CBA | CONSUMER BANKERS ASSOCIATION

Via electronic submission

June 1, 2020

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Re: **Bureau of Consumer Financial Protection Request for Information to assist the Taskforce on Federal Consumer Financial Law, Docket No. CFPB-2020-0013.**

Mr. Weber:

The Consumer Bankers Association (CBA)[1] appreciates the Consumer Financial Protection Bureau (Bureau) issuing its Request for Information to assist the Taskforce on Federal Consumer Financial Law (RFI). CBA feels the Taskforce on Consumer Financial Law (Taskforce) and this RFI present a unique opportunity for the Bureau to better understand the implications of its various legal and regulatory proceedings on all interested stakeholders.

CBA also values the various opportunities for stakeholder engagement, including this RFI process, and the series of Requests for Information issued by the Bureau in 2018. CBA participated fully with the 2018 Requests for Information, and summaries of our comments in that forum can be found below.

In addition to the issues highlighted in CBA's comments to the 2018 Requests for Information, we once again raise the following issues as priorities for consideration by the Taskforce.

I. Top Rulemakings for Reform

CBA appreciates the Taskforce's commitment to reviewing the Bureau's various rulemaking responsibilities and determining where the Bureau should act to effectuate better policy to protect consumers. CBA outlined specific concerns with many of the Bureau's inherited[2]

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[1] The Consumer Bankers Association is the only national trade association focused exclusively on retail banking. Established in 1919, the association is now a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly $3 trillion in consumer loans, and provide $270 billion in small business loans.

[2] *See* Comments of Consumer Bankers Ass'n, RE: Request for Information Regarding the Bureau's Inherited Regulations and Inherited Rulemaking Authorities, Docket No. CFPB-2018-0012, available at: https://www.consumerbankers.com/cba-issues/comment-letters/cba-comment-letter-re-rfi-inherited-regulations-and-inherited-rulemaking.

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and adopted regulations[3] during the Bureau's 2018 Requests for Information. In addition to those concerns, which address much of the Taskforce's RFI, we highlight the following rules as priorities for reform and further rulemaking.

A. Clarify What Products Qualify Under the Bureau's Small Dollar Rule

In 2019, the Bureau issued a proposed rule to revise its November 2017 small-dollar loan rule (2017 Rule). The proposal would effectively rescind the 2017 Rule's requirement that lenders determine a borrower's ability to repay prior to extending small-dollar and certain other types of covered loans. The Bureau has also finalized a delay of the compliance date for the 2017 Rule's existing ability to repay provisions to November 19, 2020. According to the proposal, the Bureau believes the 2017 Rule's ability to repay provisions would have the effect of eliminating lenders willing to participate in the market, thereby decreasing consumer access to credit and competition in credit markets. We agree with the Bureau's assessment of the 2017 rule and applaud the proposal that will help depository institutions offer short term credit products.

The proposed rescissions would substantially decrease the significant burdens on lenders that would be imposed by the existing ability to repay requirement. The 2017 Rule would require lenders to obtain extensive information about a consumer's finances and use the information to project whether the consumer will be able to make payments for his or her existing payment obligations and the payments under the covered loan and still meet basic living expenses for a period of thirty days. The changes in the proposed rule may encourage lenders previously discouraged by the requirements under the 2017 Rule to engage in small-dollar, short-term loans.

Lenders would still be subject to the 2017 Rule's payment provisions, which require a lender to obtain a new customer authorization to attempt to withdraw funds from a consumer's account following two consecutive failed attempts to withdraw payments from that account. The provisions also require lenders to provide consumers with a written notice prior to a first attempt to withdraw payment from a checking, savings, or prepaid account and before subsequent attempts to withdraw payments if the payment amounts, dates, or payment channels differ from the first attempt.

In May, the Bureau released a No Action Letter (NAL) template through its Office of Innovation designed to create a pathway for financial institutions looking to offer small-dollar, short term loans. The NAL template followed earlier statements by the Bureau encouraging financial institutions to offer these products in response to COVID-19. While CBA appreciates these steps to open the small dollar market, we still feel a formal rulemaking on small-dollar short term loans is necessary.

The NAL template provides limited relief only to those institutions who request it and does not create a regulatory environment where financial institutions broadly can get involved. Further, and more concerning, NALs can be revoked in the future, creating uncertainty for those institutions looking to enter the space. For these reasons, and those above, CBA advocates the Bureau move

[3] *See* Comments of Consumer Bankers Ass'n, RE: Request for Information Regarding the Bureau's Adopted Regulations and New Rulemaking Authorities, Docket No. CFPB-2018-0011, available at: https://www.consumerbankers.com/cba-issues/comment-letters/cba-comment-letter-re-rfi-adopted-regulations-and-new-rulemaking.

forward with their planned final rule on small-dollar short term loans to better allow financial institutions to serve customers in this space.

As the Bureau moves forward with a final rule, we note stakeholder feedback has identified issues outside the scope of the proposal. CBA urges the Bureau to grant an immediate extension of the compliance date for the entire 2017 Rule. Without an immediate extension, banks will expend resources unnecessarily to achieve compliance with a rule the Bureau is reconsidering and may materially change.

The Bureau's small dollar rule has greater impact on products outside of the short-term lending space. The Bureau should strongly consider exempting traditional consumer loan products, which do not raise consumer protection concerns, and which this rulemaking was not intended to address. In the 2017 Rule, the Bureau expansively defined "covered loans" — i.e., the loans subject to the Final Rule's restrictions — without regard to the loan's amount or duration. Consequently, the 2017 Rule captures many loans that are not short-term, small dollar loans, including some wealth management products and bridge loans just to give two examples. To address this concern, the Bureau should also clarify the financing of any product or service in connection with a purchase money loan is included in the Rule's exemption for these loans and thus avoid restricting access to open-end lines of credit.

B. Update and Harmonize Regulations Dealing with Electronic or Digital Advertising and Disclosures

Regulations X, Z, and DD all have standards establishing the prominence and proximity for various disclosures, including where certain disclosures must be displayed, how they must be displayed, and what disclosures they should be grouped together with. These regulations should be amended and harmonized to indicate the prominence and proximity standards they include meet the "clear and conspicuous" standards for all applicable electronic advertisements and disclosures set forth in the Regulations.

