial institutions, and other government entities, as well the agency's advisory groups. The Office of Consumer Response engages with consumers and other stakeholders, through its consumer complaint system. Other offices in the Division of Consumer Education and Engagement have focused on the needs of servicemembers, students and young Americans, older Americans, and economically vulnerable consumers. The Division of Research, Markets, and Regulations conducts additional outreach to various regulated industries. And, pursuant to statutory responsibilities, the Office of the Ombudsman engages the public. In 2017, for example, the Ombudsman held three teleconferences with state banking associations from 20 states. It also held teleconferences with regional consumer groups in the Northeast and West regions.[5]

The CFPB must continue this important engagement with external stakeholders

We believe it is vital for the agency to sustain and extend the external engagement that has been a hallmark of its first six years. Robust external engagement ensures that the CFPB can share information with consumers, industry participants, and the wide range of other entities interested in and affected by the CFPB's actions. Moreover, external engagement ensures that the CFPB's policymakers, consumer educators, attorneys, examiners, and other staff have the information they need to understand and appropriately address consumers' needs and experiences. Any engagement forum, from a one-on-one conversation to a large town-hall meeting to a social media exchange, can provide the CFPB with invaluable information about how the markets for consumer financial products and services operate and the risks that consumers may face, and this information is vital for the CFPB to develop and target its initiatives appropriately.

Because of the importance of external engagement to CFPB operations, we are troubled by recent indications that a change in leadership has been leading the CFPB away from external engagement with consumers and consumer representatives since he arrived at the agency in late November, 2017. For example, while the CFPB held three public events during the five months through November 2017, the agency has held no public events in the five months since then[6] and cancelled a meeting of the

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[4] *Testimony of Elizabeth Warren before the Committee on Oversight and Government Reform,* Elizabeth Warren, CONSUMER FINANCIAL PROTECTION CFPB (July 14, 2011) https://www.consumerfinance.gov/about-us/newsroom/testimony-of-elizabeth-warren-before-the-committee-on-oversight-and-government-reform/

[5] *2017 Annual Report to the Director, CFPB Ombudsman's Office*, CONSUMER FINANCIAL PROTECTION CFPB (website visited April 23, 2018) https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_ombudsman-office-annual-report_fy2017.pdf

[6] Events, Consumer Financial Protection Bureau (website visited May 4, 2018) https://www.consumerfinance.gov/about-us/events/

Community Bank Advisory Board,[7] the Credit Union Advisory Council,[8] with other cancellations expected. Moreover, while seeking to direct dramatic policy shifts at the Bureau, Mr. Mulvaney appears to have largely insulated himself from external input. To take March 2018 as an example, according to his calendar, Mr. Mulvaney held only three external meetings during that month. These three meetings were with two government groups and one industry entity: the Chamber of Commerce, the Florida Commissioner of Financial Regulation, and the Small Business Administration Administrator.[9] There are no meetings listed with consumers, or consumer groups. We are aware of only one meeting by Mr. Mulvaney with the broad set of consumer and community based organizations with which we are familiar during his tenure. By contrast, in March 2017, then-CFPB Director Cordray met with 15 consumer, student or faith groups; nine business leaders or trade associations, including the Chamber of Commerce; and 10 government officials, including two members of Congress.[10]

We are especially concerned about signs that the agency seeks to reduce external engagement with individual consumers. We are particularly alarmed that Mr. Mulvaney has indicated that he may restrict public access to the consumer complaint database, a key way that the CFPB engages with members of the public. And while the CFPB's RFI on external engagement notes the agency's expectation that "entities that have engaged with the Bureau are likely to have useful information and perspectives about Bureau engagements," this document makes no mention of individual consumers.[11] More broadly, we are troubled that this RFI along with the others threaten to lead to less consumer protection, not more.

We urge CFPB leadership, as well as staff across all levels of the agency, to dedicate time to engaging directly with consumers and their representatives, as well as other stakeholders. Additionally, we urge the entire staff of the CFPB both to expand the agency's existing engagement practices, and to continue developing and refining ways to analyze and use the information that the CFPB receives through its external engagements.

Additional specific recommendations follow below.

A. Advisory Groups

The CFPB has established four advisory groups: the Consumer Advisory Board, the Community Bank Advisory Council, the Credit Union Advisory Council, and the Academic Research Council. By February 2018, the CFPB had conducted 47 meetings of its advisory groups, many of which included a public component. Meetings have been publicly announced, live streamed, and followed by summaries on the CFPB website.

We believe in the importance of these meetings both for advising the CFPB and for engaging the members of the public who view the proceedings. The Consumer Advisory Board (CAB), for example

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[7] *(Cancelled) Spring 2018 Community Bank Advisory Council Meeting,* CONSUMER FINANCIAL PROTECTION BUREAU (website visited April 16, 2018) https://www.consumerfinance.gov/about-us/events/archive-past-events/spring-2018-community-bank-advisory-council-meeting-washington-dc/

[8] *(Cancelled,) Spring 2018 Credit Union Advisory Council Meeting,* CONSUMER FINANCIAL PROTECTION BUREAU (website visited May 21, 2018) https://www.consumerfinance.gov/about-us/events/archive-past-events/spring-2018-credit-union-advisory-council-meeting-washington-dc/

[9] *Leadership calendar, Mick Mulvaney, March 2018,* CONSUMER FINANCIAL PROTECTION BUREAU (March 2018) https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_mick-mulvaney-calendar_03-2018.pdf

[10] *Leadership calendar, Richard Cordray, March 2017,* CONSUMER FINANCIAL PROTECTION BUREAU (March 2017) https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Director_Richard_Cordray_March_2017_Calendar.pdf

[11] *Request for Information, CFPB External Engagements,* 83 Fed. Reg. 8247, 8248 (Feb. 26, 2018)

provides market intelligence and expertise, and appropriately, its members bring a wide range of expertise to the CFPB. Its members include the director of Texas Appleseed, a public interest nonprofit dedicated to promoting social and economic justice, a legal aid attorney from Florida, a Boston law professor, a retired PNC Bank executive, and many others.[12] CAB Chairperson Ann Baddour, writes that "we have been able to offer new insights to the CFPB and ensure the agency work remains relevant in the face of evolving community experiences and market practices."[13]

We recommend that the CFPB increase the frequency of their meetings, and convene meetings for each advisory group at least three times per year to ensure that conversations and dialogue can address the most current and pressing issues. Further, we strongly support the continued transparency of the advisory group meetings. Meetings should continue to be advertised and summarized publicly, and broadcast in full whenever possible. Additionally, we recommend that at least one of these meetings for each of these groups take place outside of Washington.

Finally, though we recognize the value that industry representatives can bring to the CAB and its advisory mission, we recommend that a majority of the CAB be composed of individual consumers, consumer advocates, scholars, or others whose work focuses on protecting consumers.[14] As a body charged with advising the CFPB on its consumer protection functions, the CAB should be led by and consist of members whose work is focused on consumer protection. Further, the CFPB already sustains two industry-based advisory boards related to community banks and credit unions.

B. Field Hearings, Town Halls, and Roundtables

Through February 2018, the CFPB had held field hearings or town halls in 38 cities.[15] Each focused on a designated topic and engaged members of the public through public attendance and discussion and the showing of a live video that is later available on the CFPB's website.[16]

We strongly support and encourage further use of town halls, field hearings and roundtables to engage the public. We particularly urge the CFPB to maintain the transparency of these mechanisms, to continue including senior CFPB staff, including associate directors, in these events, and to continue holding them in locations across the country to provide a diverse range of consumers and other interested members of the public to attend and participate in person.

We also support the CFPB's focus on key issues that are before the agency in these meetings. One town hall meeting in 2012 focused on issues affecting military personnel, and included "26 representatives from such organizations as the Military Officers Association of America (MOAA), the Veterans of

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[12] *Consumer Advisory Board, member biographies*, CONSUMER FINANCIAL PROTECTION CFPB, (September 2017) https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_CAB-Biographies_2017-2018.pdf

[13] *Annual Report Consumer Advisory Board,* CONSUMER FINANCIAL PROTECTION CFPB (2017) https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_cab-annual-report_fy2017.pdf

[14] We note this has been a strength of the CFPB in the past, contrasting with certain advisory boards associated with other financial regulators. For example, at the Commodity Futures Trading Commission, the Energy and Environmental Markets Committee contains only one public advocate; the balance represent commercial interests, with one professor funded by industry. *Energy and Environmental Markets Advisory Committee,* COMMODITY FUTURES TRADING COMMISSION (February 17, 2016) https://www.cftc.gov/About/CFTCCommittees/EnergyEnvironmentalMarketsAdvisory/emac_members.html

[15] *Consumer Financial Protect, by the numbers,* CONSUMER FINANCIAL PROTECTION CFPB (website visited April 16, 2018) https://files.consumerfinance.gov/f/documents/201701_cfpb_CFPB-By-the-Numbers-Factsheet.pdf

[16] Field hearings are available to view as archived videos on the CFPB's website at *https://www.consumerfinance.gov/about-us/events/archive-past-events/*

Foreign Wars (VFW), Iraq and Afghanistan Veterans of America (IAVA), the National Military Family Association (NMFA), and others as we talked about how the CFPB works to protect servicemembers, veterans, and military families."[17] Another town hall in 2011 in Maine focused on elder abuse, where "there are an estimated 14,000 incidents of elder abuse annually in Maine and at least 84 percent go unreported."[18] A field hearing in 2017 in Los Angeles focused on small business lending and featured testimony from the US Chamber of Commerce, a director of Union Bank, the owner of Plum Restaurants, community advocates, and others.[19]A field hearing in 2012 focused on payday lending included consumer and industry panels.[20] Town halls and field hearings play an important role in giving consumers a direct opportunity to talk to the CFPB about their most important issues and should be held as often as possible to allow the CFPB to hear directly from consumers as it decides how to handle pertinent issues.

C. **Consumer Complaints, Stories, and Additional Engagement Venues**

Other engagement mechanisms are also critical to the CFPB's ability to understand, react to, and inform consumers and other key stakeholders. We especially support the CFPB's direct engagement with consumers through its complaint tool and other mechanisms.

The CFPB's consumer complaint tool is an invaluable way for the CFPB to engage with the public.[21] Since its inception, the CFPB has collected more than 1 million consumer complaints. [22] Those complaints allow consumers to obtain tailored help. They also provide important information to the CFPB and to the public, as the CFPB publishes complaint data that can help other consumers learn about consumer financial products and potential risks.

Equally important are the CFPB's other day-to-day engagement mechanisms. The CFPB website allows consumers to tell "their stories," explaining: "We want to hear about your experiences with money and financial services, good and bad. The CFPB is listening."[23] Like individual complaints, these consumer stories can help inform the CFPB about key issues in the marketplace, and areas that may warrant further research. Through social media, the CFPB can promote and explain other engagement opportunities.[24]

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[17] Holly Petraeus, *Making new partners at our first VSO-MSO town hall,* CONSUMER FINANCIAL PROTECTION CFPB (March 19, 2012) https://www.consumerfinance.gov/about-us/blog/making-new-partners-at-our-first-vso-mso-town-hall/

[18] Skip Humphrey, *Older Americans Need to be Armed Against Financial Fraud,* CONSUMER FINANCIAL PROTECTION CFPB (Dec. 10, 2011) https://www.consumerfinance.gov/about-us/newsroom/older-americans-need-to-be-armed-against-financial-fraud/

[19] *Field hearing on small business lending in Los Angeles,* CONSUMER FINANCIAL PROTECTION CFPB, (May 10, 2017) https://www.consumerfinance.gov/about-us/events/archive-past-events/field-hearing-about-small-business-lending-los-angeles-ca/

[20] *CFPB Convenes Field Hearing In Birmingham, Alabama On Payday Lending*, CONSUMER FINANCIAL PROTECTION CFPB (Jan 18, 2012) https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-CFPB-convenes-field-hearing-in-birmingham-alabama-on-payday-lending/

[21] *Consumer Complaint Data Base*, CONSUMER FINANCIAL PROTECTION CFPB (website visited April 26, 2018) https://www.consumerfinance.gov/data-research/consumer-complaints/

[22] *Consumer Complaint Data Base*, CONSUMER FINANCIAL PROTECTION CFPB (website visited April 26, 2018) https://www.consumerfinance.gov/data-research/consumer-complaints/

[23] *Your Money. Your Story*. CONSUMER FINANCIAL PROTECTION BUREAU (website visited May 4, 2018) https://www.consumerfinance.gov/your-story/

[24] For example, a Facebook posting explained that after opening remarks from a senior CFPB official, "we'll get right to the most important part of this event: a community panel and an open mic session. We'll listen to and learn from community members' experiences with student loans, credit cards, mortgages, and other consumer financial

Small group meetings, attendance at conferences, and other opportunities to meet and speak with consumers, consumer advocates, scholars, and industry and government entities are also critical ways for CFPB staff to engage with key stakeholders and should be widely encouraged.

The CFPB's efforts to engage with consumers in languages other than English help ensure that the CFPB can understand and react to the full range of consumer experiences and should be continued and expanded.[25]

We urge the CFPB to continue to promote and expand these mechanisms for engagement. In particular, we recommend:

1) Continued engagement with a diverse set of stakeholders. Through meetings, conferences, and other venues, the CFPB should engage with consumers and consumer groups that represent the full range of consumer experiences. The experiences and needs of low-income consumers may differ from those of higher-income consumers, for example. Similarly, consumers with bank accounts likely have different concerns from those without bank accounts, as do those consumers who are frequent internet users and those who are not. It is important that the CFPB engage with and understand the experiences of all these sets of consumers.

2) Continued development of mechanisms to reach a diverse set of stakeholders. To reach a wide and diverse range of consumers, the CFPB should continue to promote and develop its consumer complaint tools, its "Tell Your Story" website, its other technology-based tools, and its language-access initiatives. This promotion and development should include making all of the CFPB's tools easily available on the CFPB's website. For example, the "Tell Your Story" website and other tools should be under the "Consumer Tools" menu. To increase the CFPB's reach, we recommend media releases directed to regional and community media, including local newspapers that may notice upcoming public events at no cost. The CFPB should also continue exploring partnerships with community groups to organize and promote events. Similarly, the CFPB should explore or continue exploring partnerships with other federal, local and state agencies (such as courts and libraries) to inform consumers and other stakeholders about engagement opportunities.

3) Explore new mechanisms to engage with individual consumers. For example, the CFPB could organize "listening sessions," which would allow consumers to engage in open ended discussions about financial services concerns with senior CFPB staff. The CFPB has some experience with events like these in the industry context. Through "Project Catalyst," the CFPB has held four or five "office hours" annually in San Francisco, New York, and Austin, Texas to connect with financial technology practitioners.[26] Similar opportunities for consumers could yield valuable insight and help consumers better understand how the CFPB works for them.[27]

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products and services."*CFPB Town Hall Event in Minneapolis,* FACEBOOK (website visited April 16, 2018) https://www.facebook.com/events/1022158967808354/

[25] *CFPB in Your Language,* CONSUMER FINANCIAL PROTECTION BUREAU (website visited May 4, 2018) https://www.consumerfinance.gov/language/.

[26] CFPB Annual Report 2017, Consumer Financial Protection Bureau (2017) https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201706_cfpb_Semi-Annual-Report.pdf

[27] We are concerned with rebranding the CFPB as a "bureau", which will frustrate the efforts to date to establish a public face.

In addition to structures and strategies, the CFPB must nurture a culture that promotes public engagement with consumers. Moreover, the lessons learned and information gathered from public engagement, especially with consumers, should drive policy decisions at the agency. Already, financial firms retain lobbyists with ample access to all federal agencies, including the CFPB. The CFPB must work diligently to hear from those without generous sponsorship from industry.

It is essential that the CFPB maintain a policy and procedure for external engagements, such as a minimum number of roundtables, advisory board meetings, and/or teleconferences. It is equally important to take public engagement seriously. Many of the engagements structures now in place didn't exist when the CFPB began operations, or were not identified in the statute, but emanated from that initial culture of engagement. Public engagement has been and should remain a hallmark of the CFPB. Congress created this agency to protect consumers, and this consumer protection mandate requires a pro-active posture of public engagement.

Sincerely,

Allied Progress

Americans for Financial Reform

Atlanta Legal Aid Society, Inc

California Reinvestment Coalition

Center for Responsible Lending

Consumer Action

Consumer Advocacy & Protection Society (CAPS)

Consumer Federation of America

Demos

Housing and Economic Rights Advocates

Interfaith Center on Corporate Responsibility

Jacksonville Area Legal Aid, Inc.

Main Street Alliance

Mississippi Center for Justice

NAACP

National Association of Consumer Advocates

National Consumers League

National Consumer Law Center (on behalf of its low-income clients)

Public Citizen

Public Justice Center

Public Law Center

Tennessee Citizen Action

Tzedek DC

US PIRG

Virginia Organizing

Consumer Financial Protection Bureau
1700 G St., N.W.
Washington, DC 20552
Bureau of Consumer Financial Protection

Docket No. CFPB-2018-0014

Re: CFPB RFI - Request for Information Regarding the Bureau's Consumer Complaint and Consumer Inquiry Handling Processes

July 16, 2018

Dear Acting Director Mulvaney:

Thank you for your interest in our feedback to your Request for Information (RFI) regarding the Bureau's consumer complaint and consumer inquiry handling processes. The undersigned consumer protection, civil rights, fair lending, higher education and community groups welcome the opportunity to express our fervent support of the Consumer Financial Protection Bureau's (CFPB) public complaint process and address your request as to whether changes to existing practices would be appropriate.

Our organizations are grateful for the Bureau's historical appreciation for stakeholder feedback in refining these vital processes for consumers. Since the Consumer Bureau's inception, the agency has had a record of thoughtfully considering input from a variety of sources in creating its first-class complaint system. Individuals with unresolved financial complaints often find the CFPB is one of the very few options left for them to turn to for help in solving a dispute with a financial services company.

The Bureau's primary objective for its consumer complaint and inquiry process must remain focused on consumers: to assist them in receiving timely responses and resolutions to their financial questions and complaints.

Our organizations represent the consumers, seniors, servicemembers, veterans, students and underrepresented communities across our nation who rely on the consumer protections that the CFPB was created to support and enforce. It is essential that the CFPB not retreat from its core mission to protect and inform consumers, and to make our financial markets more fair, accountable, transparent and competitive.

The Bureau should improve transparency in its complaint process.
The Bureau should not focus its time and effort on "reclassifying" consumers' complaint submissions, rather it should increase and improve complaint transparency by making details of financial problems and resolutions a primary

source of information for the public in both the public complaint database and in regularly published reports.

We urge the Bureau to expand the use of the complaint feedback process to include public access. Specifically, the CFPB could enhance its complaint process by making the newest portion of the system, the Feedback portion, publicly available as soon as the feedback is reported to the Bureau. Complaint outcomes offer invaluable information to individuals who are trying to evaluate a company's commitment to its customers. Consumers who use the complaint process as a pre-purchase tool would be well served to review the detailed feedback that individuals provide once they've received a response to a complaint filed with the CFPB. Consumer satisfaction or dissatisfaction in a complaint's outcome – and the *details why*--are precisely the kind of information consumers value to indicate if a company has a habit of standing behind its products and services.

This excellent addition to the complaint process provides firsthand feedback for consumers to determine whether a company stands behind its services and customer service claims. It allows the public to seek out firms that have positive complaint resolution practices.

The CFPB's system permits for both positive and negative feedback from consumers which allows businesses that cater to customers to stand out in this sort of system, and for other companies to strive to achieve that recognition through the feedback process. Sharing complaint outcome details with the public would enhance the valuable complaint tool the Bureau currently offers, and reduce the need to rely on its supervision and enforcement authority. Making consumer complaint feedback more transparent inspires corporate accountability and encourages the market to monitor itself.

Public access to this final portion of a complaint's lifecycle offers the public the opportunity to hold the CFPB accountable as well. Direct consumer feedback helps the CFPB better recognize companies that are consistently providing excellent customer service and companies that are falling short. Firsthand feedback on complaint outcomes can alert the Bureau and businesses to remaining unresolved problems, communications breakdowns, and the potential existence of festering harmful trends.

Here are some other recommendations to improve the CFPB's complaint process:

Complaint resolution details should be featured in an annual public report. The Bureau should make it possible for consumers to see how individual companies are handling the complaints they receive in the database. A company "snapshot" could include an overview of response times, explanations and relief. Resolutions should be broken down by monetary relief and include dollar amounts received, combined with the type of complaint filed and company name. Non-monetary relief

should report the specific actions taken by a company, such as "Error removed from credit bureau records" and "interest rate reduced." Additional complaint resolution information such as the percentage of complaints resolved--broken down by method and company--should be released in an annual specialty report. A summary of resolution details could also appear when a consumer hovers over a company name in the public database.

Complaint explanation details should be publicly reported. The vast majority of consumers receive a private explanation in response to their complaints. Consumers have frequently reported that they are not provided with a meaningful company response to their complaint, receiving instead a nebulous, unresponsive reply. Details from company explanations should be transparent to the public and reported in summary form. The Bureau should compile company responses and provide the public with the primary explanations consumers are receiving. Response examples might include why a credit line was not increased or a loan was denied. Companies are required to provide complainants with *tailored* responses, rather than a stock, vague reply that does not address the consumer's concerns. In a monthly or specialty report, the Bureau should publicly disclose companies' most common response examples, including vague replies. How a company typically responds to its customers' complaints is precisely the type of helpful information consumers can use when evaluating which businesses to engage with. Highly responsive companies would benefit from this public disclosure, even when the response is not in the consumer's favor.

Consumer inquiries should be recorded and reported.
A CFPB record should be kept registering the type of financial product or service a consumer has called to inquire about, as well as detailed categories of topics raised. The CFPB should track the topics inquired about. If the Bureau's Division of Consumer Education and Engagement has not already addressed the most requested topics in its publications it should create new financial education materials or additions to the Ask CFPB section of its website. Names of companies should also be logged along with a note as to whether the consumer's inquiry has been addressed.

Consumers--not companies--should distinguish if their inquiry is a complaint or a question. If it is not abundantly clear to a CFPB phone representative, consumers should be asked if their inquiry is a complaint, and if so, they should be assisted in filing a formal complaint. Conversely, the consumer should be the one to reclassify her complaint as an inquiry if appropriate, but the focus of the Bureau's attention should be on response and resolution to the consumer rather than what category to classify their communication.

Consumer representation must continue for complaint assistance.
It is essential that the Bureau continue to allow consumers' credit and housing counselors, attorneys and other representatives assist individuals in filing a financial complaint. Consumer advocates are often more familiar with the complaint

system and better able to effectively describe the issue(s) to enable the company to better understand the problem to properly address it. This assistance benefits the Bureau as well as the consumer.

CFPB should maintain its indispensable language access line for inquiries and complaints from limited English consumers.
To its credit, the Bureau accepts questions, complaints and comments regarding financial products and services in more than 180 languages. Limited English Proficiency (LEP) consumers have a place to lodge a complaint, expect a response and hopefully receive a solution to their financial problem. This access to information and action provides a vital service to LEP consumers that should be maintained. In addition to critical phone line access, the CFPB should develop an online system that allows LEP consumers to submit written complaints in their preferred language, which will expand access and protection for LEP consumers.

The Bureau should report on company communication with complainants.
How a company communicates with consumers reflects its customer responsiveness. For instance, if a company does not respond to a consumer complaint, the Bureau should report it in the database as "No response." Companies that fail to provide a response to a complaint within 60 days should be disclosed to the public in monthly or specialty reports. This type of public reporting would allow consumers to see the percentage of complaints to which a specific company does *not* respond in a timely manner or at all.

The Bureau should require timely, tailored company responses.
The Bureau should require all companies supervised by the CFPB to adequately respond to and attempt to resolve consumer complaints within the 15 and 60-day time frames. The CFPB should pursue companies that do not respond to or resolve consumer complaints and hold them more accountable. If a company is too reliant on a boilerplate, standardized response to customers, the CFPB should review its response history during supervisory examinations. The Bureau should follow up with unresponsive companies directly and press them to provide more detailed, tailored responses and resolutions, both publicly and privately.

All consumer complaints received by the Bureau should be reported publicly.
All complaints filed with the CFPB should become part of the public database, including complaints referred to other agencies or involved in a lawsuit. These complaints can include a note that they were referred to a specific agency or not addressed by the Bureau due to litigation, but the existence of these complaints should nonetheless be reported publicly. Complaint reports should also include all complaints to allow researchers and the public to review the full complement of complaints received and evaluate how widespread a harmful practice may be.

All complaints should be listed by the specific company the consumer complained about, as well as by the parent company's name. The Bureau should

add a field to the database that lists each complaint in the public database by the company subsidiary name used by the consumer in the complaint. Currently complaints are listed typically by a field containing just the parent company's name. For example, the only place that the specialty consumer reporting agency ChexSystems appears currently is in optional complaint narratives section, since it is owned by Fidelity National Information Services, Inc. (FNIS). No consumer knows FNIS. Reporting complaints by the company subsidiary name that a consumer would recognize makes the complaint far more useful to consumers wanting to check on previous complaints about a firm. The additional field would greatly help the public evaluate a company's overall practices and help to hold the company accountable.

Complaints should be transmitted from the Bureau to each company complained about. Depending on the financial product or service, only a portion - in some cases less than half of complaints received (only 47% of debt collection cases, for example) are transmitted by the CFPB to the aggravating company. This fails to achieve one of the Bureau's primary functions of "collecting, investigating, and responding to consumer complaints," nor does it provide the public with the vital information needed to help consumers make responsible financial decisions. Every effort must be made (including use of U.S. Postal mail) to ensure that a consumer's complaint reaches the company, even if the company is not connected to the portal, to increase the likelihood of resolution.

The Bureau should improve the targeting of its scrubbing standard. While consumer privacy is imperative, sometimes too much information is redacted from complaint details (dates, times and numbers), and what data is removed often seems inconsistent. While personally identifiable information should remain redacted, details about the situation forming the basis of the complaint should be made publicly available so that consumers can better understand what happened.

Consumer complaint data should be made more accessible and more user-friendly. The Bureau should be commended for continuously seeking feedback from the public and for its constant improvements to the database, which are regularly published in updated release notes. For example, as recently reported, the interface has seen improved tools for filtering and visualizing complaints [Consumer Financial Protection Bureau, *Consumer Complaint Database Release Notes for 14 November 2017*, 14 November 2017, archived at https://web.archive.org/web/20180514030347/http://cfpb.github.io/api/ccdb/release-notes.html]. Nevertheless, the Bureau should continue to demand that its online database vendor Socrata create a more entry-level, user-friendly interface so consumers can more intuitively select the most useful dataset views. Power users often simply download the dataset into their preferred analysis software. It makes sense to better optimize the online viewer for entry-level users—average consumers. The *Read Consumer Narratives* section is the most valuable option for consumers because it supplies complaint details. The *View Complaint Data* section is

too similar to *Read Narratives* and should be made easier for consumers to sort or filter. Consumers will not know to convert data to columns in *View data in Socrata*, nor how to best review the columns.

The consumer complaint database should be made more accessible to small business owners. The complaint database should be more available as a tool for small business owners seeking to submit concerns about financial products and services. While individual consumers have filed approximately 1.4 million complaints with the Bureau, an estimated 911 small business-related complaints have been filed with the CFPB from 2011 through the first half of 2017, according to a review by the California Reinvestment Coalition. The Consumer Bureau should improve outreach and enhance its website to make clear that small business owners are welcome to file financial complaints. Making the complaint database more accessible to consumers who own small businesses would empower small business owners to apply this tool and help the CFPB exercise its existing authority to identify and enforce fair lending laws, and to develop a critically needed small business data collection rule.

The Bureau must maintain public access to its invaluable complaint database. The CFPB's public complaint database is a trustworthy tool that empowers individuals to inform and protect themselves in the marketplace. It helps consumers evaluate a company's practices and creates incentives for companies to treat their customers fairly. It helps both consumers and businesses resolve problems when they arise and helps the market reward good products and services by providing consumers with the ability to publicly share their experiences. The complaint database also allows companies to identify and correct problems on their own without the impetus of a new rule or enforcement action.

Providing consumers access to a public complaint database fulfills the Bureau's obligations to ensure that:

1) "consumers are provided with timely and understandable information to make responsible decisions about financial transactions"; and

2) consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination."[1]

These obligations, combined with the Bureau's statutory function of "collecting, researching, monitoring, and *publishing* information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers" all add up to a powerful argument for the vital role a public database plays in advancing the legally mandated work of the Bureau.

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[1] Dodd-Frank Section 1021

The CFPB's public complaint reporting and analysis is beyond useful; the Bureau's collection and dissemination of consumer complaint information is an indispensable resource for consumers to empower and protect themselves in the marketplace.

Conclusion

We call on the Bureau to focus on response and resolution to consumer inquiries and complaints. Any changes to existing practices would *not* be appropriate or helpful in delivering on its duty to provide consumers with timely and understandable information about consumer financial products and services, and to protect consumers from harm.

We urge the Bureau to maintain public access to the complaint database and to include additional detailed data in its statutory reports to provide the most meaningful information possible for consumers to make responsible financial decisions.

We must once again note our objection to the CFPB's reliance on burdensome RFIs that appear designed primarily to divert valuable consumer advocacy and third-party resources and create unnecessary opportunities for industry to circumvent or eliminate thoughtful, thorough positions and processes already evaluated and crafted by the Consumer Bureau. We remain gravely concerned about attempts to weaken consumer protection through this RFI process.

Thank you for taking the time to thoughtfully review our comments.

Sincerely,

Allied Progress
Atlanta Legal Aid Society
Americans for Financial Reform
Arizona PIRG
Association for Neighborhood and Housing Development
Bronx Legal Services
Brooklyn Legal Services
CALPIRG
California Reinvestment Coalition
Center for Digital Democracy
Center for Economic Integrity
Center for NYC Neighborhoods
Center for Responsible Lending
COPIRG
Community Legal Services of Philadelphia
Connecticut Fair Housing Center
ConnPIRG

Consumer Action
Consumer Federation of America
Consumers Union
Demos
Empire Justice Center
Florida PIRG
Georgia PIRG
HomeSmart NY
Illinois PIRG
Indiana PIRG
Interfaith Center on Corporate Responsibility
Iowa PIRG
Legal Services NYC
Main Street Alliance
Manhattan Legal Services
Maryland PIRG
MASSPIRG
MoPIRG
Mobilization for Justice
National Association of Consumer Advocates
National Association of Consumer Bankruptcy Attorneys
National CAPACD
National Community Reinvestment Coalition
National Consumer Law Center (on behalf of its low income clients)
National Consumers League
National Fair Housing Alliance
National Housing Resource Center
National Urban League
New Yorkers for Responsible Lending
NCPIRG
NHPIRG
NJPIRG
NMPIRG
Ohio PIRG
Oregon PIRG
PennPIRG
PIRG in Michigan
Privacy Rights Clearinghouse
Privacy Times
Public Citizen
Public Justice
Public Law Center
Queens Legal Services
RIPIRG
Staten Island Legal Services
Student Debt Crisis

The Institute for College Access & Success
Tennessee Citizen Action
TexPIRG
UnidosUS
U.S. PIRG
WASHPIRG
WISPIRG
Woodstock Institute
World Privacy Forum

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Comment Submitted by Benet Magnuson, Kansas Appleseed Center for Law and Justice

The is a Comment on the **Consumer Financial Protection Bureau** (CFPB) Notice: **Requests for Information: Bureau Civil Investigative Demands and Associated Processes**

For related information, **Open Docket Folder**

Comment Period Closed
Apr 26 2018, at 11:59 PM ET

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Submitter Information

Submitter Name:
Benet Magnuson

Organization Name:
Kansas Appleseed Center for Law and Justice

Comment

April 26, 2018

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

Re: Request for Information (RFI) Regarding the Bureau Civil Investigative Demands and Associated Processes (Docket No. CFPB-2018-001)

Dear Ms. Jackson:

Thank you for the opportunity to comment in response to the Consumer Financial Protection Bureaus (CFPBs) Request for Information regarding Civil Investigative Demands (CIDs) and associated processes.

These comments are submitted on behalf of the Kansas Appleseed Center for Law and Justice (Kansas Appleseed). Kansas Appleseed is a 501c3 nonprofit, nonpartisan justice center dedicated to the belief that Kansans, working together, can build a state full of thriving, inclusive, and just communities. We conduct research, intensive grassroots engagement, and policy advocacy to work towards a future where all Kansans have the resources they need to support themselves and raise a healthy family; where all Kansans can participate fully in the community under equal protection of the law; and where all Kansans benefit from a fair and effective judicial system.

The CFPB plays a critically important role in realizing Kansas Appleseeds vision of a state where all Kansans have the resources they need to support themselves and raise a healthy family. The CFPB was created to address the systemic consumer protection problems that led to the Great Recession in which thousands of Kansas families were harmed (in fact, Kansas fell further than the nation as a whole during

the Great Recession). Since its creation, the CFPBs investigations and enforcements have returned nearly $12 billion to 29 million Americans who were harmed by consumer protection violations.

Recent apparent changes in the CFPBs investigation and enforcement processes have raised significant concerns for Kansas communities (see, e.g., the January 19, 2018, article CFPB drops Kansas payday lending case, stoking fears Trump is backing off the industry in the Kansas City Star).

Kansas Appleseed therefore urges the CFPB not to adopt any changes regarding CIDs and associated processes that would weaken the CFPBs investigations of consumer protection violations. CIDs and associated processes must remain responsive enough to provide CFPB staff with the ability to quickly and effectively initiate and execute investigations into consumer protection violations, and CFPB staff must be able to conduct CIDs independent of political pressures.

Thank you for the opportunity to submit these comments.

Comments of Legal Academics on Docket No. CFPB-2018-0001

April 25, 2018

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

Dear Ms. Jackson:

Please see the submission below in response to the Consumer Financial Protection Bureau's Request for Information ("RFI") Regarding Bureau Civil Investigative Demands and Associated Processes (Docket No. CFPB-2018-0001). We are legal academics who research and teach about consumer protection law, public enforcement of civil law, administrative law and related topics.[1] Many of the below signatories also have experience in public enforcement of consumer protection laws. We appreciate the opportunity to submit these comments for your consideration.

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SUMMARY

The statutory authority and regulations for Bureau CID issuance are modeled on FTC powers. Decades of experience by the FTC and state attorneys general with substantially similar CID authority support broad discretion and flexibility in CID use for effective public enforcement of UDAP laws. Courts have consistently so held.

The Bureau's enforcement actions to date have produced remarkable results for consumers. Even if the Bureau decides to shift its enforcement strategy, there is no need to change its CID procedures to accomplish this new direction, especially given the Bureau's statutory mandate to enforce consumer protection under a plethora of different federal laws.

The Office of the Inspector General of the Federal Reserve Board recently conducted an independent examination of the Bureau's use of CIDs and concluded that its procedures maintained an appropriate balance between the Bureau's investigatory needs and the burden on CID recipients, and found no substantial irregularities or deficiencies in Bureau CID use.

THE BUREAU NEEDS BROAD AND FLEXIBLE CID AUTHORITY TO SUPPORT EFFECTIVE UDAP AND OTHER CIVIL LAW ENFORCEMENT.

One of the most salient features of public enforcement of federal and state UDAP law is the authority of public enforcers to engage in pre-complaint investigations. Numerous public enforcement officials and academic commentators have remarked on the importance of Civil Investigative Demand ("CID") authority to effective public enforcement.[2]

Although the Bureau is a relatively recent creation, its CID authority reflects decades of experience in public enforcement of UDAP laws, and in particular the experience of the other

[2] Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 Notre Dame L. Rev. 747, 761 (2016) (Professor Citron is the Morton & Sophia Macht Professor of Law, University of Maryland Carey School of Law; an Affiliate Scholar, Stanford Center on Internet & Society; and an Affiliate Fellow, Yale Information Society Project. Writing about UDAP actions on privacy issues, she observes that "…civil investigative demands (CIDs), are crucial to investigations."); Pamela H. Bucy, *Federalism and False Claims*, 28 Cardozo L. Rev. 1599, 1608 (2007) (Professor Bucy, Research Professor of Law, University of Alabama School of Law, is a former Assistant United States Attorney. She completed a study of thirteen states with state laws similar to the federal False Claims Act. Based on interviews, she concluded based on interviews that "[a]ll of the offices with CID authority agree that CIDs are extremely powerful prosecutorial tools. In the Attorney General's offices in the eight states without CID powers, all but two indicated that such powers would be helpful."); Darren Bush, *The Incentive and Ability of the Federal Trade Commission to Investigate Real Estate Markets: An Exercise in Political Economy*, 35 Real Est. L.J. 33, 37 (2006) (Professor Bush, University of Houston Law School, holds a Ph.D. in economics and J.D. and is a former DOJ attorney in antitrust enforcement. He notes that "the FTC's ability to obtain complete and accurate information primarily rests with the Civil Investigative Demand (CID) and subpoena.")

primary federal UDAP regulator, the Federal Trade Commission (FTC).[3] The Bureau's CID powers also align with the authority given to state attorneys general to enforce UDAP laws. We urge the new leadership of the Bureau to consider any reforms to CID processes in light of the accumulated knowledge gained from decades of public enforcement experience of UDAP laws by a diverse range of public officials.

A. The Bureau's CID Authority Parallels the CID Authority of the FTC and Other Public Enforcers of Consumer Protection Laws.

Any consideration of possible changes to the CID authority of the Bureau must start with an understanding of the place of pre-complaint investigatory procedures in public enforcement. The specific CID authority of the Bureau and its procedures for exercising that authority, as articulated in the Dodd-Frank Act and in the Bureau's regulations, are substantially similar to the authority and procedures that govern other public enforcers.

The other primary federal regulator with UDAP authority, the FTC, is the closest point of comparison. The substance of what constitutes a deceptive or unfair practice for Bureau-regulated entities mirrors the UDAP standards developed by the FTC in the early 1980s.[4] Similarly, the CID authority of the Bureau in the Dodd-Frank Act is substantially derived from and comparable to the FTC's CID authority.[5]

The same is true of the Bureau's regulations implementing its CID authority. In adopting its CID regulations, the Bureau expressly noted its reliance on existing FTC procedures:

> [T]he Final Rule is modeled on investigative procedures of other law enforcement agencies. For guidance, the Bureau reviewed the procedures currently used by the FTC, the Securities and Exchange Commission (SEC), and the prudential regulators, as well as the FTC's recently proposed amendments to its nonadjudicative procedures. In light of the similarities between section 1052 of the Dodd-Frank Act and section 20 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 et seq., the Bureau drew most heavily from the FTC's nonadjudicative procedures in constructing the rules.[6]

The Office of the Inspector General of the Federal Reserve Board of Governors concluded in its recent report on the Bureau's use of CIDs that, "the FTC's CID authority is similar to the CFPB's."[7]

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[3] We use the abbreviation "UDAP" to mean either Unfair or Deceptive Acts or Practices, the law enforced by the FTC, or any other federal or state variant of that law, including the Bureau's authority over abusive conduct.
[4] *Compare* 12 U.S.C. § 5531(c) *with* FTC Policy Statement on Unfairness (appended to International Harvester Co., 104 F.T.C. 949, 1070 (1984)); *Compare* CFPB Supervision and Examination Manual UDAAP 5-7 (August 2017) *with* FTC Policy Statement on Deception, 103 F.T.C. 174 (1984).
[5] *Compare* 12 U.S.C. § 5562 (CFPB Authority) *with* 15 U.S.C. § 57b-1 (FTC authority)
[6] 77 Fed. Reg. 39101 (June 29, 2012).
[7] The Office of Inspector General of the Board of Governors of the Federal Reserve System, *The CFPB Generally Complies with Requirements for Issuing Civil Investigative Demands but Can Improve Certain Guidance and Centralize Recordkeeping*, Evaluation Report 2017-SR-015 at 5 n.9 (September 2017) [hereinafter "Inspector

Courts resolving disputes over the proper use of CID authority by the FTC have consistently upheld the need for a broad and flexible application of this investigative authority. In the seminal case on the use of CIDs by federal agencies, *U.S. v. Morton Salt Co.,*[8] the United States Supreme Court made clear that CID authority of the FTC is not to be confused with, and thus cannot be restricted by, the limits on discovery in judicial actions. As the Court explained:

> The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.[9]

Federal courts have consistently given a wide berth to the FTC in structuring its CIDs and rejected challenges from CID recipients premised on the relevance of the requested information. These judicial opinions note the importance of not prematurely limiting the flexibility and scope of FTC investigations. As one court observed, it is improper to ask the FTC to "prove what it is investigating as a condition of the legitimacy of the investigation."[10] In an oft-cited *en banc* decision of the United States Court of Appeals for the District of Columbia, rejecting a challenge to a CID issued by the FTC, the court held that, "a wide range of investigation is necessary and appropriate where, as here, multifaceted activities are involved, and the precise character of possible violations cannot be known in advance,"[11] and the CID was proper because it was not "obviously wrong."[12]

Similar CID authority also is a cornerstone of the power that state attorneys general hold as public enforcers of state UDAP laws. Almost every state attorney general can use CIDs when investigating possible violations of state laws.[13] While the specific powers and requirements vary by state,[14] the need for some general statement of notice as to the possible violations and the

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General Report"]. The Inspector General also observed that: "[t]he CFPB modeled the investigation rules on the investigative procedures of other federal agencies with enforcement authority, such as the FTC and the U.S. Securities and Exchange Commission." *Id.* at 5. *Compare* 12 C.F.R. 1080.5-.6 (CFPB CID regulations) *with* 16 C.F.R. 2.7 (FTC CID regulations).

[8] 338 U.S. 632 (1950).

[9] *Id.* at 633-634.

[10] *F.T.C. v. Church & Dwight Co.*, 747 F. Supp. 2d 3, 6 (D.D.C. 2010), aff'd, 665 F.3d 1312 (D.C. Cir. 2011),

[11] *FTC v. Texaco,* 555 F.2d 862, 877 INTERNAL (D.C.Cir.1977) (en banc).

[12] *Id.* at 877 n.32.

[13] National Association of Attorneys General (Emily Myers, Ed. And Principal Author) , *State Attorney General Powers and Responsibilities* 232-233 (3d Ed. 2013) (noting that all but four state attorneys general have CID authority for consumer protection enforcement, and in two of those states the CID authority rests with a different consumer protection regulator).

[14] *See generally* National Consumer Law Center, *Unfair and Deceptive Acts and Practices* §13. 3 (9th Ed. 2016) (analyzing requirements of varying state CID laws).

power to compel document production and testimony are common.[15] Like their federal counterparts, state courts reviewing CID requests typically allow state attorneys general a broad purview in their use of CIDs. As Professors Dee Pridgen and Richard Alderman observe, state "pre-complaint discovery power is usually construed quite liberally by the courts to allow the state attorney general's office to effectively enforce the state consumer protection statute."[16]

Judicial decisions on the Bureau's authority to enforce its CIDs reflect the broad discretion afforded the agency to pursue its investigations. Federal courts have overwhelmingly granted enforcement of Bureau CIDs.[17] As a district court observed in a February 28, 2018 decision granting a Bureau petition to enforce a CID, "like every other administrative agency, the CFPB can define the contours of its investigation 'quite generally' while still complying with its statutory obligations."[18] Of course, CID authority has limits. In particular, courts will not enforce a CID that describes an investigation beyond the authority of the agency, which occurred with the Bureau when a court rejected enforcement of a CID on determining the Bureau lacked authority over the CID recipient.[19]

B. Discretion and Flexibility in CID Authority Allows the Bureau to Tailor CID Requirements to Specific Applications of Its Broad Enforcement Authority.

Decades of experience with CID use by a variety of federal and state enforcers demonstrate that broad and flexible CID authority is critical to effective, efficient and fair public enforcement of consumer protection laws. A concern raised by the focus of the RFI solely on the rights of investigatory targets is that the Bureau will consider promulgating rules that would later prevent it from adapting its investigatory procedures to the needs of the different sorts of investigations undertaken by the Bureau. Even if rules restricting CID use were consistent with the Bureau's substantial statutory investigative authority in the Dodd-Frank Act, it is difficult imagine how the Bureau can impose limitations on the use of CIDs that would be equally appropriate in the wide variety of enforcement contexts for which it is responsible to act under the Dodd-Frank Act.

1. Varying Enforcement Cases Require Varying Uses of CID Authority.

The Bureau has an exceptionally broad enforcement mandate. To fulfill that mandate, its CID authority cannot be bound by the kinds of rigid rules that govern litigation. In some situations, the Bureau needs to request relatively small amounts of material from an investigatory target. In

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[15] *Id.*
[16] Dee Pridgen and Richard Alderman, *Consumer Protection and the Law* § 7:2 (2017).
[17] *Consumer Fin. Prot. Bureau v. Great Plains Lending, LLC*, 846 F.3d 1049 (9th Cir.), cert. denied, 138 S. Ct. 555 (2017) (affirming district court refusal to set aside Bureau CID); *Consumer Financial Protection Bureau, V. Heartland Campus Solutions, Esci.*, No. CV 17-1502, 2018 WL 1089806 (W.D. Pa. Feb. 28, 2018) (granting Bureau petition to enforce CID); *Consumer Fin. Prot. Bureau v. Seila Law, LLC,* No. 817CV01081JLSJEM, 2017 WL 6536586 (C.D. Cal. Aug. 25, 2017) (granting Bureau petition to enforce CID); *Consumer Fin. Prot. Bureau v. Source for Pub. Data, LP*, No. 3:17-MC-16-G-BN, 2017 WL 2443135 (N.D. Tex. June 6, 2017) (same).
[18] *Consumer Financial Protection Bureau, V. Heartland Campus Solutions, Esci.*, No. CV 17-1502, 2018 WL 1089806, at *3 (W.D. Pa. Feb. 28, 2018) (quoting the district court in *Seila Law,* which cited FTC cases).
[19] *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colleges & Sch.*, 854 F.3d 683 (D.C. Cir. 2017) (affirming district court refusal to grant Bureau petition to enforce CID for lack of authority over the CID recipient).

others, particularly where there are multiple potential legal claims, numerous institutions, or very large targets, the CIDs must reflect the complexity of the investigation.

The Bureau combines authority to enforce its UDAP law with the authority to enforce violations of numerous product specific or area specific consumer finance regulatory regimes. The Bureau's enforcement reach varies across multiple dimensions, including the following:

> *Investigatory Stage*. Public enforcement investigations are initiated with varying amounts of information acquired from an array of possible sources. One source is the Bureau's complaint portal which receives millions of complaints. The FTC Bureau of Consumer Protection, for instance, "reported receiving over 3 million complaints, not including Do Not Call Registry complaints, during 2016. And staff commence investigations based on information uncovered in other investigations; requests from Congress, other federal agencies, and state enforcers; the staff's own experiences as consumers; and after monitoring industry activities, particularly after issuing new guidance."[20] The same is true of the Bureau.
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> *Focusing its investigatory resources:* The Bureau, like other government entities, cannot pursue all the possible violations of the law that come to its attention. While it has the authority to bring enforcement actions against entities of various sizes, compared to other public UDAP enforcers, the Bureau rarely proceeds against small companies.[21] Similarly, the Bureau typically does not target individuals except as part of an investigation of a targeted entity with which the individuals are connected.[22] The Bureau has been judicious in its selection of targets and use of CIDs.
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> *Supervisory Structure*. The Bureau has used its enforcement powers to bring cases against banks and non-banks, including-- among others-- mortgage servicers and credit reporting agencies.[23] The type of institution and its products or actions under investigation influence the content of the CIDs.
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> *Type of Law Violation*. Congress charged the Bureau with enforcing a complex and diverse array of statutes. In addition to the Consumer Financial Protection Act, which Congress adopted as Title X of the Dodd-Frank Act, Congress tasked the Bureau with responsibility for eighteen "enumerated" consumer financial laws. These statutes include nearly all federal consumer credit consumer protection statutes.[24] The statutes

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[20] Howard Morse & Sarah Swain, *Defending Federal Trade Commission Consumer Protection Investigations: A How-to Guide*, Antitrust, Summer 2017, at 26, 27. *See also* David C. Shonka, *Responding to the Government's Civil Investigations*, 15 Sedona Conf. J. 1, 2 (2014) (noting that public enforcement actions begin with "news stories, consumer complaints, requests from Congress, leaks from informants, first-hand observations by government employees, self-reporting, or any number of other sources.")

[21] Prentiss Cox, Amy Widman, and Mark Totten, *Strategies of Public UDAP Enforcement*, 55 Harv. J. on Legislation 37 (providing data showing substantial gap between mean and median size of defendants by both annual revenue and number of employees, suggesting substantial variance in company size).

[22] *Id.;* Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 Tulane L. Rev. 1057, 1080-1083 (2016).

[23] Peterson, *supra* note 21 at 1084-1085.

[24] 12 U.S.C. § 5481(a)(12). Also, Congress later gave the CFPB enforcement authority under the Military Lending Act. 10 U.S.C. § 987(f)(6).

cover a range of subject matters that include credit, debt collection practices, payment systems, savings accounts, prepaid cards, interstate land purchases, reputational information, advertising, information sharing, discrimination, and personal privacy. Even within the topic of consumer credit, the Bureau is responsible for enforcing the law with respect to both secured and unsecured credit, large and small loans, as well as open-ended lines of credit and closed-end loans. Collectively these statutes touch the lives of virtually every American consumer. Professor Peterson's study shows that through 2016 the Bureau brought enforcement actions not only under UDAP, but also for violations of TILA, FCRA, ECOA, FDCPA, EFTA, and RESPA.[25]

Remedial Purpose. The Bureau can seek to resolve cases with injunctive or supervisory terms regulating future conduct, public compensation to consumers and/or a civil penalty. The type of relief sought also influences the material sought in CIDs. To date, the Bureau appears to seek all these forms of relief when it treats a matter as an enforcement action; however, it has the option of seeking only some forms of relief in each case.

