BANK POLICY INSTITUTE

June 1, 2019

Via Regulations.gov
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
Attn: Comment Intake

Re: Request for Information to Assist the Taskforce on Federal Consumer Financial Law (Docket No. CFPB-2020-0013)

Ladies and Gentlemen:

The Bank Policy Institute[1] appreciates the opportunity to comment on the request for information issued[2] by the Consumer Financial Protection Bureau seeking input to assist the Taskforce on Federal Consumer Financial Law.

Consumer financial services laws and regulations play a vital role in aiding consumers to make sound financial decisions regarding credit, lease, deposit, and payment products by providing transparency regarding pricing and other key terms. They also include important substantive protections, such as protections against unlawful discrimination or deceptive advertising. These laws and regulations give the CFPB supervisory and enforcement powers to monitor and enforce compliance with their requirements.

Like other legal frameworks, consumer financial services laws and regulations are a product of the time when they were adopted. Technology and consumer preferences, however, continually evolve. For example, mobile banking via smart phones, alternative data, and artificial intelligence were not significant factors when existing regulatory frameworks were established. As a result, the consumer financial protection regulatory framework periodically should be modernized to reflect the evolution of technology, and consumer patterns of engaging with financial services providers. Similarly, the CFPB's supervision and enforcement practices were instituted shortly after the agency's creation and in the aftermath of the 2008-09 financial crisis. While supervisory practices have evolved as the CFPB has matured, institutionalizing these improved practices is an important next step in the evolution of the CFPB and its relationship with supervised entities.

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[1] The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

[2] Request for Information to Assist the Taskforce on Federal Consumer Financial Law, 85 Fed. Reg. 18,214 (April 1, 2020) (hereafter "Taskforce RFI").

For the reasons stated above, BPI's comments focus on the following five areas:

- First, BPI recommends that the CFPB modernize consumer disclosures so that they serve consumers who increasingly choose to operate in a digital world. One impediment to electronic disclosures results from the consumer having to "reasonably demonstrate" an ability to access disclosures electronically. Another concern is that disclosures developed for a paper-based world are increasingly being viewed by consumers on small-screen devices, but the content, format, and timing requirements for disclosures have failed to keep pace with these contemporary methods of accessing disclosures. For both areas, disclosures should be useful to a consumer regardless of how he or she chooses to receive and view the information, and disclosure rules should be sufficiently flexible to accommodate further advances in technology and consumer preference.

- Second, BPI recommends that the CFPB use the experience of the COVID-19 pandemic to modernize regulatory requirements to provide more flexibility so that firms can more readily meet consumer needs in times of crisis. Advance notice requirements and time limits on certain temporary relief measures are examples of where greater flexibility would better serve consumers.

- Third, BPI recommends that the CFPB take steps to modernize credit underwriting to enhance opportunities to use alternative data and artificial intelligence/machine learning models to refine credit underwriting and promote access to responsible credit.

- Fourth, BPI recommends that the CFPB institutionalize constructive changes made to its supervision process.

- Fifth, BPI recommends that the CFPB implement certain changes to its enforcement policies to make the process more fair, transparent, and consistent.

I. Modernize Consumer Disclosures for a Digital World

Account opening documentation, periodic statements, and changes in terms should be redesigned to serve consumers who increasingly operate in a digital world, while continuing to meet the needs of consumers who opt to receive paper disclosures. This modernization of consumer disclosures should focus on eliminating obstacles to providing disclosures electronically and creating more flexible and streamlined disclosure requirements. Such an approach would be better adapted to meet consumer needs regardless of the means they use to access information.

A. An increasingly digital world requires modernizing the E-Sign Act standard for "reasonably demonstrating" the ability to access disclosures electronically.

The Electronic Signatures in Global and National Commerce Act ("E-Sign Act")[3] was a groundbreaking statute when it was adopted 20 years ago to give legal recognition to the use of electronic records and signatures in commerce, including in consumer financial disclosures. At the time, Senator Phil Gramm, then Chair of the Senate Banking Committee, correctly predicted that the legislation–

> will expand for consumers everywhere the availability of products and services as well as permit tremendous time savings. With consumers no longer bound by expensive and time-absorbing requirements to complete transactions through the mail or in person, consumer costs will decline and choices will grow.

[3] 15 U.S.C. § 7001 *et seq.*

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Working from home computers, people will increasingly be able to pay bills, apply for mortgages, trade securities, and purchase goods and services wherever and whenever they choose.[4]

Consumer behavior and preferences have changed significantly over the past 20 years. At the time the E-Sign Act was passed, as Senator Gramm noted, the home computer was the primary means of access, and electronic banking was just beginning to gain traction with consumers.[5] Mobile banking and the digital revolution in the delivery of financial services accelerated over the past decade, following the introduction of the iPhone in 2007.[6] Today, a majority of consumers access their financial account information electronically,[7] and it is the smart phone and other small devices, rather than the home computer, that are leading this digital transformation. Electronic and digital banking has become ubiquitous and a majority of consumers operate comfortably in a digital world and routinely use digital devices to conduct financial transactions.

Congress included in the E-Sign Act's consent provisions certain conditions designed to ensure that consumers who agreed to the electronic delivery of disclosures could actually access the disclosures electronically. In today's digital-driven environment, however, the lack of clarity and seamlessness around those conditions frustrate consumer choice and limit the efficient delivery of information to consumers. The increased use of and reliance on digital banking channels as a result of the COVID-19 crisis underscores the importance of revisiting these E-Sign consent issues. For the CFPB and other interested stakeholders, the key objective should be to promote consumer choice by ensuring that they have accurate and timely disclosures in whatever channel the consumer opts to use.