Regulations B, E, X, V, Z, and DD should be amended to better clarify that required language, including required disclosures and language related to advertisements, may be provided to consumers via a hyperlink when included in an electronic document. This will greatly increase the accessibility of the required language for consumers. To this end, the Bureau should issue similar guidance on disclosure requirements to harmonize the requirements of the Homeowners Protection Act.

Accordingly, the required language should be considered:

- Prominent if:
    - It is at least the same size as the trigger term; or
    - Where it is provided through a separate link, the link is as prominent as the trigger term; or
    - If the disclosures are on the first principal page of electronic marketing, consistent with the Fair Credit Reporting Act.

- Proximate if:
  - It is in close proximity to the trigger term;
  - Where it is provided through a separate link, the link is in close proximity to the trigger term; or
  - The trigger term itself links to it.

Amending the above regulations to allow financial institutions to better provide electronic disclosures will help lead to better informed consumers as electronic disclosures can be expanded to accommodate the individual needs of the document they appear on, and can easily be printed in a large format.

C. Amend and Clarify E-Sign Act Requirements and Modernize Rules Governing Delivery of Disclosures Provided Electronically

The Bureau should remove the e-consent requirement under the Electronic Signatures in Global and National Commerce Act[4] ("E-Sign Act") which requires consent prior to providing adverse action notices under Regulation B. This extra requirement is inconsistent with the requirements of Regulation V, which allows the electronic delivery of adverse action notices without e-consent. CBA advocates the Bureau should allow the electronic delivery of adverse action notices without e-consent to better facilitate an effective process with the customer. Additionally, financial institutions are often able to make credit determinations before a consumer has established a relationship with the lender and gone through an e-consent process.

The Bureau should also provide guidance on what consumer behavior constitutes "reasonable demonstration of access" to electronically receive and access information under the E-Sign Act. This is especially important when consumers consent to a financial institution's E-Sign disclosure using bank technology or devices. Accordingly, the timing for delivery of electronic disclosures should be more flexible and allow electronic delivery to qualify for the longer time periods permitted for delivery when the consumer is not present. For example, Regulation DD requires account disclosures to be made at account opening, but allows up to 10 business days to deliver the disclosure to a consumer if they are not present at the time the account is opened, unless the consumer uses electronic means to open the account. Allowing the 10 day delivery window when a consumer is present at the financial institution, and provides E-Sign consent to electronic delivery on a device at the financial institution would allow the consumer the opportunity to view the disclosures before account opening, and would accommodate the convenience of in-person account opening by allowing the consumer to consent either at the financial institution or on a personal device after account opening.

Additionally, allowing for electronic delivery of Regulation Z disclosures without requiring E-Sign consent will help facilitate closed-end loans at the point of sale. Many issues can be resolved if the Bureau clarifies that a consumer using an electronic device in entering a transaction will satisfy the "reasonable demonstration of access" requirement.

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[4] *See*, Electronic Signatures in Global and National Commerce Act, Pub. L. 106-229, 114 Stat. 464 (enacted June 30, 2000).

Clarification stating that when a consumer submits an application electronically, and consents to electronic delivery of communications when submitting the application, this should allow financial institutions the ability to deliver adverse action letters to the consumers provided digital delivery channel. Often when customers choose electronic options, it is to avoid many of the complications and hurdles traditional methods create. Providing adverse action notices and other related documents electronically allows for more timely and responsive communications with customers throughout the process. Greater flexibility on E-Sign requirements will greatly impact the convenience and availability of important information for CBA member's customers and help permit financial institutions to better serve their customers in an increasingly digital world.

D. Streamline Section 1071 Small Business Data Collection

CBA strongly urges the Bureau to take a cautionary approach to rulemaking under Section 1071 of the Dodd-Frank Act, which amends the Equal Credit Opportunity Act (ECOA) to require financial institutions to compile, maintain, and report information concerning credit applications made by women-owned, minority-owned, and small businesses. Under the section, every financial institution must inquire of any business applying for credit whether the business is a small business, or a women- or minority-owned business, maintain a record of the information separate from the application, and report the information along with related information about the application to the Bureau. The information must be made public on request in a manner to be established by regulation and will be made public annually by the Bureau.

CBA and its member institutions strongly believe Section 1071 is not as simple as data collection for other lending products, such as residential mortgages. Business lending parallels are not comparable to residential mortgage lending. Home Mortgage Disclosure Act (HMDA)-like reporting for business lending activity intended to reveal potential discrimination is a flawed premise because the two transactions are inherently different in many key aspects:

- Residential lending all shares the same type of collateral. Business lending may not be secured at all, and when secured, the type of collateral varies tremendously. Therefore, comparing terms between loans is problematic.

- HMDA-reported mortgage loan applicants are all to consumers. Business lending involves loans to all types of applicants, ranging from mom-and-pop businesses to sophisticated corporate structures through sole-proprietors to corporations.

- Business loans are often renewals rather than new loans. These renewals are not akin to refinances in the residential world as often they are for a year in duration with the intent to renew upon maturity.

- Business loans often have much shorter and varied durations, where mortgages tend to be more uniform.

- The appropriate property address for a business loan to use for reporting and analysis can be debated with no easy or right answer.

- Capturing business loan applicants for reporting and analysis can be debated with no easy or right answer given the various ownership and structures.

- Without a standard definition of small business, it is impossible to perform comparisons between institutions unless the scope of what is covered is defined.

We believe the Bureau must be keenly aware that the dissimilar nature of business lending presents two serious challenges for Section 1071 rulemaking:

1. Determining which data fields to require collection for, developing standard values to be reported, and proposing workable rules for collecting and reporting the data will be tremendously difficult if the goal is to have a thoughtful, achievable rule that yields useful data.

2. Constructing fair lending analyses that will yield meaningful and appropriate conclusions for business lending is even more challenging.