For all the permutations of investigations based on the above and many other factors, the Bureau has one CID pre-complaint investigatory power. The experience of a systemically important national bank in responding to a CID indicating possible UDAP concerns in the sale of ancillary products through credit card or other account add-on may raise concerns that are wholly different from a CID issued in an investigation of a regional furniture rent-to-own company engaged in possible violations of the Truth in Lending Act. The CID powers provided in the Dodd-Frank Act and the Bureau's existing regulations can be adapted on a case by case basis to accommodate the proper balance between justifiable burden on the CID recipient and the need for information to protect consumers in that market or type of transaction.

Again, the long FTC experience in public UDAP enforcement is instructive when it comes to understanding the need for the Bureau to have flexible CID authority. The FTC has developed different investigatory regimes for its antitrust work and its UDAP work. Former FTC attorneys Howard Morse and Sarah Swain provide a summary of this difference:

> In contrast to merger investigations, where the FTC has issued a model Second Request and announced a presumptive limit on the number of custodians to be searched and number of years to be covered, CIDs in consumer protection matters vary widely. A 2014 ABA study found the cost of responding to a Second Request ranges from $2 million to $9 million, with a median cost of $4.3 million and a per custodian median cost of $151,000. In our experience, the burden of complying with a consumer protection CID varies widely though is generally less than the burden of responding to a Second Request.[26]

Because the Bureau's enforcement authority is even more diverse than that of the FTC, encompassing both UDAP and a broader range of other regulatory regimes, the need for

[25] Peterson, *supra* note 21 at 1090.
[26] Morse and Swain, *supra* note 19, at 29.

the Bureau to maintain broad and flexible investigative powers is even greater than for the FTC. Accordingly, the CID authority of the Bureau should remain sufficiently flexible to allow for effective investigation of all types of law violations. In sum, there is no one-size-fits-all CID for Bureau investigations. Limits on the complexity and number of topics in CIDs could have the unintended consequence of privileging the entities most determined to obfuscate responses so as to prevent the Bureau from discovering the worst abuses.

The FTC requires in consumer cases that one Commissioner approve a CID prior to issuance. This process allows the FTC to have review by one official who is in the line of authority for making determinations about violations of UDAP law. The Bureau has no similar procedure. The existing Bureau procedure reflects the difference in structure between the FTC as a multi-member Commission and the Bureau with its Director. The Bureau would have no analogous higher level review by a single official who is not also the person ultimately solely responsible for enforcement decision-making.

2. Flexible CIDs Allow the Bureau to Adopt Differing Enforcement Strategies.

The enforcement record of the Bureau to date has been remarkable. The Bureau's enforcement and supervision actions have led to $11.8 billion in ordered relief for more than 29 million consumers.[27] There has been broad public support for the Bureau and its enforcement work.[28] Professor Christopher Peterson has published a detailed empirical study of Bureau enforcement actions in its first four years that reveals an agency that is both remarkably effective and completely at odds with descriptions of the agency by its critics. The study shows a balanced set of cases between banks and nonbanks and enforcement through administrative and judicial action. The study also shows that the Bureau focused less on technical rule violations and more on UDAP violations in actions that returned money to consumers, and used sparingly the new "abusiveness" power it has as part of its UDAP authority.[29] As the study observes:

> …if the CFPB were continually overstepping its bounds, then perhaps critics of the agency ought to be able to point to many decisions of district court judges, administrative law judges, or U.S. courts of appeal dismissing the agency's unlawful actions. Yet, from its inception through 2015, the agency publicly announced 122 enforcement actions without losing a single case. And after the

[27] CFPB Factsheet, *Consumer Financial Protection Bureau: By the Numbers* (December 2016)
[28] Steve Eder, Jessical Silver-Greenberg, & Stacy Cowley, *Republicans Want to Sideline This Regulator. But It May Be Too Popular*, N.Y.Times, Aug. 31, 2017 ("'The public does not share the G.O.P.'s ire toward the agency and its mission,' said Dean Clancy, a Tea Party activist who worked in the White House under Preident George W. Bush and is now a policy analyst who tracks actions of the consumer bureau. 'It's an agency about protectiong the little guy, and that is tough to oppose.'"); Celinda Lake, Bob Carpenter, David Mermin, and Zoe Grotophorst, New Poll Reveals Strong Bipartisan Support for Financial Regulation; Americans Say Wall Street's Influence in Washington is Too High (July 18, 2017), available athttp://ourfinancialsecurity.org/2017/07/afrcr-polling-memo-fifth-consecutive-year-broad-backing-cfpb-wall-street-reform/ (finding that 77 percent of independents and 66 percent of Republicans "favor somewhat" or "favor strongly" the CFPB).
[29] Peterson, *supra* note 21.

study period, but prior to publication of this Article, the Bureau had lost only 1 precomplaint discovery dispute.[30]

Even in well-publicized challenges to later Bureau actions, the Bureau retains an overwhelmingly successful track record in litigation.

An example of the positive impact on consumer markets of Bureau enforcement actions is the series of cases it brought to curb a practice variously known as credit card add-on, data pass, or pre-acquired account charges.[31] In short, the nation's largest banks have sold to direct marketing companies special contract rights allowing them to charge a range of consumer bank accounts (including credit card, checking and mortgage accounts) without obtaining traditional forms of consent from the consumer, such as having the consumer provide his or her account number. Predictably, the result has been massive deception of consumers charged for unwanted membership clubs and insurance policies of dubious value. The elderly and those with limited English language capacity were especially hard hit by this deceptive practice.[32]

Years of UDAP enforcement cases by state attorneys general to attack this problem made progress, but they were unable to comprehensively attack this deceptive conduct.[33] The Bureau, however, has effectively used its enforcement authority to systematically constrain this deception. Starting with its first enforcement action in 2012, the Bureau brought a series of cases against the nation's largest financial institutions challenging this conduct as a UDAP violation, resulting in over $2 billion in returned account charges to consumers.[34]

High levels of monetary recoveries and expansive injunctive and supervisory relief by the Bureau contrast with the approach of other public enforcers with substantially similar UDAP authority. A study of all public UDAP enforcement actions completed in 2014 by all federal and state entities with primary UDAP enforcement authority found different strategies employed by different public entities.[35] Compared to other UDAP enforcers, the Bureau brought cases against defendants of much larger size and consistently obtained much larger public compensation dollars returned to consumers and much larger civil penalties. FTC enforcement showed a preference for cases against larger defendants to resolve with only injunctive relief, and effectively used asset freezes and appointment of receivers to ensure public compensation in

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[30] *Id.* at 1094.

[31] *See* General Accounting Office, *Credit Cards: Consumer Costs for Debt Protection Products Can Be Substantial Relative to Benefits but Are Not a Focus of Regulatory Oversight* (March 2011) (describing credit card add-on products); Prentiss Cox, *The Invisible Hand of Preacquired Account Marketing,* 47 Harv. J. on Legislation 425 (2010) (describing how seller "preacquired account" rights obtained from account issuers result in consumer deception); . Staff Of The Senate Comm. On Commerce, Science, And Education, *Aggressive Sales Tactics On The Internet And Their Impact On American Consumers* (Comm. Print 2009) (discussing the problem of "data pass" of account charging rights from retailers causes consumer deception).

[32] Cox, *supra* note 30 at 445-446 and 452 (providing data showing, among other things, that the elderly proportion of those charged was twice the expected rate).

[33] *Id.* at 439-441 and 467-468.

[34] CFPB Factsheet, *Consumer Financial Protection Bureau: Enforcing Federal Consumer Protection Laws* 2-4 (July 13, 2016) (listing the following add-on enforcement actions with associated consumer refunds in million $: Bank of America/727; Citibank/700; Chase/309; Discover/200; Capital One/140; American Express/59.5; Fifth Third/3).

[35] Cox, Widman and Totten, *supra* note 20.

cases with numerous small entity and individual defendants engaged in fraudulent schemes. State enforcers (primarily state attorneys general), in contrast, varied widely in their approach to UDAP enforcement. For example, almost a third of the states, including even some large states, showed relatively little use of their UDAP authority, while another group of states brought a substantial number of cases against tiny defendants. In all, the study identified eight different enforcement strategies employed by groups of states.[36]

Importantly, these various public enforcers used different strategies for UDAP enforcement while maintaining similar, flexible CID procedures. Nothing in the current CID procedures of the Bureau prevent a re-focus of enforcement priorities on one of the other types of enforcement strategies, including the less active enforcement strategies employed by some state attorneys general. Broad discretion and flexibility in CID procedures are consistent with both the Bureau enforcement strategy to date and other approaches to public UDAP enforcement.

As the Bureau looked to the FTC and other agencies with similar authority in developing its initial CID rules, we encourage this review of CID procedures to engage with and be judged against the experience of decades of public enforcement use of pre-complaint investigative procedures in enforcement of UDAP and other consumer protection laws.

C. The Report of the Office of Inspector General of the Federal Reserve Board Confirms Bureau Policies and Practices Appropriately Balance the Bureau's Need for Information with the Burden on CID Recipients.

The many signatories to this letter who have extensive experience in public enforcement actions, and UDAP public enforcement specifically, know the importance of balancing the burdens imposed on the CID recipient against the possible gain in the specific enforcement investigation at hand. A public enforcer who asks too much given the likely value to the investigation will face an administrative or judicial challenge to the demand. If the enforcer asks too little, the investigation can be unreasonably delayed or the enforcer may fail to obtain information that would alert the agency to a violation of a consumer protection law, and thus fail in its essential public protection mission.

After a thorough and independent review of the Bureau's issuance of CIDs, the Office of the Inspector General of the Federal Reserve Board found no deficiencies in the Bureau's policies, procedures and conduct in balancing these concerns, concluding that:

> Preparing and modifying a CID involves significant professional judgment to carefully balance the burden the CID places on the recipient against the CFPB's need to obtain information necessary to conduct an investigation. The Office of Enforcement's processes for CID approval and modification seek to strike that balance by allowing for substantial input from the CID recipient.[37]

The Inspector General reached its conclusion after examining the Bureau's rules and policies, including its "records management policy and the file plans for Office of Enforcement and

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[36] *Id.*
[37] Inspector General Report, *supra* note 6, at 10.

Office of the Director records," and the Bureau's actual practice of CID use, including a random selection of CIDs issued over a three year period along with "related documentation, such as CIDs, petitions, recommendation memorandums, and communications between the Office of Enforcement and the CID recipient."[38]

The report found that the Bureau's Enforcement Office effectively identified the information needed for the investigation as part of each CID sampled by the Inspector General.[39] It also found procedural compliance with all reviewed CIDs.[40] As noted above, the Inspector General found the Bureau carefully weighed investigative need and the burden on the CID recipient. It also determined that after issuance the Bureau appropriately uses "modifications and extensions of time to alleviate some of the potential burden associated with CID requests."[41] The report described this practice as follows: "[W]e found that Office of Enforcement attorneys engage CID recipients in continuous dialogue during the CID issuance process, using meet and confers, modification letters, extension letters, and extension emails to address the potential burden and allow the recipient to successfully comply with the CID."[42] The only recommendations for change to Bureau CID procedures concerned a reminder to the staff in the Guidance concerning crafting notices of CID purposes and two record-keeping items.[43]

To the extent that the RFI suggests a broad policy realignment of enforcement priorities toward the needs and concerns of CID recipients, rather than a review akin to the evaluation of the Federal Reserve Board's Inspector General, it is important that the Bureau carefully weigh how such changes would impact the extraordinary results achieved by the Bureau's enforcement actions to date. The complaints of CID recipients-- an inevitable feature of public enforcers actively doing their job-- should be carefully weighed against the impact of any shift in enforcement efforts that have to date focused primarily on the needs of American consumers. We urge that any proposed rule or guidance changes be accompanied by an analysis of specific examples of past Bureau enforcement outcomes that realistically would have been affected by restricted CID use in the context of the uncertain information available to Bureau enforcement staff at the time of CID issuance. Of course, it also is critical that the Bureau implement any such policy changes in a manner consistent with the law for CID use enunciated in the Dodd-Frank Act.

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[38] *Id.* at Appendix A.
[39] *Id.* at 8 ("We found that each of the sampled CIDs had a complete and accurate Action Required section, in which the litigation team indicated the appropriate types of information requested for each CID.)
[40] *Id.* at 9-10.
[41] *Id.* at 10.
[42] *Id.* at 10-11. In describing these Bureau practices, the Inspector General noted that the FTC and Bureau use "similar safeguards to help alleviate potential burdens in its CIDs." *Id*. at 11.
[43] *Id.* at 8-9 and 13-15.

Comments of Financial Regulation and Consumer Protection Scholars, and former Regulators on Docket No. CFPB-2018-0006

June 4, 2018

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

Dear Ms. Jackson:

Please see the submission below in response to the Consumer Financial Protection Bureau's Request for Information ("RFI") Regarding Bureau Public Reporting Practices of Consumer Complaint Information (Docket No. CFPB-2018-0006).

We are scholars, who research and teach about consumer protection law, financial regulation, administrative law, and related topics. Some of the below signatories also have experience in public enforcement of consumer protection laws.

Many of the below signatories have used the consumer complaint function for our research. Affiliations of signatories are for identification only and do not represent the views of the various institutions.

We appreciate the opportunity to submit these comments for your consideration.

Sincerely,

Kathleen Engel (on behalf of Pamela Foohey, Angela Littwin and Amy J. Schmitz)

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SUMMARY

- Publicly releasing information about consumer complaints received by the Consumer Financial Protection Bureau ("Bureau") is essential to its primary purpose of ensuring that "markets for financial products and services are fair, transparent, and competitive."[1]

- Making public a database with data from consumers' complaints (the "Database") advances the Bureau's statutory duty to release marketplace data "as is in the public interest."[2]

- When consumers can make better choices, market efficiency improves. If the Bureau makes the Database non-public, consumers will lose a key source of high-quality information and an important means of holding companies accountable. Ultimately, the marketplace will suffer.

- An easily-searchable Database provides consumers with a resource they can trust for researching financial services and products. This Database is essential because it provides far superior and more reliable information than "gripe sites" such as Yelp. Consumers lost in a sea of unreliable information on the Internet need the Database to make informed decisions.

- The public Database helps legitimate financial service companies provide valuable services to consumers without being undercut by unscrupulous competitors. By casting out companies that cut corners and injure consumers from the marketplace, the Database ensures that law-abiding companies can continue to compete fairly.

- Each data field in the Database serves an important purpose in fulfilling the Bureau's mission. But one of the most important is the name of the company subject to the complaint. Including the company name provides consumers "with timely and understandable information to make

[1] 12 U.S.C.A. § 5511

[2] *Id.* at § 5512(c)(3)(B).

responsible decisions about financial transactions,"[3] which is the Bureau's first statutory objective.

- Publishing company names incentivizes companies to monitor their reputations by responding to consumer complaints in a timely manner and providing meaningful relief. Companies also may improve practices based on this valuable feedback.

- To increase transparency and enhance the marketplace benefits provided by the Database, the Bureau should make additional data fields public, particularly data about companies' specific responses to complaints. This information is vital to evaluating the complaint mechanism's role in resolving disputes between consumers and companies.

- The Bureau's reports educate consumers, highlight industry trends, and fill key information gaps about issues that may balloon into larger problems. The Bureau should continue publishing monthly and occasional reports about specific products, services, and trends, as well as enhance these reports with more analysis.

- Allowing financial product and service providers to comment on reports prior to publication will compromise the reports' integrity.

- User friendliness is a key reason for the success of the Bureau's complaint mechanism and Database but there is significant room for improvement. The Bureau should devote resources to improving accessibility. Providing the public with easily-accessed data will increase transparency, empower consumers, and allow for dissemination of robust information, all of which further market efficiency and fairness and thus are central to the Bureau's mission.

ACCESSIBLE CONSUMER COMPLAINT INFORMATION IS VITAL TO TRANSPARENCY, EFFICIENCY, AND FAIRNESS

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") authorizes the Consumer Financial Protection Bureau ("Bureau") to make information public about the consumer financial product and service market.[4] One of the most prominent ways the Bureau does so is through its statutorily-mandated consumer complaint function.[5] This allows consumers to lodge grievances against financial products and service providers through the Bureau, usually through its website.[6]

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[3] *Id.* at § 5511(b) (emphasis added).
[4] *Id.* at § 5511(b).
[5] *Id.* at § 5493(b)(3) (requiring the Bureau to collect, monitor, and respond to consumer complaints regarding consumer financial products and services).
[6] Submit a Complaint, CFPB, http://www.consumerfinance.gov/complaint/ (last visited Apr. 19, 2018); *see also* Pamela Foohey, *Calling on the CFPB for Help: Telling Stories and Consumer Protection*, 80 LAW & CONTEMP. PROBS. 177, 178 (2017); Angela Littwin, *Why Process Complaints? Then and Now*, 87 TEMP. L. REV. 895, 911 (2015) (finding that consumers preferred to submit complaints online, with submission percentages of 85% online versus 15% by telephone).

The Bureau adds value to its complaint function by publishing reports and making public a complaint database ("Database").[7] The Database includes certain information about individual complaints and, with consumers' permission, consumers' narratives accompanying their complaints.[8] The information in the Database and the Bureau's reports support and enhance a fair, transparent, and efficient marketplace for consumer financial products and services.

First and foremost, the Bureau must continue to make the Database publicly-accessible. Acting Director Mick Mulvaney noted recently during the American Bankers Association Annual Conference that the Bureau is "supposed to ensure that consumers are provided with timely understandable information" and that the Bureau is "going to make sure that markets for consumer financial products and services operate transparently and efficiently."[9] For the reasons detailed below, making consumer complaints public via the Database is integral to the Bureau's pursuit of these two goals.

Nevertheless, Acting Director Mulvaney went on to state, "I don't see anything . . . that says that I have to make all of those [consumer complaints] public. I am thinking that . . . having a database that is publicly facing but is not completely vetted is probably not consistent with our overall mission."[10] This statement is at odds with the Bureau's statutorily-enumerated goals and severely mischaracterizes the Bureau's thoughtful consideration about when and how to populate the public Database.[11] It fails to acknowledge the Database's crucial role in providing consumers with high-quality information that is not available elsewhere and ensuring that markets operate efficiently and transparently.

If the Bureau makes part or all of the Database non-public, an important check on companies will disappear and, ultimately, the marketplace will suffer. Companies that engage in misconduct will be free to evade accountability and sweep their misdeeds under the rug. The Database itself provides evidence that companies and Acting Director Mulvaney will benefit by the removal of the Database from the public view, possibly to consumers' and the marketplace's detriment. In the past, companies and trade associations have lobbied Congress and the Bureau to remove the Database from public view. They also supported a bill put forth by Acting Director Mulvaney in 2016 that would have fundamentally altered how the Bureau responds to consumer complaints and that would have effectively gutted the Database.[12] One of the lobbying trade associations has received contributions from fourteen of the thirty companies most complained about, as evident by the

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[7] Consumer Complaint Database, CFPB, https://www.consumerfinance.gov/data-research/consumer-complaints/ (last visited Apr. 19, 2018).
[8] *See* Foohey, *supra* note 6, at 183 (discussing the Database).
[9] *Remarks by Mick Mulvaney, Acting Director, Consumer Financial Protection Bureau*, American Bankers Association Annual Conference, Washington, D.C., 3-4 (April 24, 2018), https://www.documentcloud.org/documents/4446622-Transcript-Mulvaney-ABA-Conference-4-24-2018.html.
[10] *Id.* at 5.
[11] *See infra* note 29 and accompanying text.
[12] *Companies with the Most Complaints in the CFPB Database Were Mulvaney Donors*, PUBLIC CITIZEN (May 8, 2018), https://www.citizen.org/media/press-releases/companies-most-complaints-cfpb-database-were-mulvaney-donors.

Database.[13] Acting Director Mulvaney himself has received contributions from half a dozen of the most complained about companies, also as evident by the Database.[14]

A public Database allows for this information to be discovered and discussed—that is, a public Database promotes transparency in the marketplace for financial goods and services. Hiding the Database from public view will harm consumers, who rely on the data to inform them about which companies play by the rules and which companies engage in unlawful practices. It will also harm law-abiding companies because, without transparency, they will not be able to compete effectively against their unscrupulous counterparts. Thus, the public Database is essential to an efficient and competitive marketplace for consumer financial products and services.

Particularly in light of the Bureau's recent marked slowdown in enforcement actions,[15] the Database has become an integral tool to identify company practices that are potentially harmful to consumers, by the Bureau and by advocates and other policymakers. If the Bureau eliminates public access to the Database as well, the potential harm to consumer is staggering.

Additionally, the Bureau does not post unfiltered complaints and narratives to the Database, as Acting Director Mulvaney seemed to suggest. As stated by the Bureau itself, "[a] complaint is listed in the database when the company responds to the complaint and confirms a commercial relationship with the consumer or after the company has had the complaint for 15 days, whichever comes first. Complaints are not published if they do not meet all of the publication criteria."[16] Thereby, financial service providers have the opportunity to validate information in the Database.

Consumers, advocates, companies, academics, and policymakers—most notably the Bureau—benefit from the Database because it fosters transparency and data analysis. Consumers use the Database to learn about the companies and industries they do business with, while advocates, academics, and policymakers analyze trends and identify problems in the marketplace.[17] The primary policymaker that the Database informs is the Bureau itself. The Bureau gathers invaluable information through the complaints process and Database that informs all of the Bureau's functions, from supervision and enforcement to rulemaking to consumer education. The Database thus provides data critical to the Bureau's market monitoring required by the Dodd-Frank Act.

The Database also provides important feedback to companies about concerns consumers encounter with their products and services. For example, industry consulting firms now advise companies to "turn what they hear from the [Bureau]'s consumer complaint database into a business advantage."[18] The Bureau has reported that some companies have begun to tie executive compensation to how

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[13] *Id.*
[14] *Id.*
[15] *See* Emily Stewart, *The Government's Top Consumer Watchdog Hasn't Taken a Single Enforcement Action Since Trump's Pick Took Over*, VOX (Apr. 10, 2018), https://www.vox.com/policy-and-politics/2018/4/10/17218774/mick-mulvaney-cfpb-consumer-wells-fargo-equifax.
[16] *See Semi-Annual Report of the Consumer Financial Protection Bureau*, CFPB, 19 (Spring 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201706_cfpb_Semi-Annual-Report.pdf.
[17] *See infra* Part II.
[18] *CFPB's Consumer Complaint Database*, DELOITTE (2018), https://www2.deloitte.com/us/en/pages/financial-services/articles/consumer-financial-protection-bureau-cfpb-consumer-complaint-database.html.

well the company has responded to complaints, while other companies have addressed noted and potential concerns, such as improving customer service response.[19]

In short, the public Database is far from a "Yelp for financial services."[20] The public Database is essential because it provides far superior and more reliable information than such "gripe sites." It compels accountability to consumers from providers of financial goods and services, and provides invaluable information to consumers, advocates, and policymakers. Consumers, companies, the Bureau, and third parties use this information to inform their practices.

Given the compelling benefits of the Database to consumers, advocates, policymakers, companies, and the marketplace, we urge the new leadership at the Bureau to continue to publish reports and maintain the public Database. We also urge the Bureau's leadership to evaluate the benefits of adding more data to the Database, of publishing more tailored reports based on the complaint data, and of evaluating the design of the online interfaces through which consumers lodge complaints and access the Database. These improvements will further enhance the operation of a transparent and efficient marketplace.

I. STATUTORY AND REGULATORY REQUIREMENTS TO GUIDE THE BUREAU'S COMPLAINT INFORMATION REPORTING PRACTICES

Title X of the Dodd-Frank Act contains minimum statutory and regulatory requirements that constrain and should guide the Bureau in evaluating its current complaint information reporting practices. The Dodd-Frank Act specifies the purpose, objectives, and functions of the Bureau. As relevant here, one purpose is to ensure that "markets for financial products and services are fair, *transparent,* and *competitive*."[21] Transparency is a basic requirement of competitive markets, and publicly sharing information is key to transparency. To this end, the first objective listed in Title X relates to sharing information with consumers: "The Bureau is authorized to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services— (1) *consumers are provided with timely and understandable information to make responsible decisions about financial transactions*."[22] Similarly, the Dodd-Frank Act lists one of the "primary functions of the Bureau" as "collecting, researching, monitoring, and publishing information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets."[23]

The Dodd-Frank Act requires that the Bureau provide information about the complaints it receives in three reports. First, the Bureau must present an annual report to Congress "on the complaints received by the Bureau in the prior year regarding consumer financial products and services."[24] That report must at minimum "include information and analysis about complaint numbers, complaint types, and, where applicable, information about resolution of complaints."[25] Second, the Bureau must provide as part of its semi-annual reports to Congress "an analysis of complaints about

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[19] Nathan Cortez, *Regulation by Database*, 89 U. COLO. LAW R. 1 at 50 (2017).
[20] *Remarks by Mick Mulvaney*, *supra* note 9, at 5.
[21] 12 U.S.C.A. § 5511 (emphasis added).
[22] *Id.* at § 5511(b) (emphasis added).
[23] *Id.*
[24] *Id.* at § 5493(c).
[25] *Id.*

consumer financial products or services that the Bureau has received and collected in its central database on complaints during the preceding year."[26] Notably, this provision *requires* the Bureau to create a "central database of complaints."[27] Finally, the Bureau is required to "monitor for risks to consumers in the offering or provision of consumer financial products or services, including developments in markets for such products or services." The Bureau must publish at least one report each year detailing "significant findings of its monitoring" including, *inter alia*, information gathered from consumer complaints.[28]

In addition to these statutorily-prescribed reporting requirements, the Bureau has issued policy statements detailing its reasoning behind making the Database public and including each of the categories of information about individual complaints in the Database.[29] These policy statements explain why the information the Bureau makes public through the Database comports with the principles set forth in the Dodd-Frank Act, including how the Database enhances transparency and benefits the functioning of the marketplace for consumer financial products and services.[30]

II. MAINTAINING AND AUGMENTING THE DATA INCLUDED IN THE DATABASE

It is essential that the Bureau continues to maintain current data in, as well as add data points to the Database to enhance its value and further the Bureau's policy statements about the Database.

A. Currently Available Data Comport with the Bureau's Statutory Authority to Make Complaint Information Available "As Is In the Public Interest"

When consumers file complaints with the Bureau, they identify the name of the company, select the type of product or activity to which their complaint pertains, choose the issue or sub-issue most closely associated with their complaint, specify whether they tried to resolve the issue with the company, write a narrative of their complaint, and state their desired resolution of the complaint.[31] After ensuring that complaints meet all of the Bureau's publication requirements,[32] the Bureau populates the Database with some of the data from consumers' complaints. It does not raise privacy concerns because it does not include personally identifying fields.[33]

Accordingly, the Database contains the following fields: date received, product, sub-product, issue, sub-issue, consumer complaint narrative and whether the consumer consented to publishing of the

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[26] *Id. at* § 5496(c)(4).
[27] *Id.* (emphasis added).
[28] *Id. at* § 5512(c)(3)(A), (c)(4)(B)(i).
[29] Disclosure of Consumer Complaint Narrative, 80 FR 15572 (March 24, 2015), https://www.gpo.gov/fdsys/pkg/FR-2015-03-24/pdf/2015-06722.pdf; Disclosure of Certain Credit Card Complaint Data, 77 FR 37558 (June 22, 2012), https://www.gpo.gov/fdsys/pkg/FR-2012-06-22/pdf/2012-15163.pdf.
[30] *See generally* Disclosure of Consumer Complaint Narrative, *supra* note 29; Disclosure of Certain Credit Card Complaint Data, *supra* note 29.
[31] For a discussion of the complaint mechanism, *see* Foohey, *supra* note 6, at 181-82; Littwin, *supra* note 6, at 897-99; Katherine Porter, *The Complaint Conundrum: Thoughts on the CFPB's Complaint Mechanis*m, 7 BROOK J. CORP. FIN. & COM. L. 57, 65 (2012).
[32] *See supra* note 16 and accompanying text.
[33] *See* Disclosure of Consumer Complaint Narrative, *supra* note 29, at 15575; Disclosure of Certain Credit Card Complaint Data, *supra* note 29, at 37568.

narrative, company public response, company, state, zip code, tags such as "Older American" that align with populations that the Bureau is statutorily-tasked with monitoring, how the consumer submitted the complaint, date the complaint was sent to the company, general company response, whether the company response was timely, whether the consumer disputed the company response, and a unique complaint ID.[34] Members of the public can search the Database using a variety of subject fields, including product, issues, and company.

Each of these fields serves an important purpose in advancing the Bureau's goal of fulfilling its statutory authority to disseminate marketplace data "as is in the public interest."[35] Policy statements issued by the Bureau demonstrate the usefulness of each of these fields.[36] Policymakers, advocates, and academics have used or referenced all these fields in their work based on the Database.[37] For example, since 2013, the U.S. Public Interest Research Group has published nine data reports examining specific subject matters ranging from debt collection and credit reporting abuses to the common financial service problems faced by older Americans and by service members.[38] Many of these works further call for the inclusion of more data or expansion of certain fields to allow for more detailed and complete analysis.[39] The Database has become an essential source for analyzing the consumer financial marketplace.

The Database is also an essential tool for consumer empowerment. Consumers need high-quality, clear, and accessible data to make informed choices when shopping for financial products and services.[40] Consumers have become skeptical of the information they see on Facebook and Twitter, and feel lost in a sea of questionable information on Yelp and other similar "gripe sites."[41] Information such as the Database on the Bureau's website has therefore become necessary. Consumers respect and rely on information coming from a trusted source, such as the Bureau.

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[34] *See* Consumer Complaint Database, *supra* note 7.

[35] *See* 12 U.S.C. 5512(c)(3)(B); Disclosure of Consumer Complaint Narrative, *supra* note 29, at 15575.

[36] *See generally* Disclosure of Certain Credit Card Complaint Data, *supra* note 29; Disclosure of Consumer Complaint Narrative, *supra* note 29.

[37] *See, e.g.*, Ian Ayres et al., *Skeletons in the Database: An Early Analysis of the CFPB's Consumer Complaints*, 19 FORDHAM J. CORP. & FIN. L. 343 (2014) (relying on company name, ZIP code, product, sub-product, issue, sub-issue, and consumer disputed, among other fields); Foohey, *supra* note 6 (relying on data received, product, sub-product, issue, sub-issue, and narrative fields); Littwin, *supra* note 6 (relying on state and ZIP code, among other fields, and noting the limited value of the company response and consumer response fields); Christopher K. Odinet, *Consumer Bitcredit and Fintech Lending*, 69 ALA. L. REV. 100 (2018) (relying primarily on date received, product, narrative, and company name fields); Porter, *supra* note 31 (noting time between when the complaint was received and when it was sent to the company, which relies on the "date sent" field, and noting the percentage of complaints received via the web, which relies on the "submitted" field); Gideon Weissman & Ed Mierzwinski, *Older Consumers in the Financial Marketplace*, U.S. PIRG (Oct. 2017), https://washpirgfoundation.org/sites/pirg/files/reports/WAP%20CFPB%20Older%20Report_0.pdf (relying on the "tags" field to identify older Americans).

[38] *See Reports: The CFPB Gets Results for Consumers*, U.S. PIRG, https://uspirg.org/page/usp/reports-cfpb-gets-results-consumers (last visited Apr. 20, 2018).

[39] *See generally* Littwin, *supra* note 6; Porter, *supra* note 31.

[40] Todd Zywicki, *Complex Loans Didn't Cause the Crisis*, WALL ST. J. (Feb. 18, 2010), https://www.wsj.com/articles/SB10001424052748704804204575069102749893246 (discussing the value of common proposals that clearly disclose key mortgage costs).

[41] Amy J. Schmitz, *Remedy Realities in Business to Consumer Contracting*, 58 ARIZ. L. REV. 213, 215-236 (2016) [hereinafter Schmitz, *Remedy Realities*].

In short, to fulfill its statutory duty to release data about the consumer financial marketplace "as is in the public interest," the Bureau should maintain and increase rather than decrease the data fields included in the public Database.[42]

B. Continuing to Publish Company Names Will Maintain Transparency and Enhance the Marketplace

One of the most important fields included in the Database is the company which is the subject of a consumer's complaint. If this portion of the Database becomes more generalized, such as by providing only the company's industry group, then much of the Database's utility will be lost.

The Bureau already has determined that the public disclosure of company names is in the interest of consumer protection and furthers the Bureau's charge to collect, monitor, and respond to consumer complaints. In its 2012 policy statement regarding disclosures related to credit card complaints, the Bureau carefully considered various arguments that raised either the undesirability or illegality of making company names public.[43] The Bureau made a reasoned determination that these arguments did not legally prevent or persuasively caution against the publication of company names. It made clear that the Dodd-Frank Act directly authorizes the Bureau to disclose complaint information when it is "in the public interest" to do so.[44] It further determined that sufficient safeguards were already in place to authenticate complaints after submission, thus reasonably guarding against a flood of sham complaints.[45]

In its policy statement, the Bureau also noted the importance of giving context for the complaints—a laudable goal that revealing the company names helps achieve.[46] For consumers in particular, they make better choices when they have access to information about other consumers' experiences. Consumers do not do business with generalized sectors of the financial products and services industry. They do business with specific banks, specific credit card companies, and specific mortgage lenders, among others. Knowing the identity of the company is the best way for consumers to have the necessary information to make meaningful decisions when choosing among multiple companies.

Similarly, the Database helps legitimate financial service companies provide valuable services to consumers without being undercut by unscrupulous competitors. By casting out companies that cut corners and injure consumers from the marketplace, the Database ensures that law-abiding companies continue to compete fairly.[47] In this respect, the financial marketplace has recognized the Database's importance in evaluating financial products and services. For example, in 2015, US News and World Report created a ranking for the best credit cards based, in part, on filed and resolved complaints with the Bureau.[48]

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[42] *See* Disclosure of Consumer Complaint Narrative, *supra* note 29, at 15575.
[43] Disclosure of Certain Credit Card Complaint Data, *supra* note 19, at 37560.
[44] *Id.* at 37560-65.
[45] *Id.* at 37564-65.
[46] *Id.* at 37561-62.
[47] *See Semi-Annual Report of the Consumer Financial Protection Bureau*, *supra* note 16, at 15
[48] U.S. News Staff, *Best Credit Cards for Bad Credit of 2018*, U.S. NEWS AND WORLD REPORT (Apr. 18, 2018), https://creditcards.usnews.com/bad-credit.

Further, publishing companies' names promotes self-regulation among industry participants. Companies build their reputations by improving practices based on feedback from consumer complaints. A company that appears less frequently in the database may draw more business as compared to a competitor that is the subject of numerous complaints. The Bureau has stated that "disclosure has the potential to sharpen competition over product quality and customer service."[49] Thus, the Bureau's "naming-names" approach to complaints encourages firms to avoid abusive or questionable behavior when engaging with consumers.

Finally, the Database reveals to the public which companies are responsive to complaints. The "company response field" shows whether a company provided a timely response. When combined with company name, this field serves a useful reputational function for consumer finance firms because it allows them to tell their side of the story. For instance, entries in this field can include "company believes the dispute was the result of a misunderstanding" or "company disputes the facts presented in the complaint." Similarly, the "company response to consumer" field allows companies to address complaints, further providing consumers with information about whether a company actively engaged with the consumer through the complaint mechanism. Companies within the same line of business can use these fields to distinguish themselves from competitors.

To use its own statements regarding openness and transparency, the Bureau is committed to allowing "the marketplace of ideas to determine what the [complaint] data show."[50] Publicly disclosing company names, so the Bureau has stated, allows "researchers to inform consumers about potentially significant trends and patterns in the data . . . has the potential to sharpen competition over product quality and customer service" and "help[s] ensure that the Bureau remains accountable for tackling the complaints that it receives."[51]

We thus urge the Bureau to continue publishing company names in the public Database so that the Bureau can properly and effectively execute its authority to make complaint information accessible "as is in the public interest."[52]

C. Publishing Additional Data Will Enhance Transparency, Help the Marketplace, and Allow for Better Assessment of the Complaint Mechanism

In establishing the Database and later adding consumer narratives to the Database, the Bureau articulated that a key goal of publishing data in the public-facing Database is to fulfill its statutory authority to make complaint information accessible "as is in the public interest," which includes disseminating sufficient data to "empower consumers to better understand the context of the data currently provided in the [Database]."[53] More data and context provided by the Bureau will enhance the dissemination of robust information that consumers and third-parties can use to empower market participants, promote transparency, and enhance fairness and efficiency.

1. More Data Is Needed to Fully Assess the Complaint Mechanism

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[49] Disclosure of Certain Credit Card Complaint Data, *supra* note 29, at 37564.
[50] *Id.* at 37561.
[51] *Id.* at 37564.
[52] *See* Disclosure of Consumer Complaint Narrative, *supra* note 29, at 15575.
[53] *Id.* at 15575-76.

Although the Database presently contains information key to assessing the markets for financial products and services, it does not include enough data to allow for the assessment of the Bureau's complaint mechanism as a dispute-resolution function.[54] Arbitration clauses have become ubiquitous in consumer contracts as means for preventing class actions.[55] At the same time, legal aid is limited, and it generally makes little economic sense to incur legal costs to pursue small claims in court or arbitration on an individual basis.[56] This means that most consumers have little legal recourse when they believe they have been wronged by a company.[57]

Consumers therefore turn to company "complaint systems" and social media in attempts to obtain redress. This often results in frustration when companies provide no response to complaints on social media, ignore e-mails, or send rote replies that provide little assistance.[58] These internal customer assistance processes may favor the "squeaky wheels" who are proactive in pursuing their problems.[59] Meanwhile, those consumers considered less lucrative for the companies, often due to lower incomes and buying resources, may receive little redress through these private systems.[60]

The Bureau's complaint mechanism affords consumers a trusted avenue for attempting to resolve their problems and vindicate their rights. When a consumer submits a complaint, the Bureau screens the complaint to ensure that it falls within the Bureau's statutory authority and that is it complete, whereupon the Bureau forwards the complaint to the subject company.[61] The company is required to communicate with the consumer, if needed, determine what action to take, and report back to the consumer and Bureau through a secure portal. Consumers then may provide feedback to the Bureau about the company's response.[62] As described by the Bureau, this process "seeks to ensure that consumers receive timely responses to their complaints and that the Bureau, other regulators,

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54 Schmitz, *Remedy Realities*, *supra* note 41, at 220-26.

55 *Id.*

56 According to the U.S. Census Bureau's 2011 statistics on poverty, 60 million Americans–one in five–qualified for free civil legal assistance. Unfortunately, more than 50 percent of those seeking help are turned away because of the limited resources available. These statistics describe only those below the poverty line and do not reflect the tens of millions of moderate income Americans who also cannot afford legal help. *Civil Legal Aid 101*, U.S. DEPT. OF JUSTICE (Oct. 21, 2014), https://www.justice.gov/atj/civil-legal-aid-101.

57 Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPPERDINE L. REV. 279, 290-366 (2012) [hereinafter Schmitz, *Squeaky Wheel Systems*].

58 Judy Strauss & Donna J. Hill, *Consumer Complaints by E-mail: An Exploratory Investigation of Corporate Responses and Customer Reactions*, 15 J. INTERACTIVE MARKETING 63, 63–64 (2001). One study of the Facebook and Twitter accounts of thirty-four large U.S. companies found that the companies ignored nearly half of the complaints consumers submitted, and when companies did respond, they left consumers dissatisfied in about 60% of the cases. Sabine A. Einwiller & Sarah Steilen, *Handling Complaints on Social Network Sites – An Analysis of Complaints and Complaint Responses on Facebook and Twitter Pages of Large US Companies*, 41 PUB. REL. REV. 195, 197–202 (2015) (highlighting results of the study).

59 *See* Schmitz, *Squeaky Wheel Systems*, *supra* note 57, at 280; Peter A. Alces & Jason M. Hopkins, *Carrying A Good Joke Too Far*, 83 CHI.-KENT L. REV. 879, 895-96 (2008) (discussing how businesses may discriminate in favor of sophisticated consumers).

60 *See* Amy J. Schmitz, *Secret Consumer Scores and Segmentations: Separating Consumer "Haves" from "Have-Nots"*, 2014 MICH. ST. L. REV. 1411, 1411–74 (2014) [hereinafter Schmitz, *Secret Consumer Scores*] (exploring businesses determine what contracts and benefits to provide to consumers).

61 *See Semi-Annual Report of the Consumer Financial Protection Bureau*, *supra* note 16, at 20.

62 *See id.*

consumers, and the marketplace have the complaint information needed to improve the functioning of the consumer financial markets for such products and services."[63]

A recent survey of consumer attorneys found that in lieu of full-representation, 48% of these attorneys had helped consumers submit complaints against financial institutions and 23% of all respondents said they had submitted complaints that were resolved in the consumers' favor.[64] A significantly higher proportion of responding legal services attorneys (74%) reported that they had submitted complaints to the CFPB for consumers, and 42% of legal services attorneys said that a complaint submitted to the database was resolved in the consumers' favor.[65] Further, it now is accepted legal aid practice to advise consumers whom legal aids offices are unable to represent to submit complaints themselves to the Bureau.[66]

The Bureau's complaint process thus may provide consumers with an effective avenue to pursue issues that others might bring directly to companies, thereby serving as a "litigation substitute."[67] But the Database does not contain sufficient data to fully assess the complaint mechanism as a dispute resolution function. Without data about companies' responses to complaints beyond the basic information currently provided, there is no way for policymakers, advocates, scholars, and consumers themselves to know the effectiveness of the complaint process. We urge the Bureau to take this opportunity to increase the variety of data available in the Database and, when appropriate, in reports and other publications.

2. More Data Will Increase Consumer Knowledge About Companies and Enhance the Marketplace

The results of inclusion of consumers' narratives demonstrate the benefits of including as much data as feasible. Inclusion of narratives has allowed policymakers, advocates, and academics to analyze the additional data, in combination with other data, for trends. Based on these analyses, they have proposed ways for the Bureau to enhance the complaint process, for the Bureau to monitor distinct market segments, and for consumers to better utilize the complaint process.[68]

Consumers likewise can read the narratives to assess their own problems, which may enhance how they frame their complaints and deal with companies in a way that leads to more productive resolutions and more consistent resolutions across consumers. As noted above, consumers also can use the narratives to decide which companies with which to do business.

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[63] *Id.* at 21.

[64] *Advocates Reflect on the Consumer Bureau's Role in Achieving Justice for Consumers: An Online Survey*, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES 6 (Feb. 2018), https://www.consumeradvocates.org/sites/default/files/NACA_survey_CFPB_in_our_communities022018_1.pdf.

[65] *Id.*

[66] *Id.*

[67] *See* Porter, *supra* note 31, at 77-78.

[68] *See, e.g.*, Foohey, *supra* note 6, at 177-79 (discussing how consumers use the complaint function and suggesting ways in which the Bureau can enhance its responses to consumers); Odinet, *supra* note 37, at 105 (relying on consumer narratives to analyze fintech lenders); David Ascienzo, *Cryptocurrency CFPB Complaints Rise as Prices Fall*, VALUEPENGUIN, https://www.valuepenguin.com/cfpb-complaints-about-cryptocurrencies (discussing complaints about cryptocurrency); Weissman & Mierzwinski, *supra* note 37 (analyzing complaints submitted by older Americans).

The company response fields provide for useful examples of how the Bureau can augment the data it publishes. At present, the Database includes only superficial data about company response and complaint resolution. It details the company's public response, the company's response to the consumer, and whether the response was timely. The company's public response field is blank for the majority of complaints. The company's response field is limited to seven options (closed, closed with explanation, closed with monetary relief, closed with non-monetary relief, closed with relief, closed without relief, and in process).[69] And the timely received field is a binary yes, no (and N/A).

The information about timely responses and seven response options alone can help consumers decide if they want to do business with particular companies. But additional information about the relief a company did or did not provide would help consumers make better decisions. Without additional data, questions remain about whether and which companies respond to complaints with resolutions that address consumers' complaints. If these questions go unanswered, speculations about companies' practice, both positive and negative, may proliferate. Supplementing data in the Database with observations of companies' responses to complaints will enhance the transparency of the complaint process and provide researchers with data necessary to more fully assess the complaint mechanism, which will benefit all stakeholders—companies, advocates, researchers, and consumers.

The Bureau also should make public additional data it collects through the complaint process. When consumers submit complaints, they may state what they think will be a fair resolution of the issue, but this information is not publically available. Consumers also indicate whether they tried to resolve their issues with the company before turning to the Bureau's complaint mechanism. Including these data will help policymakers, advocates, researchers, and other interested citizens learn how consumers conceptualize and deal with their financial issues.

Further, to provide more context for the company names and resolution information in the Database, the Bureau should consider adding fields that detail the market size for the subject product or service and the share of the market held by the subject company. These data points will allow consumers, researchers, and others to place consumers' complaints in the context of the broader marketplace, which will increase transparency about the prevalence of complaints about particular companies.

Importantly, the Bureau can add these fields to the Database without jeopardizing consumers' privacy or risking re-identification. Overall, in adding these fields, the Bureau will enhance transparency and allow for more detailed analysis by third parties, which will inure to the benefit of all stakeholders.

III. Reports Published by the Bureau Promote Market Transparency and Efficiency

The Bureau's reports based on complaint data are helpful tools that educate consumers and highlight industry trends that otherwise might not be easily recognizable. Reports provide consumers with information about financial products and services in one place via a website that is

[69] *See* Foohey, *supra* note 6, at 182 (noting these options).

relatively easy to access. This is a vast improvement over the piecemeal information available to consumers prior to the Bureau's publication of reports.

Similarly, the reports fill key information gaps about issues that have the potential to balloon into larger problems. Policymakers tend to rely on economic studies that examine larger data sets, information that by its nature lags in time. The Bureau's reports augment these studies with real-time information. Researchers and advocates also can draw from these reports to pinpoint particular products and services for future detailed inquiry and to identify areas where consumers may need more information to understand their options.

The reports also provide guidance to companies to insure the integrity of the marketplace. This is particularly important when consumers have little ability to choose which companies to interact with, such as in the context of mortgage servicers, which are contracted with by mortgage lenders. In these instances, companies may find their reputations tarnished by their contracting parties. The Bureau's reports can provide valuable information for companies about which other companies to contract with and whether or not to intervene with their contractual partners to require different practices. Likewise, reports' summaries of data may assist advocates, states' attorneys general, and other stakeholders in advocating for changes to industry standards, such as credit reporting practices.

Overall, the reports provide key information that, when used by advocates, policymakers, researchers, and consumers themselves, help consumers avoid financial mistakes and make better financial decisions, which in turn promotes marketplace efficiency. We urge the Bureau to continue publishing monthly reports and occasional reports about specific products, services, and trends, as well as to enhance these reports with additional analysis and a schedule.

A. Enhancing the Usefulness of the Bureau's Reports

The Bureau should capitalize on the opportunity to leverage the data it collects as part of its complaint mechanism to publish reports that add to the public's knowledge about the financial products and services marketplace. In general, additional analysis and tailored reporting increases the information available to consumers and other parties interested in cultivating marketplace efficiency.

1. Frequency

The Bureau's current reports, both monthly snapshot reports and special reports about specific industries and issues, provide valuable information for consumers, researchers, advocates, companies, and policymakers. Special reports that the Bureau issues along with educational materials and reports focusing on vulnerable populations, such as service members, lower income consumers, and the elderly, are particularly useful to advocates and researchers who focus on these populations and their particular issues. As such, we urge the Bureau to continue publishing monthly reports and special reports that deal with particular products, services, or vulnerable populations.

2. Content

Particular to the monthly reports, the inclusion of month-to-month trends is especially beneficial to research and advocates in pinpointing products, services, or issues that merit in-depth focus. In addition to continuing to include month-to-month trends in its monthly and other reports, the Bureau should consider adding more in-depth analysis of monthly trends. For example, more in-

depth analysis may focus on a particular sub-product or sub-issues, as indicated by consumers through the complaint mechanism. Adding this tailored analysis will enhance consumers' ability to make financial decisions, and similarly will allow others to decide which particular issues, products, or services merit extra focus. For all parties, the Bureau's reports likely are one of the most easily accessed and most up-to-date sources about these issues, products, or services.

Likewise, the Bureau's reporting on State and local complaint trends provides key and otherwise often unavailable information to consumers and others about regional trends. The same is true for reports that focus on particular products and services, and reports that pinpoint seasonal fluctuations. In addition to including these trends, products, and services in monthly and other reports, we urge the Bureau to publish tailored special reports that provide more in-depth analysis of trends, seasonal fluctuations, products, and services.

Particular to seasonal fluctuations, some ideas that the Bureau should consider include fluctuations that occur: during summer, when students and younger individuals take on extra work; during the winter holidays; during the beginning of semesters when companies may target college students to sign up for credit cards; and during peaks in housing market searches and sales, such as in the spring.[70]

Similarly, reports that focus on products and services will be even more useful to consumers, policymakers, advocates, and others if they include more information about specific categories and questions asked of consumers. For example, instead of stating the percentage of consumers who complained about issues with debt collection, the Bureau's reports will be more effective if they detail the percentage of consumers who complained about particular issues with debt collection, such as receiving calls after 9 p.m. or the collectors' use of illegal threats.

The Bureau can further enhance the effectiveness of its reports by adding more context for complaint information, particularly with regards to companies. We suggest above adding information about market size and company market share to the Database. Including this information in published reports will promote transparency and aid consumers and others in assessing complained about companies' place within the market for financial products and services. This transparency, in turn, will provide companies with an opportunity to distinguish themselves from other companies.

