MEMORANDUM

Susan Block-Lieb,
Cooper Family Professor in Urban Legal Issues,
Fordham Law School
Redacted

May 28, 2020

Hon. Kathleen L. Kraninger, Director,
Bureau of Consumer Financial Protection
Comment Intake (CFPB-2020-0013)
1700 G Street NW
Washington, DC 20552

Dear Madam Director:

RE: Bureau of Consumer Financial Protection ("CFPB" or "Bureau") Notice titled "Request for Information to Assist the Taskforce on Federal Consumer Financial Law," **Docket No. CFPB-2020-0013, 85 Fed. Reg. 18214** (April 1, 2020)("Notice")

I am a law professor at Fordham University School of Law, with expertise in contract and commercial law, including consumer financial protection and consumer bankruptcy law. I hold the Cooper Family Chair in Urban Legal Issues, and since 2019 have been the Scholar in Residence with the American College of Bankruptcy. In addition, for approximately 20 years, I held a position on the Board of Directors for the Coalition for Debtor Education, a section 501(c)(3) non-profit engaged in training individuals to teach financial literacy, personal financial management and debtor education.

Thank you for the invitation to assist the Taskforce in this way. I write to comment on (i) the timing of the Bureau's above-referenced Notice; (ii) the scope of the charge granted the Taskforce on Federal Consumer Financial Law by Kathleen L. Kraninger, Director of the CFPB ("Director"); as well as (iii) the Director's statutory authority to create the Taskforce "as an independent body within the Bureau and report[ing] to the Bureau's Director." 85 Fed. Reg. 18214, at ¶ 1.

Timing

I write late in May 2020, having sheltered in place at the direction of Governor Andrew M. Cuomo since March 20, and having conducted my teaching and related responsibilities at Fordham remotely since March 11, 2020. Under normal circumstances, my comment might have been filed earlier and most definitely would have profited with the ability to conduct research at a library. The Notice was filed in the Federal Register on April 1, 2020, a uniquely inappropriate time to seek public comments and information regarding the Taskforce and its charge.

The Director's decision to publish the Notice after the governors in 42 states (plus the District of Columbia and Puerto Rico) issued "shelter-in-place" or "stay-at-home" orders (with an additional 3 states following with addition such orders within 2 days) created unnecessary difficulties for individuals and entities interested in filing comments on the Notice. Publication of the Notice should have been delayed until these orders expired or were rescinded.

The difficulty of submitting a response to the Notice was worsened by the short time-limit imposed on the submission of comments as the Notice specifies that "comments must be received by June 1, 2020." Id., at ¶ 2. The due date for comments on the Notice should have been extended given the pandemic circumstances.

Moreover, the brevity of the time given for preparation of comments and further information is further exacerbated by the breadth of the Director's charge to the Taskforce. The issue of scope is discussed below.

Before moving to the issue of the excessive breadth of the Notice and the charge to the Taskforce, I'll make additional comments on the timing of the Notice.

First, there would be plenty to engage the Taskforce if it were to limit itself – or if the Director were to direct it to limit its focus – to study of appropriate reactions to the pandemic and its likely effect on consumer credit and collections on consumer credit in a time of economic crisis.[1]

Second, the CFPB could not have known that the United States would erupt in race riots like those we have not seen in this country since 1968. As inappropriate as it may be to ask the public for commentary on the Notice during a pandemic, the importance of retaining and strengthening consumer financial protection law – both legislation and regulation – could not be more starkly emphasized by the timing of the period during which the CFPB's Notice and Request for Information during this time of intense race relations.[2]

Scope

The Notice initially describes the work of the Taskforce as follows:

---

[1] For existing scholarship on coronavirus pandemic and consumer protection, see, e.g., Pamela Foohey, Dalié Jimenéz and Christopher Odinet, *The Debt Collection Pandemic*, __ CAL. L. REV. ONLINE __ (forthcoming 2020), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3598623&dgcid=ejournal_htmlemail_consumer:law:ejournal_abstractlink; Pamela Foohey, Dalié Jimenéz and Christopher Odinet, The Folly of Credit as Pandemic Relief, 68 UCLA L. REV. DISC. __ (forthcoming 2020), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3588355; Norman I. Silber and Jeff Sovern, Placing Consumers at the Front of the Relief Effort: Redirecting Credit Card Interest Charges, Hofstra Univ. Legal Studies Research Paper No. 2020-04, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3569002.

