Public notice about small servicers would also reduce the number of complaints to the CFPB and other parties.

1.4.6. Reverse Mortgage Exemption.

Reverse mortgages are currently exempt from almost all provisions of the servicing rule. Other than the ability to send a notice of error or request for information, reverse mortgage borrowers have few protections from servicing abuses. Reverse mortgage servicers typically evaluate borrowers for loss mitigation after a default on property charges. There is no logical reason to exclude reverse mortgage servicers from the rules governing loss mitigation, continuity of contact, and early intervention.

1.4.7. Borrowers with Limited English Proficiency.

The lack of protections for borrowers with limited English proficiency (LEP) in the servicing (and origination) markets raises significant fair lending concerns. We have urged the CFPB to consider additional rulemaking and other steps it can take to require servicers and other market participants to effectively meet the needs of LEP borrowers. We have noted that the CFPB should assess the extent to which borrowers with limited English proficiency (LEP) are able to access the market. Collection, tracking, and transfer of language preference are essential both to assessing and providing access.[38]

1.4.8. Mandate Affordable Loan Modifications.

At all times during the CFPB's consideration of mortgage servicing rules, we have urged the CFPB to mandate affordable loan modifications consistent with investor interests for qualified borrowers facing hardship. Without broad, transparent minimum standards, discretionary reviews under the current rules create the potential for discriminatory results. The lack of alignment between servicers' incentives and the interests of investors and homeowners makes it unlikely that servicers across the market will offer sustainable modifications now that HAMP has ended. A loan modification mandate could require outcomes that an overall benefit to the investor as well (NPV positive) at either the loan or portfolio level. It should require terms that are more affordable (for example, by reducing payments) and more sustainable (where there is a reasonable basis to believe the change in terms will improve long-term performance).

2. Ability-to-Repay and Qualified Mortgage Rule

Making mortgage loans without evaluating the borrower's ability to repay the loan was one of the prime drivers of the surge of unsustainable mortgage lending that produced the mortgage meltdown. When Congress passed the Dodd-Frank Act, it created a requirement that mortgage

[38] For a discussion of the Bureau's authority and recommendations for improving access, see Americans for Financial Reform, *Issue Brief: The CFPB and Other Federal Agencies Should Adopt Strong Language Access Protections for Homeowners and Other Consumers* (May 2016), *available at* http://ourfinancialsecurity.org/wp-content/uploads/2016/05/AFR_LEP_Issue_Brief_05.26.2016.pdf.

lenders reasonably evaluate the borrower's repayment ability, with a special category of "qualified mortgages" that were presumed to meet the ability to repay test because they are deemed free of unsafe features.[39] The Act directed the CFPB to prescribe rules to implement the exception for qualified mortgages.[40] The CFPB published the final Ability to Repay rule in January 2013.[41] These rules have restored sense to the market by ensuring that lenders have an incentive to make loans that homeowners can afford and that are safe for the market. In its regulatory implementation, the CFPB has balanced the need for robust affordability requirements with flexibility for smaller institutions. The agency should not further revise the rule at this time beyond a narrow implementation of the expansion of the small creditor portfolio exemption in Public Law No. 115-174.

2.1 The Ability-to-Repay and Qualified Mortgage rule protects consumers and the market and is consistent with the purposes of both Dodd-Frank and the Truth in Lending Act.

As the CFPB noted in its publication of the final rule, Dodd-Frank's mortgage protections were a response to "an unprecedented cycle of expansion and contraction . . . ."[42] The mortgage market is the largest consumer financial services market in the country, and this activity triggered the most severe recession since the Great Depression. Fueled by a "steady deterioration of credit standards in mortgage lending," trends included loans based solely on collateral, loans to borrowers with no documentation of income, and higher cost loans to borrowers who would have qualified for prime loans.[43] After a long period of housing price appreciation, housing prices began to decline at the same time unemployment rose precipitously and the effects of these lending patterns emerged more openly. The abuses wreaked havoc on families, communities, investors and the market. They disproportionately undermined wealth accumulation in communities of color.[44] The rates of serious delinquencies for subprime and Alt-A mortgage products climbed from 10 percent in 2006, to 20 percent in 2007, to more than 40 percent in 2010.[45] In 2012, the Federal Reserve estimated that the resulting fall in housing prices resulted in approximately $7 trillion in household wealth losses.[46]

Dodd-Frank's requirement that creditors reasonably evaluate a borrower's ability to repay a mortgage loan aligns the interests of creditors, investors, and borrowers, serving as a bulwark against future mortgage market instability. The CFPB's implementation of that rule strikes the right balance between protecting consumers and allowing for a robust market. It satisfies the purposes of Dodd-Frank and the Truth in Lending Act.

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[39] 15 U.S.C. § 1639c.

[40] 15 U.S.C. § 1639c(b)(3).

[41] 78 Fed. Reg. 6408 (Jan. 30, 2013).

[42] *Id.* at 6410.

[43] *Id.*

[44] *See, e.g.,* James H. Carr et al., *The Foreclosure Crisis and its Impact on Communities of Color: Research and Solutions,* National Community Reinvestment Coalition (Sept. 2011), *available at* https://schar.gmu.edu/sites/default/files/faculty-staff/cv/ncrc_foreclosurewhitepaper_2011.pdf.

[45] 78 Fed. Reg. 6408, 6411 (Jan. 30, 2013)(citing CoreLogic data).

[46] *Id.*

The Truth in Lending Act, passed in 1968, was enacted by Congress to promote the informed use of credit to enhance economic stability and competition. Congress amended it over time to address abusive mortgage lending practices. In 1994, Congress amended TILA and established substantive protections against mortgage lending abuses in the high-cost loan market through the Home Ownership and Equity Protection Act. (HOEPA).[47] The Federal Reserve Board then issued implementing regulations, including HOEPA's ability to repay requirement.[48] In 2001, the Board made significant additional changes to the HOEPA regulation to cover more loans and further limit abuses.[49] After a series of hearings, in 2008 the Board again expanded HOEPA's protections.[50] Dodd Frank's goals echoed and expanded upon these purposes, emphasizing access to fair, transparent and competitive markets.

The CFPB's Ability-to-Repay and Qualified Mortgage regulations not only implement Congressional intent but also animate TILA and Dodd-Frank's purposes, by providing clear safe lending rules while allowing flexibility for smaller institutions. The CFPB has balanced the need for robust affordability requirements with flexibility for smaller institutions and should not make revisions to the rule at this time.

2.2 The CFPB should craft the exemption mandated by Public Law No. 115-174 narrowly and should not expand any other exemptions to the rule.

The protections put in place by Dodd-Frank rule are of great importance to consumers and the economy as a whole. A number of lenders are already exempt from key provisions of these rules. Watering the protections down by exempting additional parts of the mortgage origination market would invite a return to the unsustainable lending practices that led to the market crash described in the preceding section.

The history of the CFPB's rulemaking shows that it has already taken sufficient account of any need for exemptions from the rule. The CFPB issued its initial rule implementing these Dodd-Frank requirements on January 10, 2013.[51] At the same time, it proposed a number of exemptions to the rule.[52] On June 12, 2013, the CFPB published a final rule creating a series of new exemptions, all generally supported by industry comments.[53] The new rule created a number of exemptions for non-profit and governmental lenders that were not controversial. Moving beyond the non-profit and government realm, the final rule also contained several provisions focused on small creditors, defined as creditors with up to $2 billion in assets that (along with affiliates) who originate no more than 500 first-lien mortgages covered under the ability-to-repay rules per year. The CFPB had previously exercised authority under the Dodd-Frank Act to allow certain balloon-payment mortgages to be designated as qualified mortgages if they were originated and held in portfolio by small creditors operating predominantly in rural or underserved areas. In this final rule, the CFPB also adopted an additional category of qualified mortgages for certain loans originated and held in portfolio for at least three years by small

[47] Public Law 103-325, 108 Stat. 2160.

[48] 60 Fed. Reg. 15463 (Mar. 24, 1995).

[49] 66 Fed. Reg. 65604 (Dec. 20, 2001).

[50] 73 Fed. Reg. 44527 (July 3, 2008).

[51] 78 Fed. Reg. 6407 (Jan. 30, 2013)

[52] 78 Fed. Reg. 6621 (Jan. 30, 2013).

[53] 78 Fed. Reg. 35,430 (June 12, 2013).

creditors, even if they do not operate predominantly in rural or underserved areas. These loans are not subject to a specific debt-to-income ratio as they would be under the general qualified mortgage definition.

On October 2, 2015, the CFPB returned to the question of exemptions, publishing a final rule that again revised the definitions of small creditor, and rural and underserved areas.[54] These amendments expanded the group of creditors who qualified for small-creditor status and were broadly supported by industry comments. Specifically, the final rule raised the loan origination limit for determining eligibility for small-creditor status from 500 to 2000 originations of covered transactions secured by a first lien. In addition, it excluded originated loans held in portfolio by the creditor and its affiliates from that limit. The final rule also established a grace period from calendar year to calendar year to allow a creditor that exceeded the origination or asset limit in the preceding calendar year to operate, in certain circumstances, as a small creditor with respect to transactions with applications received before April 1 of the current calendar year. The rule also included in the calculation of the $2 billion asset limit for small-creditor status the assets of the creditor's affiliates that regularly extended covered transactions.

The rule also modified the definitions of rural and underserved. It expanded the definition of ''rural'' by adding census blocks that are not in an urban area as defined by the U.S. Census CFPB (Census CFPB) to an existing county-based definition. It also added two new safe harbor provisions related to the rural or underserved definition for creditors that rely on automated tools.

On March 3, 2016, the CFPB further expanded the opportunity for a creditor to qualify for the rural or underserved areas exemption. It adopted a procedural rule that allowed a creditor to ask the CFPB to designate as rural an area that had not previously been so designated.[55]

On May 24, 2018, Congress passed Public Law No. 115-174, which, among other things, amended the Ability-to-Repay standard to provide a broader small creditor portfolio exemption from certain aspects of the Qualified Mortgage rule for institutions with assets up to $10 billion. We recommend that the CFPB include affiliates in the asset threshold and that it draw the new regulation as narrowly as possible to ensure that larger institutions are not inadvertently covered by the new exemption. We also urge the CFPB to craft the exemptions required by the Public Law from Dodd-Frank's appraisal and escrow requirements as narrowly as possible. Rollbacks in these requirements will inadvertently run afoul of the goals of the Ability-to-Repay standard by reducing requirements that allow consumers to have an accurate estimate of the value of the home they are financing compared to the loan amount and by undermining their ability to stay current on taxes and insurance.

2.3 The rule has not interfered with access to credit.

The CFPB's QM rule and Ability-to-Repay rule sets out common sense standards that protect the market and consumers from high-risk, unsustainable loans by ensuring borrowers have an ability to repay the loans they receive. In the run-up to the foreclosure crisis, irresponsible mortgage lending that ignored borrowers' ability to repay their loans resulted in a foreclosure tsunami that

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[54] 80 Fed. Reg. 59944 (Oct 2, 2015). *See also* 80 Fed. Reg. 7770 (Feb. 11, 2015) (proposing these changes and calling for comments).