Overall, the information the Bureau collects through the complaint mechanism places it in a unique position to publish tailored reports about trends, regional and seasonal fluctuations, vulnerable populations, and particular products and services. In many instances, the Bureau may be in the best position to disseminate this information. We thus urge the Bureau to continue releasing monthly reports, along with special reports that provide more in-depth analysis.

B. Publishing a Schedule of Reports Will Promote Transparency

The Bureau also should provide a publication schedule of its reports and other materials relying on complaint data. As noted, the Bureau is statutorily obligated to provide an annual report to Congress

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[70] *See* Jed Kolko, *The Best Time to Look for a House, By State*, CITYLAB (Jan 30, 2013), https://www.citylab.com/equity/2013/01/best-months-buy-house-city/4540/.

on its complaint operations every March 31. It also must provide semi-annual reports that cover a range of topics, including consumer complaints.[71] The Bureau further publishes additional reports and summaries of data. These reports and the Database collectively allow policymakers, industry, advocates, and consumers to assess the CFPB's complaint mechanism, and to leverage information in reports and data in the Database to likewise assess markets for financial products and services. Publication of a schedule will promote transparency and allow users of the reports and other publications to plan for how they will use to-be-published data.

C. Notifying Companies of Their Inclusion in Reports

If the Bureau notifies companies of their inclusion in Bureau reports, the Bureau should release information about how and when it notified companies of their inclusion in its reports along with the publication schedule. This likewise will promote transparency of the process by which the Bureau analyzes and distributes data based on consumer complaints.

We further urge that if the Bureau decides to notify companies of their inclusion in Bureau reports, it do so without including the companies' responses in the reports. If companies decide to provide comments about their inclusion, they may do so on their own websites or by response to the Bureau, which the Bureau can later publish, for instance, as part of its blog. This procedure will ensure that the reports continue to be based solely on information as submitted by consumers via the complaint mechanism. We urge the Bureau to avoid allowing companies to provide input into the reports before publication. This would run the risk that companies could suppress negative information about them in the reports and at the very least would create the appearance of such improprieties.

IV. The Bureau Should Devote Resources to Continuing to Improve the Accessibility of the Complaint Portal and Database

A key reason for the complaint mechanism and Database's successes has been the accessibility, design, and user-friendliness of the mechanism and the Database. Since the Database's inception, the Bureau has affirmed the benefits of providing a publicly-accessible and searchable database of complaints. In its final policy statement issued when it first established the Database, the Bureau detailed the benefits of providing a publicly-accessible and searchable database of complaints.[72] These benefits include, among others, facilitating "data visualizations, which can then be embedded on other Web sites and shared via social media," allowing for users "to disseminate information from the database, reducing transaction costs in the marketplace of ideas," and providing machine-readable data such that third-parties can "build their own tools for leveraging the data, further reducing transaction costs and improving dissemination."[73]

It is of utmost importance to the effectiveness of the complaint mechanism that the Bureau's website and the Database be easily accessible and understandable by third-parties, including the general public. Consumers must be able to easily submit complaints and use the Database to research potential creditors and financial products. This policy was at the heart of the Bureau's

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[71] *See supra* Part I.
[72] Disclosure of Certain Credit Card Complaint Data, *supra* note 29, at 37567-68.
[73] *Id.* at 37567.

addition of complaint narratives to the Database. In issuing its final policy statement, the Bureau affirmed that easily-accessible, downloadable, and searchable data about consumers' complaints empowers consumers, promotes transparency, and enhances market efficiency and fairness.[74] Conversely, if consumers face barriers in understanding or using the complaints process or Database, then the complaint portal has less value, and the transparency, efficiency, and fairness benefits of the Database are diminished.

As noted above, consumers look to the complaints process as a trusted means for gathering information and seeking to obtain redress. Since 2011, the Bureau has handled more than a million complaints from consumers nationwide, the vast majority of which were submitted through the Bureau's complaint portal.[75] The Bureau provides a safe and tested complaint process that responds to all consumers, as compared to companies' privatized and generally uneven customer services.[76]

Accordingly, the Bureau's provision of a user-friendly complaint portal and Database can help narrow the divide between consumers' access to remedies, while providing more robust data that consumers and third parties use to promote transparency, efficiency and fairness.[77] To that end, there are three key improvements and related tools the Bureau can use to expand accessibility and usability of the complaint portal and Database.

A. The Complaint Portal Should Be Simple and Easy to Understand

The usefulness of the Database decreases substantially if it is not simple and understandable for average Americans. The language on the Bureau's website and complaint portal detailing how to submit complaints must be readable and encouraging to people to speak out about problems, beginning with the Bureau's homepage. The average American reads at an eighth-grade level. Text for the general public should aim for a reading level of around grade 6, at most grade 8.[78]

For example, the Bureau's webpage that directs consumers about starting the complaint process is written at grade level 16, meaning that they are appropriate for someone who has graduated from college or has pursued an advanced degree.[79] At present, the page contains two key paragraphs:

> We've handled over 1 million complaints, helping consumers connect with financial companies to get direct responses about problems with mortgages, student loans,

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[74] Disclosure of Consumer Complaint Narrative, *supra* note 29, at 15573 (March 24, 2015).
[75] *See supra* note 6.
[76] *See supra* note 59 and accompanying text.
[77] *See* Porter, *supra* note 31, at 79 (discussing the general "knowledge value" of complaint data).
[78] The American Medical Association and the National Institutes of Health recommend readability of patient education materials to not exceed a sixth-grade reading level. The average reading skill of U.S. adults is at the eighth-grade level. *See* Adam E. M. Eltorai, et al., *Readability of Patient Education Materials on the American Association for Surgery of Trauma Website*, 3 ARCH. TRAUMA RES. 1 (2014); *see also* Barry D. Weiss, *Health Literacy and Patient Safety: Help Patients Understand*, AMA Foundation (2007), https://med.fsu.edu/userFiles/file/ahec_health_clinicians_manual.pdf.
[79] Reading level was assessed using Microsoft Word's readability statistics, which includes the Flesch-Kincaid grade level. *See* Test Your Document's Readability, OFFICE SUPPORT, https://support.office.com/en-us/article/Test-your-document-s-readability-85b4969e-e80a-4777-8dd3-f7fc3c8b3fd2#__toc342546558 (last visited May 12, 2018).

> payday loans, debt collection, credit reports, and other financial products and services.
>
> Every complaint we receive gives us insights into problems that people are experiencing in the marketplace and helps us to identify and prioritize problems for potential action. The result: better outcomes for consumers, and a better financial marketplace for everyone.[80]

These paragraphs should be easy to understand for all, and not geared for college graduates. Decreasing the reading level of this language is particularly key for improving accessibility. In particular, decreasing the reading level of these paragraphs may increase consumer's propensity to submit complaints, which will provide more data.

At the same time, the Bureau can enhance accessibility by deleting some filters and introductory paragraphs. Indeed, in prior months, this webpage did not contain any introductory paragraphs. Rather, the page prompted consumers to begin the complaint process by "choos[ing] a product or service to get started," and provided several options, each with a basic picture that represented the type of product or service.[81] Not only is this previous language better because it is at a much lower reading level, the fewer times people must click through a webpage will increase their ability to successfully lodge complaints, which again will provide more data.

Now consumers must click through the initial page that contains the above two paragraphs about submitting a complaint. And they also must read another page of text that details the five steps to submitting a complaint and contains language warning consumers about all the information they will need to submit a complaint and that they generally will not be allowed to submit a second complaint about the same problem.[82] The warning itself is at a reading level of grade 10.5.[83] More concerning is that such a warning will deter people from submitting a complaint in the first instance. Although it is important to counsel consumers about what information is needed, easier to read language combined with more visual cues will better help people submit complaints.[84] Similarly, the complaint process steps previously included more visual cues, such as a basic drawings of an automobile. Adding back these visual cues will aid people in understanding their options for submitting complaints.

B. The Database Should Be Easily Downloadable and Analyzable

For the Database to be effective, it should provide information in a way that is easy to analyze for consumers and other stakeholders. Currently, the Bureau's website provides three options for consumers and other parties to access the data: read narratives, view complaint data, and download data in CSV and JSON file formats.[85] Consumers and other third-parties use each of these options

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[80] Submit a Complaint, *supra* note 6.

[81] *See* Submit a Complaint, CFPB (Jan. 15, 2016), via Wayback Machine, https://web.archive.org/web/20160115040559/http://www.consumerfinance.gov/complaint/.

[82] Submit a Complaint, *supra* note 6.

[83] *See supra* note 79.

[84] *See* J. David Greiner, Dalie Jimenez, & Lois Lupica, *Self-Help, Reimagined*, 92 IND. L.J. 1119, 1154-56 (2017) (discussing organizing and structuring content to make content understandable by laypeople).

[85] Consumer Complaint Database, *supra* note 7.

differently, suggesting that the Bureau should tailor tools to enable users to analyze the data based on how they access the data.

For the "read narratives" option, the Bureau should continue to provide the easy sorting of complaints by date, product, sub-product, issue, and sub-issue, among other options, within its website. Once sorted, the current presentation of the information with headings and subheadings of different font sizes and styles, and ample white space comports with best practices about information presentation.[86] Any changes that the Bureau makes to how complaints are displayed should continue to adhere to these practices.

For the "view complaint data" option, the Bureau should create an interface that displays a spreadsheet in a web browser on users' personal computers and tablets similar to the Bureau's current mobile-device ready version of this option. The mobile-device ready version of this option at present brings users to a sortable spreadsheet that displays the data on their smart phones. In contrast, at present, the webpage's "view complaint data" brings users to the same page as "read narratives."[87] The duplication is confusing, and misses the opportunity to provide users with the ability to easily access a sortable spreadsheet of data online.[88]

In prior years, this page of the Bureau's website included "download the data" options that allowed users to pre-sort the downloaded data based on product or service.[89] At present, if a user clicks on "download options," the user is brought to two options (CSV, JSON) and a link to "filter the data set." The "filter" link brings the user once again to the same page with complaints as the "view complaint data" option. Such duplication is again confusing, and misses an opportunity to present consumers and third-parties with easily accessible data without needing to download the database. This analysis shows that one tool that the Bureau should consider devoting resources to developing in the near future is a more-easily accessed full version of the Database online, in addition to the Database download tools that the Bureau already provides. This will allow users to be better able to analyze complaint information via multiple interfaces.

C. The Complaint Portal and Database Should Be Mobile Friendly

The complaint portal and Database must be accessible by all consumers regardless of the technology they use to connect to the Internet. Many individuals in America use their mobile devices, such as smart phones, to access the Internet, particularly lower-income users and racial and ethnic minorities.[90] Smartphone usage has helped narrow the prior gap in Internet access based on race and

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[86] *See* Greiner, et al., *supra* note 84.

[87] Search the Consumer Complaint Database, CFPB, https://www.consumerfinance.gov/data-research/consumer-complaints/search/ (last visited Apr. 22, 2018).

[88] A spreadsheet currently is accessible through the "view complaint data in Socrata" link on the Search the Consumer Complaint Database page. *Id.* Many consumers and third parties who may benefit from this display of data likely do not understand that this is what they will be routed to if they click this link.

[89] *See* Consumer Complaint Database, CFPB (May 7, 2016), via Wayback Machine, https://web.archive.org/web/20160507102109/https://www.consumerfinance.gov/data-research/consumer-complaints/

[90] Internet / Broadband Fact Sheet, PEW RES. CTR. (Feb. 5, 2018), http://www.pewinternet.org/fact-sheet/internet-broadband/.

economic level.[91] As of 2016, 12% of Internet users relied on their smart phones as the only means for gaining access to the web.[92]

At present, the Bureau's website, complaint portal, and particularly the Database, are best viewed through a computer or laptop Internet browser, such as Internet Explorer or Firefox. For instance, the complaint portal prompts consumers to submit a complaint through five steps.[93] Each of these five steps requires consumers to click through a number of options to specify the type of product and problem at issue. To enable consumers to submit complaints, particularly on mobile devices, the Bureau should continue to refine tools that provide cues about content and upcoming questions, allowing people to read text and questions non-linearly.[94]

The Bureau's website also includes a page whereby consumers and third-parties can search complaints. On some mobile devices, this page displays complaints in linear and searchable formats. It also provides an interface to view and download the data in a mobile-friendly format. This is important in advancing access for those without home computers or broadband Internet access. The Bureau should continue to refine tools that ensure that the complaint data are viewable and downloadable in a way that promotes access from mobile devices.

V. CONCLUSION

Most importantly, the Bureau must continue to make the Database public in order to fulfill its statutory duty to promote transparency and efficiency in the marketplace for financial goods and services. Particularly when combined with the Bureau's lack of new enforcement actions, eliminating the public Database would remove an important check on companies. Ultimately, consumers, law-abiding companies, and the marketplace would suffer. The public Database provides transparency, empower consumers, allows for the dissemination of robust information, and enables market efficiency and fairness.

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[91] Kathryn Zickuhr & Aaron Smith, *Home Broadband 2013*, PEW RES. CTR. 4–5 (2013), http://www.pewInternet.org/files/old-media//Files/Reports/2013/PIP_Broadband%202013_082613.pdf.
[92] Internet / Broadband Fact Sheet, *supra* note 90.
[93] Submit a Complaint, *supra* note 6 (detailing the "five steps to submit your complaint").
[94] *See* Greiner, et al., *supra* note 84, at 1154-56 (discussing organizing and structuring content to make content understandable by laypeople).

Comments of Financial Regulation and Consumer Protection Scholars on
Docket No. CFPB-2018-0005
May 29, 2018

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

Dear Ms. Jackson:

The undersigned professors of consumer law and financial regulation and former regulators submit the following comments in response to the Consumer Financial Protection Bureau's Request for Information ("RFI") Regarding Bureau External Engagements (Docket No. CFPB-2018-0005). Each signatory's affiliation is indicated below his/her signature to provide institutional affiliation, but this comment does not represent the views of their institutions.

Sincerely,

Cathy Lesser Mansfield
Professor of Law, Drake University Law School

____

William Black
Associate Professor of Economics and Law, University of Missouri-Kansas City

Mark Budnitz
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Stephen Calkins

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I. IT IS APPROPRIATE AND NECESSARY FOR THE BUREAU TO ENGAGE IN REGULAR OUTREACH AND CONVERSATION WITH A BROAD RANGE OF INDIVIDUALS AND ENTITIES AFFECTED BY CFPB ACTIVITIES, INCLUDING INDUSTRY, CONSUMERS, AND THEIR REPRESENTATIVES.

The work of the Bureau impacts the lives of tens of millions of consumers as well as consumer financial service providers within its jurisdiction. For this reason, it is essential that as the CFPB does its work, it engages in robust outreach and conversation with all parties affected by its work, including consumers, consumer groups and advocates that focus on an array of different consumer markets and issues, and the various industry participants within the Bureau's jurisdiction. Broad and transparent engagement with all sectors of affected stakeholders will ensure that the Bureau receives the fullest possible information for sound decision-making while preserving its legitimacy as a neutral independent agency.

The undersigned believe that the Bureau's outreach and engagement efforts with affected constituencies have been appropriate and robust in the past, and that the resulting regulations, supervisory activities, enforcement actions, educational efforts, and other work of the Bureau reflect a balanced, responsive, and inclusive approach by the Bureau. We encourage the Bureau to continue to engage with and listen to all affected constituencies, as more fully described herein.

II. THE BUREAU HAS EFFECTIVELY REACHED OUT TO AND HEARD FROM EXTERNAL PARTIES, INCLUDING INDUSTRY AND CONSUMERS, IN NUMEROUS WAYS.

A. THE BUREAU HAS EFFECTIVELY REACHED OUT TO AND HEARD FROM INDUSTRY AND CONSUMERS IN ITS RULEMAKING ACTIVITIES.

In the course of the Bureau's process before issuing a final rule, the Bureau has, in the past, regularly engaged with affected parties through numerous avenues. These avenues have included, but are not limited to, discussions with advisory boards, field hearings, roundtables, town halls, small business review panels (SBREFAs), and training and implementation activities.

It would be impossible to catalog the numerous ways the Bureau, in its rulemaking, has engaged externally over the short life of the Bureau. Instead, in this comment we focus on the many external engagement activities of the Bureau in regards to one key rule adopted by the Bureau: the Mortgage Servicing Rule.[1]

In 2012, in accordance with Dodd-Frank, the Bureau proposed major changes to the mortgage servicing rule.[2] The final rule was adopted on February 14, 2013,[3] and became effective January 10, 2014.[4] The Bureau later adopted amendments to the rule on October 19, 2016,[5] which became effective (in large part) on October 19, 2017.[6]

In writing the proposed rules the Bureau took into account numerous sources of external input. These varied sources included studies and enforcement actions by other governmental agencies, including the terms of the National Mortgage Settlement, actions by the Office of the Comptroller of the Currency and the Federal Reserve Board,[7] law review articles,[8] mortgage market news accounts,[9] studies by consumer advocacy groups,[10] and testimony before Congress.[11] In developing the mortgage servicing proposals, "Bureau staff met with mortgage servicers, force-placed insurance carriers, industry trade associations, consumer advocates, other Federal regulatory agencies, and other interested parties to discuss various aspects of the statute and the servicing industry."[12] The Bureau "consulted with relevant Federal regulators both regarding the Bureau's specific proposals and the need for and potential contents of national mortgage servicing standards in general."[13]

In its notice of proposed rule-making, the Bureau specifically asked commenters to address the potential burden the regulations might have on small businesses, and to recommend adjustments to the rule that might be appropriate.[14] In setting the effective date, the Bureau also asked for input from industry regarding the speed with which servicers would be able to modify their software, adopt policies and procedures, train staff, and otherwise implement new rules.[15] The Bureau set the review timelines for loss mitigation applications (30 days), and the rule prohibiting foreclosure while a borrower was making payments pursuant to a trial loan modification, based on the existing industry standard.[16]

[1] 12 C.F.R. 1024.30 – 1024.41. For additional discussion of the Bureau's public outreach efforts with respect to its rulemaking process, see the forthcoming Comments of Financial Regulation and Consumer Protection Scholars on Docket No. CFPB-2018-0009.
[2] 77 Fed. Reg. 57199 (Sept. 17, 2012).
[3] 78 Fed. Reg. 10695 (Feb. 14, 2013).
[4] *Id.* at 10696.
[5] 81 Fed. Reg. 72160 (October 19, 2016).
[6] *Id.* There were some interim amendments to the rule as well, catalogued in the 2016 rule at 81 Fed. Reg. 72160.
[7] Proposed Rule with Request for Public Comment, 77 Fed. Reg. 57199, 57200, 57201, 57204, 57205 (Sept. 17, 2012).
[8] *Id.* at 57202.
[9] *See, e.g.*, *id.* (citing to *Inside Mortgage Finance*).
[10] *Id.* at 57203.
[11] *Id.*
[12] *Id.* at 57207.
[13] *Id.*
[14] *Id.* at 57206, 57209.
[15] *Id.* at 57208.
[16] *Id.* at 57268, 57270.

The Bureau's early intervention requirements were formed based on existing requirements on servicers imposed by private mortgage investors, the GSEs, Ginnie Mae, or government agencies offering guarantees or insurance for mortgage loans, such as FHA, the VA, or the Rural Housing Service.[17] Similarly, in response to information obtained from consumer advocates, the Bureau proposed requiring that servicers provide information requested by borrowers and respond to errors identified by borrowers even if they were delinquent on their loans.[18] The Bureau also set up a loss mitigation process that addressed "concern among mortgage market participants…regarding servicers' performance of loss mitigation activity in connection with the mortgage market crisis."[19]

In writing the rules, the Bureau considered the impact regulations might have on small businesses by convening a Small Business Review Panel and asking specifically, in the proposed rule, for comments regarding appropriate rule adjustments for small businesses.[20] The SBREFA panel consisted of representatives from 16 companies as small entity representatives.[21] The Bureau tailored its proposed rule based on input from small servicers, including feedback received in the SBREFA panel, after which it decided not to exempt small servicers from the early intervention requirements of the loss mitigation rule, but asked "whether the Bureau should consider alternative means of compliance with proposed § 1024.39 that would provide small servicers with additional flexibility, such as by permitting small servicers to develop a more streamlined written notice under proposed § 1024.39(b)."[22]

When the time came to draft and adopt final rules, the Bureau once again took into consideration the input received from various stakeholders and governmental entities.[23] It received over 300 comments, the majority of which "were submitted by mortgage servicers, industry groups representing servicers and businesses involved in the servicing industry."[24] Comments were received from "[l]arge banks, community banks and credit unions, non-bank servicers, and industry trade associations. The Small Business Administration Office of Advocacy submitted a comment and the remaining comments were submitted by vendors and attorney's [sic] representing industry interests. The Bureau also received a significant number of comments from consumer advocacy groups."[25] The Cornell e-Rulemaking Initiative submitted a 50-page comment synthesizing submissions of 144 registered participants to Cornell's Regulation Room project.[26] The Bureau's explanation of its regulatory choices discussed in great deal the comments received by all external parties and the rationales for the final rules.

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[17] *Id.* at 57281.
[18] *Id.* at 57237.
[19] *Id.* at 57265.
[20] *Id.* at 57206-57207. The SBREFA report can be found at https://files.consumerfinance.gov/f/201208_cfpb_SBREFA_Report.pdf [hereinafter SBREFA Report].
[21] SBREFA Report, *supra* note 20, at 13.
[22] 77 Fed. Reg. 57199, 57260 (Sept. 17, 2012).
[23] Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X), Final Rule; Official Interpretations, 78 Fed. Reg. 10695 (Feb. 14, 2013).
[24] *Id.* at 10705-06.
[25] *Id.* at 10706.
[26] *Id*.

Once the rule was adopted, the Bureau continued its significant engagement with external stakeholders.[27] It adopted an implementation plan through which the Bureau worked with industry to implement the rules, including publication of plain language and interpretive guides.[28] It hired as its program manager for servicing the late Laurie Maggiano, who was hailed as the "architect of the Home Affordable Modification Program" and named a "woman of influence" in 2013 by HousingWire.[29] It conducted extensive trainings for housing counselors, reaching over 5000 housing counselors in over 20 cities.[30] It issued compliance guides.[31] It issued plain language guides for consumers.[32] In its own words: "After the January 10, 2014 effective date of the rules, the Bureau has continued to engage in ongoing outreach and monitoring with industry, consumer advocacy groups, and other stakeholders."[33]

When the Bureau learned of servicer implementation challenges, it "issued two final rules amending discrete aspects of the 2013 Mortgage Servicing Final Rules."[34] In its change to the rules in 2016, the Bureau noted that the changes were meant "to address important questions raised by industry, consumer advocacy groups, and other stakeholders."[35]

The Bureau's external engagements on this one rule demonstrate both the need for and the effectiveness of the Bureau's focus on input from all external stakeholders. The undersigned encourage the Bureau to continue this sort of varied and robust dialogue with the many and varied external stakeholders impacted by the Bureau's work.

B. THE BUREAU HAS EFFECTIVELY REACHED OUT TO AND HEARD FROM INDUSTRY AND CONSUMERS THROUGH ITS FIELD HEARINGS AND ROUNDTABLES.

The Bureau has made effective use of field hearings and roundtables, held all over the United States, as a way of hearing from and reaching out to average Americans, be they consumers, business owners, or industry representatives, where they live and work. Field hearings generally consist of prepared remarks by the Bureau Director and a welcome by a local public official whose portfolio includes financial services or consumer affairs, followed by a panel discussion consisting of Bureau employees, industry representatives, and consumer representatives. After the panel discussion, attendees are invited to sign up to make a comment. All of the field

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[27] 81 Fed. Reg. 72160, 72162-63.
[28] 81 Fed. Reg. 72160, 72162.
[29] 2013 Women of Influence, available at https://www.housingwire.com/articles/27764-women-of-influence?page=21.
[30] *See* HUD Champion of Service Award for CFPB trainings, available at https://www.hudexchange.info/resources/documents/Housing-Counseling-Bridge-Newsletter-2014-07.pdf; Brenda Muniz, "We're training housing counselors on the new mortgage servicing rules", CFPB Blog, July 7, 2014, available at https://www.consumerfinance.gov/about-us/blog/were-training-housing-counselors-on-the-new-mortgage-servicing-rules/.
[31] *See, e.g.*, https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/mortserv/.
[32] Help for Struggling Borrowers, a guide to the mortgage servicing rules effective on January 10, 2014, available at https://files.consumerfinance.gov/f/201402_cfpb_mortgages_help-for-struggling-borrowers.pdf.
[33] 81 Fed. Reg. at 72163.
[34] *Id.*
[35] *Id.*

hearings are live-streamed. They are also video recorded and available through the CFPB's website and YouTube.

For example, the field hearing on Consumer Access to Financial Records, held in Salt Lake City, Utah on November 17, 2016,[36] had the following agenda:

Introduction
Zixta Martinez
Associate Director for External Affairs, CFPB

Opening remarks
Richard Cordray
CFPB Director

Welcome
Honorable G. Edward Leary
Commissioner of the Utah Department of Financial Institutions

Panelists
David Silberman
Acting Deputy Director,
Associate Director, Research, Markets and Regulations
CFPB

Holly Petraeus
Assistant Director, Office of Servicemember Affairs
CFPB

Keo Chea
Acting Assistant Director, Office of Community Affairs
CFPB

Ed Mierzwinski
U.S. PIRG

Joe Valenti
Center for American Progress

Ryan Falvey
Center for Financial Services Innovation

Rob Morgan
American Bankers Association

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[36] The video of the field hearing can be found at https://www.consumerfinance.gov/about-us/events/archive-past-events/field-hearing-consumer-access-financial-records-salt-lake-city-utah/.

Alaina Gimbert
The Clearing House

Steven Boms
Envestnet Yodlee

In conjunction with each field hearing, the Director and staff generally participate in a roundtable discussion in which individuals from consumer groups and industry get a chance to talk to the Director and staff about issues relevant to and of concern to the local community.

The undersigned encourage the Bureau to continue engaging with average American citizens through field hearings and roundtables. By taking the Bureau to the people where they live, the Bureau can gather important information about markets, and continue to make the work of the Bureau more transparent and more accessible to all Americans.

C. THE BUREAU HAS EFFECTIVELY REACHED OUT TO AND HEARD FROM INDUSTRY AND CONSUMERS THROUGH ITS CONSUMER ADVISORY BOARD.

The Bureau has historically sought advice and input from its Consumer Advisory Board (CAB), which consists of industry representatives, consumer advocates, and academics. The current CAB has equal numbers of industry representatives and advocates plus three academics. All the CAB members provide service to the CFPB and the country without any compensation

The CAB has played an important role in all aspects of the Bureau's work. When the Bureau first came into being, the initial CAB members were deeply involved in crafting the many rules that the Dodd-Frank Act required the Bureau to issue. The CAB's feedback was invaluable to these many rule-makings. Although the pace of rule-making has slowed, it has not stopped and the CAB continues to participate in rule-making discussions.

CAB members learn a great deal from the Bureau and, in turn, provide feedback on the Bureau's educational efforts, enforcement priorities, the Catalyst program, and other activities. The CAB members also bring issues that they observe in the field to the Bureau for discussion and possible investigation. Topics can range from the challenges that fintech providers are facing to new, exploitative credit products. They also bring information from Bureau staff back to their communities, for example, resources for community organizations and banks to provide their customers.

The value of the CAB lies in its constitution. Having industry people and consumer advocates work through issues in the financial marketplace has led to more agreement than one would expect. The culture of the CAB is for each person to listen carefully to other people's opinions and to render their own opinions with grace and openness. This culture makes for lively, respectful, and productive discussions.

Until Mr. Mulvaney's appointment, CAB members held two days of meetings in Washington, D.C., twice a year, and another set of two-day meetings elsewhere in country. The bulk of the

meeting time involved only CAB members and Bureau staff. This structure enabled people to speak openly and encouraged honest dialogue over grandstanding.

On the second day of the two-day meetings, the Bureau would hold two CAB sessions open to the public. At these sessions, CAB members discussed their perspectives on different consumer issues, presented information on their own work, and listened to staff descriptions of Bureau research and projects.

Between meetings, CAB members participated on conference calls to plan for upcoming meetings and to work on the various projects of three CAB subcommittees. In sum, until the fall of 2017, the CAB played an important role at the CFPB and was able to reach consensus on many complicated issues.

Since joining the Bureau, Acting Director Mulvaney has taken steps that undermine the value of the CAB. In the name of transparency, he has mandated that all CAB conference calls and in-person meetings be open to the public. This has had the effect of silencing people who worry that there could be repercussions if their statements are made public. Instead of thoughtful conversations, members of the CAB are now more likely to take entrenched positions that do not serve consumers or industry, and certainly do not advance the work of the CFPB.

In an interesting twist, the Acting Director does not want transparency to apply to him. In the one call the CAB had with the Acting Director, he refused to make the call public. In addition, in a meeting scheduled for February 2018, the CAB was advised that when Mr. Mulvaney engaged with the CAB, the public could not be present.

Mr. Mulvaney ultimately cancelled the long-scheduled February meeting because of his travel schedule.[37] CAB members, who purchased their tickets for the meetings, are still waiting reimbursement from the CFPB.

More recently, Mr. Mulvaney announced that the June CAB meeting, which had been scheduled for two days, was going to be cut down to one day for budgetary reasons and because of his schedule. (Richard Cordray made himself available for all CAB meetings on both days unless he had a critical conflict such as having to testify before Congress).

In another example of Mr. Mulvaney's lack of transparency, CAB members are no longer informed of which CFPB staff are participating or listening to CAB conference calls. To the extent this new practice makes CAB members feel they are being "watched," Mr. Mulvaney has created yet another impediment to the effectiveness of the CAB.

We urge the Bureau to and reinstate the practices Director Cordray adopted in support of the CAB and transparency.

[37] As we discuss in the next section, unlike Director Cordray, Mr. Mulvaney refuses to be transparent about his activities.

D. THE BUREAU STRUCTURE ENSURES THAT EXTERNAL PARTIES AFFECTED BY THE WORK OF THE BUREAU HAVE A VOICE INSIDE THE BUREAU.

The Bureau is structured in a way that ensures external engagement with different constituencies affected by the Bureau's work. For example, in April 2013 the Bureau established the Office of Financial Institutions and Business Liaison.[38] This office was designed "to facilitate and coordinate dialogue with all industry participants."[39] As of spring 2017, the office had "hosted hundreds of meetings, briefing calls, and public appearances with financial institutions and financial industry trade associations."[40]

On the consumer side, the Bureau maintains a division focused on consumer education and engagement.[41] Within that division are offices focused on consumer engagement, financial education, students and young consumers, older Americans, service-member affairs, and financial empowerment.[42]

The undersigned encourage the Bureau to continue with a structure that allows certain offices and positions to be consumer-facing, and others to be industry-facing, so that all external voices will be heard.

III. THE BUREAU HAS, HISTORICALLY, ATTAINED TRANSPARANCY REGARDING EXTERNAL ENGAGEMENT THROUGH PUBLICATION OF CALENDARS FOR THE DIRECTOR AND SENIOR STAFF.

In order to ensure that the Director and senior Bureau staff are engaging in wide and varied external engagements, and meeting with all affected constituencies, the Bureau must ensure that the calendars and activities of senior staff are transparent and available for public view. Through this transparency, the American public can be assured that the Director of the Bureau and senior staff have personally heard from all relevant constituencies, and any actions will be taken with a wide lens.

The CFPB posts on its websites the calendars of the director, other agency heads, and senior staff. In this regard, the CFPB website currently hosts the calendars for Elizabeth Warren (2010-2011); Raj Date (2012-2013); Steve Antonakes (2013-2015); Richard Cordray (2012-2017); Leandra English (2017-2018); and Mick Mulvaney (2017-2018).

A sampling of these calendars shows that before 2018, the calendars were complete and transparent, showing the hourly activities of each of the named Bureau staff. The calendars reveal that these individuals divided their time among the Bureau's many constituencies, and also spent time on internal bureau items. For example, in March 2015 (picked randomly), the

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[38] Semi-Annual Report of the CFPB, spring 2017 at 52, available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201706_cfpb_Semi-Annual-Report.pdf.
[39] *Id.*
[40] *Id.*
[41] Semi-Annual Report of the CFPB, spring 2017, *supra* note 38, at 43-51.
[42] A Bureau organizational chart can be found at https://www.consumerfinance.gov/about-us/the-bureau/bureau-structure/.

schedule for Director Richard Cordray shows numerous items in each of these categories, including preparing for and participating in a Congressional Hearing, two community roundtables (Arbitration and Payday), two field hearings (Arbitration and Payday); and one industry roundtable (Payday); and meetings/calls with industry representatives, including the CEO of Citigroup, the CEO of the Independent Community Bankers of America, the CEO of the American Bankers Association, the Urban Financial Services Coalition, the U.S. Chamber of Commerce Board of Directors, the CEO of LinkedIn, and the President of the Mortgage Bankers Association.

Unfortunately, this detailed transparency has virtually disappeared under Director Mulvaney's leadership. For example, Director Mulvaney's March 2018 Calendar has almost no information on it.[43] Deputy Director English's calendar for February 2018 is similarly devoid of information.[44] This paucity of information and transparency is particularly alarming in light of Director Mulvaney's remarks at an American Bankers Association meeting on April 24, 2018 that as a Congressman he would only meet with constituents and with lobbyists who had given him money.[45] By retreating from the transparency that characterized the Bureau through 2017, the CFPB has embarked on a dangerous path that threatens to endanger its integrity, accountability, and legitimacy.

The undersigned urge the Bureau to continue seeking public and private feedback through diverse outreach by senior staff and the Director to all constituencies impacted by the work of the Bureau, and to make this outreach transparent through publication of comprehensive calendars for the Director and senior staff.

CONCLUSION

In conclusion, we urge the Bureau to continue its robust strategies for external engagements. Starting from its inception, the Bureau had a goal of engaging with outside groups in all fifty states.[46] In bringing that goal to fruition, the Bureau has reached out to and taken into consideration the views of large banks, small banks, credit unions, small businesses, large businesses, progressive groups, chambers of commerce, trade groups, consumers, consumer advocates, student groups, Hispanic-American groups, seniors groups, African-American groups, military families, members of Congress, mayors and governors, state attorneys general, and many more. The Bureau has admirably sought, and should continue to seek, public and private feedback from diverse external stakeholders through rulemaking outreach, field hearings and roundtables outside of Washington, D.C., and the other external engagements discussed in this

[43] Director Mulvaney's calendar is available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_mick-mulvaney-calendar_03-2018.pdf (visited May 18, 2018).

[44] Deputy Director English's calendar is available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_leandra-english-calendar_02-2018.pdf (visited May 18, 2018).

[45] *See, e.g.*, Glenn Thrush, *Mulvaney, Watchdog Bureau's Leader, Advises Bankers on Ways to Curtail Agenc*y, New York Times, April 24, 2018.

[46] *See, e.g.*, Victoria McGrane & Maya Jackson Randall, *Banking's Scourge on Charm Offensive*, Wall St. J., March 15, 2011, available at https://www.wsj.com/articles/SB10001424052748703749504576172510974842034 (showing CFPB map tracking contacts in states).

comment. We encourage the Bureau to maintain the diversity and activities of its advisory groups. We encourage the Bureau to plan well in advance for public and private events, such as field hearings, to maximize public participation and constructive input, and to set up a mechanism for the public to suggest topics, locations, timing, frequency, participants, and other important elements of public events.

We discourage the Bureau from conducting events and external engagements that are private, and also encourage the Bureau to continue improving transparency by keeping comprehensive executive calendars that are up to date and available to the public.

Comment of Financial Regulation and Consumer Protection Scholars on Docket No. CFPB-2018-0012

June 25, 2018

Comment Intake
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Dear Sir or Madam:

Please see the submission below in response to the Consumer Financial Protection Bureau's Request for Information (RFI) Regarding the Bureau's Inherited Regulations and Inherited Rulemaking Authorities (Docket No. CFPB-2018-0012). We are concerned scholars and former regulators, including scholars specializing in financial regulation, consumer financial law, and administrative law.[*]

This comment builds on our prior comments on the Bureau's RFIs Regarding General Rulemaking Processes (Docket No. CFPB-2018-009) and Adopted Regulations and New Rulemaking Authorities (Docket No. CFPB-2018-0011). The three should be read together.

Thank you for the opportunity to submit this comment for your consideration.

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Susan Block-Lieb
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[*] Affiliations of signatories are for identification only and do not represent the views of the various

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EXECUTIVE SUMMARY

The CFPB is Using RFIs for Sham Purposes

- The CFPB has revealed that its stated reason for its many RFIs is not the real reason. The stated reason is "to seek public input" on the various RFI topics that the Bureau planned to evaluate. Instead, the CFPB is using the RFI responses as "cover" for various policy changes, when, in fact, the responses do not support such changes.

This RFI impedes public input by being impossibly vague and broad

- This RFI seeks input on twenty different sets of unrelated regulations and all their component parts. Nowhere did the CFPB specify which provisions it is considering changing. Likewise, it failed to ask specific questions that would enable meaningful responses. The Acting Director, by conducting closed-door meetings with industry, has privileged the financial services industry and left consumers in the dark about the changes industry wants and that the CFPB is considering.

The CFPB is Disguising what Should have been Notice and Comment Rulemaking as Requests for Information

- The CFPB has stated that the rule-related RFIs are for the purpose of obtaining information on desired changes to existing rules and recommendations for new rules. This type of inquiry falls under the Administrative Procedure Act, which requires very specific steps in the "process for formulating, amending, or repealing a rule."[1]

If the CFPB's Illegitimate RFI Process is Successful, the Financial Security of Consumers, Hardworking American Families, and Financial Markets will be in Jeopardy

- If the CFPB's illegitimate RFI process is successful, the financial security of consumers, hardworking American families, and financial markets will be in jeopardy.

[1] 5 U.S.C.A. 551(5).

Comment of Financial Regulation and Consumer Protection Scholars on Docket No. CFPB-2018-0012

The Request for Information (RFI) by the Consumer Financial Protection Bureau ("CFPB" or "Bureau") Regarding the Bureau's Inherited Regulations and Inherited Rulemaking Authorities asks whether the Bureau should make any changes to existing inherited regulations or add any new regulations.[2]

I. Description of "Inherited Regulations" and Incorporation of Prior Responses

This RFI is one of three CFPB RFIs on rulemaking. Previously, the Bureau issued an RFI on its rulemaking processes.[3] We filed a separate comment on that RFI.[4] The second RFI was on Adopted Regulations.[5] We also submitted a comment on that RFI.[6] The Inherited Regulations RFI is the final rule-related RFI. Our response to this RFI should be read together with the previous two responses.

Inherited Regulations are "the various regulations that" other federal agencies issued before the Dodd-Frank Act transferred their consumer-related rulemaking authority to the CFPB.[7] In circumstances where the Bureau amended an Inherited Regulation, it classifies that rule as an Adopted Regulation.[8] Inherited Regulations include:

- Truth in Lending Regulation Z
- Homeownership Equity Protection Act
- Credit Card Act of 2009
- SAFE Mortgage Licensing Act
- Fair Debt Collection Practices Act
- Federal Trade Commission Act
- Fair Credit Reporting Act

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2 Consumer Financial Protection Bureau, *Request for Information Regarding the Bureau's Inherited Regulations and Inherited Rulemaking Authorities*, 83 Fed. Reg. 12,881 (March 26, 2018) [hereinafter Inherited Regulations RFI].

3 Consumer Financial Protection Bureau, *Request for Information Regarding Bureau Rulemaking Processes*, 83 Fed. Reg. 10,437 (March 9, 2018).

4 Comment of Financial Regulation and Consumer Protection Scholars and Former Regulators on Docket No. CFPB-2018-0009 (June 7, 2018) (available at https://lawdigitalcommons.bc.edu/cfpb-comments/6/).

5 Consumer Financial Protection Bureau, *Request for Information Regarding the Bureau's Adopted Regulations and New Rulemaking Authorities*, 83 Fed. Reg. 12,286 (March 21, 2018) [hereinafter Adopted Regulations RFI].

6 Comment of Financial Regulation and Consumer Protection Scholars and Former Regulators on Docket No. CFPB-2018-0011 (June 19, 2018).

7 Adopted Regulations RFI, *supra* note 5, at 12,287.

8 *Id.*

- Gramm–Leach–Bliley Act
- Consumer Leasing Act
- Real Estate Settlement Practices Act
- Equal Credit Opportunity Act
- Home Mortgage Data Act
- Electronic Funds Transfer Act
- Interstate Land Sales Full Disclosure Act
- Truth in Savings Act
- Fair Credit Billing Act
- Homeowners Protection Act
- Alternative Mortgage Transaction Parity Act
- Expedited Funds Availability Act
- 12 U.S. Code § 1831t - Depository Institutions Lacking Federal Deposit Insurance

II. The CFPB is Using RFIs for Sham Purposes

The CFPB has revealed that its stated reason for its many RFIs is not the real reason. The stated reason is "to seek public input" on the various RFI topics that the Bureau planned to tevaluate.[9] Instead, the CFPB is using the RFI responses as "cover" for various policy changes, when, in fact, the responses do not support such changes.

The RFI process is important for all stakeholders because it enables them to share their experiences, insights, and concerns about the CFPB and the rules and policies it adopts. For the CFPB, the RFI responses can be used to justify its actions. The importance of the RFIs cannot be overstated and, for this reason, the CFPB must act with integrity in requesting, evaluating and relying on responses to RFIs.

To our consternation, the CFPB leadership's RFI process is a sham A few days after the deadline for RFI responses on external engagements closed, the CFPB announced that it was canceling all future meetings of all its advisory boards, having previously canceled every meeting since Mr. Mulvaney took office. The CFPB informed the advisory board members in two phone calls on June 6, 2018. In justifying the cancellations and effectively terminating the advisory boards, including the statutorily mandated Consumer Advisory Board (CAB), one of Mr. Mulvaney's political appointees, Anthony Welcher, stated that "the RFIs was [sic] a big driver for [the] process"[10] of shutting down the advisory boards. When a CAB member asked for more information about the RFI responses that recommended dismissing the advisory boards, Mr. Welcher admitted that "no comments were made about dissolving [the advisory boards]. . . . The RFI process allowed—there were comments that had been submitted along the way, and then in the final review, nothing changed from the direction we were headed."[11] In sum, the CFPB

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[9] Inherited Regulations RFI, *supra* note 2, at 12,882.

[10] 6.6.18 11am Advisory Boards and Councils Recorded Call (available from the CFPB).

[11] *Id.* The termination of the CAB also prevented the CFPB from hearing about emerging problems in consumer financial markets, which is one of the duties of the CAB. By silencing the CAB, the political

did not tell the truth when saying that the leadership relied on the RFI responses in terminating the advisory boards. And, the CFPB had planned the terminations before the RFI response period had ended.

Meanwhile, Mr. Mulvaney moved to commandeer or dismantle other core functions of the Bureau before the RFI responses on those functions were even due. For instance, on May 9, 2018, he announced that he was creating a new Office of Cost-Benefit Analysis that would be housed within the director's office.[12] He made that announcement even though the RFI on Bureau rulemaking processes seeking public comments on *that exact topic* was still open and did not close for another month.

On April 24, 2018, Mr. Mulvaney announced plans to shutter the CFPB's consumer complaint database[13] even though the RFI on that topic did not close for public comment until June 4.

Lastly, as we discuss in the next section, the CFPB's Adopted Regulations RFI and Inherited Regulations RFI were equally vague and sweeping, raising concerns that both RFIs are smokescreens for existing plans by the Acting Director to reverse landmark CFPB rules protecting consumers.

These events revealed that:

1. even when not telling the truth, one of Mr. Mulvaney's chosen staff pointed to the RFI responses to support his position, which reflects just how important the RFI responses are for bolstering the CFPB's positions;
2. the CFPB leadership is willing to mislead members of the CAB and the larger public to stifle public input through its advisory boards;
3. the CFPB has given the public the impression that it will make critical decisions about its activities based on public input through the RFI process when, in fact, the CFPB has already made at least some decisions on topics related to the RFIs before the deadlines for the public responses to RFIs; and
4. although it is a public agency, the CFPB does not care what the American people think or want.

III. <u>This RFI impedes public input by being impossibly vague and broad</u>

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appointees at the CFPB have eliminated a significant vehicle for the staff to learn of such wrongdoing. 12 U.S.C.A. 1014.

[12] Memorandum from Mick Mulvaney to DL DFPB All Hands, A Note on Staffing and Bureau Organization, (May 9, 2018), https://www.documentcloud.org/documents/4454936-CFPB-Memo.html (viewed May 22, 2018); Evan Weinberger, *Mulvaney Brings More Political Oversight in CFPB Restructuring*, BLOOMBERG LAW BANKING DAILY, May 9, 2018.

[13] *See* Remarks by Mick Mulvaney, Acting Director, Consumer Financial Protection Bureau, April 24, 2018, American Bankers Association Annual Conference, Washington, D.C., at 5 (available at https://www.documentcloud.org/documents/4446622-Transcript-Mulvaney-ABA-Conference-4-24-2018.html) (viewed May 3, 2018) [hereinafter April 24, 2018 Remarks].

The inherited rules RFI impedes consumer input by being impossibly vague and impossibly broad. The Inherited Regulations RFI "seeks public input regarding the substance of the Inherited Regulations, including whether the Bureau should issue additional rules. . . .The Bureau is seeking feedback on all aspects of the inherited regulations."[14] It then asks for suggestions for updates or modifications to the rules, and any aspects of the Inherited Regulations that should not be modified. The substantive portion of the RFI is 5 pages long. Nowhere does the RFI state the specific provisions the Bureau is considering revising. Similarly, the RFI does not specify any regulations that the Bureau is contemplating adopting.

For obvious reasons, the standard practice is for RFIs to ask very specific questions. For example, the substantive portion of the RFI seeking input on Payday Loans, Vehicle Title Loans, Installment Loans and Open End Lines of Credit,[15] was 34 pages long and included background information and numerous detailed questions.[16] The very first question reflects the approach of the standard CFPB RFI:

> Is there a viable business model in extending high-cost, non-covered loans for terms longer than 45 days without regard to the borrower's ability to repay the loan as scheduled? If so, what are the essential characteristics of this business model or models and what consumer protection concerns, if any, are associated with such practices?[17]

Vagueness is not the only problem with the Inherited Regulations and other rule-related RFIs. The breadth of the regulations covered by this RFI is astounding. Unlike the payday lending RFI discussed above, the Inherited Regulations RFI covers twenty sets of rules, each of which has many components. To give a sense of the scope of the Inherited Regulations RFI, we have listed the parts of just one of the many regulations that fall within the RFI:[18]

PART 226—TRUTH IN LENDING (REGULATION Z)

Subpart A—GENERAL

§226.1	Authority, purpose, coverage, organization, enforcement, and liability.
§226.2	Definitions and rules of construction.

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[14] Inherited Regulations RFI, *supra* note 2, at 12,882-83.

[15] Consumer Financial Protection Bureau, *Request for Information on Payday Loans, Vehicle Title Loans, Installment Loans and Open End Lines of Credit* (June 1, 2016) (available at https://files.consumerfinance.gov/f/documents/RFI_Payday_Loans_Vehicle_Title_Loans_Installment_Loans_Open-End_Credit.pdf).

[16] *Id.*

[17] *Id.* at 17.

[18] 12 C.F.R. pt. 1026. Regulation Z was issued pursuant to the Truth in Lending Act, 15 U.S.C.A. 1601 *et seq*.

§226.3	Exempt transactions.
§226.4	Finance charge.

Subpart B—OPEN-END CREDIT

§226.5	General disclosure requirements.
§226.5a	Credit and charge card applications and solicitations.
§226.5b	Requirements for home equity plans.
§226.6	Account-opening disclosures.
§226.7	Periodic statement.
§226.8	Identifying transactions on periodic statements.
§226.9	Subsequent disclosure requirements.
§226.10	Payments.
§226.11	Treatment of credit balances; account termination.
§226.12	Special credit card provisions.
§226.13	Billing error resolution.
§226.14	Determination of annual percentage rate.
§226.15	Right of rescission.
§226.16	Advertising.

Subpart C—CLOSED-END CREDIT

§226.17	General disclosure requirements.
§226.18	Content of disclosures.
§226.19	Certain mortgage and variable-rate transactions.
§226.20	Subsequent disclosure requirements.
§226.21	Treatment of credit balances.
§226.22	Determination of annual percentage rate.
§226.23	Right of rescission.
§226.24	Advertising.

Subpart D—MISCELLANEOUS

§226.25	Record retention.
§226.26	Use of annual percentage rate in oral disclosures.
§226.27	Language of disclosures.
§226.28	Effect on State laws.
§226.29	State exemptions.
§226.30	Limitation on rates.

Subpart E—SPECIAL RULES FOR CERTAIN HOME MORTGAGE TRANSACTIONS

§226.31	General rules.
§226.32	Requirements for certain closed-end home mortgages.
§226.33	Requirements for reverse mortgages.
§226.34	Prohibited acts or practices in connection with credit subject to §226.32.
§226.35	Prohibited acts or practices in connection with higher-priced mortgage loans.
§226.36	Prohibited acts or practices in connection with credit secured by a dwelling.
§§226.37-226.38	[Reserved]
§226.39	Mortgage transfer disclosures.
§§226.40-226.41	[Reserved]
§226.42	Valuation independence.
§226.43	Appraisals for higher-priced mortgage loans.
§§226.44-226.45	[Reserved]

Subpart F—SPECIAL RULES FOR PRIVATE EDUCATION LOANS

§226.46	Special disclosure requirements for private education loans.

§226.47	Content of disclosures.
§226.48	Limitations on private education loans.