Consumers increasingly find that the electronic delivery of disclosures is a convenient method of receiving information about their financial products and services. The law, however, continues to favor paper disclosures over electronic disclosures. Specifically, consumers can choose electronic disclosures only if they can "reasonably demonstrate" that they will be able to access the disclosures electronically. The combination of requirements to provide some disclosures at or before account opening and uncertainty about what constitutes a "reasonable demonstration of access" requires that institutions establish inefficient processes that limit consumers' ability to choose electronic disclosures.

Support for a flexible approach to the "reasonable demonstration" requirement is found in the legislative history of the E-Sign Act. In a colloquy, Senators Abraham and McCain agreed that the "reasonable demonstration"

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[4] *See* Press Release, Senate Banking Committee, Statement of Senator Phil Gramm (June 16, 2000).

[5] *See* Bell, Hogarth, and Robbins, U.S. Households' Access to and Use of Electronic Banking, 1989-2007, 95 Fed. Res. Bulletin 2009 ((consumer survey showing that use of online banking jumped from a mere seven percent in 1998 to 21 percent in 2001, followed by increases to 35 percent in 2004 and 53 percent in 2007).

[6] Board of Governors of the Federal Reserve System, Consumers and Mobile Financial Services 2016 at 1 (March 2016) (providing data on the increasing use of mobile banking and mobile payments by consumers with a majority of consumers using some form of mobile banking functionality); Ellen A. Merry, FED Notes, Mobile Banking: A Closer Look at Survey Measures (Federal Reserve Board, March 27, 2018) (noting "an upward trend in mobile banking since 2011"); Citigroup, News Release, Mobile Banking One of the Top Three Most Used Apps by Americans, 2018 Citi Mobile Banking Study Finds (April 26, 2018); ABA Survey: Two-Thirds of Americans Use Digital Banking Channels Most Often (Sept. 21, 2017) (reporting on a survey that four in ten Americans manage bank accounts online while 26 percent primarily use their mobile phones for banking); Pew Research, Mobile Fact Sheet (June 12, 2019) (according to the Pew Research Center, the percentage of Americans who own smart phones jumped from 35 percent in 2011 to 81 percent in 2019, a vast change from the largely stationary internet of the early 2000s, while one-in-five Americans is a "smartphone-only" internet user.).

[7] *See* Board of Governors of the Federal Reserve System, Consumers and Mobile Financial Services 2016 at 1 (March 2016) (providing data on the increasing use of mobile banking and mobile payments by consumers with a majority of consumers using some form of mobile banking functionality); ABA Survey: Two-Thirds of Americans Use Digital Banking Channels Most Often (Sept. 21, 2017) (reporting on a survey that two-thirds of Americans use online and mobile banking as their primary banking channels).

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requirement "could be satisfied in many ways" and that the requirement was not intended to " burden either consumers or the person providing the electronic record."[8] Accordingly, the legislative intent described therein was to provide consumers with "a simple and efficient mechanism to substantiate the ability to access the electronic information" provided to them, for example, by the consumer acknowledging or providing an affirmative response to a query or by actually accessing records in the relevant electronic format.[9] Consistent with the themes of flexibility and minimal burden set forth in the colloquy, the CFPB should apply the statutory standard in a way that takes into consideration evolving methods of consumer engagement with financial institutions through technology.

To clarify and modernize electronic disclosure consent and delivery standards in the flexible manner needed in the age of digital financial services, the CFPB should exercise its interpretive and exemption authority under existing consumer protection statutes to permit the electronic delivery of disclosures to consumers who choose them. This could be done, for example, by indicating that disclosures provided electronically pursuant to consumer consent need not also be provided "in writing." The CFPB also could set certain principles for electronic disclosures, such as requiring electronic disclosures to be provided via a commonly used delivery mechanism. This flexibility is especially important when consumers engage with banks through digital channels. In addition, the CFPB should provide more certainty related to the delivery of electronic disclosures through digital channels, such as mobile devices, by applying the "mailbox" rule—deeming electronic disclosures provided when sent—more explicitly to electronic disclosures, such as by allowing receipt to be deemed provided upon sending an email or a link containing the disclosures.

Promoting and expanding the use of electronic disclosures is vital to ensuring that digitally-connected consumers obtain important disclosures in a manner that meets their expectations and methods of engaging with financial services providers in an increasingly digital world. As the COVID-19 pandemic has shown, the ability to provide disclosures and other information to consumers electronically without friction is critical for keeping consumers connected and informed about their financial matters.

B. The CFPB should undertake efforts to modernize the content, format, and timing of disclosures to create streamlined disclosures and more flexible disclosure requirements.

The CFPB should reassess the content, format, and timing of disclosures generally and tailor disclosure requirements to reflect the ongoing evolution of technology and consumer expectations. Today, consumers increasingly view disclosures on mobile devices and in real time, and technology and consumer engagement patterns will continue to evolve. Therefore, disclosure requirements should be sufficiently flexible to be able to adapt to changes in technology and methods of consumer interaction with financial institutions.

The CFPB should make it a top priority to adopt shorter, more streamlined disclosures as consumers are increasingly accessing and viewing disclosures, including account opening disclosures, on mobile devices. In addition, the CFPB should permit increased use of layered disclosures in which detailed information, if any, can be provided via a website link, given the smaller screen size of mobile devices. Such changes would improve the quality of disclosures and enhance consumer engagement with disclosures, leading to more informed consumers.

For example, consumers reviewing credit card disclosures on mobile devices must scroll through numerous screens, not just during the application process, but for all instances where disclosures are required during the product lifecycle. As a result, banks face challenges in providing consumers with compliant disclosures on a digital platform in a consumer-friendly manner. Other industries, such as technology companies or advertisers, have sought to streamline consumer disclosures through "just-in-time" disclosures, icons or dashboards, driven largely by

[8] 146 Cong. Rec. S5282 (June 13, 2000).

