BUREAU OF CONSUMER FINANCIAL PROTECTION | JANUARY 2020

Taskforce on Federal Consumer Financial Law

Volume II: Recommendations

Message from the Director

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Sincerely,

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Kathleen L. Kraninger

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Introduction

Alpha order

How to read

Ref to VI

Recs to be determined by Director

1. Alternative Data

As consumer credit markets evolve, new technologies and methods are rapidly evolving to better serve customers such as artificial intelligence (AI), machine learning (ML), and the use of alternative data. In addition to reducing cost, increasing speed, and improving accuracy, these technologies allow better predictions of the risk of default and prepayment, enabling credit on better terms for more consumers. Industry is increasingly turning to alternative data, or data outside of the scope of traditional credit reporting data, to increase predictive accuracy of their models and to subsequently lower risk, lower prices, increase competition, and increase financial access and inclusion to traditionally underserved customers. For a more robust discussion of alternative data, see Chapter 9 in Volume I of this report.[1]

Alternative data can potentially increase predictive power of underwriting and pricing models used by financial institutions, allowing institutions to expand access to credit to previously uncreditworthy individuals (as assessed by traditional models). For instance, underwriting using cash flow data from a consumer's bank account gives a more holistic and real-time view of a consumer's actual financial situation rather than relying on point-in-time markers like monthly revolving balances that would be found on a traditional credit report. This expansion of the range of consumers a lender is willing to work with via lowering previously non-negotiable credit score or payment history requirements, particularly to consumers on the margin of acceptance under traditional regimes, expands access to previously thin-file or no-file consumers who previously could not be considered for credit. It may also benefit consumers with limited credit usage or consumers trying to restore good credit following late or defaulted payments qualify for credit that could improve the consumer's financial well-being.

In light of the benefits of use of alternative data, regulators should be cautious about unduly and prematurely restricting the use of new sources of data as consumer norms and expectations about privacy and data usage continue to evolve, especially among younger consumers who are

[1] Cite to Chapter 9.

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Commented [NA(5)]: I cut a section discussing the types of alternative data from this discussion and added it to the Chapter 9 innovation chapter those who will benefit the most from use of alternative data. This allows for greater inclusion of racial and other minority consumers who are disproportionately thin- and no-file consumers.[2]

Often, alternative data are provided by data aggregators, companies that collect information and sell it to lenders for use in their models. Safety and security questions raised by screen scraping-based approaches to alternative data aggregation and the bilateral negotiation process necessary for API-based approaches have impeded adoption of alternative data, but industry is accelerating resolutions to these problems as the business case becomes clear. For a more robust discussion of data aggregation, see Chapters 9 and 11 in Volume I of this report.[3]

Currently, the use of alternative data is allowed, but liability concerns over its use, methods of collection, and compliance with credit reporting laws have slowed its widespread adoption by industry. Under the Fair Credit Reporting Act (FCRA), firms that collect and sell any piece of data for use in the credit underwriting and evaluation process are regulated as consumer reporting agencies and subject to the validation, security, and privacy requirements laid out within the law. Some data aggregation firms have resisted this designation as it would require them to comply with, among other consumer safeguards, resource-intensive record accuracy dispute resolution processes outlined under the law.

The FCRA states that a consumer reporting agency is a "person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information for the purpose of furnishing consumer reports to third parties."[4] A consumer report includes a communication of any information, including alternative data, a consumer reporting agency that bears on a consumer's creditworthiness, character, personal characteristics, mode of living and similar traits, which is used, expected to be used, or collected in whole or in part for the purpose of establishing a consumer's eligibility for consumer credit or insurance, employment, or other permissible purpose under section 604.[5] If a data aggregator assembles or evaluates consumer information, and furnishes it to a third party for use in making a credit eligibility decision it would appear to meet the definition of "consumer reporting agency" and would be subject to the FCRA's

[2] The CFPB Office of Research, *Data Point: Credit Invisibles*, 16, 2015 ([HYPERLINK "https://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf"]).

[3] Cite to Chapter 9 and Chapter 11.

[4] FCRA sec, 603(f)., 15 U.S.C. §1681a(f).

[5] FCRA, sec. 603(d)(1), 15 U.S.C. §1681a(d(1).

privacy, accuracy, and security requirements. The Taskforce recommends that the Bureau clarify the FCRA's application to data aggregators and the use of alternative data. Alternative data will be a consumer report and regulated by the FCRA if it is used, expected to be used, or collected in whole or part for determining eligibility for consumer credit, insurance, employment, or any other FCRA permissible purpose.[6] A data aggregator that assembles or aggregates data for the purpose of assembling consumer reports to third parties is likely to be a consumer reporting agency.[7]

There is additional concern over the applicability of privacy provisions in other statutes that may bar them from reporting this information. For example, telecommunications billing information is regarded as customer proprietary network information and subject to special privacy protections. However, the benefit to consumers, especially those thin- or no-file consumers on the margins who may become scorable or prime for the first time, can outweigh the privacy and security concerns. Moreover, when the reports are limited to credit performance, the privacy concerns are no greater than with any other type of payment information. Even reporting negative information from alternative sources provides a net benefit to consumers, because it is likely a signal of the overall creditworthiness of these consumers, thereby making the market more efficient. Because of these consumer benefits, any entity with an account that requires regular payments by a consumer, other than healthcare payments, should be allowed to report this information to credit bureaus regardless of privacy provisions in other statutes.

Some stakeholders have expressed concern that specific kinds of alternative data such as educational or geographic data may serve as proxies for race, sex, age, or other protected class and that disparities in lending will emerge if these data points are used. These concerns are often tied up with larger questions about algorithmic bias, interpretability and explainability, and black boxes in AI/ML models. These concerns are valid, but these models are still subject compliance with fair lending law and discriminatory disparities in treatment or impact for a protected class are still illegal. Institutions who do not wish to be sanctioned under these regulations will strive to reduce discrimination and algorithmic bias while also investing in tools to explain their outcomes to regulators when they are examined for compliance with fair lending law. Moreover, as discussed in Chapter 10, by increasing competition and increasing choices for consumers, as well as by increasing reliance on data-based underwriting systems, entry by FinTech firms tends to reduce pricing disparities among different groups of

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6 *Id.*

7 FCRA sec. 603(f), 15 U.S.C. §1681a(f).

consumers; thus, the Bureau should be careful not to deter new entry unduly. The Bureau's Office of Innovation policies, such as the Compliance Assistance Sandbox, allow institutions to proactively collaborate with the Bureau on issues of fair lending and innovation.

Recommendations

1. The Bureau, Congress, and other federal and state regulators should eliminate and identify restrictions on the ability of consumer reporting agencies to report payment and cash-flow data. One means is for the Bureau to clarify the FCRA's application to data aggregators and the use of alternative data. All sources of alternative data should satisfy existing privacy, accuracy, and credit reporting laws.

2. The Bureau, Congress, and other federal and state regulators should exercise caution in restriction of the use of behavioral alternative data. These data can be very useful indicators of creditworthiness, and to the extent that certain behaviors are correlated with status as a protected class, existing fair lending laws prohibit unlawful discrimination.

3. The Bureau, Congress, and other federal and state regulators should allow any entity with an account that requires regular payments by consumers, other than health care providers, to report the performance of that account for purposes of credit reporting, regardless of privacy provisions in other statutes.

2. Bureau Organization

There is no one "correct" approach to internal organization and structure for a complicated agency such as the CFPB. Any structure that is adopted invariably entails tradeoffs and a system for promoting coordination across the agency to promote consistent interpretations of legal standards, a coherent approach to pursuing policy objectives, and accountability to agency goals.

The CFPB presents challenging questions of internal organization and structure because of the large number of regulatory "tools" at its disposal, or what Dodd-Frank refers to as "functions." Since its inception, the CFPB's internal structure has been largely organized around its regulatory "tools," i.e., regulation, enforcement, supervision, research, and consumer education, in addition to its statutorily mandated offices. In the opinion of the Taskforce, this tools-based organizational structure is not optimized to promote regulatory effectiveness with respect to maximizing consumer welfare in the financial sphere and has created coordination difficulties within the Bureau and its approach to external stakeholders. Regulatory effectiveness has been hampered because this structure has made it more difficult for the Bureau to use an integrated approach to efficiently identify and apply the most effective tool or mix of tools to address a specific legal or policy issue. Coordination between different divisions as to determining the appropriate tool or tool mix to accomplish a specific regulatory objective has been largely *ad hoc* and unsystematic.

The CFPB's tool-based organizational structure produced a concern in some instances that rather than fitting the best tool to provide a solution, there can be a tendency to retrofit outcomes to the chosen tool. Thus, for example, the CFPB has been criticized for pursuing what is called "regulation by enforcement," using enforcement to make industry-wide policy changes that might have been more effectively addressed through a regulation. In some instances, the choice of a regulatory tool seems to have produced highly prescriptive, highly detailed regulations that try to anticipate and resolve every possible scenario under the regulation, rather than promulgating a more principles-based regulation and then using enforcement, supervision, or other tools (such as guidance) to develop the details. By starting with a determination as to which agency tool will be used to address a particular issue and then fleshing out the substance later, it is more difficult for the agency to effectuate its policies in an efficient manner.

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Commented [SY(8]: Here, I would add the specific recommendation, instead, for example, not attacking a "particular issue" with the use of select tools, but rather approaching issued by topic that is located in cross-cutting working groups (via a different structure by topic/market) holistically with all tools available. This results is better coordination and problem solving with all tools on a topic, which is what I think you are after.

Policy coordination is also difficult under the current tool-based organizational structure. With respect to the Bureau's rules defining "Larger Market Participants" for determining entities subject to supervision, for example, the Regulation division is responsible for establishing the definition as to which entities will be covered. Yet once the threshold is defined and established, the supervision division actually conducts the examinations and sets examination policy as to priorities. Fragmenting oversight of particular markets and industries across multiple divisions makes it difficult to coordinate effectively to ensure that all divisions are pursuing the same priorities in a coherent fashion; for example, by ensuring that the Bureau's enforcement, supervision, and rulemaking divisions are all applying the same legal definition of terms such as "abusive" to participants in a given market.

Given this, the Taskforce recommends that the CFPB reorganize its internal structure so that it is primarily organized around *markets* instead of *tools*. Thus, for example, the CFPB might have divisions dedicated to credit cards, mortgages, small-dollar loans, fintech, and third-party service providers (such as debt collectors and mortgage servicers). Enforcement, rulemaking, and supervision responsibilities would reside primarily within those divisions. Other tools, such as research, consumer education, and consumer complaints, might remain Bureau-wide, but staff in each of these areas would be expected to develop expertise in working with each of the markets-based divisions.

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In the view of the Taskforce, this approach would be an improvement over the current organizational arrangement by starting with a primary focus on particular markets and their challenges and then determining which tools would be most effective in addressing those problems. A market-based organizational structure also would make it easier to use a combination of several tools to effectively respond to a problem. The Taskforce recognizes that this approach would create some coordination problems of its own, leading to a concern about maintaining consistent legal interpretations and policy goals across different markets, rather than across different tool-based divisions. Although both types of consistency are undeniably important, consistent guidance to market participants from all of the Bureau's operations (i.e., enforcement, supervision, and rulemaking) is more important to enable regulated entities to predict the Bureau's legal posture than ensuring that, for example, all rules or all enforcement actions are consistent with one another.

Commented [SY(10]: Part of how we are addressing this is through more robust knowledge management efforts, not sure if there is a way to weave that in or if there is an interest in including that. It could be a footnote.

A markets-based approach to oversight also reflects the way consumers shop for and use different products and providers supply them. Effective regulation should focus on these interactions and competitive consequences. For example, prepaid cards and bank accounts are treated as substitutes by many consumers and regulations on one could influence demand and usage for the other. Similarly, consequences for consumers of restrictions on small-dollar loans will be impacted by regulations involving comparable products, such as pawnbrokers, bank overdraft protection, and deposit advance products. It is the opinion of the Taskforce that reorganizing the Bureau's internal organizational structure around markets will orient the Bureau toward a consumer choice-centered approach to oversight that will facilitate policies that align with the dynamics of consumer choice.

The Taskforce also recommends that the CFPB create an Office of Policy Planning (OPP) with responsibility for (1) promoting coordination and consistency across the Bureau's operations, (2) identifying and Bureau's top priorities and engaging in strategic planning operations to accomplish them, (3) conducting assessment of the Bureau's effectiveness, including providing independent review of cost-benefit analysis initially conducted by Bureau divisions, (4) conducting retrospective review of regulations and major enforcement initiatives, and (5) drawing on the Bureau's research and policy expertise to conduct competition and consumer protection advocacy. OPP would assume some of the responsibilities currently executed by the Office of Strategy as well as new responsibilities.

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I would call it PPO (Policy Planning Office) and not OPP. It is reminiscent of a song from the 90s for a certain generation of us.

Recommendations:

4. The CFPB should reorganize its internal structure and operations to instantiate a "markets-based" organizational structure, as opposed to a "tools-based" operational structure.

5. The CFPB should establish an Office of Policy Planning with responsibility to coordinate operations across the Bureau, engage in strategic planning to achieve the Bureau's strategic objectives, and in collaboration with the divisions, conduct assessment of the effectiveness of the Bureau's operations, including independent cost-benefit review and retrospective review of regulations and major enforcement initiatives. The CFPB should also add a competition and consumer protection advocacy function based in OPP.

3. Competition

The Bureau's toolbox of consumer protection activities includes supervision and enforcement, consumer education and engagement, research and market monitoring, and rulemaking and regulation. The Taskforce believes that a guiding principle that should inform the use of each of these tools is competition and its power as a consumer protection tool.

3.1 Bureau effects on competition

The purpose of the Bureau as defined in the Dodd-Frank Act is to "ensure[] that the federal consumer financial laws are enforced consistently so that consumers may access markets for financial products, and so that these markets are fair, transparent, and competitive." This mandate to ensure competition in markets is crucial to protecting consumers as described in detail in Chapter 8 of Volume I of this report. Regulation, supervision, enforcement, and education are all tools that the Bureau can use to foster robust competition in consumer financial markets and enhance consumer choice and access to credit. Imprecise application of those tools, however, can have unintended effects on competition. Accordingly, the Bureau should carefully consider the market effects of interventions of all types.

Currently, the Bureau does not have any full-time staff dedicated to considering the effects of Bureau actions on the competitive landscape of consumer markets, nor does it have particularly strong relationships focused on these issues with other regulators. The Bureau should increase its internal capacity to research competition, potentially by bringing experts into the Office of Research. Data to evaluate competition in various markets do exist but are sometimes difficult for one agency to collect on its own. Therefore, the Bureau should cooperate with prudential regulators to obtain the necessary research data the Bureau may lack.

The Bureau has statutory authority to supervise nonbank covered persons of all sizes in the residential mortgage, private education lending, and payday lending markets. In addition, the Bureau has the authority to supervise nonbank "larger participant[s]" in markets for other consumer financial products or services, as the Bureau defines by rule. To ensure larger participant rules do not have unintended anticompetitive effects, the Bureau should attempt to determine whether there are threshold effects, or distortions of firm behavior as they approach thresholds for larger participant rules. Additionally, the Bureau should continue to consider costs and adverse consequences in establishing thresholds. For example, the Bureau should determine whether the $10 billion threshold artificially stunts the growth of their financial service providers.[8] Should the Bureau determine such threshold effects are harming growth and competition, it should consider means to ameliorate the unnecessary costs.

3.2 Retrospective Bureau effects on competition

The Bureau is required by statute to assess the effects of regulation on the marketplace before and after new rules are implemented, but those assessments do not have the evaluation of effects of regulation on competition as a core requirement. Undoubtedly major changes to the regulatory structure spurred by the passage of the Dodd-Frank Act and the creation of the CFPB have affected the makeup and structure of the consumer finance marketplace, and it is important to understand how and why those disruptions have shaped consumer experiences, especially regarding competition. The Bureau should retrospectively look at the effects of its rulemakings on consolidation, market entry and exit, and cost structures changing the nature of competition – and subsequently consumer protection – in the marketplace.

Enforcement is an important tool that the Bureau uses to ensure markets are "fair, transparent, and competitive," and other areas of Bureau operation should consider the effects of its actions on the competitive landscape of a particular market as well, including the tool of enforcement. As of now, little formal analysis is done on previous enforcement cases to understand how precedents that are established by those past cases affect lending products today and in the future.

To better understand its effects on markets, the Bureau should conduct retrospective analyses of completed cases with a specific eye toward identifying market impacts and assessing costs and benefits of those impacts. Learnings from these analyses should be used as an input into the decision-making process before new cases are opened. The FTC conducted similar analyses in its work on hospital mergers and acquisitions, and market-specific retrospective studies of selected CFPB cases, preferably published publicly, would go a long way to enhancing both the Bureau and other market participants' understanding of the effects of enforcement action on competition.

[8] *See* the regulatory framework discussion in Chapter 13 for additional information about the Bureau's $10 billion threshold for supervision.

3.3 Cost of credit

The Bureau's supervision, enforcement, and rulemaking activities often drastically affect the way that markets work by compelling changes in the behavior of individual providers and of the market as a whole. These decisions are made after considering voluminous evidence and detailed analyses of the costs and benefits of regulatory action, but insufficient attention is paid to the structure of individual markets themselves. A key consideration of the competitive landscape of markets is the cost of doing business, and actions to protect consumers and enhance competition should be informed by those costs.

An accurate assessment of the costs of various types of credit, as well as an understanding of how those costs influence the structure and dynamics of markets, can inform public policy decisions. Tracking costs and provision of credit on an ongoing basis can also reveal how Bureau and other regulatory action affects the way companies do business and what products consumers can access.