Subpart G—SPECIAL RULES APPLICABLE TO CREDIT CARD ACCOUNTS AND OPEN-END CREDIT OFFERED TO COLLEGE STUDENTS

§226.51	Ability to Pay.
§226.52	Limitations on fees.
§226.53	Allocation of payments.
§226.54	Limitations on the imposition of finance charges.
§226.55	Limitations on increasing annual percentage rates, fees, and charges.
§226.56	Requirements for over-the-limit transactions.
§226.57	Reporting and marketing rules for college student open-end credit.
§226.58	Internet posting of credit card agreements.
§226.59	Reevaluation of rate increases.
Appendix	Appendix A to Part 226--Effect on State Laws
Appendix	Appendix B to Part 226—State Exemptions
Appendix	Appendix C to Part 226—Issuance of Staff Interpretations
Appendix	Appendix D to Part 226—Multiple Advance Construction Loans
Appendix	Appendix E to Part 226—Rules for Card Issuers That Bill on a Transaction-by-Transaction Basis
Appendix	Appendix F to Part 226—Optional Annual Percentage Rate Computations for Creditors Offering Open-End Plans Subject to the Requirements of §226.5b
Appendix	Appendix G to Part 226—Open-End Model Forms and Clauses
Appendix	Appendix H to Part 226— Closed-End Model Forms and Clauses
Appendix	Appendix I to Part 226—Federal Enforcement Agencies
Appendix	Appendix J to Part 226—Annual Percentage Rate Computations for Closed-End Credit Transactions
Appendix	Appendix K to Part 226—Total Annual Loan Cost Rate Computations for Reverse Mortgage Transactions

Appendix	Appendix L to Part 226—Assumed Loan Periods for Computations of Total Annual Loan Cost Rates
Appendix	Appendix M1 to Part 226—Repayment Disclosures
Appendix	Appendix M2 to Part 226—Sample Calculations of Repayment Disclosures
Appendix	Appendix N to Part 226—Higher-Priced Mortgage Loan Appraisal Safe Harbor Review
Appendix	Appendix O to Part 226—Illustrative Written Source Documents for Higher-Priced Mortgage Loan Appraisal Rules
Appendix	Supplement I to Part 226—Official Staff Interpretations

The vagueness and breadth of the Inherited Regulations RFI makes it impossible for any stakeholders to meaningfully respond unless, that is, they already know the changes that the Bureau is considering. Responses to FOIA requests reveal that Mr. Mulvaney and his political appointees have been meeting regularly with representatives from financial services and related industries. The CFPB has kept many of these meetings and their contents secret. The closed-door meetings, coupled with Mr. Mulvaney's express commitment[19] to put business concerns ahead of consumers' financial welfare, lead to the ready conclusion that the meetings enable the Bureau to tell industry which rule changes it is contemplating. By the same token, these secret meetings give industry an opportunity to tell the Bureau what changes it hopes it will make to benefit companies subject to CFPB oversight.

The cozy relationship between the CFPB and financial firms gives industry representatives a tremendous advantage because they can craft their RFI responses to address the changes the CFPB anticipates making. They can also recommend any changes that were well received by the CFPB during the meetings with Mr. Mulvaney and his political appointees.

Consumers and advocates are in the dark, attempting to address issues that are hidden from their view and pleading their cases to an Acting Director who is allied with industry and who has made it clear that he wants to reduce the consumer protection regulations under which financial firms must operate. In sum, the CFPB's RFI practices handicap consumers and American families and privilege the representatives from financial services industry. The RFI process that should be and looks to be transparent has actually become the opposite.

The CFPB has engaged in the same short-circuiting of public feedback by imposing very short deadlines to respond. The response time is 90 days, which is about the same amount

[19] *See* April 24, 2018 Remarks, *supra* note 13, at 5; Rachel Witkowski, *Mulvaney vows to 'bring sanity' to Qualified Mortgage rule*, AM. BANKER, May 15, 2018.

of time that was given for people to comment on the very narrow topic of payday lending regulation discussed above.

The unworkable RFIs, tight deadlines, and the mischaracterization of the RFI responses demonstrate that the CFPB's RFI process is a mockery and illegitimate.

IV. The CFPB is Disguising what Should have been Notice and Comment Rulemaking as Requests for Information

The CFPB has stated that the rule-related RFIs are for the purpose of obtaining information on desired changes to existing rules and recommendations for new rules. This type of inquiry falls under the Administrative Procedure Act, which requires very specific steps in the "process for formulating, amending, or repealing a rule."[20]

Specifically, if the CFPB is contemplating a new rule, or an amendment or repeal of an existing rule, it must:

- publish a notice of proposed rulemaking in the Federal Register;
- provide the public with information about the rulemaking proceedings, including the governing legal authority for the rulemaking; and
- specify "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[21]

In addition, during notice-and-comment rulemaking, people outside the CFPB are prohibited from having *ex parte* communications with "any decision-making personnel that imparts information or argument directed to the merits or outcome of a rulemaking proceeding."[22] In its rulemaking RFIs, the CFPB appears to be doing all the things you would expect to see in a Notice of Proposed Rulemaking, but without giving adequate notice or following proper procedures. Of equal importance, the CFPB cannot escape its own prohibition on *ex parte* communications by mischaracterizing proposed rulemakings as requests for information.

V. If the CFPB's Illegitimate RFI Process is Successful, the Financial Security of Consumers, Hardworking American Families, and Financial Markets will be in Jeopardy

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[20] *Id*. at 1.

[21] 5 U.S.C.A. 553(b)(1-3)

[22] Consumer Financial Protection Bureau, *Policy on Ex Parte Presentations in Rulemaking Proceedings*, 82 Fed. Reg. 12,687, 18,689 (April 21, 2017).

The CFPB will consider *ex parte* communications if specific requirements are met: "A person who makes an oral *ex parte* presentation shall . . . submit to the CFPB's Executive Secretary and the CFPB employee point of contact for the presentation, a memorandum summarizing the presentation." *Id*. at 18,689-90. Any person making *ex parte* written communications must likewise submit the presentation to the same entities. The CFPB then posts the submissions to the public rulemaking docket. *Id.*

The points we make here are not simply to contest the RFI process. They are about history. Prior to the financial crisis, the Office of Thrift Supervision and the Office of the Comptroller of the Currency were captured by the financial services industry. In addition, the one regulator that could have imposed market-wide discipline on the lending industry—the Federal Reserve – refused to exercise its Congressional mandate to protect consumers. When Congress created the CFPB, it was in response to industry capture and the unwillingness of the Federal Reserve to curtail abusive lending. Now, the current administration of the CFPB is mimicking the past federal bank regulators, which is sure to again harm the American people.

Comment of Financial Regulation and Consumer Protection Scholars And Former Regulators on Docket No. CFPB-2018-0009

June 7, 2018

Comment Intake
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Dear Sir or Madam:

Please see the submission below in response to the Consumer Financial Protection Bureau's Request for Information (RFI) Regarding Bureau Rulemaking Processes (Docket No. CFPB-2018-0009). We are concerned scholars and former regulators, including scholars specializing in financial regulation, consumer financial law, and administrative law.[*] Thank you for the opportunity to submit these comments for your consideration.

Patricia A. McCoy
Professor of Law, Boston College Law School
Former Assistant Director, Mortgage Markets, Consumer Financial Protection Bureau

---

Richard Alderman
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[*] Affiliations of signatories are for identification only and do not represent the views of the various institutions.

[1] 5 U.S.C. § 553.
[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1012(a)(10), 1022

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EXECUTIVE SUMMARY

We Oppose Any Rollbacks That Would Water Down the Strengths of CFPB Rulemaking

- Since the Consumer Financial Protection Bureau opened its doors, the Bureau has created one of the most *inclusive*, *transparent*, *fact-based* and *responsive* rulemaking processes of any federal regulator. But now the Bureau is starting to roll back these four key strengths of its rulemaking process. We oppose that retreat and explain why it is essential to preserve and expand the strengths of the Bureau's rulemaking going forward.

Strength One: Preserve and Expand Fact-Based, Independent CFPB Rulemaking

- The CFPB has been committed to impartial, data-driven rulemaking and its empirical research benefits consumers and industry alike. The Bureau must refrain from any actions that would undermine that commitment, including:
    - Creating artificial obstacles to on-boarding quantitative data;
    - Prohibiting the use of qualitative data and consumer anecdotes when appropriate;
    - Compromising the independence of its cost-benefit analyses; and
    - Relying on new data, studies or reports after a Notice of Proposed Rulemaking appears without disclosing that reliance or re-opening the docket for additional public comment where appropriate.

- As the concurrent OMB Director, Acting Director Mick Mulvaney must: (1) preserve the CFPB's independence by rescinding his plan to move CFPB cost-benefit analysis into his office; and (2) recuse himself from further involvement in CFPB impact analyses.

Strength Two: Preserve and Expand the Bureau's Strong Tradition of Inclusive Public Outreach

- The Bureau should expand its strong tradition of inclusive public outreach to all segments of society, including its innovative use of social media and online feedback tools.

- The CFPB should continue to consider comments received after the comment period for a rulemaking has closed, so long as it does so transparently.

Strength Three: Maintain and Improve the Bureau's Transparency

- We oppose any efforts by new leadership to back-pedal from the Bureau's strong tradition of transparency during rulemakings.

- Because the Acting Director has praised industry lobbyists and received campaign contributions from them in the past, the Bureau should strengthen its *ex parte* policy to ensure timely public posting of all *ex parte* communications involving rulemakings.

Strength Four: Continue CFPB Responsiveness to the Public During the Implementation Phase

- The Bureau should continue its level of public responsiveness during implementation.

Comment of Financial Regulation and Consumer Protection Scholars And Former Regulators on Docket No. CFPB-2018-0009

Agency rulemakings are inherently exercises in democratic participation. That is why, when Congress enacted the notice-and-comment provisions of the Administrative Procedure Act (APA),[1] it provided an opportunity for *all* members of the public – regardless of their occupation, political affiliation, state of residence, income or wealth – to express their views on and help shape forthcoming agency rules. This opportunity for broad public participation is especially important in our representative democracy because agency heads are not elected by the public.

In the seven short years since the Consumer Financial Protection Bureau (CFPB or the Bureau) came into being, the Bureau has seriously embraced both the letter and the spirit of the APA. It has operated one of the most inclusive, transparent, fact-based and responsive rulemaking processes of any federal regulator. In the process, the Bureau has demonstrated its unswerving commitment to serving the American public. Its rulemaking history is one that the Bureau should be proud of and that all agencies should emulate.

We are now concerned that under its new leadership, the Bureau is retreating from its commitment to fair, open, and data-driven rulemakings and is responding to external pressure from industry. That would be a grave mistake. No major Bureau rule *can or will* satisfy every stakeholder on every issue it holds dear, whether the stakeholders are consumer advocates or members of industry. Rulemakings, especially major ones, are the product of compromise. But the Bureau's fact-finding processes, its notice-and-comment rulemaking procedures, and its implementation efforts provide every stakeholder with three important assurances: *one,* that public engagement will be transparent, *two,* that decisions will be informed wherever possible by thorough data analysis, and *three,* that industry, consumers and other members of the public will have ample opportunities to express their views and be heard. In these ways, the Bureau's rulemaking process affords fundamental respect and fairness to all members of the public. It is essential that these assurances not be abridged.

We open this comment letter in Section 1 by explaining the special role that CFPB rulemaking plays in protecting consumers and the economy at large. Section 2 provides a general description of the Bureau's rulemaking process and related activities. In Section 3, we detail four key strengths--fact-based rulemaking, inclusiveness, transparency, and responsiveness--that make the CFPB's rulemakings publicly accountable, grounded in fact and carefully decided. In this section, we discuss at length our concerns about recent indications that the Bureau is taking steps to undermine those strengths:

- *One,* by undermining the ability of the Research and Markets Teams to on-board and analyze key data;
- *Two,* jeopardizing the statutory independence of the CFPB by moving the cost-benefit analysis function to the Director's office, while the Acting Director is concurrently an official of the White House; and

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[1] 5 U.S.C. § 553.

- *Three,* by openly expressing partiality to lobbying by industry representatives.

These steps are inimical to the impartiality, fairness, and transparency of CFPB rulemakings and we oppose them.

1. The Special Role of CFPB Rulemaking

By Congressional design, CFPB rulemaking plays a special role in safeguarding consumer welfare and our nation's financial stability. When Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act or Dodd-Frank), it made a carefully considered decision to assign exclusive rulemaking responsibility to the Bureau for the federal consumer financial laws.[2] In doing so, Congress sought to address three important problems that culminated in the 2008 financial crisis.

The first problem involved the previous allocation of key rulemaking authority for consumer financial protection to the Board of Governors of the Federal Reserve System before 2008. When the mortgage bubble was expanding, the Board refused to use its rulemaking authority to prohibit risky and exploitative mortgage lending.[3] Part of that reticence was due to the Board's conflicting missions (causing it to elevate short-term bank profitability over long-term financial stability and consumer welfare) and part of it was due to then-Chairman Alan Greenspan's philosophical aversion to government intervention into markets.[4] Because the Board refused to adopt rules that Congress had mandated by statute, in the Dodd-Frank Act, Congress transferred the Board's rulemaking powers for consumer financial protection to the newly created Bureau and made consumer financial protection its sole mission. [5]

The second problem involved regulatory arbitrage. The lack of strong federal consumer protection rules for mortgages pre-crisis caused about half the states to enact anti-predatory lending laws of their own. The uneven strength of those laws, the lack of such laws in many states, and the effects of federal preemption for national banks, federal savings associations, and their operating subsidiaries together produced an uneven playing field in which lenders switched to federal banking charters with weaker rules to escape strong state laws. Congress ended this ability to shop for the most permissive laws by consolidating rulemaking authority in the CFPB

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[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1012(a)(10), 1022 (2010).

[3] For a description of that history, see KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE AND NEXT STEPS 194-98 (New York, N.Y.: Oxford Univ. Press, 2011). Specifically, the Board refused to promulgate two rules mandated by Congress -- one implementing provisions in the Home Ownership and Equity Protection Act (HOEPA) that required the Board to adopt a rule prohibiting unfair or deceptive mortgage practices and the other requiring the Board to promulgate a rule implementing integrated mortgage disclosures. *See id.*

[4] *See id.* at 189-94; Prepared Statement of Patricia A. McCoy, Hearing on "Consumer Protections in Financial Services: Past Problems, Future Solutions" before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, March 3, 2009, at 25-27 (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1367977.

[5] Specifically, in the Dodd-Frank Act, Congress instructed the Bureau to "implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services" [that] "are fair, transparent, and competitive." Dodd-Frank Act, § 1021(a).

and making CFPB rules applicable to virtually all providers of consumer financial services nationwide, regardless of their charter or location.[6] In so doing, Congress leveled the competitive playing field and established a federal floor that protects reputable providers from ruinous competition by unscrupulous companies.

Finally, when Congress created the CFPB's rulemaking powers, it was mindful of the weak rulemaking powers of the Federal Trade Commission (FTC). In the 1975 Magnuson-Moss Act, Congress hobbled the FTC's rulemaking ability by imposing rigid rulemaking procedures on top of those already required by the APA. After Congress enacted Magnuson-Moss, the FTC adopted no significant rules governing nonbank providers[7] and relied on enforcement actions instead.

Congress took pains to avoid replicating that situation in Dodd-Frank by conferring standard, more flexible APA rulemaking powers on the CFPB and applying those rules to banks and nonbanks alike. Because its rulemaking powers are more workable than those of the FTC, the CFPB does not have to rely on enforcement actions alone to exercise its jurisdiction. This benefits industry because, unlike enforcement, the rulemaking process affords regulated entities advance notice of the Bureau's expectations and ample opportunities for input. The rulemaking process also avoids the moral approbation that enforcement actions entail.

In the Dodd-Frank Act, Congress made sure to protect the independence of CFPB rulemakings to the same extent as rules promulgated by other federal banking regulators. Under Executive Order 12866, the Bureau and all other federal banking regulators are exempt from submission of their rules to the Office of Information and Regulatory Affairs (OIRA) of the White House's Office of Management and Budget (OMB) for review and cost-benefit analysis.[8] This exemption is designed to ensure the neutrality of CFPB rules and to insulate them from manipulation for short-term political gain by the White House and OMB. In the place of White House oversight, Congress retains ultimate control over CFPB rules.

2. General Description of the Bureau's Rulemaking Process and Related Activities

We now turn to a description of the Bureau's rulemaking process. Normally, discussions of agency rulemaking focus on the formal legal aspects of that process. These include the public notice-and-comment procedures for informal rulemakings under the APA and other rulemaking requirements and authorities enacted by Congress in the Dodd-Frank Act.[9]

But these formal legal aspects are just one part of the story. The CFPB precedes major rulemaking proceedings with an extensive initial period of study, public consultation and

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[6] *Id.* § 1022(b)(4)(A).

[7] *See, e.g.,* Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979 (2015).

[8] Executive Order 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993). This results from an exemption in Executive Order 12866 for agencies deemed to be "independent regulatory agencies" under the Paperwork Reduction Act, including the CFPB. *Id.* § 3(b); 44 U.S.C. § 3502(5) (listing independent regulatory agencies, including the CFPB).

[9] Congress conferred general rulemaking authority on the Bureau in that legislation. Dodd-Frank Act, §§ 1012(a)(10), 1022.

empirical analysis before a proposed rulemaking is even launched. Later, more study, public input, and empirical analysis occur during the proposed rule stage through to the unveiling of a final rule. After adoption, the Bureau takes its responsibility seriously to help industry participants and other members of the public with implementation of final rules by providing them with official commentaries, compliance aids and guidances, informal consultation, and online tools. More than once, when implementation problems have surfaced, the Bureau has even issued follow-on amendments to the rules to address those problems.

In short, CFPB rulemaking is thoughtful, analytical, and scrupulously fair. On the front end, it is built on a deep foundation of broad public input and rigorous data analysis. On the back end, it is followed by a detailed implementation process that provides guidance to regulated entities and continued opportunity for public input. It is important that these features be fostered and preserved.

a. Preliminary Consultation and Study

Major federal rulemakings do not occur in a vacuum. To the contrary, policymakers must decide that a rule is necessary to begin with. Assuming policymakers make the judgment to proceed with a rule, further input and analysis is needed to diagnose exactly what needs to be solved and assess the pros and cons of different courses of action.

For CFPB rulemakings that are mandated by statute, Congress makes the decision to initiate a rulemaking, but entrusts the details of the rule to the Bureau's discretion.[10] For rulemakings that Congress empowered the Bureau to issue at its discretion, Congress tasked the Bureau with analyzing whether a rulemaking should go forward in the first place.[11]

When the Bureau contemplates exercising its discretion, it is important not to leap to judgment. For that reason, the Bureau has made it a practice to elicit broad public input and conduct substantial preliminary analysis in advance of any proposed rulemaking to assure that all rulemaking decisions reflect balanced judgment. This assures that a wide range of perspectives are considered and options are carefully weighed before the Bureau chooses among those options for a Notice of Proposed Rulemaking.

i. Broad Public Input

Getting input from a broad spectrum of stakeholders—including consumers, non-profit advocates, and industry representatives--is key to the Bureau's initial period of neutral evaluation. By fostering active public engagement, the Bureau receives needed facts and viewpoints from a full range of perspectives that helps it ensure neutral and well-informed policy decisions.

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[10] Examples include the ability-to-repay rule and the TILA-RESPA integrated disclosure rule for residential mortgages. *See, e.g., id.* §§ 1100A(5), 1411-1414.

[11] A recent example was the mandatory arbitration rule. *Id.* § 1028(b). These discretionary rulemakings include potential amendments to the inherited regulations and discretionary rulemakings under other new agency powers conferred by Congress in the Dodd-Frank Act.

The TILA-RESPA integrated disclosure rulemaking for residential mortgages provides a useful case study of the CFPB's broad public outreach. The mortgage disclosure outreach process started in September 2010, ten months before the CFPB formally opened its doors. That fall, members of the CFPB Implementation Team (Team)[12] held multiple meetings with community banks, credit unions, settlement agents, other mortgage industry representatives, vendors, consumer groups, and other banking regulators to educate themselves on the challenges consumers and industry faced with the-then federal mortgage disclosures.[13] In December 2010, the Team held a mortgage disclosure symposium where industry members, marketing experts, designers, public interest groups, and other interested stakeholders briefed the Team on various potential approaches for improving the disclosures.[14]

Later, as part of its outreach process for the mortgage disclosure rulemaking, the Bureau developed Internet tools to make it easy for members of the public—including financial services providers and consumers alike—to share their suggestions and concerns.[15] For instance, when it was developing the mortgage disclosure prototypes in 2011, the Bureau posted two prototypes on its "Know Before You Owe" website each month and elicited public feedback on the designs through an online interactive tool. In the first seven rounds of input, the Bureau received 27,000 comments on the prototypes, about half from consumers and half from industry, either through its online portal or by email. The comments proved extremely helpful to the staff by pinpointing where the prototypes fell short and identifying useful solutions. Using those comments, the Bureau's staff was able to quickly process the feedback, revise the sample forms, and then post the new prototypes online for a fresh round of public comments.[16]

This iterative and intensive feedback process played a crucial role by informing Bureau staff of the most important problems with various disclosure prototypes, of stakeholders' key goals, and of design, cost and implementation considerations. Drawing on this experience, the Bureau later

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[12] The Treasury Department created the Team in early fall 2010 to stand up the CFPB. The Team members who worked on the mortgage disclosure project later transitioned to the Bureau.

[13] For a description, see Bureau of Consumer Financial Protection, *Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z); Final Rule*, 78 Fed. Reg. 79,730, 79,741-44 (Dec. 31, 2013) [hereinafter TRID Final Rule].

[14] The preamble to the final TILA-RESPA integrated disclosure rule gave a sense of the impressive depth and breadth of the Bureau's public outreach efforts pre-rulemaking (*id.* at 79,744):

> While developing the proposed forms and rules to integrate the disclosures, and throughout its qualitative testing of the prototype disclosure forms, the Bureau continued to conduct extensive outreach to consumer advocacy groups, other regulatory agencies, and industry representatives and trade associations. The Bureau held meetings with individual stakeholders upon request, and also invited stakeholders to meetings in which individual views of each stakeholder could be heard. The Bureau conducted these meetings with a wide range of stakeholders that may be affected by the integrated disclosures, even if not directly regulated by the final rule. The meetings included community banks, credit unions, thrifts, mortgage companies, mortgage brokers, settlement agents, settlement service providers, software providers, appraisers, not-for-profit consumer and housing groups, and government and quasi-governmental agencies. Many of the persons attending these meetings represented small business entities from different parts of the country.

[15] Leonard J. Kennedy, Patricia A. McCoy, & Ethan Bernstein, *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century*, 97 CORNELL L. REV. 1141, 1158, 1165-66 (2012).

[16] For a fuller description of this public feedback process, see *id.* at 1165-66; TRID Final Rule, *supra* note 13, at 79,744.

developed prototype disclosures for student loans and credit cards and, again, solicited public input from citizens, consumer groups, and the financial services industry.[17]

These outreach efforts are not limited to mortgages, student loans, or credit cards.[18] Since its launch date in July 2011, the Bureau has continued to solicit the views of consumers, community leaders, industry representatives, and government officials on other policy questions through hundreds of meetings, roundtables, town halls, other public meetings, briefing calls, and the complaint and inquiry process. To broaden these efforts, the Bureau has also issued Requests for Information (RFIs)[19] and Advance Notices of Proposed Rulemakings[20] inviting public input to illuminate areas needing study and to identify data sources.[21] Instead of relying on *Federal Register* publication and press releases alone, the Bureau regularly spreads word of the opportunity to comment through the Internet and social media.[22]

The Bureau also has expanded its avenues for public input in other ways. In one important step, the CFPB kicked off regular field hearings around the country to hear from individual consumers, advocates, and industry about the issues in specific consumer financial services markets. One such field hearing was on payday lending in Birmingham, Alabama, another was on mandatory arbitration clauses in Albuquerque, a third was on credit card lending in Chicago, and there have been many more. In another step, the Bureau convened four new advisory councils--the Consumer Advisory Board, the Community Bank Advisory Council, the Credit Union Advisory Council, and the Academic Research Council--to provide it with ongoing, informed perspectives from different sectors on potential rulemakings.[23] The Bureau also adopted its "Policy for Consultation with Tribal Governments" in 2013 in order to facilitate feedback from tribal governments and tribal members before issuing Notices of Proposed Rulemaking.[24]

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17 Kennedy et al., *supra* note 15, at 1166.

18 For a description of these broader post-launch outreach efforts, see, *e.g.,* Consumer Financial Protection Bureau, Semi-annual report of the Consumer Financial Protection Bureau, October 1, 2016-March 31, 2017, at 52-53 (Spring 2017) [hereinafter March 2017 Semi-annual Report].

19 *See, e.g.,* Consumer Financial Protection Bureau, *Impacts of Overdraft Programs on Consumers*, 77 Fed. Reg. 12,031, 12,031-33 (Feb. 28, 2012); Consumer Financial Protection Bureau, *Request for Information Regarding Private Student Loans and Private Educational Lenders*, 76 Fed. Reg. 71,329, 71,330 (Nov. 17, 2011).

20 Bureau of Consumer Financial Protection, *Debt Collection (Regulation F); Advance Notice of Proposed Rulemaking*, 78 Fed. Reg. 67,848, 67,853 (Nov. 12, 2013); Bureau of Consumer Financial Protection, *Electronic Fund Transfers (Regulation E); Advance Notice of Proposed Rulemaking*, 77 Fed. Reg. 30,923, 30,925 (May 24, 2012) (prepaid cards).

21 *See, e.g.,* Consumer Financial Protection Bureau, *Request for Information Regarding Bureau Rulemaking Processes*, 83 Fed. Reg. 10,437, 10,439 (March 9, 2018) [hereinafter Rulemaking RFI].

22 For a description of the Bureau's various social media campaigns inviting the public to comment on inquiries into prepaid cards, overdraft protection, private student loans, reverse mortgages, and payday loans through live-streaming, blog posts, Twitter, and Facebook, see Patricia A. McCoy, *Public Engagement in Rulemaking: The Consumer Financial Protection Bureau's New Approach*, 7 BROOKLYN J. CORP., FINAN. & COMMERCIAL L. 1, 13-15 (2013) [hereinafter McCoy 2013].

23 *See* Consumer Financial Protection Bureau, Advisory Groups, https://www.consumerfinance.gov/about-us/advisory-groups/ (viewed Apr. 25, 2018); Dodd-Frank Act, § 1014.

24 Consumer Financial Protection Bureau, Policy for Consultation with Tribal Governments (2013), https://files.consumerfinance.gov/f/201304_cfpb_consultations.pdf (viewed Apr. 27, 2018).

In some cases, Congress mandated preliminary consultation in the Dodd-Frank Act. For instance, the Bureau by law must consult with specific federal regulators prior to proposing a rule (and later during the comment period) concerning the rule's consistency with fellow regulators' prudential, market, or systemic objectives.[25] In addition, Congress required the Bureau to set up a separate major feedback channel for draft proposed rules that could have a significant economic effect on a substantial number of small businesses. This channel has made the preliminary stage even more responsive to public input, as we now discuss.

ii. Small Business Review Panels

This special feedback channel is known as the small business review panel process and was mandated by the Dodd-Frank Act.[26] In that legislation, Congress imposed special procedural requirements on any CFPB notice-and-comment rulemaking "which will have a significant economic impact on a substantial number of small entities"[27] under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).[28] The only other federal agencies that are subject to SBREFA requirements are the Environmental Protection Agency and the Department of Labor's Occupational Safety and Health Administration.[29]

SBREFA, among other things, requires the formation of a review panel with representatives from the CFPB, the Chief Counsel for Advocacy of the Small Business Administration, and the Office of Management and Budget's Office of Information and Regulatory Affairs.[30] Before the Bureau may publish a proposed rule that falls under SBREFA, the review panel must meet with a selected group of representatives from small businesses to get their feedback on the potential economic benefits and burdens of a future proposed rule and to explore alternative approaches that might minimize the regulatory burden on small businesses.[31] Later, within sixty days of convening, the review panel must issue a public report on the comments of the small business representatives.[32] The report must also present the review panel's findings on the potential economic impacts of any proposed rule on small businesses and any significant alternatives that could accomplish the rule's objectives while minimizing its impacts.[33] The CFPB takes the comments and findings into account when drafting a proposed rule.[34]

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[25] Dodd-Frank Act, § 1022(b)(2)(B)-(C). The CFPB and the Federal Trade Commission also entered into a Memorandum of Understanding for consultation prior to any rulemaking on unfair, deceptive, or abusive acts or practices. *See* Rulemaking RFI, *supra* note 21, at 10,438-39.

[26] Dodd-Frank Act, § 1100G(a). This discussion of the SBREFA process is taken from McCoy 2013, *supra* note 22, at 18-20.

[27] 5 U.S.C. § 609(a). For a list of CFPB rulemakings that have utilized the SBREFA process so far, see Rulemaking RFI, *supra* note 21, at 10,438 n.9. For a general description of the CFPB's SBREFA process, see CFPB, Small Business Review Panels, https://www.consumerfinance.gov/policy-compliance/rulemaking/small-business-review-panels/ (visited Apr. 26, 2018).

[28] Pub. L. No. 104-121, 110 Stat. 857 (1996).

[29] 5 U.S.C. § 609(d).

[30] *Id.* § 609(b)(3).

[31] *Id.* § 609(b); Press Release, CFPB, Consumer Financial Protection Bureau Convenes Small Business Panel for Know Before You Owe Mortgage Disclosures (Feb. 21, 2012) [hereinafter Small Business Panel].

[32] 5 U.S.C. § 609(b)(5).

[33] *Id.* § 609(b)(5); CFPB, FACT SHEET: SMALL BUSINESS REVIEW PANEL PROCESS (2012) [hereinafter FACT SHEET].

[34] *See, e.g.*, CFPB Mortgage Disclosure Team, *SBREFA, Small Providers, and Mortgage Disclosure*, CFPB (Feb. 21, 2012).

The main purpose of SBREFA was to elicit comments from small businesses on the effects of potential CFPB regulations. But the SBREFA process had an unanticipated benefit, which is written disclosure to the public at large of rulemaking options under consideration by the Bureau before a proposed rule is published. This benefit stems from the fact that before every SBREFA outreach meeting, the CFPB typically distributes briefing materials to the small business representatives who are chosen for outreach as well as to the general public.[35] The materials provide a rich overview of the options that the CFPB has under consideration, including information on the background of the rulemaking, a description of the alternative approaches being considered, a preliminary analysis of the likely economic impacts of those approaches on small businesses, and a list of questions and issues on which the review panel will seek input.[36] Thus, the SBREFA process offers the added benefit of informing the entire public of the direction in which the Bureau is headed before any proposed rule comes out. That gives the public added opportunity for input before the Bureau's approach becomes hard-baked into a proposal.

iii. Market and Data Analysis

The CFPB does not rush into rulemakings. To the contrary, the Bureau has preceded virtually all of its major proposed rulemakings with careful empirical analyses.[37] Further, where the Bureau has discretionary rulemaking authority, the agency does not pre-judge the need for a rule. Instead, the Bureau's Regulations, Markets, and Research Division (RMR) conducts economic studies of the market in question, usually based on large data sets following consultation with industry, academia, think tanks, consumer groups and others, to evaluate whether a rule should even be considered in light of the competing benefits and costs. If a discretionary rulemaking moves forward, the Bureau will run more empirical analyses to pinpoint how the market has failed and to evaluate competing approaches for how to fix it.[38]

Take the payday lending rule, which was one of the Bureau's discretionary rules. RMR studied the payday lending market for more than four years before the Bureau issued its final payday lending rule in fall 2017.[39] During that period, RMR issued four empirical reports analyzing and measuring consumer welfare outcomes in the payday lending industry.[40] Similarly, the Bureau

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[35] For example, by August 2012, the Bureau made its SBREFA briefing materials available online to the public for three mortgage rulemakings. The first time was for the integrated mortgage disclosure rulemaking discussed earlier; later, the Bureau released the briefing materials for the mortgage loan originator and mortgage servicing rulemakings. *Id.*; Ashley Gordon, *What the Proposed Mortgage Servicing Rules Could Mean for You*, CFPB (Apr. 10, 2012); Press Release, CFPB, Consumer Financial Protection Bureau Considers Rules to Simplify Mortgage Points and Fees (May 9, 2012); *see also* Small Business Panel, *supra* note 31; Press Release, CFPB, Consumer Financial Protection Bureau Outlines Borrower-Friendly Approach to Mortgage Servicing (Apr. 9, 2012).

[36] FACT SHEET, *supra* note 33.

[37] The ability-to-repay rule was a special case. Because the Bureau inherited that rulemaking from the Board of Governors of the Federal Reserve System, which had issued the proposed rule, this initial research occurred both at the Bureau and at the Federal Reserve.

[38] These analyses build on an existing foundation of the ongoing monitoring of consumer financial markets for developments and any risks to consumers required by Section 1022(c) of the Dodd-Frank Act.

[39] Consumer Financial Protection Bureau, *Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 82 Fed. Reg. 54,472 (Nov. 17, 2017).

[40] Consumer Financial Protection Bureau, Supplemental findings on payday, payday installment, and vehicle title loans, and deposit advance products (June 2, 2016); Consumer Financial Protection Bureau, Online Payday Loan Payments (Apr. 20, 2016); Consumer Financial Protection Bureau, CFPB data point: Payday lending (March

preceded the issuance of its mandatory arbitration rule in summer 2017[41] with two major empirical studies of problems with arbitration clauses in the two preceding years.[42]

These episodes epitomize the Bureau's longstanding commitment to in-depth, neutral evaluation before making any decision to initiate discretionary rulemakings. Here, again, the TILA-RESPA integrated disclosure rulemaking for residential mortgages provides a good example of this research process. Before issuing a proposed rule, the Bureau considered it important to design sample disclosure forms that informed mortgage applicants about the features, benefits, and risks of their loans as effectively as possible. To come up with those forms, the CFPB undertook the most sophisticated testing of disclosures in history of any U.S. banking regulator. During the qualitative testing phase, the Bureau did field testing of ten rounds of prototype forms in nine cities over a year.[43] This extensive course of testing afforded multiple opportunities to fine-tune the forms in response to experiences with real consumers and lending officials in the field.

Nothing in this process, moreover, prejudges the need for discretionary rulemakings. To the contrary, the CFPB has conducted many studies on consumer financial markets without commencing rulemakings. Examples include, but are not limited to, reverse mortgages,[44] overdrafts,[45] and student loans.[46] This research stage is designed to guard against any rush to judgment resulting in unnecessary or overbroad rulemaking proceedings. Indeed, in one instance, serious problems in the debt collection market suggested a need for a rule but the Bureau concluded that further study was required, so it issued an Advance Notice of Proposed Rulemaking (ANPR) instead to gather additional data on the consumer welfare implications of debt collection practices.[47]

In short, the CFPB has done a remarkable job of public engagement and empirical research during the information-gathering phase before rulemakings are initiated. It has gone above and beyond by pioneering innovative technologies to reach out to people. It has made its thinking transparent through the public release of the SBREFA briefing materials, before any proposals solidify. It has studied consumer problems empirically and neutrally to determine whether the facts support intervention before the Bureau initiates a rule. This is how rulemaking should be.

24, 2014); Consumer Financial Protection Bureau, White Paper on Payday Loans and Deposit Advance Products (Apr. 24, 2013).

[41] Consumer Financial Protection Bureau, *Arbitration Agreements: Final rule; official interpretations*, 82 Fed. Reg. 33,210 (July 19, 2017). Congress subsequently nullified this rule under the Congressional Review Act.

[42] Consumer Financial Protection Bureau, Arbitration Study: Report to Congress 2015 (March 10, 2015); Consumer Financial Protection Bureau, Arbitration study preliminary results (Dec. 12, 2013).

[43] TRID Final Rule, *supra* note 13, at 79,743.

[44] *See, e.g.,* Consumer Financial Protection Bureau, A closer look at reverse mortgage advertisements and consumer risks (June 3, 2015); Consumer Financial Protection Bureau, Reverse Mortgages Report (June 28, 2012). Congress gave the Bureau authority to issue rules on reverse mortgages in Section 1076 of the Dodd-Frank Act.

[45] *See* Consumer Financial Protection Bureau, Consumer voices on overdraft programs (Nov. 21, 2017); Consumer Financial Protection Bureau, CFPB Data Point: Frequent overdrafters (Aug. 4, 2017); *see* Jeff Bater, *CFPB Rulemaking Agenda Under Trump Pared Back*, Bloomberg Law Banking Daily, May 9, 2018.

[46] *See, e.g.,* Consumer Financial Protection Bureau, CFPB Data Point: Student loan repayment (Aug. 16, 2017).

[47] *See, e.g.,* Bureau of Consumer Financial Protection, *Debt Collection (Regulation F); Advance Notice of Proposed Rulemaking*, 78 Fed. Reg. 67,848, 67,853 (Nov. 12, 2013).

b. APA Rulemaking Proceeding Process

Normally, the CFPB commences the notice-and-comment APA rulemaking process by publishing a Notice of Proposed Rulemaking (NPRM) in the *Federal Register*.[48] Among other things, the NPRM details the text or substance of the proposed rule, the justification for the proposal, and the statutory authority for the rule. Following publication of the proposed rule, the public has the opportunity to submit written comments on the proposal by a stated deadline. Comments may be submitted electronically and are available for public viewing online at *regulations.gov*. After the official comment period has closed but while a rulemaking is pending, the Bureau has also had an informal practice of allowing members of the public to submit additional written replies to the first round of comments.

After the formal comment period has closed, the Bureau's staff reviews the comments with an eye to needed changes.[49] Then, management and staff conduct further internal deliberations involving all of the divisions of the Bureau to decide on the final path and shape of the rule.

Sometimes, the Bureau reopens proposed rulemakings or conducts additional data analysis rather than proceed directly to issuance of the final rule. This happened in the ability-to-repay rulemaking, where new issues came to the fore after the Board of Governors of the Federal Reserve Board published the proposed rule on May 11, 2011, before the Bureau had opened its doors and inherited the rulemaking.[50] Because some of these issues had not been aired for comment in the original notice of proposed rulemaking, the Bureau decided to reopen the comment period to allow the public to comment on the new issues, information, and data.[51]

Meanwhile, most major CFPB rulemaking proceedings continue to undergo intensive empirical research by RMR's markets experts and economists after the NPRM is issued to evaluate new issues, including those flagged in the comments. For example, following publication of the proposed TILA-RESPA integrated disclosure rule, the Bureau conducted quantitative testing of the final disclosure forms with 858 consumers in twenty locations across the country to make sure that the new forms were more effective than the old ones before issuing the final rule.[52]

Once the Bureau decides to issue the final rule, more analysis and writing remains. The Bureau will make any needed changes to the final text of the rule. In addition, much care will go into writing the preamble to the final rule. The preamble will include responses to the comments and justifications for the final form of the rule. Importantly, the preamble also will set forth the Bureau's impact analysis of the potential benefits and costs to consumers and covered persons, including any potential reduction of access by consumers to consumer financial products or services due to the rule.[53]

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[48] 5 U.S.C. § 553. The only exception is where the Bureau issues an ANPR. *See* Rulemaking RFI, *supra* note 21, at 10,438, for a summary of the contents of NPRMs.

[49] In some circumstances, the Bureau could even decide, based on the comments, to postpone a discretionary rulemaking.

[50] *See* Board of Governors of the Federal Res. Sys., *Regulation Z; Truth in Lending*, 76 Fed. Reg. 27,390 (proposed May 11, 2011) (noting that the CFPB was scheduled to open on July 21, 2011).

[51] *See* Bureau of Consumer Financial Protection, *Truth in Lending (Regulation Z)*, 77 Fed. Reg. 33,120, 33,120-21 (June 5, 2012).

[52] TRID Final Rule, *supra* note 13, at 79,748-49.

[53] *See* Dodd-Frank Act, § 1022(b)(2).

To issue the final rule, the Bureau must publish the final text plus the preamble to the rule in the *Federal Register* at least thirty days before its effective date.[54] In practice, to give affected parties sufficient time to comply, the Bureau provides much more time before major rules take effect.

The CFPB is accountable for its rulemakings both through Congressional oversight plus multiple avenues of review. Aggrieved parties can challenge the Bureau's final rules under the APA in federal court.[55] In addition, upon the petition of any member agency of the Financial Stability Oversight Council (FSOC), FSOC may set aside any final CFPB rule in whole or in part if it decides that the regulation or provision would put the safety and soundness of the U.S. banking system or the stability of the U.S. financial system at risk.[56] Congress, with approval from the President, can nullify a CFPB rule within sixty days of publication or receipt of a mandatory report on the rule to Congress,[57] whichever is later, under the Congressional Review Act.[58] Congress can also amend the U.S. Code to overturn a CFPB rule.

c. Implementation

The CFPB's rulemaking process does not end with the promulgation of a final rule. Once a final rule has been announced, the Bureau undertakes a thorough implementation process to facilitate industry's compliance with the rule.[59]

The Bureau thinks seriously about implementation issues long before a final rule is announced. In the testing and online public comment on the mortgage disclosure prototypes, for example, the CFPB asked lenders and brokers to identify implementation problems so that they could be addressed.[60] Similarly, the public comment process and small business review panel closely examined the ease of implementation for the new data standards for expanded data reporting under the Home Mortgage Disclosure Act (HMDA).[61] The agency's focus on the practical implementation runs throughout all of its substantive rulemakings.

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54 *See* 5 U.S.C. § 553(d). For a description of the preamble to a final rule, see Rulemaking RFI, *supra* note 21, at 10,438.

55 5 U.S.C. § 702. 5 U.S.C. § 706(2) sets forth the standard for review:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> . . .

56 Dodd-Frank Act, § 1023(a); *see also id.* § 1023(b)-(f).

57 For a description of this report, see Rulemaking RFI, *supra* note 21, at 10,438.

58 5 U.S.C. § 801.

59 Meanwhile, the Bureau's RMR Division conducts assessments of existing rules to gauge their effectiveness and any need for change. We plan to discuss that assessment process in a response to the Bureau's Request for Information on Adopted Rules.

60 *See* Kennedy et al., *supra* note 15, at 1164; McCoy 2013, *supra* note 22, at 6. The Bureau has also instituted and expanded its eRegulations platform to make CFPB regulations and their commentaries easier to navigate and understand. March 2017 Semi-annual Report, *supra* note 18, at 69.

61 Bureau of Consumer Financial Protection, *Home Mortgage Disclosure (Regulation C); Proposed Rule*, 79 Fed. Reg. 51,732, 51,761-62 (Aug. 29, 2014).

After the Bureau unveils a final rule, the staff devotes substantial resources to supporting industry implementation through written materials, public outreach, conference speeches, outreach meetings, phone calls, and coordination with other federal regulators.[62] Central to this process is the creation of compliance aids to assist market participants with the transition. Typically, these aids include guides, instructional videos and webinars, summaries of the rule, compliance timelines, coverage charts and other reference charts, relevant sections of the examination manual, consumer education materials, online tools, FAQs, and, in the case of disclosure rules, sample forms and design files.[63] In addition to these compliance aids, the CFPB issues official guidance on specific rules from time to time.[64]

For the TILA-RESPA mortgage disclosure rule, for example, the Bureau created five separate compliance guides: a small entity compliance guide, a guide to the loan estimate and closing disclosure forms, a guide for real estate professionals, a guide for settlement professionals, and a readiness guide to prepare for examinations. The Bureau updated these guides as needed. In addition, the Bureau created seven compliance videos and posted a "question index" to find out which video answered which question.[65]

The CFPB makes official guidances and compliance aids easily accessible on the agency's website. For each major rule, the Bureau creates a public website for implementation.[66] On top of links to the final rule in question, any official guidance, and the compliance aids, each website provides a link where industry professionals can ask the staff compliance questions. In addition, service providers can sign up online for email updates about the rule's implementation. Another link connects readers to the "Supervisory Highlights" webpage, where CFPB examination staff describe any compliance problems they have encountered to date with the rule.

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[62] March 2017 Semi-annual Report, *supra* note 18, at 65, 67.

[63] Consumer Financial Protection Bureau, Implementation and Guidance, https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/ (viewed Apr. 27, 2018). The HMDA implementation materials are even more extensive. The Bureau's Resources for HMDA Filers website contains filing instruction guides, links to a technology preview webpage and a page to file online, and online tools including a Loan/Application Register (LAR) formatting tool, a file format verification tool, a rate spread calculator, and a check digit tool. March 2017 Semi-annual Report, *supra* note 18, at 66-67; Consumer Financial Protection Bureau, Resources for HMDA Filers, https://www.consumerfinance.gov/data-research/hmda/for-filers (viewed Apr. 28, 2018).

[64] *See, e.g.,* March 2017 Semi-annual Report, *supra* note 18, at 65-69; Consumer Financial Protection Bureau, Implementation and Guidance, https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/ (viewed Apr. 27, 2018); Consumer Financial Protection Bureau, Status of New Uniform Residential Loan Application and Collection of Expanded Home Mortgage Disclosure Act Information about Ethnicity and Race in 2017 under Regulation B, https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/status-new-uniform-residential-loan-application-and-collection-expanded-home-mortgage-disclosure-act-information-about-ethnicity-and-race-2017-under-regulation-b/ (viewed Apr. 27, 2018).

[65] Consumer Financial Protection Bureau, TILA-RESPA Integrated Disclosure rule implementation, https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/tila-respa-disclosure-rule/ (viewed Apr. 27, 2018).

[66] *See, e.g.,* Consumer Financial Protection Bureau, Title XIV rules: mortgage origination, https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/title-xiv-mortgage-rules/ (viewed Apr. 27, 2018).

Fine-tuning the rules when needed through amendments is another important part of the implementation process. Rules may have clerical errors that need to be fixed. Amendments may be needed to solve compliance difficulties in the field. Examples include the need to harmonize a rule to facilitate compliance with other requirements under state law or to create a safe harbor for information obtained by providers using CFPB online tools. In these and other circumstances, the Bureau has not hesitated to amend its final rules when needed. In addition, the CFPB has repeatedly amended its rules to expand exemptions for small business participants and to extend effective dates upon industry request. All in all to date, the Bureau has amended its Home Mortgage Disclosure Act rule twice, [67] its prepaid rule twice,[68] its TILA-RESPA mortgage disclosure rule five times,[69] its loan originator compensation rule twice,[70] its escrow rule once,[71] its mortgage servicing rule seven times,[72] and its electronic fund transfer rule eight times.[73] The CFPB also issued two interpretive rules for its 2013 final rule under the Home Ownership and Equity Protection Act (HOEPA),[74] another interpretive rule for its 2013 mortgage servicing rule[75] and still another for the ability-to-repay rule,[76] plus a supplemental final rule for appraisals on high-cost mortgages.[77]

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67 Consumer Financial Protection Bureau, Home Mortgage Disclosure Act (Regulation C), https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/regulation-c-home-mortgage-disclosure-act/ (viewed Apr. 27, 2018).

68 Consumer Financial Protection Bureau, Prepaid Accounts under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z), https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/prepaid-accounts-under-electronic-fund-transfer-act-regulation-e-and-truth-lending-act-regulation-z/ (viewed Apr. 27, 2018).

69 Consumer Financial Protection Bureau, 2013 Integrated Mortgage Disclosure Rule Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/2013-integrated-mortgage-disclosure-rule-under-real-estate-settlement-procedures-act-regulation-x-and-truth-lending-act-regulation-z/ (viewed Apr. 27, 2018).

70 Consumer Financial Protection Bureau, Loan Originator Compensation Requirements under the Truth in Lending Act (Regulation Z), https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/loan-originator-compensation-requirements-under-truth-lending-act-regulation-z/ (viewed Apr. 27, 2018).

71 Consumer Financial Protection Bureau, Escrow Requirements under the Truth in Lending Act (Regulation Z), https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/escrow-requirements-under-truth-lending-act-regulation-z/ (viewed Apr. 27, 2018).

72 Consumer Financial Protection Bureau, Title XIV Rules: Mortgage Servicing, https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/mortserv/ (viewed Apr. 27, 2018).

73 Consumer Financial Protection Bureau, Electronic Fund Transfers (Regulation E); Amendments, https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/electronic-fund-transfers-regulation-e/ (viewed Apr. 27, 2018).

74 Consumer Financial Protection Bureau, High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Regulation X), https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/high-cost-mortgage-and-homeownership-counseling-amendments-truth-lending-act-regulation-z-and-homeownership-counseling-amendments-real-estate-settlement-procedures-act-regulation-x/ (viewed Apr. 27, 2018).

75 Consumer Financial Protection Bureau, Safe Harbors from Liability under the Fair Debt Collection Practices Act for Certain Actions Taken in Compliance with Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/safe-harbors-liability-under-fair-debt-collection-practices-act-certain-actions-taken-compliance-mortgage-servicing-rules-under-real-estate-settlement-procedures-act-regulation-x-and-truth-lending-act-regulation-z/ (viewed Apr. 27, 2018).

In sum, the CFPB has prided itself on inclusive public engagement, a high degree of transparency, a strong factual basis for its rules, and responsiveness to the public in its rulemaking process. Now, with the new leadership, it is essential to preserve and build on this strong tradition going forward.

3. Key Strengths of CFPB Rulemaking and the Importance of Preserving Them

The CFPB has run one of the most impressive rulemaking processes of any federal agency to date, chiefly due to four key strengths. The Bureau's rulemakings have been evidence-based, inclusive, transparent, and responsive to the public. By embracing these four strengths, the CFPB has taken to heart the purpose behind APA rulemaking, which Congress intended to be an inherently democratic, public-facing process. There are recent concerns, however, that the Bureau's current leadership is backing away from that tradition, as we now discuss.

a. Data-Driven Decision-Making [RFI Questions 1.b, 4.c, 10]

From its creation, the CFPB has prided itself on decision-making that is firmly based on empirical research and facts. The CFPB has been scrupulous to avoid interpreting its statutory mission of consumer financial protection as a rush to judgment. Rather, every time the CFPB has contemplated substantive rulemaking, it has based its decisions on rigorous social science research.