[9] *Id.*

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increased mobile device usage on the part of consumers.[10] Unlike these companies, however, banks operate in a unique space—one that requires balancing consumer demand for the use of digital platforms with ensuring appropriate compliance with the relevant consumer financial protection obligations. Maintaining such a balance, however, requires disclosure regulations to keep pace with changes in consumer use of digital platforms, something that has not happened.

The solution is for the CFPB to comprehensively reexamine and modify the consumer disclosure regime under Regulations Z, E, and DD to provide greater flexibility to adapt disclosures for small-screen digital formats so that consumers can more easily navigate disclosures regardless of the channel they use to view them. We offer as examples three specific suggestions for disclosure modifications. *First*, the requirements for tabular disclosures could be modified to accommodate a mobile design. Instead of a fixed table, disclosures could be permitted to use a "dashboard" solution, where the primary tabular disclosures are clearly displayed, but secondary features, such as rewards, could be provided through collapsible titles to make the disclosures easier for the consumer to use. *Second*, the CFPB could expand the periodic statement alternative it adopted for prepaid cards[11] and make it, or an alternative modeled on it, an option for other financial products. *Third*, advance notice times for change in terms notices under Regulations Z and E[12] and for preauthorized transfer payment notices under Regulation E[13] could be reduced to reflect the faster delivery of and access to disclosures provided to consumers electronically.

Beyond targeted changes to address specific disclosure issues, the CFPB should consider adopting a principles-based approach to disclosures that can evolve with technology and market developments. This approach could be combined with safe harbor examples to facilitate compliance. Key disclosure principles should include:

- Form and format requirements should be stated as principles, to the extent permitted by law, and should be sufficiently flexible to take into account differences in display technologies and methodologies, including with respect to location, spacing, sizing, grouping and segregation. For example, the use of hyperlinks to provide disclosures should be permitted to facilitate layered disclosures in small-screen formats and provide for the prominent disclosure of the most important information.

- Disclosure content requirements should not vary based on the method of disclosure.

- Disclosures required to be made in writing should be allowed to be made electronically to consumers who consent or agree to electronic disclosures, including consent or agreement obtained by telephone or in person, without the extra hurdle of a reasonable demonstration of access.

- Timing requirements should not vary based on the method of disclosure. This requires an expanded "mailbox" rule that applies so that electronic disclosures, like paper disclosures, are deemed provided when sent (or accessed electronically).

II. Modernize Regulations to Provide Flexibility to Meet Consumer Needs in Times of Crisis

The CFPB should modernize its regulations to provide institutions with greater flexibility to meet consumer needs in times of crisis, whether national, regional, or individual. The COVID-19 pandemic, the 2019 government shutdown, and prior crises have illustrated various ways in which existing regulatory requirements are too inflexible and prescriptive to allow firms to quickly and efficiently meet consumer needs in times of crisis. The CFPB has undertaken many important steps during the COVID-19 situation to provide flexibility and alleviate burden so that

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[10] *See* FTC Report, Mobile Privacy Disclosures: Building Trust Through Transparency (Feb. 2013).

[11] 12 C.F.R. § 1005.18(c).

[12] 12 C.F.R. § 1026.9(c); 12 C.F.R. § 1005.8(a).

[13] 12 C.F.R. § 1005.10(d).

institutions can focus on serving consumers in this time of great need. However, the CFPB's ability to act is constrained, in many respects, by the prescriptive nature of certain regulatory requirements. More can and should be done to enable banks to extend relief to consumers in times of stress. Going forward, the CFPB should leverage what it has learned from these experiences to modernize regulations to be more flexible and principles-based. Such an approach would enable institutions to better serve the needs of consumers under all types of conditions, including during crises, without the need to obtain special relief from regulators.

For example, certain provisions of the Credit Card Accountability, Responsibility, and Disclosure Act of 2009 ("CARD Act") and its implementing regulations limit the ability of credit card issuers to provide prompt and efficient assistance to consumers in time of crisis. *First*, the advance notice requirements for increasing an annual percentage rate, fee, or charge on a credit card and the broader prohibition on increasing rates, fees, or charges on card during the first year after a credit card account is opened[14] can place some restriction on issuers' ability to offer limited-duration APR and fee reductions to consumers, particularly new customers, in times of crisis, unless the workout and temporary hardship arrangement exception applies (with its written disclosure requirement).[15] The E-Sign Act consent requirements, particularly the "reasonable demonstration" requirement described above, further exacerbate the effects of the advance notice requirements. *Second*, under the CARD Act rules, a credit card issuer may not provide temporary relief in the form of a reduced APR, fee, or charge for a period of less than six months.[16]

Based on the foregoing, the CFPB may consider modifying Regulation Z to allow credit card issuers to provide temporary relief *in limited circumstances*, such as natural disasters, based upon the electronic disclosure of clear and conspicuous terms and conditions without regard to the E-Sign consent requirements, the CARD Act/Regulation Z advance notice/protected balance requirements, and the CARD Act/Regulation Z limitations on rate and fee increases on first-year credit card accounts. Even absent a crisis, we would note that there may be opportunities for the CFPB to provide greater flexibility to allow creditors to meet the specific needs of consumers. For example, consumers may find it beneficial to trade up to a different card product within the first year of the account, even if the new product has a higher rate or fees, without having to submit a new application.

III. Modernize Credit Underwriting to Encourage the Use of New Technologies and Innovations

The regulatory framework for credit underwriting was designed in an era of traditional credit underwriting models and impedes the use of alternative data and artificial intelligence and machine learning models (collectively, "AI models") in credit underwriting. The broader use of alternative data, particularly cash flow data, and AI models can expand access to credit and lead to more accurate and improved outcomes in credit underwriting. The regulatory framework should be updated to embrace and encourage the use of these important innovations.