3.4 Facilitating competition in bank accounts

Markets with low switching costs are usually competitive, as consumers can be enticed by better offers. However, not all markets make it easy for consumers to change financial service providers. Bank and credit union accounts are one example where the relative difficulty of switching banks to opening a new account may lead consumers to continue an account despite the availability of alternatives with more attractive terms. Switching checking accounts is especially difficult for a consumer with limited liquidity. Before closing their existing account, they must wait for all outstanding checks to clear, to avoid expensive "returned check" charges and potential damage to their credit report. To be able to continue receiving banking services during this wait, they must have the funds to make the minimum initial deposit required by the new bank, thus maintaining minimum deposits at two banks simultaneously and paying any account fees at two banks. While some creditors deposit checks promptly and the "travel time" for the check to clear is a week or less, other payees might put the check in a drawer and forget it, requiring the consumer to goad the payee to cash the check so the old account can be closed. These costs in time and money may lead consumers to remain in an overly costly banking relationship where they would not do so if switching costs were lower.

While there are legitimate fraud and security reasons that may warrant a painstaking process for account changes, there should not be unnecessary friction caused by the process. High switching costs allow incumbents to avoid competition from rivals, regardless of price or service because customers succumb to inertia rather than go through the process to find a better offer at a competitor.

Other nations, especially in the EU and Australia, have pioneered reductions in account inertia via regimes that they call 'open banking,' which are larger efforts to promote innovations in payment systems. The EU open banking regime, as laid out in the revised Payment Services Directive (PSD2), allows for portable bank account numbers that customers can use to easily switch banks across the EU zone. Lowering the switching cost for consumers is expected to increase competition and spur innovation in the payments sector, leading to better economic and consumer protection outcomes. The Taskforce recommends that the Bureau study ways to promote competition in domestic depository accounts, including how to lower switching costs and the potential of account number portability.

3.5 State licensure

Currently, a patchwork of state licensing laws makes it difficult for many types of consumer financial service providers to expand their business across state lines. While safeguards are important, inconsistent standards and confusing requirements can prevent safe and efficient providers from entering a market. Inconsistent requirements artificially constrain expansion of popular services and insulate declining sectors from fair competition, leaving consumers worse off if they are unable to benefit from a truly competitive landscape. What should be paramount in consumer protection at the state level is not the legacy of yesterday's arrangements, but the steps states can maintain protection while lowering the cost and increasing the quality of financial options. States should research their regulations and those of other states to better understand what they can do to eliminate barriers to competition caused by these inconsistencies while still protecting consumers, with the end goal being both a high standard of consumer protection and a low cost of doing business.

Some states have taken important steps, for example by adopting consistent standards in the Uniform Consumer Credit Code (UCCC). The UCCC was drafted in 1968 by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and has been updated since. More updates are probably needed Adoption of the UCCC gives consumers consistent protections against unconscionable transactions, unfair contracts, and usurious credit terms by merchants in those states. In turn, merchants receive consistent treatment under the law, can save costs on compliance regimes in multiple states, and can more readily expand to additional states. There are currently nine states who use this code as a basis for their state laws. Colorado, Idaho, Indiana, Iowa, Kansas, Maine, Oklahoma, Utah, and Wyoming are all adoptees, and several other states have adopted substantially similar laws.

While the Taskforce does not specifically endorse adopting the UCCC, we believe that states should consider modeling their consumer credit laws after these principles and do what they can to alleviate unnecessary burden on financial institutions who wish to serve more customers. As an additional step, states can consider eliminating or significantly streamlining license requirements; we note that many states either to not license creditors or have adopted a simple registration requirement that authorizes the creditor to engage in a wide range of consumer financial services. In contrast, licensure in some states can take up to a year before institutions can legally operate, leaving consumers out in the cold. For its part, the Bureau can conduct a review of state creditor licensing laws to identify the practices that produce unnecessary burdens and require excessive amounts of time for licensing approval, thereby creating unwarranted barriers to entry.

3.6 RESPA Settlement Service Packaging

Mortgage acquisition is a difficult, time consuming, and costly process that could be made easier and less expensive for the consumer by using a packaging of settlement services approach.

Shopping for a mortgage can be a complicated process, with a wide array of options available. Loan and origination costs can involve various types of charges and different types of fees from different service providers, which use complicated terminology that is not standardized. RESPA requires a good faith estimate listing each individual settlement charge and fee. Upon application for a mortgage, a borrower receives a disclosure form that itemizes individual entries for items such as closing attorney, title search, and mortgage appraisal, to name but a few of the numerous services that are part of settlement.

Information provided on the good faith estimate includes the cost, the service, and sometimes even the name of a specific service provider. Some settlement services are preselected by the lender with both the service provider and cost forced on the borrower. With other settlement services, the borrower is permitted to search out its own provider and negotiate a price or select and accept the lender selected provider at the presented cost.

Searching for all of these services can be time consuming and costly. Although some borrowers may do so, others may rely on referrals from their loan originator for many services. Originators, however, do not have strong incentives to send consumers to the lowest cost provider of services. Although savvy consumers may shop, others may not. Moreover, borrowers, likely most, that infrequently enter into mortgage arrangements, can easily find the entire settlement process overwhelming or at least very effort intensive. For borrowers, whether purchasing or refinancing a home, attention is split between more pressing demands such as the need to search and select a home, deal with real estate professionals, consider interest rates, come up with down payments, and an assortment of other distractions, often relegating the cost of settlement services to the back seat.

Consumer's inattention to the cost of closing charges results in limited pricing pressure for settlement services. At the same time, a lender has little concern for the cost of settlement services since it does not pay the costs. This, too, results in minimal pricing pressure. Without lender attention to cost, competitive price pressure on settlement service providers is replaced by competition among these providers for lender attention to gain the sought-after placement on a lender's settlement service provider referral list. To the extent that borrowers rely on referrals, and referrals do not depend mainly on price, inefficient service providers may persist, undermining market efficiency.

The current RESPA induced settlement process creates competitive economic inefficiencies that raise the cost of mortgage acquisition for consumers.

The way to address these lingering non-productive economic costs in the typical mortgage transaction is to create a competitive market environment where lenders benefit from low closing costs and are incentivized to drive the costs lower. All-encompassing closing packages are the answer.

Packaged settlement would simplify and make the mortgage acquisition process less expensive for the consumer. Shoppers would save search costs by avoiding the need to individually find and select the various settlement services needed at closing. They would need only search for a single settlement price when otherwise preoccupied with lenders about mortgage interest rates, availability and qualifications. Consumer focus on single settlement package prices would in turn inspire lenders to focus on cost. Lenders would demand the lowest possible price from settlement service providers. Settlement service providers would compete on cost. Quality of settlement services would not suffer as lenders would require competent settlement work to ensure proper income producing mortgage closings.

The packaged settlement process offers other efficiencies too. The current RESPA system requires a specific breakout of each component of a closing cost. The effort to track and report these details involves burdens on lenders that create costs that ultimately fall on the consumer. Settlement packages would eliminate the need for this detailed tracking effort.

Recommendations:

6. The Bureau should implement the Dodd-Frank Act mandate to consider the effects of Bureau actions on competition. Consider competition, effects on consumer choice, and competitive effects of remedies in policy decision-making, including supervision, enforcement, and rulemaking.

7. The Bureau should increase capabilities of researching competition, in line with the previous recommendation to include analysis of competition when taking action. The Bureau should cooperate or coordinate with prudential regulators to obtain necessary research data the Bureau may lack.

8. The Bureau should determine threshold effects when establishing thresholds for Larger Participant rules. Should the Bureau identify serious threshold effects, it should determine why the phenomenon exists and address any anticompetitive effects.

9. Conduct selective case retrospectives to identify the market impacts of the Bureau's cases and assess the costs and benefits those impacts. Evaluate selective cases grouped by market and look to FTC's work on mergers and acquisitions as a model. Seek to answer the question: how do the precedents that are established by these cases affect lending products today and in the future?

10. The Bureau should conduct retrospective research on the effects of Bureau regulations on consolidation of FIs and certain types of institutions exiting markets and effects on competition and consumer protection (as different cost structures have different impacts on consumer use).

11. The Bureau should conduct a program of regular studies of the cost of lending in key product markets.

12. The Bureau should conduct a general, ongoing study of the cost structure of different types of markets. The Bureau should look at total costs, not just cost of regulatory compliance.

13. The Bureau should study ways to ease changing financial institutions and promoting competition, such as the feasibility of allowing consumers to port checking account numbers to a new bank.

14. The Bureau should research the effect of state creditor licensure laws for covered entities and whether the burden and time for licensing approval create unwarranted barriers to entry.

15. States should consider eliminating or streamlining licensing requirements for providers of financial services, to avoid anticompetitive barriers to entry.

16. The Bureau should establish an exemption for lenders and mortgage originators from the RESPA requirement to itemize settlement services and fees. This exemption should be allowed for lenders and mortgage originators that offer without upfront fees:

    a) A guaranteed price package that includes the cost of all loan origination charges and other settlement services needed to close the loan;

    b) A loan with an interest rate guarantee; and

    c) The package price remains the same throughout the mortgage application, approval, and settlement process subject only to changes related to final underwriting condition
    4. Consumer Empowerment

Traditional approaches to consumer financial education appear to have had limited success in providing meaningful improvements in consumers' knowledge. Nevertheless, it is well-recognized that financial education can be an important tool for consumer empowerment by making markets more transparent and promoting market competition. The disappointing effects of financial education may be attributed to a number of problems with the traditional approach. The goals are often poorly defined and frequently reflect the beliefs of those providing the information on what issues are important, rather than what consumers need. Information is not always provided at the relevant time or in the relevant period in a consumer's financial life cycle. For example, younger consumers may need more information on accessing a bank account and using credit while middle aged consumers may need more information with respect to retirement savings and investments.

In addition, much of consumer financial education is based on models that rely on statistical or mathematical rules for decisions under risk when probabilities are known. However, consumers make many decisions in which information is limited and the future is uncertain. Evidence suggests decisions made using heuristics and incomplete information may perform as well as rules based on extensive information and consideration of tradeoffs among alternatives.

4.1 General opportunities

The Taskforce has identified several specific research items in the next section that could be explored to further the goal of financial literacy, but there is much work to be done to understand what interventions actually work to help consumers. The literature has not found evidence that many financial literacy efforts are consistent or reliable at improving consumer financial well-being. The Bureau is well positioned to be a leader in financial education due to its unique Congressional mandate, expertise of the staff, and the relatively low opportunity costs for the Bureau to take up this research compared to other agencies. The Bureau should explore study methodologies that tell us more about when and how to intervene in consumer financial education, including incorporating credit and financial education issues in ongoing longitudinal panel studies such as the Panel Survey of Income Dynamics (PSID). The Bureau should also consider retrospective studies to test the efficacy of various consumer education interventions. To the Taskforce's knowledge, serious research on this subject has not been conducted before. Understanding what kinds of interventions work is a prerequisite for many of the financial education proposals offered below.

Commented [SY(12]: What is this assessment based on and how is it measured? This is a broad statement. Even if simply based on continued issues and general observations, would include a word about on what grounds they make this assertion

Commented [SY(13]: And besides, it is in the statute.

Commented [SY(14]: I think you mean "results" or "outcome" or unmet expectations, but not "effects"

When is there ever disappointment associated with education or the acquisition of knowledge

Commented [SY(15]: Which should be based on research, data, complaints, and consensus in consultation with the examiners, policy makers, and researchers and those gathering and analyzing the complaints

Commented [SY(16]: Perhaps it is not as coordinated and focused as it could be, not only internally but across the financial agencies which may lend to the apparent lack of focus and effectiveness and bias

Commented [SY(17]: I would start the entire discussion on this topic with this sentence because this is key.

Commented [SY(18]: There should also be superlative emphasis on coordinating with everyone anywhere who is working on this subject, so that CFPB financial educators are on the cutting edge.

4.2 Specific opportunities

The Bureau's 2015 Report on measuring consumer financial well-being[9] is an important step forward in understanding the goals of consumer financial education and literacy. By focusing on both objective and subjective measurements of consumer well-being, the goals captured there provide a useful set of metrics to measure efforts to empower consumers throughout their lifecycle to be informed and responsible consumers.

The Taskforce urges the Bureau to continue to experiment and to conduct research on how to operationalize the normative goals of the 2015 Report. We believe the Bureau should conduct research on how consumers actually make decisions, on how well their decision processes work, on how decision processes might be improved, and how best to provide financial education. The Bureau should focus on larger items in consumers' budgets—mortgages, retirement savings, and auto purchases, for example. It should consider the extent to which consumer education should consider developing less cognitively-taxing tools like rules of thumb and heuristics rather than only optimizing decisions in particular choice contexts. In the research process the Bureau should consider the extent to which "buyer behavior modeling" used in applied psychology studies and marketing would be useful in these contexts. The Bureau should conduct research on the extent to which the ballooning student debt crisis is affecting the financial well-being of consumers as well as their financial maturation broadly. As the Bureau is the only federal regulator with a statutory mandate to address and improve consumer education, the Bureau should invest the resources to become the leader in this research.

Specific research projects conducted by the Bureau or other research institutions can help advance our knowledge of what works and what doesn't in the field of consumer education. Well-designed and focused educational pilot programs will help individual consumers meet their financial goals and advance Bureau goals of increased consumer savings, the reduction of foreclosures, and the reduction of credit defaults among others. These pilot programs can have a variety of targets, varying by locality, participant demographics, length, and objective goals. The creation of many small, nimble pilot programs can create further areas of exploration and research to empower consumers.

Utilizing current Bureau infrastructure and expertise in innovation and project management, the Bureau could create a program analogous to the existing Tech Sprint program in the Office of Innovation to field proposals for these pilot experiments, creating competition from inside

Commented [SY(19]: And savings practices and the relationship to wellbeing or financial security

Commented [SY(20]: And other implications such as societal stability, career choices, etc

Commented [SY(21]: Since the TF is not recommending a change with respect to this tool

[9] Cite to well-being report: [HYPERLINK "https://www.consumerfinance.gov/practitioner-resources/financial-well-being-resources/"]

and outside of the Bureau to identify the best proposals. The Office of Innovation program would not be limited to these small educational pilot programs but could support a broader mission of encouraging private entities to partner with the Bureau to implement effective financial literacy programming.

Often, financial literacy education targeted at young people is designed entirely by financial professionals and ignores the large body of research on pedagogy broadly. While the Bureau should of course strive for a deep understanding of pedagogical research and reality, it is unlikely that the Bureau will be able to overcome this pitfall entirely in its design of educational programs. Thus, after identifying effective interventions that can be targeted toward young people, the Bureau should look to successful educational programs designed and administered by other government bodies as potential models to actually implement them. One such program is the Presidential Youth Fitness Program designed by the Department of Health and Human Services, which is heavily embedded into primary and secondary school physical education curriculums. A similar program for financial literacy fitness could be established at a national level, possibly including a partnership of government promotion (and existing resources) and private participation on a Board or Council. Such a program would be voluntary throughout the country but provide valuable education for kids, schools, and families, offering educators and families free access to courses and assessments for youth fitness at appropriate levels and motivational recognition to empower students to adopt and maintain financial well-being.

Commented [SY(22]: It is a balance --- you need enough financial depth on subject as well as pedagogy expertise to get it right, also really think that it is important to look at how many other entities are approaching this subject, not limited to governments and NGOs, as a lot of financial institutions (including credit unions) do financial education effectively o various topics

Commented [SY(23]: Per note above, as well as other non-governmental entities

Should also keep coordinating with other nations, too, as we learned from the OECD/INFE related work

Recommendations:

17. The Bureau should explore study methodologies that tell us more about when and how to intervene in consumer financial education, including incorporating credit and financial education issues in ongoing longitudinal panel studies such as the PSID. The Bureau should also consider retrospective studies to test the efficacy of various consumer education interventions.

18. The Bureau should continue to experiment and conduct research on how to operationalize the normative goals of the 2015 Report. Conduct research to understand how consumers actually make decisions, assess how well their decision processes work, consider how decision processes might be improved, and determine how to disseminate the findings to consumers. The Bureau should first focus on larger items in consumers' budgets—mortgages, retirement savings, and auto purchases, for example. Consider the extent to which consumer education should be focused on developing tools to engage in optimizing decisions in particular choice contexts versus less cognitively taxing heuristics and rules of thumb. Finally, the Bureau should consider the extent to

which the buyer behavior model used in marketing would be useful in this context.

19. The Bureau should establish an ongoing research program utilizing educational pilot programs with specific, objective goals in mind. Develop multiple pilots and approaches in differing in localities, target demographics, objective goals, and length. If feasible, attempt the same pilot in multiple locations with similar target groups, goals, and lengths to control for variation and assess the efficacy of the program.

20. The Bureau's Office of Innovation should create a new program analogous to its tech sprint program around financial education at FIs and in the private sector generally. These tech sprints should provide as a benefit the opportunity for FIs to pilot these programs with supervision.

21. The Bureau should research the economic effects of Student Loans, especially on the financial well-being generally and financial maturation of younger consumers.

22. The Bureau should consider studying the efficacy of and subsequently experimenting with programs designed to educate and reward financial literacy for young consumers. One example could be a Presidential Youth Financial Fitness Program.

Commented [SY(24]: What about reference to the train the trainer programs which operate as force multipliers the government cannot do it all so the more there is coordination and a chain of training at scale, the better and there is already work in this area

5. Consumer Credit Reporting

Congress enacted the Fair Credit Reporting Act ("FCRA") in 1970,[10] and the Dodd-Frank Act transferred rulemaking authority to the Bureau effective July 2011. The Bureau issued a consolidated restatement of the FCRA's implementing regulation, Regulation V,[11] but otherwise it has not engaged in significant rulemaking related to consumer reporting. The Taskforce recommends that the Bureau amend Regulation V in various respects and research certain consumer reporting issues, and it recommends that Congress amend the FCRA to address civil liability for class actions.

5.1 Rulemaking and Interpretive Issues

Between 1970 and 2011, the Federal Trade Commission ("FTC") issued numerous informal interpretations and guidance, including over 400 staff opinion letters and a staff compliance manual. The FTC initially consolidated many of these in its 1990 FCRA commentary,[12] on which the FTC sought public comment before publishing a final version in the Federal Register. FTC staff were revising the commentary when Congress passed the Dodd-Frank Act. To assist the Bureau and the public, the FTC published a compendium of its FCRA interpretations, often referred to as the "40-Year Report,"[13] that included updates to the 1990 commentary and other staff letters, informal opinions, and rulemakings.