[2] Norman I. Silber, *Discovering that The Poor Pay More: Race Riots, Poverty, and the Rise of Consumer Law*, 44 FORDHAM URB. L.J. 1319, 1328 (2017)(with reference to history of race relations in mid-1960s, and legislative history of Consumer Credit Protection Act, emphasizing "the necessity for better understanding [of] the role of consumer law in the perpetuation of poverty, injustice, and social disorder").

> The Taskforce is charged with developing recommendations on harmonizing, modernizing, and updating the Federal consumer financial laws, as well as identifying gaps in knowledge that should be addressed through research, ways to improve consumer understanding of markets and products, and potential conflicts or inconsistencies in existing regulations and guidance (Id., at ¶ 1).

In a Background section, it subsequently expands further on the breadth of issues delegated to the Taskforce for consideration:

> The Taskforce is charged with (1) examining the existing legal and regulatory environment facing consumers and providers of consumer financial products and services; and (2) reporting it recommendations for ways to improve and strengthen Federal consumer financial laws, including recommendations for resolving conflicting requirements or inconsistencies, reducing unwarranted regulatory burdens in light of markets and products and services, and identifying gaps in knowledge that the Bureau should address through future research. Where possible and within time constraints, the Taskforce's report may include recommendations relating to the 18 enumerated consumer laws and titled X and XIV of the Dodd-Frank Act, including those provisions relating to unfair, deceptive, or abusive acts or practices. The Taskforce's recommendations may include actions that the Bureau could carry out using its current authorities and actions that would require legislation to implement (Id., at ¶ 7).

The scope of the charge extended to the Taskforce is, thus, as broad as – if not broader than -- the scope of the CFPB's own regulatory jurisdiction. Moreover, the Notice further elaborates on the breadth of the charge to the Taskforce and the questions on which the Bureau seeks information – these include an additional 23 numbered paragraphs of questions (although nearly each of these numbered paragraphs contains more than one questions).

In numerous places, the Notice characterizes the work of the CFPB as focused on the "functioning" of consumer credit markets, rather than on the protection of consumers in the context of well-functioning markets. The Notice contends that Congress created the CFPB "to ensure 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 competition" (Requests for Information, ¶ 2), but this quote misleadingly ellipses an important qualification. The full language from which the Notice picks and chooses is as follows:

> The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.[3]

This language, in its entirety, emphasizes the CFPB's obligation to *implement and enforce the existing Federal consumer financial laws* with an interest in access to fair, transparent and competitive markets. It does not justify the claim, implicit in the Notice, that the CFPB holds authority over regulation of consumer finance markets more broadly than protection of

[3] 12 U.S.C. § 5511(a).

consumers in these markets. It does not authorize the CFPB to direct the Taskforce to look to propose "regulatory changes that could facilitate competition and materially increase consumer welfare" (Requests for Information, ¶ 3). Nor does the reference to competitive markets for consumer credit in the above-quoted language justify the leap made within the Notice that any regulatory reform should focus on market efficiency, the facilitation of competition in this market, and the maximization of aggregate consumer welfare -- to the exclusion of all other interests (Requests for Information, ¶ ¶ 3, 4, and 5).