A. Revise regulations to encourage the ue of alternative data, particularly bill payment and cash flow data, in credit underwriting.

The CFPB should take steps to update guidance and regulations to encourage the use of alternative data in credit underwriting, especially the use of bill payment data and data on cash flow through transactional accounts, and provide greater flexibility to adjust pricing and terms for open-end credit to reflect changes in cash flow.

Late last year, the CFPB and the other federal banking agencies issued a constructive interagency statement which recognized that the use of alternative data can improve credit underwriting and expand access to

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[14] 12 C.F.R. § 1026.55(b)(3).

[15] 12 C.F.R. § 1026.55(b)(5).

[16] 12 C.F.R. § 1026.55(b)(1).

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responsible credit.[17] The agencies broadly described "alternative data" as "information not typically found in the consumer's credit files of the nationwide consumer reporting agencies or customarily provided by consumers as part of applications for credit."[18] Such data includes, among other things, bill payment and cash flow data.[19] The agencies focused on cash flow data as a well-accepted benchmark of financial health and ability to repay credit obligations, both for consumers and for small businesses.[20] The agencies observed that "[c]ash flow data may include a range of metrics that examine categories of income and expenses (e.g., fixed expenses such as housing, amount of variable expenses, etc.) and how a consumer or small business has managed an account over time (e.g., residual balances)."[21]

Banks continue to explore using alternative data, particularly bill payment and cash flow data, to further expand access to credit products. For example, an applicant's ability to make consistent utility, cellular, rental, housing, or medical payments could both predict a borrower's ability to repay credit obligations and yield greater insight into a borrower's credit behavior.[22] The use of factors beyond those traditionally used in credit scores to assess credit risk holds great promise, but requires clear and flexible rules of the road.

BPI recommends that the CFPB to build upon the interagency recognition of cash flow as a beneficial type of alternative data by incorporating cash flow (and bill payment) underwriting into its regulations. *First*, the CFPB should revise the Regulation Z ability-to-repay standards, particularly for credit cards, to recognize a broader range of cash flow and bill payment metrics as acceptable bases for ability-to-repay determinations as alternatives to reliance on metrics such as debt-to-income ratios that may raise artificial barriers to credit access.[23] *Second*, the CFPB should provide further support for the use of modeled income based on empirically derived, demonstrably and statistically sound models, as permitted by the official interpretations to Regulation Z.[24]

This recognition of the value of cash flow and bill payment data should be the beginning, and not the end, of the CFPB's efforts it this area. The CFPB should actively identify other types of alternative data that improve credit

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[17] Interagency Statement on the Use of Alternative Data in Credit Underwriting at 1 (Dec. 3, 2019) (recognizing that "the use of alternative data may improve the speed and accuracy of credit decisions and may help firms evaluate the creditworthiness of consumers who currently may not obtain credit in the mainstream credit system.").

[18] *Id.* at 1 n. 1 (citing CFPB, Request for Information Regarding Use of Alternative Data and Modeling Techniques in the Credit Process, 82 Fed. Reg. 11,184 (Feb. 21, 2017)).

[19] CFPB, Request for Information Regarding Use of Alternative Data and Modeling Techniques in the Credit Process, 82 Fed. Reg. 11,184 (Feb. 21, 2017).

[20] Interagency Statement on the Use of Alternative Data in Credit Underwriting at 2 (noting that "the evaluation of a borrower's income and expenses to help determine repayment capacity is a well-established part of the underwriting process. Improving the measurement of income and expenses through cash flow evaluation may be particularly beneficial for consumers who demonstrate reliable income patterns over time from a variety of sources rather than a single job.").

[21] *Id.* at 2 n. 5.

[22] *See id.* at 1-2; Request for Information Regarding Use of Alternative Data and Modeling Techniques in the Credit Process, 82 Fed. Reg. 11183 (Feb. 21, 2017) (noting that "the use of traditional data and modeling techniques has left some important gaps in access to mainstream credit for certain consumer groups and segments); GAO, Agencies Should Provide Clarification on Lenders' Use of Alternative Data , GAO-19-111 (Dec. 2018) (stating that both fintech lenders and banks see the benefits of additional clarity regarding the use of alternative data as a part of underwriting models); *see also* Greg Baer & Naeha Prakash, Machine Learning and Consumer Banking: An Appropriate Role for Regulation (Mar. 14, 2019).

[23] *See* 12 C.F.R. § 1026.51(a). For example, the current residual income standard in Regulation Z has limited practical utility without greater clarity and certainty around how regulators would apply it. *See* 12 C.F.R. § 1026.51(a)(1)(ii).

[24] 12 C.F.R. part 1026, supplement I, § 1026.51(a)(1)(i)-5.iv.

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underwriting, collect or conduct the necessary research, and (where appropriate) make the same types of adjustments proposed above for the use of other alternative data.

Finally, the CFPB should work with the federal banking agencies to promote a uniform approach to ability-to-repay standards. In certain circumstances, existing credit card ability-to-repay standards are not applied uniformly by the different regulatory agencies. As the agency responsible for adopting these standards, the CFPB should take the lead and, in consultation with the federal banking agencies, to ensure a level playing field in the application of ability-to-repay standards for all banks, regardless of charter, and for non-banks.

B. Promote innovation and access to credit by supporting the use of artificial intelligence models in credit underwriting.

The increased availability of alternative data gives banks the opportunity to explore the use of innovative types of credit scoring models to further expand access to credit products. In particular, credit underwriting models built upon AI Models have the potential to consider large sets of alternative data and provide a more nuanced perspective for demonstrating a customer's repayment ability. Moreover, incorporating AI Models into the traditional credit underwriting process would aid in further streamlining the process and increase efficiencies, in turn reducing costs for borrowers.