[55] 81 Fed. Reg. 11099 (Mar 3, 2016).

disproportionately impacted communities of color—eviscerating a generation of wealth building and nearly destroying the economy. The data show that the QM rule has not had a negative impact on the market and there has been a modest but steady increase in lending.[56]

Financial institutions, including small banks, are continuing to recover from the worst financial downturn since the Great Depression. Mortgage lending, in particular, continues to steadily improve. Small banks are playing an important and growing role in the recovery. Contrary to theories that the Dodd-Frank Act has stifled growth, the financial sector has had record profits. In 2016 U.S. financial institutions had total annual profits of $171.3 billion, the highest level since 2013.[57] Financial institutions continue to soar and enjoyed record high profitability in the first quarter of 2018.[58]

The profitability of community banks has also rebounded strongly and meets pre-recession levels. In 2010, less than 78 percent of community banks were profitable. By the end of 2015, over 95 percent of community banks were profitable.[59] The most recent FDIC report from the first quarter of 2018 notes that the percentage of unprofitable institutions sank to 4.6 percent, which is the "lowest percentage since the first quarter of 1996."[60] This FDIC report also notes that net income of community banks jumped 17.7 percent from the first quarter of 2017.[61] To the extent there may be concerns about smaller lenders, many have noted that the recent statutory roll back of Dodd-Frank is likely to result to a significant acceleration in mergers and acquisitions of smaller institutions, regardless of the Ability to Repay requirements.

Credit unions have also continued to grow while recovering from the financial crisis. Credit union membership has been steadily growing in recent years. In 2016, credit unions added 4.7 million new members, which amounted to "the biggest annual increase in credit union history and four times the pace set a decade earlier."[62] In a recent report using data from February 2018, membership rose 4.6 percent from the previous year.[63] Operating costs for credit unions have

[56] CRL Analysis, HMDA 2016 data, *available at* https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-2016hmda-policy-brief-sep2017.pdf.

[57] Wall Street Journal, U.S. Banking Industry Annual Profit Hit Record in 2016 (Feb 28, 2017), *available at*: https://www.wsj.com/articles/u-s-banking-industry-annual-profit-hit-record-in-2016-1488295836.

[58] Federal Deposit Insurance Corporation, FDIC-Insured Institutions Report 56 Billion in Net Income in First Quarter of 2018 (2018), *available at* https://www.fdic.gov/news/news/press/2018/pr18030.html. See also CNN Money, American Banks just had their most Profitable Quarter Ever (2018), *available at* http://money.cnn.com/2018/05/22/investing/banks-record-profits-fdic-deregulation-bill/index.html.

[59] Federal Deposit Insurance Corporation, Core Profitability of Community Banks 1985-2015 1 (2016), *available at* https://www.fdic.gov/bank/analytical/quarterly/2016_vol10_4/article1.pdf.

[60] Federal Deposit Insurance Corporation, Quarterly Banking Profile: First Quarter 2018, *available at* https://www.fdic.gov/bank/analytical/quarterly/2018-vol12-2/fdic-v12n2-1q2018.pdf.

[61] Id. At 19.

[62] CUNA Mutual Group, Credit Union Trends Report (2017), *available at* https://www.cunamutual.com/resource-library/publications/credit-union-trends-report.

[63] CUNA Mutual Group, Credit Union Trends Report (April 2018), *available at* https://www.cunamutual.com/-/media/cunamutual/about-us/credit-union-trends/public/apr_2018_cu_trends_report.pdf.

also fallen in the period since Dodd-Frank was passed and were down to 3.08 percent in 2018 from a high of 3.59 percent in 2008.[64]

While the number of small lenders, including community banks and credit unions, has decreased over the years, this cannot be reasonably attributed to Dodd-Frank or CFPB regulations. The number of community banks has declined every single year since 1984.[65] FDIC research concludes that community bank profitability since 2008 has overwhelmingly been driven by macroeconomic conditions, not regulations.[66] The FDIC study first takes a wide look at regulations that include Dodd-Frank, but also Basel III capital standards. The study states that "regulation is just one among many noneconomic factors that may contribute to structural change in community bank profitability," but concludes that 80 percent of variation in profitability is due to macroeconomic factors, and the other 20 percent includes not just changing regulations, but also "the rise of nonbank lending, competition from larger banks, and changes in loan portfolios and other business practices."[67]

Smaller lenders play an important role in extending access to credit, and it is noteworthy that lending has also rebounded from the depths of the crisis. After falling from June 2008 to November 2010, outstanding consumer loans have steadily increased at $3.7 trillion in December 2016, which well exceeds pre-crisis levels.[68] Small banks have posted increases in commercial lending in all but one quarter compared to levels at the time of passage of Dodd-Frank in 2010.[69] Furthermore, the FDIC's quarterly community bank performance data for the fourth quarter of 2016 shows that community banks hold 43 percent of all small loans to businesses and that they increased lending by $6.4 billion (2.2 percent) compared to 2015, twice the rate of other banks.[70]

Finally, mortgage lending has also steadily recovered since the crisis. Community banks and small lenders play an important and growing role in the mortgage market in particular. In 2015, mortgage lenders originated 850,085 more loans[71] than they did in 2012, a 37 percent increase. Loans originated by smaller lenders with assets under $1 billion saw the biggest increase during this period (48 percent) while the largest institutions, those with assets over $10 billion, saw a 1

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[64] National Credit Union Administration, NCUA Chart Pack (2016), *available at* https://www.ncua.gov/analysis/Pages/industry/fact-sheets.aspx. See also National Credit Union Administration, NCUA Chart Pack (March 2018), *available at* https://www.ncua.gov/analysis/Pages/call-report-data/reports/chart-pack/chart-pack-2018-q1.pdf.

[65] Federal Deposit Insurance Corporation, Community Banking Study 1 (2012), *available at* https://www.fdic.gov/regulations/resources/cbi/report/cbi-full.pdf.

[66] FDIC, Core Profitability of Community Banks *supra* note 4.

[67] Id at 42.

[68] Federal Reserve, Total Consumer Credit Owned and Securitized, Outstanding *available at* https://fred.stlouisfed.org/series/TOTALSL.

[69] Federal Reserve, Total Value of Loans for All Commercial and Industry Loans, Small Domestic Banks *available at* https://fred.stlouisfed.org.

[70] Federal Deposit Insurance Corporation, Quarterly Banking Profile, Community Bank Performance, Fourth Quarter (2016), *available at* https://www.fdic.gov/bank/analytical/qbp/2016dec/qbpcb.html.

[71] CRL Analysis of HMDA Data 2012-2015. Loan analysis limited to: home purchase, owner-occupied, 1-4 family units, 1st lien loans, *available at* http://www.responsiblelending.org/media/new-hmda-data-shows-mortgage-market-continues-exclude-consumers-color-and-low-wealth-families. See also CRL 2016 HMDA analysis, *supra* note 2.

percent decline. Credit unions alone originated $41.7 billion in first-lien mortgage loans in the third quarter of 2016, an increase of 22 percent over the same period in the previous year.[72]

Small lenders also saw their market share in mortgage lending increase over this time period. The market share of the smallest lenders with assets under $1 billion increased from 54 percent in 2012 to 58 percent in 2015. In contrast, the market share of the largest lenders with assets over $10 billion, decreased from 31 percent in 2012 to 22 percent in 2015.[73]

2.4 The rule should not be re-opened at this time, and any future changes should limit exemptions while ensuring that protections are maintained for riskier products.

The CFPB should not re-open the rule at this time, but instead should monitor implementation and further collect data on its impact, including on the increasingly expanding market of non-QM lending. If the CFPB does re-open the rule, however, the Qualified Mortgage rule should maintain its limited approach to institutional exemptions but carve out riskier products, such as high-cost mortgages and land installment contracts. Moreover, the CFPB should actively study how to incorporate predictive residual income measures into the ability to repay analysis.

- *Riskier products should be carved out of the Qualified Mortgage presumption.* Under Dodd-Frank, the Qualified Mortgage receives a presumption of affordability exactly because it is considered to be a safer product. However, some products are inherently unsafe and should not be granted such a presumption. High-cost mortgages have warranted additional protections for over two decades. Congress confirmed the need for such protections when it affirmed these protections and lowered the thresholds in Dodd-Frank. High-cost mortgages should be excluded from the Qualified Mortgage presumption. Moreover, land installment contracts, which constitute credit under TILA, are inherently abusive, denying homeowners the opportunity to fairly build equity while requiring them to bear all the risk. Land installment contracts do not warrant the Qualified Mortgage presumption.

- *Institutional exemptions must remain narrow.* As noted above, the statute and the CFPB's existing rules already provide a number of accommodations for smaller institutions, allowing them to originate Qualified Mortgage loans on a more flexible basis. Moreover, Congress has passed Public Law No. 115-174, which includes an expansion of the small creditor portfolio exemption. This and any future exemptions should be narrowly drawn to ensure that market incentives promote origination of affordable mortgages even as the market returns to a period of expansion and innovation.

Residual income measures should be incorporated into the ability to repay analysis alongside debt-to-income ratios. While Dodd-Frank itself identifies residual income along with debt-to-income ratio as a measure for affordability, the regulation does not yet incorporate this crucial concept. Increasingly, researchers are examining a means to update this measure, to ensure it can be predictive of affordability in the contemporary market. While a debt-to-income ratio standard

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[72] CUNA Mutual Group, Credit Union Trends Report (2016), *available at* https://www.cunamutual.com/resource-library/publications/credit-union-trends-report.

[73] CRL Analysis *supra* note 76.

offers some level of surety, it is weak in identifying affordability problems in lower-income borrowers who simply have limited cash on hand. We urge the CFPB's researchers to work with outside analysts to develop a residual income measure that can be incorporated into the rule.

3. Truth in Lending and Real Estate Integrated Disclosures

3.1 History behind Congressional directive to the CFPB to combine disclosures under these two statutes

In 2010, Congress directed the Consumer Financial Protection Bureau (CFPB) to create "a single, integrated disclosure" form combining the existing HUD-1 settlement statement and TILA disclosure form.[74] But the overlap between RESPA's required settlement cost disclosures and TILA's cost of credit disclosures was recognized as confusing long before then.[75] Earlier efforts to combine the forms formally started in 1996 when Congress directed HUD and the FRB to simplify and improve these disclosures and combine them into a single format.[76] The agencies submitted a report to Congress in which they recommended that Congress amend these statutes in specific ways.[77] Congress took no action to implement the suggested changes. In 2009, the FRB took matters into its own hands and proposed significant changes to the TILA disclosures and stated that it would work with HUD "towards" integrating the two disclosure regimes.[78]

Before the FRB could finalize this proposal, Congress passed the Dodd-Frank Act in 2010. In that Act, Congress amended both TILA and RESPA[79] and directed the CFPB to create "a single, integrated disclosure" form combining the existing HUD-1 settlement statement and TILA disclosure form.[80] Congress did not mandate the nature or form of the changes other than to state that: "Such forms shall conspicuously and clearly itemize all charges imposed on the borrower and all charges imposed on the seller in the connection with the settlement and shall indicate whether any title insurance premiums included in the borrower's such charges covers or insures the lender's interest in the property, the borrower's interest, or both."[81]

In 2011, the CFPB embarked on an extensive project to fulfill this Congressional mandate. The process included consumer testing in the form of a qualitative study[82] that led to the publication

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[74] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1098, 124 Stat. 1376 (July 21, 2010), *codified at* 15 U.S.C. § 1604(b).