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[10] 15 U.S.C. §§ 1681–1681x. Congress has amended the FCRA numerous times.

[11] Bureau of Consumer Fin. Protect., *Fair Credit Reporting (Regulation V)*, 76 Fed. Reg. 79307 (Dec. 21, 2011); Bureau of Consumer Fin. Protect., *Correcting Amendments*, 77 Fed. Reg. 67744 (Nov. 14, 2012); Bureau of Consumer Fin. Protect., *Finalization of Interim Final Rules (Subject to Any Intervening Amendments) Under Consumer Financial Protection Laws*, 81 Fed. Reg. 25323 (Apr. 28, 2016).

[12] Fed. Trade Comm'n, *Statement of General Policy or Interpretation; Commentary on the Fair Credit Reporting Act*, 55 Fed. Reg. 18804 (May 4, 1990) (rescinded July 2011).

[13] Fed. Trade Comm'n, *40 Years of Experience with the Fair Credit Report Act: An FTC Staff Report with Summary of Interpretations*, 2011 WL 3020575 (July 2011), [HYPERLINK "https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf"].

The degree to which the public may rely on the FTC's interpretations is uncertain. As with the prior 1990 commentary, the interpretations in the 40-Year Report have no binding legal effect, though courts have sometimes cited them as persuasive authority. The Bureau has stated generally that it gives "due consideration" to informal guidance that other agencies issued prior to the Dodd-Frank Act, but that it determines whether to apply such guidance "in light of all relevant factors," such as the formality of the guidance and its persuasiveness.[14] The public thus cannot predict reliably which aspects of the 40-Year Report the Bureau or a court may find persuasive. Consequently, consumers may be uncertain of their rights, while furnishers, consumer reporting agencies ("CRAs"), and users of consumer reports may be uncertain of their obligations.

The Taskforce recommends that the Bureau adopt the FTC's interpretations set forth in the 40-Year Report—specifically, that the Bureau identify the interpretations that it finds persuasive and to which it gives weight, updating them as necessary. Preferably, the Bureau would do so by codifying the interpretations as official commentary to Regulation V. Pending any rulemaking, the Bureau may wish to take an interim measure clarifying the aspects of the FTC's interpretations on which the public may rely. Such an approach would give the public and courts greater certainty about how the Bureau interprets the FCRA.

When Congress enacted the Dodd-Frank Act, the FTC was also revising the content and model disclosures for the FCRA's summary of consumer rights,[15] notice to furnishers of information to CRAs,[16] and notice to users of consumer reports.[17] The FTC issued a proposed rule that would have, among other things, added information relating to the then-new Furnisher Direct Dispute Rule, improved the notices' clarity, and deleted certain information that the FCRA does not require.[18] However, the FTC did not finalize the rule because its authority transferred to the Bureau. In 2018, the Bureau issued an interim final rule amending the summary of consumer

[14] Bureau of Consumer Fin. Protect., *Identification of Enforceable Rules and Orders*, 76 Fed. Reg. 43569, 43570 (July 21, 2011) ("The CFPB will give due consideration to the application of other written guidance, interpretations, and policy statements issued prior to July 21, 2011, by a transferor agency in light of all relevant factors, including: whether the agency had rulemaking authority for the law in question; the formality of the document in question and the weight afforded it by the issuing agency; the persuasiveness of the document; and whether the document conflicts with guidance or interpretations issued by another agency.").

[15] FCRA section 609(c), (15 U.S.C. § 1681g(c)).

[16] FCRA section 607(d)(2), (15 U.S.C. § 1681e(d)(2)).

[17] *Id.*

[18] Fed. Trade Comm'n, *Summary of Rights and Notices of Duties Under the Fair Credit Reporting Act*, 75 Fed. Reg. 52655 (Aug. 27, 2010).

rights to incorporate new statutorily required language,[19] but unlike the FTC's proposal, it has not generally revised the notices.

The Taskforce recommends that the Bureau engage in rulemaking to update the summary of consumer rights, notice to furnishers, and notice to users. As the FTC observed, adding information about the Furnisher Direct Dispute Rule and revising the language on the notices could improve consumers' understanding of their rights and furnishers' and users' understandings of their duties. It also may be helpful to consider how the language that Congress added to the summary of consumer rights in 2018 interacts with other information on that form. To ensure the revised disclosures' efficacy, the Bureau should conduct consumer testing of at least the summary of consumer rights, if not all three notices.

The Bureau should also clarify the obligations of CRAs and furnishers when responding to consumer disputes. CRAs and furnishers report that they receive many repeated, frivolous disputes, with credit repair organizations submitting a large portion. But they express reluctance to use the FCRA's streamlined dispute-response procedures applicable to "frivolous or irrelevant" disputes because of uncertainty about when they have satisfied the requirement to "reasonably determine" that a dispute is in fact frivolous or irrelevant.[20] Investigating and responding to disputes thus reportedly imposes a greater burden on CRAs and furnishers than may be necessary to comply with the law and may lead to the removal of accurate information because the investigation is not completed in a timely manner. It also gives them an incentive respond superficially to disputes—such as removing accurate negative information from a consumer's file to avoid additional disputes or rejecting a meritorious dispute without sufficient investigation. These outcomes are harmful generally to consumers and the market because they reduce the amount of accurate information available to creditors and other users of consumer reports.

The Bureau should clarify through rulemaking what constitutes a reasonable determination that a dispute is frivolous or irrelevant. In particular, it may be beneficial for the Bureau to identify examples of disputes that are (or are not) frivolous or irrelevant and the steps that CRAs or furnishers must or may take in various factual circumstances. The FTC has used this approach in some of its Guides, stating a general principle and then providing examples of its

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[19] Bureau of Consumer Fin. Protect., *Summaries of Rights Under the Fair Credit Reporting Act (Regulation V)*, 83 Fed. Reg. 47027 (Sept. 18, 2018).

[20] FCRA section 611(a)(3) (15 U.S.C. § 1681i(a)(3)); 12 C.F.R. § 1022.43(f).

application.[21] Relatedly, with respect to disputes that are not frivolous or irrelevant, the Bureau should consider clarifying the FCRA's requirement that a CRA or furnisher conduct a "reasonable [re]investigation" of disputed information.[22] Again, the public may benefit from examples of disputes regarding various types of alleged furnishing errors and steps that would (or would not) constitute a reasonable investigation.

5.2 Research Issues

The Fair and Accurate Credit Transactions Act of 2003 required, among other things, the FTC to conduct a national study of the accuracy and completeness of consumer credit reports. As discussed in chapter 11, the FTC's 2012 report summarized findings from the first national study designed to engage all the primary groups that participate in the credit reporting and scoring process.[23] Stakeholders commonly cite to this report, including its finding that at least 24 percent of credit reports potentially contained errors.[24]

The FTC and the Bureau continue to engage with stakeholders regarding the accuracy of consumer reports,[25] and the Bureau has indicated its intention to conduct a follow-up to the FTC's influential 2012 report. As discussed in chapter 11, the Taskforce wholeheartedly endorses these endeavors because they will add greatly to the Bureau's and the public's knowledge regarding the impact of recent changes in consumer reporting. The Taskforce recommends that the Bureau update the FTC's 2012 study periodically, so that it can assess how the accuracy and completeness of consumer reports change over time, as well as monitor trends in the types of furnished information. In addition, while the FTC's 2012 study addressed accuracy concerns that existed at the time, the Taskforce recommends that the Bureau also focus on how consistently various types of information are included in consumer reports, in light of the financial system's increasing reliance on new technology and expanded datasets.

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[21] *See, e.g.*, Green Guides, 16 CFR Part 260, and Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.

[22] FCRA section 611(a)(1)(A) (15 U.S.C. § 1681i(a)(1)(A)); 12 C.F.R. § 1022.43(a).

[23] Fed. Trade Comm'n, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003* (Dec. 2012), [HYPERLINK "https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf"].

[24] *Id.* at 63.

[25] For example, the FTC and the Bureau held a joint workshop in 2019 regarding accuracy in consumer reporting. *See* Fed. Trade Comm'n, *Accuracy in Consumer Reporting Workshop* (Dec. 10, 2019), [HYPERLINK "https://www.ftc.gov/news-events/events-calendar/accuracy-consumer-reporting-workshop"].

These studies could provide valuable insight to the consumer reporting market, including to the accuracy and completeness of any non-traditional, or alternative, data that may be furnished.

The Bureau should specifically study the tradeoff between accuracy and completeness implicit in the NCAP requirement for a minimum amount of identifying information before pubic record information is included in credit reports. It should also study the problem of "file fragments" more generally.

As part of these studies, the Bureau should consider consumer reporting issues that arise in connection with a consumer's bankruptcy. Commenters to the Taskforce RFI, as well as the recent American Bankruptcy Institute ("ABI") Commission on Consumer Bankruptcy, noted that the interplay of the FCRA and the Bankruptcy Code can raise questions about how a creditor complies simultaneously with both laws.[26] The FCRA contains two discrete provisions regarding bankruptcy,[27] but they do not state how a creditor must furnish accurate and complete information about debts owed by consumers who have filed bankruptcy or are co-liable with another person who has filed bankruptcy. The ABI Commission's report identified several specific issues, including examples of potentially inaccurate furnishing or inconsistent reporting methods, though it noted that it had not yet explored whether these are widespread problems. The Commission recommended further study.

The Taskforce echoes the ABI Commission and recommends that the Bureau research issues in consumer reporting related to bankruptcy. In particular, the Bureau should investigate the accuracy and completeness of information furnished regarding debts in bankruptcy and consider whether potential uniform reporting standards are necessary. Depending on the Bureau's findings, it may wish to provide guidance to stakeholders or engage in rulemaking under the FCRA, or Congress may need to amend relevant statutes.

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[26] Am. Bankruptcy Inst., *Final Report of the ABI Commission on Consumer Bankruptcy* § 5.05 (2019), [HYPERLINK "https://consumercommission.abi.org/commission-report"].

[27] FCRA section 605(a)(1) (providing that consumer reports generally must exclude information about bankruptcy cases that arouse more than ten years before the date of the report), (d)(1) (stating that any consumer report that contains information about a bankruptcy must include the specific chapter of bankruptcy and, if applicable, that the consumer withdrew the bankruptcy case before a final judgment). (15 U.S.C. § 1681c(a)(1), (d)(1).) The FTC's 40-Year Report provides various guidance regarding bankruptcy (see Comments 605(a)(1)-1 through -3, 607(b)-6, and 611(a)-3), but they are limited in scope and, as discussed above, are not binding.

5.3 Supervision

As part of its supervision of CRAs, the Bureau should examine the success of consumers' request for security freezes. In 2018, Congress enacted the Economic Growth, Regulatory Relief, and Consumer Protection Act ("EGRRCPA"), which prohibited nationwide CRAs from charging a fee to place, remove, or temporarily lift a security freeze. The Taskforce notes that the CFBP Examination Manual includes an assessment of compliance with requests for security freezes. However, the Bureau received feedback through its Request for Information that some consumers may nonetheless have difficulty placing or removing security freezes, and the volume of consumer complaints on this issue supports a degree of concern.

5.4 Legislation

The FCRA affords consumers a private right of action and the ability to seek damages for violations. Unlike other consumer protection statutes, however, it does not have any limitations on class action awards. For example, the Truth in Lending Act, the Equal Credit Opportunity Act, the Fair Debt Collection Practices Act , and the Electronic Funds Transfer Act each limits class action awards to the lesser of $500,000 or $1,000,000 or one percent of the creditor's net worth.[28] To promote consistency among consumer protection laws, the Taskforce recommends that Congress amend the FCRA to impose appropriate limits on civil penalties in class actions.

Recommendations:

23. The Bureau should engage in rulemaking to clarify the obligations of CRAs and furnishers with respect to disputes under the FCRA. In particular, the Bureau should provide guidance on when an entity has "reasonably determine[d]" that a dispute is frivolous or irrelevant, and it should consider clarifying what constitutes a "reasonable investigation" of disputed information. The Bureau should consider providing examples

[28] TILA § 130(a)(2)(B), (15 U.S.C. § 1640(a)(2)(B), ECOA § 706(b), (15 U.S.C. 1691e(b); FDCPA § 813(a)(2)(B), 15 U.S.C. § 1692k(a)((2)(B); EFTA §916(a)(2)(ii), (15 U.S.C. § 1693m(a)(2)(B).

of conduct that does, and does not, satisfy these standards in various factual circumstances.

24. The Bureau should engage in rulemaking to codify as Commentary to Regulation V the FTC's interpretations of the FCRA, which are set forth in the FTC's 40-Year Report. The Bureau should assess whether any of the interpretations requires updates or revisions.

25. The Bureau should engage in rulemaking to update and revise the FCRA's summary of consumer rights, notice to furnishers of information to CRAs, and notice to users of consumer reports. The Bureau should conduct consumer testing on the summary of consumer rights to ensure its efficacy, and it should consider testing the notices to furnishers and users.

26. The Bureau should update periodically the studies of credit reporting errors that the FTC conducted pursuant to the Fair and Accurate Credit Transactions Act. The Bureau's studies should include a focus on whether consumer reports include all the types of information that they should include.

27. The Bureau should determine through its examination authority whether consumers are able to obtain and remove security freezes appropriately.

28. The Bureau should research consumer reporting issues that arise in connection with a consumer's bankruptcy.

29. Congress should adopt class action civil penalty limitations for FCRA, to bring the FCRA civil liability provision in line with similar laws.

6. Cost-Benefit and Bureau Activities Analysis

6.1 Regulatory Cost-Benefit Analysis

To improve regulatory decision-making, transparency, accountability, and credibility, the Bureau should incorporate cost-benefit analysis into its regulatory program to a greater degree. In order to achieve these goals, the Bureau should adhere to established principles and best-practices of cost-benefit analysis and include CBA analysts and economists in regulatory deliberations as early in the process as possible. To maximize the benefits of regulatory CBA, the analysis should be conducted prior to a final selection of the regulatory alternatives. To enhance the objectivity of the Bureau's analyses, the Bureau should establish a system of independent review of its analyses.

An established policy of adhering to a set of principles and best practices of CBA standardizes important elements and provides a set of guidelines to hold agencies accountable to. The fundamental principles of CBA involve an analysis of the problem and relevant market failures; the identification of alternative solutions to the problem; an analysis of the costs and benefits of each alternative that is quantified and monetized to the maximum extent possible; and a recommendation to select the policy that maximizes net benefits. Other principles and best practices provide guidance on more technical matters, such as, among other things, establishing a baseline, discounting costs and benefits to present value, and the treatment of uncertainty. Still other principles and best practices of CBA are intended to advance the transparency of the rulemaking, such as providing clear presentation of the costs and benefits of regulations, clearly articulating analytical inputs to ensure reproducibility, and presentation of impacts using both pre- and post-statutory baselines. The principles and best practices of CBA are listed and discussed at length in chapter 13.

Cost-benefit analysis must be able to accommodate qualitative information when quantitative and monetized values are unavailable. These qualitative benefits include distributional concerns, fairness, equity, and human dignity. Because of the importance of inclusion and credit availability to the Bureau's mission, the Bureau should evaluate any positive or negative effect on inclusion as part of its cost-benefit analyses as appropriate.

That said, CBA is most effective at achieving the goals stated above when all benefits and costs are quantified and monetized. As noted in Chapter 13, the CFPB is still a young agency and many of the benefits associated with CFPB regulations are difficult to quantify and monetize due to a lack of quality research. The Bureau should endeavor to conduct or sponsor quality research intended to develop reliable estimates of the benefits of avoided consumer harms.

In order to maximize the impact of regulatory CBA, it is important that the appropriate internal procedures be in place to ensure the lessons of the analysis are fully socialized in the agency and amongst decision-makers. To do this, economists and other analysts responsible for developing the CBA should be incorporated into regulatory deliberations as early as possible – and the decision-making process should allow for the analysis to be completed prior to final option selection.

Finally, to promote accountability the Bureau should subject its analyses to a review by an independent body. This review could be accomplished by existing regulatory authorities in the executive branch, such as the Office of Information and Regulatory affairs (OIRA) which performs this task for Executive regulators. Alternatively, the Bureau could establish its own office that operates independent of the offices responsible for analytical development and regulatory decision-making. The Bureau should also consider codifying the principles and best practices of CBA in a rulemaking to further enhance the accountability of its analyses.

The Taskforce notes that many of its recommendations are consistent with recommendations made by the Administrative Conference of the United States (ACUS) in its report, Benefit-Cost Analysis at Independent Agencies. In its report, ACUS recommended that independent agencies consider adopting principles of cost-benefit analysis akin to OMB Circular A-4, consultation with OIRA, and early incorporation of CBA into decision-making processes. ACUS also recommended that independent agencies should quantify and monetize benefits and costs whenever possible; produce transparent and reproducible estimates; and include clear summary information about the estimated costs, benefits, and transfer payments.[29]

6.2 Evaluation of Bureau Activities

[29] Admin. Conf. of the U.S., Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies*, [HYPERLINK "https://www.govinfo.gov/content/pkg/FR-2013-07-10/pdf/2013-16541.pdf"] (July 10, 2013). Pg. 56. Report can be accessed at [HYPERLINK "https://www.acus.gov/sites/default/files/documents/Copeland%20Final%20BCA%20Report%204-30-13.pdf"].

As the Task Force has emphasized throughout this report, it is important that government policies and procedures are informed by the best available science and evidence. Maintaining a rigorous program for research and evaluation is essential to well-informed policy that deploys the Bureau's resources efficiently to maximize its strategic and statutory goals. The Task Force applauds the Bureau's work to date in developing performance metrics under the Government Performance and Results Act (GPRA). Also, the Task Force is aware of the Bureau's efforts to voluntarily comply with Title I of The Foundations for Evidence-Based Policy Act (2018), which emphasizes the importance of using evidence to address policy questions.