This mischaracterization of the breadth and direction of the authority of the CFPB, and so of the scope of the work of the Taskforce appointed by the Director, emboldens the claim in the Notice, for example, that the Taskforce should address "potential obstacles to financial inclusion" (Expanding Access, chapeau). Financial inclusion is not an object distinct from consumer protection. The G-20 and World Bank have both defined financial inclusion to mean "that individuals and businesses have access to useful and affordable financial products and services that meet their needs – transactions, payments, savings, credit and insurance – *delivered in a responsible and sustainable way*" (World Bank, Financial Inclusion, at https://www.worldbank.org/en/topic/financialinclusion). Financial inclusion, thus, refers not only to access to credit and other financial services, but specifically access "that is delivered in a responsible and sustainable way."[4]

This misunderstanding about the concept of "financial inclusion" and the CFPB's role in removing obstacles to financial inclusions, is exemplified by the questions posed in this section. With each question, the Notice suggests that the CFPB's mission of consumer protection is secondary to the goal of market expansion. This suggestion both misunderstands financial inclusion and the CFPB's mission.

Expanding Access, Question 1

The Notice asks, with Question 1: whether the CFPB "should promote greater access to banking services." It also asks whether "alternatives to deposit accounts" should be viewed as sufficient for this purpose. These Questions sit outside the regulatory jurisdiction of the CFPB and are best addressed by the Department of the Treasury, either through its Office of Comptroller of the Currency or the Federal Deposit Insurance Corporation.[5] To the extent the CFPB wishes to insert itself on issues of financial inclusion, it should address the need for consumer protection

---

[4] See also World Bank, Good Practices for Financial Consumer Protection (2017), at https://www.worldbank.org/en/topic/financialinclusion/brief/2017-good-practices-for-financial-consumer-protection; G20 High-Level Principles of Financial Consumer Protection (2011), at https://www.oecd.org/daf/fin/financial-markets/48892010.pdf.

[5] Indeed, the OCC and FDIC are actively engaged with these questions. See Department of Treasury, Office of Comptroller of the Currency, Banking the Underbanked Resource Directory, at https://www.occ.treas.gov/topics/consumers-and-communities/community-affairs/resource-directories/banking-underbanked/index-banking-the-underbanked-resource-directory.html; Federal Deposit Insurance Corporation, National Survey of Unbanked and Underbanked Households (2017), at https://economicinclusion.gov; Martin J Gruenberg, Chairman, Federal Deposit Insurance Corporation, Remarks, Financial Inclusion - Expanding Economic Opportunity Local Initiatives Support Corporation (Nov. 7, 2017), at https://www.fdic.gov/news/news/speeches/spnov0717.pdf.

regulation of such services, especially those like pay-day loans as one example, well known for their deceptive, unfair and abusive practices.[6]

Expanding Access, Question 2

The Notice continues, with Question 2, whether the Taskforce should consider whether it is "necessary to tie transaction services to the banking system?" Again, this issue sits well outside the regulatory jurisdiction of the CFPB. Other regulatory agencies are already engaged on the topic.[7] To the extent the individual members of the Taskforce believe that the breadth and fragmentation of banking regulation is itself "an obstacle to financial inclusion," they should either lobby Congress to create an additional regulatory agency or adopt legislation or write a law review article.

Expanding Access, Question 3

Question 3 continues in this vein, asking: "What steps could be taken to promote greater competition among providers of services such as payments, financial advisory services, and savings accounts?" Like earlier questions, this one purports to vest the CFPB and so the Taskforce with authority over any question concerning expansion of consumer credit markets. These questions sit outside the CFPB's authority and have been addressed by other regulatory agencies.[8]

Expanding Access, Question 4 (as well as Questions 9, and 15-18)

Question 4 focuses on the market for "short-term, small-dollar credit," which presumably is meant to include pay-day loans, title pawn transactions and the like. Question 4 asserts that "there is consumer demand for short-term, small-dollar credit," assumes that this demand is unmet, and that its self-appointed interest in reducing "obstacles to financial inclusion" dictate "expanding access" in this market. But the CFPB's regulatory jurisdiction does not extend to the expansion of consumers' access to the market for short-term, small-dollar loans; this is particularly clear given the CFPB's past regulatory actions in this context (Id.).