[75] 78 Fed. Reg. 79,730, 79, 79,738 (Dec. 31, 2013) (describing this history).

[76] Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. No. 104-208 (1996).

[77] Bd. Of Governors of the Fed. Reserve Sys. & U.S. Dep't of Hous. and Urban Dev., *Joint Report to the Congress Concerning Reform to the Truth in Lending Act and the Real Estate Settlement* (1998). *See* 78 Fed. Reg. at 79,739 (summarizing this Report).

[78] 78 Fed. Reg. at 79,739.

[79] 15 U.S.C. § 1604(a); 12 U.S.C. § 2603.

[80] 15 U.S.C. § 1604(a).

[81] 12 U.S.C. § 2603(a).

82 Kleimann Commc'n Grp., Know Before You Owe: Evolution of the Integrated TILA-RESPA Disclosures (2012), available at www.consumerfinance.gov. *See* NCLC Comments on 77 Fed. Reg. 51,116 (Aug. 23, 2012) (critiquing Kleimann study), available at of proposed forms followed by a quantitative study to validate the effectiveness of its proposal.[83] In addition, the agency utilized a web-based initiative known as "Know Before You Owe" to directly solicit input on the forms from the general public.[84]

Two years later, on December 31, 2013, the CFPB finalized the forms and the accompanying regulations.[85] According to the CFPB, the primary purpose of the integrated early disclosures "is to inform consumers of the cost of credit when they have bargaining power to negotiate for better terms and time to compare to other financing options.".[86] The new regime commenced on October 3, 2015, for applications received on or after that date.[87]

3.2 The CFPB should not re-open the Integrated Disclosure rules

As discussed in more detail in the Comments filed by NCLC and other consumer groups to the Request for Information Regarding the Bureau Rulemaking Processes (Docket No. CFPB-2018-0009), the CFPB put an extensive amount of time and effort developing the proposed TILA-RESPA Integrated Disclosure rules (hereinafter "Integrated Disclosure" or "TRID" rules), including conducting consumer testing and focus groups to get direct feedback from consumers on whether the disclosure was accessible and useful. The CFPB also solicited input from the public, including consumer advocates and industry participants. The agency did not favor consumer concerns more than those of industry members, but properly focused on the question of whether consumers could understand disclosures intended to convey key information.

Use of the Integrated Disclosures is no more burdensome than the prior disclosure regime. Most of the information required was previously required on the old disclosure forms. And the mortgage industry has by now adapted to the new forms. Similarly, HousingWire stated in April 2016, "it appears that, despite the initial hiccups and headaches, lenders now have this whole TRID thing figured out, as the time to close a loan fell to a 12-month low in March."[88]

MBA's mortgage credit availability index is at its highest level since June 2011, when it began tracking data.[89] The Urban Institute similarly finds that mortgage credit is more available today than it was before the integrated disclosures became mandatory.[90] "Mortgage credit availability in the GSE channel—Fannie Mae and Freddie Mac—has been at the highest level since its low

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https://www.nclc.org/images/pdf/foreclosure_mortgage/predatory_mortgage_lending/comments-to-cfpb-tila-respa-integration.pdf.

[83] Kleinman Commc'n Grp., Know Before You Owe: Quantitative Study of the Current and Integrated TILA-RESPA Disclosures (Nov. 20, 2013), available at www.consumerfinance.gov; 77 Fed. Reg. 51116 (Aug 23, 2012).

[84] *See generally* CFPB Know Before You Owe website, available at https://www.consumerfinance.gov/know-before-you-owe/.

[85] 78 Fed. Reg. 80,225 (Dec. 31, 2013).

[86] *Id.*

[87] *Id.*

[88] https://www.housingwire.com/articles/36851-is-trid-hysteria-over-time-to-close-drops-to-12-month-low.

[89] Index hit 180.6 in May 2018 https://www.mba.org/news-research-and-resources/research-and-economics/single-family-research/mortgage-credit-availability-index; historical chart: https://www.housingwire.com/articles/40919-mba-mortgage-credit-loosens-as-conventional-programs-become-more-available

[90] https://www.urban.org/policy-centers/housing-finance-policy-center/projects/housing-credit-availability-index

in 2011."[91] Closing costs have declined since 2013,[92] and a survey by the American Land Title Association shows that "a significantly larger portion of homebuyers are actually reviewing their mortgage documents prior to closing than they were before TRID's implementation . . . ."[93]

While there were difficulties during the transition period, defects related to the new disclosures have declined dramatically. In the first quarter of 2016, one financial compliance company reported that "legal/regulatory/compliance" defects had jumped from 25.9% of critical defects before the integrated disclosure rule to 50% of all critical defects.[94] But the most recent data shows that number as having dropped to 9.96%[95]-- even lower than before the integrated disclosures were required.

Small creditors are already exempt from the integrated disclosure rules. Anyone who made five or fewer non-HOEPA[96] mortgages in the previous year is not required to provide the integrated disclosures or any other TILA disclosures.[97] Many transactions secured by manufactured homes are also not subject to the integrated disclosure requirements because they are legally considered personal property.[98] The CFPB has also granted a partial exemption for certain mortgage loans provided through housing assistance loan programs for low- and moderate-income households from the TILA/RESPA integrated disclosure requirements.[99] There is no further need to create exemptions from the integrated disclosure requirements.

Congress's recent enactment of the Economic Growth, Regulatory Relief, and Consumer Protection Act on May 24, 2018, is yet another reason why the agency should not reopen the Integrated Disclosure rule.[100] In that Act, Congress amended TILA in several ways but did not amend the statute regarding the TILA/RESPA integrated disclosure.[101] Congress, did, however, express the "sense of Congress" and stated that the CFPB should:

> endeavor to provide clearer, authoritative guidance on—

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[91] Id.

[92] Bankrate.com National Survey of Closing Costs 2013-2017.

[93] Ben Lane, HousingWire, TRID works: More homebuyers actually review mortgage documents (May 16, 2016), available at https://www.housingwire.com/articles/37040-trid-works-more-homebuyers-actually-review-mortgage-documents.

[94] ARMCO Releases Inaugural Mortgage QC Industry Trends Report, ARMCO press release (Sept. 6, 2016), available at http://www.armco.us/about-us/news/press-release/ARMCO-Releases-Inaugural-Mortgage-QC-Industry-Trends-Report. The company attributed this increase to the new disclosure requirements, but the legal/regulatory/compliance defect category includes far more than just the disclosures.

[95] ARMCO Q3 2017 ARMCO Mortgage QC Industry Trends, available at https://www.armco.us/knowledge/mortgage-qc-industry-report-2017-q3.

[96] High-cost loans subject to the Home Ownership Equity Protection Act.

[97] *See* National Consumer Law Center, Truth in Lending § 2.3.3 (9th ed. 2015), *updated at* www.nclc.org/library

[98] National Consumer Law Center, Truth in Lending § 5.11.2.1a (9th ed. 2015), *updated at* www.nclc.org/library (integrated disclosures do not apply to "[c]onsumer credit that is secured by personal property that is a dwelling but that is not also secured by real property.").

[99] Reg. Z § 1026.3(h); Official Interpretations § 1026.3(h).

[100] Pub. L. No. 115-174 (2018).

[101] Pub. L. No. 115-174, §§ 101-103, 107, 108, 109, 307.

> (1) the applicability of the Integrated Disclosure Rule to mortgage assumption transactions;
>
> (2) the applicability of the Integrated Disclosure Rule to construction-to-permanent home loans, and the conditions under which those loans can be properly originated; and
>
> (3) the extent to which lenders can rely on model disclosures published by the Bureau of Consumer Financial Protection without liability if recent changes to regulations are not reflected in the sample Integrated Disclosure Rule forms published by the Bureau of Consumer Financial Protection.[102]

Congress took this opportunity to revisit TILA and directed the CFPB to "endeavor" to provide clearer guidance on three specific topics related to the Integrated Disclosure rules. The CFPB should not stray beyond this "sense of Congress" and engage in further rulemaking to amend the Integrated Disclosure rules. Congress could have chosen to amend the statute itself or instruct the CFPB to issue regulations if it had so desired.

If, however, the CFPB decides to re-open the existing Integrated Disclosure rules, we strongly urge the agency to make four changes: 1) move the APR to the first page of both the loan estimate and closing disclosure and make the interest rate less conspicuous; 2) eliminate exceptions to the finance charge definition; 3) eliminate the use of "informational" loan estimates; and 4) prohibit creditors from providing a closing disclosure earlier than four days before the original closing.[103]

4. Loan Originator Compensation Rule

4.1. The Loan Originator Compensation Rule has played a key role in protecting consumers and the mortgage market.

The limits on loan originator compensation contained in the Dodd-Frank Act and in the CFPB's rule are important consumer protections that fundamentally improved the mortgage market and reduced the incentives that mortgage originators had to benefit themselves financially by placing borrowers in more expensive loans.

According to the CFPB, prior to the mortgage crisis, training and qualification standards for loan originators varied widely.[104] Borrowers often paid brokers an upfront fee and were under the impression that the broker would obtain the best possible loan for the borrower. Yet, the borrower was unaware that the lender was paying a commission – or a yield spread premium – to the originator. The premium increased with the interest rate or other loan terms. These deceptive practices grossly inflated the cost of a mortgage, even when borrowers qualified for a better deal.

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[102] Pub. L. No. 115-174, § 109(b)

[103] These concerns are described in more detail in the Comments filed by NCLC and other consumer groups to the Request for Information Regarding the Bureau Rulemaking Processes (Docket No. CFPB-2018-0009).

[104] Final Rule, Loan Originator Compensation Requirements under the Truth in Lending Act, 78 Fed. Reg. 11279, 11280 (Feb. 15, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-02-15/pdf/2013-01503.pdf.

Yield spread premiums caused families to be steered into loans that cost more than was appropriate and that they could not afford over the long run. Leading up to the crisis, yield spread premiums were a major culprit in the number of borrowers of color that were steered into high-priced subprime mortgages.[105] Not only did these borrowers end up paying more, the high-cost terms of the mortgages often ultimately resulted in loss of the home to foreclosure. When a borrower loses a home to foreclosure, society pays the price in the drop in surrounding property values and lost tax revenue.[106]

The CFPB's rule regulates how compensation is paid to a loan originator in most closed-end mortgage transactions. Most importantly, it does not permit a loan originator to be compensated based on the terms of a mortgage loan or a proxy for the terms of the loan (other than compensation based on a fixed percentage of the loan amount). The rule also imposes qualification standards on loan originators. Loan originators must be licensed and registered if required under the SAFE Act or other state or federal law. Furthermore, loan originators who are not required to be licensed must be trained on the state and federal legal requirements that apply to their loan origination activities.