This commitment to fact-based rulemaking is one of the most impressive aspects of the Bureau's rulemaking process. Right from the start, the Bureau put a priority on data-driven analysis and hard-baked that culture into its structure and rulemaking process. The research team within RMR employs highly regarded Ph.D. researchers in economics, psychology, and behavioral decision-making[78] who analyze large data sets using sophisticated quantitative methods to examine key questions raised by rulemakings. Separately, the markets teams in RMR monitor the U.S. consumer financial markets for emerging risks and provide empirical policy analyses of those markets, including mortgages, credit cards, small dollar lending, student loans, deposits, debt collection, and credit reporting.[79] Meanwhile, the Bureau's Academic Research Council,

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[76] Consumer Financial Protection Bureau, Application of Regulation Z's Ability-To-Repay Rule to Certain Situations Involving Successors-in-Interest, https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/application-regulation-zs-ability-repay-rule-certain-situations-involving-successors-interest/ (viewed Apr. 27, 2018).

[77] Consumer Financial Protection Bureau, Appraisals for Higher-Priced Mortgage Loans, https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/appraisals-higher-priced-mortgage-loans/ (viewed Apr. 27, 2018).

[78] *See* Consumer Financial Protection Bureau, CFPB Researchers, https://www.consumerfinance.gov/data-research/cfpb-researchers/?page=1#o-filterable-list-controls (viewed Apr. 30, 2018).

[79] *See* Kennedy et al., *supra* note 15, at 1155-56. For examples of this monitoring, see Consumer Financial Protection Bureau, Consumer credit trends, https://www.consumerfinance.gov/data-research/consumer-credit-trends/ (viewed Apr. 30, 2018); Consumer Financial Protection Bureau, Mortgage Performance Trends, https://www.consumerfinance.gov/data-research/mortgage-performance-trends/ (viewed Apr. 30, 2018).

comprised of leading economists and other academics, provides expert advice to RMR on research methodologies, data collection, and analytic strategies.[80]

Far from working in a vacuum, the CFPB's markets and research teams are fully integrated into the rulemaking process from start to finish. Once a rulemaking has been initiated, members of those teams and staff from the Bureau's other divisions actively work with RMR's attorneys to ensure that the Bureau's rulemaking decisions are based on a firm grasp of the market in question and are tailored to address real consumer harms at the least cost.[81]

The CFPB brings its research and markets teams to bear on all major questions raised in major rulemakings: Is there harm to consumers? If so, what is the nature of the market failure and can the market self-correct? Exactly which segment of consumers is harmed and what is the extent of their harm? What are the countervailing benefits to consumers, in type and in size? Assuming that a rule is called for, what is the best way to tailor that rule to address the problem while preserving current benefits to consumers and minimizing costs to industry?

The Bureau draws on a broad range of quantitative and qualitative data to tackle these questions. The research economists and markets experts in RMR analyze large data sets, some assembled by the federal government[82] and others purchased from private vendors. Their work is augmented with qualitative analysis and field insights from CFPB examinations, consumer complaints, public responses to RFIs, and other sources,[83] which are used, among other things, to identify potential problems for further research. This breadth and depth of data sources ensure that CFPB's rulemakings rest on strong empirical foundations.

In short, in just the few short years of its existence, the CFPB has done a remarkable job in establishing its capacity for thorough empirical analysis. It on-boarded major data sets and attracted some of the best experts from around the country to staff its research and markets teams. And it has made good on its commitment to data-driven rulemaking through its process of in-depth, neutral social science research before embarking on rulemaking initiatives.

Given the CFPB's strength in empirical research and markets analysis, the CFPB should refrain from any action that would undermine that strength. *We stress that the CFPB's impartial empirical research benefits consumers and industry alike.* CFPB research guards against over-regulation by the Bureau by zeroing in on the exact nature of any consumer harm and by crafting

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[80] March 2017 Semi-annual Report, *supra* note 18, at 56; *see also* Consumer Financial Protection Bureau, Academic Research Council, https://www.consumerfinance.gov/about-us/advisory-groups/academic-research-council/ (viewed Apr. 30, 2018). For examples of such recommendations, see Annual report of the Academic Research Council, October 1, 2016-September 30, 2017, at 6-7 (2017), https://www.consumerfinance.gov/about-us/advisory-groups/academic-research-council/ (viewed Apr. 30, 2018).

[81] Kennedy et al., *supra* note 15, at 1156.

[82] Examples include the Home Mortgage Disclosure Act dataset and the National Mortgage Database. *See* Federal Financial Institutions Examination Council (FFIEC), HMDA & PMIC Data Products, https://www.ffiec.gov/hmda/hmdaproducts.htm (viewed Apr. 30, 2018); Federal Housing Finance Agency, National Mortgage Database (NMDB®), https://www.fhfa.gov/PolicyProgramsResearch/Programs/Pages/National-Mortgage-Database.aspx (viewed Apr. 30, 2018).

[83] *See, e.g.,* Consumer Financial Protection Bureau, How We Use Complaint Data, https://www.consumerfinance.gov/complaint/data-use/ (viewed Apr. 30, 2018); March 2017 Semi-annual Report, *supra* note 18, at 64.

tailored solutions. The Bureau's research into costs and benefits keeps the agency keenly attuned to the twin concerns of minimizing regulatory burden while maintaining consumer access to financial products and services. At the same time, the Bureau's commitment to research is vital to making sure that questionable market conduct is analyzed and addressed instead of being swept under the rug.

We are deeply concerned about a number of recent developments at the Bureau that could jeopardize the agency's evidence-based rulemaking going forward:

i. <u>Obstacles to On-boarding Quantitative Data</u>

The CFPB relies heavily on data, including outside data collected by the Bureau, in its rulemaking process. This information includes consumer data on credit cards and mortgages reported in company disclosures to the CFPB, data in commercial databases and government datasets, and information on trends gleaned from the Bureau's examinations, enforcement actions, and consumer complaint database. Without these robust data originating from the private sector and other external sources, the rigor and impartiality of CFPB rulemaking would be seriously threatened.

In a press conference on December 4, 2017, Acting Director Mulvaney announced that he had frozen the CFPB's collection of personal information, including loan level data, on privacy and information security grounds. In imposing the freeze, Mr. Mulvaney halted the collection of data that could trace back to *either* consumers or businesses.[84] Subsequently, in an email to Bureau employees on May 31, 2018, he announced plans to resume the collection of consumers' personally identifiable information because an outside consultant had determined that the agency's information security systems "appeared to be well-secured."[85]

The data freeze had an immediate and damaging effect on essential data flows to the rulemaking process. The Bureau shut down the Extranet, which CFPB examiners depended on to upload company data in advance of examinations. This crippled Supervision's ability to conduct examinations and analyze trends. Meanwhile, the Bureau's Enforcement attorneys were barred from reviewing electronic evidence produced in discovery, which hampered enforcement.[86] The agency also stopped the Research team from the long-planned onboarding of data that was required to carry out the reviews of certain rulemakings mandated by Congress in the Dodd-

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[84] *See, e.g.,* Yuka Hayashi, *New CFPB Chief Curbs Data Collection, Citing Cybersecurity Worries,* WALL ST. J., Dec. 4, 2017.

[85] Evan Weinberg, *CFPB to Resume Data Collection After Data Security Review,* BANKING DAILY, BLOOMBERG BNA, May 31, 2018.

[86] *See* James Kim & Bowen "Bo" Ranney, *CFPB data collection freeze impacting CFPB examinations*, Consumer Finance Monitor (Ballard Spahr, Dec. 15, 2017); Letter from Sen. Elizabeth Warren to Leandra English & Mick Mulvaney 2-4 (Jan. 4, 2018), https://www.housingwire.com/ext/resources/files/Editorial/2018_01_04_Letter_to_English_and_Mulvaney_on_CFPB_Data_Collection.pdf [hereinafter Warren letter].

Frank Act.[87] Questions also linger about the freeze's effect on the processing and handling of the consumer complaint process.[88]

We strongly agree that protecting data privacy and the security of sensitive data is of the utmost importance. However, the December data freeze was unprecedented and unnecessary and served to paralyze key functions of the Bureau. No other federal agency has ever halted data onboarding in response to a data breach. Instead, if a data breach occurs, federal agencies typically plug the leak as quickly as possible while resuming data collection.[89] Accordingly, the CFPB's data freeze was outside of accepted cybersecurity norms, particularly because the Bureau's IT systems "appeared to be well-secured." Instead, we fear its purpose was to impede core responsibilities of the Bureau.

Since May 2017, the Bureau's Inspector General (IG) has issued several reports on data security at the Bureau.[90] In the most important of these reports, the IG found that the Bureau's information security program was operating at a level-3 maturity (consistently implemented), on a scale of 1 to 5, and that several of the program's activities were operating at a higher level-4 maturity. Despite room to improve, the CFPB's cybersecurity readiness exceeded that of the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Securities & Exchange Commission, and the Department of the Treasury, which never stopped data collection.[91] While the IG proposed improvements, it *never* recommended a halt to the Bureau's data collection, whether for personally identifiable information (PII) or otherwise. Meanwhile, the Bureau concurred with all of the IG's recommendations and has taken action to implement them.

In short, nothing in the CFPB's continuing efforts to rectify any shortcomings in its data security program justified the data freeze imposed on December 4. If any aspects of that freeze persist, they do serious damage to the Bureau's core functions, including rulemaking, and should be rescinded immediately.

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[87] Dodd-Frank Act, § 1022(d).

[88] Separately, we have strong concerns about Acting Director Mulvaney's planned closure of the consumer complaint database and any possible degradation of the consumer complaint process, both for the welfare of aggrieved consumers and the vigor of the CFPB's internal data collection and risk monitoring processes. *See* Remarks by Mick Mulvaney, Acting Director, Consumer Financial Protection Bureau, April 24, 2018, American Bankers Association Annual Conference, Washington, D.C., at 5, https://www.documentcloud.org/documents/4446622-Transcript-Mulvaney-ABA-Conference-4-24-2018.html (viewed May 3, 2018) [hereinafter April 24, 2018 Remarks]; Comments of Financial Regulation and Consumer Protection Scholars, and former Regulators on Docket No. CFPB-2018-0006.

[89] Kate Berry, *Mulvaney response to CFPB data security gaps baffles cyber experts,* AM. BANKER, Apr. 23, 2018; Warren Letter, *supra* note 86, at 2-4.

[90] Office of Inspector General, Board of Governors of the Federal Reserve System and Consumer Financial Protection Bureau, Report on the Independent Audit of the Consumer Financial Protection Bureau's Privacy Program, Audit Report 2018-IT-C-003, at 2 (Feb. 14, 2018); Office of Inspector General, Board of Governors of the Federal Reserve System and Consumer Financial Protection Bureau, Audit of the CFPB's Encryption of Data on Mobile Devices, Executive Summary, 2018-IT-C-002R (Jan. 25, 2018); Office of Inspector General, Board of Governors of the Federal Reserve System and Consumer Financial Protection Bureau, 2017 Audit of the CFPB's Information Security Program, Audit Report 2017-IT-C-019, at 2-3 (Oct. 31, 2017); Office of Inspector General, Board of Governors of the Federal Reserve System and Consumer Financial Protection Bureau, The CFPB Can Improve Its Practices to Safeguard the Office of Enforcement's Confidential Investigative Information, Evaluation Report 2017-SR-C-011 (May 15, 2017).

[91] Warren Letter, *supra* note 86, at 4-5.

ii. Use of Qualitative Data and Consumer Anecdotes

The Bureau's recent data freeze intersects with another issue that has appeared in this RFI, which is the appropriate use of qualitative data in CFPB research and rulemaking. There have been suggestions that qualitative data—including descriptive information about problems encountered by individual consumers in the consumer financial marketplace—should not be used in research or decision-making by the Bureau. The discounting of consumer experience by regulators in the years leading up to the financial crisis shows the dangers of this position, and we strongly urge the Bureau to seek out and treat seriously qualitative data on consumer use of financial products.

Qualitative data serve an important role in the Bureau's research efforts. The Bureau relies on copious qualitative data in analyzing market structures, market dynamics, company internal controls, incentive systems, and consumer psychology. This reliance on qualitative data is intrinsic to the CFPB's research efforts and must continue.

There are many types of qualitative data, including what are sometimes derisively called anecdotes. Consumers or their advocates report individual people's experiences with financial services or products, including the harm American consumers have experienced from unfair and deceptive practices. These anecdotes are relayed through a variety of channels, including responses to RFIs, ANPRs, or NPRMs, field hearings, town halls, or other face-to-face meetings, other forms of external engagement, public inquiries, consumer complaints, enforcement actions, and supervisory findings. This evidence is crucial to the development of rules that create a fair marketplace for three reasons.

First, understanding actual consumer experience is critical to formulating inquiries about the types of data needed to understand the functioning of the market and the questions to be tested. Until the Bureau grasps how consumers actually use and perceive consumer financial products, and how they are sometimes misled and harmed in the use of those products, it cannot know which quantitative datasets or data fields could show the existence or extent of the problems which the rulemaking aims to correct. For example, during the explosive growth of abusive subprime mortgages in the 2000s, the subprime mortgage industry defended the quality of its loans by noting the manageable level of defaults on these loans. But loan default rates usually do not rise during property bubbles because troubled borrowers can retire their debts by selling their homes or refinancing their loans. Instead, the loan default rates masked systematic efforts during the latter years of subprime growth to "churn" refinancing loans through sharply higher use of loans with false "stated incomes," fraudulent appraisals and other tactics reflecting deteriorated underwriting standards. Consumer reports should have been used to point to the collection of data that would have exposed the misleading reliance on overall default rates, and thus that could have led the Federal Reserve to promulgate HOEPA rules to constrain this destructive lending.

Consumer inquiries and complaints, examination findings, and enforcement investigations are canaries in the mine, alerting the Bureau to new and emerging types of consumer harm. While one report is not a trend, it puts the Bureau on notice that there may be a need to inquire whether other consumers are suffering the same harm.

During the lead-up to the financial crisis, the Federal Reserve Board heard countless accounts from community leaders and others about the dangers of subprime mortgages, but it discounted those reports and sat on its hands.[92] In the ensuing crisis, millions of households lost their homes to foreclosure and the global financial system nearly collapsed. Congress later responded by transferring the Board's rulemaking powers over consumer financial protection laws to the CFPB. If the CFPB were to start ignoring anecdotes as did the Federal Reserve, it would do so at high risk to itself and the public that it serves. Instead, consumer narratives should be the impetus for further research and inquiry, not something to be discarded.

Second, some problems are not effectively captured by quantitative data. Lenders, for instance, can produce data showing pristine compliance with existing disclosure laws while training its sales force to use oral practices that effectively mislead consumers. Identifying how consumers actually experience consumer finance and how they perceive being harmed in that market can point to consumer misunderstandings that are not easily captured in data that can be harvested from industry records.

The Bureau's December data freeze exacerbated the treatment of anecdotes inordinately. If anecdotes count for nothing standing alone *and* the Bureau could not analyze those claims using large data sets due to supposed privacy or data security concerns, then consumer harms, for all intents and purposes, would end up being ignored.

A dismissive stance toward consumer reports runs the added danger of one-sided decision-making. Consumers are not the only source of anecdotes. Industry provides the Bureau with plentiful anecdotes of its own to illustrate compliance problems or regulatory costs, which is helpful to understanding how to make efficient rules that promote compliance. The danger is that industry anecdotes will be credited, while consumer anecdotes will not, leading to biased and myopic rulemakings and impact analyses.

Third, consumer reports of experience can inform how to make rules effective in practice. The Bureau, for instance, has mounted extensive and widely praised qualitative studies of laboratory test results for proposed disclosures.[93] This is no different than the routine use by industry of consumer focus groups and qualitative data gathering in developing new consumer products. The wisdom produced by varied sources of information about how the marketplace functions is essential to understanding how to act effectively in promulgating rules that will work in practice. This is no less true for Bureau rulemaking than it is for lenders and other businesses developing strategies to sell consumer financial services.

We close this discussion with one related point. The Bureau should continue to make data publicly available to the greatest extent possible, consistent with consumer privacy and the protection of truly proprietary data. This will allow outside researchers to test the magnitude and ramifications of anecdotal reports. Otherwise, data will end up being locked up in government and industry hands, leaving the larger public with anecdotes alone. That would be a serious

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[92] Binyamin Appelbaum, *Fed Held Back As Evidence Mounted on Subprime Loan Abuses,* WASH. POST, Sept. 27, 2009.

[93] *See* Kleimann Communication Group, Inc., Know Before You Owe: Evolution of the Integrated TILA-RESPA Disclosures (July 9, 2012).

problem, particularly if the Bureau failed to test those anecdotes using quantitative data when possible. The Bureau's recent decision to re-open the 2015 HMDA final rule[94] is the most important episode to raise this concern, but it is not the only one.

iii. Impact Analyses [RFI Question 4.c]

In RFI Question 4.c, the Bureau solicits comment on "[i]mpact analyses for the proposed rule, including the qualitative and quantitative analysis therein, and the data on which they rely."

The CFPB is required to produce impact analyses when conducting rulemakings. The main impact analysis is the so-called "Section 1022(b)(2) Analysis" mandated by Section 1022(b)(2) of the Dodd-Frank Act, which states:

> In prescribing a rule under the Federal consumer financial laws—
> (A) the Bureau shall consider—
> (i) the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule; and
> (ii) the impact of proposed rules on covered persons, as described in section 1026,[95] and the impact on consumers in rural areas . . .

In addition, the Regulatory Flexibility Act (RFA)[96] requires the CFPB to consider whether proposed and final rules would have a significant economic impact on a substantial number of small entities.

The CFPB takes both types of impact analyses extremely seriously. While not required to do so by statute, the Bureau goes to great lengths to quantify and monetize its impact analyses whenever possible.

It is difficult to respond to RFI Question 4.c because the Bureau has not identified any issues surrounding its assessment of its impact analyses and its methodologies and underlying data. Given this lack of context, we confine our comments on the impact analyses to six points.

First, if the Bureau wishes to properly solicit public feedback on its approach to impact analyses, it should issue a separate, new Request for Information in which it fully fleshes out the methodologies that it currently uses for impact studies and any resulting issues. That RFI should give specifics about the qualitative and quantitative analyses that the Bureau uses and any issues concerning those approaches and the data relied on. The Bureau should also describe what new

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94 Consumer Financial Protection Bureau, CFPB Issues Public Statement On Home Mortgage Disclosure Act Compliance (Dec. 21, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-public-statement-home-mortgage-disclosure-act-compliance/ (viewed May 3, 2018). The public statement announcing the new rulemaking raises at least two concerns in that regard: (1) that numerous entities that are now required to report under HMDA would be exempted from HMDA reporting; and (2) that some new, important data fields added in the 2015 HMDA rule would be rolled back. *See id.*

95 This refers to depository institutions and credit unions with $10 billion or less in assets. Dodd-Frank Act, § 1026(a).

96 5 U.S.C. §§ 601-612.

approaches it might consider to its impact analyses going forward. Without a detailed enumeration of the Bureau's current approach and any critiques or issues, it is virtually impossible to comment on any changes the Bureau might be contemplating to its impact studies.

Second, we need to stress that in ordinary rulemakings, the Bureau has no statutory obligation to perform a net benefit analysis. Instead, Section 1022(b)(2) of Dodd-Frank mandates the Bureau to "consider" the potential costs and benefits, without requiring it to calculate net benefit. While we applaud the Bureau for seeking to quantify and monetize costs and benefits whenever possible, we oppose *requiring* the agency to do more than its authorizing statute requires.

Third, and in this regard, we must emphasize that OIRA standards for impact analyses *do not* apply and may not be lawfully imposed on CFPB rulemakings. This legal requirement is intrinsic to Congress' decision in the Dodd-Frank Act to establish the CFPB "in the Federal Reserve System, [as] *an independent bureau . . .*"[97] For this reason, the Bureau, like all other federal banking regulators, is exempt from submitting its rules to OIRA for review and cost-benefit analysis.[98]

Fourth, there are important reasons why Congress exempts impact analyses by federal banking regulators, including the CFPB, from OIRA and OMB oversight. First, the exemption insulates the Bureau, its fellow federal banking regulators, and the health of the economy at large from interference for purposes of short-term political gain by OMB and the White House. Second, in financial regulation, often it is harder to quantify benefits in the form of harms avoided than it is to quantify costs. The Bureau and other federal banking regulators must make many rulemaking decisions under circumstances of incomplete data and future uncertainty. Requiring federal banking regulators, including the Bureau, to fully monetize harms avoided—which might prove impossible--would dangerously tilt rulemaking analyses toward inaction and the status quo.

Fifth, if Mr. Mulvaney were serious about impact analyses, then he would allow the Bureau to collect and analyze the complete data needed to properly do them. But his data freeze raised questions about the Bureau's ability going forward to collect data on consumer benefits. If the freeze had that effect, then there was a serious danger that any impact analyses would be artificially heavy on costs while understating the benefits.

Finally, we are deeply concerned that Mr. Mulvaney's dual service as the heads of both the CFPB and OMB undermines the independence that Congress required from OMB and OIRA. Mr. Mulvaney's recent statements and actions have confirmed those concerns. After he took over the helm of the CFPB, he was quoted saying: "You could imagine that the Office of Management and Budget under the Trump administration might look very cautiously, even cynically, against rules that were produced by" the previous CFPB Director, Richard Cordray.[99] Later, in an email to staff, Mr. Mulvaney demanded even more quantitative cost-benefit analysis

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[97] 12 U.S.C. § 5491(a).

[98] Executive Order 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993); *see* note 8 *supra*.

[99] Ian McKendry, *Mulvaney's first days at CFPB: payday, personnel and a prank,* AM. BANKER, Dec. 4, 2017.

of proposed agency rules than the Bureau already provides.[100] In the most alarming development to date, Mr. Mulvaney announced plans to create an Office of Cost Benefit Analysis that would be housed within the director's office.[101] He made that announcement even though this RFI seeking public comment on *that very topic* remained open.

As these statements show, Mr. Mulvaney is scrutinizing CFPB rulemakings under the aegis of OMB and OIRA. His plan to move the cost-benefit analysis researchers into his office and have them report directly to him is the culmination of that assault and a serious affront to the agency's independence as mandated by Congress. Further, the timing of his announcement raises concerns that this RFI is nothing more than cover for what he is intent on doing anyway. To comport with the law, Mr. Mulvaney must immediately rescind the plan to move the cost-benefit unit into his office and recuse himself from further involvement in CFPB impact analyses.

iv. Consideration of New Data, Studies and Reports After the NPRM is Released [RFI Questions 10 and 11]

Finally, in RFI Question 10, the Bureau asked for input on the "[c]onsideration of new data, studies, and reports issued by other agencies or third parties after the NPRM is released."

In many cases, consideration of those data will bolster the evidence base for any final rule that is issued, thereby improving the quality of the rule and its ability to withstand review. Public transparency is essential, however, when considering those sources. Consequently, we firmly support the Bureau's consideration of new data, studies and reports after an NPRM's issuance, but only on three conditions.

The first condition is that the Bureau should mention any new data, studies and reports it considered (to the extent that they are relevant) in the written preamble to the final rule. If the information was instrumental or dispositive in the shape of the final rule, the Bureau's written description should discuss and evaluate those data, studies and reports in detail [see RFI Question 11].

The second condition is that all data, studies and reports that are received through *ex parte* contacts between the issuance of an NPRM and that of a final rule should be timely posted to the public rulemaking docket. Normally, the Bureau's Policy on Ex Parte Presentations in Rulemaking Proceedings will apply to such submissions.[102] As we will discuss, however, there

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[100] Memorandum from Mick Mulvaney (Jan. 23, 2018), http://bit.ly/2DZELLC. In that email, Mr. Mulvaney said this about the Bureau's impact analyses:

> Speaking of data: the Dodd Frank Act requires us to "consider the potential costs and benefits to consumers and covered persons." To me, that means quantitative analysis. And while qualitative analysis certainly can play a role, it should not be to the exclusion of measurable "costs and benefits." In other words: there is a lot more math in our future.

Here it is worth noting that Mr. Mulvaney's efforts to hamper data collection by the Bureau makes the cost-benefit analysis he advocates all the harder.

[101] Memorandum from Mick Mulvaney to DL DFPB All_Hands, A Note on Staffing and Bureau Organization, (May 9, 2018), https://www.documentcloud.org/documents/4454936-CFPB-Memo.html (viewed May 22, 2018); Evan Weinberger, *Mulvaney Brings More Political Oversight in CFPB Restructuring*, BLOOMBERG LAW BANKING DAILY, May 9, 2018.

[102] *See* Section 3.c.i *infra*.

have been serious delays in posting such submissions to regulations.gov. Below, we recommend a change to the Ex Parte Policy to ensure timely posting.

The last condition is that the Bureau should seriously consider re-opening the record to allow the public to comment and respond to those data, studies and reports, particularly where additional information or interpretations could alter the outcome of the final rule. This is especially important where those sources raise new issues and the original NPRM did not put the public on notice of the issue in question. Admirably, the CFPB took precisely this step in the ability-to-repay rulemaking. After the original NPRM appeared (it was issued by the Federal Reserve Board shortly before the Bureau opened its doors), two new issues—the extent of liability exposure and where to set a possible debt-to-income ratio cap for qualified mortgages—rose to the fore in the Bureau's deliberations. Accordingly, the Bureau reopened the rulemaking to solicit public comment on those two issues and the underlying data sources.[103] The CFPB should follow the same approach whenever newly received information could affect the outcome of final rules.

b. Inclusiveness [RFI Questions 1-3, 5-7, 9, 12]

The CFPB deserves praise for its commitment to inclusiveness in its rulemaking proceedings to date. Its External Engagement staff and all other Bureau staff involved in those outreach efforts take the goal of democratic participation seriously and have bent over backwards to solicit public comment from all affected stakeholders, consumers and industry alike. Staff have made tireless efforts to go into local communities and engage the public face to face. Most impressively, they have harnessed new technologies—including emails, social media, and online interactive tools—to seek comment from ordinary Americans located in the farthest reaches of the country.

This broad and imaginative outreach is true not only to the letter, but also to the spirit of, the Administrative Procedure Act. In the APA, Congress sought to allow *all* members of the public – regardless of their occupation, political affiliation, state of residence, income or wealth – to express their views on and help shape forthcoming agency rules. For this reason, all NPRMs are published in the *Federal Register*, which the federal government disseminates online at no cost to the public. Industry participants, trade associations, national consumer advocacy groups, and scholars such as ourselves know to scan *Federal Register* notices daily for upcoming comment periods of interest. However, the average consumer and local community organizations probably do not scan *Federal Register* notices and may not be aware of the *Federal Register* to begin with.

Accordingly, if publicity of upcoming comment periods were confined to *Federal Register* notices alone, public comment would be badly tilted toward special interests. Commendably, in its external engagement to date, the Bureau has been sensitive to that problem and has gone to great lengths to elicit rulemaking comment from the general public in innovative ways (especially outside the Beltway). To that end, the CFPB has deployed twenty-first century communications methods to achieve the original intent of the APA. Thanks to those efforts and

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[103] Bureau of Consumer Financial Protection, *Truth in Lending (Regulation Z): Notice of reopening of comment period and request for comment*, 77 Fed. Reg. 33,120 (June 5, 2012). To its credit, the Bureau re-opened the comment period despite a tight Congressional deadline for the final rule.

innovations, the CFPB's rulemaking process is better as a result. Meanwhile, through its deep public engagement, the CFPB has made itself accountable to the entire American populace.

It is important, at this key juncture in the Bureau's young life, not to retreat from its deep and vibrant engagement with the public in rulemaking proceedings. The Bureau should continue to engage in all of its types of public outreach to the same wide spectrum of stakeholders and with the same frequency as it has since its inception.

During the information-gathering phase before the publication of any NPRM, we support all of the added ways in which the Bureau has sought public participation. We encourage the continued use of RFIs "concerning market conditions or issues, particular regulatory options, or the process or content of Bureau Research" [RFI Question 1.a] to give the public a chance for input *before* the agency solidifies a proposal. Similarly, we applaud the Bureau's "[e]fforts to gather data from industry, academics, think tanks, consumer groups, and others to support quantitative analysis" [RFI Question 1.b], on the condition that such use be transparent. Such data can provide a stronger factual foundation for any eventual rule and should be expanded, not curtailed.

Turning to publication of NPRMs and final rules in the *Federal Register*, we similarly support the Bureau's practice of releasing those documents in advance on the agency's website, as well as supporting materials and activities such as press releases, summaries, consumer-facing blog posts, and remarks by the Director at public events or on press calls [RFI Questions 5 and 12]. These materials assist public understanding of proposed or final rules and are a far more effective way for the Bureau to explain its rules than the standard *Federal Register* preamble.

We also urge the Bureau to continue its use of online tools and other innovative mechanisms to solicit public feedback on NPRMs [RFI Question 7]. The Bureau's smash success eliciting public feedback on the integrated mortgage disclosures through its online tool shows the power of such engagement. Sadly, it appears that the Cornell University's eRulemaking Initiative,[104] which the Bureau interfaced with from 2012 to 2014, has closed; we hope the Bureau will explore new and better alternatives to the Cornell website. In keeping with the Bureau's tradition of transparency, the agency should make all such feedback available online on a timely basis for public view, either through regulations.gov or through the Bureau's own website.

In a similar vein, the Bureau raises the issue whether it should provide "'reply periods' for commenters to review and formally respond to other commenters' comment letters, and whether and to what extent the Bureau should consider comments received after the close of the comment period" [RFI Question 6]. We start by noting that the APA does not formally address this question. At the same time, the APA does not prohibit the Bureau from receiving or considering responses to the original round of written comment letters after the comment period has closed. In addition, under the APA, the Bureau has discretion to re-open public comment periods. More often, the Bureau can (and does) receive oral and written responses to written comments on an *ex parte* basis after the deadline for the comment period has passed.

[104] Regulation Room, http://regulationroom.org/ (viewed May 3, 2018).

The ability to submit and receive these responses is invaluable to stakeholders and the Bureau alike. Major written comments submitted during the comment period are often long and can present new information or arguments that were not aired in the NPRM. Frequently, the meaning or validity of that information or arguments is subject to interpretation. Permitting responses to written comments after the comment period has closed allows all affected stakeholders to be heard. It also improves the quality and impartiality of the rulemaking by making sure that counterarguments and differing viewpoints are taken into account.

That said, we do oppose a *formal* second reply period. Setting a formal reply period would cause several problems. First, it would increase the burden on all commenting parties, who would feel compelled to read and respond to prior comments and to submit a second set of comments. Second, it would add to the burden of CFPB staff to read all of those comments. Third, it would drag out the rulemaking process.

But the biggest problem with a formal reply period is that it would result in one-sided input by industry players, to the severe detriment of ordinary consumers and the general public, including academics and consumer advocacy organizations. Ordinary people who file comments do not review other comments and are not going to have the time to submit a second set of comments. Even academics and public interest organizations rarely have the time to do so. Simply spending the time to review a proposed rule and to write comments also already imposes a considerable burden on those who do not have a financial interest in a rule and takes time away from other obligations to submit comments.

On the other hand, industry players, trade associations and their attorneys and lobbyists pay salaried staff who have ample time to submit a second set of comments. If a formal reply period existed, they would submit lengthy replies to comments by consumers and other consumer-facing commenters with nothing to balance them out.

In addition, having a formal reply period could disincline the Bureau to consider additional input beyond the reply period or the formal comment process. Yet it may be important for the public to be able to provide input through more informal channels or through written means long after the comment period has closed when the key issues have become more crystallized.

Thus, so long as the Bureau has enough time before finalizing a rule, we encourage it to accept informal input after the comment period has closed, *so long as the Bureau is transparent*. To that end: In the rare circumstances when the Bureau re-opens a public comment period to solicit responses to initial comments, transparency is guaranteed. However, when the Bureau receives those responses on an *ex parte* basis, there is a danger that those responses will result in closed-door rulemaking unless they are timely posted online for public view. Consequently, we make recommendations below to ensure that the Bureau's policy on *ex parte* communications results in faster posting of those responses online. This will give transparency to what otherwise is a valuable form of public input.

c. Transparency and Concerns About Agency Capture [RFI Questions 1.a, 2.d, 7-10]

Early in its existence, the Bureau made a strong and impressive commitment to transparency so that its rulemaking proceedings would be impartial and fully informed. Now with the change in leadership, we have grave concerns that the Bureau, under Acting Director Mulvaney, is back-pedaling from its strong tradition of neutral and broad-based public engagement. There has been only one public announcement of an upcoming field hearing or town hall since his appointment.[105] Similarly, Mr. Mulvaney has not published his complete calendar on the Bureau's website.[106] Meanwhile, on June 6, 2018, he disbanded the current membership of one of its most effective consumer-facing feedback channels--the Consumer Advisory Board —after refusing to meet with it,[107] even though he had proceeded to meet with the Bureau's Community Bank Advisory Council in May.[108]

These actions, combined with Mr. Mulvaney's recent remarks before the American Bankers Association (ABA) indicating that he engaged in "pay to play" as a Congressman, are alarming and raise concerns that the Bureau under his aegis is curtailing consumer input while meeting with industry behind closed doors. As he explained to the ABA, he only met with constituents and with lobbyists who contributed money, stating:[109]

> If you were a lobbyist who never gave us money, I didn't talk to you. If you were a lobbyist who gave us money, I might talk to you.

Mr. Mulvaney then praised industry lobbying as one of the "fundamental underpinnings of our representative democracy, and you have to continue to do it."[110] Meanwhile, eight of the ten financial companies that received the most complaints in the Bureau's consumer complaint database contributed to Mr. Mulvaney when he served in Congress.[111]

These pay-to-play remarks put a cloud over the Bureau's impartiality and commitment to consumer welfare. To remove that cloud, full transparency is necessary to ensure that the

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[105] *See* Consumer Financial Protection Bureau, Town hall in Topeka, Kan., on fighting elder financial exploitation in your community (May 16, 2018), https://www.consumerfinance.gov/about-us/events/town-hall-topeka-kan-fighting-elder-financial-exploitation-your-community/.

[106] *See* Consumer Financial Protection Bureau, Leadership calendar, https://www.consumerfinance.gov/about-us/the-bureau/leadership-calendar/ (viewed May 3, 2018); Comment of Financial Regulation and Consumer Protection Scholars and Former Regulators on Docket No. CFPB-2018-0005.

[107] *See* Email from Delicia Hand (CFPB) dated June 6, 2018, at 10:18:57 AM EDT; Kate Berry, *Is Mulvaney trying to purge CFPB's advisory board?*, Am. Banker, June 4, 2018; National Consumer Law Center, Texas Appleseed & California Reinvestment Coalition, Press Release, Acting Director Mulvaney Fires Members of Advisory Boards of Consumer Financial Protection Bureau, Endangering Financial Well-Being of American Families (June 6, 2016).

[108] *See* Consumer Financial Protection Bureau, Spring 2018 Community Bank Advisory Council meeting in Washington, D.C. (May 14, 2018), https://www.consumerfinance.gov/about-us/events/spring-2018-community-bank-advisory-council-meeting-washington-dc/.

[109] *See* April 24, 2018 Remarks, *supra* note 88, at 11.

[110] *See id.*

[111] *See* Public Citizen, *Companies With the Most Complaints in CFPB Database Were Mulvaney Donors* (May 8, 2018), https://www.citizen.org/media/press-releases/companies-most-complaints-cfpb-database-were-mulvaney-donors.

Bureau is listening to all affected stakeholders--consumers and industry members alike--as we now discuss.

i. CFPB Policy on Ex Parte Presentations in Rulemaking Proceedings [RFI Question 9]

When an NPRM is issued and through the time a final rule comes out, the APA contemplates that the written comment process will provide the main channel for public input into rulemakings. This process has two important features that promote transparency: *one*, a deadline that provides a cut-off on written comments; and *two*, public posting of the written comments (which are available for reading online at regulations.gov).

The rulemaking process can be long, however, and external parties may want to communicate with the Bureau about pending rulemakings one-on-one about recent developments, outside of the written comment process. These communications and discussions can provide valuable information to the Bureau and help it craft better tailored and more responsive rules. At the same time, *ex parte* communications pose the danger of undue influence if conducted behind closed doors. Accordingly, the Bureau issued its CFPB Policy on Ex Parte Presentations in Rulemaking Proceedings (Ex Parte Policy)[112] to ensure that potentially useful *ex parte communications* take place during pending rulemakings in an atmosphere of openness. The Ex Parte Policy is the cornerstone of the Bureau's transparency efforts.

The CFPB's Ex Parte Policy seeks to strike a balance with this straightforward requirement: *ex parte* communications with decision-making personnel at the Bureau about pending rulemakings, starting with the publication of an NPRM through issuance of a final rule, must be documented in writing within ten days and posted to the public rulemaking docket for online view.[113]

The Bureau's Ex Parte Policy was one of the strongest policies of its type when it was first adopted. It has cast laudable sunshine onto the Bureau's rulemaking process. We recommend four improvements, however, to ensure that the Ex Parte Policy in fact provides transparency on a timely basis:

- *First:* Under the original version of the Policy, outside parties making oral presentations to CFPB decision-making personnel concerning pending rulemakings had three days to post a written summary of the communications to the rulemaking docket. According to the Bureau, outside parties had technical difficulties posting these submissions on regulations.gov. Accordingly, in 2017, the Bureau reviewed the Policy to excuse outside parties from posting the written summary to the rulemaking docket. Now, instead, outside parties simply need to email the required materials to the CFPB's Executive

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[112] Bureau of Consumer Financial Protection, *Policy on Ex Parte Presentations in Rulemaking Proceedings*, 82 Fed. Reg. 18,687 (Apr. 21, 2017) [hereinafter Ex Parte Policy]. The 2017 policy revised the Bureau's original *ex parte* policy, which was issued on August 16, 2011. Consumer Financial Protection Bureau, Policy on Ex Parte Presentations in Rulemaking Proceedings, CFPB Bull. 11-3 (Aug. 16, 2011), https://files.consumerfinance.gov/f/2011/08/Bulletin_20110819_ExPartePresentationsRulemakingProceedings.pdf (viewed May 4, 2018); *see* Kennedy et al., *supra* note 15, at 1158-59; McCoy 2013, *supra* note 22, at 20-21.

[113] *See* Ex Parte Policy, *supra* note 112, at 18,689-90. The disclosure requirement does not apply to *ex parte* presentations by other federal agencies, offices, or their staff, by members of Congress or their staff in many cases, by state attorneys general or certain state regulators, or to the General Counsel's office that concern judicial review of a decision by the Bureau. *See id.* at 18,690.

Secretary and to the CFPB employee point of contact for the presentation. The new Policy provides that CFPB staff will post the summaries and other required written materials "on the public rulemaking docket in accordance with this policy, including making reasonable efforts to do so within a reasonable period of time before publication of the final rule."[114]

Unfortunately, this new procedure has been known to result in lengthy delays in the posting to the public rulemaking docket of summaries of *ex parte* discussions and written materials. In some cases, the written materials have not been posted publicly until after the written rule has been issued. We are highly sympathetic to the often crushing demands on RMR staff's time. At the same time, these delays defeat the purpose of the Ex Parte Policy and make it needlessly difficult or impossible for other interested parties to respond when *ex parte* summaries are posted soon before a final rule is unveiled or, worse, afterwards. Accordingly, we urge the Bureau to revise the Policy to set a hard but reasonable deadline from receipt (of, say, ten business days) for Bureau staff to post written records of *ex parte* contacts to the public rulemaking docket. The CFPB should also dedicate the necessary additional staff time and resources to make that possible.

- *Second:* In a similar vein and given these delays, we further recommend that the CFPB post on its website for public view a log of each *ex parte* contact with CFPB decision-making personnel directed to the merits or outcome of a rulemaking proceeding. The log should list each such *ex parte* contact (whether oral or written) within five business days of its occurrence or receipt and state: (1) the names of all outside persons who attended or otherwise participated in any presentation to the Bureau and their institutional affiliation(s); (2) the date of any presentation; (3) the names and institutional affiliations of all individuals who prepared any written materials presented *ex parte* to the Bureau; (4) the names of all Bureau officials and staff who attended the presentation; and (5) the street address, city and state of the contact. Meanwhile, the Acting Director, Deputy Director, and senior staff, including political appointees, who now oversee all division heads, should post their complete daily calendars of their work for the Bureau to the CFPB's website immediately.

- *Third:* In its provisions on the handling of written materials with potentially confidential material, the Ex Parte Policy states, among other things, that the outside party should provide the Bureau with two versions of the document with the confidential information: one redacted and one not. However, the Policy does not commit the Bureau to posting the redacted version of the document to the public rulemaking docket. The CFPB should amend the policy to ensure that all redacted versions of written materials containing confidential information can in fact be timely viewed on regulations.gov.

- *Fourth:* Under the current Ex Parte Policy, the CFPB reserves the discretion "not to apply the policy" during certain rulemaking proceedings under Section 553 of the APA where public interest requires. While the Policy mentions that this could occur where the CFPB has determined that no final rule will be issued, the Preamble states that this is only "an example."[115] Currently, when leadership's commitment to transparency at the Bureau is in question, we have concerns that this exception could be improperly expanded to situations where a final rule is ultimately issued. Under this provision, what

[114] Ex Parte Policy, *supra* note 112, at 18,688, 18,690.
[115] *Id.* at 18,688-90.

would stop the Bureau, for example, from suspending publication of *ex parte* contacts pending internal debates whether to proceed to a final rule, based on the reasoning that a final rule might *not* be issued? Because there is no way to cabin this exception against misuse, it should be eliminated.

ii. Transparency During the Initial Information-Gathering Stage and the Implementation Stage [RFI Questions 1.a, 2.d]

The Ex Parte Policy does not apply to the initial information-gathering stage, before an NPRM is ever issued, or the implementation stage. Consequently, the degree to which these stages are transparent is largely at the discretion of the Bureau.

Under its former leadership, the Bureau staked out and carried through on its commitment to transparency during the information-gathering in impressive and innovative ways. We have catalogued the depth and breadth of that outreach and transparency above, ranging from requests for information and the occasional ANPR soliciting public comment, to the posting of data sets for public analysis. We applaud all those efforts while stressing that it is imperative to continue to solicit the same inclusive feedback while assuring transparency to the same high degree.

In this regard, it is important to continue posting written comments in response to requests for information and ANPRs to regulations.gov. Further, it is essential to continue publicly releasing the outline of a proposed rule under consideration, along with outreach to other stakeholders, as part of the SBREFA process [RFI Question 2.d]. Doing so helps encourage broad public input when it really counts, before a proposed rule crystallizes. Moreover, *not* releasing that outline to the public during the SBREFA process would secretly and unfairly tilt the playing field toward industry because nothing would stop small business participants in the SBREFA process from privately disseminating the outline to other industry members. That would prejudice the very consumers whom the Bureau was established to protect and undermine the Bureau's integrity.

iii. Level of Detail in Preambles [RFI Questions 4, 11]

The detailed content of the Bureau's preambles to major rulemakings should also be preserved because it injects transparency into the rulemaking process. The extended discussion of the legal basis, evidentiary record, and impact analyses helps Bureau rules withstand any possible judicial challenge. Detailed preambles also provide a historical record for future policymakers to consult.

To the extent the length of the CFPB's rulemaking preambles poses a concern, the answer is not to artificially truncate those documents. Instead, the CFPB should continue to rely on other tools such as press releases, summaries, highlights, outreach calls and public events, and the like to help explain rules to the public in an easy-to-understand and digestible manner.

d. Ongoing Responsiveness [RFI Questions 4.a, 4.d, 12]

The CFPB has gone to great lengths to be responsive to industry and other stakeholders throughout the implementation phase. That level of responsiveness is praiseworthy and should be maintained and deepened as necessary.

Above, we discussed in detail the wide suite of implementation aids and tools and the CFPB's efforts to facilitate implementation through public outreach. The Bureau's responsiveness also extends to its development of commentary, appendices and model and sample forms [RFI Question 4.d]. In this respect, we wish to draw attention to an especially helpful feature of the Bureau's eRegulations tool. This tool imbeds links to Official Interpretations by the CFPB into each affected subsection of the Bureau's rules.[116] Under this feature, when readers consult a specific subsection of a rule, the Official Interpretation link is easy to find, immediately following the subsection. This simple but ingenious CFPB innovation makes it extremely convenient for readers and substantially aids their understanding of a rule.

Similarly, to the extent possible, the CFPB should continue to conduct implementation outreach and roll out implementation materials simultaneously with the release of a final rule instead of waiting until the *Federal Register* announcement or later [RFI Question 12]. Doing so provides timely answers to the natural and inevitable questions that surround the unveiling of a major rule. In addition, the CFPB's current practice advances compliance by giving regulated entities the maximum time possible to implement the rule.

4. Conclusion

Under the new leadership, there are signs that the Bureau is headed toward a Catch-22 that would paralyze principled, impartial rulemaking. If the Bureau cannot consider qualitative data, including consumer anecdotes, and if it cannot analyze consumer issues using large data sets due to supposed privacy or data security concerns, then there will be no evidentiary basis to redress serious consumer harms. At the same time, the Bureau will not be able to perform the impact studies that the Acting Director demands, let alone quantitative impact studies at all. Meanwhile, there are serious fears that agency capture of the rulemaking process is unfolding behind closed doors. We call upon the Bureau to reverse these developments immediately and return to the data-driven decision-making, inclusiveness, transparency, and responsiveness that the American public deserves from the CFPB and the process it employs when writing rules.

116 For an example, see the eRegulations page for 12 C.F.R. § 1026.43(a)(3)(iv), located https://www.consumerfinance.gov/eregulations/1026-43/2016-14782_20160627#1026-43-a.

June 7, 2018

Kristine M. Andreassen
Owen Bonheimer
Senior Counsels
Office of Regulations
Consumer Financial Protection Bureau
1700 G St., NW
Washington, DC 20552

Re: Docket # - CFPB-2018-0009 - Request for Information Regarding Consumer Financial Protection Bureau Rulemaking Processes

Dear Ms. Andreassen and Mr. Bonheim:

The 45 undersigned consumer, community, civil rights and legal services groups submit these comments in response to the Consumer Financial Protection Bureau ("CFPB")'s Request for Information ("RFI") regarding its rulemaking processes. In its first several years of operation, the CFPB's rulemaking process has been inclusive, transparent, evidence-based and comprehensive. It is essential to preserve this robust process.

1) Objections to the CFPB's Request for Information Process

We must first note our objections to the burdensome RFI process. The amount of time and attention required to adequately address the CFPB's numerous RFIs on a multitude of subjects in a very short amount of time has diverted valuable consumer advocacy and third-party resources to respond to these requests. The very structure of these RFIs, the nature of many of the questions, and the fact that many focus on processes known mostly to industry actors and their lawyers, favor financial institutions with greater resources at their disposal, and we are gravely concerned about any attempts to weaken consumer protection through this process.

These issues have prevented us from responding in more detail, seeking more input and signatories, or publicizing the comment opportunity more widely. The CFPB must not take the limited number of comments from the public as indicative of a lack of broad objections to changes the CFPB might make that would weaken its role in effectively protecting the consumer public.
These comments summarize in brief our vigorous support of the current rulemaking process.

2) The CFPB should maintain and expand opportunities for public input in its rulemaking process.

We applaud the CFPB for embracing an inclusive approach to public outreach and including additional opportunities for public input in its rulemaking processes. The CFPB should continue its efforts to hear from consumers as much as possible to inform its rulemaking at all stages of the rulemaking process.

The CFPB's field hearings and meetings provide a valuable avenue for the general public to share their experiences directly with the CFPB, and the agency should hold more field hearings and meetings with consumer groups to allow the public more direct access to the CFPB throughout the rulemaking process. The CFPB should continue to explore innovative ways to broaden opportunities for input, including online tools and social media. It is crucial that the CFPB preserve this strong tradition of inclusive public outreach because the agency needs information from a variety of different perspectives. Public input has helped the CFPB make informed decisions in its rulemaking, and outreach should be expanded to allow for even greater public participation.

In particular, we strongly urge the CFPB to seek broad public input in the early stages of identifying problems and potential solutions and as proposed rules are being developed. Once the CFPB has developed a Notice of Proposed Rulemaking ("NPRM"), we support continuation of the practice of first publishing the proposal on the CFPB website, before it is published in the Federal Register. This practice gives the public more time to respond, and often the public is more familiar with the CFPB website. We also strongly support publishing both proposed and final rules along with a press release, blog post, summaries, fact sheets, videos and other materials to make the rulemaking process more accessible and more comprehensible to a wider audience.

While the public should be encouraged to submit comments on a timely basis, the CFPB should not impose any hard rules against continuing input after the comment period closes. Many rulemakings take many years, during which new information can become available, new issues may arise, or the public may become newly aware about the importance of a rulemaking.

The CFPB should also be proactive about reaching out to consumer groups for additional input when new information has come to light, or circumstances have changed, and in particular when industry has provided new information. We also encourage the CFPB to hold more joint roundtables so that all parties can be in the room at the same time. These roundtables have encouraged helpful dialogue in the past.

The CFPB should not impose a formal reply period to comments. Doing so would burden consumers, industry, and other stakeholders with a double comment obligation and would burden CFPB staff with reading additional comments. Such an approach would also unduly favor industry, which has the resources to read and respond to numerous comments, whereas neither our organizations nor certainly the general public has comparable capacity to do so.

3) The CFPB should stay transparent in its rulemaking process to ensure that the agency stays accountable to the public.