In light of these issues and the need to streamline the credit process for qualified applicants, CBA and its member institutions cannot stress enough the importance of well-balanced rules under Section 1071. Any data collections need to be clearly tied to well-defined, measurable goals. Overly burdensome data collection requirements will stifle small business lending, greatly increase compliance costs for small business lenders, and lead to costly litigation.

To this end, the Bureau should define "women-owned" and "minority-owned" consistent with other federal rules, such as the Financial Crimes Enforcement Network's customer due diligence requirements, and "small business" consistent with the Community Reinvestment Act and call report data. The Bureau should further limit reportable loans to new account originations providing extensions of credit, and all data points collected should be limited to those expressly required by statute.

Key to this rulemaking is lenders' ability to address 1071 reporting compliance with already existing reporting systems (e.g., Community Reinvestment Act, etc.) to ensure minimum market disruption. These systems will need to be automated and accurate. Adherence to systems already in place will allow lenders to streamline data collection.

E. Balance TILA-RESPA Integrated Disclosure Rule Costs Versus Intended Benefit

The TILA-RESPA Integrated Disclosure (TRID) Rule implemented the Dodd-Frank Act's directive to combine certain disclosures that consumers receive under the Truth in Lending Act (TILA) and Real Estate Settlement Procedures Act (RESPA) in connection with applying for and closing on mortgages. As such, this rule advances a very important mortgage-related reform of the Dodd-Frank Act, laying out the key informational documents that consumers receive in the mortgage lending process.

Pursuant to section 1022(d) of the Dodd-Frank Act, the Rule's assessment that is currently underway must address, among other relevant factors, the Rule's effectiveness in meeting the purposes and objectives of Title X of the Dodd-Frank Act and the specific goals of the TRID Rule as stated by the Bureau. Sections 1098 and 1100A of the Dodd-Frank Act set forth two goals for the TRID Rule: "to facilitate compliance with the disclosure requirements of [TILA and RESPA]" and "to aid the borrower or lessee in understanding the transaction by utilizing readily understandable language to simplify the technical nature of the disclosures."

CBA supports clear and accurate disclosures and well-regulated markets where well-crafted rules provide effective information and consumer protections. We share the Bureau's goals of assuring that these disclosure regulations succeed in providing consumers with information needed to navigate the mortgage origination and settlement process. Consumer protection is only part of the focus, however, because the Bureau must also observe the dual responsibility of simplifying compliance, and ensuring that markets for consumer financial products and services operate "transparently and efficiently to facilitate access and innovation," and that "responsible, affordable mortgage credit remains available to consumers." The assessment must be guided by these twin objectives: facilitating consumer protection and improving market operations.

Accordingly, CBA supports the Bureau's efforts to gather relevant cost data via structured interviews and surveys with industry participants to assess firms' implementation and other ongoing costs. However, consultation with our members suggests that that precise cost data attributable to implementation efforts will be very difficult to obtain. These discussions reveal that historical cost data from the TRID implementation period dating from 2013 to 2015 (and beyond) were not identified as TRID-specific implementation costs. At that time, mortgage lenders faced multiple compliance deadlines, including implementation of new Ability-to-Repay, Loan Officer Compensation, and HMDA regulations. Mortgage lenders did not attribute implementation expenses on a per-regulation basis; instead, they generally apportioned costs to overall "mortgage compliance."

This is particularly true for the TRID Rule, which established a disclosure "grid" that affected other mortgage-related requirements. For instance, efforts to comply with new HMDA requirements regarding application outcomes or changes to the Uniform Residential Loan Application (URLA) and valuation disclosure forms under Equal Credit Opportunity Act would have been tightly intertwined with TRID's loan estimate and closing disclosure implementation processes. Because all these requirements had to work in tandem in lenders' loan origination systems, dissecting only TRID-related costs was unfeasible, if not impossible.

CBA believes the assessment must attempt to quantify the TRID Rule's benefits with rigor. The Bureau should have concrete metrics demonstrating the existence of, or degree of "improvement," that the TRID Rule achieved over the previous RESPA and TILA regimes. To that end, we believe the Bureau's consumer benefit analysis should not only seek to measure purported improvements in individual understanding of the new disclosure forms, but also must seek to identify consumer behavior changes.

Consumer surveys should determine if more borrowers shop for mortgages after TRID. If so, what is the scale of the difference, and is it possible to isolate the impact of disclosure changes from the evolving access to online information and availability of digital consumer facing applications that have occurred over the past 10 years? Quite simply, the Bureau's consumer survey should measure whether TRID changed consumer understanding or behavior in a manner that justifies the tremendous costs of the rule.

F. Regulation P: Privacy of Consumer Financial Information

Under the Gramm-Leach-Bliley Act ("GLBA") of 1999,[5] and its implementing Regulation P, financial institutions are required to furnish customers with an annual privacy notice. This notice is provided at considerable cost to providers yet provides little benefit to consumers. The annual privacy notice has long been one of the least useful yet most burdensome requirements placed on CBA members, especially those members that do not share information outside one of the statutory exceptions, or have not changed their information sharing practices since the last time a customer was provided with a disclosure.

The Bureau amended Regulation P in 2014 to offer an alternative means for providers to comply with the statutory annual notice requirement. However, the Bureau's final rule included a number of conditions and qualifications that significantly limited its use by financial institutions, including requiring financial institutions to post the notice online and annually notify customers that the information is available online, either in written or electronic form. These conditions eliminated any benefits from the 2014 proposal and deterred institutions from taking advantage of the intended relief.

After the amendment to Regulation P was released, the United States Congress amended GLBA to eliminate the annual notice requirement demonstrating Congress' conclusion that the annual notices provided little benefit to consumers and contributed to consumer information overload. The FAST Act[6] eliminated the annual privacy notice, provided a financial institution meets two simple conditions. First, the financial institution can only share information within the parameters of one of GLBA's statutory exceptions, and second, the institution may not have changed its information sharing practices since the last time the customer was provided with a privacy notice.

While the FAST Act provision was self-enacting, CBA strongly urges the Bureau to eliminate the annual notice as superfluous where there is no sharing under either GLBA or Fair Credit Reporting Act ("FCRA") that would require the institution to offer customers an opt-out. Additionally, the Bureau should develop model forms for electronic delivery of disclosures that will provide the same safe harbor provided when presenting the printed forms.