The rule also implements other key provisions of the Dodd-Frank Act, including prohibiting mandatory arbitration clauses in contracts, prohibiting contracts from being interpreted to waive federal statutory causes of action, and prohibiting financing of lump-sum credit insurance premiums or fees.

4.2. The CFPB should not erode the rule.

The Dodd-Frank Act and the CFPB's final rule have made the mortgage marketplace safer and more transparent. The rule has helped eliminate predatory compensation practices and should remain fully intact. Indeed, if the rule had been in place prior to the housing crisis, borrowers in the subprime market would have received fairer and more affordable, sustainable loans. Any attempt to erode the rule would have costly and disastrous consequences for consumers and the overall market.

Furthermore, in implementing the rule, the CFPB carefully balanced industry and consumer concerns. For instance, although the final rule generally prohibits loan originator compensation from being reduced to offset the cost of a change in transaction terms (i.e., a pricing concession), the final rule permits loan originators to reduce their compensation to defray certain unexpected increases in estimated settlement costs. This exception was adopted over the objections of many consumer advocates. Additionally, the final rule generally prohibits loan originator compensation based upon the profitability of a transaction or a pool of transactions. However, over objections

[105] *See* Debbie Gruenstein Bocian, Keith S. Ernst, and Wei Li, *Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages*, Center for Responsible Lending (May 31, 2006), *available at* https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/rr011-Unfair_Lending-0506.pdf.

[106] *See* 2013 Update: The Spillover Effects of Foreclosures, Center for Responsible Lending (Aug. 19, 2014), *available at* https://www.responsiblelending.org/mortgage-lending/research-analysis/2013-crl-research-update-foreclosure-spillover-effects-final-aug-19-docx.pdf; Daniel Hartley, The Impact of Foreclosures on the Housing Market, Federal Reserve Bank of Cleveland (Oct. 27, 2010), *available at* https://www.clevelandfed.org/newsroom-and-events/publications/economic-commentary/economic-commentary-archives/2010-economic-commentaries/ec-201015-the-impact-of-foreclosures-on-the-housing-market.aspx.

from many consumer advocates, the final rule clarified the application of this prohibition to various kinds of retirement and profit-sharing plans. For example, mortgage-related business profits can be used to make contributions to certain tax-advantaged retirement plans, such as a 401(k) plan, and to make bonuses and contributions to other plans that do not exceed ten percent of the individual loan originator's total compensation.

Section 107 of Public Law No. 115-174 establishes an exemption for most manufactured home dealers from the definition of a "mortgage originator," meaning dealers do not have to comply with the loan originator compensation provisions. Although the new law also requires that dealers disclose their affiliation with a lender and not directly negotiate loan terms, this provision significantly weakens consumer protections due to the interrelationship between manufactured home dealers and financers. We urge the CFPB not to weaken these protections any further.

5. Higher-Priced Escrow Rule

5.1. The escrow rule has played a key role in protecting consumers in higher-priced loans.

Escrow accounts protect consumers by ensuring that they have funds for recurring homeownership-related expenses, such as property taxes and insurance premiums. This is especially critical with high-cost and higher-risk loans. Prior to passage of the Dodd-Frank Act, creditors were required to set up and administer escrow accounts for higher-priced mortgage loans for a minimum of one year. The Dodd-Frank Act expanded the applicable time period from one year to five years, and the CFPB's escrow rule implements this requirement. Additionally, the rule clarified that one does not have to escrow insurance payments for homeowners in common interest communities where the governing body is required to purchase master insurance policies.

5.2. The CFPB should not erode the rule.

Both the Dodd-Frank Act and the CFPB's escrow rule took industry concerns into account and exempted certain types of transactions from the escrow requirement. The rule creates an exemption from the escrow requirement for small creditors that operate in rural or underserved areas.[107] The rural-or-underserved test extends eligibility to small creditors that originated at least one covered loan secured by a first lien on a property located in a rural or underserved area in the preceding calendar year.

Section 108 of Public Law No. 115-174 creates new exemptions from the escrow requirement for higher-priced mortgage loans. The new Act requires the CFPB to exempt by regulation from this requirement any insured depository institution or credit union with assets of $10 billion or less, that has extended fewer than 1,000 first mortgages on a principal residence, and that meets three additional requirements, including having made at least one mortgage loan in a rural area.

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[107] Final Rule, Escrow Requirements Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 4725 (Jan. 22, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-01-22/pdf/2013-00734.pdf. TILA Higher-Priced Mortgage Loans (HPML) Escrow Rule, Small Entity Compliance Guide (March 2016), *available at* https://files.consumerfinance.gov/f/201603_cfpb_tila-hpml-escrow_compliance-guide.pdf.

Unexpected costs and mortgage defaults happen all too often where escrow protections are weakened. Weakening escrow protections is risky for both prospective homebuyers and the general taxpayer. It is also a direct threat to sustainable homeownership. We urge the CFPB to draw the exemption required by the new Act as narrowly as possible to protect homebuyers and taxpayers.

6. Higher-Priced Loan Appraisal Rule

6.1. The appraisal rule has played a key role in protecting consumers and lenders from the perils of inflated mortgage loans.

An accurate appraisal helps to ensure that mortgage loans are properly and accurately collateralized. This protects both lenders, through adequate collateral for their loans, and borrowers, by preventing them from borrowing more than their homes are worth. The lack of adequate regulation in the appraisal market was a significant factor causing the housing market crash.[108] In fact, between 2000-2007, a coalition of appraisal organizations produced a petition, signed by 11,000 appraisers that stated lenders were pressuring them to artificially inflate home prices, and would only give business to appraisers that complied.[109]

As required by the Dodd-Frank Act, the CFPB and five other federal regulatory agencies adopted the Higher-Priced Mortgage Loans (HPML) Appraisal Rule in 2013.[110] Mortgage loans are HPML if they are secured by a borrower's principal dwelling and have interest rates above certain thresholds. Lenders that originate covered loans must abide by important rules, including using a licensed or certified appraiser who certifies that the appraisal complies with the Uniform Standards of Professional Appraisal Practice and the Financial Institutions Reform, Recovery and Enforcement Act; having the appraiser physically visit the property and view the interior and produce a written appraisal report; obtaining an additional appraisal at the originator's own expense if the property's seller acquired the dwelling within the past 180 days and is reselling it for a price that exceeds certain thresholds; providing a disclosure within three business days of application that explains the consumer's appraisal rights; and giving consumers free copies of the appraisal reports at least three days before the transaction consummates.

The agencies exempted from the rule's requirements reverse mortgages, bridge loans for 12 months or less, loans for initial construction of a dwelling (not limited to loans of 12 months or less), and qualified mortgage (QM) loans meeting the CFPB's definition in 12 C.F.R. 1026.43(e).[111]

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[108] Financial Crisis Inquiry Report, Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States. Submitted by The Financial Crisis Inquiry Commission Pursuant to Public Law 111-21, January 2011, 17-19.

[109] *Id.* at 18.

[110] *See* Final Rule, Appraisals for Higher-Priced Mortgage Loans, 78 Fed. Reg. 10367 (Feb. 13, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-02-13/pdf/2013-01809.pdf; TILA Higher-Priced Mortgage Loans (HPML) Appraisal Rule, Small Entity Compliance Guide, *available at* https://files.consumerfinance.gov/f/201401_cfpb_tila-hpml_appraisal-rule-guide.pdf.

[111] Lenders must assess the borrower's ability to repay for nearly all closed-end residential mortgage loans. One way a lender can follow the ability-to-repay rule is by making a qualified mortgage. All QM loans must have points and fees less than or equal to 3% of the loan amount, no risky features, and a maximum loan term less than or equal to 30 years.

6.2. The CFPB should not erode the rule.

In 2014, the agencies adopted additional exemptions to the rule.[112] These apply to extensions of credit of $25,000 or less, indexed every year for inflation; certain types of refinancing products commonly referred to as streamlined refinances; and certain covered HPMLs secured by manufactured housing. In addition, the agencies broadened the exemption from the appraisal rule for qualified mortgages beyond the CFPB's QM definition to include any transaction that falls under the statutory QM criteria.[113] These expanded exemptions provide evidence that the regulators already have endeavored to accommodate industry demands.

Section 103 of Public Law No. 115-174 amends Title XI of the Financial Institutions, Reform, Recovery and Enforcement Act (FIRREA) and exempts certain mortgages from the requirement that there be an appraisal of the real estate collateral. The new exemption applies to mortgages in a rural area where no appraiser is reasonably available, and where certain other conditions are met. The exclusion does not apply to high-cost loans, and there are limits on the sale of mortgages covered by the exclusion. We urge the CFPB to bear in mind the predatory appraisal practices leading up to the financial crisis, and not take any actions to weaken the appraisal rule beyond the exemptions explicitly required by the Public Law.

7. Home Ownership and Equity Protection Act

7.1. Significance of HOEPA and its expansion by Congress in the Dodd-Frank Act.

The Home Ownership and Equity Protection Act (HOEPA) was enacted in 1994 as an amendment to TILA to address abusive practices in refinancing and home equity mortgage loans with high interest rates or high fees. Loans that meet the Act's high-cost coverage tests are governed by special disclosure requirements and restrictions on loan terms. In addition, specific acts or practices are restricted or banned.[114] Congress also invested the Federal Reserve Board with the specific authority to issue regulations banning additional acts or practices that it finds to be unfair, deceptive, designed to evade the Act's protections, or are abusive lending practices arising in the refinancing context.[115]

[112] *See* Supplemental Final Rule, Appraisals for Higher-Priced Mortgage Loans, 78 Fed. Reg. 78519 (Dec. 26, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-12-26/pdf/2013-30108.pdf (effective date of Jan. 18, 2014).

[113] For example, this exemption includes transactions that are covered by the CFPB's Ability-to-Repay Rule and are QMs defined under any final rule that the CFPB, HUD, or other federal agencies may adopt under authority at 15 U.S.C. 1639c. In addition, transactions that are not covered by the CFPB's Ability-to-Repay Rule may still be eligible for the exemption if they are insured, guaranteed, or administered by HUD, VA, or USDA and meet the QM criteria under rules issued by the corresponding agency. *See* TILA Higher-Priced Mortgage Loans (HPML) Appraisal Rule, Small Entity Compliance Guide, at 7, *available at* https://files.consumerfinance.gov/f/201401_cfpb_tila-hpml_appraisal-rule-guide.pdf.

[114] 15 U.S.C. § 1639.

[115] 15 U.S.C. § 1639(p) (formerly § 1639(l)).