The questions posed in this paragraph seem intended to shift away from the CFPB's regulatory focus on the deceptive, unfair, and abusive aspects of this industry, in this case toward promoting greater access to such industry. As though the mission of the CFPB were centered on expanding access to such loans, this question focuses solely on expanding this market and excludes assessing the deceptive, unfair and abusive aspect of such loans (or of expansions of such markets).

---

[6] Consumer Financial Protection Bureau, Payday, Vehicle Title, and Certain High-Cost Installment Loans, Final Rule, 12 CFR 1041(eff. Jan.16, 2018).

[7] See Department of Treasury, A Financial System That Creates Economic Opportunities Nonbank Financials, Fintech, and Innovation (July 2018), at https://home.treasury.gov/sites/default/files/2018-07/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financi....pdf.

[8] Id.

Within this same paragraph, the Notice broaches the question of federalism in the market for pay-day lending. But Title X of the Dodd-Frank Act is incredibly clear on federal pre-emption of state law in this context. Sections 1041-43 (Part D: Preservation of State Law) comprise the preemption provisions for the Dodd Frank Act. Section 1041(a) states that the Act does not override any state laws except to the extent that they are inconsistent although it also provides that state laws providing *greater* protection than the Act are not considered inconsistent (and are therefore binding). Section 1041 also lays out the process for states to petition the Bureau to establish or change a regulation. Section 1042 permits any state Attorney General to bring actions under Dodd Frank in district or state court in that state. However, the AG must give notice of that action to the Bureau, upon which the Bureau may intervene. Distinct state and federal consumer financial protection laws are expressly intended by Dodd-Frank. Any complaint about the inconvenience of these distinctions are outside the purview of the CFPB and so therefore of the Taskforce.

Of course, combinations of federal and state regulation make it harder for industry actors to expand their deceptive, unfair, and abusive products. That is the point of the regulation. Reducing the deception, unfairness and abusiveness in a market need not result in fewer small-dollar, short-term loans overall, however. Regulation instead channels expansion toward products that are transparent, fair, and do not rely on harsh collection tactics for their profitability. Looking to achieve this result *is* squarely within the CFPB's jurisdiction.

(My comments above, regarding the issues of pre-emption limits express in the Dodd-Frank Act and importance of comity between state and federal regulators, enforcement agencies and regulations, should also be understood also to apply to: Consumer Data, **Question 9,** and Federal and State Coordination, **Questions 15, 16, 17 and 18.)**

Expanding Access, Question 5

There is no need for the Taskforce to take on the issues within Question 5. Question 5 has already been answered in an Inter-Agency Statement on the Use of Alternative Data in Credit Underwriting.[9] This Statement provides:

> As with prior developments in the evolution of credit underwriting, including the advent of credit scoring, the use of alternative data and analytical methods also raises questions regarding how to effectively leverage new technological developments that are consistent with applicable consumer protection laws. Applicable consumer protection laws, include, as appropriate, fair lending laws, prohibitions against unfair, deceptive, or abusive acts or practices, and the Fair Credit Reporting Act.

This language hints at the distinct and important privacy implications of using "alternative data" in credit underwriting, although it cites to the Fair Credit Reporting Act.

---

[9] Board of Governors of the Federal Reserve System, Consumer Financial Protection Bureau, Federal Deposit Insurance Corporation, National Credit Union Administration and Office of the Comptroller of Currency, Inter-Agency Statement on the Use of Alternative Data in Credit Underwriting, at https://files.consumerfinance.gov/f/documents/cfpb_interagency-statement_alternative-data.pdf.