Further, the §1016.14 exceptions to notice and opt-out requirements for processing and servicing transactions should be expanded to include an exception for private label credit cards to include co-brands.

Additionally, financial institutions often do not share account numbers with third parties when the third party is to provide a service to consumers because of a lack of clarity around what the term "marketing" means under the GLBA, and if a the prohibition against "marketing" would be triggered. Clarification on what constitutes "marketing" for purposes of the prohibition on

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[5] Annual Privacy Notice Requirement Under the Gramm-Leach Bliley Act (Regulation P), 81 Fed. Reg. 44801, July 11, 2016.
[6] Fixing America's Surface Transportation Act, Pub. L. No. 114-94.

sharing account numbers under the GLBA[7] would help reduce fraud risk for consumers and allow financial institutions to better serve their customers.

Finally, clarity is needed on the relationship between GLBA prohibitions on the re-use and re-disclosure of data in relation to its open access banking requirements. Specifically, information about when financial institutions allowing consumers to access data are considered "custodians" of the data and obliged to follow and protect the data despite not having any further control over it.

G. Additional Areas for Support

In addition to the enumerated issues discussed above, and the many topics discussed throughout our responses to the 2018 Requests for Information, CBA raises the following items for consideration by the Taskforce and for reform by the Bureau.

1. Adopt the *Inclusive Communities* Holding

In 2015 the Supreme Court held disparate impact claims were cognizable, and discussed limitations on and stands for these claims in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*[8] While the 2018 joint resolution passed by Congress on the Bureau's "Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act"[9] bulletin prevented the Bureau from issuing new guidance on disparate impact, we would urge the Bureau to change examination manuals to incorporate key elements of *Inclusive Communities*. Aligning examination procedures with the standards in *Inclusive Communities* will help better protect consumers and more prudently regulate potential disparate impact issues in the future.

2. Continue Engagement on the Telephone Consumer Protection Act

CBA appreciates the Bureau's consistent involvement in the Telephone Consumer Protection Act (TCPA). The Bureau has long worked with the Federal Communications Commission to advocate for much-needed reforms, and CBA encourages continued engagement on this issue. Most recently, the Bureau submitted comments[10] supporting a CBA petition[11] to the FCC requesting an emergency declaration to allow for the use of Automatic Telephone Dialing Systems during the COVID-19 pandemic. Engagement like this will be crucial as the Bureau finalizes rules on communication methods under the Fair Debt Collection Practices Act as provisions of the TCPA may conflict with the final rule's goals and provisions.

3. Tailored Use of No-Action Letters, Project Sandbox, and Trial Disclosure Program

[7] 16 C.F.R. §313.13.
[8] 135 S. Ct. 2507 (2015) (*Inclusive Communities*).
[9] S.J. Res. 57, 115th Congress, Apr. 18, 2018.
[10] Comments from Consumer Financial Protection Bureau Director Kathleen L. Kraninger in Support of Petition for Expedited Declaratory Ruling, Clarification, or Waiver of the Consumer Bankers Association Before the Federal Communications Commission, CG Docket No. 02-278.
[11] Petition for Expedited Declaratory Ruling, Clarification, or Waiver of the Consumer Bankers Association Before the Federal Communications Commission, CG Docket No. 02-278.

CBA applauds the Bureau and its Office of Innovation for reforms made to the No-Action Letter (NAL) and Trial Disclosure Programs, as well as the establishment of Project Sandbox. We feel many of the revisions made to these programs help facilitate a more flexible regulatory environment which in turns allow financial institutions to better protect consumers while developing new and innovative products.

However, CBA would caution the Bureau against using NALs of Project Sandbox to forego other regulatory and rulemaking obligations, as may be the case with small-dollar short-term loans. While NALs can provide relief to institutions looking to develop or enter particular products, the relief provided by NALs and Project sandbox is not broad enough to ignore rulemaking and other forms of guidance.

4. Establish Disaster Recovery & Relief Programs

The novel COVID-19 pandemic has put an enormous strain on our nation's economy, and on the financial institutions which serve consumers daily. Throughout the crisis, CBA's members have done all in their power to help ensure consumer financial safety and security, often offering fee waivers, forbearances, and many other forms of loan modifications aimed at protecting consumers during this unprecedented time.

The Bureau has done much during this crisis to address a host of regulatory and legal issues preventing financial institutions from reaching customers when they needed our help most. CBA urges the Bureau to examine all the various releases, proceedings, and consumer outreach conducted as a response to COVID-19, and use these tools to create a system which will leave financial institutions and our customer better prepared for future times of crisis. This time has taught us much about the resilience of the American people and our financial institutions, and we urge the Bureau to use this learning opportunity to better prepare us all in case another dire situation like this arises again.

II. The Bureau Should be Headed by a Bipartisan Commission

Since its inception, the Bureau has been the center of political and legal debates about the legitimacy of its leadership structure. Earlier this year, the issue made its way to the Supreme Court in a challenge to the structure of the Bureau and whether its single director leadership model is constitutional. We are concerned the Seila Law v. CFPB case[12] could result in a Supreme Court ruling that would create a governance structure where the director is removable at-will; inviting increased political turmoil at the Bureau, further undermining the mission and operations of the Bureau.

The Director is currently a single officer responsible for leading the Bureau, and is the chief decisionmaker over all rulemakings, enforcement, and supervisory actions that affect millions of Americans' financial safety and security. This high level of authority is unparalleled when compared to other regulatory agencies. The potential of a court ruling that could install a

[12] Seila Law v. Consumer Financial Protection Bureau, 923 F.3d 680 (9th Cir. 2019), *petition for cert. filed* (U.S. June 28, 2019) (No. 17-56324).

removeable at-will director would bring increased confusion to financial services providers who require stability and transparency at the Bureau. An at-will Director, removable every four years, or sooner, would leave financial instructions with few assurances that the rules they are complying with today would remain in place. When regulatory stability is eroded by changing political dynamics, the consumer suffers from financial institutions' inability to rely upon a consistent regulatory environment. This in turn results in fewer consumer choices and increased costs, limiting financial institutions' ability to best serve and protect their customers.