The Task Force has reviewed the Bureau's performance metrics in its *Fiscal Year 2020: Annual Performance Plan and Report, and Budget Overview.*[30] Generally, the Task Force believes the strategic goals established by Bureau reasonably capture its statutory obligations, and that the performance metrics identified are appropriate. However, the Task Force believes that the performance metrics relate primarily to specific actions taken by the Bureau and that this work could be supplemented with additional metrics that track the general health of the markets they regulate using general welfare concepts in economics. These metrics could include tracking prices and quantities, competitiveness, and innovation.

Evaluation can be a useful tool to inform decisions about allocating scarce resources across the Bureau's activities. One area that is particularly ripe for additional research and evaluation is tool selection. If more information were available about the marginal benefits and costs of supervision and enforcement activities, the Bureau could allocate resources in manner to maximize compliance given resource constraints. The Bureau should evaluate the benefits and costs of enforcement and supervision to inform these decisions. It should also consider that enforcement and supervision may have economies (or diseconomies) of scale by firm size. Small banks may experience disproportionally higher costs than big banks due to supervision and enforcement, which may reduce competitiveness.

Recommendations

30. The Bureau should adopt principles and best-practices like those identified in chapter 13 in a public-facing statement to promote

[30] Consumer Financial Protection Bureau (2020), *Fiscal Year 2020: Annual Performance Plan and Report, and Budget Overview.* Accessed at [HYPERLINK "https://files.consumerfinance.gov/f/documents/cfpb_performance-plan-and-report_fy20.pdf"]

accountability and transparency. The Bureau could develop these principles and best practices on their own or voluntarily adopt OMB Circular A-4. The Bureau should consider implementing these principles and best practices via rulemaking.

31. The Bureau should establish independent review of its regulatory cost-benefit analyses by either staffing an office of cost-benefit analysis at the Bureau and establishing the appropriate internal controls to promote independent review, or by voluntarily submitting its analyses to OIRA for review. The Bureau should analyze these options and proceed accordingly.

32. The Bureau should conduct or sponsor high-quality empirical work to monetize the reduction in risk of consumer harms that comprise the benefits of its regulations.

33. The Bureau should involve staff responsible for conducting regulatory CBA in the development of the regulation at the earliest possible point in the process. The analysis should be completed prior to selection of any final option, so that decision-makers are able to consider the results of the analysis when deciding.

34. Because of the importance of inclusion and credit availability to the Bureau's mission, the Bureau should evaluate any positive or negative effect on inclusion as part of its cost-benefit analyses as appropriate.

35. The Bureau should supplement the performance metrics its developed for the GPRA with additional metrics that track the general health of the markets they regulate using general consumer welfare concepts in economics. These should include metrics intended to capture inclusion, competition, innovation, prices, and quantities. These metrics should be incorporated into the Bureau's next GPRA performance plan.

36. The Bureau should research and evaluate the benefits and costs of supervision and enforcement activities and use that research to inform resource allocation decisions. The Bureau should analyze economies or diseconomies of scale by firm size in the benefits and costs of supervision and enforcement as part of this research.

7. Deposit Accounts

Commented [WN(25]: Topics missing in the preamble:
1. Should mention the fraud potential of delays in the clearing system.
2.Tie this to previous rec endorsing faster payments systems.
3. To increase competition such that consumers can more easily move their money to better bank opportunities. Subject to any prudential regulatory needs.
4. Note: Fed's suspension of this limit during the Coronavirus pandemic.

A significant percentage of consumers are only marginally included in the financial system. They are unbanked or underbanked. Reasons for avoiding banks vary. Included among reported reasons are don't have enough money, bank fees are too high, don't need an account, and dislike or distrust banks. These consumers often live from paycheck to paycheck. Unbanked and underbanked consumers use a variety of nonbank firms (check cashers, money order vendors, payday lenders, and pawnshops, for example) for their financial needs, which primarily involve payment services or short-term credit and are relatively expensive.

Increasingly, many consumers use prepaid cards for paying ongoing living expenses instead of a bank account. Depending on a consumer's financial circumstances, a prepaid card may be used to make payments at a lower cost than a checking account. Prepaid cards are less costly than checking accounts, and attractive because users often do not have sufficient savings to avoid some types of bank fees.

The Taskforce endorses measures aimed at increasing transparency and promoting competition for bank deposit and similar services. Measures include standardizing disclosures to facilitate comparisons among products (such as prepaid and debit cards), removing restrictions that inhibit competition on price or product features (such as price controls on debit card interchange income, which may cause banks to increase fee income), take advantage of improvements in technology to add value to products (such as speeding up availability of deposited funds, which may lessen demand for payday loans), and eliminating obsolete restrictions (such as limits to savings account withdrawals).

With these considerations in mind, the Taskforce proposes six recommendations.

Recommendations

37. The Bureau should expand access to the payment system by unbanked and underbanked consumers by applying the same Regulation E rules to consumers using prepaid cards and debit cards. Both types of card issuers should provide

the same Regulation E opt-in and just-in-time fee disclosures and allow issuers to apply new funds first to overdraft fees and negative balances to avoid creating debt traps.

38. The Federal Reserve and the Bureau should take all reasonable measures to speed up the payments system by updating Regulation CC on expedited funds availability as appropriate to reflect improvements in the technology for faster check clearing. Updates to Reg CC should result in:
    1. giving consumers the same prompt access to checks deposited by mobile devices as is required for ATM deposits, and
    2. treating deposits to prepaid accounts the same as deposits to checking accounts.

39. The Fed should consider eliminating or permanently raising the 6-transaction limit for savings accounts.

8. Disclosures

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8.1 Regulatory principles for disclosures

Disclosure is one of the key tools of consumer financial protection, but effective disclosures are hard to come by. To make informed financial decisions, consumers must be exposed to, pay attention to, comprehend, accept, and then retain information necessary to evaluate a transaction. With so many steps in the decision-making process, there is ample opportunity for intervention and failure, leading to less efficient outcomes for consumers. For an in-depth discussion of disclosures, please see Chapter 7 of Volume I of this report.

In the view of the Taskforce, disclosures that provide additional information must seek to reduce the costs to consumers of locating the product or service they want. Disclosures should be focused on standardizing terms and facilitating comparability, because these approaches can potentially reduce the costs of obtaining information. They should be tightly focused on information that is important to consumers and directly relevant to their purchasing decisions to avoid the problem of information overload. Disclosing all possible details and contingencies may appear to *provide* more information, but, as discussed above, consumers may actually *use* less information.

Other disclosures may serve primarily to document the details of a transaction. In a mortgage transaction, for example, consumers likely need a detailed listing of various charges to determine which fees are tax deductible, and ultimately to determine correctly their gain or loss when the property is sold. Similarly, the itemized list of transactions on a credit card statement serves to document where the money went for purposes of budgeting, and to enable the consumer to identify incorrect or inappropriate charges. Neither type of disclosure is intended to influence purchasing decisions.

The role of government in regulating financial disclosures is contentious because the potential for market interventions that harm rather than help consumers is high, usually because of a lack of understanding of what effective disclosures and related policies are. Simply adding another required disclosure to a stack of already monotonous and unreadable paperwork does not result in increased consumer protection. New research on disclosures, consumer attention, and the economics of information discussed in Chapter 7 as well as decades of experience with the current regime lead to the conclusion that the Bureau and other financial regulators should re-think their overall approach to disclosures, especially when making new rules. Where possible the Bureau should encourage principles-based rules rather than the overly prescriptive regulations that led us to our troubles today. Mandatory disclosures should only contain the minimum information that is relevant and necessary for consumers to understand at the time that they make a decision, and additional important information should be readily available to consumers when they need it. Disclosed information does not have to include everything in the contract – that's why the contract exists, and consumers can read it in full.

8.2 Credit advertising rules

Beyond disclosures at the time of purchase or contract signing, there are a litany of required disclosures in advertising. Television commercials, radio spots, and print ads often require disclosure in the unreadable fine print or by actors sped up to incomprehensible speeds. This approach to advertising disclosure is ineffective and cumbersome, the butt of many jokes, and downright annoying to most consumers. The Bureau should review advertising disclosure requirements, especially those involving advertising trigger terms, with the purpose of avoiding misleading advertising in presented terms and to require additional information only when necessary to prevent deception about the nature or significance of the presented terms. For example, stating that a credit sale requires a 10% down payment may be useful to consumers shopping for a product they can buy on credit. But this statement triggers a host of other disclosures, including the annual percentage rate, which the creditor may not know until the consumer applies for credit. Similarly, the payment amount and number of payments will not be known until the consumer selects the product, and the creditor and consumer agree on the final price, and the consumer picks the length of the repayment term. The commentary to Regulation Z allows a creditor to use a unit-cost example, such as "48 monthly payments of $ 27.83 per $1,000 borrowed."[31] But even if the consumer had the math skills to determine what the monthly payment would be on an item that cost, for instance, $ 3,479.50,[32] the consumer would not have the information she needed if the APR depended on her creditworthiness.

Instead of the overly prescriptive rules of the past, a principles-based approach enforced by UDAAP authority will streamline advertisements, allowing entities to advertise their products effectively and consumers to understand what is important to them in the moment, while avoiding deceptive representations.

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[31] Regulation Z, Supp. I, cmt. 24(d)(2)-2.

[32] ($3,479.5/$1,000) x $27.83 = $96.80 monthly payment.

8.3 ECOA adverse action notices

The FCRA and ECOA both contain requirements for notices of adverse action in certain situations. Although the FCRA is the older law, its adverse action notice requirement was amendment by amendment over 25 years after the ECOA's adverse action notice requirements. Commentary to Regulation B that was appropriate when first drafted has become obsolete and poses unintended compliance obligations for creditors and sometimes limits the useful information available to consumers.

Specifically, the FCRA's requirements overlap with similar requirements in the ECOA, as implemented by Regulation B, sometimes creating uncertainty. Regulation B requires an adverse action notice to include a statement of the specific reason for the action, and it identifies as insufficiently specific a statement that the consumer failed to achieve the qualifying score on the creditor's credit scoring system.[33] When the Federal Reserve Board promulgated this rule in 1976, the provision helped ensure that consumers learned the reasons underlying their non-qualifying score.[34] The prohibition against stating that the consumer "failed to achieve a qualifying score on the creditor's credit scoring system" has been widely understood to similarly prohibit a reason relating to not achieving a qualifying score on a credit bureau's scoring system.

But Congress has since amended the FCRA to require that, when a person takes adverse action based on information in a credit report, the person disclose to the consumer the key factors that adversely affected the consumer's credit score.[35] Consequently, the FCRA ensures that consumers learn the underlying reasons for their non-qualifying credit scores, and there is no need for Regulation B to require disclosure of the same information, duplicating the information in the FCRA portion of the combined notice. The Bureau should therefore amend Regulation B to permit a creditor to state, as a specific reason for denial, that the consumer failed to achieve a qualifying credit score when the notice also contains the key factors as part of its FCRA notice.

This change, which would apply only when the creditor gives the key factors for a low credit score, would provide to a consumer both the valuable information that a low credit score was a

[33] 12 C.F.R. § 1002.9(a)(2)(i), (b)(2).

[34] Bd. of Governors of the Fed. Res. Sys., *Amendments to Regulation B to Implement the 1976 Amendments to the Equal Credit Opportunity Act*, 42 Fed. Reg. 1242, 1248-49 (Jan. 6, 1977).

[35] FCRA sections 615(a), 609(f)(1) (15 U.S.C. §§ 1681(i)(a), 1681g).

principal reason for adverse action and the key factors preventing the score from being higher. Without this change, creditors are left trying to figure out which ECOA reasons to list based on the credit score key factors and which to list based on non-credit score reasons for denial – all while staying within the maximum four reasons the Regulation B commentary recommends. This change would simplify compliance for creditors and provide as much or more information to consumers who are denied credit.

Commenters to the Taskforce RFI raised a second compliance issue concerning whether and how a retail seller complies with the ECOA's adverse action notice requirements when the seller's sole reason for denial was that all indirect lenders refused to purchase the consumer's contract. For example, automobile dealerships may deny a consumer's credit application because all prospective indirect creditors that reviewed the application declined to purchase the proposed contract from the dealer. Dealerships question whether they must send an ECOA adverse action notice if the indirect creditors already provide one and, if so, what they should identify as the reason for denial.

Regulation B excuses a dealership or other retail seller from sending an adverse action notice if another party sends one on its behalf. Most potential assignees will not agree to complicate their own adverse action notices by meeting the requirements for the dealer, however.[36] Although some dealerships do not send adverse action notices when they know that the banks and finance companies that denied the application will do so, this is probably not in compliance with Regulation B. Other retail sellers struggle to provide the principal, specific reasons for denial because they do not know them. No law requires indirect creditors to share their reasons with the retail seller, and many finance sources decline to do so. Moreover, each creditor reviewing the consumer's application will have its own underwriting criteria and its own reasons for adverse action. For example, one creditor may have a minimum credit score threshold the consumer does not meet, while another creditor will accept that score but will not deny the application based on the consumer's payment-to-income ratio or excessive mileage on a used car. The retail creditor is often at a loss to describe accurately another creditor's reasons for denial. Its only accurate reason is that it was unable to find a finance source to buy the consumer's contract on acceptable terms.

[36] The commentary to 12 C.F.R. § 1002.9(g) requires a creditor giving an adverse action notice on behalf of another creditor (such as a retail seller) to give the name an address of each creditor and either: (a) disclose the applicant's right to a statement of reasons within 30 days, including the retail seller's phone number for making such a request and the right to have any reason given orally confirmed in writing; or to give the "primary reasons each creditor relied upon in taking the adverse action – clearly indicating which reasons relate to which creditor." 12 C.F.R. Part 1002, Supp. I, 9(g)-1.

The commentary to Regulation B's definition of "creditor" excuses from the adverse action requirement automobile dealers and others "who do not participate in credit decisions but who only accept applications and refer applicants to creditors, or select or offer to select creditors to whom credit requests can be made."[37] Although this comment may have been intended to excuse retail sellers from adverse action notice requirements, it does not do so when the retail seller is also the original creditor (as the retail seller is when extending credit on a retail installment contract) and not merely referring applicants to creditors.

The Bureau should amend Regulation B to clarify that, if an indirect creditor provides an adverse action notice to the consumer in this situation, the retail seller does not also need to provide one. This approach eliminates inefficiency and even potential misinformation, without reducing the accurate and useful information available to consumers.

8.4 Disclosures in electronic transactions

Shopping around for any product or service is a great way to find the best option to suit a consumer's needs, and one of the key contributions of consumer financial disclosure regulations is offering a standardized way to do so via measures like the APR. See Chapter 7 for a longer discussion of the benefits of shopping. All disclosure rules or regulations that the Bureau and others consider should be focused on enabling consumers to shop and make comparisons to find the product that best suits their needs. Increasing the opportunity for shopping will increase competition amongst product providers, thereby lowering prices and resulting in consumer benefit.

Many of our rules and regulations around disclosures were written decades before the widespread adoption of digital technology. Today, some customers would rather take out a mortgage online at home or on their phone than in person at a bank, and the implications for how substantial disclosures should disseminated and processed by the consumer are unclear. The Bureau should conduct research on electronic disclosures and how they can be delivered in ways that benefit consumers, particularly looking at the varieties of experience consumers can have with mobile technology and smart speakers.

8.5 Marketing to consumers with limited English proficiency

[37] 12 C.F.R. Part 1002, Supp. I, 2(*l*)-2.

America's status as a melting pot of people, cultures, and languages can only survive if people are given the opportunity to thrive. However, some creditors are reluctant to market to consumers with limited English proficiency (LEP) because they may lack the ability to provide all legally required documents in the consumer's preferred language. This is especially a concern for smaller companies and even for large one for languages that are not widely used.

At the same time, potential risk exists for consumers who desire a product or service but may be unable to read a contract and subsequent documents, like billing statements, in English. In providing guidance to creditors, the Bureau should balance the value of making more financial services available to LEP consumers and ensuring reasonable consumer protections. For example, existing UDAAP authority would prevent a creditor from making promises in non-English advertising that it did not keep. It may also be useful to tell consumers in a non-English marketing piece whether the contract and other documents will be available only in English.

8.6 Research needed

The Bureau should conduct research on the availability of information, including timely or ongoing access to information and retainability, and conduct more testing on usability of consumer financial disclosures. As appropriate, based on research, the Bureau should make necessary recommendations to Congress for disclosure reform, when disclosures are statutorily mandated, and it should revise disclosures in regulations for which the Bureau is responsible.

Recommendations:

40. The Bureau should amend Regulation B or its commentary to clarify that a reason for adverse action relating to an insufficient credit score meets the standard for a "principal, specific reason" when the creditor also provides the four or five "key factors" that kept the credit score from being higher, as required by the FCRA.

41. The Bureau should amend Regulation B to state that notification of adverse action is not required by a retail seller that does not make an underwriting decision and denies an application only because no third-party creditor agreed to purchase the contract, if each creditor taking adverse action complies with the adverse action notification requirements, directly or through a third party.

42. The Bureau should only issue disclosure-related rules guided by research into what information is important to consumers and should use this research to re-

think its overall approach to disclosures. The Bureau should conduct research on the availability of information, including timely or ongoing access to information and retainability. The Bureau should conduct more testing on usability of consumer financial disclosures. As appropriate, based on research, the Bureau should make necessary recommendations to Congress for disclosure reform.

43. The Bureau should conduct research on electronic disclosures and how they can be delivered in ways that benefit consumers.

44. To make disclosures more useful, the disclosures mandated by Congress and the Bureau should consist of only the minimum information consumers need to make an informed decision and to verify they received the product terms promised.

45. The Bureau should develop a foreign language disclosure scheme that allows FIs to reach out into underbanked/unbanked consumer communities without forcing the FIs to maintain an underlying foreign language infrastructure.

46. The Bureau should revise credit advertising disclosure requirements, especially streamlining advertising trigger terms, with the purpose of avoiding misleading advertising in presented terms and to require presenting additional information necessary to prevent deception.

