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 Redacted or Redacted

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)

Redacted

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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

[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

[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;

[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

[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

[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:
> (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

[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.

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

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.

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

Redacted

- 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

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

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.htm (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(d), 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. <u>Judicial Supervision Ensures that Recipients' Rights Are Protected</u>

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 § 13405(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. <u>The Bureau Has Used Its Investigative Authority Responsibly and Effectively</u>

As our state's 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. <u>Conclusion</u>

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
Hawaiʻi Attorney General

Stephen H. Levins
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Pennsylvania Attorney General

Peter F. Kilmartin
Rhode Island Attorney General

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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.

Request for Information on Adopted Regulations and New Rulemaking Authorities

- 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

[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

[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,

[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

[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]

[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

[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

[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

[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.

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The length of Bureau investigations.

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

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

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

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

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

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

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

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

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

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

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

11 POLICIES AND PROCEDURES MANUAL VERSION 3.0 at 94.

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

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

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

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

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

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

[14] POLICIES AND PROCEDURES MANUAL VERSION 3.0 at 91.

[15] *Id.*

[16] *Id.*

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

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

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

[17] *Id.* at 96.

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

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

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

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

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

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

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

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

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

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

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

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

(D) the history of previous violations; and

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

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

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[19] 12 U.S.C. § 5565(c)(3).

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

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

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

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

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

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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.

[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.

[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

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[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

[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—

[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. §

[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

[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

[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

[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.

[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

[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*

[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]

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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

[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.

[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

[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.

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[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

[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

[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

[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

[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

[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

[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.

[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

[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.

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[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,

[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

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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

[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

[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)

[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

consumer action
Education and advocacy since 1971

www.consumer-action.org

Redacted

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

Redacted

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 (9^{th} 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.
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These views are spelled out in more detail below.

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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.

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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.

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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

[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. Time-Barred Debt

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. Litigation Disclosure

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

[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) <u>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.</u>

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.

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[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

[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

[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

[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

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[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

[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

[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

[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

[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.

[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).