GEORGETOWN LAW

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Submitted to eRulemaking Portal
Director Kathleen L. Kraninger
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Request for Information from Taskforce on Federal Consumer Financial Law, Docket No. CFPB-2020-0013

Dear Director Kraninger:

I write in response to the request for information from Taskforce on Federal Consumer Financial Law (Taskforce). By way of background, I am a chaired, tenured professor of law at Georgetown University Law Center, your alma mater, where I teach courses in consumer finance, bankruptcy, contracts, payment systems, secured credit, and structured finance. I have previously been the Bruce W. Nichols Visiting Professor of Law at Harvard Law School and the Scholar in Residence at the American Bankruptcy Institute. I am also the author of the only textbook in existence on consumer finance regulation, *Consumer Finance: Markets and Regulation* (Wolters Kluwer 2018).

I am well-known to the Bureau: I served on the Bureau's Consumer Advisory Board from 2012-2015, where I chaired the mortgage committee and was a member of the small-dollar lending committee. I have also served as an expert witness for the Bureau in three litigations, and been an invited presenter for the Bureau's General Counsel's office and at the Bureau's summer 2019 symposium on the meaning of "abusive" acts and practices.

As an initial matter, I strongly object to the Bureau's process with the Taskforce. The very existence of the Taskforce is unnecessary. In 2018, the Bureau issued a dozen requests for information on a wide-range of aspects of consumer finance law and the Bureau's operations. These requests generated substantial response, including a letter from me on July

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1, 2018,[1] which I hereby incorporate by reference per the initiation to do so in the Taskforce request for information. Now the Taskforce is requesting substantially the same information as in the prior requests for information, simply worded differently. This is duplicative and wasteful of the public's time and resources. It is particularly egregious to do, however, in the midst of the COVID-19 pandemic, when members of the public may have more difficult working conditions and less ability to respond because of the demands of child care and illness.

Not only is the Taskforce unnecessary, but its conclusions on many issues are forgone given its stacked composition. While the Taskforce purports to be inspired by the National Commission on Consumer Finance created in 1968, it actually bears no resemblance to that Commission. The CFPB's Taskforce is substantially smaller (5 members, as compared to the Commission's 12), so it represents an inherently more limited range of views. Moreover, those five members are all individuals who are or have been employed by covered persons or service providers as attorneys, consultants, or expert witnesses, and not a single person who works for consumers. Every one of the Taskforce members as a well-established track record as an advocate for deregulation. There is no one in the consumer finance world who has any doubt about the type of recommendations that will come out of the Taskforce given its membership. That makes the whole request for information an exercise in regulatory kabuki theater.

Additionally, the timeline for the Taskforce is artificial and underscores its political nature. Whereas the Commission took four years to carefully consider a range of evidence, the Taskforce is working on an artificial and accelerated deadline of one year, and ploughing ahead even in the midst of the COVID-19 pandemic, insisting on a 60-day response window for the request for information. There is no reason for this accelerated timeline except to get a Taskforce report out before political control of the Bureau might change as a result of the November 2019 election. That such a political consideration would shape the Taskforce's timeline underscores that its recommendations are a done deal and do not actually depend on anything that will be submitted in the public comments. This is not a Taskforce but a Taskfarce.

In regard to the substance, I will briefly address only three of the Taskforce's inquiries, number 19 regarding competition, number 20, regarding disclosures, and number 22 regarding the optimal mix of regulation, enforcement, supervision, and consumer financial education. In regard to all three my basic point is that consumer financial education, disclosure, and competition are all of limited, if any, use in consumer finance regulation.

[1] Comments of Financial Regulation and Consumer Protection Scholars on Docket No. CFPB-2018-0013, dated July 1, 2018.

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First, the idea that competition can routinely be relied upon to provide consumer protection in financial markets is preposterous, and indeed, if it were true, there would be no need for the CFPB to exist. There is no competition for consumers' business in loan servicing, debt collection or credit reporting markets, as consumers do not choose their loan servicer, their debt collector, or their consumer reporting bureau.[2] Likewise, in indirect lending markets, such as much of auto finance, and in on-line lending that is intermediated through lead generators, the lender does not compete for the consumer's business, but from the dealer or the lead generator's business.[3] In other consumer financial markets competition is likely to be less than perfect for the simple reason that there are formal legal barriers to entry in the banking market—not any can get a banking charter.

Even in markets where there are large numbers of competitors, competition is often warped because of the bespoke nature of products and by partitioned pricing. Competition works best in commoditized product markets that compete only on a single price term, such as 90-day winter wheat futures. There are virtually no consumer financial products that are commoditized to such a degree. The only one that comes close are ATM withdrawal fees. Deposit accounts, for example, vary significantly in terms of fees and in terms contractual terms. Even products that tend to use standardized contract forms, such as mortgages that used the Fannie/Freddie uniform instruments, are far from commoditized given variations in maturity, rate structure, amortization, etc., not to mention non-uniform covenants. The lack of commoditization in consumer financial products should give serious pause to anyone believes as an ideological matter that competition is the best protection for consumers. Competition is a wonderful consumer protection—but only in a particular set of circumstances that do not obtain in most consumer financial product markets.