47. Congress and the Bureau should focus shopping disclosures on reducing the cost to consumers of locating the product or service they want.

9. Electronic Signature and Document Requirements

Congress enacted the Electronic Signatures in Global and National Commerce Act, or E-Sign Act, in 2000.[38] The E-Sign Act provides national rules regarding, among other things, provision of electronic disclosures to consumers. In general, when a federal or state law requires a person to provide a notice or other information "in writing," the E-Sign Act permits the person to sign or send it electronically, subject to obtaining the consumer's consent and making several statements about the consumer's rights and the technology necessary to access the electronic notice.[39] The E-Sign Act applies to many federal and state laws, and numerous federal and state agencies have authority to interpret the Act as it applies to laws over which they have jurisdiction.[40] The Bureau is among these agencies, and it inherited the Board's rules interpreting the E-Sign Act as it applies to Regulation B (Equal Credit Opportunity Act), Regulation E (Electronic Fund Transfer Act), Regulation M (Consumer Leasing Act), Regulation Z (Truth in Lending Act), and Regulation DD (Truth in Savings Act).

As chapter 9 discusses in more detail, Congress enacted the E-Sign Act to promote innovation and electronic commerce, but some of its requirements now appear outdated and can impede timely provision of financial services. For example, the Act requires that, prior to obtaining consent, a person must provide a consumer with "a statement of the hardware and software requirements for access to and retention of the electronic record," and, if the hardware or software requirements subsequently change, the person may have to re-obtain the consumer's consent and provide a new statement of the hardware and software requirement. In addition, the Act requires that a consumer's consent be "affirmative" and given or confirmed "in a

[38] 15 U.S.C. §§ 7001 *et seq.*

[39] E-Sign Act section 101(c)(1) (15 U.S.C. § 7001(c)(1)).

[40] E-Sign Act section 104 (15 U.S.C. § 7004).

manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent."[41]

The Bureau estimates that the required disclosures may be more than 1,000 words long,[42] which could take an average person 2 to 8 minutes to read. Or, more likely, they simply add to the barrage of disclosures that consumers scroll past without reading as they attempt to complete a transaction.[43] Requiring that the consumer consent "in a manner that reasonably demonstrates that the consumer can access information in the electronic form" imposes an additional procedural step and can create compliance questions about whether a consumer has made such a demonstration.[44] The substance of the reasonable-demonstration requirement also may be antiquated, better suited to a time when software programs had very different capabilities and there was a genuine question whether a given consumer could open a particular type of electronic file. Today, formats such as PDF are widely available, free to download, and compatible with most operating systems, reducing concerns that consumers will consent to receiving notices that they cannot open.

For these reasons, the Taskforce recommends that Congress replace or revise substantially the E-Sign Act. At a minimum, Congress should eliminate the E-Sign Act's antiquated requirements, including the required disclosures regarding necessary hardware and software and the requirement a consumer's consent be in a manner that reasonably demonstrates that the consumer can access information in the electronic records. More generally, Congress should consider revising the consent process, including the requirement that a consumer's consent be affirmative.

The Taskforce notes that the E-Sign Act contains an unusual "reverse preemption" provision.[45] This provision allows the general preemption of section 101 of the E-Sign Act if a state enacts the Uniform Electronic Transactions Act (UETA) drafted and recommended by the National

[41] E-Sign Act section 101(c)(1) (15 U.S.C. § 7001(c)(1)).

[42] Bureau of Consumer Fin. Protect., *Debt Collection Practices (Regulation F)*, 84 FR 23274, 23361 (May 21, 2019).

[43] [cite to chapter 7 (Information)].

[44] Compliance questions could include, for example, whether a "reasonabl[e] demonstrate[ion]" includes consumers' affirmations that they can access a particular type software or obtaining a consumer's consent on an HTML web page even though the disclosure will be in PDF. *See, e.g.*, Thomas P. Quinn, Jr., *Time to Rethink ESIGN "Consent Handshake" Standards?* (May 2014), [HYPERLINK "https://www.counselorlibrary.com/insights/article.cfm?articleID=810"].

[45] E-Sign Act section 102(a) (15 U.S.C. § 7002).

Conference of Commissioners on State Laws in 1999.[46] UETA, which has been adopted by all but two states, avoids many of the cumbersome procedures of E-Sign and provides a time-tested model for E-Sign modernization.[47] For example, UETA allows a consumer's consent to conduct a transaction electronically either by a simple consent ("I agree") or inferred from the circumstances.[48]

Pending Congressional action, the Taskforce recommends that the Bureau clarify or streamline certain of the E-Sign Act's requirements, recognizing that the Bureau's rulewriting authority is limited in some respects, particularly as to creating exemptions.

Clarifying what constitutes a reasonable demonstration could alleviate unnecessary burden and potentially speed the consent process. Commenters to the Taskforce RFI and the Bureau's Call for Evidence RFIs expressed frustration with the uncertainty about when a consumer has "reasonably demonstrated" the ability to access an electronic record. Clarifying what constitutes a reasonable demonstration could thus alleviate unnecessary burden and potentially speed the consent process. As a start, it would be very helpful for the Bureau to state that a presumption exists that the financial institution has met this standard when the consumer initiates the transaction on the consumer's device and consents to complete the transaction electronically.

In addition, the Bureau should streamline or create an exemption from the E-Sign Act's requirements for TILA/Regulation Z disclosures and ECOA/Regulation B adverse action notices. In contrast, the Bureau has much greater flexibility regarding the regulations for which it is solely responsible. The "trigger" for a duty to comply with E-Sign is a law or regulation that requires a document be provided to a consumer "in writing."[49] Amending a regulation to allow a creditor to provide a disclosure "electronically or in writing" would obviate the need for E-Sign compliance.

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46 *Id.*

47 Only New York and Illinois have not adopted E-Sign, but they have laws that accomplish much of the same policies. *See* https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034.

48 Comment 1 to UETA section 2, *available at*: [HYPERLINK "https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=2c38eebd-69af-aafc-ddc3-b3d292bf805a&forceDialog=0"], at 6-7.

When consumer consent to an electronic transaction, the creditor should be able to provide required disclosures electronically and in a form the consumer can keep, without the need to read the extensive E-Sign consent disclosures and demonstration requirements. For instance, some laws, like the Fair Credit Reporting Act, have been amended to expressly allow electronic disclosures of adverse action, but the companion provisions in the Equal Credit Opportunity Act's Regulation B have not, even though these notices are almost always provided at the same time in a single document. The Bureau could easily allow electronic notices for credit denials, and the Taskforce believes that doing so would reduce the costs of offering credit with no reduction in consumer protections.

The Bureau could also enhance the delivery of Truth in Lending disclosures electronically. Increasingly credit sales are consummated electronically at the point of sale. Under the current rules, the consumer may complete an application electronically at the point of sale. Once the application is approved (typically by a third-party assignee), the seller must print a "review copy" of the Regulation Z disclosures and, if the consumer agrees to complete the transaction, print an identical set of disclosures that contain the consumer's signature. The set of documents is then transmitted electronically to the assignee and usually maintained in electronic form for the life of the transaction. The "reasonable demonstration" requirements are difficult to meet when the transaction is conducted on the creditor's devices, complicating compliance with the technical requirements of E-Sign.

Recommendations:

48. Congress should eliminate the E-Sign Act's antiquated requirements, including the required disclosures regarding necessary hardware and software and the requirement a consumer's consent be in a manner that reasonably demonstrates that the consumer can access information in the electronic records. More generally, Congress should consider revising the consent process, allowing consent by either a simple statement of agreement or consent to conduct the transaction electronically or an inference from the circumstances of the transaction.

49. Pending Congressional action, the Bureau should provide guidance as to what constitutes a "reasonabl[e] demonstrate[ion]" that a consumer can access information in the electronic records.

50. Pending Congressional action, the Bureau should enable electronic disclosures to consumers by reviewing its rules that require providing information "in writing," and consider amending the rule, where possible under the enabling law, to allow electronic disclosures.

10. Emergency Authority

Like most industries, financial services can be disrupted during times of emergency – particularly in times of natural disaster. In these particularly acute periods, the Bureau should have the necessary flexibility to reduce barriers to recovery and access to financial services. The Bureau should also have the flexibility to shuffle its priorities in times of crises to meet acute needs, even if it means missing some statutory deadlines on projects unrelated to the emergency response.

During an emergency, it may become impracticable for creditors to comply with some the Bureau's regulations, potentially disrupting the supply of credit when it may be in high demand. To ensure that consumers have access to credit in times of emergency, the Bureau should adopt a rule of general applicability that will authorize it, respecting rules it has adopted or laws it can interpret, to suspend or modify specific provisions during a time of declared emergency when it determines that the emergency has made compliance impracticable. When invoking this authority, the Bureau should publicly announce its action, the scope and duration of the suspension or modification, and the basis for its determination of impracticability.

The Bureau could provide additional flexibility during an emergency if it were able to provide temporary relief from state regulations. For example, the Bureau has authority during a period of national pandemic to temporarily suspend the operation of state laws that require in-person real estate closings. The Bureau should explore the pre-emptive powers it has to identify additional temporary relief measures it could take in an emergency. Congress should consider giving the Bureau additional preemption authority over state laws that hinder financial transactions in an emergency.

During an emergency, time is of the essence and administrative procedure can delay necessary services. Emergencies are often associated with periods of confusion and communication can be difficult. The Bureau should consider automatic policy responses (or automatic stabilizers) to the extent possible. Since such policies would be in place prior to an emergency, they can reduce uncertainty and reliance on emergency communications – and for these reasons, automatic policy responses are superior to ad hoc enforcement discretion. For example, whenever a state of emergency closes a courthouse, the time period requirement for information that can only be obtained from a courthouse should be automatically extended until the courthouse reopens or a reasonable time thereafter.

Events like the pandemic have highlighted the need for flexibility in the regulatory system to deal with unanticipated shocks. Financial regulation traditionally has been highly prescriptive in its rule structure, an approach that creates certainty and predictability for consumers and providers but can stifle change and adaptability, especially in crises. But financial regulators' ability to react quickly and decisively in an emergency is a product legislation that affords them the discretion to do so when circumstances appropriate such a response. Going forward, Congress should continue to bear in mind the need for enabling legislation that provides agencies with the ability to exercise discretion to stabilize the financial market and protect consumers in the event of emergencies.

Recommendations:

51. The Bureau should adopt a rule of general applicability that will authorize it, respecting rules it has adopted or laws it can interpret, to suspend or modify specific provisions during a time of declared emergency when it determines that the emergency has made compliance impracticable. When invoking this authority, the Bureau should publicly announce its action, the scope and duration of the suspension or modification, and the basis for its determination of impracticability.

52. The Bureau should explore the preemptive powers it has over state regulations to identify ways it might provide additional relief from state laws hindering financial transactions in an emergency. Likewise, Congress should consider giving the Bureau additional preemption authority over such state laws.

53. The Bureau should implement automatic policy responses that trigger during Presidentially declared disasters.

11. Enforcement

11.1 Enforcement guidance

The Bureau's enforcement policy is opaque, and the passage of time and large number of settlements has done little to improve the public's understanding of when the Bureau will advance supervisory concerns to an enforcement matter or how it selects its remedies.

No company can expect to comply perfectly with every aspect of the myriad and often complex rules that govern consumer transactions, and we do not believe that the Bureau expects flawless compliance, especially when violations are caused by an occasional human error. Yet the public would benefit from a better understanding of how the Bureau makes these important decisions.

The Taskforce believes that consumer harm, both magnitude and severity, should be the lodestar of every enforcement decision. An excellent starting point would be creating a Bureau policy statement on the concept of consumer harm.

Once the Bureau has articulated the meaning of consumer harm, which we assume would include both out-of-pocket and reasonable intangible costs, the staff should estimate the total consumer harm, which would provide a rough estimate of the cost of a settlement. This amount could be adjusted up or down, depending on aggravating factors (such as the need for deterrence or the willfulness of the violation) and mitigating factors, such as good faith or ability to pay.

The next step would be allocating the settlement amount between consumer redress and a civil penalty. All things considered, the allocation of the settlement amount should weigh in favor of consumer restitution, because returning money to consumers is always a priority. But the Taskforce recognizes that some violations do not easily lend themselves to consumer restitution, such as adverse action notice violations, privacy violations, and deceptive or abusive debt collection calls – to name just a few. In such settlements, the Bureau's foot might more fairly weigh on the pedal of allocating funds to civil money penalties to ensure that the total cost of the settlement represents a fair value of consumer harm, deterrence, ability to repay, and other relevant factors.

Another Taskforce concern is the disparity among enforcement agencies' sanctions for violations, especially the Bureau and the Federal Trade Commission. The Bureau and the FTC have the same enforcement jurisdiction over non-bank creditors, but they have vastly different enforcement tools. We can see no basis for this disparity, and we believe Congress ought to bring greater congruity to these remedies.

The Bureau should also offer more guidance regarding how it has implemented enforcement policy. The Taskforce believes the Bureau's recent adoption of a tool for researching CFPB enforcement actions[50] adds significantly to the public's understanding of past actions and potential future trends. An important potential adjunct to this database, however, is a description of possible enforcement actions the Bureau has decided ***not*** to bring. The FTC realizes this objective, at least in part, by placing closing letters on the public record. At their best, these letters explain the Commission's concern with the named company's conduct and describe why the agency declined to pursue an enforcement action, including any corrective action the company took that weighed against an enforcement action. In contrast, some FTC closing letters do little more than announce the Commission's decision against taking formal action and offer little insight into why. Because these letters reveal the existence of a non-public investigation, if they do not shed light on the Commission's thinking, the Taskforce sees little rationale for them other than, perhaps, shaming the investigatory target publicly.

A better alternative, in the Taskforce's view, would be a periodic public document that explained why the Bureau determined not to proceed with an enforcement action under specified facts, without naming the company. We think of this publication as a companion to the valuable Supervisory Highlights.

The Bureau has often said that it will not engage in "regulation by enforcement," which the Taskforce understands to mean that it will not attempt to set new industry standards in the terms of settlements of enforcement actions. Such settlements are unwise because they circumvent the opportunity for notice-and-comment rulemaking in which the public can express views that may not have been paramount for the company that agreed to the settlement terms. Further, when the Bureau requires very specific terms for a company's future conduct, the public often cannot tell whether the Bureau considers these terms as what is needed to avoid and unfair, deceptive, or abusive practice or whether the specific remedy is merely in the vein of a "fencing in" provision for a single enforcement target and not intended as a standard

[50] https://www.consumerfinance.gov/enforcement/payments-harmed-consumers/enforcement-database/

for all industry actors. Regulation-by-enforcement is poor public policy and, despite the Bureau's occasional condemnation of it, the practice continues to occur.

11.2 Civil penalty assessment standards

Congress has given the Bureau extraordinary powers to collect civil penalties. A "knowing" violation can result in a fine of $1 million per day (or per consumer affected). In the great majority of cases, the civil penalty assessed in a settlement is less than the maximum allowed by law, and it is usually far below the maximum allowed. But the answer to how the Bureau determined the exact lesser amount is often hard to discern. This uncertainty has costs and, of particular concern, can deter innovation, inclusion, and competition.

The Dodd-Frank Act contains a short list of mitigating factors, but the general nature of these factors makes it hard to know how the Bureau applies them, much less whether they are applied consistently. Other financial regulatory agencies have taken three actions to improve the consistently and transparency of civil penalty demands, which the Bureau has declined to adopt.

In order to bring greater predictability to enforcement actions and to make clear the Bureau's enforcement priorities, the Taskforce recommends that the Bureau adopt greater guidance on civil penalties and a "matrix" to indicate the factors to be considered, as other financial regulatory agencies have done.

The first action is adopting the FFEIC Interagency Policy Regarding Assessment of Civil Money Penalties (1998 FFIEC Interagency Policy). The 1998 FFIEC Interagency Policy articulates 13 relevant factors that the agencies should consider in assessing civil penalties, which provide further guidance on the general statutory factors. The Bureau has declined to adopt the 1998 FFIEC Interagency Policy and states that considering these 13 factors is optional.

The second action is a matrix of how, in concrete terms, the agency should weigh the mitigating and aggravating factors listed in the 1998 FFIEC Interagency Policy. The prudential regulators have long used matrices as guidance. The matrix ensures that these 13 factors are considered in civil penalty decisions and enhance consistency of decisions. But the prudential regulators note the matrix is not substituting a mathematical formula for sound judgment. Using a matrix will never produce perfect justice, and each case will have its own unique factors to consider. Nevertheless, providing greater guidance and predictability will advance the goals of fairness, predictability, and the rule of law.

Although the Bureau and the company may disagree on the number of violations or on which cell of the matrix should be applied to specific allegations, the matrix almost certainly would produce more consistent and transparent results. The Bureau has declined to adopt a matrix.

Third, the FDIC and OCC have published statements on how they will apply each of the factors in the 1998 FFIEC Interagency Policy as part of the public Examination Manual (FDIC), general Policies and Procedures Manual (OCC), or Supervision and Regulation Letters (Federal Reserve Board). In contrast, the Bureau's Enforcement Policies and Procedure Manual, which discusses its civil penalty policy and procedures, is a non-public document. Moreover, the Bureau's Enforcement Manual offers scant guidance on how to develop a civil penalty recommendation. The manual instructs the staff to include a recommended penalty or range in its memorandum seeking authority to settle or sue but does not ask the staff to explain why the recommended range is appropriate.

The Taskforce also notes that agencies have different civil penalty limits for violations of unfair, deceptive, or abusive acts or practices, which can give rise to real and perceived unfairness and uncertainty. The FTC lacks general authority to assess a civil penalty for an unfair or deceptive practice. The OCC and FDIC take similar approaches to each other regarding penalties. In contrast, the Bureau states that it might consider whether a proposed penalty would be comparable to a penalty assessed by other regulators, but staff should rely primarily on the statutory maximum.