Starting as early as 2003, "Federal Reserve staff began to 'observe deterioration of credit standards' in the origination of non-traditional mortgages. Yet, the Federal Reserve Board failed to meet its responsibilities under HOEPA, despite persistent calls for action."[116] Signs of a looming foreclosure catastrophe in the subprime mortgage market began to emerge in the beginning of 2007. Well-documented causes include the collapse of the housing bubble fueled by low interest rates, easy credit, negligible regulation, and toxic mortgages.[117] Based on these reports and testimony from extensive hearings, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) in part to address "the spectacular failure of the prudential regulators to protect average American homeowners from risky, unaffordable, 'exploding' adjustable rate mortgages, interest only mortgages, and negative amortization mortgages."[118] This Act expanded the coverage of HOEPA to regulate more loans and restricted or banned additional acts or practices, such as balloon payments, modification and deferral fees, prepayment penalties, late fees, acceleration clauses, and the financing of points and fees.[119]

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[116] S. Rep. No. 111-176, at 15 (2010) (Report regarding The Restoring American Financial Stability Act of 2010) (quoting from Banking Committee document, ''Mortgage Market Turmoil: A Chronology of Regulatory Neglect" prepared by the staff of the Banking Committee, March 22, 2007.).

[117] Fin. Crisis Inquiry Comm'n, The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States, xvi (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf. More specifically, the Commission found: widespread failures in financial regulation and supervision by key federal agencies; failures of corporate governance and heightened risk-taking; excessively leveraged financial institutions and high consumer debt-loads; deterioration of mortgage-lending standards; loosening of due diligence standards applied in the securitization process; the re-packaging and sale of questionable mortgage-backed securities into collateralized debt obligations and the sale of credit default swaps to hedge against the collapse of the securities; failures of the credit rating agencies; and an unprepared government that responded inconsistently to the crisis. *Id.* at xviii-xxvii (summary). See also *FDIC Oversight: **Examining and Evaluating the Role of the Regulator during the Financial Crisis and Today: Hearing before the Subcommittee on Financial Institutions and Consumer Credit** of the House Fin. Servs. Comm.* May 26, 2011, 5-12 (testimony of Sheila C. Bair) (identifying the roots of the financial crisis—excessive reliance on debt and financial leverage, misaligned incentives in financial markets, failures and gaps in financial regulation, and erosion of market discipline due to "too big to fail"), *available at* http://financialservices.house.gov/UploadedFiles/052611bair.pdf (last visited June 14, 2018).

[118] S. Rep. No. 111-176, at 15 (2010) (Report regarding The Restoring American Financial Stability Act of 2010).

[119] 15 U.S.C. § 1602(bb)(1) (general definition of "high-cost" mortgage, accounting for introductory rate, and treatment of mortgage insurance), 2(B) (limits on agency changes to APR trigger) (4)(B) (compensation to mortgage originator counted as point and fee), 4(D)-(F) (insurance premiums, debt cancellation/suspension fees, and prepayment fees and penalties as points and fees), (5) (calculation of points and fees for open-end consumer credit plans); 15 U.S.C. § 1639 (addressing content and timing of disclosures; prepayment penalties; limitations after default; balloon payments; negative amortization; prepaid payments; ability to repay; payments under home improvement contracts; recommended default; late fees; acceleration of debt; financing points and fees; consequence of failure to comply; discretionary authority of the Bureau; evasions and structuring of transactions; modification and deferral fees; payoff statements; pre-loan counseling; and corrections of unintentional violations.

15 U.S.C. § 1602(dd) (treatment of discount points as points and fees).

15 U.S.C. § 1639(c) (changes to prepayment penalties prohibition), (e) (changes to balloon payment prohibition), (j) (prohibition against recommending or encouraging default), (k) (protections related to late fees), (l) (limitation on scope of acceleration clauses), (m) (restriction on financing of points and fees), (r) (prohibitions on evasions, restructuring of transactions, and reciprocal arrangements), (s) (ban on modification and deferral fees), (t) (provision of payoff statements), (u) (disclosures related to and provision of pre-loan counseling), (v) (creditor or assignee corrections and unintentional errors).

The major HOEPA rulemaking initiated by the CFPB addressed these Congressional amendments. The agency proposed to implement these amendments on August 15, 2012, and finalized the changes on January 31, 2013,[120] pursuant to its authority under TILA and the Dodd-Frank Act.[121]

For the most part, the CFPB faithfully followed the statutory language in the Dodd-Frank Act. The agency, however, used its exemption authority[122] to create two exemptions from HOEPA for initial construction loans and for loans originated by a Housing Finance Agency or by the U.S. Department of Agriculture's Rural Development Section 502 Direct Loan program.[123] In addition, the CFPB clarified inconsistencies in the statute and the existing regulations where supported by industry comments.[124]

The importance of HOEPA cannot be overstated. Due to the heightened regulation of loan terms and creditor practices in the high-cost market, the number of high-cost loans has declined. Creditors prefer to originate loans under the triggers to avoid the reputational stigma and liability risks associated with making these loans.[125] The data suggest that higher-risk borrowers who might otherwise have been given HOEPA loans are now receiving mortgage credit that is subject to the separate protections for "higher-priced" loans at a lower cost.[126]

Consumers are protected because they are not subjected to the practices that led to the original enactment of HOEPA--protections that were significantly expanded by the Dodd-Frank Act. Beyond the new prohibitions and expanded coverage, the Dodd-Frank counseling requirement should result in more consumers avoiding high-cost loans when offered by the small number of creditors that currently offer those products.[127]

7.2. Subsequent HOEPA regulatory changes.

The CFPB initiated three rulemaking processes to address a handful of substantive issues following the publication of the final rule implementing Dodd-Frank amendments on January 31, 2013. All of the resulting changes to the regulations and commentary were supported by the lending industry.

First, the CFPB issued a final rule on October 1, 2013, in response to industry requests for guidance regarding the treatment of third party paid charges and creditor-paid charges for

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[120] 77 Fed. Reg. (Aug. 15, 2012) (proposed); 78 Fed. Reg. 6856 (Jan. 31, 2013) (final).

[121] 12 U.S.C. §5481(12), (14); 15 U.S.C. § 1604(a).

[122] This authority is found in 15 U.S.C. § 1639(p).

[123] Reg. Z § 1026.32(a)(2).

[124] Examples include: when amounts must be payable to be included in the definition of points and fees, 78 Fed. Reg. at 6891-92; the operation of the 30- and 60-day periods listed in section 1639(v) in which consumers may select a remedy, 78 Fed. Reg. at 6869-70; or, calculating the total loan amount for purposes of the points and fees trigger by starting with the amount financed, rather than the principal amount of the loan as proposed and then deducting the financed points and fees, 78 Fed. Reg. at 6914-15.

[125] 78 Fed. Reg. at 6858, 6942, 6945.

[126] See also discussion below.

[127] 78 Fed. Reg. at 6943-44 (discussing the size of the HOEPA market).

purposes of the points and fees calculation.[128] Also, the agency extended the exception that allows all small creditors, regardless of whether they operate predominantly in "rural" or "underserved" areas, to continue originating balloon high-cost mortgages if the loans meet the requirements for qualified mortgages. This change was supported by trade associations, credit unions, and other industry advocates.[129]

Next, the CFPB announced an interim final rule on October 23, 2013 that fixed a gap in the January 31 regulations regarding when pre-origination counseling must occur for a certain subcategory of mortgage loans, primarily those secured by manufactured homes.[130] The CFPB's Federal Register notice did not mention whether this change originated from concerns raised by the manufactured housing industry, but it was clearly a response to a problem that would hamper lenders making these loans. The rule was issued as an interim final rule prior to the receipt of comments from the public, along with a request for comments.[131]

Finally, another interim final rule implemented a change Congress made in December 2015 that allowed the CFPB to expand the scope of the small rural lender exemptions from various provisions in Regulation Z.[132] Published on March 25, 2016, this change was clearly driven by industry criticism the CFPB received over time that also likely led to the Congressional amendment.[133]

7.3. Future revisions to the HOEPA regulations are unnecessary.

7.3.1. In 2018, Congress amended HOEPA and TILA where it considered necessary; the CFPB should refrain from changing what Congress chose to leave unchanged.

Congress enacted and the President signed the Economic Growth, Regulatory Relief and Consumer Protection Act on May 24, 2018.[134] In this Act, Congress took the opportunity to revisit HOEPA and the Dodd-Frank provisions related to TILA. The CFPB may need to implement the specific Congressional amendments, but it should refrain from amending what Congress chose to leave unchanged.

Relevant to HOEPA loans, the Act amends TILA's timing requirement for the special high-cost mortgage disclosure by providing that where the creditor makes a second offer of a mortgage loan that has a lower APR than the first offer, consummation of that second offer can take place immediately after the disclosures, rather than waiting at least three days.[135] Wisely, the Act also

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[128] 78 Fed. Reg. 60,382, 60,408 (Oct. 1, 2013).

[129] 78 Fed. Reg. 60,414.

[130] 78 Fed. Reg. 62,993 (Oct. 23, 2013).

[131] The agency did seek comments to be filed following the publication date of the rule and before its effective date.

[132] 81 Fed. Reg. 16,074 (Mar. 25, 2016).

[133] 80 Fed. Reg. 7770, 7774 (Feb. 11, 2015) (Amendments Relating to Small Creditors and Rural or Underserved Areas Under the Truth in Lending Act (Regulation Z). The Bureau discussed comments from industry prior to this rulemaking and noted that the consumer comments did not support amendments proposed. *Id.* at 7778-81.

[134] Pub. L. No. 115-174 (2018).

[135] Pub. L. No. 115-174, § 109.

excludes HOEPA loans from a new exemption from appraisal requirements for mortgages in a rural area where no appraiser is available, and certain other conditions are met.[136]

Beyond these modifications, Congress enacted only a few changes to the Dodd-Frank Act that are quite limited in scope, underscoring its intent to retain the numerous protections it considered essential to protect consumers and the nation from the consequences of reckless lending practices.[137]

7.3.2. The Dodd-Frank HOEPA amendments have no restricted credit.

The data that is available shows that neither HOEPA itself nor the Dodd-Frank amendments to HOEPA have restricted access to credit by the consumers that HOEPA is intended to protect. Instead, those provisions have resulted in beneficial changes to the mortgage market, replacing the highest-cost loans to which HOEPA applies with above-prime but considerably less expensive loans that the CFPB's regulations categorize as "higher cost."

Well before the mortgage crisis, loans with such high APRs or such high points and fees that they were subject to HOEPA had declined from the peak of 35,980 loans in 2005 (a 53% increase from 2004)[138] to 11,269 in 2007.[139] Since the onset of the foreclosure crisis in 2009, HOEPA loan originations reached their lowest point in 2015 (1,194) but rose to 3,149 following the date in 2014 when the Dodd-Frank Act expanded coverage to include purchase loans. This change does not appear to have restricted credit to consumers.

Attorneys working with homeowners shortly after HOEPA was originally passed noted that loans that formerly had been above the HOEPA thresholds were replaced with loans clearly designed to fall below the triggers. The peak years of this "subprime" market occurred in 2004-2006.[140] When the mortgage meltdown hit, the dollar volume of subprime originations plummeted, as was true for prime mortgages.[141] In 2009, the Federal Reserve Board issued

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136 Pub. L. No. 115-174, § 103(d).