Replacing the sole director model with a bipartisan, Senate confirmed, five-person commission would depoliticize the Bureau while increasing stability, accountability and transparency for all consumers and industry stakeholders. As we saw after the departure of former Director Cordray, the Bureau's current governance structure is subject to dramatic political shifts and strains with each change in presidential administration. Unpredictable political shifts make it difficult for the financial services industry to plan for the future, ultimately stifling innovation and limiting access to credit.

It is crucial that appropriate checks and balances are in place given the scope and importance of the CFPB. It is also important to insulate the Bureau from political shifts with each new director that could reduce its ability to impartially ensure a fair and competitive marketplace. As such, the Bureau should be led by a bipartisan, five-member Commission.

III. The Bureau Should Use All Their Tools to Prevent Consumer Harm

CBA appreciates Director Kraninger's emphasis to use all the Bureau's tools to prevent consumer harm. This includes properly educating consumers and establishing clear regulations in addition to ensuring compliance through supervision and holding bad actors accountable through enforcement. A directive to utilize all the Bureau's facilities marks a departure from how the CFPB has historically emphasized the enforcement process as a regulatory tool and focused a large portion of industry interaction through enforcement actions.

CBA commented thoroughly on the Bureau's consumer protection tools during the 2018 Requests for Information.[13] While we appreciate Director Kraninger's charge to use all the Bureau's tools, CBA members continue to raise concerns that the new directive has not worked its way throughout the Bureau. We still see many Bureau examiners continuing to present new issues on previously settled matters of law, lookback periods, and issues remediated by other government agencies through their supervision processes. To this end, CBA recommends the Bureau focus on the following issues when looking to protect consumers.

[13] *See* Comments of Consumer Bankers Ass'n, Re: Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes, Docket No. CFPB-2018-0001, available at: https://www.consumerbankers.com/cba-issues/comment-letters/joint-trades-letter-cfpb-re-cid-processes, Re: Request for Information Regarding Bureau External Engagements, Docket No. CFPB-2018-0005, available at: https://www.consumerbankers.com/cba-issues/comment-letters/cba-rfi-comment-bcfp-external-engagement.

A. Improving the Bureau's Enforcement Priorities[14]

The Bureau serves a vital function to provide vigilant oversight over consumer financial products, particularly in novel areas exclusive to the Bureau's authority. Proper use of enforcement powers can facilitate a safe and sound consumer financial market. Since inception, the Bureau historically operated in a manner commonly referred to as "regulation by enforcement," with a host of negative implications placed on financial institutions and consumers alike. Often, the Bureau used enforcement actions to announce new regulatory standards instead of issuing rules or guidance which require stakeholder feedback.

Bureau enforcement actions predicated on new legal theories have had considerable impacts on entire industries. Examples include the Bureau's application of a fair lending "disparate impact theory" to indirect auto lenders and actions related to the sale, servicing, and marketing of certain ancillary products. In other past enforcement actions, the Bureau punished institutions for alleged violations of Bureau-enforced regulations immediately after their effective date, often relying on unfair, deceptive or abusive acts and practices (UDAAP) authority.

Improper "regulation by enforcement" has existed not just in the Bureau's legal claims but also in the conduct requirements contained within consent orders. Such conduct requirements are not always connected with legal requirements, often merely citing the Bureau's broad UDAAP authority, yet in the past the Bureau has suggested other institutions follow these conduct stipulations to avoid enforcement. Expecting the entire financial services industry to follow conduct requirements negotiated with a single institution is another example of the Bureau's past overreach.

"Regulation by enforcement" runs counter to the Bureau's core purposes and creates an unstable and unnavigable regulatory environment. CBA appreciates recent efforts to curb this behavior, and to facilitate a regulatory environment that is transparent and allows for thorough stakeholder review and analysis of conceived regulatory principles. The Bureau should continue increasing transparency throughout their supervision process, and CBA commends the Bureau on recent changes in policies and procedures better effectuating that change.

1. Ensure Fair and Equitable Treatment of Self-Reported and Remediated Issues

CBA members often report that self-reported issues are receiving unbalanced and overly punitive penalties. The Bureau has repeatedly encouraged institutions to self-report, self-examine, and provide restitution where appropriate. The Bureau's response to self-reported issues needs to be consistent with this belief, within the scope of previous regulatory actions. Anything to the contrary would be counterproductive to furthering a well-regulated, consumer-focused banking system.

[14] *See* Comments of Consumer Bankers Ass'n, Re: Request for Information Regarding Enforcement Processes, Docket No. CFPB-2018-0003, available at: https://www.consumerbankers.com/cba-issues/comment-letters/fsr-cba-cmc-joint-cfpb-enforcement-comment-letter.

CBA appreciates recent updates to the Bureau's Responsible Business Conduct Policy[15] (Policy) which works to outline proper procedures for institutions looking to self-assess, self-report, and remediate issues within their institution. Increased clarity and certainty on self-reported and remediated conduct will help financial institutions better assess themselves and work in a more transparent matter with the Bureau.

To guarantee the Policy's effectiveness, CBA urges the Bureau to ensure it is followed consistently among Bureau staff and between different investigations. Financial institutions have frequently dealt with great inconsistencies between different self-reported actions, so we hope stricter adherence to the guidelines published in the Policy will effectuate a more stable and reliable environment for institutions looking to self-assess, self-report, and remediate.

CBA also encourages the Bureau to continue to coordinate with other federal financial regulators when information is self-reported or submitted for review. Often, institutions may report activity to their prudential regulator which makes its way to the Bureau, so stated policies on how the Bureau will treat this information will further help financial institutions self-report and remediate issues as they may arise.

2. Establish a Civil Money Penalty and Restitution Matrix

Some of the issues institutions often face through enforcement, whether self-reported or initiated by the Bureau can be addressed if the Bureau establishes a formal Civil Money Penalty (CMP) matrix detailing how CMPs will function in various situations. Often, CMPs are implemented inconsistently across investigations, and among administrations at the Bureau. Establishing specific provisions and guidelines for the Bureau to implement CMPs will provide greater transparency and consistency between enforcement actions and set a baseline for remediation across the industry.