The Taskforce sees no public policy benefit from these differences in methods and authorities for setting civil penalties based solely on the happenstance of the agency that brings the action. Congress should reconcile the civil penalty authorities for the prudential regulators, the Bureau, and the Federal Trade Commission. The lack of structure in ensuring consistent approaches to civil penalties is reminiscent of the disparity in sentencing by federal courts, which was address by Congress's creation of a bipartisan United States Sentencing Commission. The Taskforce believes that a formal entity similar to the Sentencing Commission is unnecessary in this context; instead, the CFPB is encouraged to follow the lead of the other financial regulators and adopt a similar matrix in coordination with those agencies.

We observe that a great imbalance exists in the statutory remedies available to the FTC and the Bureau for the same violation, with the Bureau holding the power to impose higher sanctions with fewer procedural hurdles and delay than the FTC. This imbalance can lead to pressure on one agency to defer to another, not based on the expertise of the agency, but rather which agency has mightier enforcement powers and the ability to impose heavier sanctions. Or the agencies may each bring coordinated actions, which the Taskforce does not favor because enforcement "double-teaming" a company squanders scarce enforcement resources at each agency.

Although the FTC can seek a civil penalty for unfair or deceptive acts and practices, it can do so only in the narrow circumstances established in Section 5(m)(1)(b) of the FTC Act.[51]. This Section requires the Commission to first determine in an adjudicated administrative action that a practice is unfair or deceptive and to then put a different company on actual notice of the Commission's administrative determination before going to federal court to seek a civil penalty against the second company.[52] Because this procedural requirement requires a specific finding that a particular practice is unfair or deceptive, and because many Commission decisions lack such findings, it has fallen into disuse.

The process for obtaining consumer restitution under Section 19 of the FTC Act is even more problematic. The FTC must first obtain a ruling in an administrative action and, after all judicial review is complete, litigate the violations a second time in federal district court, proving that the conduct was not only unfair or deceptive but also that a reasonable person would have known that the conduct was "dishonest or fraudulent."

To avoid the difficulties of Section 19, the FTC has used its authority under Section 13(b) to seek permanent injunctions that not only seek to bar unfair or deceptive practices but also to impose various kinds of monetary equitable relief, such as restitution and rescission of contracts, to remedy past violations. But the legality of this practice is currently under consideration by the Supreme Court and, as a result, it is in jeopardy.

As a result of this imbalance in powers between the CFPB and FTC, the Taskforce recommends that Congress act to make the system of civil remedies more consistent and coherent among the prudential financial regulators, the FTC, and the CFPB. The Taskforce's recommendation is contingent on the Supreme Court, when considering the Commission's authority under Section 13(b) this term, holding that the FTC's powers are not consistent with our recommendation below.

The agencies should be able to order consumer redress for any violation of law, including an unfair, deceptive, or (for the Bureau) abusive act or practice, if the conduct is dishonest or fraudulent. The standard for a penalty should be higher. The FTC Act limits that agency, wisely, we believe, to seeking a civil penalty in situations where the company knew or should have known its conduct was illegal, such as a violation of a rule.[53] Similarly, the Commission can

[51] 15 USC 45(m)(1)(b).

[52] 15 USC § 57b.

[53] 45 U.S.C. §45m(1).

obtain consumer redress only for acts that are dishonest or fraudulent. We recommend that Congress, in reconciling the powers of the Bureau and the Commission, employ the dishonest-or-fraudulent standard for remedies amounting to a penalty, including the equitable relief of disgorgement.

Recommendations:

54. The Bureau should adopt a policy statement on the concept of consumer harm.

55. The Bureau should adopt public statement on how it will determine appropriate consumer restitution and civil penalties in a given matter. The total of payments, in restitution and penalties, should reflect optimal consumer redress and deterrence. The Bureau's objectives should relate principally to the magnitude of consumer harm and be adjusted in appropriate matters as needed to further deterrence, subject to the statutory limits and mitigating factors.

56. Congress should reconcile the civil penalty and consumer redress authorities of the prudential regulators, the Bureau, and the Federal Trade Commission, including giving the FTC statutory authority for obtaining consumer restitution for any unfair or deceptive act or practice that is dishonest or fraudulent and granting civil penalty authority to the Bureau and prudential regulators for unfair or deceptive acts and practices that are also dishonest or fraudulent or that violate another statute or regulation.

57. The Bureau should issue Enforcement Highlights, analogous to Supervision Highlights, to share Bureau concerns with the wider public and provide greater enforcement guidance on what activities are not illegal or improper or the factors it might consider in deciding not to take an enforcement action against a firm that may have engaged in wrongful conduct.

58. The Bureau should avoid setting new standards for industry practices, in settlements of enforcement actions, especially regarding practices deemed unfair or abusive. Instead, it should use its rulemaking authority to ensure that all affected parties have an opportunity to express views and provide relevant data.

59. The Bureau should expressly adopt the 1998 FFIEC Interagency Policy Regarding Assessment of Civil Money Penalties.

60. The Bureau should adopt and publish a civil penalty matrix based on the factors in 1998 FFIEC Interagency Policy and consistent with the matrices of the prudential regulators, together with public guidance to enforcement staff on how to apply the factors in the matrix.

12. Equal Access to Credit

12.1 Discrimination based on disability

The history of consumer credit and lending is fraught with discrimination on the basis of immutable human characteristics and social categories that have no place in the evaluation of creditworthiness. In the mid-1970s, Congress enacted and amended the Equal Credit Opportunity Act (ECOA)[54] to outlaw discrimination on nine prohibited bases. Per Regulation B, which implements the ECOA, they are "race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to contract); to the fact that all or part of the applicant's income derives from a public assistance program; or to the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act."[55] The ECOA was a key victory in the push for civil rights in financial markets, along with the Fair Housing Act, the Community Reinvestment Act, and the Home Mortgage Disclosure Act.

Commented [SY(27]: What about gender and religion and marital status? I would delete this because it is not accurate.

Although civil rights legislation such as the ECOA have made great progress in advancing access to credit for many disadvantaged groups, not all vulnerable groups are explicitly protected. The ECOA does not include disability as a prohibited basis group, despite its inclusion in civil rights legislation regarding employment and in other credit granting such as the Fair Housing Act. The Americans with Disabilities Act (ADA) provides protections against unlawful discrimination on the basis of disability, but there is no entity examining financial institutions for compliance with it in any systematic way like is done with other prohibited basis groups. There is very little literature on the prevalence or severity of discrimination on the basis of disability in consumer credit markets, but that does not mean that it does not exist – people with disabilities have historically faced discrimination in many facets of life.

The Bureau should conduct research on the need for amending the ECOA to include disability as a prohibited basis group, and then potentially recommend its inclusion to Congress. Conducting this research first will allow us to understand the prevalence of discrimination, and

[54] 15 U.S.C. § 1691(a) (2018).

[55] 12 CFR §1002.1 (b)

follow-up research after including disability status will allow us to measure the effect of the law, something that was not done at the inception of the ECOA for other prohibited basis groups. Including disability as a prohibited basis will bring the ECOA in line with the Fair Housing Act, providing uniform protections to protected classes across the credit sphere. Research should look for holes in the ADA that Regulation B should fill, looking at issues around machine readability and other concerns raised by rapidly developing financial technology in addition to potential discrimination in underwriting and pricing.

12.2 Modernization of Regulation B

The main antidiscrimination rules in Regulation B have remained largely unchanged since 1977, and what concerned Regulation B's drafters enough to be codified over forty years ago may be no longer relevant and may have unintended consequences. Initially conceived as a law to protect women from sex and marital status discrimination, the ECOA, in conjunction with other legal and social movements toward equality, has been largely successful in significantly reducing disparities in credit access between men and women. The Federal Reserve Board found in a report published in 2007 that there is no real difference in average credit scores by sex, which strongly suggests that women and men have approximately the same access to credit.[56] It would be difficult for women to have the same average credit score as men if they experienced a meaningful difficulty in obtaining credit.

Now, as sex roles are destabilized and activities traditionally associated with being a woman are destigmatized, some of the specific requirements, prohibitions, and constraints laid out in the ECOA may be harmful or unnecessary. One such precaution that was previously useful in preventing discrimination at the time but has since become both obsolete and a hindrance to financial inclusion is the prohibition on considering whether an applicant has a telephone listing in her own name.[57] Initially, the ban was necessary because of the prevalence of husband-registered telephone lines in married households, but now mobile numbers are typically associated with an individual rather than a household. Since 2016, a majority of

Commented [SY(28]: Do you mean traditional sex or gender based roles? Might add "traditional"

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[56] The Federal Reserve Board, Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit (August 2007), [HYPERLINK "https://www.federalreserve.gov/boarddocs/rptcongress/creditscore/performance.htm"].

[57] Regulation B, 12 C.F.R. § 1002.6(b)(4) ("A creditor shall not take into account whether there is a telephone listing in the name of an applicant for consumer credit but may take into account whether there is a telephone in the applicant's residence").

households have only cellphone service.[58] The ban may restrict a creditor's ability to consider alternative data that would benefit the consumer, such as the use of automated records of wireless phone numbers and the owner's name. As the utility of alternative data as a vehicle for economic inclusion continues to grow, we must be cognizant of the stifling effects of overly-prescriptive regulations that have not been modernized to reflect the world we live in today or future-proofed with a principles-based approach to adapt to the world of tomorrow.

In a similar vein, the Bureau should remove the requirement that creditor must consider the credit history of accounts in the name of a spouse for which the applicant is not contractually liable but is authorized to use. This was an important protection in 1977, when the credit history that married women helped build was typically listed only under their husband's name. This problem was compounded if the woman was widowed or divorced, because they often lost all access to the credit history at the very time they most needed it.

As noted above, however, in the 46 years since the ECOA was enacted, systemic obstacles to women in obtaining credit have been largely eliminated, and women on average have credit histories comparable to men. The need to attribute the credit history of an account for which the person has no legal liability but is allowed to use can have perverse effects.[59]

Because a consumer reporting agency often does not know whether an account reported in two names – on who is contractually liable and the other who is not – are married to each other, they have adopted the practice of reporting such credit histories in both names. They reasonably believe that this action is necessary so that the creditor-users of their credit reports can avoid violating Regulation B.

As a result, consumers will find negative information in their credit files on an account for which they had no legal liability. Indeed, a credit card holder can usually add authorized users without the users' knowledge or consent. In situations in which one spouse but not the other files for bankruptcy, it is not uncommon for the bankruptcy also to be attributed to the non-filing spouse who was only an authorized user on the discharged accounts.

[58] National Center for Health Statistics, Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July – December 2016 (May 2017), [HYPERLINK "https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf"]

[59] Regulation B, 12 C.F.R. § 1002.6(b)(6) ("[I]n evaluating an applicant's creditworthiness a creditor shall consider: (i) The credit history, when available, of accounts designated as accounts that the applicant and the applicant's spouse are permitted to use or for which both are contractually liable") .

The problem can work in reverse, as well. Private student lenders are often confronted with underwriting educational loans for 17- and 18-year-olds with excellent credit, because their parents listed them as authorized users on their accounts. The same dilemma applies to other creditors when young applicants have credit reports showing many years of good repayment. In fact, a fraudulent industry has developed by companies who incentivize people with good credit to list as authorized users on their accounts people with bad credit, as a way of helping these poor risks quickly acquire a better history.[60] The person who "loans out" his good history is paid a fee for each authorized user added, and the person who acquires the credit history (but not the actual right to use the account) pays a large fee. Creditors and their honest customers are the losers in this scheme.

The risk of harm to an applicant of being penalized by a spouse's poor credit or bankruptcy not involving the applicant and the risk to creditors of attributing a good credit history to those who have not earned it, such as minor children and strangers, is likely outweighed by the benefits of such a change because there is little evidence that married women now have difficulty in establishing credit in their own names.

The requirement in 12 CFR 1002.5(d)(2) to present a disclosure before asking about income from child support and similar sources is also outdated and cumbersome, causing unnecessary expense in processing applications for a protection that is no longer relevant for many women and parents. Choosing to provide income from child support does not necessarily reveal the applicant's marital status, because a child support payor and recipient may never have been married to each other, and the recipient, at the time of application, could have any marital status. Additionally, the ban on questions related to childbearing or childrearing plans should have an exception for credit intended to finance fertility treatments or other services for which childbearing plans are directly relevant, a market that barely existed in 1977.

[Jean will add discussion of Commentary to Paragraph 7(d)(1)]

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12.3 Disparate Impact

One of the cornerstones of the Bureau's fair lending supervision and enforcement mission has been the evaluation of lenders using the standard of disparate impact to identify illegal disparities in outcomes for different protected groups. In 2015, the Supreme Court issued a ruling in Texas Department of Housing and Community Affairs vs. Inclusive Communities

60 Cite to FTC cases.

("Inclusive Communities") on the validity of disparate impact under the Fair Housing Act. The Supreme Court held that it is cognizable, but that claims using disparate impact place the burden on the plaintiff to establish that the defendant's policies cause the disparities in question.[61] The Department of Housing and Urban Development (HUD) has subsequently issued a final rule reinterpreting disparate impact significantly raising the bar for plaintiffs to bring a suit for housing discrimination, though this rule has been stayed by a federal district court. [62]

HUD's rule and the Inclusive Communities ruling are specifically related to the Fair Housing Act but raise broader concerns about the use of disparate impact in other applications of fair lending including ECOA actions by the Bureau. Perhaps anticipating these concerns and potential future challenges, in July of 2020 the Bureau published a Request for Information on several aspects of Regulation B, including whether the Bureau should clarify its use of the disparate impact test for fair lending liability.[63] The Bureau should adopt an interpretive rule on disparate impact that minimizes the risk of concluding discrimination has occurred when the facts do not meet the Inclusive Communities standard, or failing to pursue discrimination that does meet the standard, due to a lack of certainty in how to apply it.

12.4 Enhanced antidiscrimination protections in auto finance

[Jean will add]

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Recommendations:

[61] Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc., No. 13-1371, 576 U.S. (2015).

[62] Mass. Fair Hous. Ctr. Inc. v. HUD (D. Mass., No. 1:20-cv-11765, preliminary injunction, Oct. 25, 2020).

[63] Bureau of Consumer Financial Protection, *Request for Information on the Equal Credit Opportunity Act and Regulation B*, CFPB, July 28, 2020, at 6, [HYPERLINK "https://files.consumerfinance.gov/f/documents/cfpb_rfi_equal-credit-opportunity-act-regulation-b.pdf"]

61. The Bureau should conduct research on the need for amending the ECOA to include disability as a prohibited basis group and then potentially recommend its inclusion to Congress.

62. The Bureau should modernize Regulation B in the following specific ways:

a) Delete the required disclosure before asking about income from child support and similar sources in 12 CFR 1002.5(d) (2).

b) Eliminate the ban on questions about plans for childbearing in 12 CFR 1002.5(d)(3) or should provide for an exception for credit intended to finance fertility treatments or other services for which childbearing plans are directly relevant.

c) Eliminate the prohibition on considering whether an applicant has a telephone listing in the applicant's name.

d) Remove the requirement that creditor must consider the credit history of accounts in the name of a spouse for which the applicant is not contractually liable but is authorized to use.

e) revise the Commentary to Paragraph 7(d)(1) to allow an intent to apply jointly to be determined by the totality of the circumstances, including the completion of information designated for a "joint applicant" on an application and a signature on a line for a "joint applicant."

63. The Bureau should adopt an interpretive rule on Disparate Impact that minimizes the risk of concluding discrimination has occurred when the facts do not meet the Inclusive Communities standard, or failing to pursue discrimination that does meet the standard, due to a lack of certainty in how to apply it, in light of the Supreme Court's decision in that case.

64. The Bureau should address any future concerns about credit discrimination in pricing by auto dealers through its ECOA enforcement powers with dealerships under its jurisdiction, rather than through enforcement actions against the banks and other creditors that take assignment of these contracts.

65.In evaluating a dealership's compliance with the ECOA, the Bureau should take into account the many legitimate non-discriminatory reasons a dealer may vary the APR over the assignee's wholesale buy rate, such a consumer's negotiation for a more competitive rate, the requirements of a manufacturer's promotional rate offering, the additional time and effort needed to find financing for some applicants, and similar non-discriminatory business reasons.

66. The Bureau and the Federal Reserve Board should amend the Commentary to Regulation B to provide that good faith implementation of the Fair Credit Compliance Program or comparable program constitutes one method of preventing discrimination in pricing credit offered by retail sellers.

13. FinTech Regulation

As detailed in Chapters 8, 9, and 10, innovation advances competition and in turn benefits consumers through greater choice, improved products, lower prices, and greater financial inclusion. Technology-enabled financial services, or FinTech, is at the center of innovation today. FinTech companies provide or support a wide array of consumer financial services, including payments, savings, peer-to-peer lending, and financial management. By using digital technology, FinTech companies can provide these services in new ways, allowing consumers to transfer funds through mobile devices, automate savings decisions, obtain loans without stepping foot inside a bank, and receive credit decisions and budgeting recommendations that consider a vast amount of data.

Regulatory uncertainty and unnecessary regulatory costs threaten to inhibit FinTech-based innovation, however. In particular, non-bank FinTech companies engaged in payments, remittances, or lending services are generally subject to state law and must register or acquire a license from each state in which they operate. A company with a nationwide footprint thus may need 50 separate licenses and adjust its practices to conform with each state's laws. As a result, a non-bank FinTech lender would be subject to different maximum-allowable interest rates depending on the state, whereas a federally chartered bank providing the same service could charge the interest rate that its home state allows, regardless of the consumer's location. These costs, and the competitive disadvantages from a segmented regulatory regime, are significant.

Federal policymakers should address these regulatory hurdles and promote competition and innovation by enabling FinTech companies to operate nationwide. Specifically, following on the NCCF's recommendation that Congress create a federal consumer financial protection agency that could issue federal charters to non-bank finance companies, the Taskforce recommends that Congress authorize either the Bureau or the Office of the Comptroller of the Currency to issue federal charters or licenses to non-bank FinTech companies engaged in payments, remittances, or lending services. Charters or licenses should provide that these institutions are governed by the regulations of their home states, even when providing services to consumers located in other states, similar to the National Bank Act's treatment of federally chartered banks.