137 Specifically, Congress passed only targeted changes to the broader set of TILA protections. For example, it created a new safe harbor from the general ability-to-repay standards for certain mortgages held in portfolio by banks with less than $10 billion in assets. Pub. L. No. 115-174, § 101. It exempted manufactured housing retailers and their employees from consumer protections applicable to loan originators. § 107. The Act created exemptions from the escrow provisions for higher-priced mortgage loans by requiring the CFPB to exempt any insured depository institutions or credit union with assets of $10 billion or less, that has extended fewer than 1,000 first mortgages on a principle residence, and that meets three additional requirements, including having made at least one mortgage loan in a rural area. § 108. Finally, it exempts mortgages from appraisal requirements made in a rural area where no appraiser is available and certain other conditions are met. § 103.

138 Federal Reserve Board Bulletin, *Higher-Priced Home Lending and the 2005 HMDA Data* A132-133, A 147 (2006) (Table 4) (total reported mortgage loans originated: 15,611,711), *available at* www.federalreserve.gov/publications/bulletin.htm. The 2006 HMDA data included 15,172 HOEPA loans out of 13,969,965. Federal Reserve Board Bulletin, *The 2006 HMDA Data* A132-133, A 147 (Dec. 2007) (Table 4), *available at* www.federalreserve.gov/publications/bulletin.htm. Note that lenders were not required to report HOEPA loans as a separate category until 2004.

139 See Chart 1 at the end of this section.

140 The dollar volume of subprime loans during this period was, in billions: 2004—$401.46; 2005--$507.65; and. 2006--$483.05. Mortgage Finance Publications, The 2008 Mortgage Market Statistical Annual, Vol. I, at 3 (2008).

141 Subprime dollar volume dropped from $23 billion in 2008 to $4 billion in 2009 and remained at that level through 2014. Total origination volume dropped from $3.945 trillion in 2003 (the high) to $1.24 trillion in 2014. Mortgage Finance Publications, The 2015 Mortgage Market Statistical Annual, at 12 (2015).

regulations that layered lighter regulation on "higher-priced" mortgage loans than it did on HOEPA loans.[142] These rules govern much of the former "subprime" market. The number of higher-priced loans were dropping before this effective date, not surprising since the foreclosure crisis began in 2007 and was still virulent by 2010. Nonetheless, the number of higher-priced originations rose from the low of 221,613 in 2010 to 465,204 in 2017.[143] This data suggests that mortgage credit remains available both for prime and non-prime, without the need to resort to the highest-priced loans subject to HOEPA.

Loans to purchase, refinance, or improve manufactured homes require more explanation to understand the HMDA data regarding this segment of the market. The reliance on manufactured housing as primary residences increased significantly from 1991 to 1998.[144] Indeed, manufactured housing shipments as a percentage of all new site-built homes sold peaked in 1995 at 33.8%. The manufactured housing bubble burst following 1995, several years before the broader mortgage market meltdown, and has yet to return to the pre-1995 levels. Since 2007, for example, this percentage has ranged between 11% and 14.4%.[145] The causes of both the meltdown in the manufactured housing market and the later meltdown of the entire mortgage market included similar risky lending practices.[146]

By 2000, loan defaults and repossessions increased dramatically and inventory at dealerships stagnated.[147] The flood of repossessed homes that occurred between 1999 and 2002 accounted, at least in part, for the decreased sales and sale prices.[148] Many dealers went out of business. Secondary market players, including Fannie Mae and Freddie Mac, incurred huge losses and have been reluctant to re-enter this market.[149] As of 2014, most manufactured housing loans

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[142] These rules were effective for most provisions on October 9, 2009 The escrow provisions did not take effect until April 1, 2010 for all higher-priced loans other than for manufactured home loan. The escrow rule was effective on October 1, 2010 for manufactured home loans.

[143] See Chart 2 at the end of this section.

[144] Ann. M. Burkhart, *Bringing Manufactured Housing into the Real Estate Financing System*, 37 Pepp. L. Rev. 427, 437 (2010).

[145] *Id.* at 437 (providing data up to 2008); U.S. Census Bureau, U.S. Shipments of New Manufactured Homes 2015-2018, *available*

at www.census.gov/data/tables/time-series/econ/mhs/latest-data.html; U.S. Census Bureau, Single-Family Site-Built Homes Sold By Region, *available at* www.census.gov/construction/nrs/historical_data/index.html (including data from 1963-2017).

[146] Ann. M. Burkhart, *Bringing Manufactured Housing into the Real Estate Financing System*, 37 Pepp. L. Rev. 427, 437-439 (2010) (describing these practices and the resulting decline in capital once sales began to stagnate and lenders saturated the market).

[147] *See also* Consumer Fin. Prot. Bureau, Manufactured-housing consumer finance in the United States 6-7 (Sept. 2014), *available at* files.consumerfinance.gov/f/201409_cfpb_report_manufactured-housing.pdf ("Poor manufactured-home loan quality drove high defaults. For example, in the year 2000 alone, more than 75,000 consumers had their manufactured homes repossessed, about 3.5 times the typical number during the 1990s. Between the beginning of 1999 and the end of 2002, repossessed inventory grew more than fourfold to $1.3 billion.").

[148] Ann. M. Burkhart, *Bringing Manufactured Housing into the Real Estate Financing System*, 37 Pepp. L. Rev. 427, 440 (2010).

[149] *Id.* at 441.

were not sold to the secondary market and were held in portfolio.[150] "Today, more than a decade after this collapse, production and sales remain at depressed levels, and the secondary market is extremely limited."[151]

Without a robust secondary market and in light of the slow recovery of this market, it is not surprising that manufactured home loans dipped from 2007 (214,030) to 2011 (93,091). Since the passage of the Dodd-Frank Act, the market has risen, with some fits and starts to 129,427 in 2017.[152] The higher-priced segment of this market exhibits a similar trend and accounts for a large percentage of the entire manufactured housing finance market.[153] Manufactured home HOEPA loans remain minuscule at 821 in 2017, compared with 71,423 higher-priced loans.[154]

This evidence shows that both the HOEPA and higher-priced mortgage regulations are doing their job. Consumers with credit issues are not plagued by the most expensive mortgage loans containing onerous terms. They can, however, access the less expensive higher-priced market and obtain loans with slightly higher interest rates than conventional loans and can rely on the protections contained in applicable ability-to-repay, escrow, and appraisal rules, as well as those protections governing the broader closed-end mortgage market. These developments are welcome in light of the increase in originations of more expensive mortgage loans.

In addition, since at least 2014, non-bank lenders and riskier mortgage loans have begun to return to the market. For example, non-bank mortgage lenders represented almost half of all mortgage originations in 2016, up from twenty percent in 2007, and made almost half of all loans sold to Fannie Mae and Freddie Mac.[155] Meanwhile, these lenders accounted for seventy-five percent of all FHA and VA insured loans in 2016.[156] These trends are not surprising since FHA, VA, RHS loans and loans sold to Fannie Mae and Freddie Mac can more easily meet the safe harbor protection for qualified mortgages, even if they are higher-priced loans.[157]

Some nonbank mortgage lenders also make loans that do not meet the strict qualified mortgage underwriting standards set forth in the Dodd-Frank Act.[158] Wall Street investors, such as private

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[150] Consumer Fin. Prot. Bureau, Manufactured-housing consumer finance in the United States 37 (Sept. 2014), *available at* files.consumerfinance.gov/f/201409_cfpb_report_manufactured-housing.pdf.

[151] *Id.* at 6-7.

[152] See Chart 3 at the end of this section.

[153] Id.

[154] Compare Chart 1 with Chart 3, below.

[155] You Suk Kim, et al., *Liquidity crisis in the mortgage market* 3 (Brookings Paper on Economic Activity 2018), *available at* www.brookings.edu/project/brookings-papers-on-economic-activity.

[156] *Id.* at 3-4.

[157] 15 U.S.C. § 1639c(b)(3)(B)(ii); Reg. Z § 1026.43(e)(4)(ii)(1), (iii).

[158] Brad Finkelstein, *Carrington to start offering subprime mortgages*, Nat'l Mortgage New (Apr. 3, 2018), www.nationalmortgagenews.com (describing Carrington Mortgage Services' decision to enter the subprime market; its subprime program is aimed at borrowers with credit scores as low as 500; Carrington is a servicer and a large FHA and VA lender); Alexis Leondis & Jody Shenn, *Western Asset Bespoke Mortgages Feeding Non-Agency Demand*, Bloomberg (June 9, 2014), www.bloomberg.com (identifying Caliber Home Loans, Inc. as one such lender). *Cf.* Rachel Witkowski, *Underwriting Standards Loosened to Precrisis Levels, OCC Warns*, Am. Banker, Dec. 9, 2015, *available at* www.americanbanker.com (noting OCC concerns about more lax underwriting standards in the indirect consumer loan (bank loans to finance the purchase of goods) and credit card contexts).

equity firms, hedge funds, and mutual fund companies, are buying subprime, Alt-A, and interest-only loans and placing those loans into private funds that are sold to institutional investors and wealthy clients, thus creating a demand for these products.[159] Several lenders reportedly are now offering higher loan-to-value loans and low-credit score programs to target borrowers who have been unable to purchase a home.[160] Other products, such as equity purchase contracts,[161] also are appearing.

7.4 The CFPB should not re-open the HOEPA rules.

As shown above and in the Comments filed by NCLC and other consumer groups to the Request for Information Regarding the Bureau Rulemaking Processes (Docket No. CFPB-2018-0009), the CFPB faithfully followed the statutory language amending HOEPA in the Dodd-Frank Act during the original rulemaking in 2012-13. As a rule, the CFPB adopted consumer comments only if the industry expressed similar concerns or the industry was silent. In the subsequent rulemakings addressing the HOEPA regulations, the agency implemented clarifications, provided guidance, or filled gaps that industry requested. In the most recent rulemaking, the industry wanted and got an easy-to-meet definition of rural lender for purposes of expanding access to exemptions from certain consumer protections despite consumer objections. Finally, Congress just amended HOEPA in May of this year in a very limited way. No further regulatory action is necessary other than to possibly address these limited changes.

If the CFPB decides to re-open the existing HOEPA rules, we strongly urge the agency to end the disparity between protections for open-end and closed-end mortgagors that have arisen because Congress extended the HOEPA coverage to include home equity lines of credit (HELOC). Congress did not, however, address the question of whether the HELOC APR should include finance charges, as does the closed-end mortgage loan APR trigger. Failing to make the APRs comparable for purposes of the APR trigger would undermine these improvements by increasing a pre-existing and dangerous gap between the rules for open and closed-end mortgages. Creating an apples-to-apples comparison between the cost of HELOCs and closed-end mortgage loans would further the expressed purpose of TILA…" to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."[162] The existing gap encourages lenders to seek the path of least resistance by making HELOCs instead of closed-end loans in order to avoid the more stringent rules for closed-end credit. Thus, while the addition of

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[159] *See, e.g.*, Kirsten Grind, *Crisis-Era Mortgage Attempts a Comeback*, Wall St. J., Feb. 1, 2016 (discussing investor appetite for Alt A low-documentation loans); Arleen Jacobius, *Firms Resurrect Non-Agency RMBS Market*, Pensions & Investments, Sept. 19, 2016, *available at* www.pionline.com; Alexis Leondis & Jody Shenn, *Western Asset Bespoke Mortgages Feeding Non-Agency Demand*, Bloomberg, June 9, 2014, www.bloomberg.com (discussing investor appetite for interest-only loans with higher debt-to-income ratios).