3. Increase Communication Between Bureau Enforcement Staff and Financial Institutions

The Bureau can further ensure the reliability of their investigation and enforcement priorities by taking a few key actions. CBA recommends the increasing communication between the Bureau's Division of Supervision, Enforcement, & Fair Lending and financial institutions at the outset and during investigations and conducting investigations within a prescribed time period which is clearly communicated to the examined financial institution.

A major element of increased communication includes providing all institutions a Notice to Respond and Advise (NORA) unless exigent circumstances require immediate relief. NORA letters should provide the specific provisions of law allegedly violated by institutions and should give institutions at least 30 days to respond. Financial institutions should further be permitted to present on alleged violations prior to the filing of a NORA to further increase transparency

[15] Consumer Financial Protection Bureau, Responsible Business Conduct: Self Assessing, Self-Reporting, Remediating, and Cooperating, 85 FR 18214-18217.

throughout the process. Increasing communication throughout the entire investigation process will help both the Bureau and its regulated financial institutions better protect consumers.

4. Clearer Use of "Abusive" Will Better Serve Consumers

By granting the Bureau authority to regulate unfair, deceptive and "abusive" acts or practices (UDAAP), the Dodd-Frank Act created an anomaly within the existing and well-documented regulatory regime. In addition, Congress did not provide clarity as to why an additional and seemingly redundant "abusive" violation was created, which has placed all companies under the Bureau's jurisdiction at risk of inadvertent noncompliance because it is unclear how an "abusive" standard will be applied or how it is different from unfair or deceptive. Many depository institutions are supervised both by the Bureau for UDAAP violations and by their prudential regulator for Unfair and Deceptive Acts of Practices violations, creating an overlapping and potentially confusing supervisory regime.

CBA appreciates the recent policy statement[16] outlining a framework for how it plans to apply the "abusiveness" standard moving forward. Chiefly, CBA appreciates the Bureau focusing on citing conduct as abusive only when the harm to consumers outweighs the benefits, avoiding "dual pleading", and seeking monetary relief only when there has been a lack of good-faith effort to comply. These efforts represent important steps in further detailing "abusive" behavior, and its impact on enforcement. Financial institutions continually work with all their regulators to ensure compliance with rules and regulations, and this policy helps reflect the great work they do to comply every day. CBA urges the Bureau to ensure this policy is widely adopted by investigative staff and applied consistently to those institutions undergoing an investigation. Such consistency will help increase the reliability of the policy, while encouraging compliance at financial institutions, and better protecting consumers.

B. Enhancing the Bureau's Supervision Procedures[17]

Sound supervision should prevent consumer harm while still allowing financial institutions the flexibility to develop new products and services to better serve customers. Examiners need to streamline procedures and work with other regulators to create an efficient supervisory regime that protects consumer interests and establishes clear rules of the road for financial institutions. Despite improvements in the Bureau's supervision policies and procedures, CBA members still find examiner communication lacking as there seems to be a persistent disconnect from Bureau leadership. The result is more arduous, duplicative and inefficient exams for financial institutions that leave less time and resources to improve policies, procedures and serve our customers. CBA feels the following changes will help better effectuate the Bureau's supervisory procedures to better strengthen consumer protections across the board.

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[16] Consumer Financial Protection Bureau, Statement of Policy Regarding Prohibition on Abusive Acts r Practices, 85 Fed. Reg. 6733-6738.

[17] *See* Comments of Consumer Bankers Ass'n, Re: Request for Information Regarding the Bureau's Supervision Program, Docket No. CFPB 2018-0004, available at: https://www.consumerbankers.com/cba-issues/comment-letters/joint-trades-letter-re-bureau-supervision-process.

1. The Bureau Should Coordinate with Other Regulators on Supervisory Processes

CBA strongly encourages the Bureau to ensure coordination with other regulatory agencies remains a high priority and do more to streamline exam processes. CBA member banks are often supervised by multiple federal regulators as well as the state regulatory bodies that supervise state-chartered banks. A single financial services company can be examined by the Federal Reserve, the OCC, the FDIC, and the Bureau, among others. In some cases, more than one agency is examining a bank for similar or related issues, each with a slightly different set of lenses. The same or substantially similar documents are often sought by multiple entities, and repetitive inquiries are often made to the same people inside supervised institutions, requiring additional time and effort to respond to each duplicative inquiry. Better interagency coordination is needed to minimize the cost and burden to financial institutions, allowing them to better serve their customers.

Further, Dodd-Frank gave the Bureau primacy in supervision over the Bureau's adopted and inherited regulations. Other financial regulators are permitted to step in only if the Bureau is not fulfilling their duties. Despite these requirements, financial institutions often find other financial regulators supervising for substantially similar or identical activity. CBA encourages the Bureau to continue to coordinate with its federal and state partners to ensure a streamlined and efficient supervisory process for all.

In a similar vein, enforcement can be a multiple agency process, with each agency taking on the same issue and imposing its own penalties for related violations. The Treasury Department, in its 2017 report on financial services, recognized this as problematic and recommended a single entity act as a traffic cop or coordinator to minimize wasted effort by both public and private entities. CBA supports this approach to increased regulatory coordination.

Finally, although the Bureau holds federal preemption over state regulators on the rules and regulations it enforces, individual state Attorney Generals and "mini-CFPBs" continue to create new and differing obligations on regulated financial institutions. This undercuts much of the Bureau's work to create uniform rules which can be relied on regardless of geography. CBA encourages the Bureau to continue to work with state regulators to minimize the amount of differing requirements and support federal preemption language in future consumer finance laws considered by Congress.

2. The Bureau Should Tailor Examinations to Institutions

The Bureau's supervisory processes could be greatly enhanced if the Bureau makes changes to the scope, timing, and frequency of examinations, and considers the needs and challenges at each individual institution when preparing an examination. Tailoring examinations to institutions based on size, products offered, and geographies can help focus examinations and better allow financial institutions to prepare and work with Bureau examination staff throughout the process. This, in turn, will greatly reduce unnecessary expenses and inefficiencies at both the Bureau and examined institution, allowing both to focus their examination activities where it is needed most.