Likewise, to the extent there is competition in consumer financial products, the competition exists on the more salient price terms, but not on less salient price terms, with the result that the consumer welfare benefits from competition are muted. [4] Given the complexity of pricing in most consumer financial products—where there are numerous monetary terms (interest rates and fees, *e.g.*) as well as numerous non-monetary terms that affect the monetary terms (events of default, amortization schedules, and methodologies for calculating balances to which interest rates apply, *e.g.*), the idea that there would be the type

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[2] Richard Cordray, Prepared Remarks of CFPB Director Richard Cordray at University of Michigan Law School, Oct. 24, 2014, *at* https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-university-of-michigan-law-school/; Prepared Remarks by Richard Cordray at the Consumer Advisory Board meeting, Feb. 20, 2013, *at* https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-by-richard-cordray-at-a-consumer-advisory-board-meeting/.

[3] Levitin, Fast and Usurious

[4] *See* CFPB, CARD Act Report, Oct. 1, 2013, at 19 ("To the extent that regulation shifts costs either towards or away from salient components, it can significantly affect consumers in the market.").

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of robust competition that provides consumer protection in commoditized product markets is absurd.

If faith in competition as a consumer financial protection is founded on set of assumptions about markets that do not accurately describe most, if any consumer financial product markets, faith in consumer financial education and disclosure is stands on even thinner grounds. Simply put, there is no evidence indicating that consumer financial education has meaningful welfare impacts on consumers.[5] And why would it? Consumer financial decisions are complex and contingent and depend on numerous factors that are unlikely to be addressed by education, such as limited self-restraint, optimism biases, terms buried in fine print, lack of understanding of complex products that cannot be rectified by general consumer financial education, etc. Consumer financial education is the homeopathy of consumer finance regulation. Until and unless such evidence—showing a statistically significant improvement in consumer welfare based on consumer financial education—is adduced, the CFPB should not waste its time and resources pursuing it.

As far as disclosure goes, there is also precious little evidence of its efficacy as a general matter. There are a few studies that indicate that particular types of disclosure affect consumer behavior,[6] but generally studies have not found existing disclosures (at least cost of credit disclosures required under the Truth in Lending Act) to be effective.[7] That alone should give pause to a strategy of doubling down on disclosure. More broadly, the complexity of pricing structure for many consumer financial products—both partitioning of monetary terms and the use of non-monetary price terms like binding mandatory arbitration clauses and class action waivers—makes it hard to imagine that disclosure could be effective except for the simplest of consumer financial transactions, such as ATM fees.[8]

Moreover, even if consumers understood the interest rates and fees, it is farfetched to think that they would understand contract terms that control the application of these rates and fees, such as terms in credit card agreements that provide that there is an interest free grace period only upon two consecutive on-time payments.[9] No reasonable consumer reads his cardholder agreement, much less is likely to understand exactly how the interest rate

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[5] *See, e.g.*, Lauren E. Willis, *Against Financial Literacy Education*, 94 IOWA L. REV. 197 (2008); Lauren E. Willis, *The Financial Education Fallacy*, 101 AM. ECON. REV. 429 (2011) ("Objective observers generally admit that research to date does not demonstrate a causal chain from financial education to higher financial literacy, to better financial behavior, to improved financial outcomes…").

[6] *See, e.g.*, Marianne Bertrand & Adair Morse, *Information Disclosure, Cognitive Biases, and Payday Borrowing*, 66 J. FIN. 1865 (2011).

[7] *See, e.g.*, Victor Stango & Jonathan Zinman, *Fuzzy Math, Disclosure Regulation, and Market Outcomes: Evidence from Truth-in-Lending Reform*, 24 REV. FIN. STUDIES 506 (2011).

[8] ADAM J. LEVITIN, *CONSUMER FINANCE: MARKETS AND REGULATION* 238-40 (2018).

[9] Please do not confuse the example in this issue with distinct issue of double-cycle billing, which has been prohibited since 2009 under the CARD Act.

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application provision works,[10] and even if the consumer thinks he does, it is not the consumer's understanding that will control in practice, but the card issuers, which might well be different.

I suspect that given the composition of the Taskforce, I am shouting into the wind here, but at the very least, I wish to go on the record with my opposition to the process by which the Bureau has proceeded with the Taskforce and urge the Bureau to start from square one with a neutral and balanced Taskforce that is not operating under an artificial politically-driven timetable.

Sincerely,

Adam J. Levitin

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[10] ADAM J. LEVITIN, *CONSUMER FINANCE: MARKETS AND REGULATION* 561-64 (2018).

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