The Dodd-Frank Act created in the Bureau a unique agency well-situated to regulate entities engaged in interstate activities. By making the Bureau the licensing agency, Congress would assure that consumer protection concerns are at the forefront. The Bureau could supervise licensed entities to ensure compliance with applicable federal and state laws, just as it already does with respect to many other bank and non-bank institutions.

Permitting non-bank FinTech companies to operate nationwide while subject to a single set of laws would ensure consistency, thus reducing unnecessary regulatory costs and promoting competition. It would also promote regulatory competition between states and ensure that states retain their role as laboratories of experimentation. Each state would have an incentive to establish workable consumer protection regulations to attract FinTech companies.

As a good alternative to Bureau-issued licenses, Congress could clarify the OCC's authority to issue federal charters to non-bank FinTech companies. The OCC, which has a long history of evaluating and granting charters, recently took steps to issue charters to such companies engaged in lending, and it has announced its intent to do the same with money transmitters. These efforts are subject to legal uncertainty, however, because of questions about whether a non-depository can engage in "banking" under the National Bank Act. Especially if Congress elects not to authorize the Bureau to issue federal licenses, it should clarify the OCC's authority. This alternative option would ensure that FinTech companies operating nationwide companies are subject to a single set of laws. Moreover, the OCC has significant expertise in FinTech generally and in these services specifically, and it may be well-positioned to supervise non-bank FinTech companies who operate nationally.

Regardless of which agency charters the FinTech, careful~~ly~~ attention should be paid to any capital requirements in crafting the rules. Unlike banks that benefit from FDIC insurance of their deposits, FinTechs typically do not take deposits or do not have FDIC insurance on any deposits they take. Without the risk to consumers ~~of holding their deposits~~where an entity does not hold deposits, there appears to be no need for minimum capital requirements.

Apart from licensing, the Bureau should consider the costs and benefits to consumers of preempting state law in specific cases where the potential for conflict can impede provision of valuable products and services, such as regulation of FinTech companies engaged in money transmission. For example, state laws governing money transmitters vary greatly, and in some cases impose significant barriers to market entry. It may be that consumers would benefit from greater competition and choice if the Bureau preempted certain of those state requirements.

Recommendations:

68. Congress should authorize the Bureau to issue licenses to non-depository institutions that provide lending, money transmission, payments services. Licenses should provide that these institutions are governed by the regulations of their home states, even when providing services to consumers located in other states, similar to the National Bank Act's treatment of federally chartered banks. In the alternative, Congress should clarify that the OCC has the authority to issue charters to non-depository institutions engaged in lending, money transmissions, or payments services.

69. The Bureau should consider the benefits and costs of preempting state law in some specific cases where the potential for conflict can impede provisions of valuable products and services, such as regulation of FinTech companies engaged in money transmission.

14. Inclusion

The concept of "inclusion" in financial markets is of great interest and importance to all concerned and ~~was often commented upon by~~ individuals and organizations interacting with the Taskforce often commented on this topic during the Taskforce's ~~its~~ public outreach efforts, which ~~that~~ helped inform its work. Inclusion was one of the major themes of the Report of National Commission on Consumer Finance in 1972. Volume I, Chapter 10 of this Taskforce's Report discusses this subject.

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Inclusion in financial markets means ~~is~~ the ability of consumers to participate in the products and services offered by the financial system. Full access to products and services like savings and checking accounts, credit cards, auto financing, student loans, and payment systems helps consumers lead engaged financial lives efficiently, at low cost, and to their overall benefit. Consumers without access, and unable to use financial products, obtain credit, or otherwise left out of the system can suffer as a result. They pay higher costs, are blocked from wealth creation tools such as mortgage loans used to obtain home ownership or credit used to purchase durable goods and can find even the purchase of necessities more difficult.

Barriers to access can come in a variety of forms and often in far more nuanced ways than outright discrimination. Barriers can and do originate from within the financial system and its regulations. Laws, regulations, and the natural forces of competition play a role in opening the financial system to all consumers including the underserved, although without special care, even laws and regulations meant to enhance the consumer experience, can produce unintended negative effects on inclusion and access. Rules can also produce excessive compliance costs, change the ability to manage financial risk and the profit profile of products and services, lessen provider access to markets, and put limits on where a provider can operate or with whom it can do business.

For example, price controls in one aspect of a transaction have the predictable effect of forcing a bank to raise fees (or eliminate services) in another part of the business. Congress's price controls on debit card transactions have caused banks to increase other fees, including those on basic checking accounts.

14.1 Expanding credit unions' ability to serve under-served areas

Credit unions have important potential to serve unbanked consumers. Currently, only one credit union charter type, the multiple common bond charter, can serve underserved communities outside their common-bond membership. ~~64~~The Taskforce recognizes that credit unions are subsidized entities. But middle- and upper-class individuals have access to and use credit unions; thus, individuals outside these groups should be able to as well. Moreover, it is the view of the Taskforce that credit union charter type distinctions are arbitrary. As a result, the Taskforce is unable to discern a logical reason for excluding certain credit unions from serving underserved areas. Taking as a given the definition of credit unions and their charter types, the Taskforce can endorse this recommendation for the purposes of inclusion.

14.2 Implementing focus on inclusion

[Staff: Develop brief support for other recommendations]

14.3 Card Act reform

Another area of concern is the costs impose by the CARD Act.[65] The Taskforce believes the Bureau should analyze these effects, with special emphasis on costs that adversely affect risk management and its effect on inclusion. If analysis suggests that costs to inclusion may be greater than intended, Congress should consider amending it.

Further, two specific provisions of the CARD Act that were intended as consumer protections should be reconsidered. As discussed in Chapter 10, the CARD Act limits the ability of banks to issue credit cards to consumers under the age of 21 and to market to college students.[66] These protections were intended to protect college students and other younger adults from incurring debts they could not repay, thus harming their credit histories early in their adult lives. However, an important effect of these limitations was reduced credit availability to young adults. Because those new to the use of credit, like new drivers, are likely more prone to mistakes, it is not clear whether delaying the use of credit cards from age 18 to 21 will result in reduced credit problems for young adults or merely delay their financial maturation.

[64] ~~[Add citation.]~~

[65] The Credit Card Accountability Responsibility and Disclosure Act of 2009 (Card Act), Pub. L. 111-24, 111th Congress, 15 U.S.C. § 1601 note.

[66] CARD Act, §§ 301-303, 15 U.S.C.A. § 1637(c)(8); 1681b(c)(1)(B)(iv); § 1637(p).

The second provision of the CARD Act is the so-called "fee-harvester" ban. This provision limits the total of fees assessed during the first year a credit card account is open to 25 percent of the total credit line at opening.[67] Subprime cards with high fees and low credit limits do not provide the benefit of extending a meaningful line of credit to consumers. But they can provide value to a consumer as a credit improvement vehicle. Banks issuing these cards will often offer a traditional credit card after a consumer demonstrates good repayment with this card. Further, if the bank reports the credit history on the subprime cards, good payers can often find more choices in selecting an issuer of a traditional credit card. The key consideration is that consumers who are considering such a card understand its costs and potential value, so they can make an informed decision on whether the card can help them meet their financial goals. This can be accomplished by either a disclosure-based regime, focusing on the terms of greatest interest to the users of these cards, or a principles-based regime, relying on the ban on unfair, deceptive, or abusive acts and practices.

Competition between providers to attract consumers creates innovation in offerings and puts downward pressure on prices, drawing neglected members of the consumer class into the mainstream financial system. An effective way greatly to increase competition would be to expand access to the payments system to non-bank providers. The Taskforce believes that promoting innovation in consumer payments, as already found in other countries, could be powerful vehicle for increasing financial inclusion and competition.

With these considerations in mind, the Taskforce proposes seven recommendations.

Recommendations:

70. The National Credit Union Administration should recommend that Congress allow all credit union charter types to serve underserved areas given the potential to increase inclusion.
71. The Bureau should formally implement the Dodd-Frank Act mandate to consider effects on inclusion, access, and choice in all its deliberations.
72. The Bureau should study how to facilitate creditor access to credit report information for recent immigrants so that credit information from their

[67] CARD Act, § 105, 15 U.S.C.A. § 1637(n).

financial lives prior to arrival in the United States can be used in credit decisions.

73. The Bureau should analyze all costs related to the CARD Act with special emphasis on how the law impacts financial institution risk management and how the impacts ultimately affect inclusion. If analysis suggests that negative effects on inclusion, such as limited consumer access to credit cards, may be greater than intended, Congress should consider amending the law.

74. Congress should consider repeal of the prohibition on marketing credit cards to consumers age 21 and under. The rule has clear costs to consumers. It impacts inclusion and limits access to credit. To help Congress understand the impact of the current ban, the Bureau should study its benefits and determine whether the prohibition has simply pushed the credit use learning curve forward a few years from the age of 18 to 21.

75. Congress should repeal the Card Act's restrictions on fees for unsecured subprime credit cards. The restrictions make these cards uneconomical for potential issuers, which diminishes their availability to consumers who seek to use the cards to build a positive credit history. Without question, heightened scrutiny of these cards is warranted to ensure consumer protection. To avoid precluding consumer access to this credit improvement vehicle, policing of these subprime credit cards should be accomplished through principles based UDAAP rules or a new disclosure regime rather than through legal restrictions that ultimately limit access.

76. The Bureau should research Anti-Money-Laundering laws and Bank Secrecy Act effects on inclusion and access to credit, especially concerning remittances and other services used by immigrant populations. If necessary, the Bureau should conduct original research in this area.

77. Congress should repeal the provisions in Section 1075 of the Dodd-Frank Act that imposes price controls on debit card interchange fees, subject to antitrust or other applicable laws, due to its adverse impact on access to

free or low-fee banking accounts, which have impeded inclusion in the banking system.

78. The Bureau should explore mechanisms, identify barriers, and make appropriate recommendations to Congress and other regulators for expanding access to the payments system by non-bank providers, while at the same time recognizing legitimate concerns about money laundering and financial solvency.

15. Regulatory Coordination

Financial institutions and other financial firms are regulated by many different Federal and State regulators. For instance, depository institutions face consumer financial regulations from the Federal Reserve (the Fed), the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), the National Credit Union Administration (NCUA), state-level banking regulators, and the CFPB.[68] Other non-depository entities that offer consumer financial products are regulated by state banking agencies, the Federal Trade Commission, and the CFPB[69]. With such a high level of regulatory overlap, the Bureau must effectively coordinate with its regulatory partners to minimize duplication of effort and avoid unnecessary cumulative costs on the industry.

Regulators should continue to identify and focus on opportunities to coordinate regulatory efforts. To ensure that regulation doesn't stifle promising innovation, the Bureau should work with other agencies to create a unified regulatory regime for new and innovative technologies providing services similar to banks. In coordinating with other agencies to avoid duplication and burdensome supervision and examination of covered entities, Federal regulators should evaluate whether revisions to Memoranda of Understanding could improve and formalize the responsibilities of the various agencies. The Taskforce learned that all the prudential regulators currently duplicate the CFPB's examination of banks compliance management systems (CMS) and compliance with the federal ban on engaging in unfair or deceptive acts or practices (UDAP). These are perhaps the two most time-consuming aspects of a consumer compliance exam, which limits the resources of all these agencies to direct resources in more productive ways. Moreover, they create serious problems for banks that sometimes receive contradictory supervision guidance on the adequacy of the CMS or whether a practice is unfair or deceptive. Even when the positions of a prudential regulator and the Bureau do not directly conflict on

[68] For more information on the degree of regulatory overlap, see the Congressional Research Service's report "Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework" *at* [HYPERLINK "https://fas.org/sgp/crs/misc/R44918.pdf"]

[69] *Ibid.*

issues involving CMS and UDAP, banks can never rely with confidence of the position of one regulator out of concern the other will instruct differently.

Opportunities exist for the Bureau to improve communication and coordination with state banking regulators. By improving outreach to States, it is likely duplication of efforts can be better avoided and identifying more opportunities to streamline regulation can be achieved.

Automobile dealerships, like other retail sellers, typically offer financing to customers only if a third-party finance source agrees to purchase the contract after making a decision about the consumer's creditworthiness. For that reason, the third-party finance source is mostly or wholly responsible for the credit decision, even though the retail seller is the nominal creditor. When consumer concerns are focused on the retail seller, they typically relate to sales practices or product concerns rather than the financing. Because the FTC has jurisdiction over both unfair and deceptive sales practices and consumer credit extensions, oversight of retail sellers may be most efficiently handled by the FTC. The Taskforce believes there is no reason to treat auto dealers differently from other retail sellers, such as furniture or electronics sellers whose sales practices are regulated by the FTC. A distinction should be drawn between creditor and retailers who only handle the marketing and sales of a product, not the financing of the product. This parity in jurisdictional treatment could be accomplished by giving sole jurisdiction to the FTC for retail sellers. Alternatively, the Bureau and the FTC could continue to share jurisdiction the financial aspect of the transaction, although this may lead to inefficiencies. Further, the line between where a sales transaction ends and the credit transaction begins is often not bright. The agencies should consider entering into an MOU to avoid duplicative enforcement.

Recommendations:

79. The Bureau should continue to identify and focus on opportunities to coordinate regulatory efforts. The Bureau and prudential regulators should eliminate overlapping examination subject areas and reconcile inconsistent examination standards that unnecessarily expend multiple resources and can cause confusion.

80. The Bureau should continue to increase dialogue with state regulators to bridge knowledge gaps and streamline regulation.

81. The Bureau should work with other agencies to create a unified regulatory regime for new and innovative technologies providing services similar to banks

82. The Bureau should work with the Federal Trade Commission to explore opportunities to streamline jurisdiction and enforcement of consumer financial protection regulation of third-party financing offered at automobile dealerships and other retail sellers. Because the FTC has jurisdiction over both unfair and deceptive sales practices and consumer credit extensions, oversight of retail sellers may be most efficiently handled by the FTC. The agencies should consider an MOU to avoid duplicative effort.

16. Regulatory Principles

To maximize the utility of the Bureau's regulations, it should rely on flexible principles-based regulations that protect consumers from harm while promoting access, inclusion, innovation, and competition, rather than detailed and specific regulations that can become quickly outdated, impose more costs than necessary, and foreclose innovative new approaches to protecting consumers. Regulations should be clear and easy to understand, and the Bureau should be sure to issue regulatory guidance to clarify confusing language or resolve novel questions. The Bureau should be sure to use clear and consistent language, concepts, and terms and apply them consistently across the Bureau's functions. To maintain a modern regulatory program that is simple and imposes no more burdens than necessary, the Bureau should build on its process of ongoing review of existing rules to identify regulations that can be simplified, streamlined, updated, or otherwise improved.

Highly detailed and specific regulations are inferior to more flexible principles-based standards for several reasons. Most regulated industries have some heterogeneity in business models, operating procedures, costs, and products, so one-size-fits-all standards are unlikely to maximize benefits net of costs. More flexible standards provide firms with the ability to develop more innovative solutions to problems that are more adaptable to changes in the industry. This may reduce the probability that a regulator has to rewrite the regulations when consumer preferences change, or innovative new products develop.

The Bureau's regulations should be in plain language and easy to understand. The Bureau should be sure to use clear and consistent language, concepts, and terms, as well as apply them consistently across the Bureau's functions. Policy guidance should be aligned and applied equally by regulations, supervision, and enforcement teams when conducting Bureau business. The Bureau should issue regulatory guidance to clarify the regulations, as necessary. In doing so, the Bureau should be careful that guidance documents do not create new law or policy and should subject significant guidance documents to notice and comment in the Federal Register.

Review of the stock of regulations is an important element in any regulatory program. In 2011, President Obama issued Executive Order 13563 "Improving Regulation and Regulatory

Review," requiring executive agencies to conduct retrospective analyses of existing regulations to identify rules that may be outdated or excessively burdensome.[70] Further, the 1994 Riegle Community Development and Regulatory Improvement Act required the banking agencies to conduct a systematic review of their regulations to "improve efficiency, reduce unnecessary costs, eliminate inconsistencies, eliminated outmoded and duplicative requirements, promote uniformity among the regulations and policies of the agencies, and reduce regulatory burden... ."[71] Section 1022(d) of the Dodd-Frank Act requires the Bureau to publish an assessment of its each of its significant regulatory actions within five years of finalization. Also, the Regulatory Flexibility Act requires the Bureau to review rules within ten years of publication to assess whether it had a "significant economic impact upon a substantial number of small entities."[72]

As a young agency, the Bureau rightly prioritized its mandatory rulemakings and several high-priority discretionary rulemakings. Now, the Bureau should redouble its efforts to review existing regulations for opportunities to streamline and reduce costs. In addition to its existing practices for reviewing the existing stock of regulations, the Bureau should consider adopting some process to prompt review of existing regulations as questions arise. The Bureau should consider whether additional assessments of major regulations should be instituted at intervals beyond the five-year requirement in the DFA. The Bureau should consider processes to review regulations that the Bureau inherited and have not been recently amended. The Bureau should evaluate and streamline, as appropriate, the process by which questions that come through Supervision examinations, the Office of Regulations, the Office of Innovation, and other policy-interpretation areas of the Bureau are shared with other parts of the Bureau so that guidance can be consistent and shared publicly.

Recommendations:

83. The Bureau should rethink overall approach to regulation, endorsing a principles-based regulation wherever possible, with sufficient flexibility

[70] President Obama's Executive Order 13563 (2011), "Improving Regulation and Regulatory Review," can be accessed at [HYPERLINK "https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review"]

[71] [HYPERLINK "https://www.federalreserve.gov/boarddocs/rptcongress/Annual96/regsim.pdf"]

[72] See the Bureau's [STRATEGIC PLAN] https://files.consumerfinance.gov/f/documents/cfpb_performance-plan-and-report_fy20.pdf

for crises and change. Rules should be updatable, adaptable to developing threats, and periodically reviewed.

84. Regulations should use plain language and be easy to understand. The Bureau should apply concepts, terms, and guidance consistently across Bureau functions and activities.