The development and implementation of AI models in credit underwriting represents the next step in the ongoing evolution of automated underwriting, an approach that regulators generally favor over manual underwriting. As BPI explored in a white paper discussion draft on artificial intelligence in credit underwriting, the current regulatory framework makes it difficult for banks to implement AI models, while non-banks face fewer regulatory constraints.[25]

The CFPB recently has taken constructive steps to clarify that ECOA and Regulation B contain "built-in flexibility" for providing specific reasons for adverse action that are compatible with the use of AI algorithms.[26] The CFPB, in consultation with the federal financial regulators, should continue to take concrete steps to modernize the regulatory framework to promote the use of artificial intelligence in credit underwriting without imposing overly prescriptive regulatory requirements on this new and evolving area.[27] These should include the following:

- The CFPB should focus on facilitating the assessment and use of AI models in credit underwriting in a manner that is consistent with the anti-discrimination principles set forth in the fair lending laws. Financial institutions are committed to assessing fair lending risks and designing and implementing appropriate safeguards to mitigate any risk of discrimination while using AI Models.[28] However, these efforts may require that the CFPB demonstrate flexibility in the procedures it uses to examine financial institutions for such risk.

- The CFPB should continue to provide flexibility and further clarity relating to making the reasons for the decisions generated by AI models transparent to credit applicants in adverse action notices under the Equal Credit Opportunity Act and the Fair Credit Reporting Act.

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[25] Bank Policy Institute and Covington & Burling LLP, Artificial Intelligence Discussion Draft, The Future of Credit Underwriting: Artificial Intelligence and its Role in Consumer Credit at 15-21 (Sept. 9, 2019).

[26] Fair Lending Report of the Bureau of Consumer Financial Protection at 9-10 (April 2020).

[27] These steps could take the form of revised regulations, interagency guidance, updated examination procedures, or some combination thereof.

[28] *See* Artificial Intelligence Discussion Draft at 14.

- The CFPB, in conjunction with the federal banking agencies, should articulate practical standards for developing and validating AI models to satisfy risk management expectations for both consumer protection (*e.g.*, anti-discrimination) and safety and soundness.

This additional clarity will promote innovation, prevent discrimination, and ensure consistent application of requirements across banks and non-banks in a manner that promotes access to responsible and safe credit products, including for borrowers that traditionally have had less access to these products.

IV. Modernize the CFPB's Supervisory Process

A. The CFPB should take the lead role in examining for compliance with federal consumer financial law.

Section 1025 of the Dodd-Frank Act grants the CFPB "exclusive authority" to require reports and conduct examinations on a periodic basis of insured depository institution with total assets of more than $10,000,000,000 and any affiliate thereof for purposes of—

- Assessing compliance with the requirements of "Federal consumer financial laws;"

- Obtaining information about the activities subject to such laws and the associated compliance systems or procedures of such persons; and

- Detecting and assessing associated risks to consumers and to markets for consumer financial products and services.[29]

The federal banking agencies retain authority to examine financial institutions for issues that could pose a threat to those institutions' safety and soundness. Those agencies also have authority to conduct examinations to assess consumer compliance by financial institutions with less than $10 billion in total assets.

The Dodd-Frank Act contemplates coordination among the CFPB and the federal banking agencies. For example, sections 1025(b)(2) and 1024(b)(3)-(4) of the Dodd-Frank Act require the CFPB to coordinate its supervisory activities with the supervisory activities conducted by the Federal Banking Agencies, including consultation regarding their respective schedules for examining institutions and requirements regarding reports to be submitted by institutions.[30] Section 1025(e)(1) of the Dodd-Frank Act requires that the CFPB and the Prudential Regulators:

- Coordinate the scheduling of examinations of Covered Institutions;

- Conduct simultaneous examinations of insured depository institutions with more than $10 billion in assets and their insured depository institution affiliates, unless the institution requests separate examinations;

- Share draft reports of examinations of those institutions with the other agency and permit the receiving agency at least 30 days to comment on the draft report before it is made final; and

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[29] 12 U.S.C. § 5515.

[30] 12 U.S.C. § 5515 (b)(2); 12 U.S.C. § 5514(b)(3)-(4).

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- Take into consideration any concerns raised by the other agency before issuing the final report of examination.[31]

The Dodd-Frank Act does not define the type of examinations that must be coordinated, although presumably the intent was that the banking agencies coordinate the timing of their safety and soundness examinations with the timing of the CFPB's consumer compliance examinations for financial institutions' planning and other logistical purposes. In implementing the aforementioned sections of the Dodd-Frank Act, the banking agencies and the CFPB executed a Memorandum of Understanding intended to, among other things, establish which examination schedules must be coordinated, which examinations must be conducted simultaneously, and what it means to conduct an examination simultaneously.[32]

The MOU defines the "Covered Supervisory Activities" that must be coordinated as those that relate to compliance with the requirements of Federal consumer financial law, Section 5 of the Federal Trade Commission Act, which prohibits unfair and deceptive acts and practices, and other consumer compliance supervisory activities with respect to institutions with more than $10 billion in total assets. The MOU explicitly provides that "[g]enerally, other safety and soundness supervisory activities such as examinations of asset quality of lending, liquidity, financial condition and performance, capital adequacy, deposit insurance, information technology, securitization and financial and capital market operations that do not assess underwriting, sales, marketing, servicing, collections, or other activities related to consumer financial products or services are not Covered Supervisory Activities."