If the CFPB were itself interested in addressing the consumer protection issues of alternative data, they would find much to study. Expanding credit availability through the use of "alternative data" comes at a "cost" – and consumers are likely to pay that cost, although they may be unaware of these costs including implications of the intrusions on their privacy by this means. As noted in a recent blog posting by the Center for Financial Inclusion:

> Various consumer advocacy groups and the United States Government Accountability Office (GAO) have expressed concerns about data accuracy and privacy issues arising from the amount and sensitivity of the alternative data collected and used by financial technology companies. The lack of transparency in the models, data sources and data analytics technologies are also criticized.[10]

To the extent the CFPB involves itself in this debate, it should limit its input to questions of consumer protection – that is, assessing the extent to which collection and reliance on alternative data (i) constitutes a deceptive, unfair and abusive practice in the market for FinTech or (ii) violates existing law or consumers' reasonable expectations of privacy. The CFPB should not be guided in this assessment of existing law and the need for additional regulation with a mission of minimizing all "obstacles to financial inclusion" (Notice, Expanding Access, chapeau). Other policy agents are better equipped to address issues of market expansion. The CFPB should stay in its lane.

Summary

This discussion of the scope of the Notice, and its implicit expansion of the regulation jurisdiction of the CFPB and of the charge extended by the Director to the Taskforce covers only one issue area specified in the Notice – that concerning Expanding Access – and the five numbered paragraphs within that issue area. The Notice goes on to address four additional issue areas and with multiple questions in 17 additional numbered paragraphs. Many if not all of these questions involve issues beyond the scope of the CFPB and, thus, inappropriately extended to the Taskforce by means of the Director's charge. I could spend additional time and space commenting further, but my overarching point is made. The Notice, and the charge to the Taskforce, is excessively broad.

This contention leads to my final point: the Director has exceeded her authority in establishing the Taskforce. I turn to the question of authority in the next section.

Authority

The Notice provides that the "Director of the Bureau established the Taskforce pursuant to the executive and administrative powers conferred on the Bureau by section 1013(a) and 1021(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)"

---

[10] Sezgi Guler-Fuechec, Alternative Data in America: Policy and Concerns, Center for Financial Inclusion (Jan. 28, 2020), at https://www.centerforfinancialinclusion.org/alternative-data-in-america-policy-and-concerns. For the GAO report this blog refers to, see United States General Accountability Office, Financial Technology: Agencies Should Provide Clarification on Lenders' Use of Alternative Data (Dec. 2018), at https://www.gao.gov/assets/700/696149.pdf.

(Supplementary Information, Background, ¶ 1). Neither of these references justifies or empowers the Director's actions, especially given the degree to which the charge to the Taskforce either duplicates existing work on which existing units of the CFPB are engaged.

Section 1013(a) does not expressly authorize the appointment of a Taskforce, speaking instead about units within the CFPB and employees within those units. The Dodd-Frank Act does not give the Director unfettered discretion to establish units within the Bureau. Sections 1013(b)-(e) & (g) enumerate specific units and offices. One such unit must be dedicated to "research." Under the Act, this research unit holds several responsibilities, one of which is to research, analyze, and report on "developments in markets for consumer financial products or services, including market areas of alternative consumer financial products or services with high growth rates and areas of risk to consumers" (see section 1013(b)(1)(A)). Instead of entrusting the responsibility of researching "the existing legal and regulatory environment" with a Taskforce that reports directly to the Director, the Act envisions that this responsibility should be exercised by the Regulations office or at least to someone who would report to the Division of Research, Markets & Regulations' policy associate director.

Nor does section 1021(c) enable the Director's creation of the Taskforce. This section, instead, lays out the functions of the Bureau as a whole. Section § 1021(c)(3) enables the "collecting, researching, monitoring, and publishing information relevant to the functioning of markets for consumer financial products and services…." Research is one such purpose of the CFPB. But, as noted above, the CFPB already possesses an Office of Research.

Although the Notice cites to section 1013 and 1021 as authorizing the Director's creation of the Taskforce, it is clearer from section 1014 that the Director does not have authority to create duplicative and overlapping advisory entities in her sole discretion. Section 1014 mandates that the Director "shall establish a Consumer Advisory Board to advise and consult with the Bureau in the exercise of its functions under the Federal consumer financial laws, and to provide information on emerging practices in the consumer financial products or services industry, including regional trends, concerns, and other relevant information." Relying on this express statutory mandate, the Director has already established the Consumer Advisory Board and three limited councils: Community Bank Advisory Council; Credit Union Advisory Council; the Academic Research Advisory Council.