[160] Aly J. Yale, *Borrower FICO Scores Hit 8-year Low*, MReports (May 25, 2017), *available at* www.themreport.com/daily-dose/05-25-2017/borrower-fico-scores-hit-8-year-low-fico-scores-lowest-non-bank-lenders (these lenders include Royal Pacific Funding, Opes Advisors, Sierra Pacific, Sun West, Flagstar Bank, Ditech Financial, and Castle Mortgage).

[161] Kevin Wack, *Startup Offers to Buy Home Equity, Instead of Lending Against It*, American Banker (Sept. 13, 2016) (describing the downside for homeowners).

[162] 15 U.S.C. § 1602(a).

open-end credit to HOEPA's purview was a constructive change, parity in APR treatment should be addressed.

Chart 1: Origination of HOEPA loans 2007-2017 (number of loans) (source: HMDA)[163]

YEAR	ALL HOEPA LOANS (other than manufactured housing loans)	MANUFACTURED HOME HOEPA LOANS	TOTAL
2017	2,328 (1,235) [164]	821 (273)	3,149
2016	1,584 (653)	253 (100)	1,837
2015	991 (616)	203 (104)	1,194
2014	921 (674)	306 (165)	1,227
2013	1,254[165]	557	1,811
2012	1,385	729	2,114
2011	1,546	791	2,337
2010	2,260	1,041	3,301
2009	4,337	1,985	6,322
2008	6,119	2,264	8,383
2007	9,275	1,994	11,269

[163] This chart reflects HMDA data available at the CBFP's website at www.consumerfinance.gov/data-research/hmda/explore. This search tool provides data from 2007 through 2017. The results are derived from applying the following filters for each of the years 2007 to and including 2017: year, all originated mortgages, property type—1 to 4 family but not including manufactured housing (middle column) or only manufactured home loans (right column); owner-occupied as principal dwelling; loan purpose—purchase (2014-2017 only), home improvement, refinancing (2007-2013); loan type—conventional, FHA, VA, FSA/RHS; lien status—first and subordinate; HOEPA—yes.

[164] The number in parentheses reflects the number of non-purchase loans included in the total. Note: HOEPA did not cover purchase loans before 2014.

[165] These numbers represent non-purchase loans as HOEPA did not cover purchase loans before 2014.

Chart 2: Origination of higher-priced mortgage loans 2007-2017 (number of loans) (source: HMDA) [166]

YEAR	ALL HIGHER-PRICED MORTGAGE LOANS (including manufactured home loans)
2017	465,204
2016	424,739
2015	395,488
2014	461,113
2013	350,821
2012	244,421
2011	231,865
2010	221,613
2009	443,610
2008	731,009
2007	1,678,071

[166] This chart reflects HMDA data available at the CFPB's website at www.consumerfinance.gov/data-research/hmda/explore. This search tool provides data from 2007 through 2017. The results are derived from applying the following filters for each of the years 2007 to and including 2017: year, property type—1 to 4 family including manufactured housing; owner-occupied as principal dwelling; loan purpose—purchase, home improvement, refinancing; loan type—conventional, FHA, VA, FSA/RHS; lien status—first and subordinate; HPML—yes.

Chart 3: Origination of higher-priced and all prime[167] manufactured home loans 2007-2017 (number of loans) (source: HMDA) [168]

YEAR	ALL HIGHER-PRICED MANUFACTURED HOME LOANS	ALL MANUFACTURED HOME LOANS
2017	71,423	129,427
2016	64,528	120,002
2015	60,987	111,915
2014	56,161	101,933
2013	50,209	114,516
2012	51,257	104,716
2011	46,353	93,091
2010	51,474	102,347
2009	61,219	128,148
2008	94,948	171,647
2007	105,099	214,030

[167] "Prime" refers to all mortgage loans, excluding higher-priced or high-cost mortgage loans.

[168] This chart reflects HMDA data available at the CFPB's website at www.consumerfinance.gov/data-research/hmda/explore. This search tool provides data from 2007 through 2017. The results are derived from applying the following filters for each of the years 2007 to and including 2017: year, all originated mortgage loans; property type—manufactured housing; owner-occupied as principal dwelling; loan purpose—purchase, home improvement, refinancing; loan type—conventional, FHA, VA, FSA/RHS; lien status—first and subordinate; HPML—yes (middle column); neither HPML or HOEPA checked (right column).

Comments of

Americans for Financial Reform

Center for Responsible Lending

The Consumer Federation of America

National Consumer Law Center (on Behalf of Its Low-Income Clients)

U.S. Public Interest Research Group

March 27, 2018

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2 018-0001; Document Number: 2018-05783--Request for Information Regarding Consumer Financial Protection Bureau Civil Investigative Demands and Associated Processes

Ms. Jackson:

The comments below are submitted in response to the Consumer Financial Protection Bureau's Request for Information ("RFI") Regarding the Bureau Civil Investigative Demands and Associated Processes (Docket No. CFPB-2018-001) on behalf of the undersigned advocacy groups. All of the signatories are joined together by their long history of protecting and defending the rights of consumers through education, advocacy, policy, research, and litigation. Our organizations address a wide variety of consumer issues and have extensive knowledge of the consumer needs addressed by the Consumer Financial Protection Bureau ("CFPB"), the statutes the CFPB enforces, and the work the agency has accomplished.

The undersigned frequently engage with the CFPB and vigorously support both its mission and its independence. Many of our staff have significant experience in public enforcement of consumer protection laws. We appreciate the opportunity to submit these comments for your consideration

The CFPB was created in response to the 2008 financial crisis. Inattention by other regulatory agencies, along with limitations on their authority, contributed significantly to the crisis that destabilized the American economy and caused grave hardship to American families. Reacting to market and regulatory failures that fueled this "Great Recession," Congress in 2010 enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank Act").

As part of this reform, "Congress saw a need for an agency to help restore public confidence in markets: a regulator attentive to individuals and families. So, it established the Consumer Financial Protection Bureau."[1] Congress gave the agency both power to improve financial markets for consumers and autonomy to guarantee the agency "the authority and accountability to ensure that existing consumer protection laws and regulations are comprehensive, fair, and vigorously enforced."[2]

Since its establishment, the CFPB effectively has used its authority and accountability to serve the public interest. The CFPB's supervision and enforcement actions alone resulted in nearly $12 billion in ordered relief for more than 29 million consumers victimized by unlawful activity.[3]

A. Congress intended the CFPB to be an independent agency with broad and flexible CID authority to support its investigatory and public enforcement duties

Congress created the CFPB in 2010 after more than 100 hearings and extensive debate about the causes of the 2008 financial crisis and the ways in which the government could prevent a similar crisis in the future.[4] When it did so, Congress "gave the new agency a focused mandate to improve transparency and competitiveness in the market for consumer financial products."[5]

Congress concluded that with this singular focus on consumers, the CFPB could serve American households more effectively than other regulators. In the past, "[f]ederal bank regulators had given short shrift to consumer protection."[6] "Congress concluded that [the] 'failure by the prudential regulators to give sufficient consideration to consumer protection … helped bring the financial system down.'"[7] "All told, nearly $11 trillion in household wealth … vanished" in the 2008 financial crisis.[8] "In Congress's view, the 2008 crash represented a failure of consumer protection."[9]

Congress responded to these failures by consolidating in the CFPB "authorities to protect household finance that had previously been scattered among separate agencies in order to … ensure accountability."[10] It also gave the CFPB important new authority.

The CFPB is the first federal regulator to supervise credit reporting agencies—companies whose data fuel many of consumers' most important financial transactions.[11] More generally, Congress

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[1] PHH Corp. v. CFPB, -- F.3d --, 2018 WL 627055, *1 (D.C. Cir. Jan. 31, 2018).
[2] H.R. Rep. No. 111-517, at 874 (2010) (Conf. Rep.); *see generally PHH*, 2018 WL 627055, at *3-4.
[3] CFPB, *Factsheet, Consumer Financial Protection Bureau: By the Numbers* (July 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_by-the-numbers.pdf; Zixta Q. Martinez, *Six Years Serving You*, CFPB (July 21, 2017).https://www.consumerfinance.gov/about-us/blog/six-years-serving-you/.
[4] *See* Dodd-Frank Act, § 1011, 124 Stat. at 1964 (12 U.S.C. § 5491); S. Rep. No. 111-176, at 44 (2010).
[5] *PHH*, 2018 WL 627055, at *3; *see also* 12 U.S.C. § 5511(a).
[6] *PHH*, 2018 WL 627055, at *3.
[7] *Id.*. (ellipsis in original) (quoting S. Rep. No. 111-176, at 166).
[8] *Id.* (internal brackets and quotation marks omitted).
[9] *Id.*
[10] *Id.* (internal quotation marks and brackets omitted); 12 U.S.C. § 5581(b).
[11] *See CFPB to Supervise Credit Reporting*, CFPB (July 16, 2012), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-to-superivse-credit-reporting/; *see generally* 12 U.S.C. § 5481(15)(A)(ix).

made the CFPB the first federal regulator to supervise both banks and non-bank financial companies, including mortgage companies, private student lenders, and payday lenders.[12] With this "level playing field" approach, Congress aimed to ensure that consumers would receive the same level of protection and companies the same level of regulation, in either sector of the market.[13]

Congress also paid careful attention to the CFPB's structure. Vital to the new agency's success, Congress concluded, was its independence.[14] Other financial regulators had been "overly responsive to the industry they purported to police."[15] With the Dodd-Frank Act, as Senator Cardin put it, Congress aimed to "create a consumer bureau … that will be on the side of the consumer, that is independent, so the consumer is represented in the financial structure."[16]

Within this context, Congress assigned the CFPB five key functions. In addition to support activities, the CFPB is charged with the responsibility for: (1) "collecting, investigating, and responding to consumer complaints"; (2) supervising financial companies and taking enforcement action to address violations of the law; (3) "issuing rules, orders, and guidance" to implement consumer protection law; (4) "conducting financial education programs," and (5) researching and monitoring the markets for consumer financial products and services.[17]

To fulfill these functions independently and effectively, the CFPB has the authority to issue pre-complaint investigative demands, often referred to as Civil Investigative Demands ("CID" or "CIDs") to gather the critical facts and data needed to inform its judgments. The undersigned consumer organizations strongly believe the CFPB needs to retain broad and flexible CID investigatory discretion in order to meet the ever-evolving range of challenges within its mandate. It is from this perspective that we respond to the specific questions raised in the RFI concerning the CFPB's use of CIDs and in the exercise of its investigatory duties.

B. The CFPB recently received a successful independent review of its CID procedures—further revisions are duplicative and unnecessary.