The "Covered Examinations" subject to the MOU are those used in conducting "Covered Supervisory Activities" that yield a Covered Report of Examination—a report of a Covered Examination that concludes a supervisory cycle and yields a Compliance, CAMELS, or RFI rating. Thus, the banking regulators and the CFPB appear to contemplate that the prudential regulators have some authority to examine financial institutions with more than $10 billion for consumer compliance and to reflect their findings in this regard in CAMELS or RFI ratings (or subsequently adopted ratings systems). However, the ability of the banking agencies to conduct examinations for consumer compliance related matters is inconsistent with both the letter and spirit of the Dodd-Frank Act's transfer of authority from the banking agencies to the CFPB to assess compliance with federal consumer financial law by institutions with more than $10 billion in total assets.[33]

We encourage the CFPB to assert its "exclusive" authority to examine banks for consumer compliance consistent with Congressional intent that the CFPB be the lead consumer financial regulatory and enforcement agency. To be sure, the prudential regulators will always have some role to play in assessing compliance with consumer financial law as part of their safety and soundness examinations. However, this limited role is not a license to duplicate work that Congress entrusted to the CFPB. Accordingly, the CFPB should seek to revise the terms of the MOU with the federal banking agencies to clarify its central role in examining and regulating the consumer compliance activities of large financial institutions with respect to laws over which it has authority.

At a minimum, the CFPB and the federal banking agencies should clarify their respective jurisdictions with respect to examining institutions for compliance with all relevant federal consumer laws and increase coordination regarding the content and timing of examinations in order to minimize the overlap in supervision that currently exists. In addition, the CFPB and the federal banking agencies should enhance the coordination of their respective

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[31] 12 U.S.C. § 5515(e)(1).

[32] *See* Memorandum of Understanding on Supervisory Coordination (May 2012), *available at*: https://files.consumerfinance.gov/f/201206_CFPB_MOU_Supervisory_Coordination.pdf

[33] The federal banking agencies have asserted that they continue to have supervisory and enforcement authority regarding unfair and deceptive acts and practices ("UDAAP") pursuant to section 5 of the FTC Act by referencing the agencies' general authority to enforce any "violation of law" under section 8 of the FDIA. However, pursuant to section 1031 of the Dodd-Frank Act, the Bureau has exclusive statutory authority to issue and enforce UDAAP rules for banks

supervisory and examination findings and required remediation actions, as appropriate. The CFPB and the federal banking agencies also should coordinate data requests so that institutions are not required to respond to identical or nearly identical data requests by different regulators. Enhanced coordination with regard to subject matter, information requests, and timing would greatly improve regulatory efficiency and thus help institutions to more quickly identify and remediate activities that could potentially harm consumers.

B. The CFPB should institutionalize improvements to the examination process.

In May 2018, one of the predecessor organizations to the BPI, The Clearing House Association, responded to the CFPB's Request for Information on Supervision. That submission, like many others filed in response to the Request, explained the need for the CFPB to approach supervision with a focus on communication and problem-solving. In the years since, generally the CFPB's examination teams have fostered a relationship of mutual respect and collaboration that has helped accomplish a shared goal of compliance with consumer protection laws. We urge the CFPB to consider further institutionalizing the productive approach now in place.

1. The CFPB should establish greater procedural safeguards and provide increased transparency during the examination process.

One of the benefits of open communication between the CFPB examination team and the firm under examination is that factual issues can be resolved before a report of examination has been issued. This process prevents circumstances where the CFPB makes a finding on the basis of an inaccurate or incomplete factual predicate, only to later learn of contrary evidence. Accordingly, the CFPB should formalize a process under which firms are permitted to review the facts on which the CFPB's examination report will be based and, if necessary, correct any inaccuracies.

Similarly, a robust approach to supervision involves candid communication about the CFPB's interpretation of the relevant statutes or regulations at issue. This communication helps ensure that firms have the opportunity to present their view of the law, so that the CFPB's final conclusions are the product of rigorous give-and-take. Accordingly, the CFPB should consider formalizing a process under which firms are permitted to review the legal theories on which the CFPB's examination report will be based and, if necessary, present alternative views.

These same considerations should apply to PARR (Potential Action and Request for Response) Letters, Supervisory Letters, and Examination Reports. These documents should contain a clear description of the relevant statutes or regulations at issue and a description of the actions of the institution that the CFPB believes constitute a potential violation of those statutes or regulations, which we believe currently tends to be the case. As such, the CFPB should consider formalizing this practice for the future. The principal beneficiary of such clarity will be consumers, who will benefit from institutions fully understanding and responding to the CFPB's concerns.

In addition to the discussion above, the PARR letter process itself requires reform. Given the amount of data and detail regularly requested via PARR letters, firms typically need at least 60 days to respond. However, PARR letters provide just 14 days to respond. At present, the CFPB often agrees to extend this deadline. However, the CFPB should revise the baseline timetable itself to ensure that firms are guaranteed sufficient time to respond. In addition, the CFPB should consider publishing additional information regarding the PARR letter process. For example, the CFPB could provide anonymized data that identifies the issues addressed via PARR letters and the ultimate disposition of those issues. Such a report could cover whether the institution remediates the issue satisfactorily, how such remediation is achieved, and whether an enforcement action is pursued. Such transparency would help the public evaluate—and regulated entities navigate—the PARR process.

The exit meeting process likewise could be strengthened. Post-examination exit meetings are more productive when written results have been provided in advance to an institution. Such advance notice means that firms can come to the exit meeting equipped to suggest potential solutions to the issues identified. The CFPB should formalize this approach. Finally, the CFPB should provide further clarity on the CFPB's expectations on when an institution's consumer compliance rating will be refreshed, what examinations need to be done to update the rating, and how that rating should be reflected in other regulators' rating systems (if at all).