Further, the Bureau should consider the potential risks each individual institution poses throughout the examination to better focus in on potential consumer protection issues. Soliciting feedback and communication from institutions prior to examinations kicking-off will help ensure institutions have the proper resources in place to respond to Bureau requests and facilitate a smoother and more efficient examination for both sides.

We also recommend at least a six-month interval occur between examinations to avoid overlap in examined activity and allow financial institutions to properly address examiner feedback. Often, when examinations occur to frequently, financial institutions may still be working to address issues raised in a previous examination when they enter a new examination with the Bureau. The constantly revolving door of examinations does not allow financial institutions the proper time or resources to address issues raised previously and can hamper our own internal consumer protection efforts. Coordination and communication throughout the entire examination process, including communication prior to, during, and after an examination, will help ensure financial institutions are best able to work with Bureau staff to continue to protect consumers.

To this point, CBA members often deal with multiple concurrent examinations from their various regulators. To help financial institutions better operate and provide timely and efficient feedback throughout these examinations, the Bureau should clarify how the examination team scopes examination windows and how they plan examinations within those windows. Financial institutions often deal with multiple Bureau examinations within each year under the examination window, and the results have major impacts on institution's consumer compliance rating. Clarity on how the Bureau considers the various examination ratings throughout the window, and how it ties into other bank rating systems will help financial institutions better comply with examination teams throughout the entire examination process.

C. Efforts to Improve the Bureau's Rulemaking[18]

CBA recommends the Bureau adopt rulemaking processes that increase openness, accessibility, and accountability, both for the Bureau, and for regulated entities. Adopting these principles will promote transparency when the Bureau gathers information and analyzes data, enhance collaborative rulemaking processes that incorporate perspectives from a diversity of stakeholders, and allow for more support during implementation periods while allowing for review of rules to assess their effectiveness.

Specifically, CBA recommends the Bureau enhance their communications about specific rulemakings to include a roadmap that updates stakeholders on the status and timeline for each new or revised rule. Increased transparency throughout the rulemaking process, including through enhanced small business review panel access, longer comment periods, and a validation system for all submitted comments will help more stakeholders better engage with the Bureau as it undertakes various rulemakings.

[18] *See* Comments of Consumer Bankers Ass'n, Re: Request for Information Regarding Bureau Rulemaking Processes, Docket No. CFPB-2018-0009, available at: https://www.consumerbankers.com/cba-issues/comment-letters/cba-comment-letter-re-rfi-bureau-rulemaking-processes.

1. The Bureau Should Undergo A Thorough Cost-Benefit Analysis of its Various Enumerated Regulations

The Dodd-Frank Act's standards for rulemaking require the Bureau to consider, among other things, "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumer to consumer financial products or services resulting from such rule." Clear and rational regulations that are promulgated with an awareness of economic impact encourage better understanding for all stakeholders of the associated benefits and provide helpful data to ensure consumers' access to credit is not impeded with unnecessary and costly rulemakings. We believe these objectives are best met through a robust public comment process, firm adherence to formal rulemaking, and flexible implementation after a final rule is issued. Under this framework, we would encourage the Bureau to not focus solely on policy-based rulemaking, and to base new regulations on real-world data and rigorous economic cost-benefit analysis, as required by the Dodd-Frank Act. We appreciate this RFI as an effort towards those means and encourage the Bureau to continue to engage in this behavior moving forward.

2. Guidance & Implementation Support[19]

CBA appreciates efforts by the Bureau to provide guidance on rules after they are issued, and to continue to adjust and tailor the implementation of rules to adjust to the constantly changing financial landscape. However, uncertainty around the role of guidance can often limit its effectiveness, and frequently financial institutions see unintended consequences as a result of issued guidance. For example, often one rulemaking may have a host of FAQs, interpretive guidance, and other clarifying resources interpreting the rule. To better provide certainty, additional pieces of interpretation and commentary should be closely and clearly connected to the rule's provisions to maximize its effectiveness. To enhance guidance's role in the financial regulatory landscape, the Bureau should continue to re-examine its guidance materials on a daily basis to ensure they maintained desired effect, and standardize official interpretations conveyed in advisory opinions and guidance.

Further, efforts to improve the Bureau's various regulatory inquiries function, such as limiting the use of disclaimers on inquiries and other forms of guidance or issuing cumulative frequently asked questions can help increase financial institutions' understanding and implementation of various Bureau rules. As guidance can frequently assist financial institutions better serve customers within the confines of various regulations, we greatly appreciate any work the Bureau can do to better effectuate increased transparency and certainty throughout the process.

D. Financial Education[20]

CBA greatly appreciates efforts by the Bureau to better educated consumers to improve their financial safety and security. Financial education is more important now than ever as

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[19] *See* Comments of Consumer Bankers Ass'n, RE: Request for Information Regarding Bureau Guidance and Implementation Support, Docket No. CFPB-2018-0012, available at: https://www.consumerbankers.com/cba-issues/comment-letters/cba-comment-letter-re-rfi-bureau-guidance-and-implementation-support.

[20] *See* Comments of Consumer Bankers Ass'n, Re: Request for Information Regarding Bureau Financial Education Programs, Docket No. CFPB-2018-0015, available at: https://www.consumerbankers.com/cba-issues/comment-letters/cba-comment-letter-re-rfi-bureau-financial-education-programs.

Americans are faced with tough financial decisions daily as a result of the novel coronavirus. CBA applauds the Bureau for its vigilant pursuit of resources designed to help consumer through this troubling time, and for the many resources the Bureau provides consumers on a daily basis.

Financial institutions have always supported financial education efforts across the country, and often provide free financial education to all consumers, regardless of bank-customer relationships. CBA members are aligned with the Bureau's financial education goals by helping customers save, plan, borrow, and spend appropriately to finance their dreams. We support further collaboration between our members and the Bureau to continue to help American consumers strive for what is financially important.