Since its beginning, the CFPB made a strong commitment to transparency so that its rulemaking process would be impartial and fully informed. For example, while the CFPB is required by law to meet with small business representatives before commencing rulemaking, the CFPB's commitment to transparency is demonstrated in its practice of distributing the briefing materials to the general public before these meetings, which provide insight into what options the CFPB is considering and an opportunity for all sides to provide input before the rulemaking process begins. Another example is the agency's ex parte

policy. Recognizing the danger of undue influence from one-sided communications behind closed doors, the CFPB implemented a policy requiring ex parte communications to be documented in writing and publicized.

The CFPB should continue these practices and publish as much information as possible to stay accountable to the public about the information it is considering in its rulemaking deliberations. We urge the CFPB to complete and publish ex parte memoranda promptly and to post a log of each ex parte contact that occurs regarding a rulemaking process. Consistent with prior practice, we also recommend that the Acting Director and Deputy Director post their complete daily calendars to the website to further improve the CFPB's transparency. If the CFPB considers information after the comment period ends for a rulemaking, this information should be made public too. Transparency is one of the CFPB's greatest strengths, and it should be preserved and expanded to protect the credibility of the rulemaking process.

4) The CFPB should continue to rely on all types of objective empirical research to inform its decisions in rulemaking and should not politicize the analytical process.

The CFPB has prioritized empirical research by integrating its Research and Markets team's impartial research into its rulemaking process. One major source of quantitative data used in this research is the information the CFPB collects through its examinations, enforcement actions, and consumer complaint database. It is important for the CFPB to continue collecting this data so that it can do its own empirical analysis, which preserves its impartiality.

Moreover, recognizing that numeric fields may not tell an entire story, the CFPB enhances its analysis with qualitative data and field insights. This qualitative data, including individual stories, is a fundamentally important part of meaningful research into the impact of consumer financial products and services, and must not be disregarded. Examples of consumer problems play a valuable role in alerting the CFPB to new issues, possible trends, emerging types of consumer harm, and gaps in or evasions of existing protections.

Disregarding consumer stories as unrepresentative "anecdotes" is particularly dangerous because it encourages one-sided decision-making. Consumers are well-equipped to describe their personal experiences with financial institutions, but in many cases neither consumers nor consumer advocates are likely able to assemble quantitative data that could show how widespread any problems are. Nor are they likely to have access to quantitative data from industry or third-party vendors. Without access to industry data, consumers are also in no position to respond to one-sided presentations. Yet their descriptions of their experiences can point to market trends, and to areas where further scrutiny is needed, and should not be ignored. As the agency has done throughout its history, it should use consumer stories as a starting point for further inquiry and an essential part of its analysis.

For the same reasons, while the CFPB is required to consider costs and benefits, it is not required to conduct a quantitative net benefit analysis and should not be required to do so. Industry will provide projections of costs, which may be overstated, while many benefits are inherently not quantifiable. Any requirement to quantify benefits downplays the very real but often unquantifiable benefits that CFPB

regulations provide, including enhanced disclosures for consumers, stability and soundness in mortgage markets, and preventing abusive and deceptive practices that harm consumers.

Similarly, the CFPB should not politicize the analytical process. The CFPB is by design independent from the White House and is not required to, and should not, submit its rules to the Office of Management and Budget ("OMB") for review. An OMB review would be a fundamental violation of the CFPB's independence and contradictory to congressional intent in maintaining the agency's independence from the executive branch. We also object to moving the cost-benefit analysis section into the director's office and urge that the function remain in the hands of non-political staff.

To its credit, the CFPB has always relied on a broad range of both quantitative and qualitative data in its analyses to inform its rulemaking. It is imperative that the CFPB continue to draw from a variety of sources for this type of research going forward.

The CFPB rulemaking process is thoughtful and thorough. From beginning to end, the CFPB's rulemaking process provides all stakeholders with the opportunity to weigh in and allows for the CFPB to have data and information from a wide variety of sources in order to make informed decisions. This robust and responsive rulemaking process is effective in producing rules that carry out the consumer protection mission of the agency and should be maintained for the CFPB's future rules.

Sincerely,

30th District Democrats
Allied Progress
American Consumer Justice Fellowship
Americans For Financial Reform
Arizona PIRG Education Fund
Arkansans Against Abusive Payday Lending
Boston Tax Help Coalition
Center for NYC Neighborhoods
Center for Responsible Lending
Chaudhri Group
Citizens For Honest Government
Common Cause
Connecticut Fair Housing Center
Consumer Action
Delaware Community Reinvestment Action Council, Inc.
Dragonfly Financial Solutions LLC
The Financial Clinic
Florida Consumer Action Network
Green Party of Taos County
Heartland Alliance for Human Needs & Human Rights
Interfaith Center on Corporate Responsibility

Mac's Transit Authority, LLC
Main Street Alliance
Massachusetts Communities Action Network
Mobilization for Justice Inc.
MoBo Bicycle Cooperative
Montana Organizing Project
NAACP
Naples Florida League of Women's Voters
National Active and Retired Federal Employees Association
National Alliance of Community Economic Development Associations - NACEDA
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low-income clients)
NEA/CTA
New Jersey Citizen Action
Oregon Food Bank
Prosperity Now
Public Justice Center
Self-Help Federal Credit Union
Society of Saint Vincent DePaul
South Carolina Appleseed Legal Justice Center
Tennessee Citizen Action
U.S. PIRG
Virginia Organizing
Wilshire Baptist Church

April 26, 2018

Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Via: http://www.regulations.gov

Re: Docket ID CFPB-2018-0001

Comments to the Consumer Financial Protection Bureau's (CFPB) Request for Information Regarding Civil Investigative Demands

The National Association of Consumer Advocates (NACA) is a nonprofit association whose members are private and public sector attorneys, legal services attorneys, law professors, and law students committed to representing consumers' interests. NACA is actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means. We respectfully submit these comments responding to the Consumer Financial Protection Bureau's (CFPB or bureau) Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes.

NACA is concerned that the CFPB has issued this and other public Requests for Information to begin an effort to revamp its internal processes and functions for the benefit of covered financial entities and to the detriment of consumers and the financial markets. We offer our comments below to reflect our full support of the bureau's current functions. Specifically, CFPB investigations and ensuing enforcement actions have had spectacular results, benefitting tens of millions of consumers across the country. The bureau must refrain from making any changes that would hamper its ability to fulfill its statutory mission to protect consumers in the financial marketplace, including its ability to initiate and carry out investigations of potential violations of consumer financial protection laws. The examination of civil investigative demands, i.e. administrative subpoenas, should not be used to "relax" standards for present and future investigations of financial industry misconduct.

Background

Just a decade ago the reckless behavior of big banks and predatory lenders and the lack of safeguards to hold them responsible for their actions caused the Great Recession, leaving millions of Americans without jobs, wiping out their savings, and causing devastating losses of homes. Consumer protection was neglected for far too long in the lead up to the financial crisis. In 2010, Congress created the CFPB, one of the core features of the Dodd-

Frank Act Wall Street Reform and Consumer Protect Act. The financial reform law gave the CFPB the massive responsibility to enforce the Consumer Financial Protection Act (Title X of the Dodd-Frank Act) and 18-plus additional consumer financial protection statutes. It also armed the CFPB with the tools it would need to fulfill its mission, including vigorous supervisory and enforcement authorities to investigate and act on potential violations of those laws.

The evidence shows that the CFPB has had tremendous success. Its work has led to the return of $12 billion in relief to 27 million consumers who were harmed by wrongful corporate conduct. It has stopped harmful conduct, provided restitution and other remedies to harmed consumers, and facilitated improved business practices for financial entities it oversees.

With its investigative and enforcement authorities, the CFPB has taken legal actions against credit card companies for engaging in unfair, deceptive, and abusive practices related to marketing, billing, and enrollment for credit add-on products and services; banks for charging overdraft fees to consumers who had not agreed to overdraft services; payday lenders for pressuring borrowers into debt traps; for-profit colleges for exploiting students and pushing them into unaffordable loans; debt collectors for using illegal tactics to intimidate consumers into paying debts they may not owe; mortgage companies for wrongly foreclosing on consumers' homes.

CFPB's Statutory Authority is Consistent with its Past Approach to CIDs
The Dodd-Frank Act makes clear that protecting consumers is the CFPB's top priority. For example, the CFPB is required to "enforce federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[1] The CFPB must also ensure that "consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination."[2] One of its "primary functions" is to "supervise covered persons for compliance with federal consumer financial law, and tak(e) appropriate enforcement action to address violations of Federal consumer financial law."[3]

To pursue its statutory mission and objectives, the CFPB must actively seek out information to stay abreast of developments that could potentially harm consumers in the offering, selling, servicing, marketing, etc. of financial products and services. CIDs, i.e. administrative subpoenas, are important for covering "substantial information gaps" on potential violations of consumer financial protection laws to help the agency decide whether to initiate formal enforcement actions.[4] Therefore, this process must be efficient and substantive to enable the agency to carry out broad investigations as it is specifically authorized and tasked to do for the public's benefit. Adopting onerous requirements for

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[1] 12 U.S.C. § 5511(a).
[2] 12 U.S.C. § 5511(b).
[3] See, *Consumer Fin. Prot. Bureau v. Heartland Campus Sols., ESCI*, Civil Action No. 17-1502, 2018 U.S. Dist. LEXIS 31952 (W.D. Pa. Feb. 28, 2018) *citing* 12 U.S.C. § 5511 (c)(4).
[4] E.S. Kisluk, *"Fishing" for Trouble?: On the Appropriate Limits of a Civil Investigative Demand Issues by the CFPB*, 21 N.C. Banking Inst. 299 (2017).

civil investigative demands that would make investigations more difficult for CFPB staff to obtain information they need, or weakening or narrowing the process that would enable bad financial actors to evade and hinder investigations would betray the public interest.

Entities Have Appropriate Avenues, including Courts, to Question CIDs
The CFPB thoughtfully structured the CID process through a public rulemaking and notice-and-comment period.[5] In addition, businesses have multiple avenues to seek relief or challenge the validity of civil investigative demands that they receive. The process includes opportunities for appeal of CID requests at the agency, and businesses also can turn to courts to seek to set aside or limit investigations.[6] CFPB investigations do not need additional hurdles that would prevent the agency from taking action in a timely manner to protect consumers from illegal and predatory financial conduct.

Entities have sued in federal court to dispute CID notices and breadth of investigations. Notably, a number of courts have examined and mostly have concluded that the CFPB's exercise of its statutory authority to investigate, including its notices to entities of investigations and its requests for information, has been carried out within the scope of the statute.[7]

For example, courts have ordered entities to comply with CFPB CIDs seeking:
(1) Information as part of an investigation to determine whether consumer reporting agencies, persons using consumer reports, or other persons may be violating federal consumer financial protection laws, including the Fair Credit Reporting Act.[8]
(2) Information to determine whether debt relief providers, lead generators, or other unnamed persons are engaging in unlawful acts or practices in the advertising, marketing, or sale of debt relief services or products, in violation of the Consumer Financial Protection Act and the Telemarketing Sales Rule.[9]
(3) Information to determine whether student-loan servicers or others, in connection with servicing of student loans, including processing payments, charging fees, transferring loans, maintaining accounts, and credit reporting, engaged in unfair, deceptive or abusive acts or practices.[10]
(4) Information to determine whether small-dollar online lenders or others engaged or are engaging in unlawful acts or practices relating to the advertising, marketing, provision, or collection of small-dollar loan products, in violation of the Dodd-Frank Act, the Truth in Lending Act, the Electronic Funds Transfer Act, and the Gramm-Leach-Bliley Act.[11]

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[5] See, Christopher Peterson, *Symposium Article: Consumer Financial Protection Bureau Law Enforcement: An Empirical Review,* at 12 (June 2016). Rules Relating to Investigations, 12 C.F.R. pt. 1080.
[6] Rules Relating to Investigations, 12 C.F.R. pt. 1080.
[7] See, e.g. *Consumer Fin. Prot. Bureau v. Heartland Campus Sols., ESCI*, Civil Action No. 17-1502, 2018 U.S. Dist. LEXIS 31952 (W.D. Pa. Feb. 28, 2018); *Consumer Fin. Prot. Bureau v. Seila Law, LLC*, No. 8:17-cv-01081-JLS-JEM, 2017 U.S. Dist. LEXIS 217692 (C.D. Cal. Aug. 25, 2017); *Consumer Fin. Prot. Bureau v. Source for Pub. Data, L.P.*, No. 3:17-mc-16-G-BN, 2017 U.S. Dist. LEXIS 86856 (N.D. Tex. June 6, 2017); *Consumer Fin. Prot. Bureau v. Great Plains Lending, LLC*, 846 F.3d 1049 (9th Cir. June 6, 2016).
[8] *Consumer Fin. Prot. Bureau v. Source for Pub. Data, L.P.*, No. 3:17-mc-16-G-BN, 2017 U.S. Dist. LEXIS 86856 (N.D. Tex. June 6, 2017).
[9] *Consumer Fin. Prot. Bureau v. Seila Law, LLC*, No. 8:17-cv-01081-JLS-JEM, 2017 U.S. Dist. LEXIS 217692 (C.D. Cal. Aug. 25, 2017).
[10] *Consumer Fin. Prot. Bureau v. Heartland Campus Sols., ESCI*, Civil Action No. 17-1502, 2018 U.S. Dist. LEXIS 31952 (W.D. Pa. Feb. 28, 2018).
[11] *Consumer Fin. Prot. Bureau v. Great Plains Lending*, LLC, 846 F.3d 1049 (9th Cir. 2017).

These and other investigations are critical to protect American consumers, the public interest, and the health of the financial market. The current CID process, which is within the statutory scope for its investigations, necessarily gives the CFPB sufficient flexibility and authority to enforce multiple consumer financial protection laws, such as those mentioned above.

Financial institutions responding to CIDs have complained that the CID process constitutes an "undue burden," on their businesses. In reality, the inconveniences that CIDs may pose to financial institutions likely do not meet the definition of "undue burden." Courts have reasoned that an "undue burden" related to responses to administrative subpoenas is met when businesses "supply evidence establishing that compliance "threatens to unduly disrupt or seriously hinder normal operations of a business."[12] It is a high and necessary standard to meet to ensure that the CFPB can issue valid requests for information and require substantive and timely responses from corporate entities.

CFPB Should Enforce Substantive Law and Disregard Political Industry Pressure

Finally, Congress, through the Dodd-Frank Act, recognized that an independent CFPB also needed broad authority to investigate potential wrongdoing by entities in a sophisticated industry that has vast resources and wields tremendous political influence. Bad actors in the financial industry have been successful in their political efforts to loosen safeguards and shield themselves from liability for their wrongdoing. CFPB's ability to initiate investigations and to issue investigative demands in adherence of the law must be free from political considerations. CFPB should focus on its mandate to comply with the Dodd-Frank Act, protect consumers in the finance markets, and enforce the consumer protection laws under its jurisdiction.

Sincerely,

Christine Hines
Legislative Director

[12] See, e.g., *Consumer Fin. Prot. Bureau v. Future Income Payments,* LLC, 252 F. Supp. 3d 961, 970 (C.D. Cal. 2017).

May 29, 2018

Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Via https://www.regulations.gov/comment?D=CFPB-2018-0005-0001

RE: Request for Information, CFPB External Engagement/Docket No. CFPB-2018-0005

Comments to the Consumer Financial Protection Bureau's (CFPB) Request for Information: Bureau External Engagements

The National Association of Consumer Advocates (NACA), a nonprofit organization actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means, respectfully submits these comments responding to the Consumer Financial Protection Bureau's (CFPB or bureau) Request for Information on its External Engagements (RFI). Overall, NACA is concerned that the CFPB has issued this and other public Requests for Information as an opening to revamp its internal processes and functions in a way that would hinder CFPB activities meant to protect consumers and the financial markets.

The Dodd-Frank Wall Street Reform and Consumer Protection Act – the law passed to remedy flaws in the U.S. economic system that led to the Great Recession in 2008 and the loss of homes, jobs, businesses and economic security for millions of Americans – created the CFPB to specifically protect the interests of financial consumers. Since opening its doors, the CFPB has utilized its powers and authority to bring about fairness in a marketplace that almost was toppled during the financial crisis.

The bureau must reject dangerous proposals in this RFI process, regarding External Engagements and other key agency functions such as Investigations, Enforcement, Rulemaking and Complaint Response, that would sabotage its work and mission to ensure consumers are treated fairly by powerful financial institutions. The bureau must continue its record of seeking public input and taking action to hold bad actors accountable for wrongdoing and harm they cause.

External Engagement, Generally

From its inception through November 2017, the bureau's external engagements (organized events with the public and various stakeholders) have been central to its functions, with 47 meetings of its advisory boards, 33 field hearings, and 15 town halls in more than 40 cities, among other efforts. There have been significantly fewer public engagements so far in 2018.

It is vital for the agency to sustain and extend the external engagement that has been a hallmark of its first six years. Robust external engagement ensures that the CFPB can exchange information with its stakeholders, including millions of consumers, as well as industry participants and entities interested in and affected by the CFPB's actions. Moreover, external engagement ensures that the CFPB's policymakers, consumer educators, attorneys, examiners, and others have the information they need to understand and appropriately address consumers' needs and experiences.

Currently, it appears that the bureau is prioritizing the concerns of regulated industry entities. All of its released RFIs appear to be drafted from the perspective and interests of financial institutions. For example, the current RFI states that the "[b]ureau expects that entities that have engaged with [it] are likely to have useful information and perspectives about Bureau engagements." There is little mention of engagement with consumers. The bureau's work and mission have a broad impact on a variety of stakeholders, and particularly diverse groups of consumers, such as the elderly, minority communities, students, low-income consumers, and military members. The CFPB must provide a forum on a regular basis, through various public events and meetings, to hear concerns from its diverse array of stakeholders, particularly those – examples mentioned above – who lack comparable political power and influence over decision makers as financial industry players.

Advisory Groups

The CFPB's four advisory groups, the Consumer Advisory Board, the Community Bank Advisory Council, the Credit Union Advisory Council, and the Academic Research Council, have been and should be the core of external engagements. Section 1014 of the Dodd-Frank Act required the CFPB director to establish the Consumer Advisory Board (CAB) "to advise and consult with the bureau in its functions, and to provide information on emerging practices in the consumer financial products or services industry, including regional trends, concerns, and other relevant information."[1]

The statute is also clear on the qualities and expertise of the CAB membership. It specifies stakeholders for membership whose voices traditionally would be heard far less than industry players, if at all: "experts in consumer protection, financial services, community development, fair lending and civil rights, and consumer financial products or services and

[1] 12 U.S. Code § 5494 - Consumer Advisory Board.

representatives of depository institutions that *primarily serve underserved communities, and representatives of communities that have been significantly impacted by higher-priced mortgage loans*." [2]

As a body charged with advising the CFPB on its consumer protection functions, the CAB should be led by and consist of representatives for these communities and whose work is focused on consumer protection. It is important to obtain views and hear voices of smaller organizations and individuals in the marketplace that have important information to share about consumers' experiences with financial products and services. Therefore, we recommend that a majority of the CAB be composed of individual consumers, consumer advocates, scholars, or others whose work focuses on protecting consumers.

Further, it is important to note that the CFPB has held no public events since late 2017, and has cancelled advisory board meetings. We recommend that the CFPB increase the frequency of advisory group meetings, and convene meetings for each advisory group at least three times per year to ensure that conversations and dialogue can address the most current and pressing issues. The CAB must continue its previously established work to provide venues to hear and consider on a regular basis diverse voices in vulnerable, underserved, and less politically-influential communities.

<u>Transparency with External Engagement</u>

Given the impact of its role and mission on the lives of everyday consumers, the bureau has a responsibility to be open and transparent in its engagement with the public.

First, advisory group meetings and activities should continue to be advertised and summarized publicly, and broadcast in full whenever possible. Additionally, we recommend that at least one of these meetings for each of its advisory groups take place outside of Washington.

Second, the CFPB leadership must be transparent with their engagement with external groups and individuals. The bureau calendar for leadership, beginning with the bureau director, including the current "acting" director," must provide public and updated information of meetings with all external stakeholders. Based on recent information derived from the CFPB website, the CFPB's leadership calendar appears to be outdated and incomplete.

Third, we strongly support the CFPB's direct engagement with consumers through its complaint tool and other mechanisms. Public access to the consumer complaint database is a key way that the CFPB engages with consumers. The complaint database should not be restricted or curbed in any way.

[2] 12 U.S. Code § 5494 (b).

Since its inception, the CFPB has collected more than one million consumer complaints. Those complaints allow consumers to obtain tailored help. They also provide important information to the CFPB and to the public, as the CFPB publishes complaint data that can help other consumers learn about consumer financial products and potential risks. Equally important are the CFPB's other day-to-day engagement mechanisms. The CFPB website also allows consumers to tell "their stories," another valuable resource.

Additional Mechanisms

We urge the CFPB to explore additional mechanisms, such as "listening sessions," which would allow consumers to engage in open ended discussions about financial services concerns with senior CFPB staff. The CFPB has some experience with events like these in the industry context. Through "Project Catalyst," the CFPB has held four or five "office hours" annually in San Francisco, New York, and Austin, Texas to connect with financial technology practitioners. Similar opportunities for consumers could yield valuable insight and help consumers better understand how the CFPB works for them.

Finally, the CFPB must nurture a culture that promotes public engagement with consumers. The CFPB must work diligently to hear from those without generous sponsorship from industry. It is essential that the CFPB take public engagement seriously. It must maintain a policy and procedure for external engagements, such as a minimum number of roundtables, advisory board meetings, and/or teleconferences. It is imperative that the bureau regularly seeks input from a diverse array of stakeholders, particularly those who lack the power and influence of regulated industry entities. Congress created this agency to protect consumers, and this consumer protection mandate requires a proactive posture of public engagement.

Sincerely,

Christine Hines
Legislative Director

Consumer Financial Protection Bureau
1700 G St., N.W.
Washington, DC 20552
Bureau of Consumer Financial Protection
Via email: *FederalRegisterComments@cfpb.gov*

Docket # - CFPB -2018-0006

Re: CFPB RFI # 6 - Request for Information Regarding Bureau Public Reporting Practices of Consumer Complaint Information

June 4, 2018

Dear Acting Director Mulvaney:

The National Consumers League (NCL) writes to express our strong support of the CFPB's public complaint process and to respond to the Consumer Financial Protection Bureau's (CFPB) Request for Information (RFI) on the public reporting of consumer complaint information.

At NCL, we are keenly aware of the power of complaint data to protect consumers. NCL's Fraud.org campaign relies on thousands of fraud complaints we collect from consumers annually. If our own complaint data, or another government agency's data, identifies a new fraud trend we can preemptively draft educational materials educate consumers before the scam becomes widespread. Our complaints also allow us to offer consumers direct counseling to help prevent them from becoming victims and help victims of fraud recover as quickly as possible.

As the sole federal financial regulator created for the purpose of consumer financial protection, the Bureau has rightly developed a robust and trustworthy complaint process that includes access to a public complaint database to meet its consumer protection mandate.

The public complaint database is a crucial tool that empowers individuals to inform and protect themselves. The database also allows consumers to evaluate a company's practices and decide where to take their business. This database empowers the free market to work as it should by creating incentives for companies to treat their customers fairly. In addition, the complaint database enables companies to quickly identify and correct emerging

problems on their own without the burden of a new rule being issued or an enforcement action being required.

It is the responsibility of the the CFPB, to use all of the tools they possess, including complaint data, to provide the public with "timely and understandable information to make responsible decisions about financial transactions."[1]

Providing consumers access to a public complaint database also fulfills the Bureau's obligations to protect consumers from "unfair, deceptive, or abusive acts and practices and from discrimination"[2] and identify risks to consumers in the "collecting, researching, monitoring, and *publishing* (of) information relevant to the functioning of markets for consumer financial products and services."[3]

Usefulness of complaint reporting and analysis

The firsthand accounts of consumer's financial complaints are a valuable tool for consumers when researching who they want to conduct business with. Consumers can review the details of a complaint and then draw their own conclusions on whether the complaint is valid or not and choose their financial institution accordingly.

While many companies may argue against the need for public disclosure of complaints, Americans have long known that sunlight is the best disinfectant for questionable business practices. The public database not only allows consumer education groups like ours to spot new trends, but it also allows consumers who are completing their due diligence before selecting a business to determine if the company they are considering does right by their customers.

Suggestions to improve the complaint process

- **We urge the Bureau to allow public access to the feedback process.** Knowing the outcome of complaints would better allow consumers to complete their due diligence before selecting a company as they would understand how companies respond once a issue has been raised. Adding additional transparency in this area will not only allow consumers to research vendors more accurately, but it will also allow increased competition amongst companies in the area of customer service.

[1] Dodd-Frank Section 1021
[2] Dodd-Frank Section 1021
[3] *Ibid*

- **Complaints should be sortable by the specific company the consumer complained about.** The Bureau should list complaints not by the parent company's name but by the name the consumer complained about.

- **Complaint resolution details should be publicly reported**. The Bureau should make it possible for consumers to see how individual companies are handling the complaints they receive in the database. A company "snapshot" could include an overview of complaint relief. Resolutions should be broken down by monetary relief (dollar amounts received) and type of complaint filed. Non-monetary relief should report a company's specific actions, such as "Error removed from credit bureau records."

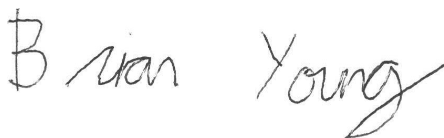
- **Complaint explanation details should be publicly reported**. The vast majority of consumers receive a private explanation in response to their complaints. Companies are required to provide complainants with *tailored* responses, rather than a vague reply. Details from company explanations should be transparent to the public and reported by the Bureau in summary form in a special report.

It is essential that the CFPB not retreat from its core mission to protect and inform consumers and to make our financial markets more fair, accountable, transparent and competitive.

The CFPB consumer complaint database allows consumers to make better financial choices, drives nonprofits' education efforts, and encourages firms to improve their customer service and take notice of competitors' practices that they should avoid. We urge the Bureau to maintain public access to the consumer complaint database.

Thank you for taking the time to thoughtfully review our comments.

Sincerely,



Brian Young
Public Policy Manager
The National Consumers League

Comments of
Americans for Financial Reform
Center for Responsible Lending
Consumer Action
The Consumer Federation of America
National Association of Consumer Advocates
National Consumer Law Center (on Behalf of Its Low-Income Clients)
Public Citizen
U.S. PIRG

May 21, 2018

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

Re: Request for Information ("RFI") Regarding the Bureau's Supervision Program (Docket No. CFPB-2018-004)

Dear Ms. Jackson:

The undersigned consumer groups submit these comments in response to the Consumer Financial Protection Bureau's (CFPB's) Request for Information ("RFI") regarding the Bureau's Supervision Program. Our key points are:

- The CFPB's supervision program should not be weakened. Supervision is critical for the Bureau's mission. It is very different from enforcement. It is also often a faster, less resource-intensive, and more flexible tool. It has resulted in enormous benefits to millions of consumers across a number of markets, as well as to the entities being supervised in terms of better compliance and operations.
- The CFPB's supervision activities should not and cannot be delegated to prudential or state regulators. The Dodd-Frank Act is clear that the Bureau has ***exclusive*** authority to supervise banks with over $10 billion in assets for consumer protection compliance and is ***required*** to supervise certain nonbanks for the same. Furthermore, prior to the Dodd-Frank Act, prudential regulators failed at supervision for compliance with consumer financial laws, due in part to structural issues and in part to a perceived conflict between protecting consumers and bank safety and soundness. State regulators often lack the authority and resources to supervise nonbank financial services providers, and relying on them would leave consumers without uniform protection across the country.
- The CFPB has appropriately defined which debt collectors, consumer reporting agencies, student loan servicers, international money service transfer companies, and auto finance companies should be supervised as "larger participants" in their respective markets. The Bureau should engage in rulemakings to similarly define larger participants in the prepaid account, installment loan, vehicle title lending, and financial data aggregator markets.

- The CFPB should continue to issue Supervisory Highlights reports. The reports provide valuable information, transparency, and guidance. They help consumers, the general public, the media, and members of industry.
- CFPB supervision has greatly improved compliance by supervised entities with consumer financial laws. Examples of four markets that have benefitted from CFPB supervision include consumer reporting, debt collection, mortgage servicing, and student loan servicing.
    - In the consumer reporting market, CFPB supervision has forced the Big Three credit bureaus to institute some much-needed fundamental reforms, such as establishing robust quality control programs and overseeing information furnishers to ensure they are meeting legal and other obligations.
    - In the student loan servicing market, examiners have halted unfair practices such as servicers declaring loans to be automatically in default when a co-signer has died or declared bankruptcy, where the loan contracts were ambiguous.
    - CFPB supervision of mortgage servicers has resulted in hundreds of thousands of homeowners avoiding millions of dollars in improper charges, sometimes through measures as simple as fixing a software flaw. CFPB examinations of the loss mitigation practices of servicers have led to substantial improvements, helping put homeowners in a better position to avoid foreclosure.
    - In the debt collection market, examiners uncovered multiple violations of the Fair Debt Collection Practices Act and directed collectors to take remedial actions to address these violations. Violations included practices that are often the subject of complaints, such as attempting to collect from authorized users who were not liable for credit card debts, impermissibly communicating with third parties about a debt, and communicating with consumers at inconvenient times.

I. Supervision is Critical to the CFPB's Mission

A. The Dodd-Frank Act gives exclusive authority and, in some cases, actually requires the CFPB to engage in supervision for compliance with federal consumer financial laws.

The CFPB's supervision program is a crucial and indispensable component of the Bureau's work. We completely agree with the statement in the RFI that "[t]he Bureau's ability to supervise entities is an essential part of the Bureau's statutory mission of enforcing Federal consumer financial laws." 83 Fed. Reg. 7166, 7167. We urge the CFPB to fully honor the spirit of this statement and continue its supervision program with the same vigor as it has during these past six years since it began.

Supervision by the CFPB is critical given that that the Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act gives the Bureau sole supervision authority over certain entities for compliance with federal consumer laws. Section 1025(b)(1) of the Dodd-Frank Act, 12 U.S.C. § 5515(b)(1), states:

> The Bureau shall have *exclusive authority* to require reports and conduct examinations on a periodic basis of persons described in subsection (a) [financial institutions with over $10 billion in assets] for purposes of—
> (A) assessing compliance with the requirements of Federal consumer financial laws;
> (B) obtaining information about the activities subject to such laws and the associated compliance systems or procedures of such persons; and
> (C) detecting and assessing associated risks to consumers and to markets for consumer financial products and services.
>
> (emphasis added).

For other entities, specifically non-bank companies, the Act actually mandates that the CFPB engage in supervision. Section 1024(b)(1) of the Dodd-Frank Act, 12 U.S.C. § 5514(b)(1), states:

> The Bureau *shall require reports and conduct examinations* on a periodic basis of persons described in subsection (a)(1) [nonbank mortgage lenders and services; larger participants in a consumer financial services market, private student lenders, payday lenders] for purposes of—
> (A) assessing compliance with the requirements of Federal consumer financial law;
> (B) obtaining information about the activities and compliance systems or procedures of such person; and
> (C) detecting and assessing risks to consumers and to markets for consumer financial products and services.
>
> (emphasis added)

Given that the Bureau is the only regulator with the authority to examine banks with more than $10 billion in assets for consumer protection issues, a failure by the CFPB to adequately supervise these banks means that no regulator will be looking out for the interest of consumers with respect to them. Supervising these banks is particularly important since their actions affect many millions of consumers. Since many of them dominate such a large share of the consumer financial services market and are "too big to fail," the market itself is unlikely to correct their errors.

For nonbank entities, the Dodd-Frank Act actually requires the CFPB to periodically examine covered entities for compliance with federal consumer financial laws. A failure to adequately supervise nonbank entities would violate both the letter and the spirit of the Act.

B. Supervision is not the same as enforcement, and has aspects that are superior.

Supervision is very different from, and a necessary complement to, the Bureau's enforcement program. Supervision is a proactive activity, with regularly scheduled examinations on an ongoing basis. With supervision, a regulator is empowered to review the policies, procedures, systems and data of the regulated entity. The regulator may send representatives to conduct on-site visits; send questions and demand answers; and examine the internal operations of the

supervised entity. Supervision provides the ability to detect violations and correct them without the need to go to court or an administrative body.[1]

In contrast, enforcement requires a regulator to learn of potential legal violations, undertake an investigation, and collect enough evidence for a *prima facie* legal case. Such investigations are often resource-intensive and less efficient than supervision, especially if there is a significant amount of discovery and other litigation activities.[2] Enforcement is also much slower than supervision, as it may take years to build and prosecute a case. In the meantime, a harmful practice might still continue to cause injury to consumers. Enforcement is an after-the-fact method of regulation, whereas supervision can be proactive. Supervision can fix a problem before it escalates into a more serious matter.

Enforcement is also a much blunter tool, as it is very binary – either a company gets sued or it doesn't. Supervision can be a much more surgical tool, with a gradient of responses such as a memorandum of understanding (MOU) or a potential action and request for response (PARR) letter. Furthermore, these responses can be kept out of the public eye. Supervision means that a regulator can give the business feedback without creating a public relationships nightmare.

Indeed, even those entities supervised by the Bureau have pointed to benefits of the precision and flexibility of supervision, albeit in a backhanded way. In the early days of CFPB supervision, the U.S. Chamber of Commerce's financial services arm complained that:

> Perhaps because of the uneven quality of examination teams, businesses consistently report that that the Bureau's examination teams have little authority to make decisions—the Bureau's examiners must obtain permission from "Washington" before making even the most minor decisions. That lengthens examinations considerably and eliminates *the situation-specific approach that has traditionally characterized, and is one of the key benefits of, the examination process*.[3]

C. *Coordination is important, but should not amount to de facto delegation of authority to another regulator.*

In the final topic in its Request for Information, the CFPB asks for feedback regarding:

> The manner and extent to which the Bureau can and should coordinate its supervisory activity with Federal and state supervisory agencies, including through use of simultaneous exams, where feasible and consistent with statutory directives.

We agree that coordination between the CFPB and other regulatory agencies is helpful and important. Section 1025(b)(2) of the Dodd-Frank Act explicitly requires such coordination,

[1] See Jean Braucher & Angela Littwin, Examination as a Method of Consumer Protection, 87:4 Temple L. Rev. 807 (Summer 2015).
[2] *Id.* at 808 ("Although examination is time-consuming and commands devotion of resources both by the agency and regulated entities, it is still less resource-consuming than litigation. It thus provides a relatively cost-effective way for an agency to obtain both changes in company practices and compensation for victims.").
[3] Comment from David Hirschmann, Center for Capital Markets Competitiveness, February 14, 2013 (emphasis added).

including consultation over examination schedules and reporting, in order to minimize regulatory burden on banks.[4] Section 1024(b)(3) requires similar coordination in the supervision of nonbank entities.[5]

Some of the comments that will be filed in response to this RFI may complain about deficiencies in coordination between the CFPB and prudential regulators. But developing the ability to have good coordination, to work well together, takes time. It has been a mere six years since the CFPB began its supervision program. During those six years, the Bureau was required to hire staff, put a structure in place, create protocols and draft a nearly 1600 page Examinations Manual. At the same time, the Bureau was developing relationships with the prudential regulators, figuring out roles, and establishing channels of communications. Such undertakings require time to properly develop, and we assume they are still being worked on to this day. But such efforts do not require new regulations. And they certainly will not be helped by weakening the Bureau's supervision program.

One outcome that cannot happen is for the Bureau to cede supervision activity to these other federal and state agencies. Media reports indicate that the Acting Director has raised such a possibility.[6] However, such an outcome is both inadequate, contrary to the Dodd-Frank Act, and detrimental to the CFPB's mission of protecting American consumers.

With respect to bank supervision, as discussed in Section I.A above, the Dodd-Frank Act gives the CFPB sole and exclusive authority to examine banks with over $10 billion in assets for compliance with consumer protection laws. The prudential regulators simply do not have the authority to supervise the big banks for consumer protection – period. If the CFPB does not supervise big banks for consumer protection, no one will be doing it. Such lack of oversight is not just harmful to consumers, it can literally jeopardize the national and world economies. After all, it was consumer protection abuses and lack of oversight over such abuses that created the mortgage meltdown and financial crisis ten years ago.

Even if the prudential regulators hypothetically had the legal authority to supervise banks over $10 billion for consumer protection, delegating or ceding such a role to them is ill-advised. As discussed in the next section, the financial crisis of 10 years ago was caused in part because the prudential regulators had a conflict of interest when it came to consumer protection, and placed

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[4] That paragraph specifically states: "To minimize regulatory burden, the Bureau shall coordinate its supervisory activities with the supervisory activities conducted by prudential regulators and the State bank regulatory authorities, including consultation regarding their respective schedules for examining such persons described in subsection (a) and requirements regarding reports to be submitted by such persons."

[5] That paragraph states: "To minimize regulatory burden, the Bureau shall coordinate its supervisory activities with the supervisory activities conducted by prudential regulators, the State bank regulatory authorities, and the State agencies that licence, supervise, or examine the offering of consumer financial products or services, including establishing their respective schedules for examining persons described in subsection (a)(1) and requirements regarding reports to be submitted by such persons."

[6] Kate Berry, *CFPB should take back seat to bank regulators on supervision: Mulvaney*, American Banker, March 1, 2018 ("Mick Mulvaney, the acting director of the Consumer Financial Protection Bureau, said Thursday the agency may allow prudential regulators to take the lead on more supervisory matters to cut down on duplication and ease the burden of exams on financial firms.… suggesting regulators like the Office of the Comptroller of the Currency and the Federal Reserve Board could have a greater supervisory role on consumer compliance matters. 'There's no reason why folks have to go through sequential regulations for the same thing,'")

the profit margins of banks over consumer protection. Ceding supervision of consumer protection to the prudential regulators raises the distinct possibility that they will not doing a proper job and will once again jeopardize our economy.

With respect to nonbank entities, ceding authority or delegation is impossible, because the Dodd-Frank Act literally mandates that the CFPB must examine covered entities for compliance with consumer financial laws. As discussed above, the Bureau "*shall* require reports and conduct examinations on a periodic basis" of covered entities. Section 1024(b)(1) of the Dodd-Frank Act.

Furthermore, there is no way to delegate or cede supervision of many nonbank entities to another regulator, whether federal or state, because these companies simply do not have another supervising regulator. The other regulators for these companies, such as the Federal Trade Commission or state Attorneys General, may be able to take enforcement action. But as discussed above, enforcement is very different from supervision.

State regulators in particular cannot fill the gap if the CFPB ceases or reduces its supervision of nonbank entities.[7] Relying on state regulators would leave consumers without uniform protection across the country. Many state agencies lack the financial resources to go after well-funded national corporations. State Attorneys General usually do not have supervision authority. Many non-bank entities, such as credit reporting companies, do not have any state agency with supervision authority over them. Specific industries are discussed below.

D. Consumer protection supervision by bank prudential regulators has historically been hampered by a perceived conflict of interest.

Before the Dodd-Frank Act, the prudential regulators were primarily responsible for overseeing banks for compliance with federal consumer financial laws. Oversight was spread among several agencies, including the Office of Comptroller of Currency (OCC), the former Office of Thrift Supervision (OTS), the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the National Credit Union Administration.

A review of the history of consumer protection by these prudential regulators demonstrates consistent inattention, at best, and opposition, at worst, to the needs of consumers. These regulators not only ignored the glaring abuses of predatory subprime mortgages, but in some cases they actively opposed efforts by other regulators, such as state agencies and legislatures, to rein in the abuses. These failures encompass many years and many different subject areas, and show that the problems were institutional, not occasional lapses.[8]

[7] *See generally*, Evan Weinberger, States Face Limits in Stepping Up as CFPB Retreats, Bloomberg BNA, Apr. 30, 2018.

[8] *See* Regulatory Restructuring: Safeguarding Consumer Protection and the Role of the Federal Reserve, Hearing Before the Subcomm. on Domestic Monetary Policy of the H. Comm. on Fin. Serv. 111 Congr. 183 (2009)(statement of Lauren Saunders, National Consumer Law Center); Jean Braucher & Angela Littwin, Examination as a Method of Consumer Protection, 87:4 Temple L. Rev. 807, 821-26 (Summer 2015).

Part of the problem was a perceived conflict of interest between consumer protection and bank financial health that frequently resulted in prudential regulators giving short shrift to the former in favor of the latter. Prudential regulators often considered consumer protection to conflict with bank safety and soundness, because protecting consumers from harmful yet profitable products could hurt banks' bottom lines.

Another contributing factor was that banks could essentially choose their own regulator by changing their charters. This was especially problematic because federal regulators' budget depended on the fees paid by the banks within their jurisdiction. Thus, a regulator had an extremely strong incentive to refrain from taking robust action to protect consumers, and in fact to take the side of the banks against consumers – a bank that was unhappy with its prudential regulator's consumer protection activities could simply switch charters (and take its fees) to a friendlier regulator. Indeed, this type of charter shopping occurred with one of the most notorious purveyors of subprime mortgages – Countrywide Financial, which reorganized as a thrift and moved from the OCC to the OTS when the latter promised a friendlier regulatory environment.[9]

These problems caused such great harm to the American economy, and Congress addressed them by placing consumer financial protection in one federal agency irrespective of the charter or legal structure of the institution. This design gives consumer protection the attention and clear focus it deserves. It provides consistent regulation no matter who offers the product or service, and results in a regulator that can take a holistic view. Perhaps most importantly, by preventing charter shopping, it ensures the Bureau's regulatory independence and freedom from regulatory arbitrage.

The CFPB's design reflects an understanding of why the prudential regulator model of consumer protection failed and a goal of reversing course. Consumer protection is the CFPB's only mission. Thus, it does not face the perceived conflict of interest between that mission and the need to boost the bottom line of banks in the name of safety and soundness.

E. Supervision of nonbank has made a critical difference.

In addition to appointing a single regulator for consumer protection for the big banks, Congress made the very deliberate and wise decision to include non-banks within the CFPB's authority. By doing so, Dodd-Frank prevents a company from removing itself from the CFPB's jurisdiction by changing its structure. It also levels the proverbial playing field between banks and nonbanks, the former of which have sometimes complained that other market players are not as regulated as they are. The CFPB's supervision program for nonbanks directly addresses that complaint. Indeed, one of Congress's explicit objectives in creating the CFPB was to ensure that "Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition." Section 1021(b)(4) of the Dodd-Frank Act, 12 U.S.C. § 5511(b)(4).

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[9] Jean Braucher & Angela Littwin, Examination as a Method of Consumer Protection, 87:4 Temple L. Rev. 807, 823 (Summer 2015).

More importantly, nonbank supervision has benefitted consumers immensely and improved compliance by supervised entities with federal consumer financial laws. As discussed below in Section II, it has resulted in a sea change in the way critical industries such as credit reporting agencies, debt collectors, student loan servicers, and mortgage servicers have treated consumers.

F. The CFPB has appropriately defined which companies to supervise as "larger participants," but should also supervise other important financial services markets.

Under the Dodd-Frank Act, one category of nonbanks that the CFPB is required to supervise are "larger participants of a market for other consumer financial products or services." Section 1024(a)(1)(B). The Bureau is required to define by regulation what entities are considered "larger participants". *Id.* (referring to § 1024(a)(2)).

Thus far, the CFPB has issued regulations defining "larger participants" in five markets – consumer reporting, debt collection, student loan servicing, international money transfers, and automobile financing. 12 C.F.R. Part 1090. The CFPB appropriately defined which larger participants to supervise in each of these markets. In most cases, the CFPB adopted a narrower definition than urged by consumer advocates. For example:

- In the debt collection market, the CFPB chose a threshold of $10 million in annual receipts from debt collection,[10] whereas consumer advocates had urged a threshold of $7 million.[11] Furthermore, the Bureau excluded debt collectors that primarily collect medical debt, despite our urgings.[12]
- In the consumer reporting market, the CFPB excluded furnishers of information from coverage as larger participants[13] (although some furnishers may fall into other categories of covered persons subject to supervision, such as banks with over $10 billion in assets).
- With respect to money transfer providers, the CFPB only covered providers of international transfers.[14] Consumer advocates had urged that larger participant providers of domestic money transfers also be covered.[15]
- In the student loan servicing market, the CFPB chose a threshold of 1 million loans,[16] whereas consumer advocates urged a threshold of 200,000 loans.[17]

[10] 12 C.F.R. § 1090.106(b).
[11] National Consumer Law Center, Comments to the CFPB on Defining Larger participants
in Certain Consumer Financial Product and Service Markets (Debt Collection and Consumer Reporting), April 17, 2012, *available at*
https://www.nclc.org/images/pdf/rulemaking/nclc_larger_participant_debt_collector_april2012.pdf.
[12] *Id.*
[13] 12 C.F.R. § 1090.104(a)(ii).
[14] 12 C.F.R. § 1090.107(b).
[15] National Consumer Law Center, et al., Comments to the CFPB on Defining "Larger Participants" of the International Money Transfer Market, April 1, 2014, *available at*
https://www.nclc.org/images/pdf/banking_and_payment_systems/comments-larger-participants-imf-04012014.pdf
[16] 12 C.F.R. § 1090.106(b).
[17] Center for Responsible Lending, et al., Comments to the CFPB on Defining Larger Participants of the Student Loan Servicing Market, May 28, 2013, *available at* http://www.studentloanborrowerassistance.org/wp-content/uploads/2007/03/comments-servicer-larger-markets-may2013.pdf.

Thus, the CFPB's definitions of larger participants in all of these markets were conservative and modest. In the long run, we hope the CFPB will expand these definitions. But while the CFPB did not cover as many entities as we had urged, overall the Bureau's rules capture the primary larger participants that need oversight in these markets and represent a reasonable approach.

The major task that remains for the CFPB is to address additional markets for which a definition of larger participants must be established. These markets include prepaid account issuers, installment lenders, vehicle title lenders, and financial data aggregator markets.

G. The CFPB's Supervisory Highlights reports provide valuable information and guidance.

In the Request for Information, the CFPB asks for feedback about "[t]he usefulness of Supervisory Highlights to share findings and promote transparency." We urge the CFPB to keep producing Supervisory Highlights reports. They provide valuable feedback and information to consumers, members of industry, the general public, academics, and the media. They serve the role of providing transparency without naming individual companies and causing public relations problems for them. They provide a high level view of how CFPB supervision is working.

We have conducted a review of all five years' worth of Supervisory Highlights reports, which reveals some striking trends. It appears that in several markets, supervised companies have gone from struggling to set up compliance systems (or totally ignoring the need for them) to being more proactive about correcting non-compliant practices and conducting internal evaluations. The deficiencies noted in the reports have become less structural (*i.e.* companies with no compliance system at all) and more particular (e.g., specific deceptive practices). The reports also note that companies themselves are noticing data or systems errors that they are self-correcting.

We discuss individual observations in the Supervisory Highlights reports in Section II with respect to the particular markets analyzed in those sections. We also have included a chart summarizing our review of all sixteen Supervisory Highlights reports in Appendix A.

In addition to providing transparency and documenting improvements in supervised markets, the Supervisory Highlights reports provide critical guidance for industry. And the industry is eager for such guidance. For example, in one of the earlier-filed comments to this RFI, the Operational Compliance Manager of a mortgage lender requested that:

> The vast majority of lenders genuinely want to get things right the first time, but sometimes struggle getting guidance on issues that aren't clear in the written regulatory literature.
> Therefore, although the CFPB is generally good about calling back with informal answers to those who submit questions, it would be most helpful to provide written responses, even if it contains qualifying comments about it not being legal advice.

> Otherwise, we have nothing to rely on when dealing with Auditors, State & Prudential Regulators, and business partners. Instead, we are left with mere recollections of informal telephone conversations – which doesn't have much credibility.[18]

Thus, the CFPB should continue to issue Supervisory Highlights reports to provide the kind of written guidance that is greatly desired by members in industry.

II. Examples of Consumer Financial Services Markets Where CFPB Supervision Has Resulted in Significant Reform

A. Credit reporting

One of the most important CFPB achievements in its supervision program has been to tackle the intransigent deficiencies in the credit reporting industry. The Big Three credit reporting companies (CRCs) occupy a unique role in the American credit economy. They serve a vitally important function for both the credit industry and in the financial lives of Americans. A good credit history is necessary for consumers to obtain credit, and to have that credit be fairly priced. Credit reports are also used by other important decisionmakers, such as insurers, landlords, utility providers, and unfortunately, even employers. Thus, it is no exaggeration to say that a credit history can make or break a consumer's finances.

Yet CRCs are entirely private companies, and the fact that there are only three of them makes them an oligopoly. The CRCs are publicly traded, which means their highest duty is to shareholder profit, not to consumers or creditors or the American economy. Consumers do not have any leverage over these private companies, unlike most other industries, because market forces do not apply to this industry - we are not the customer, but rather the commodity, of the CRCs. We cannot vote with our feet or our purse strings. For example, we cannot choose to avoid Equifax even after its negligence resulted in the theft of sensitive data for over half of the U.S. adult population. This characteristic – lack of consumer choice – is a common theme among those markets with the worst abuses, such as debt collection and student loan servicing, where consumers have benefitted the most from CFPB's supervision.

In addition to the lack of market forces to rein them in, the CRCs were insufficiently regulated until the Bureau began supervising them. Until 2012, their primary regulator was the beleaguered Federal Trade Commission (FTC), which only had the power to take enforcement action when something went wrong. As discussed in Section I, enforcement is very different from supervision. In the case of the CRCs, it was also far less effective. In addition, even with respect to enforcement, the FTC was outstaffed and outgunned by the CRCs and their deep pocketed resources. As for the states, there was (and still is) no state agency that could exercise supervision authority over the CRCs[19] - the most that states can do is take enforcement action through their Attorneys General.