2. The CFPB should provide greater transparency after the examination process has been completed.

Consistent with recommendations above, BPI urges the CFPB to recognize that the formal supervisory appeal process is no substitute for meaningful opportunities to engage with CFPB staff—both the examination team and CFPB subject-matter experts—on a regular basis throughout the supervisory cycle. Instead of relying on the appeals process to raise issues of fact or law, the CFPB should consider providing institutions with regular interim updates by the examination team and (as appropriate) CFPB subject-matter experts during the course of examinations. Such updates would allow firms to clarify factual misunderstandings and remediate issues in real time, as opposed to deferring all findings and remediation to the end of the examination cycle.

We also recommend that the CFPB provide additional procedural safeguards prior to a rating downgrade. A firm should be given notice and an explanation of the reasons for the potential downgrade, and the opportunity to correct any factual misstatements and respond to any proposed adverse findings. As part of this process, a firm should have the opportunity to meet with senior CFPB staff. No downgrade should be finalized until such a review has been completed and senior staff at the CFPB have determined that a ratings downgrade is warranted.

While these procedural safeguards should reduce the need for appeals, the remaining firms should have a fair opportunity to appeal. Accordingly, BPI recommends—as it did in 2018—that such appeals should be handled by a dedicated appellate authority outside of the supervisory and examination function. This authority could be the CFPB's Ombudsman or another independent authority, provided that the authority would be consistently available, rather than change with each appeal. In addition, there remains the potential for significant unfairness so long as the CFPB has discretion to respond to objections by enhancing the damages it will seek. On these issues, as on others, these concerns stem not out of any concern with the recent past, but out of our strong interest in institutionalizing reforms that will stand the test of time.

The due process already afforded by the supervisory appeals process vastly exceeds that afforded by the CFPB's Action Review Committee. The ARC process determines whether or not supervisory issues will be referred to enforcement. These decisions are of enormous consequence to a firm. However, the affected firm is typically in the dark about what materials the ARC will review, what criteria it will apply, and when and how its decision will be reached. If the purpose of the ARC is to reach the best decision possible, it should allow the relevant firm to be heard directly, and then provide a written explanation for its decision. Moreover, the CFPB should periodically report on the ARC processes and decisions on an anonymized basis in order to allow help consumers and firms alike understand and evaluate its work.

V. Modernize the CFPB's Enforcement Process

A. The CFPB should continue to avoid "regulation by enforcement" by adopting policies to ensure that future enforcement actions are grounded in existing law and regulations.

In May 2018, in response to a CFPB Request for Information, one of the predecessor organizations to the BPI, The Clearing House Association, detailed the ways in which the CFPB had has used individual enforcement actions as a means of instituting *de facto* industry standards.[34] As the U.S. Treasury Department explained, this "excessive reliance on enforcement actions, rather than rules or guidance, to regulate conduct . . . deprives regulated

[34] *See generally* TCH Response to the Bureau's Request for Information regarding Bureau Enforcement Processes, CFPB-2018-0003 (May 14, 2018).

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parties of fair notice concerning the rules to which they must conform their conduct."[35] The Consent Orders negotiated to resolve individual enforcement actions lack the public input, adversarial testing, and rigorous explanation that would provide appropriate legal standards.

The CFPB has largely eschewed such "regulation by enforcement" in the years since the 2018 RFI.[36] However, as with the improvements in the examination process noted above, such changes may prove temporary unless they are institutionalized. There are ways in which the CFPB could take additional steps to prevent regulation by enforcement, including:

- The CFPB should make clear, either through a public enforcement policy or other public statement, that the remedial provisions in consent orders are uniquely negotiated for the specific institution and do not reflect any legal requirement or CFPB guidance for the industry in general.

- The CFPB should curtail the risk that its UDAAP authority will be used to punish violations of previously unannounced standards by instituting formal procedures through which a senior leadership committee (including the CFPB's Office of General Counsel) review, modify, or reject a CID that proposes to investigate a potentially abusive, unfair, or deceptive practice.[37]

- The CFPB should implement policies preventing the imposition of civil monetary penalties where a substantive provision of law is being interpreted for the first time, or in a way that is contrary to a broadly held understanding of the law. Such a policy will substantially alleviate the due process concerns that arise where entities lack fair notice that a practice is unlawful, without limiting the CFPB's ability to put a stop to the practice and to ensure that affected consumers are fairly compensated.[38]

B. The CFPB should take steps to improve the processes by which the firm under investigation may be heard during the course of an investigation or an enforcement action.

The CFPB should encourage robust discussion of the steps taken by the CFPB during investigations and enforcement actions. None of the proposed reforms below would prevent the CFPB from choosing its own path, but rather would ensure consistency in approach with respect to the CFPB's enforcement process.

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[35] U.S. Department of the Treasury, A Financial System That Creates Economic Opportunities, 82 (June 2017) (the "2017 Treasury Report").

[36] To its credit, the Bureau has also added ways for firms to obtain guidance on the Bureau's views of the law outside of the enforcement process, including a rejuvenated No-Action Letter Policy and Advisory Opinions.

[37] *See* TCH Response to the Bureau's Request for Information regarding its CIDs and related processes, Part II.B (Apr. 26, 2018).

[38] Such a policy would align with the approach proposed by a 2017 Treasury Report identifying potential regulatory reforms and legislative changes. *See* 2017 Treasury Report at 90. It would also be consistent with the Department of Justice's ("DOJ") policy prohibiting enforcement actions predicated upon guidance documents rather than forma rules. *See* DOJ, Office of the Associate Attorney General, Memorandum "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases" (Jan. 25, 2018).

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1. The CFPB should make the opportunity to move to set aside or modify a CID meaningful.