Why did the Director decide to create a Taskforce consisting of academics to do this research work when existing employees, the Consumer Advisory Board and the Academic Research Advisory Council has already been established to do the same work? One can only presume that the Director struggles with the constraints set out in the statutory limits of the CAB set out in section 1014, and in the charters creating the CAB and each of Councils listed above.[11]

The Notice contends that the Taskforce "is inspired in part by an earlier commission established in 1968 by the Consumer Credit Protection Act" (Supplementary Information, Background, ¶ 2). This "inspiration" is not a substitute for statutory authority, of course. Moreover, reference to the earlier work of the National Commission on Consumer Finance (NCCF) does not demonstrate

[11] See, e.g., Consumer Financial Protection Bureau, Charter of the Bureau's Academic Research Council, at https://files.consumerfinance.gov/f/documents/cfpb_Academic-Research-Council-charter_2019.pdf.

"inspiration," given how distinctly different the Taskforce is as compared to the NCCF. The NCCF was authorized by Congress (see Public Law 90-321), it was bipartisan, over the four years during which it met in held numerous public hearings, and it focused in its report to Congress as much on market failures and excesses as on platitudes regarding the desirability of competition in consumer credit markets.

Given the nuance of the findings of the NCCF in their Report, it is perhaps worth emphasizing these findings, published in a report dated Dec. 31, 1972,[12] because they so starkly differ from the text and subtext of the Notice. In its Report, the NCCF noted that

> the Commission was unanimous in concluding that a truly competitive consumer credit market, with adequate disclosure of relevant facts to an informed consuming public, together with legislation and regulation to eliminate excesses, will foster economic growth and serve to optimize benefits to the consumer.[13]

It would be a mistake to view the NCCF as having found consumer credit markets "truly competitive," however. Far from it. The Commission's report is lengthy and complex – how couldn't it be, given four years of public testimony and study. The Report summarizes its findings regarding the difficulties in achieving "a truly competitive consumer credit market," and the need to "eliminate excesses" in that market, as follows:

> As to excesses in the marketplace, our Report recommends significant additions to the protection of consumers in the fields of creditors' remedies and collection practices. We have urged restrictions on remedies such as garnishment, repossession, and wage assignment. We have recommended abolition of the holder in due course doctrine, confessions of judgment, and harassing tactics in debt collections.
>
> As to adequate disclosure of relevant facts, our Report urges enhanced supervision and enforcement of the Federal Truth in Lending Act. We have also specified actions to make the disclosure features of Truth in Lending more effective and have suggested expanding the coverage of that Act to include disclosure of charges for credit life and accident and health insurance as an annual percentage rate.
>
> We also favored making federally chartered financial institutions subject to state as well as Federal examination for compliance with state laws governing the terms and conditions of consumer credit extensions. In addition, we recommended expanded administrative authority over all classes of creditors.
>
> As to our conclusion that free and fair competition is the ultimate and most effective protector of consumers, we have recommended the elimination of restrictive barriers to entry in consumer credit markets by permitting all creditors open access to all areas of consumer credit. We have urged the entry of savings and loan associations and

[12] Report of National Commission on Consumer Finance, Consumer Credit in the United States (Dec. 31, 1972), at https://archive.org/stream/ReportConsumerCreditInTheUS/Report_Consumer%20Credit%20in%20the%20US_djvu.txt

[13] Id., at ii.

> mutual savings banks into the consumer credit market. We have recommended prohibitions on acquisitions that would eliminate potential competition or that would substantially increase concentration in state or local credit markets. We have also urged that rate ceilings which constrain the development of workably competitive markets be reviewed by those states seeking to increase credit availability at reasonable rates. Some controversy has developed as to whether the Commission approved a specific rate structure including 42 percent on smaller loans. The Commission has never voted for such a rate structure and does not endorse it.[14]

If the Director is, truly, inspired by the NCCF, she should follow its lead – and its leadership – more explicitly.

[14] Id.