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[18] Comments from Vernon Tanner, Sr. Vice President – Operational Compliance Manager, Crescent Mortgage Company, Feb. 26, 2018.

[19] The one future possible exception would be New York State, which has proposed but not finalized rules requiring consumer reporting agencies to register with its Department of Financial Services and permitting the Department to conduct examinations. New York State Department of Financial Services, Proposed 23 N.Y. Comp. Codes R. &

Due to this insufficient oversight and the lack of consumer choice, the CRCs developed a culture of impunity and arrogance. For decades, they abused consumers, cut corners in personnel and systems, and failed to invest in measures that would promote accuracy or handle disputes properly. Their idea of a dispute system was a travesty of automation, converting painstakingly written consumer disputes and supporting documentation into two- or three-digit codes and sending only those codes to the creditor or debt collector (the "furnisher") that provided the erroneous information.[20] After the furnisher responded, the CRCs' main response was to repeat or "parrot" whatever the furnisher claimed. The CRC always took the side of the furnisher, like a judge that always sides with the defendant. And they often spent minimal resources on disputes -- at one point, Equifax paid a mere $0.57 per dispute letter to a Philippines-based vendor to handle disputes.[21]

The CRCs also have had error rates that are simply unacceptable. The definitive FTC study on credit reporting errors found that 1 in 5 consumers have verified errors in their credit reports, and 1 in 20 consumers have errors so serious they would be denied credit or need to pay more for it.[22]

It is no surprise then that the CRCs are often the top three most complained-about companies to the Bureau, with the vast majority of complaints involving incorrect information on credit reports.[23] These problems with accuracy stem fundamentally from a culture where compliance and quality control take a back seat to profits and marketing, and where cutting corners is the norm.

A CFPB's Supervisory Highlights report documented these problems, noting major deficiencies at the CRCs such as:[24]

- Lacking programs to test the accuracy of credit reports that the CRCs produced. CFPB personnel were surprised to find that the CRCs' quality control systems were either rudimentary or virtually non-existent.
- Insufficient monitoring and re-vetting of furnishers to ensure they were continuing to meet their legal and other obligations. Furnishers were rarely provided with feedback regarding data quality, and were sometimes charged fees for data-quality reports.

Regs. 201, *available at*
https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/DFS_CRA_Reg.pdf#_blank

[20] *See* Chi Chi Wu, National Consumer Law Center, Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports (Jan. 2009), *available at* www.nclc.org/images/pdf/pr-reports/report-automated_injustice.pdf.

[21] *Id*. at 32.

[22] Federal Trade Comm'n Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003 (Dec. 2012).

[23] *See, e.g.*, Consumer Financial Protection Bureau, Monthly Complaint Report, Vol. 21, March 2017, *available at* https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201703_cfpb_Monthly-Complaint-Report.pdf.

[24] Consumer Financial Protection Bureau, Supervisory Highlights Consumer Reporting Special Edition, Issue 14 (Mar. 2, 2017), available at http://files.consumerfinance.gov/f/documents/201703_cfpb_Supervisory-Highlights-Consumer-Reporting-Special-Edition.pdf.

- Deficiencies regarding dispute handling: not only in conducting cursory reviews as discussed above, but also in failing to consistently notify furnishers of disputes and to describe the results of dispute investigations in federally-mandated notices to consumers.

CFPB supervision has made a significant difference in addressing these problems and compelling the CRCs to institute reforms for the first time. While there are still plenty of problems and concerns with the CRCs, the Bureau's supervision program "moved the needle" and started the CRCs along the right path. The same Supervisory Highlights report documents how supervision has resulted in the CRCs:[25]

- formalizing and centralizing data governance policies;
- establishing robust quality control programs;
- enhancing standards for public records data including greater frequency of updates and stricter identity-matching criteria;
- monitoring furnishers on an ongoing basis, including a process to temporarily stop accepting data from furnishers that have accuracy problems or that fail to provide regular updates;
- tracking furnisher dispute data;
- providing data-quality reports to data furnishers at no cost; and
- correcting the deficiencies in dispute handling by ensuring appropriate review of consumer proof documents, and proper provision of notices to both furnishers and consumers.

The CFPB has also engaged in supervision of other key players in the credit reporting system, including furnishers, resellers and specialty reporting agencies. This supervision has resulted in similar reforms.[26]

The FTC, state agencies, and consumer litigants have been fighting with the Big Three CRCs for over forty years regarding their abuse of consumers, but they have never been able to make the CRCs change their culture or institute fundamental reforms. It is *only* CFPB supervision that has resulted in large-scale improvements finally being made. While this is admittedly a work in progress, the Bureau has succeeded in forcing the CRCs to adopt systemic policies and procedures to improve accuracy. Instituting "compliance management systems" may not seem sexy, but it's the type of reform that is necessary in order to improve the overall accuracy of data on a large scale.

Reform of the credit reporting system will potentially benefit tens of millions of consumers. As discussed above, 5% of consumers with a credit file – about 11 million Americans – have serious errors in their reports that could cause them to pay more for credit or result in a denial of credit. Each of these 11 million consumers could be losing thousands of dollars by being forced to pay more for car loans or mortgages – or worse they may lose out on jobs or homes by being denied employment or credit based on their credit reports. If the CFPB reforms fix the serious deficiencies in their systems, these 11 million Americans will benefit to the tune of potentially

[25] *Id.*
[26] *Id.*

billions of dollars. More importantly, the CFPB will be helping these consumers restore their good names and financial reputations, which may be more precious to them than dollar savings.

However, the reforms announced by the CFPB in its report are only the first step. Whether the CFPB is successful in obtaining meaningful and lasting reform of the credit reporting system depends on continued vigorous supervision of the Big Three CRCs. If the CFPB's supervision program is weakened, the progress made by Bureau may be undone and the Big Three CRCs may backslide into their old ways.

B. Student Loan Servicing

Currently in the United States, roughly 44 million people owe more than $1.5 trillion on their student loans.[27] This makes student loan debt the second largest source of debt in the United States, just behind mortgages.[28] Unfortunately, federal data show that more than 1 in 4 of these borrowers are delinquent or in default on their federal student loans.[29]

At the National Consumer Law Center (NCLC), advocates see and hear the human toll of the tattered student loan safety net every day from the low-income borrowers that they represent in Massachusetts. Vulnerable students attempting to improve their lives and better provide for their families through education face severe consequences if they default on federal student loans. The federal government has nearly boundless powers to collect student loans, far beyond those of most unsecured creditors. It can garnish a borrower's wages without a judgment, seize tax refunds (even those that include the Earned Income Tax Credit, a special tax break intended to boost low wage workers out of poverty[30]), place a levy on federal benefits such as Social Security,[31] and deny eligibility for new education grants or loans.

Even borrowers who avoid default and repay their debts can face additional charges if they fall behind on their payments at any point. For borrowers facing financial hardship, competent and accurate servicing can be the difference between missing a payment and staying on track.

Servicing in the private student loan market poses even more challenges to borrowers. Within the private loan market, there is a general lack of information about servicing and debt collection practices.[32] The CFPB has provided information on some revealing trends, including that private

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[27] *See* Fed Reserve St. Louis, 2018 Q1 Student Loans Owned and Securitized, Outstanding (updated May 7, 2018), https://fred.stlouisfed.org/series/SLOAS.

[28] *See* Federal Reserve Bank of New York, Quarterly Report on Household Debt and Credit (May 2017), https://www.newyorkfed.org/microeconomics/hhdc.html.

[29] Consumer Financial Protection Bureau, Student Loan Servicing: Analysis of Public Input and Recommendations for Reform, (Sept. 2015), http://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf. Default is defined as being more than 270 days behind on payment.

[30] For stories from borrowers on the impact of EITC offsets *see* Persis Yu, National Consumer Law Center, Voices Of Despair: Student Borrowers Trapped In Poverty When The Government Seizes Their Earned Income Tax Credit (March 2018).

[31] *See* Persis Yu, National Consumer Law Center, Pushed into Poverty: How Student Loan Collections Threaten the Financial Security of Older Americans (May 2017).

[32] For more detailed comments, *see* NCLC Comments to CFPB on Proposal to Collect Student Loan Servicing Data (federal and private), Docket No. CFPB-2017-0002, April 24, 2017, and NCLC Comments to the Consumer

student loan servicers generally receive a flat monthly fee per account serviced with compensation generally not tied to any specific services performed on behalf of the borrower. This compensation structure disincentivizes servicers from providing any services to borrowers.

A common complaint we hear from borrowers is that they are unable to obtain even basic information, such as amounts owed and paid, from their private student lenders or servicers. A borrower from New York who contacted NCLC through its website summarized this problem concisely: "I have a private loan that has been passed around and I can't seem to get ahold of anyone about it."

Accountability is critical to ensuring that borrowers receive consistent and high quality services.[33] As the CFPB aptly identified in its 2015 report on student loan servicing:

> Borrowers depend on servicers to offer an error resolution process that is accessible, effective, and transparent. Adequate customer service and error resolution is especially important in the student loan market, where the consequences of borrowers' failure to satisfy an obligation can be particularly injurious, given many borrowers' limited credit history. When errors occur and are not quickly addressed, harm to borrowers may not be limited to problems with the individual loan or loans in question. Increasingly, consumer credit profiles serve as a precondition to employment, housing, and access to credit, and consequently, servicing errors can have spillover effects on many other aspects of borrowers' lives and livelihoods.[34]

CFPB supervision is a critical component to providing that accountability, and when done aggressively, can make a meaningful difference for ensuring consumer protections. As the CFPB highlighted in its latest annual Student Loan Ombudsman report,[35] in 2014, the Bureau reported on complaints from student borrowers about surprise automatic defaults that required borrowers to pay back the loans in full immediately if their co-signer had died or declared bankruptcy. Among them were borrowers who had been making their loan payments on time each month. In March 2016, the Bureau reported that CFPB examiners halted one or more servicers' unfair automatic defaults where loan contracts were ambiguous. Soon after, at least six of the nation's largest private student lenders eliminated the contract terms that led to automatic defaults. According to today's report, at least two-thirds of all private student loans made in the 2016-17 academic year, estimated to total approximately $8 billion, did not permit automatic defaults for borrowers who are successfully repaying their private loans.

A $1.5 trillion market cannot go without supervision. It is the congressionally mandated duty of the CFPB to supervise the student loan market and ensure that student loan borrowers are protected from abusive and predatory student lending practices.

Financial Protection Bureau on Request for Information Regarding Complaints from Private Education Loan Borrowers, Docket No. CFPB-2012-0024, August 13, 2012.

[33] For more detailed comments, *see* NCLC Comments to CFPB on Proposal to Collect Student Loan Servicing Data (federal and private), Docket No. CFPB-2017-0002, April 24, 2017.

[34] Consumer Fin. Prot. Bureau, Student Loan Servicing: Analysis of Public Input 140-141 (Sept. 2015).

[35] Consumer Fin. Prot. Bureau, Annual report of the CFPB Student Loan Ombudsman, Strategies for consumer-driven reform (Oct. 2017).

C. *Supervision of Mortgage Servicers*

i. The importance of getting mortgage servicing right

Servicing plays a central role in the home mortgage market. Servicers communicate with homeowners about every aspect of their mortgage loans. They prepare the written account statements and notices that tell homeowners about the status of their loans. They collect payments, manage escrow accounts, and decide whether to offer help when homeowners experience financial distress. Servicers ultimately make the decisions about whether to foreclose. Yet, homeowners have no ability to choose their mortgage servicers. Servicing rights are bought and sold like a marketable commodity. The investors that own mortgage loans exercise little direct control over servicers. The servicer's compensation is not tied directly to how well a loan performs.[36]

Servicing is also vulnerable to abuse because the terms of servicing contracts and economies of scale make it highly profitable for servicers to collect even relatively small charges from an individual homeowner. For example, one court noted that Wells Fargo, with a servicing portfolio of 7.7 million mortgages, could earn $115,000,000.00 if it collected a single $15.00 fee once annually from each homeowner.[37] In 2006, a relatively stable period before delinquencies skyrocketed, Countrywide Mortgage received $285 million in revenue from late fees alone.[38]

By 2013, over four million American families had lost their homes to foreclosures. Millions more were in default and facing foreclosures. Investors in these mortgages faced staggering losses. As the crisis deepened, the loss to investors from each foreclosure averaged about $145,000.[39] These losses hit in particular the public and non-profit entities that invested heavily in mortgage-backed securities.[40]

As the crisis intensified, it was servicers, not the investors who owned the loans, that continued to decide when foreclosures would proceed. In many instances, servicers foreclosed unnecessarily. An array of loss mitigation options provided alternatives to foreclosures, but servicers failed to implement them. Unnecessary foreclosures occurred because servicers made little effort to consider the alternatives. Despite growing evidence that affordable loan modifications were sustainable, servicers did not communicate with more than half of all borrowers with seriously delinquent loans about loss mitigation options.[41]

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[36] *See e.g.* Adam J. Levitin and Tara Twomey, *Mortgage Servicing,* 28 Yale J. on Reg. 1 (2011).
[37] *In re Stewart*, 391 B.R. 327, 343 n. 4 (Bankr. E.D. La. 2008).
[38] Gretchen Morgenson, Dubious Fees Hit Borrowers in Foreclosures, N.Y. Times, Nov. 6, 2007, at A1 (reporting that Countrywide received $285 million in revenue from late fees in 2006).
[39] Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications*, 41 Conn. L. Rev. 1107 (2009).
[40] American Association of Mortgage Investors, *White Paper, The Future of the Housing Market for Consumers After the Housing Crisis: Remedies to Restore and Stabilize America's Mortgage and Housing Markets* (January 2011) available at http://the-ami.com/wp-content/uploads/2011/01/AMI_State_AG_Investigation_Remedy_Recommendations_Jan_2011.pdf
[41] State Foreclosure Prevention Working Group, Memorandum on Loan Modification Performance (Aug. 2010) (consisting of representatives of twelve states' attorneys general and Conference of Bank Supervisors), *See* https://www.dfs.ny.gov/about/press/pr100824.htm

Government investigations have consistently identified certain servicer practices that aggravated the foreclosure crisis.[42] Servicers misled and confused homeowners about their loss mitigation options. They lost borrowers' paperwork, demanded redundant and unnecessary documents, misrepresented the reasons for denying loss mitigation requests, imposed unfair charges, and foreclosed before completing assessments of borrowers' options.[43]

ii. <u>The CFPB's crucial role in supervising mortgage servicers</u>

The CFPB began to supervise mortgage servicers in 2011, while the country was in the midst of the gravest foreclosure crisis in its history. As discussed above, the CFPB is *required* to supervise nonbank mortgage servicers' compliance with federal consumer protection laws. 12 U.S.C. § 5514(b)(1)(A). These laws include the Real Estate Settlement Procedures Act (RESPA) and the Truth-in-Lending Act (TILA), which together regulate a wide range of mortgage servicing activities.[44]

The Bureau has also issued regulations that address many aspects of mortgage servicing as part of its duty to implement RESPA and TILA. Much of the CFPB's supervision has focused on ensuring that servicers follow the new RESPA and TILA rules, as well as detecting unfair and deceptive servicer practices.

A review of the CFPB's Supervisory Highlights reports shows the effectiveness and importance of the Bureau's oversight so far. For example, a report from 2013 focused on problems with servicers' loss mitigation practices, such as long application processing delays, missing notices to borrowers, incomplete and disorganized files, and gaps in written policies and procedures.[45] In the report, the CFPB stressed the importance of compliance with the new RESPA rules scheduled to go into effect in January 2014, emphasizing that "the examination materials that will be used to assess compliance with these new provisions have been published, well in advance of the compliance deadline."[46]

Three years later, the CFPB reported that servicers had made significant improvements "in part by enhancing and monitoring their servicing platforms, staff training, coding accurately,

[42] U.S. Government Accountability Office, GAO-11-433, *Mortgage Foreclosures: Documentation Problems Reveal Need for Ongoing Regulator Oversight* (2011); U.S. Government Accountability Office, GAO Report 11-288 *Troubled Asset Relief Program Treasury Continues to Face Implementation Challenges and Data Weaknesses in its Making Home Affordable Program* (2011); U.S. Government Accountability Office Report to Congressional Committees, GAO-09-837, *Troubled Asset Relief Program: Treasury Actions Needed to Make the Home Affordable Modification Program More Transparent and Accountable* (2009); March Oversight Report: The Final Report of the Congressional Oversight Panel (2011); Congressional Oversight Panel, *Foreclosure Crisis: Working Toward a Solution: March Oversight Report* (2009).
[43] National Consumer Law Center, *At a Crossroads, Lessons from the Home Affordable Modification Program (HAMP)* January 2013, *available at* https://www.nclc.org/issues/at-a-crossroads.html .
[44] The CFPB also examines servicers for compliance with other federal statutes that broadly apply to financial transactions beyond mortgage lending and servicing, including the Electronic Fund Transfer Act (EFTA), the Fair Debt Collection Practices Act (FDCPA), the Fair Credit Reporting Act (FCRA), the Gramm-Leach-Bliley Act (GLBA), and the Equal Credit Opportunity Act (ECOA).
[45] Consumer Financial Protection Bureau, Supervisory Highlights Issue 3 (Summer 2013).
[46] *Id* at 15.

auditing, and allowing for greater flexibility in operations."[47] The CFPB's procedures for identifying problem areas and working with servicers to resolve them were working well.[48] Many deficiencies were due to servicers' use of outdated or defective "information technology structures."[49] CFPB supervision led servicers to replace this outdated technology and better manage their documents.[50]

Mortgage servicing relies heavily on software programs and platforms. Servicers also depend on other service providers to perform discrete tasks. The service providers in turn use their own platforms to store and transfer documents and data. An error imbedded in any of these computer programs can impact hundreds of thousands of homeowners, leading potentially to improper assessment of fees, denials of loss mitigation options, and even foreclosures. As we discuss below, the CFPB repeatedly found these types of computer program errors in servicers' systems. CFPB supervision led to prompt and effective remedial actions, with crucial improvements saving homeowners and investors millions of dollars. In addition, the effective supervision obviated public enforcement actions that could have been costly to the servicers, their reputations, and to the CFPB.

Finally, reporting these outcomes in the CFPB's Supervisory Highlights reports is very beneficial to all parties. Publication of these results points other mortgage servicers in the direction they should look to improve their own systems.

iii. Supervision of mortgage servicers' loss mitigation activities

When servicers mishandle homeowners' applications for loss mitigation help, they open the floodgate to unnecessary foreclosures. The CFPB's RESPA rules brought some order to this chaotic application process, but it must be combined with rigorous supervision. Otherwise the chaos will return.

CFPB examinations of servicers' loss mitigation practices have led to substantial improvements, including fixing flaws in computer programs and improving standardized forms, at a minimal cost to servicers. Supervision encouraged staff training and control mechanisms to ensure that loss mitigation worked properly. Loss mitigation reduces the financial hit both to homeowners and to the investors who own, insure, and guarantee mortgage loans.

CFPB's supervision shows that simple requests to revise a computer program can dramatically change outcomes for hundreds of thousands of homeowners. For example:

- One examination revealed that a servicer's software was improperly charging all homeowners a fee when it approved them for a loss mitigation option. At the CFPB's

[47] Consumer Financial Protection Bureau, Supervisory Highlights Mortgage Servicing Special Edition Issue 11 (June 2016), at 19.
[48] *Id.*
[49] *Id.*
[50] *Id.* pp. 19-20.

request, the servicer removed the charge from its software program and refunded the improperly collected fees.[51]

- A CFPB audit found that a servicer's loss mitigation processing platform had been malfunctioning repeatedly over a substantial period of time. The program failed to acknowledge receipt of homeowners' loss mitigation applications, as required by the RESPA rules. The CFPB told the servicer to correct the software and then monitored to make sure that it did so.[52]
- Another CFPB audit found that a servicer's underwriting program routinely inflated homeowners' income by using gross income instead of net income to calculate eligibility for loss mitigation. This was contrary to the guidelines set by the investors who owned the loans. The CFPB directed the servicer to revise its underwriting formula and beef up training of its underwriters.[53]

The CFPB Supervisory Highlights reports show repeatedly that examinations led to changes in forms that had far-reaching impact on entire loan portfolios. For example, letters sent by "one or more servicers" to homeowners offering them a loss mitigation option listed a date for acceptance that had already passed before the homeowners received the letters.[54] A different servicer sent out letters giving homeowners thirty days to submit documents to complete loss mitigation applications, but denied the applications before thirty days were up.[55] The CFPB directed these servicers to implement controls to properly date their notices to homeowners.

Servicers' overly burdensome requests to homeowners for documents have consistently impeded loss mitigation. CFPB supervision has resulted in servicers revising document requests, making them more comprehensible and limited to relevant information.[56] Other servicers sent homeowners letters denying loss mitigation options without including information about the option to appeal the decisions, in violation of the RESPA rules.[57] As part of its Supervision, the CFPB directed the servicers to revise the standardized language in their denial letters to inform homeowners that they could appeal the denials.

iv. Improving servicing transfers practices

The rights to service a mortgage are routinely transferred from one servicer to another, which can sometimes create a host of problems for homeowners. In recent years, many new players have entered the mortgage servicing market, but they often lack trained staff and must develop new technology platforms. Even with an experienced servicer, incompatible servicing programs can lose track of essential borrower information. The RESPA rules set certain standards for the exchange of documents upon servicing transfers.[58]

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[51] Consumer Financial Protection Bureau, Supervisory Highlights Issue 2 (Winter 2013).
[52] Consumer Financial Protection Bureau, Supervisory Highlights Issue 8 (Summer 2015).
[53] Consumer Financial Protection Bureau, Supervisory Highlights, Mortgage Servicing Special Edition, Issue 11 (June 2016).
[54] *Id.* at p. 10.
[55] Consumer Financial Protection Bureau, Supervisory Highlights Issue 9 (Fall 2015).
[56] Consumer Financial Protection Bureau, Supervisory Highlights Issue 3 (Summer 2013); Issue 8 (Summer 2015); Issue 11 (June 2016).
[57] *Id.* Issue 9 (Fall 2015).
[58] 12 C.F.R. §§ 1024.38(b)(4), 1024.41(k). *See also, Servicing Transfers,* CFPB Bulletin 2014-01 (Aug. 19, 2014).

CFPB supervision has frequently addressed problems caused by servicing transfers.[59] For example, examinations found that new servicers did not respect loan modifications approved by prior servicers, even when the investor had approved the modifications and the homeowners had been making all required payments on the modified loans. Instead of recognizing the modifications, the new servicers demanded the higher monthly payment amounts due before the modifications. In these cases, the CFPB directed the servicers to revise their policies and procedures to link databases from the prior servicers to their own platforms. In the June 2016 Supervisory Highlights report, the CFPB documented that servicers had improved their data transfer systems after earlier examinations had cited these types of servicing transfer problems.

v. Accomplishments in other mortgage servicing areas

Supervision has focused on a number of important servicing issues. For example, CFPB examinations gave particular attention to safeguarding the rights of servicemembers, who receive special protections against foreclosures under federal law. The CFPB compelled corrections by two servicers found to have inadequate checks in place to verify a homeowner's military status before proceeding with foreclosures.[60]

CFPB examinations also addressed the following issues:

- CFPB found servicers charging late fees contrary to investor guidelines. These servicers were required to take corrective measures.[61]
- TILA rules require servicers to be specific in their monthly statements and to clearly disclose the nature of each charge assessed to an account.[62] As part of a review, the CFPB informed a servicer that it must stop using labels such as "Misc. Expense" and "Charge for Service" on monthly statements and instead provide homeowners with a comprehensible explanation for each charge.[63]
- The RESPA rules require that servicers meet certain accountability standards in handling homeowners' escrow accounts.[64] Supervision led servicers to stop practices that routinely caused the late payment of property taxes, resulting in penalties assessed against the homeowners.[65]
- In another case, CFPB supervision discovered a servicer disbursing funds from some homeowners' escrow accounts to pay for insurance premiums owed by other homeowners.[66] The CFPB ordered the servicers to implement appropriate corrective policies and practices.

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[59] Consumer Financial Protection Bureau, Supervisory Highlights Issue 2 (Winter 2013); Issue 3 (Summer 2013); Issue 8 (Summer 2015); Issue 11 (June 2016).
[60] Consumer Financial Protection Bureau, Supervisory Highlights Issue 2 (Winter 2013).
[61] *Id.* Issue 3 (Summer 2013).
[62] 12 C.F.R. § 1026.41(d).
[63] Consumer Financial Protection Bureau, Supervisory Highlights Issue 15 (Spring 2017).
[64] 12 C.F.R. §§ 1024.17, 1024.34.
[65] Consumer Financial Protection Bureau, Supervisory Highlights Issue 3 (Summer 2013).
[66] *Id.* Issue 15 (Spring 2017).

In summary, the CFPB's supervision of mortgage servicers has focused on important and appropriate subjects. As a result, hundreds of thousands of homeowners avoided millions of dollars in improper charges. Many homeowners were put in a better position to avoid foreclosures through more effective loss mitigation procedures. And it was only because of the CFPB's supervision program that these homeowners received relief—homeowners themselves would never have been able to uncover the cause of the problems they were experiencing. Yet in many cases a simple letter from an oversight agency was able to pinpoint a problem affecting thousands of consumers and put an end to a widespread practice that was leading to unfounded charges and could potentially take away their homes.

D. Debt Collection

Debt collection is a pervasive part of American life, affecting a huge number of consumers. In 2016, 33% of Americans with a credit report had at least one debt in collection.[67] In predominantly nonwhite zip codes, the share with debt in collection reached 45%.[68]

The need for CFPB supervision of debt collectors is clear from the prevalence of consumer complaints about the debt collection industry. Debt collection is a leading source of consumer complaints to the CFPB,[69] the FTC,[70] the Better Business Bureau,[71] and others.[72] The categories of the 84,500 complaints received by the CFPB in 2017 were:

- Attempts to collect debt not owed (39%)
- Written notification about debt (22%)
- Communication tactics (13%)
- Took or threatened to take negative or legal action (11%)
- False statements or representation (10%) and

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[67] Urban Institute, Debt in America: An Interactive Map (Apr. 2018), *available at* http://apps.urban.org/features/debt-interactive-map/.

[68] *Id.*

[69] Consumer Fin. Protection Bur., Annual Report 2018: Fair Debt Collection Practices Act (Mar. 2018), available at http://files.consumerfinance.gov ("In 2017, the Bureau handled approximately 84,500 debt collection complaints, making it one of the most prevalent topics of complaints about consumer financial products or services received by the Bureau.").

[70] Fed. Trade Comm'n, Consumer Sentinel Network Data Book 2017 (608,535 complaints, or 22.74% of all complaints).

[71] U.S. Better Bus. Bureau, 2016 Statistics Sorted by Complaints, available at www.bbb.org (in 2016 it received 16,817 complaints and more than three million inquiries about collection agencies). *See also* Emma Fletcher and Rubens Pessanha, BBB Institute for Marketplace Trust, 2016 BBB Scam Tracker Annual Risk Report: A New Paradigm for Understanding Scam Risk, available at www.bbb.org (the Better Business Scam Tracker received reports of a number of debt-related scams in 2016, including tax collection scams (7902), debt collection scams (2798), and credit repair/debt relief scams (487)).

[72] CFA & NACPI, 2016 Consumer Complaint Survey Report (July 27, 2017), available at www.consumerfed.org (investigators who survey state and local consumer protection agencies to ask about their top complaints found that credit and debt complaints ranked fourth).

- Threatened to contact someone or share information improperly (4%)[73]

In addition to receiving complaints from consumers, the CFPB has also surveyed consumers about their experiences with debt collection. In 2017, the CFPB published the results of this survey, in which respondents indicated that they had experienced a variety of debt collection abuses.[74] For example, of respondents who had been contacted about a debt:

- 53% "indicated that the debt was not theirs, was owed by a family member, or was for the wrong amount";
- 63% "said they were contacted too often";
- 36% were called after 9 p.m. or before 8 a.m. (presumed inconvenient times);
- 27% were threatened; and
- 75% of consumers who requested that the creditor or debt collector stop contacting them reported that the contact did not stop.[75]

CFPB supervision has addressed several of these abuses. For example, examiners found that debt collectors had violated the Fair Debt Collection Practices Act by attempting to collect from authorized users who were not liable for credit card debts, impermissibly communicating with third parties about a debt, and communicating with consumers at inconvenient times. Examiners directed the debt collectors to take remedial actions to address each of these violations.[76]

CFPB supervision of debt collectors is critical. Although the CFPB's supervisory authority only extends to larger participants in the debt collection market,[77] its impact is extensive and important. First, the larger participants in the debt collection market have massive portfolios of debts in collection, meaning that their collection practices impact large numbers of Americans. For example, the debt buyer Encore Capital Group, Inc. claims that twenty percent of American consumers either owe it money currently or have owed it money in the past.[78] Second, CFPB supervision provides guidance to the rest of the debt collection industry through the publication of the Supervisory Highlights reports, as well as through the publication of Guidance documents that address emerging industry practices that the Bureau becomes aware of through its supervision and enforcement activities.[79] Thus, CFPB supervision of the larger participants in the debt collection market allows the Bureau to monitor and respond to emerging trends quickly in a way that is beneficial to the industry as a whole.

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[73] Consumer Fin. Protection Bur., Annual Report 2018: Fair Debt Collection Practices Act (Mar. 2018), available at http://files.consumerfinance.gov.

[74] Consumer Fin. Protection Bur., Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt (Jan. 2017).

[75] Id. at 5, 35, 46.

[76] Consumer Financial Protection Bureau, Supervisory Highlights Issue 16 (Summer 2017)

[77] 12 C.F.R. § 1090.105(b).

[78] Chris Albin-Lackey, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor (Human Rights Watch, Jan. 2016).

[79] *See, e.g.,* CFPB Compliance Bulletin 2017-01, Phone Pay Fees (July 31, 2017).

There is simply no substitute for CFPB supervision. The states cannot provide the same level of oversight, because the existing state regulatory framework is insufficient to protect all consumers from abusive debt collection practices. Although some states require debt collectors to be licensed, others do not.[80] Even those states that do require licensure for debt collectors may have significant gaps in coverage. For example, some states specifically exempt certain debt buyers from licensure.[81] Whether they arise due to an absence of state licensing laws or an exemption for a particular type of debt collector, these gaps mean that the states cannot adequately supervise the 8,513 debt collection agencies that were active in the United States in 2017.[82] Moreover, the type of oversight that states provide varies greatly,[83] as do the level of resources and types of tools that each state that does require licensure provides to its regulator. States also differ as to the degree in which state licensing statutes focus on protecting consumers compared to preventing the misappropriation of creditor funds.[84]

Conclusion

The CFPB supervision program has done what Congress intended it to do – improve the lives of millions of Americans by ensuring that providers of financial services and products follow the law. There is simply no substitute – not by prudential regulators nor by state agencies nor by other federal authorities. The CFPB has the tools, it has the mission, it has the expertise, and most importantly, it has the authority and mandate under the Dodd-Frank Act. The CFPB has used all of these tools to make significant and important reforms to the industries that it supervises, to the benefit of everyone – consumers, industry members, and the American public. The CFPB should – indeed it must – continue this vigorous and excellent work.

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[80] *See* National Consumer Law Center, Fair Debt Collection, Appx. D (9th ed. 2018), *updated at* www.nclc.org/library (summarizing state debt collection practices statutes, including debt collection licensing statutes); insideARM, State Licensing Interactive Map, *available at* www.insidearm.com/state-laws/

[81] *See, e.g.,* Tenn. Code Ann. §§ 62-20-103(a)(9) (exempting "[a]ny person that holds or acquires accounts, bills or other forms of indebtedness through purchase, assignment, or otherwise; and only engages in collection activity through the use of a licensed collection agency or an attorney authorized to practice law in this state"); *Dorrian v. LVNV Funding, L.L.C.*, 479 Mass. 265, 94 N.E.3d 370 (2018) (concluding that the debt buyer LVNV is not a debt collector under the Massachusetts licensing statute).

[82] IBISWorld, Debt Collection Agencies – US Market Research Report (Dec. 2017), *available at* www.ibisworld.com/industry-trends/market-research-reports/administration-business-support-waste-management-services/administrative/debt-collection-agencies.html.

[83] *See* insideARM, State Licensing Interactive Map, *available at* www.insidearm.com/state-laws/ (showing maps for license requirements, bond requirements, and licensing fee requirements).

[84] *Compare* Alaska Stat. §§ 08.24.290 (grounds for revocation of license focused on preventing misappropriation of creditor's funds) with Ark. Code Ann. § 17-24-307(grounds for revocation of agency license focus on abusive debt collection practices against consumers).

Thank you for the opportunity to submit these comments. If you have questions about them, please contact Chi Chi Wu at cwu@nclc.org or 617-542-8010.

Respectfully submitted,

National Consumer Law Center (on behalf of its low-income clients)
Americans for Financial Reform
Center for Responsible Lending
Consumer Action
The Consumer Federation of America
National Association of Consumer Advocates
Public Citizen
U.S. PIRG

Appendix A – Chart with Highlights from CFPB Supervisory Highlights Reports

September 2017

Industry	Act	CFPB Action
Auto loan servicing	(H) Despite loan extensions or other repossession avoidance options, servicers repossessed cars after repossession was canceled	Directed to stop and refund customers repossession fees. Servicers now required to verify that repossession orders are still active immediately before repossessing cars.
Credit card account management	(H) Failed to provide full tabular disclosures when opening accounts	Directed to review and strengthen procedures for opening accounts
Credit card account management	(H) Deceptive communications to consumers regarding costs and availability of pay-by-phone options	Directed to reimburse consumers paying unnecessary fees, and ensure consumers are informed of all payment options before paying
Credit card account management	(H) Service reps did not follow call scripts for debt cancellation products & did not give consumers accurate info on fees & benefits	Directed to reimburse consumers and ensure service reps are following scripts & providing accurate information
Credit card account management	(H) Did not follow error resolution process in Regulation Z (late communications, no investigation of charges, etc.)	Directed entities to remediate affected consumers, develop stronger error resolution plans, and in some cases to change service providers
Debt collection	(H) Did not verify that the correct person was contacted before trying to collect debt	Directed to improve consumer verification processes; retrained collection agents
Debt collection	(H) Deceptively implied that a credit card user (not cardholder) was responsible for a debt	Remedial & corrective actions under review
Debt collection	(H) False representations regarding the credit score effect of paying a debt in full rather than settling the debt	Directed to change training materials and language used by collectors
Debt collection	(H) Deliberately contacting consumers at inconvenient times	Directed to enhance compliance monitoring of dialer systems & call times
Deposits	(H) Unnecessary freezing of deposit accounts after suspicious activity	Directed to review freezing policy and communications with consumers about hard holds on accounts
Deposits	(H) Misrepresentations about which payments qualified for waiver of monthly service fees	Cited for deceptive acts and practices; required to ensure that disclosures are accurate & not misleading
Deposits	(H) Violations of Regulation E's error resolution requirements,	Directed to come into compliance with Regulation E

	including delays in communications and failure to investigate claims	
Deposits	(H) Deceptive statements about coverage of overdraft protection	Directed to cease misrepresenting overdraft protection products
Mortgage origination	(H) Failure to fully comply with Know Before You Owe mortgage rule (lack of documentation, incomplete disclosures)	Reimbursement to affected consumers, corrective actions depending on the cause of the harmful act
Mortgage origination	(H) Failure to reimburse unused service deposits	Refunds to affected consumers
Mortgage origination	(H) Arbitration language in residential loan documents, in violation of Regulation Z	Directed to remove the language
Mortgage servicing	(H) Failed to fully complete loan modification applications, accepted incomplete applications	Directed to implement procedures that would ensure servicers obtain all available documents & information for applications
Mortgage servicing	(H) Broad waivers of rights in loss mitigation agreements	Directed to remove all waivers from agreements
Remittances	(H) Failed to treat int'l mobile top-ups and bill payments over $15 as remittance transfers	Directed to include disclosures and compliance management with these transactions
Mortgage servicing	(H) Servicers' billing failed to give total charges on statements	Directed to include this info on periodic statements
Payday loans	(H) Repeated collection calls to workplace or other third parties	Remedial & corrective actions under review
Payday loans	(H) Misrepresentations re: actions collectors would take if not paid (in-person visits, etc.)	Remedial & corrective actions under review
Payday loans	(H) Misrepresentations about loan products (availability, competitor comparisons, online applications)	Directed to revise marketing materials & remove misleading information
Payday loans	(H) Using borrower references to market loans to them or attempt collections	Directed to ensure disclosures include full use of references
Payday loans	(H) Unauthorized debits on borrowers whose loans were already paid	Remedial & corrective actions under review
Mortgage servicing	(H) Failed to provide borrowers with foreclosure protections	Directed to pay $1.15M to harmed borrowers

April 2017

Industry	Act	CFPB Action
Mortgage servicing	(H) Failed to request all documents needed for loss mitigation programs, then denied applications that were missing documents	Directed to review and strengthen policies & procedures
Mortgage servicing	(H) Failed to timely register loss mitigation applications, causing consumers to lose foreclosure protections	Directed to remediate consumers & strengthen policies for processing and registering applications
Mortgage servicing	(H) Paid consumers' insurance premiums with other consumers' escrow funds	Directed to strengthen policies regarding how escrow funds are used
Mortgage servicing	(H) Issued periodic statements without fully itemized charges	Directed to provide specific descriptions
Student loan servicing	(H) Failed to remediate borrowers for wrong deferment terminations, resulting in greater fees and interest	Directed to conduct audit to locate affected accounts for remediation
Student loan servicing	(H) Deceptive statements regarding interest during deferment periods	Directed to conduct audit to locate affected accounts for remediation
Credit bureau	(H) Falsely reported that credit scores sold to consumers were the same seen by lenders	Directed to truthfully represent credit scores and pay $3 million civil penalty
Mortgage servicing	(H) Businesses paid for referrals for mortgage services	Ordered to pay $4 million civil penalty
Mortgage servicing	(H) Did not notify consumers of foreclosure relief options	Ordered to pay $21.4 million in remediation to consumers, and $7.4 million in civil penalties

Consumer Reporting Special Edition (March 2017)

Industry	Act	CFPB Action
Consumer reporting	(P) Strengthened policies & systems for data governance & handling consumer info	
Consumer reporting	(P) Developed systems to track patterns and trends in consumer reports and possible errors	
Consumer reporting	(P) Greater monitoring of data from outside furnishers, including ceasing to accept data from furnishers who do not meet	

	standards	
Consumer reporting	(H) Reseller CRCs used systems with programming errors that introduced errors into data	Directed to review & strengthen accuracy procedures
Consumer reporting	(P) Increased use of tech systems, call scripts, training for dispute handling	
Consumer reporting	(H) Failed to review all consumer dispute documentation	Directed to revise policies to ensure all consumer information is considered
Consumer reporting	(H) Failed to give timely or clear notice of dispute investigation results	Directed to state results of investigations quickly and clearly
Consumer data furnishing	(H) Weak data oversight & monitoring	Directed to address system weaknesses
Consumer data furnishing	(H) Failed to have clear and reasonable written policies	Directed to develop such policies
Consumer data furnishing	(H) Failed to maintain full documentation and records	Directed to retain dispute documentation for a reasonable amount of time
Consumer data furnishing	(H) Reported consumer info that furnisher knew was incorrect	Directed to correct the data

General market observations:

- Overall CRCs have made advances to promote greater accuracy, oversight of furnishers, and enhancements to dispute resolution
- Continued improvements are necessary; many CRCS lack clear incentives to do better and under-invest in accuracy

October 2016

Industry	Act	CFPB Action
Auto loan origination	(H) Weak complaint systems, lacking policies & training	Directed to implement & strengthen CMS
Auto loan servicing	(H) Held borrowers' personal property found in repossessed cars and charging fees for storing the property	Directed to stop charging for storing property or refusing to return property
Debt collection	(H) Charged unlawful convenience or collections fees	Remedial & corrective actions
Debt collection	(H) Made false statements to get consumer info or collect debts, including impersonating consumers	Remedial & corrective actions
Debt collection	(H) Unlawful communication with third party about the debt	Remedial & corrective actions
Debt collection	(H) Failed to train employees to record & analyze dispute records	Directed to develop stronger policies & training for dispute records & analysis
Debt collection	(H) Failed to investigate FCRA	Remedial & corrective actions

	disputes	
Debt collection	(H) Failed to give consumers authorization terms for recurring electronic fund transfers	Directed to strengthen policies & employee training
Debt collection	(P) Had a well-organized, monitored compliance system with trained employees & call scripts	
Mortgage origination	(H) Failed to verify total monthly income as part of ability to pay	Directed to revise policies to ensure proper verification
Mortgage origination	(H) Failed to provide timely disclosures after applications	Directed to strengthen monitoring and compliance systems
Mortgage origination	(H) Failed to ensure loan originators were properly licensed under the SAFE Act	Directed to discontinue using unlicensed loan originators
Student loan servicing	(H) Denied or failed to approve income-driven repayment plan applications	Directed to remedy harmed borrowers and follow up all applications
Student loan servicing	(H) Failed to provide borrowers choice in payment allocation	Directed to hire consultants to improve communications with borrowers about payment allocation
Student loan servicing	(H) Failed to notify borrowers that interest would accrue during paid-ahead periods	Directed to hire consultants to improve communications with borrowers about paid-ahead periods
Student loan servicing	(H) Data & systems errors that skew interest payments	Directed to remediate consumers & fix data errors
Fair lending	(H) Marketed different or fewer products to non-English speaking consumers	Revised marketing materials to be more comprehensive in Spanish
Fair lending	(H) Failed to provide info about any debt-relief offers to non-English speaking consumers	Directed to remediate affected consumers and begin communicating with them in their preferred language
Fair lending	(H) Deceptive marketing in Spanish of products; subsequent info provided only in English	Directed to remediate affected consumers and cease all deceptive marketing/communications
Credit (bank)	(H) Deceptive marketing and illegal billing of add-on products	Required to end unfair billing, pay $27.75 million in relief and $4.5 million civil penalty
Student loan servicing	(H) Failed to communicate with consumers; charged illegal fees	Required to pay $410 K to borrowers & $3.6 million civil penalty, and improve billing & processing procedures

[Mortgage Servicing Special Edition (June 2016)]

Industry	Act	CFPB Action
Mortgage servicing	(H) Failed to notify customers about options to avoid foreclosure	Cited violating servicers & directed them to remediate borrowers and monitor communications platforms. New rules standardize servicer receipt of loss mitigation applications.
Mortgage servicing	(H) Deceptive notices regarding foreclosure in loss mitigation programs.	Remedial & corrective actions are under review.
Mortgage servicing	(H) Deceptive notices regarding fees & charges in loss mitigation programs	Cited for deceptive & abusive practices, required servicers to provide accurate info on fee assessment.
Mortgage servicing	(H) Delayed sending loss mitigation offer letters until deadlines were imminent or past	Cited for unfair practice; remedial & corrective actions under review
Mortgage servicing	(H) Changed loss mitigation agreements after borrowers had signed	Directed to take remedial & corrective actions
Mortgage servicing	(H) Treated borrower gross income as net income when evaluating loss mitigation applications	Cited for violating Regulation X; directed servicer to train personnel on guidelines for income reporting
Mortgage servicing	(H) Failed to convert trial loan modifications to permanent ones after trial period ended, charging borrowers higher interest	Directed to take remedial & corrective actions
Mortgage servicing	(H) Deceptive disclosures of when deferred mortgage payments would be collected	Directed to clearly disclose the interest accrual and payment schedule for deferred payments
Mortgage servicing	(H) Sent incorrect foreclosure warnings to customers who were current on payments	Directed to cease sending these letters
Mortgage servicing	(H) Required borrowers to sign loan modification/mortgage repayment agreements that included consumer rights waivers	Directed to remove this language from agreements
Mortgage servicing	(H) Loss mitigation denials did not give specific or correct reasons for denials, and did not explain borrowers' right to appeal	Directed to state the specific reason borrowers were denied and explain appeal options
Mortgage servicing	(H) Transferring loans/documents between	Directed transferees to develop policies & trainings to ease loan transfers and quickly

	incompatible platforms meant that some information was lost and some loan agreements not honored	identify loan agreements
Mortgage servicing	(P) Transferee servicers began using new technological tools & platforms to maintain loan data during transfers	Directed servicers to continue and expand use of loan data tools

General market observations:

- CFPB has increased supervision of servicers' loss mitigation and loan modification communications with consumers, who previously were often unaware of options other than foreclosure or had received deliberately confusing, deceptive, or late communications from servicers.
- Servicers have improved in actively reviewing and analyzing complaints against themselves for instances of law violations, created new complaint departments/personnel, and even designated primary contacts for state and federal regulators to address complaints.