The CFPB has provided that the Deputy Assistant Directors of the Office of Enforcement may issue Civil Investigative Demands.[39] As a practical matter, these same Deputy Assistant Directors are also the last word on modifications of the CID and requests for extensions.[40] However, the Deputy Assistant Directors do not attend the required meet and confer process. Thus, although, the CID recipient must "make available at the meeting personnel with the knowledge necessary to resolve any issues relevant to compliance with the demand,"[41] the CFPB personnel "necessary to resolve any issues" is absent.[42]

Given the limited process involved in the issuance of CIDs, and the considerable costs of compliance, the CFPB should have a robust process by which a CID recipient can seek modification of a CID. Some of the areas that have raised issues include:

- all arguments are deemed waived if not raised within ten days;[43]
- the petition to modify the CID is due within twenty days, even though the scope of the petition depends upon the CFPB's initial ruling on requested modifications, which may not be available until well into the twenty days;[44]
- extensions are disfavored;[45]
- petitions for modification are heard by the CFPB Director, rather than an independent third party;[46]
- petitions for modification are made public, imposing a substantial cost on any firm with the temerity to appeal;[47] and
- the CFPB rarely grants any portion of a petition, even though courts have subsequently rejected CFPB CIDs after requested modifications have been denied.

In short, the CFPB should reevaluate this approach. Many of the responses to the CFPB's RFI on CIDs—including that submitted by The Clearing House Association—contain important insights on how such change could be accomplished. Such an improved process should allow for exceptions when necessary to prevent ongoing consumer harm.

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[39] 12 C.F.R. § 1086 (a).

[40] *See* 12 C.F.R. § 1086(d).

[41] 12 C.F.R. § 1086(c)(1).

[42] *See* CFPB Enforcement Policies and Procedures Manual at 63. https://files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-and-procedures-memo_version-3.0.pdf.

[43] 12 C.F.R. § 1080.6(c)(3).

[44] 12 C.F.R. § 1080.6(e).

[45] 12 C.F.R. § 1080.6(e)(2).

[46] 12 C.F.R. § 1080.6(e)(4).

[47] 12 C.F.R. § 1080.6(g)

(continued…)

2. The CFPB should take additional steps to ensure that the NORA process provides a meaningful opportunity to respond to the CFPB's findings.

Like the CFPB's CID appeals process, the CFPB's Notice and Opportunity to Advise process should be enhanced to ensure that it provides the CFPB with a well-rounded view of its potential case. To begin with, the NORA Process should be the culmination—not the totality—of the CFPB's explanation of its concerns. As with examinations, the enforcement process would be enhanced by continuous dialogue. Reticence to discuss concerns could result in harm to consumers, as a failure to promptly notify a firm of allegedly improper conduct may mean that the conduct continues for the full span of the investigation. Insufficient communication also creates inefficiency, as a firm that understands the substance of the investigation may be able to respond more promptly and effectively to requests for documents and other information.

During the NORA process, the CFPB has unlimited time to pull together its case; however, the respondent gets two weeks to respond.[48] The CFPB has a full investigative record; the respondent learns only what the CFPB decided to tell it.[49] The CFPB has a detailed memorandum of allegations, but the NORA letter provides only the barest description of the potential charges.[50] All of these disadvantages can be and often are ameliorated through extensions and detailed oral briefings. Such an improved process should allow for exceptions when needed to prevent ongoing consumer harm.

C. The CFPB should be consistent in its approach to enforcement.

The CFPB should strive to be consistent in the way it approaches enforcement matters.[51] We believe the CFPB intends to be consistent and understand that the complicated facts of different enforcement actions make it difficult to assess whether neutral standards are being applied. However, there are a number of tools that the CFPB could institute to help ensure consistency in the way it handles enforcement matters. For example, the CFPB's approach to investigations would benefit from the following:

- a policy statement as to applicable limitations periods and the CFPB's approach to seeking tolling agreements;
- a policy statement that the CFPB will refrain from requesting or using attorney-client privileged materials in enforcement actions;
- an internal process that ensures senior-level review of open enforcement matters to foster diligent progress on open matters and to avoid perpetual investigations with no clear roadmap to resolution.

Resolution of enforcement matters would be more consistent if the CFPB considered adopting:

- a policy on CFPB demands for restitution that requires that such demands be grounded in demonstrated financial injury;

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[48] CFPB Bulletin 2011-04; Notice and Opportunity to Respond and Advise, available at https://files.consumerfinance.gov/f/2012/01/Bulletin10.pdf.

[49] This is despite the fact that the Bureau will have to produce the full record if it brings charges. *See* 12 C.F.R. § 1081.206(a).

[50] *See id.*

[51] As Benjamin Cardozo wrote a hundred years ago: "If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles." Benjamin N. Cardozo, The Nature of the Judicial Process, (1921) at 33 (quoting William Galbraith Miller, The Data of Jurisprudence 335 (1903).

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- a civil monetary matrix—similar to those that have been used for many years by the Office of the Comptroller of the Currency, the Federal Reserve Board, and the Federal Deposit Insurance Corporation – to ensure that civil monetary penalties are imposed equitably;[52] and

- an MOU or other interagency agreement to avoid redundant enforcement efforts and duplicative penalties.

After a Consent Order has been signed, the CFPB should continue to be consistent and fair by adopting:

- a policy that CFPB press releases announcing an enforcement action will adhere to the text of the consent order or complaint; and

- a policy detailing the standards it will use for terminating consent orders.

In short, BPI would recommend that the CFPB consider adopting and implementing the above to ensure consistency for firms that become subject to the CFPB's enforcement process.

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BPI appreciates the opportunity to comment on the request for information. If you have any questions, please contact the undersigned by phone at Redacted or by email at Redacted

Respectfully submitted,

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Bank Policy Institute

[52] See *CFPB Has Too Much Flexibility in Assessing Fines* by Eric Mogilnicki (April 16, 2019); *available at* https://www.americanbanker.com/opinion/cfpb-has-too-much-flexibility-in-assessing-fines.