85. When necessary, the Bureau should clarify regulations with appropriate guidance. The Bureau should ensure that interpretive guidance documents do not create new policy and are published for notice and comment in the Federal Register.

86. The Bureau should build upon its process of ongoing review of existing rules to identify regulations that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. The Bureau should consider adopting a process to prompt review of existing regulations as questions from stakeholders arise. The Bureau should consider whether additional assessments of major regulations should be instituted at intervals beyond the five-year requirement in the DFA. The Bureau should consider processes to review regulations that the Bureau inherited and have not been recently amended.

87.The Bureau should evaluate and streamline, as appropriate, the process by which questions that come through Supervision examinations, the Office of Regulations, the Office of Innovation, and other policy-interpretation areas of the Bureau are shared with other parts of the Bureau so that guidance can be consistent and shared publicly.

17. Security and Privacy

Technology and the benefits and risks associated with it have pushed data privacy and security issues into the spotlight. The intense focus on these issues is likely to continue as our society innovates and deploys technology in ways to meet our needs. So too will the search for privacy solutions that balance the benefits derived from innovative uses of information with the need to prevent practices that may harm consumers.

Striking this balance serves both consumers and the financial services industry. Consumers have a need to guard against the misuse of their information. Financial services providers have an interest in providing products and services in a convenient way while maintaining the level of security consumers expect. They also require complete and accurate information to address information asymmetries and accurately assess risks and costs. Regulators should keep these considerations in mind when exercising their regulatory, supervisory, and enforcement authorities.

In the past, regulators have sought to address privacy and security concerns by implementing regulations that are overly reliant on disclosure requirements. The result has been a regulatory regime that has been largely ineffectual. Even regulations that have succeeded in restricting the use of data have failed to address potential harms to consumers efficiently, instead relying on consumers to protect themselves. Regulators should shift their focus to protecting consumers rather than data, identifying the potential adverse consequences for consumers from particular data use or misuse. In this regard, the Fair Credit Reporting Act is an appropriate model, restricting use of credit reporting data to a specified set of uses, with provisions designed to avoid the adverse consequences that can result from inaccuracies in credit reporting data. Privacy regulation based on controlling adverse consequences is discussed in more detail in Chapter 11. Determining how to draft regulations that prevent harmful outcomes without restricting beneficial uses of data is worthy of regulators' study and consideration.

There is little evidence that the current, disclosure-based approach to privacy regulation has worked. Indeed, privacy policies would seem to be the epitome of information overload, discussed in detail in Chapter 7.

A standard limiting notification of data breaches to only those when there are steps consumers can take to protect themselves will improve consumer recognition and responsiveness to privacy and security related notifications. Furthermore, as noted in Chapter 11, section III, "[P]rivacy harms do not depend on the consumer's state of residence. They are the same, wherever the consumer lives." There is, therefore, little benefit in privacy requirements varying from state to state. There are, however, significant costs, particularly for online commerce and multistate firms, if companies must comply with a patchwork of inconsistent requirements, so such a standard should be set by Congress.

Recommendations:

88. The Bureau should consider data privacy and cybersecurity risks as part of its regulatory mission. The Bureau should determine whether proposed regulatory, supervisory or enforcement actions pose data privacy or security risks and adopt substantive regulations or internal policies or procedures to prevent those harms. With respect to regulation, the Bureau should recognize and address, where possible, any potential anticompetitive effect of regulations as part of its rulemaking process.

89. The Bureau should study the effectiveness of GLBA privacy notices to ensure that information is relayed in a manner that is useful manner to consumers. Additionally, the Bureau should consider allowing financial services providers to post current privacy notices online only given consumer's growing dependence on the internet and the dynamic, fast-changing nature of technological advances.

90. Congress should enact a law authorizing national preemptive standard for data breach notifications adopted by a relevant regulatory agency. The standards should consider what the objectives of such a notification would be when defining the scope of the law and the remedies.

18. Small Dollar Credit

One of the most contentious yet important issues in consumer financial protection is the provision of small dollar credit to consumers. For consumers on the economic margins, small dollar credit can be a lifeline to get through turmoil caused by unplanned expenses, loss of income, or other liquidity shock. With this aid comes a heightened risk for lenders of default and larger operating costs per loan dollar, leading to higher interest rates and fees than mainstream credit products like personal loans or credit cards. Advocates champion small dollar credit as a necessary lifeline to keep many consumers above water and point out that small dollar lenders are the only ones willing to give credit to marginal borrowers on any terms. Critics say the interest rates are usurious, that consumers in dire straits do not understand or fully consider the consequences of a small dollar loan, and the business model for small dollar lenders, which in their view relies on rolled over debt to make a profit, traps consumers in a cycle of debt and poverty. Undoubtedly some benefits and some harms can occur with these products, and the potential for great benefit and great harm exists. The research literature on the costs and benefits of small dollar loans is mixed. Chapter 5 of Volume I this report explores background and research findings on small dollar credit at greater length.

Many of the reasons cited by customers for using small-dollar loan products are intractable or won't be swayed by anything the Taskforce can recommend here, although one reason for using small dollar loan products is changing. Consumers sometimes employ payday loans ostensibly because they are expecting shortly to have the money to cover their expense when their next paycheck or some other source of income is deposited in their account. Some portion of delays between when consumers know funds are coming in and when funds are deposited can be attributed to delays in the payment processing system, which is currently undergoing a transformation as advancements in financial technology focus on speeding up the payments system. Financial technology firms, traditional banks, and the Federal Reserve are now focused on increasing the speed of payments processing, with a myriad of potential positive effects for consumer welfare. The Bureau should conduct research on the degree to which delays in the processing system are causing the use of small dollar credit products and associated consumer harms. Some of the need for small-dollar credit can be alleviated by technical solutions, such as faster payments and speedier posting of deposits. Other changes will not reduce demand for small-dollar loans, but hold potential to reduce costs and increase choice and competition.

As shown in Chapter 4 of Volume I of this report, costs per loan dollar of lending small amounts are important, with costs of smaller loans higher per loan dollar on small loans. Consequently, when states set interest-rate ceilings, the effect is to eliminate the smaller loan sizes. It is the Taskforce's view that any ceiling will inevitably eliminate some potential borrowers from the market. For this reason, it urges states to exercise caution when setting interest rate caps and to consider the impact on credit availability.

In this vein, states should reconsider, review, and update or eliminate usury laws that are antiquated and outdated; recognizing the high costs they impose by denying valuable services to consumers who need them. The National Commission on Consumer Finance (NCCF) conducted a comprehensive analysis of effective usury regulations and concluded in 1972 that a better way was to encourage financial inclusion through policies that encouraged competition, free entry to markets, and consumer information. The passage of time has not changed the importance of the NCCF's conclusions and so we recommend that States revisit and reconsider existing usury regulations with inclusion in mind and revise, update, or eliminate them as appropriate.

As noted in Volume I, hundreds of years of study and experience have shown that usury laws interfere with credit availability and inclusion of marginalized borrowers. Today, prominent Truth in Lending disclosures reveal finance charges, and evidence suggests that most customers know what they are getting and how much it will cost them.

For the Taskforce, the Big Question is whether society believes availability of credit for everyone is a good idea or not. Ultimately, to ask whether there should be government intervention in small dollar credit markets is a debate about societal ideals more than it is about economics. This decision is not solely an economic or legal analytical question and there is no satisfactory solution or recommendation that will satisfy everyone.

Recommendations:

91. The Bureau should research how much small dollar credit use and potential associated consumer harms are caused by delays in payment processing.

92. States should exercise caution when setting interest rate caps when implementing regulations on small dollar credit loans. States should carefully consider the negative impact on credit availability when considering further regulations. Preferably, interest rate caps should be eliminated entirely.

93. States should reconsider, update, or eliminate usury laws as appropriate, recognizing the high costs they impose by denying valuable services to consumers who need them.

19. Supervision

The Bureau dedicates a considerable portion of its staff resources to the supervisory process. Nearly a third of its employees are involved in supervision related activity. As noted in Volume I Chapter 6 of this Report, government inspections are a common tool of consumer protection enforcement but the Bureau's authority to engage in ongoing supervision through the examination process to the extent it does is unusual. As such, how the Bureau carries out its supervision process warrants serious consideration.

19.1 Defining a "larger participant"

Thousands of financial institutions fall under the Bureau's supervision authority. One way the Bureau obtains jurisdiction over nonbank institutions in individual markets is via the larger participant rules promulgated by the Bureau under Dodd-Frank. The criteria for what constitute a larger participant lack consistency across markets and seemingly create an uneven playing field; some product and service providers face the costs of compliance supervision, while others escape Bureau oversight and are whose compliance failures are often less likely to be detected. As a result, institutions are incentivized to work actively to avoid Bureau supervisory oversight. This has the potential to negatively impact consumers as market participants avoid growth and the provision of products to an expanded clientele.

Moreover, the rulemaking teams appear to select the criteria for being a larger participant more by feel than principles. Should a "larger" participant be one in the top decile of the ranked participants? Should the larger participants, collectively, cover a certain percentage of the transactions in the industry? Or should they have the number of transactions annually that, on average, a bank under the Bureau's jurisdiction has? For ten years, the Bureau has been feeling its way on this topic. The Taskforce believes it is time to articulate some clear standards for this important decision.

19.2 Leveraging technology in examinations

The Bureau's supervision role for all institutions under its jurisdiction is executed through examinations that take extensive amounts of time and effort. Despite the significant commitment of resources to the supervision function, Bureau resources are limited. It can only examine a small number of institutions in any given time period.

To expand the reach of its exam efforts to cover more financial institutions and enhance consumer protection, the Bureau should develop new exam capabilities. In the Spring of 2020, the Bureau proved capable of taking new approaches to its exam process when it rolled out a new "prioritized assessment" process to deal with the conditions created by the Covid-19 pandemic. The Bureau should apply this same ingenuity to create automated processes to expand its supervision capabilities.

19.3 The role of CMS review

As noted above, the supervision function is accomplished through the examination process. Examinations generally involve two distinct avenues of review, transaction testing and assessment of an institution's Compliance Management System (CMS).

Transaction testing is conducted to determine if an institution has followed the law. It involves the review of records, such as consumer mortgage files, to determine compliance with the law and evidence of consumer harm. Consistent with the Taskforce's principles based, outcomes-oriented approach to consumer protection, this sort of review by a government regulator seems appropriate and directly determinative of compliance with the law.

Though only a few consumer compliance statutes require or refer to CMS, the Bureau supervisory exam process considers CMS as the linchpin for consumer protection efforts and concentrates most of its efforts on the CMS of financial institutions. The working theory seems to be that if an institution possesses a self-governing consumer CMS, the institution will be more likely to comply with the federal protection laws. So it seems fair to ask, "After ten years of repeated Bureau CMS reviews at the biggest depository institutions in the country, reviews designed to instill effective self-governing compliance systems at these banks, have Bureau efforts resulted in the banks developing CMS systems that receive the very best Bureau ratings ("STRONG"), and have these same banks achieved complete compliance with the federal consumer protection laws and regulations?"

The CMS review is an in-depth analysis of the management system used by a financial institution to comply with the law. Examiners look at how well the institution's systems detect, prevent, and correct practices that present significant risk of violating law and causing consumer harm. The review is a deep and intrusive probe into the institution's business operations. A CMS review, after considerable back and forth with the institution's management, culminates with a rating for how well the institution's systems foster compliance with the law and a description of how the management system falls short of the Bureau's ideal management form. The findings, produced at the end of an exam and presented in a supervisory letter or exam report, end up essentially as a process by which the Bureau substitutes the institution's management judgment with the Bureau's management ideals. This sort of review by a government regulator does not seem appropriate.[73]

The value of the Bureau's practice of assessing a financial institution's CMS during the examination process is not clear. This is not to say that the CMS is not valuable to the financial institution; it almost certainly is. Maintaining good compliance with the vast and sometimes complex laws and rules that govern consumer financial transactions is challenging, and the financial institution's CMS is important to achieving this goal. But, to a large extent, the proof is in the pudding. If an institution's CMS is poorly documented or otherwise appears weak by examiner expectations, but the institution consistently meets its compliance obligations, the Taskforce believes its compliance should be judged by its results, not its CMS documentation.

The review of a CMS is time consuming and labor intensive for all parties. It burdens both the Bureau and the examined institution. If less time were spent performing CMS reviews and the focus was on the less time and cost consuming work of determining whether an institution complies with a law/regulation, many more institutions could be examined in a given time period than are currently examined thus multiplying the power and presence of the Bureau in the marketplace.

The entire CMS review process is vulnerable to subjective assessments by examiners and is ripe for inefficiency. Exam hours can easily slip by in debates by examiners over issues such as whether or not the particular number of loan files reviewed (3, 5, or 7 etc.) by the quality review committee at a bank is sufficient for an exam team to qualify the action as meeting the monitoring requirement of a sufficient CMS or whether the proper number and type of complaints are captured and recorded in an institution's complaint system. If the answers to these CMS related questions are debatable within an exam team, how can an examined institution understand what it needs to do to live up to the Bureau's expectations? The process seems filled with imprecision. With the possibility of legitimate disagreement within the Bureau over CMS findings, as well as the final exam institution ratings, the entire process bears all the underpinnings of arbitrary and capricious action by the government.

19.4 Appeals of exam findings and ratings

The Bureau recognizes the possibility that examined institutions may develop legitimate concerns about examiner conclusions in a final exam report, so it has an appeal system to deal

[73] We recognize that review of a bank's CMS has a different role for prudential regulators, who are charged with ensuing the bank's safety and soundness and protecting the insurance fund from losses.

with these situations. The current appeal process took effect in October 2015. The process, however, seems insufficient.

The Bureau appeal process lacks independence, the corner stone of American due process. Appeals take place entirely within the Bureau's supervision organization and its immediate chain of command. Appeals are heard by a committee appointed by the Associate Director of the Supervision Enforcement and Fair Lending division, known as SEFL, and includes a staff person from this Associate Director's staff, one or more representatives from Bureau headquarters supervision management, and one or more representatives from regional management (the four Bureau regional offices are supervision organizations). Supervision operations are run out of four relatively autonomous regions. Without input from each region appeal decisions can easily lack nationwide consistency. Furthermore, with appeals cloistered inside the supervision operation, views of other Bureau offices and the Bureau's top leadership, are given no consideration, possibly impacting consistency of decisions across the entire Bureau and compliance with the Director's policy positions.

In addition, the current appeal process does not offer an appeal opportunity at critical junctures of an exam. At no point during the early stage of an exam does the target institution have an opportunity to contest Bureau action. The current appeal process provides no appeal opportunity until after the completion of an exam and issuance of a final exam letter. For example, if the Bureau supervision group determines a depository institution is under its jurisdiction by virtue of meeting the $10 billion dollar assets threshold, there is no ability for the institution to avoid an exam even if it disputes the fact that it meets the threshold amount if supervision staff insist that the institution does meet the threshold. The exam goes on, and only at the conclusion of the exam can the entity appeal. A point at which the costs of the exam are already incurred by both the Bureau and the examined entity.

19.5 Examining for Military Lending Act compliance

[Need preamble support. Nat, please assign.]

With these considerations in mind, the Taskforce proposes four recommendations.

Recommendations:

94. The Bureau, whenever possible, should consider conducting automated or data-based examinations. Taskforce conversations with private and public stakeholders indicate that the Bureau is behind the prudential regulators, and many financial institutions, where automated review processes are already used to help with compliance operations.

95. The Bureau should focus its supervision activity on financial institution compliance with the consumer protection laws. The institution's exam rating should be based on the outcome of its CMS – that is, its compliance and compliance failures. Unless otherwise necessitated by laws that require the presence of a CMS, the Bureau should involve itself with CMS considerations only for risk assessment in setting exam scope and focus. CMS reviews should be limited to use in situations where a financial institution has shown an overwhelming and repeated failure to comply with the consumer protection laws. CMS review and ratings tend to be subjective and involve substituting the Bureau's judgment for the institution's business and compliance judgment so examination activities should focus on transaction testing and other methods to assess the level of compliance with covered laws. This approach would benefit both supervised institutions and consumers by making better use of examination hours, shortening exams, and permitting examinations of more institutions and more areas of activity during each exam.

Commented [NJ(31]: Nat and Jeff – These recs seemed needlessly redundant of the preamble. If there are any points made here absent from the preamble, please move them up and try to reduce each rec to a sentence or two.

96. The Bureau should change its current supervision appeal process to further fairness and consistency. The Bureau's Deputy Director should serve as the appeal officer to eliminate the exclusive supervision perspective that dominates the current appeal process, to elevate the appeal away from the Bureau staff involved in the action being appealed, and to ensure Bureau wide consistency that Director level input promotes. The Deputy Director should serve as judge in an adversarial process where the appealing entity and the supervision organization present their cases. In light of the existence of four distinct regional supervision offices that operate with substantial autonomy from supervision headquarters, to promote consistency of operations around the country, the supervision team presenting the case should include a member from each of the four regional offices. Furthermore, the Bureau should be more transparent about appeal rights and provide notice of appeal rights to examined institutions via written notice contained in letters issued when a financial institution is notified of the Bureau's intent to conduct an exam and once again later in the supervisory letter or exam report issued at the conclusion of the exam.

Commented [NJ(32]: Nat/Jeff – Ditto for this rec.

97. The Bureau should revisit its larger participant rules to evaluate the ability of the rules to effectively promote consumer protection in the supervision process. It should determine with clarity the purpose behind the rules and whether the rules are working correctly and meeting their goals. The assessment should consider the costs and benefits of the rules. The Bureau should also address if the larger participant thresholds are set at appropriate levels and the usefulness of current levels as individual markets change in substance and size over time.

98. Congress should grant the Bureau explicit authority to conduct examinations specifically intended to review compliance with the Military Lending Act. The requested authority would complement the work the Bureau currently does to enforce the MLA.

Commented [NJ(33]: Nat/Jeff – Ditto again. I expanded the discussion of larger participants in the preamble, which was scant, but did not make all these points. Move up to preamble and develop more fully if needed, and be more succinct here. Thanks.