Summer 2016

Industry	Act	CFPB Action
Auto loan origination	(H) Deceptive marketing of gap-coverage products	Under review
Auto loan origination	(H) Generally weak compliance management system	Remedial & corrective action
Debt collection	(H) Sold debts that were in bankruptcy, fraudulent, or already settled	Directed to redress affected consumers and increase oversight of debt records
Debt collection	(H) False and misleading statements about repayment options	Directed to find out why collectors made false statements and determine appropriate corrective action
Mortgage origination	(H) Incorrect calculations of finance charges	Review procedures to be sure charges are calculated correctly
Mortgage origination	(H) Referrals did not fit the rules of affiliated business arrangements, requiring unnecessary affiliated services	Directed to revise disclosures to avoid improper referrals
Mortgage origination	(H) Failed to provide adverse action notices	Directed to revise training and policies to ensure disclosures/notices are provided
Mortgage origination	(H) Failed to properly disclose interest on interest-only loans	Directed to review whether payments were correctly applied to interest and principal
Mortgage origination	(H) Weak or otherwise inadequate complaint management systems	Directed to enhance monitoring & corrective actions and to revise training, policies, & procedures for compliance
Payday loans	(H) Loan agreements included a vaguely-defined range of	Directed to specify an acceptable range of transfer amounts, or notify consumers each

	amounts to be debited from consumers' accounts, rather than individual notice of transfers	time a transfer is initiated
Fair lending	(H) Recorded conditional approvals of loan applications as denials if applicants withdrew	Directed to review recording practices and resubmit HDMA Loan Application Register if there were many errors
Debt sales	(H) Gave inflated APR info on credit card accounts sold to debt buyers, who used the inflated APRs when trying to collect	Ordered to pay $5 million in customer relief and $3 million in penalties

March 2016

Industry	Act	CFPB Action
Consumer reporting	(H) Furnishers of consumer info failed to have written policies/procedures regarding info accuracy & verification	Directed to establish & strengthen such policies/procedures
Consumer reporting	(H) Failed to timely update outdated or incorrect information	Directed to update information for all accounts
Consumer reporting	(H) CRAs failed to ensure & maintain data quality	Directed to develop monitoring for data quality
Debt collection	(H) Failed to honor consumers' cease-communications requests	Directed to improve training for handling cease-communications requests
Debt collection	(H) Threatened garnishment against consumers not eligible for garnishment (student loans)	Directed to investigate why employees made threats & to stop in future
Mortgage origination	(H) Failed to maintain written policies/procedures for loan origination	Directed to establish such policies
Remittance transfers	(H) Gaps in compliance systems resulting in inaccurate communications with consumers	
Remittance transfers	(H) Inaccurate or incomplete disclosures & receipts	Cited for violation of Remittance Rule
Remittance transfers	(H) Deceptive statements re: conditions to receive funds	Directed to cease making deceptive statements
Remittance transfers	(H) Transfer fees resulted in no-money-received transactions	Not a violation, but providers should be sure consumers are aware of this
Student loan servicing	(P) Restructured payment allocations to be most beneficial to borrowers	
Student loan servicing	(H) Auto-default clauses in case of bankruptcy or death – loan becomes immediately due	Directed to immediately cease this practice
Student loan	(H) Failed to disclose that	Directed to make this clear in disclosures

servicing	forbearance could mean loss of cosigner release	
Student loan servicing	(H) Servicing conversion errors result in inaccurate higher interest rates	Directed to reimburse affected consumers
Student loan servicing	(H) Weak or confused policies & procedures for furnishing consumer data, ensuring accuracy, etc.	Directed to strengthen policies/procedures
Fair lending	(H) Excluded borrowers from debt relief offers because of national origin	Paid $201 million in redress to consumers
Payday loans	(H) Illegal debt collection practices	Ordered to refund $7.5 million to consumers and pay $3 million civil penalty; barred from future in-person debt collection
Mortgage loan origination	(H) Discriminatory redlining	$25 million in direct subsidies to qualified consumers in affected neighborhoods, $2.25 million in community programs, and $5.5 million civil penalty

General market observations:

- The accuracy of consumer information given to consumer reporting agencies needs to be improved across all industries/product areas

Winter 2015

Industry	Act	CFPB Action
Consumer reporting agencies	(P) Improved dispute handling systems in response to CFPB directives	
Consumer reporting agencies	(H) Failed to forward all consumer information submitted in disputes	Directed to strengthen training for handling consumer information
Debt collection	(H) Made false representations re: loan rehabilitation and legal action taken against borrowers	Remedial & corrective actions under review
Debt collection	(H) False statements re: borrowers' ability to change or cancel ACH payments	
Deposits	(H) Failed to disclosure changes in overdraft calculation and fee assessment	
Mortgage origination	(H) Staff received compensation based on terms of specific transactions	Redirected transaction compensation to proper parties
Mortgage	(H) Failed to provide revised	Refunded consumers

origination	GFEs, resulting in greater settlement charges to consumers	
Mortgage origination	(H) Failed to timely provide Good Faith Estimates (GFEs)	Appropriate corrective action
Mortgage origination	(H) Advertised products without required disclosures	Appropriate corrective action
Mortgage origination	(H) Failed to timely and properly notify applicants of action taken on applications	Directed to review denied applications for compliance issues
Mortgage origination	(H) General deficiencies in compliance management systems & audits	Directed to address weaknesses in systems
Fair lending	(H) Declined applicants who relied on non-employment income	Directed to identify & remediate wrongly denied applicants

Fall 2015

Industry	Act	CFPB Action
Consumer reporting agencies	(H) Did not have written procedures or training ensuring accuracy of consumer data furnished to CRAs	Directed to standardize policies/system used for provision of data to CRAs
Debt collection	(H) Failed to state that calls were from a debt collector	Directed to train employees to properly identify themselves
Debt collection	(H) Failed to comply with consumer requests re: time and means of communication	Directed to train employees to properly note consumer communication requests
Debt collection	(H) Inadequate policies & procedures for consumer data furnished to CRAs under Reg V	Directed to develop stronger policies
Mortgage origination	(H) Failed to keep charges at settlement reasonably below the good faith estimate for the origination charge	Required to provide restitution for harmed borrowers, & develop procedures for documenting circs. that would cause charges to increase
Mortgage origination	(H) Inaccurate completion of HUD-1 settlement statements	Directed to provide restitution to harmed consumers, and strengthen oversight of statements
Mortgage origination	(H) Failed to provide loan applicants with homeownership counseling services	Directed to strengthen compliance management system
Mortgage origination	(H) Failed to provide fully accurate loan disclosure statement after application	Directed to strengthen compliance management system
Mortgage origination	(H) Failed to provide adequate consumer financial privacy	Directed to strengthen compliance management system

	notices	
Mortgage origination	(H) Failed to properly register employees involved in loan origination with NMLSR	Directed to identify all such employees & get them properly registered
Mortgage origination	(H) Failed to reimburse borrowers for understated APRs and other charges	Directed to reimburse harmed borrowers and upgrade systems to identify borrowers owed money
Mortgage servicing	(H) Failed to timely & completely communicate with borrowers re: loss mitigation options, application status, deceased borrowers' successors	Directed to establish policies & procedures compliant with Regulation X
Mortgage servicing	(H) Failed to properly evaluate loss mitigation applications	Directed to allow borrowers time to submit all required documents before evaluating applications
Mortgage servicing	(H) Included misleading waivers designed to make borrowers think they could not bring claims against servicers	Directed to remove language from loan agreements
Mortgage servicing	(H) Failed to timely terminate mortgage insurance, resulting in greater cost to borrowers	Directed to reimburse borrowers and revise termination policies
Mortgage servicing	(H) Charged illegal fees for payments made over the phone	Directed to only collect phone fees when authorized by law
Mortgage servicing	(H) Failed to send timely or accurate debt validation letters	Directed to review debt validation policies to ensure correct communications
Student loan servicing	(H) Did not allow borrowers a choice in allocating partial payments, causing higher fees	Directed to change allocation process and give comprehensive disclosures about allocation
Student loan servicing	(H) Auto payment system issues (early debits, fees when payment falls on a non-business day)	Directed to review auto payment system & cease charging unwarranted fees
Student loan servicing	(H) Deceptive statements re: dischargeability of student loans in bankruptcy	Directed to cease deceptive statements
Student loan servicing	(H) Deceptive statements re: late fees charged by DOE	Directed to cease stating that DOE charges late fees
Student loan servicing	(P) Clear communication with borrowers re: balance owed during a paid-ahead period	
Student loan servicing	(H) Failure to verify and audit consumer data provided to CRAs	Directed to strengthen policies & procedures
Fair lending	(H) Denied minority loan applicants more frequently than similarly situated whites	Cited for ECOA violation & required to provide relief
Auto loans	(H) Charged minority borrowers	Required to pay $80 million in damages

	higher interest	
Credit cards	(H) Deceptive marketing & billing of credit card add-ons	Required to refund consumers $700 million and pay $35 million in civil penalties
Student loan servicing	(H) Overstated minimum payments & denied info needed for tax benefits	Ordered to refund $16 million to consumers & pay $2.5 million civil penalty
Mortgage servicing	(H) Deceptive marketing of mortgage payment program	Ordered to return $33.4 million in fees to consumers & pay $5 million civil penalty
Mortgage servicing	(H) Did not honor modifications in transferred loans	Paid $1.5 million in restitution to consumers
Deposit bank	(H) Failed to credit full deposits to consumers' accounts	Required to pay $11 million in restitution and $7.5 million civil penalty
Credit cards	(H) Deceptive marketing of add-ons	Required to pay $3 million in restitution and $500K in civil penalties

Summer 2015

Industry	Act	CFPB Action
Consumer reporting agencies	(H) Policies were outdated; furnishers were not checked to be adhering to them	Directed to revise and maintain policies
Consumer reporting agencies	(H) No quality control policies to test consumer data for accuracy	Directed CRAs to establish quality controls
Debt collection	(H) Inadequate compliance management systems	Directed to strengthen policies and trainings, and remedy management weaknesses
Debt collection	(H) Failed to investigate disputes	Directed to begin tracking and investigating reported disputes
Debt collection	(H) Failed to have written policies on furnishing consumer data to CRAs	Directed to develop such policies
Student loan servicing	(H) Deceptive statements about tax deductibility of student loan interest	Directed to remove deceptive language
Student loan servicing	(H) Did not provide complete FRCA adverse action notices	Remedial & corrective actions
Mortgage origination	(H) Failed to maintain written policies in compliance with the Loan Originator Rule	Directed to develop such policies
Mortgage origination	(H) Failed to timely provide applicants with homeownership counseling services	Corrected
Mortgage origination	(H) Failed to timely or fully provide a Good Faith Estimate	Directed to strengthen training and monitoring procedures
Mortgage	(H) Failed to fully complete	Directed to refund consumers and

origination	HUD-1 settlement statements	strengthen training
Mortgage origination	(H) Loan agreements included misleading waivers of notices and demands	Directed to remove language from agreements
Mortgage servicing	(H) Misleading or inadequate communication with consumers re: loss mitigation applications	Directed to remediate consumers and fix servicing platforms
Mortgage servicing	(H) Loss of information when transferring loans, resulting in higher interest and fees	Directed to develop policies & audits to maintain consumer information during transfers
Mortgage servicing	(H) Sent foreclosure notices to borrowers already approved for trial modifications	Directed to track foreclosure notices more carefully
Mortgage servicing	(H) Failed to send clear periodic statements of transaction history	Directed to send such statements
Mortgage servicing	(H) Collected unearned premiums on mortgage insurance after failing to automatically terminate it	Directed to remediate affected consumers
Fair lending	(H) Denied loan applications from borrowers with non-employment income	Provided borrowers financial remuneration and opportunity to reapply after unfair denial
Mortgages	(H) Paid managers based on interest rates of loans they closed	Paid $228K in civil penalties
Deposit banks	(H) Charged illegal overdraft fees	Directed to fully refund all consumers; fined $7.5 million

Fall 2014

Industry	Act	CFPB Action
Consumer reporting agencies	(H) Failed to notify consumers that investigations were underway or complete, and gave inconsistent information on dispute reporting	Directed to strengthen policies and procedures for consumer communication
Debt collection	(H) Charged illegal convenience fees	Directed to identify and reimburse harmed consumers
Debt collection	(H) Made false threats of litigation	Directed to cease making threats
Debt collection	(H) Gave prohibited disclosures to third parties	Directed to conduct remedial training for employees and monitor collections agents
Debt collection	(H) Inflated APRs when selling debts	Remedial & corrective action
Deposits	(H) Delayed in investigating reported errors	
Deposits	(H) Denied consumers' error	Directed to develop policies in line with

	claims, citing consumer negligence	Reg. E
Deposit	(H) Did not give consumer documentation supporting denial of error claim	Directed to correct notices of denial
Mortgage servicing	(H) Lacked policies for oversight of service providers	Directed to strengthen policies
Mortgage servicing	(H) Failed to timely convert trial loan modifications to permanent ones, resulting in higher interest	Determined unfair practices
Mortgage servicing	(H) Changed terms of loan modification agreements without warning	Determined unfair practices
Student loan servicing	(H) Allocated partial payments to maximize late fees	Cited as unfair practices
Student loan servicing	(H) Misrepresented minimum payments to include interest on deferred loans	
Student loan servicing	(H) Charged late fees on loans still in grace period	Directed to stop charging these fees
Student loan servicing	(H) Failed to provide accurate tax info for deducting loan interest payments, required additional certification that money was used for education	Found to be deceptive
Student loan servicing	(H) Misrepresented that student loans are not dischargeable in bankruptcy	Directed to clarify communications and cease these statements
Student loan servicing	(H) Routinely autodialled borrowers late at night or early in the morning	Directed to improve internal controls to stop inconvenient autodialled calls
Fair lending	(H) Advertised free checking accounts without disclosing eligibility & activity requirements	Ordered to pay $2.9 million to consumers and $200K in civil penalties
Mortgage servicing	(H) Denied and delayed loss mitigation, foreclosure relief, loan modification applications	Ordered to pay $27.5 million to consumers and $10 million in civil penalties; barred from acquiring default loan portfolios until entity shows compliance
Credit/bank	(H) Illegal billing of add-on products and services consumers did not receive	Ordered to pay $48 million to consumers and $9 million in civil penalties
Payday loans	(H) Used illegal debt collection practices to pressure borrowers into taking out more loans	Ordered to pay $5 million in refunds and $5 million in civil penalties

Auto Lending Special Edition (Summer 2014)

Industry	Act	CFPB Action
Auto lending	(H) Discretionary pricing that resulted in discrimination against minority borrowers	Redress for consumers, maintain strong policies on discretionary pricing to avoid future discrimination
Auto lending	(P) Limited discretionary pricing adjustment to reduce discrimination against borrowers	
Auto lending	(P) Developed dealer compensation not based on discretionary markup, also to reduce discrimination	

General market observations:

- After supervisory actions targeting discriminatory lending, some lenders are more strictly monitoring dealers and, when seeing evidence suggesting discrimination, are implementing limits to discretionary pricing adjustments or taking other actions to manage or reduce risks of discrimination
- So far maintaining strong compliance management, imposing strict caps on discretionary pricing adjustments, and/or adopting non-discretionary dealer compensation models has looked like a good way to limit fair lending risk

Spring 2014

Industry	Act	CFPB Action
Consumer reporting agencies	(H) Insufficient oversight of complaint management systems	Directed to establish more active authority over CMS
Consumer reporting agencies	(H) Failed to exercise oversight of third-party service providers	Directed to establish policies to be sure service providers are adequately trained, complying with federal law, etc.
Consumer reporting agencies	(H) Failed to monitor & track consumer complaints and documentation	Directed to establish a complaint management process
Consumer reporting agencies	(H) Refused to accept online or phone-filed disputes if consumers did not have a recent CRA report or disclosure	Directed to stop requiring this before filing disputes
Debt collection	(H) Inadequate and outdated complaint management systems	Directed to update and strengthen CMS
Debt collection	(H) Failed to assess debt buyers' compliance with federal law	Directed to carefully examine business relationships with other entities
Debt collection	(H) Sold cancelled debts to debt buyers	Directed to remediate harmed consumers, and establish new procedures to keep this from happening
Debt collection	(H) Deleted disputed accounts	Directed to investigate going forward

	instead of investigating dispute	
Debt collection	(H) Failed to get written authorization before starting recurring transfers from consumers' accounts	Directed to fully comply with Reg. E when setting up payment plans
Debt collection	(H) Harassing phone calls to borrowers	
Debt collection	(H) Misleading claims of debts owed that entities could not back up in court	
Payday loans	(H) Ineffective compliance management programs	Directed to strengthen policies, training, & oversight
Payday loans	(H) Improper collections calls (to references, third parties, after do-not-call requests, etc.), in-person visits	Cited for unfair and abusive practices, directed to cease violations
Credit cards	(H) Deceptive marketing and illegal billing of credit card add-on products	Ordered to pay $727 million to consumers and $20 million in civil penalties; temporarily barred from marketing add-on products

Winter 2013

Industry	Act	CFPB Action
Mortgage servicing	(H) Failed to honor existing loan modifications after a servicing transfer	Directed to remediate consumers and revise policies relating to servicing transfers
Mortgage servicing	(H) Required borrowers to waive existing claims in order to apply for loan modifications	Directed to cease using waivers
Mortgage servicing	(H) Deceptive marketing regarding money saved through biweekly payment programs	Directed to cease making deceptive statements
Mortgage servicing	(H) Failed to verify data provided to consumer reporting agencies	Directed to strengthen reporting processes to avoid giving false information
Mortgage servicing	(H) Failed to honor deferred payment plan for a soldier on active duty, charged fees	Directed to revise policies for greater oversight of payment plans
Mortgage servicing	(H) Failed to honor borrowers' requests to contact attorneys for future collections attempts	Directed to implement training & monitoring to avoid recurrence
Credit services	(H) Charged consumers for credit monitoring products they did not receive	Refunded $309 million to consumers, directed to pay $20 million in civil penalties
Payday loans	(H) Robo-signed court	Refunded $14 million to consumers,

	documents; overcharged servicemembers & their families	directed to pay $5 million fine
Auto loans	(H) Charged minority borrowers higher interest rates	Paid $80 million to consumers, $18 million in penalties, established new compliance system
Credit cards	(H) Unfair billing practices & deceptive marketing of add-on products	Paid $59.5 million to consumers, $9.6 million in civil penalties, $6.6 million in other fines

Summer 2013

Industry	Act	CFPB Action
Nonbanks	(H) Less likely than banks to have any kind of complaint management system	Directed entities to establish CMS
Mortgage servicing	(H) Carelessness in transferring loans – lack of review or organization of documents, no disclosures	Directed to carefully review and organize all documents received in transfers
Mortgage servicing	(H) Changes in payment process without notice to borrowers, resulting in late payments	Directed to remediate affected borrowers and provide notice going forward
Mortgage servicing	(H) Delayed and disorganized loss mitigation process	Directed to review entire loss mitigation process for efficiency and accuracy, as well as specific fees and charges to borrowers
Fair lending	(H) Failed to provide timely adverse action notice	Directed to review CMS to ensure timing requirements are met
Auto loans	(H) Deceptive marketing and lending targeting active-duty military	Directed to reimburse harmed consumers, stop deceptive practices, improve disclosures

Fall 2012

Industry	Act	CFPB Action
Financial institutions (unspecified)	(H) Institutions had nonexistent or weak compliance management systems	Directed institutions to establish CMS and adopt policies & procedures to ensure compliance with consumer law
Financial	(H) Failed to properly oversee third-party service providers	Directed to ensure servicers are complying with the law
Credit cards	(H) Deceptive product marketing	Directed to end such marketing, be audited, remediate affected consumers, and pay civil penalties
Mortgage origination	(H) Failed to completely disclose interest rates & payment schedules	Directed to follow the law on disclosures

NEW YORK STATE
DEPARTMENT *of*
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

Maria T. Vullo
Superintendent

April 12, 2018

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

Re: Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes (Docket No. CFPB-2018-0001)

Dear Ms. Jackson:

I write as Superintendent of the New York State Department of Financial Services (NYDFS) in response to the Consumer Financial Protection Bureau (Bureau)'s Request for Information regarding Civil Investigative Demands and related processes (CIDs). As a state banking regulator that has partnered with the Bureau, NYDFS appreciates the opportunity to offer our thoughts on this crucial and core tool of the Bureau.

NYDFS supervises approximately 3,800 institutions with assets of approximately $7 trillion, including state-chartered banks operating in New York; branches of foreign banks licensed in New York; U.S. and foreign insurance companies operating in New York; and licensed lenders, money transmitters, check cashers and other non-bank financial companies, some of which are also supervised by the Bureau. NYDFS has worked with the Bureau since its creation on supervisory matters, such as joint examinations, and is party to an information-sharing agreement with the Bureau to enhance our cooperative relationship. NYDFS has also taken joint enforcement action with the Bureau; we were co-plaintiffs in a suit against two companies and three of the companies' individual managers for deceiving consumers about the costs and risks of their pension advance loans.[1] Our federal-state partnership has shown the Bureau to be a leader in protecting financial markets and institutions and enforcing consumer financial laws.

I write to urge the Bureau to maintain its CID processes because they are an essential and important part of the Bureau's statutory mission of enforcing federal consumer financial laws.

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[1] Press Release, CFPB, CFPB and New York Department of Financial Services Sue Pension Advance Companies for Deceiving Consumers About Loan Costs (Aug. 20, 2015), *available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-new-york-department-of-financial-services-sue-pension-advance-companies-for-deceiving-consumers-about-loan-costs/.

The Consumer Financial Protection Act (CFPA) grants the Bureau broad authority to investigate suspected violations of law. This reflects the important governmental interest in the swift and efficient investigation of possible unlawful activity. The Bureau's effectiveness in carrying out its congressionally-mandated duty of enforcing federal consumer financial laws requires this authority and the concomitant tools to conduct fulsome investigations of potential wrongdoing.

CIDs are a principal means by which the Bureau engages in investigating possible violations and determining whether enforcement is warranted, in order to protect consumers. Indeed, two of the Bureau's "primary functions," set forth in 12 U.S.C. § 5511(c), concern the Bureau's ability to investigate: first, regarding "collecting, investigating, and responding to consumer complaints," *id.* at § 5511(c)(2), and second, regarding the Bureau's ability to take appropriate enforcement action to address violations by covered persons of federal consumer financial law, *id.* at § 5511(c)(4). The Bureau is thus statutorily compelled to discover and procure evidence of compliance, or non-compliance, with federal consumer financial laws. The Bureau may wield this broad power through the issuance of CIDs, which enable it to investigate and collect relevant facts without requiring the commencement of any proceedings before information may be obtained. It is well-settled that an agency such as the Bureau should be given wide latitude to investigate via CIDs, a type of administrative subpoena, so that potential violations are quickly found and scrutinized. The faster an agency can get to the facts of any situation, the faster it can act to halt wrongdoing and determine whether enforcement should follow.

Importantly, while the Bureau is a relatively new agency, its CID processes are not—they come directly from the CID processes provided for in the Federal Trade Commission Act (FCTA), which were added to the FCTA in 1980. *Compare* 12 U.S.C. § 5562 *with* 15 U.S.C. § 57b-1. Both statutes set out similar processes: specifying who can initiate and conduct investigations;[2] requiring notification of the purpose of the CID;[3] mandating that CID recipients meet and confer with the agency;[4] providing processes for filing petitions for an order to modify or set aside CIDs, including the time to so file;[5] establishing requirements and procedures for oral testimony and the rights of witnesses;[6] and so forth. Just as the Bureau's CID processes replicate the FCTA's, the FCTA itself was based on the CID procedure utilized by the Department of Justice under the Antitrust Civil Process Act, 15 U.S.C. § 1311. Given these other laws and regulations, it is clear that the Bureau's CID processes arise out of and join a well-established tradition of administrative investigation, one repeatedly upheld by the courts[7] and duplicated through legislation.

At the same time as the CID processes give the Bureau the means and methods to investigate violations of federal consumer financial laws, they also provide recipients of investigative

[2] 12 C.F.R. §§ 1080.4, 1080.6; 16 C.F.R. §§ 2.1, 2.5
[3] 12 U.S.C. § 5562(c)(2); 12 C.F.R. § 1080.5; 15 U.S.C. § 57b-1(c)(2); 16 C.F.R. § 2.6.
[4] 12 C.F.R. § 1080.6(c); 16 C.F.R. § 2.7(k).
[5] 12 U.S.C. § 5562(f)(1); 12 C.F.R. § 1080.6(e); 15 U.S.C. § 57b-1(f)(1); 16 C.F.R. § 2.10.
[6] 12 C.F.R. §§ 1080.6(a)(4), 1080.9; 16 C.F.R. §§ 2.7(b)(4), 2.9.
[7] *United States v. Morton Salt*, 338 U.S. 632 (1950); *United States v. Powell*, 379 U.S. 48 (1964); *FTC v. Texaco, Inc.*, 555 F.2d 862 (1977); *United States v. Markwood*, 48 F.3d 969 (6th Cir. 1995); *CFPB v. Source for Public Data, LP*, No. 17-16, 2017 WL 2443135 (N.D.T.X. June 6, 2017).

demands opportunities and procedures to clarify, modify, and challenge such demands. The requirement that CID recipients meet and confer with the Bureau soon after receiving a demand enables early discussion and clarification of any issues. 12 C.F.R. § 1080.6(c). Further, the Bureau must give notice to CID recipients of the nature of the conduct constituting the alleged violation under investigation and the provision of law applicable to such violation. 12 U.S.C. § 5562(c)(2); 12 C.F.R. § 1080.5. While the Bureau defines the scope of its own jurisdiction when issuing CIDs, *CFPB v. Habour Portfolio Advisors, LLC*, No. 16-14183, 2017 WL 631914, at *2 (E.D. Mich. Feb. 15, 2017) (quoting *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001)), this provision gives the CID recipient fair notice about the conduct and alleged violation that prompted the demand. Recipients may also petition to modify or set aside CIDs, first to the Bureau itself and then to a federal court. 12 U.S.C. § 5562(f)(1). Courts consider whether a CID's subject matter is outside of the agency's jurisdiction, whether the demands are too indefinite, or whether the requests are unduly burdensome. *See CFPB v. Heartland Campus Solutions, ESCI*, No. 17-1502, 2018 WL 1089806, at *4 (W.D. Pa. Feb. 28, 2018); *United States v. Markwood*, 48 F.3d 969, 979 (1995) (reviewing cases). These processes, taken together, show that CID recipients are afforded multiple opportunities to challenge improper requests. At the same time, the CID is a crucial governmental investigatory tool that allows the Bureau, like other governmental authorities, to obtain information essential to its mission.

In short, the Bureau's CID processes enable the Bureau to efficiently carry out its statutory duty to investigate possible violations of federal consumer financial law, are consistent with the known and accepted processes for CIDs by other agencies, and offer CID recipients fair and reasonable ways to challenge any improper requests. Any alterations to these processes may weaken, slow, or unnecessarily complicate the Bureau's important and leading role in investigating and enforcing federal consumer financial laws and protecting consumers in the financial marketplace.

Sincerely,

Maria T. Vullo
Superintendent
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April 25, 2018

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

Via email: FederalRegisterComments@cfpb.gov

Re: Request for Information, Civil Investigative Demands/Docket No. CFPB-2018-0001

Dear Executive Secretary Jackson,

On behalf of more than 400,000 members and supporters of Public Citizen, we offer the following comment in response to the Request for Information (RFI) regarding the Consumer Financial Protection Bureau's (Bureau, CFPB, agency) Civil Investigative Demand (CID) processes.

At the outset, we object to this foundational exploration of both the CID process and the other elements of the Bureau's basic operations. Currently, the Bureau lacks a director that has been confirmed by the Senate. Congress conceived the Bureau as an agency independent of political interference. Instead, this RFI comes at the direction of Mick Mulvaney, who serves as a caretaker at the pleasure of the President and is otherwise the Director of the Office of Management and Budget. This is the opposite of independence. Further, as a member of Congress, Rep. Mulvaney objected to the existence of the Bureau, calling it a "sad, sick joke."[1] Since then, many of his actions at the Bureau have reversed the course of the mission of consumer protection that Congress mandated.[2]

We nevertheless offer the following comments to emphasize the important role that CIDs play in protecting consumers.

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[1] Emily Stewart, *Mick Mulvaney once called the CFPB a "sick, sad" joke. Now he might be in charge of it,* VOX (NOV. 16, 2017)
https://www.vox.com/policy-and-politics/2017/11/16/16667266/mick-mulvaney-cfpb-cordray-omb-joke
[2] *Letter From Sen. Elizabeth Warren to OMB Director Mick Mulvaney*, OFFICE OF SEN. WARREN (March 16, 2018)
https://www.warren.senate.gov/imo/media/doc/2018.03.16%20Letter%20to%20Mulvaney1.pdf

Background

Congress created the Bureau in response to the financial crash of 2008. This crash followed massive abuse of consumers in the lending market. This abuse and subsequent calamity stripped millions of Americans of their homes, jobs and savings. While bank regulators might have arrested this misconduct, they subordinated their mandate to protect consumers to their additional mandate to protect the safety of the financial system. These regulators apparently viewed Wall Street profits as a proxy for safety, even when those profits ultimately derived from consumer abuse. Congress created the Bureau with a singular purpose: "to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[3] In doing so, Congress made the CFPB the first federal regulator to supervise both banks and non-bank financial companies, including mortgage companies, private student lenders, and payday lenders.[4]

Congress drew from a number of practices in government through extensive congressional hearings and other expert input when it devised the Bureau. It crafted investigative tools so as to help the Bureau detect, prosecute and win recompense for wrongdoing. By July 2017, the Bureau's enforcement and supervision actions had netted roughly $12 billion in ordered relief for more than 29 million consumers victimized by unlawful activity.[5] Other consumers likely benefit from the deterrence value of these actions.

The Civil Investigative Demand

One of these investigative tools is the CID. A CID, similar to a subpoena, is a tool for the agency to gather information in investigating potential wrongdoing. It is expressly authorized by the Dodd-Frank Wall Street Reform and Consumer Protection Act and that statute, in combination with the Bureau's regulation, establishes appropriate parameters for the Bureau's CID processes.[6] The Bureau issues CIDs to entities and persons whom the CFPB believes may have information relevant to a violation of laws the Bureau enforces. These demands require recipients to provide the Bureau with information in varying forms, including written answers to questions, documents, and testimony. Recipients are required to produce the requested information to the Bureau, which uses such information to further investigations of potential violations of Federal consumer financial laws. Under 12 U.S.C. § 5562, each civil investigative demand must state the nature of the conduct constituting the alleged violation that is under investigation and the provision of the applicable law. That provision also requires, for example, that demands for documents prescribe a return date that is "reasonable", and that those for

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[3] 12 U.S.C. § 5511(a)

[4] *See* 12 U.S.C. §§ 5514-15

[5] Zixta Martinez, *Six Years Serving You,* CONSUMER FINANCIAL PROTECTION BUREAU (July 21, 2017) https://www.consumerfinance.gov/about-us/blog/six-years-serving-you/

[6] *See* 12 U.S.C. § 5562; *see also*12 CFR § 1080.6

written reports or answers "propound with definiteness and certainty the reports to be produced or the questions to be answered."

The RFI asks about the "processes for initiating investigations, including the . . . delegation of authority." We support the current process whereby senior staff at the Bureau issue CIDs. A CID bears the signature of either the enforcement director of the deputy enforcement director. Authority for this important tool should not be politicized by requiring approval from the Director. Requiring additional approvals can impede the efficiency of an investigation.

The RFI further asks about ways to "improve CID recipients' understanding of investigations," including the nature, purpose and scope of the query. The Bureau's policies already require a clear declaration of purpose, including the alleged violation. Initial requests may be and are often narrowed following the course of communication between the Bureau and a firm. [Of note, consumers who may be victims of these firms are not accorded the same time with enforcement staff about the purpose of the CID.] The Bureau's manual regarding CIDs directs staff to "consider the burden the CID will impose on the recipient. A CID should be narrowly tailored to solicit the information necessary for the investigation."[7] Providing additional information could lead abusive firms to conceal or destroy evidence. Further, as some CIDs go to third parties, even the subject firm may not wish for the Bureau to expand on this information for fear of potential reputational harm.

The Inspector General examined the CID process in 2017. It concluded that its CID processes were sound. It provided several suggestions, such as for record keeping, and noted that the Bureau had implemented these recommendations. [8]

Conclusion

Finally, we express concern about the nature of this review of CIDs. The RFI seeks this information, the Bureau explains, to identify ways that the "CIDs may be . . . streamlined . . . while minimizing burdens."[9] In fact, the RFI uses the term "burden" five times in its two-page request. It does not use the term "protection" at all, other than to name the Bureau.

Further, the request makes clear that the Bureau is most interested in hearing from recipients of CIDs, that is, firms that the Bureau has some reason to believe are violating the law. It asks to hear from firms that "have received one or more CIDs from the Bureau, or members of the bar who represent these entities." Many of these companies will be ones that the CFPB believed

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[7] *Policies and Procedures Manual, Office of Enforcement,* CONSUMER FINANCIAL PROTECTION BUREAU (May 2017) https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-and-procedures-memo_version-3.0.pdf

[8] The CFPB Generally Complies With Requirements For Issuing Civil Investigative Demands But Can Improve Certain Guidance And Centralize Recordkeeping, OFFICE OF INSPECTOR GENERAL, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM CONSUMER FINANCIAL PROTECTION BUREAU(Sept. 20, 2017), https://oig.federalreserve.gov/reports/cfpb-civil-investigative-demands-sep2017.pdf

[9] *Request for Information: Civil Investigative Demands,* CONSUMER FINANCIAL PROTECTION BUREAU/REGULATIONS.GOV (website visited February 19, 2018) https://www.regulations.gov/document?D=CFPB-2018-0001-0002

violated the law. Building a record based on complaints by abusive firms can only debase the CFPB's important investigative tools, and certainly undermines the mission of the agency. In 1950, the Supreme Court recognized this natural antagonism to investigative questions when it recognized, in a related context, an agency's "power to get information from those who best can give it and who are most interested in not doing so."[10]

We recognize that a CID imposes some responsibilities on firms. That is the nature of oversight. It is the duty of firms and individuals to comply with Bureau questions where there are suspicions of misconduct. The cost to consumers of financial industry abuse far outweighs these compliance duties.

For questions, please contact Bartlett Naylor at bnaylor@citizen.org

Sincerely,

Public Citizen

[10] *United States v. Morton Salt Co.*, 338 U.S. 632, 640 (1950).

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June 7, 2018

Submitted via www.regulations.gov

Consumer Financial Protection Bureau 1700 G Street, NW Washington, DC 20552

Re: Docket No. CFPB-2018-0009, Request for Information Regarding Bureau Rulemaking Processes

Dear Mr. Mulvaney:

Public Citizen thanks the Bureau for the opportunity to submit comments regarding the Bureau's Request for Information regarding Bureau rulemaking processes. Public Citizen is a non-profit organization with 400,000 members and supporters nationwide. We represent the public interest through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues that include consumer protections with respect to financial products.

In just the few short years of its existence, the CFPB has issued rules that protect consumers in the markets for mortgages, prepaid cards, remittances, payday loans, and other financial products. The CFPB's process for writing rules has been thoughtful, considered, robust, and transparent in part due to special procedural and analytical requirements that Congress placed on the CFPB when it created the new agency. Like all agencies across the federal government, the CFPB seeks and responds to public comment, as required by the Administrative Procedure Act (APA). On top of the existing rulemaking requirements under the APA that apply to all federal agencies when promulgating regulations and seeking input, Congress has placed specific analytical and procedural requirements on the CFPB that are in some cases unique to this agency and result in a rulemaking process that is significantly more extensive than virtually every other federal agency's rulemaking process. Given the additional burden the CFPB faces when promulgating, amending, or repealing its rules as compared to other agencies, there is simply no basis (beyond a backdoor attempt to slow the process), for the CFPB to use any potential discretionary authority to modify its rulemaking process as grounds to add even more procedural and analytical requirements to a rulemaking process that is already one of the most inclusive, transparent, and comprehensive among all agencies.

For instance, when issuing rules, the CFPB considers the potential benefits and costs of the regulation to both consumers and regulated entities, as well as the impact on depository institutions with $10 billion or less in assets and consumers in rural areas. *See* 12 U.S.C. § 5512(b)(2). These tailored requirements to assess impacts on smaller financial institutions and rural consumers are unique among financial agencies. The CFPB's consideration of these potential benefits and costs and impacts has involved thoughtful and detailed analyses that the CFPB publishes with both its proposed and final rules. We applaud the CFPB's careful attention to these topics. We recommend that in considering the potential

benefits, costs, and impacts of its regulations, that the CFPB continue to use meaningful data from a wide range of sources including both quantitative data and consumer anecdotes and other qualitative information, from the CFPB's own sources (such as consumer complaints) and external sources.

We especially urge the CFPB to continue recognizing the value of qualitative data in identifying and describing benefits that are real and tangible for consumers, but that cannot be reduced to monetary or quantified values. Federal agencies across the government have long been encouraged to treat qualitative benefits on equal footing as quantified benefits or costs for purposes of impact analyses in order to achieve statutory goals set out in authorizing legislation to protect people. For example, OMB has encouraged Executive agencies that when agencies are not able to express all of the benefits or costs in monetary units, which occurs often, cost-benefit analysis "is less useful, and it can even be misleading, because the calculation of net benefits in such cases does not provide a full evaluation of all relevant benefits and costs."[1] Analysts should therefore attempt to quantify benefits or costs as much as possible but "exercise professional judgment" in determining whether non-quantified factors are important enough to justify consideration of the regulation.[2]

Pursuant to statute, the CFPB also devotes particular attention to the concerns of small entities. The CFPB is one of only three agencies, and the sole financial regulator, that creates a special process to consider the input of small businesses, pursuant to the Small Business Regulatory Enforcement and Fairness Act (SBREFA). Pursuant to the Dodd-Frank Act's amendments to SBREFA, the CFPB actively seeks small business input prior to proposing any rule that is determined to have a significant impact on a significant number of small entities. Under the statute, representatives of small businesses that would be impacted by the rule are identified and asked to provide feedback that is reflected in a formal report that is issued publicly. *See generally* 5 U.S.C. § 609(b), (d). We encourage the CFPB to continue using its SBREFA process with an eye toward seeking the full range of perspectives from small businesses, including perspectives on the benefits to small businesses from CFPB rules. For example, in the pending rulemaking on Business Data Lending (Regulation B),[3] which is intended to provide the CFPB with available data on lending to women and minority-owned small businesses, the CFPB should consider seeking feedback directly from minority and women small business owners as part of its SBREFA Panel in the course of the rulemaking.

In addition, the CFPB's statute includes a requirement for "retrospective review." The CFPB must assess each significant rule five years after its effective date. *See* 12 U.S.C. § 5512(d). This statutory requirement is particularly notable because under it, the CFPB will evaluate its rules more frequently than agencies that follow only the Regulatory Flexibility Act, which applies to agencies across the federal government and requires review of certain rules only every 10 years. *See* 5 U.S.C. § 610.The CFPB has taken its retrospective review requirement seriously, publishing detailed plans for its reviews and seeking public comment on those plans.[4]

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[1] OMB Circular A-4, "Regulatory Analysis," September 17, 2003. The circular is available at http://www.whitehouse.gov/omb/assets/regulatory_matters_pdf/a-4.pdf.

[2] *Id*.

[3] https://www.gpo.gov/fdsys/pkg/FR-2017-05-15/pdf/2017-09732.pdf#page=1

[4] See CFPB, *We Are Seeking Comment on Our Plan for Assessing the ATR/QM Rule*, https://www.consumerfinance.gov/about-us/blog/we-are-seeking-comment-our-plan-assessing-atrqm-rule/ (May 25, 2017); CFPB, *We Are Seeking Comment on Our Plan for Assessing the Mortgage Servicing Rule*, https://www.consumerfinance.gov/about-us/blog/we-are-seeking-comment-our-plan-assessing-mortgage-

In developing its rules, as well as its retrospective review plans, the CFPB has been creative, thorough, thoughtful, and transparent in seeking input and conducting outreach to interested parties. For example, the CFPB's recently issued rule regarding payday and vehicle title loans relies on more than five years of research and outreach, including multiple public events and hundreds of stakeholder meetings. *See* 82 Fed. Reg. 54472, 54503-19 (Nov. 17, 2017). We urge the agency to continue its commitment to outreach, research, and transparency, which we believe supports robust and informed rulemaking processes.

The CFPB should not politicize its important outreach and research processes or its consideration of the benefits, costs, and impacts of its rules. For this reason, Public Citizen opposes the CFPB's recent decision to move to create a new Office of Cost Benefit Analysis within the director's office. The CFPB should continue trusting its senior career staff to lead objective and thorough analyses of the relevant benefits and costs.

Public Citizen also strongly opposes any attempt to require centralized regulatory review of CFPB regulations by the White House's Office of Management and Budget (OMB). Moreover, any requirement for OMB review would be in severe tension with Congress's decision to expressly designate the CFPB as independent, 12 U.S.C. § 5491(a), and to restrict the OMB's authority "over the affairs or operations of the Bureau," 12 U.S.C. § 5497(a)(4)(E). As the CFPB's only Senate-confirmed director explained, "[t]his would give any President unprecedented authority to influence the policy and rulemaking functions of independent regulatory agencies and would constitute a fundamental change in the role of independent regulatory agencies."[5] It would be especially problematic because the CFPB is currently under the authority of Acting Director Mick Mulvaney, who simultaneously heads OMB. By the very nature of his dual roles, Mulvaney's presence at the CFPB guts the agency's independence. Any increase in the OMB's authority over the CFPB would only exacerbate the problem. Further, such review is entirely unnecessary, since Congress has already directed the CFPB to conduct its own extensive analyses of its regulations.

The CFPB rulemaking process is among the most comprehensive, rigorous, and driven by data and evidence, of any rulemaking process across the federal government, which was the intent of Congress in fashioning the CFPB's rulemaking process. The CFPB should carefully consider this Congressional design, and the limits of the CFPB's discretionary authority in making changes to its rulemaking process, as it continues to assess its rulemaking processes.

For questions, please contact Amit Narang at anarang@citizen.org

Sincerely,

Public Citizen

servicing-rule/ (May 4, 2017); CFPB, *We Are Seeking Comment on Our Plan for Assessing the Remittance Rule*, https://www.consumerfinance.gov/about-us/blog/cfpb-seeks-comment-its-plan-assessing-remittance-rule/ (Mar. 17, 2017.

[5] See https://sensiblesafeguards.org/wp-content/uploads/Financial-Regulators-Oppose-IARAA-2015.pdf.

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Agency: Consumer Financial Protection Bureau (CFPB)
Document Type: Nonrulemaking
Title: Requests for Information: Bureau Public Reporting Practices of Consumer Complaint Information
Document ID: CFPB-2018-0006-0001

Comment:
The Consumer Financial Protection Bureau's public complaint database is an invaluable resource for Hoosier consumers. Members of the Indiana Assets & Opportunity Network have used the database in a variety of ways in their work to promote public policies that allow low-wealth Hoosiers to build assets. We ask that the CFPB continue to offer this important tool for consumers, researchers, and policymakers, and commit to keeping the data publicly available.

Collectively, we have referred a number of individuals and organizations to the complaint database to seek redress. One Hoosier was made aware of a pending lawsuit against the tribal lender she was struggling to pay back through the complaint process, while others have reported that filing a complaint with the database secured a more prompt and satisfactory response than their individual efforts garnered. Over 16,000 Hoosiers have submitted complaints to the CFPB on issues ranging from debt collection tactics to student loan servicing problems.

We have also used the data to inform our publications and policy priorities. In an upcoming policy brief on debt collection, the ability to sort complaints by type revealed that many Hoosiers have complained about collection attempts for debts they feel they do not owe and tactics they find inappropriate. This enabled our researcher to focus policy recommendations on the areas of greatest concern. In the aggregate, complaints provide compelling information about the policy and program areas that could benefit from further attention.

A public database connected to a regulatory body leads to greater accountability and swifter resolution of consumer concerns. Private ratings websites, while meaningful, are not backboned by an agency that can seek out patterns of practice or go after bad actors. Further, they have no commitment to maintain operations; they could be here today and gone tomorrow. Maintaining this particular database is important to lending weight to consumer feedback and resolving problems quickly.

Again, the Indiana Assets & Opportunity Network respectfully requests that the CFPB keep this powerful consumer tool and the data it produces accessible.

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First Name: Kathleen
Last Name: Lara
Organization Name: The Indiana Assets & Opportunity Network

This information will not appear on Regulations.gov:

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June 4, 2018

Comment Intake
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

RE: Public Comment on Docket No. CFPB-2018-0006 (83 FR 9499)

Dear Sir or Madam:

Veterans and military service organizations appreciate and benefit from the public reporting and database of consumer complaints received by the US Consumer Financial Protection Bureau.

Because servicemembers, veterans, their families, and survivors are targets for consumer fraud by predatory financial companies, it is essential that their complaints are not hidden from the public and the organizations that represent and serve them.

The Bureau's current practices of publishing monthly complaint reports, special reports on servicemembers, and other similar tools are extremely useful to external stakeholders. Most notably, the public consumer complaint database allows service members, veterans, and their families to explain challenges they have had in just a few words. Seeing these comments is extremely helpful for the public and the organizations that serve veterans, servicemembers, and their families and survivors to understand the true nature of problems faced by them. The database is essential to ensuring quality customer service and accountability and helping prevent others from falling victim to the same types of consumer fraud. By providing an early warning system about fraud and a sense of the trends in consumer concerns, the database also helps prevent waste, fraud, and abuse of taxpayer dollars that flow to consumer financial companies.

We urge you not to curtail or cut back on the Bureau's public reporting and not to curtail the level of access to complaint information currently available to external stakeholders and the public through the public consumer complaint database, including the ability to search complaints for specific types of abuses by specific financial companies. If anything, we would encourage the Bureau to build additional tools to enable users to better analyze complaint information to better protect American consumers.

Sincerely,

Joseph Chenelly
National Executive Director
AMVETS

Neil Van Ess
National Commander
Military Order of the Purple Heart

[continued on next page]

Kristofer Goldsmith
President
High Ground Veterans Advocacy

Phil Gore
Legislative Director
National Association of Veterans' Program Administrators

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U.S. Coast Guard Chief Petty Officers Association & Enlisted Association

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Carrie Wofford
President
Veterans Education Success

[Regulations.Gov: Your Comment Tracking Number: 1k2-93j9-70xd]

Advancing Economic Security and Community Prosperity

June 7, 2018

Kristine M. Andreassen
Owen Bonheimer
Senior Counsels
Office of Regulations
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Docket No. CFPB-2018-0009 -- Request for Information Regarding Consumer Financial Protection Bureau Rulemaking Processes

Dear Ms. Andreassen and Mr. Bonheimer:

Woodstock Institute submits these comments in response to the Consumer Financial Protection Bureau (CFPB)'s Request for Information (RFI) regarding its rulemaking processes. In its first several years of operation, the CFPB's rulemaking process has been inclusive, transparent, evidence-based and comprehensive. It is essential to preserve this robust process.

1. About Woodstock Institute

Woodstock Institute is a leading nonprofit research and policy organization in the areas of equitable lending and investment, wealth creation and preservation, and access to safe and affordable financial products and services. We work locally and nationally to create a financial system in which lower-wealth persons and communities of color can safely borrow, save, and build wealth so that they can achieve economic security and community prosperity. Our key tools include: applied research; policy development; coalition building; and technical assistance.

In recent years, Woodstock played a leading role on reforms regarding payday and other high-cost lending, currency exchanges/check-cashers, debt collection, public fines & fees, children's savings accounts, and retirement savings programs for private sector workers. Woodstock also plays a leading role in helping to ensure banks invest in and provide safe and affordable services to low- and moderate-income communities, communities of color, and older people.

2. Objections to the CFPB's Request for Information Process

This RFI is one of a litany of RFIs that have been issued under the direction of Acting Director Mick Mulvaney. The number of RFIs and their frequency is overly burdensome to small not-for-profits like Woodstock. Industry, with its greater resources in terms of staff and otherwise, is far more capable than the consumer advocacy community in developing thorough responses to this flood of RFIs. The amount of time and attention required to try to address the flood of RFIs has diverted scarce nonprofit resources that might otherwise be spent on other issues like the gutting of Dodd-Frank or the multitude of Congressional efforts to repeal agency rulemakings through the Congressional Review Act. The information provided through this RFI process will be inherently skewed in industry's favor simply because it has the necessary resources to create an official record reflecting its position. Accordingly, at the end of the day, the official record that will have been established through this process is not an accurate reflection of the variety and force of opinions on the many issues covered by the RFIs. We anticipate the need to raise objections insofar as this process is used to back off enforcement, lessen oversight, or gut the CFPB itself.

3. The CFPB should maintain and expand opportunities for public input in its rulemaking process.

We applaud the CFPB for embracing an inclusive approach to public outreach and including additional opportunities for public input in its rulemaking processes. The CFPB should continue its efforts to hear from consumers as much as possible to inform its rulemaking at all stages of the process.

The CFPB's field hearings and meetings provide a valuable avenue for the general public to share their experiences directly with the CFPB, and the agency should hold more field hearings and meetings with consumer groups to allow the public more direct access to the CFPB throughout the rulemaking process. The CFPB should continue to explore innovative ways to broaden opportunities for input, including online tools and social media. It is crucial that the CFPB preserve this strong tradition of inclusive public outreach because consumer protection is the core the agency's mission. Public input has helped the CFPB make informed decisions in its rulemaking, and outreach should be expanded to allow for even greater public, i.e., consumer, participation. Field hearings and roundtable discussions should take place as a complement to, and not as a substitute for, regular in-person meetings of the duly constituted Consumer Advisory Board.

In particular, we strongly urge the CFPB to seek broad public input in the early stages of identifying problems and potential solutions and as proposed rules are being developed. Once the CFPB has developed a Notice of Proposed Rulemaking (NPRM), we support continuation of the practice of first publishing the proposal on the CFPB website, before it is published in the Federal Register. This practice gives the public more time to respond, and often the public is more familiar with the CFPB website.

We also strongly support publishing both proposed and final rules along with a press release, blog post, summaries, fact sheets, videos and other materials to make the rulemaking process more accessible and more comprehensible to a wider audience.

While the public should be encouraged to submit comments on a timely basis, the CFPB should not impose any hard rules against receiving input after the comment period closes. Many rulemakings take many years, during which new information can become available, new issues may arise, or the public may become newly aware about the importance of a rulemaking.

The CFPB should also be proactive about reaching out to consumer groups for additional input when new information has come to light or circumstances have changed and, in particular, when industry has provided new information. We also encourage the CFPB to hold more joint roundtables so that all parties can be in the room at the same time. These roundtables have encouraged helpful dialogue in the past.

The CFPB should not impose a formal reply period to comments. Commenting on any relevant topic, including comments submitted by others, should be encouraged, but a formal reply period unduly favors industry, which has the resources to read and respond to numerous comments, whereas neither our organizations nor certainly the general public has comparable capacity to do so.

4. The CFPB should stay transparent in its rulemaking process to ensure that the agency stays accountable to the public.

Since its beginning, the CFPB made a strong commitment to transparency so that its rulemaking process would be impartial and fully informed. For example, while the CFPB is required by law to meet with small business representatives before commencing rulemaking, the CFPB's commitment to transparency is demonstrated in its practice of distributing the briefing materials to the general public before these meetings, which provide insight into what options the CFPB is considering and an opportunity for all sides to provide input before the rulemaking process begins. Another example is the agency's *ex parte* policy. Recognizing the danger of undue influence from one-sided communications behind closed doors, the CFPB implemented a policy requiring *ex parte* communications to be documented in writing and publicized.

The CFPB should continue these practices and publish as much information as possible to stay accountable to the public about the information it is considering in its rulemaking deliberations. We urge the CFPB to complete and publish *ex parte* memoranda promptly and to post a log of each *ex parte* contact that occurs regarding a rulemaking process. Transparency is one of the CFPB's greatest strengths, and it should be preserved and expanded to protect the credibility of the rulemaking process.

5. The CFPB should continue to rely on all types of objective empirical research to inform its decisions in rulemaking and should not politicize the analytical process.

The CFPB has prioritized empirical research by integrating its Research and Markets team's impartial research into its rulemaking process. One major source of quantitative data used in this research is the information the CFPB collects through its examinations, enforcement actions, and consumer complaint database. It is important for the CFPB to continue collecting this data so that it can do its own empirical analysis, which preserves its impartiality.

Moreover, recognizing that numeric fields may not tell an entire story, the CFPB enhances its analysis with qualitative data and field insights. These qualitative data, including individual stories, are a fundamentally important part of meaningful research into the impact of consumer financial products and services, and must not be disregarded. Examples of consumer experiences play a valuable role in alerting the CFPB to new issues, possible trends, emerging types of consumer harm, and gaps in or evasions of existing protections.

Disregarding consumer stories as unrepresentative "anecdotes" is particularly dangerous because it encourages one-sided decision-making. Consumers are well-equipped to describe their personal experiences with financial institutions but, in many cases, neither consumers nor consumer advocates are likely able to assemble quantitative data that could show how widespread any problems are. Nor are they likely to have access to quantitative data from industry or third party vendors. Without access to industry data, consumers are also in no position to respond to one-sided presentations. Yet consumers' descriptions of their experiences can point to market trends, and to areas where further scrutiny is needed, and should not be ignored. As the agency has done throughout its history, it should use consumer stories as a starting point for further inquiry and an essential part of its analysis.

Similarly, the CFPB should not politicize the analytical process. The CFPB is, by design, independent from the White House and is not required to, and should not, submit its rules to the Office of Management and Budget (OMB) for review. An OMB review would be a fundamental violation of the CFPB's independence and contradictory to Congressional intent in maintaining the agency's independence from the executive branch. We also object to moving the cost-benefit analysis section into the director's office and urge that the function remain in the hands of non-political staff.

To its credit, the CFPB has always relied on a broad range of both quantitative and qualitative data in its analyses to inform its rulemaking. It is imperative that the CFPB continue to draw from a variety of sources for this type of research going forward.

The CFPB rulemaking process is thoughtful and thorough. From beginning to end, the CFPB's rulemaking process provides all stakeholders with the opportunity to weigh

in and allows for the CFPB to have data and information from a wide variety of sources in order to make informed decisions. This robust and responsive rulemaking process is effective in producing rules that carry out the consumer protection mission of the agency and should be maintained for the CFPB's future rules.

Sincerely,

WOODSTOCK INSTITUTE