CBA also encourages the Bureau to work with other federal and state agencies to provide more financial education to those who need it most. CBA members work with government agencies at every level, and inclusion of the Bureau would help streamline many projects, especially where overlap may exist. Partnerships like the Bureau's "Start Small, Save Up" initiative are great opportunities for financial institutions and the Bureau to work hand in hand to better educate and provide for consumers across this country. CBA members stand ready to help the Bureau better educate consumers, and much of this can be done through the existing channels our members have already established.

IV. The Bureau Should Increase Supervision and Examination of Fintechs

Today's consumer financial landscape is ever changing. New players enter the market every day, and consumer demands shift just as frequently. Banks are constantly evolving to meet customer needs, but new, non-bank entities have also gained prominence over the past decade. Now "fintechs" have a pervasive role in many products consumers use as they strive towards financial security. Banks often partner and work together with many fintechs through our constant work to serve customers.

However, some products are rapidly becoming dominated by fintech entities. For instance, non-banks are responsible for more than half of all mortgages in the United States,[21] the largest provider of student loan refinancing is a fintech,[22] and there has been a 163% increase in non-bank loan origination over the past 5 years. However, despite fintechs' growing role in our economy, the Bureau does not supervise these entities with the dedication and fervor it puts towards traditional financial institutions. While many banks are forced to ensure fintech compliance with Bureau rules and examinations through their third-party management systems, the Bureau should do more to examine and supervise these entities.

Traditional financial institutions are subject to a litany of regulations, examinations, and supervisory actions on a daily basis, leaving them much more heavily regulated than their fintech counterparts. While this thorough regulatory environment helps ensure the safety and security of our customers, it also can restrict traditional financial institutions who look to innovate and develop

[21] Federal Deposit Insurance Corporation, Quarterly Bank and Nonbank Lending Over the Past 70 Years, Vol. 13, No. 4, Published 2019, available at: https://www.fdic.gov/bank/analytical/quarterly/2019-vol13-4/fdic-v13n4-3q2019-article1.pdf.

[22] *See* SoFi Press Release, Leading Marketplace Lender SoFi Announces $3 Billion Funding Milestone, https://www.sofi.com/press/leading-marketplace-lender-sofi-announces-3-billion-funding-milestone/.

products in new spaces. Conversely, fintechs are not bound by the same system of rules, both permitting their ability to move into new and innovative spaces more easily, but also putting consumers at greater risk for harm without the same capital and regulatory requirements placed on traditional financial institutions.

Additionally, traditional financial institutions have established robust, thorough, and costly compliance management systems to better protect consumers through all the work we do daily. The Bureau bases much of its examination and supervisory efforts on traditional financial institutions' compliance management systems effectiveness, and fintechs should be held to the same standards to better protect consumers. To foster an environment which better protects consumers while ensuring new and innovative products and services can be developed, the Bureau should more closely and regularly supervise and examine fintechs to ensure the Bureau's mandate of protecting consumers is upheld.

V. Data Aggregation

As the financial landscape becomes increasingly digital, more consumers are granting access to their financial information to a host of third parties, many of which may aggregate financial data to create new financial products and services. Like the Bureau, CBA wants to ensure the safety of our customer's financial data while providing opportunity for new financial services to be developed. To this end, CBA urges the Bureau to clarify and take action on a few key items to give banks more confidence when dealing with customer financial data.

The Bureau should clarify the Gramm-Leach-Bliley Act (GLBA) applies to financial data aggregators. Congress used an intentionally expansive definition of "financial institution" in GLBA,[23] which includes "any institution the businesses of which is engaging in financial activities as described in the [Bank Holding Company Act of 1956, Section 4(k)].[24] The definition incorporates any business that engages in financial activities identified by the Board of Governors of the Federal Reserve, and establishes a list if nonbanking activities so closely related to banking "as to be a proper incident thereto".[25] This list includes "data processing, data storage and data transmission".[26] A statement by the Bureau clearly noting GLBA coverage for data aggregators will help ensure they are better monitored and regulated by both the Bureau and other prudential regulatory bodies.

In accordance with data aggregators role under GLBA, the Bureau should directly supervise data aggregators by initiating rulemaking subjecting them to regular examination. Through the "larger participants" section of the Dodd-Frank Act, the Bureau should impose supervisory authority over data aggregators to better protect consumers in this rapidly growing landscape.

Further issues are exacerbated by the lack of relationship between financial institutions and data aggregators that often occur. Often, financial institutions have no knowledge of the data

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[23] Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338, codified in relevant part primarily at 15 U.S.C. §§ 6801-6809, §§ 6821-6827.
[24] 15 U.S.C. §§ 6809(c), 6809(3)(A); 12 C.F.R. § 1016.3(1)(1).
[25] 12 C.F.R. § 225.28.
[26] 12 C.F.R. § 225.28(b)(14).

aggregators' internal security protocols, and as such, should not be held liable for unauthorized transactions conducted through the data aggregators' systems. Regulation E assigns liability to service providers as they are the best party to avoid and manage losses, as are data aggregators in their use of customer financial data.

The Bureau should similarly apply unauthorized transaction liability under Regulation E to data aggregators instead of the financial institutions. Additionally, given the lack of relationship between financial institutions and data aggregators, the Bureau should work with the prudential banking regulators to ensure any relationships between the two are not considered third-party vendor relationships. Financial institutions have little ability to supervise data aggregators or perform due diligence as data aggregators have no reason to respond to financial institution requests. Clarifying the responsibilities present for both data aggregators and financial institutions will help better protect consumers as this data is exchanged and continues to evolve.

VI. Conclusion

CBA greatly appreciates the Bureau establishing the Taskforce, and its efforts to provide recommendations on those areas of Bureau rules and processes ripe for reform. CBA has long advocated for look back periods on major rulemakings, guidance, and other legal proceedings before the Bureau. This Taskforce is an important step in ensuring the Bureau's rules and regulations stay up to date with a rapidly evolving financial landscape and has the potential to lead to better outcomes for consumers across the country.

If you have any questions or wish to discuss any of the matters raised above further, please do not hesitate to contact the undersigned directly at (202) 552-6381 or scongdon@consumerbankers.com.

Sincerely,

Stephen Congdon

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