In 2017, the Board of Governors of the Federal Reserve System and Consumer Financial Protection Bureau Office of the Inspector General conducted an independent audit of the CFPB's CID rules and policies.[18] This evaluation included a review of the CFPB's records management policy,

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[12] *See* 12 U.S.C. §§ 5514-15; S. Rep. 111-176, at 167–169; CFPB, *Semi-Annual Report of the Consumer Financial Protection Bureau* 70 (Spring 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201706_cfpb_Semi-Annual-Report.pdf.

[13] S. Rep. 111-176, at 11, 167-68, 229; *see also* 12 U.S.C. § 5511(b)(4).

[14] *See* S. Rep. No. 111-176, at 10-11, 161, 163; H.R. Rep. No. 111-517, at 874. Congress also provided exacting direction about other aspects of the new agency's organization. The Dodd-Frank Act required specific offices and units and an advisory board, 12 U.S.C. §§ 5493(a)(5), (b)-(g), 5494, 5535, specified personnel rules, *id.* § 5493(a)(1)-(4), and described how employees could be transferred from other agencies, *id.* § 5584.

[15] *PHH*, 2018 WL 627055, at *1.

[16] 156 Cong. Rec. S5871 (daily ed. July 15, 2010).

[17] 12 U.S.C. § 5511(c)(1)-(6).

[18] BD. OF GOVERNORS OF THE FED. RES. SYS. AND CONSUMER FIN. PROTECTION BUREAU OFF. OF INSPECTOR GEN., THE CFPB GENERALLY COMPLIES WITH REQUIREMENTS FOR ISSUING CIVIL INVESTIGATIVE DEMANDS BUT CAN IMPROVE CERTAIN GUIDANCE AND CENTRALIZE RECORDKEEPING,

the file plans for the Office of Enforcement and Office of the Director's records, and every petition to modify or set aside CIDs filed from June 2012 to June 2017.[19] The evaluation also included a sample of CIDs and CID responses.[20] Additionally, the Inspector General conducted over a dozen interviews with CFPB officials as well as contextually appropriate interviews of related officials at the Department of Justice and the Federal Trade Commission.[21]

After this detailed, professional, and thorough review of the CFPB's CID procedures, the Inspector General concluded that the CFPB generally complies with the Dodd-Frank Act and the CFPB's own policies and procedures manual. Moreover, the Inspector General found that "the CFPB often uses modifications and extensions of time to alleviate some of the potential burden associated with CID requests."[22] The Inspector General noted that the CFPB enforcement staff were cooperative and responsive to the evaluation and thanked the CFPB's career, professional staff for their help.[23] The Inspector General did make a handful of constructive suggestions on recordkeeping and providing notice to CID recipients. The CFPB's Enforcement Office immediately responded favorably to these recommendations and began adopting them.[24]

The Inspector General's independent review is strong evidence that further revisions to the CFPB's CID policies and practices are unnecessary. The Inspector General's evaluation shows that the CFPB's CID procedures are working well; are in line with the practices at other federal law enforcement agencies; and, should not be further reformed or altered at this time. Conducting a second review of the CFPB's CID polices within a year is entirely unnecessary and a waste of resources.

Moreover, this RFI should not be used as a pretext for slowing federal investigations or holding off on sending CIDs in light of the fact that the CFPB *already completed an audit of CID practices* just six months ago. Additionally, our organizations are concerned that this Request for Information may be politically motivated and calibrated simply to allow companies found violating federal law and other special interests to air grievances related to the CID process. We are concerned that the decision to issue an RFI on CID processes following the Inspector General's successful audit is a waste of time and encourage CFPB leadership to instead focus on protecting consumers from unfair, deceptive, and abusive financial practices in the marketplace.

C. Specific questions raised in the RFI concerning the CFPB's discretion in the use of its CID and investigatory authority.

1. The Bureau's processes for initiating investigations, including 12 CFR 1080.4's delegation of authority to initiate investigations to the Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement.

EVALUATION REPORT 2017-SR-C-015 (2017), https://oig.federalreserve.gov/reports/cfpb-civil-investigative-demands-sep2017.pdf (hereinafter FED OIG CID EVALUATION REPORT).

19 *Id.* at 17.

20 *Id.*

21 *Id.*

22 *Id.* at 10.

23 *Id.*, executive summary memorandum.

24 *Id.* at 20.

The signatories believe the current process for initiating investigations is appropriate. 12 CFR § 1080.4 delegates to the Assistant Director and Deputy Assistant Directors of the Office of Enforcement the discretion to open investigations. Currently, the Enforcement Office's policies and procedures manual requires that "the Enforcement Director must approve the opening of any new investigation."[25] In addition, existing Enforcement Office policies require that a panel of career professional staff headed by an issue expert from the Enforcement Office's Policy and Strategy Team ("PST") weigh in with a recommendation prior to any investigation opening decision.[26] This process already guarantees that a panel of issue experts act as a check on ill-advised investigation proposals.

We believe the current CFPB rules and procedures provide an appropriate level of management control over professional enforcement staff. In particular, we believe the CFPB should not require more senior CFPB staff approval to begin investigations, as such a step would place investigation approvals at a level of managerial control too far removed from professional enforcement attorneys and investigators. An added level of bureaucratic managerial control would risk chilling professional enforcement staff, possibly discouraging them from opening investigations and recommending certain types of investigations and legal theories.

Moreover, requiring higher level approvals prior to initiating investigations could prevent enforcement staff from responding to new and unexpected harmful practices that emerge with new forms of commerce. A critical lesson of the financial crisis of 2008 was that federal consumer financial law enforcement was too slow to respond and to deferential to banking industry preferences and legal opinions.[27] To protect the public interest, the CFPB's career enforcement staff must have the latitude to investigate suspected illegal activity whenever it occurs.

Requiring senior management approval also risks slowing down the process for commencing investigations and bottlenecking the Bureau's law enforcement work. Consumers have a right to expect that the federal law enforcement staff working on their behalf will move expeditiously to resolve suspicion of illegal activity. Large financial institutions can cause tremendous consumer harm in short periods of time. The necessity of opening enforcement investigations must not be stacked in

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[25] CONSUMER FIN. PROTECTION BUREAU, OFF. OF ENFORCEMENT, POLICIES AND PROCEDURES MANUAL VERSION 3.0 37 (2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-and-procedures-memo_version-3.0.pdf [hereinafter "POLICIES AND PROCEDURES MANUAL VERSION 3.0].

[26] The current CFPB Enforcement Office Policy and Procedures Manual requires:

> The Opening Memo should be shared with the appropriate Issue Team for Issue Team and PST input. The Issue Team and PST should, within a week of receipt of the Opening Memo, provide the case team with feedback about whether they believe the investigation should be opened and how this investigation fits into the Enforcement Strategic Plan and articulated priorities. The Issue Team and PST feedback may be oral and informal, but should also include a short written recommendation to the Enforcement Front Office about whether to proceed with opening the investigation. That written recommendation should be no more than one page long, and should be provided in a document separate from the Opening Memo.

POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26,

[27] *See, e.g.*, U.S. FIN. CRISIS INQUIRY COMM'N, FINANCIAL CRISIS INQUIRY REPORT, 15 (2011), http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf (discussing whistleblowers who were "infuriated at the slow pace of enforcement and at prosecutors' lack of response to a problem that was wreaking economic havoc . . . .").

queue behind competing political duties, public appearances, educational activities, responding to Congressional oversight, and other responsibilities of senior levels of management.

Instead the decision to open enforcement investigations should remain at a managerial level below political staff with career enforcement professionals in order to prevent conflicts of interest, partisanship, and the appearance of impropriety. Political staff simply may be distracted by their public duties and lack the focus needed for making timely and reflective decisions on opening investigations. Furthermore, political staff are more likely to be deterred from opening necessary investigations because these decisions could impede future electoral campaign fundraising, appointment or confirmation to top level political posts, or transition into the lucrative management positions in large financial institutions following public service. The public must have confidence that law enforcement investigations will not be affected by public relations, electoral politics, or campaign finance. Keeping the authority to open investigations at the career enforcement level avoids the appearance of impropriety and promotes public confidence. Moreover, it is in the best interests of senior political management to have investigation opening decisions in the hands of staffers who are relatively immune to potential political repercussions of investigating the largest financial institutions in the world.

If the Bureau makes any changes to its investigation opening procedures, the signatories recommend revising the Enforcement Office Policies and Procedures Manual to allow the Deputy Assistant Directors of the Office of Enforcement to open investigations without requiring approval from the Assistant Director of the Office of Enforcement.[28] Such a change would be consistent with the existing regulations which explicitly provide for this delegation of authority.[29]

2. The Bureau's processes for the issuance of CIDs, including the non-delegable authority of the Director, Assistant Director of the Office of Enforcement, and the Deputy Assistant Directors of the Office of Enforcement to issue CID.

The signatories believe that the current process for issuing CIDs is appropriate. 12 CFPR § 1080.6 provides discretion to the Assistant Director and Deputy Assistant Directors of the Office of Enforcement to issue CIDs.[30] Current office policies require CID forms be "signed by the Enforcement Director or a Deputy Enforcement Director."[31] This procedure strikes the appropriate balance between managerial control and the potential for slowing enforcement investigations.

Furthermore, the CFPB should not require a higher level of senior management approval prior to issuing CIDs. As with the decision to open investigations, professional enforcement staff need flexibility, discretion, and speed to provide a nimble, 21st century response to illegal activity. Slowing down investigations by requiring career staff to obtain buy-in from more senior leaders would lead to slower investigations, fewer investigations, less deterrence of illegal activity and more harm to the American public.

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[28] *Cf* POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 37,

[29] 12 CFR § 1080.4 ("The Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement have the nondelegable authority to initiate investigations.").

[30] 12 CFR § 1080.6.

[31] POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 57,

Moreover, requiring sign-off from more senior managers for sending CIDs could harm the subjects of investigations themselves. For example, some publicly traded consumer finance businesses disclose the existence of CFPB investigations in their securities disclosures. Slowing down the investigation process by requiring more red-tape and hurdles in issuing CIDs could force investigation subjects to disclose investigations more frequently and for longer periods of time.

The signatories believe that the current rules and process on issuing CIDs is working well and should not be changed.

3. Specific steps that the Bureau could take to improve CID recipients' understanding of investigations, whether through the notification of purpose included in each CID or through other avenues, including facilitating a better understanding of the specific types of information sought by the CID.

Current Bureau practices strike the right balance between CID recipients' need for understanding investigations and the Bureau's need to uncover evidence of illegal activity. Existing regulations and CFPB Enforcement Office Policies *already* require enforcement staff to provide notice to CID recipients of the purpose of CIDs in the "Notification of Purpose" section of the standard office CID form.[32] Under existing policy, enforcement staff "are required to describe the nature of the conduct constituting the alleged violation under investigation and the applicable provisions of law."[33] The undersigned believe this existing policy is more than sufficient to provide notice to CID recipients. Further levels of red tape, bureaucratic detail, or instructions to CFPB enforcement staff could interfere with their ability to effectively investigate suspicious activity.

CFPB leadership should bear in mind that many investigation subjects are hostile to CFPB investigations because the subjects are engaged in violations of the law. While some investigation subjects are forthcoming and cooperative in investigations, other subjects may engage in spoliation of evidence, concealment, and obfuscation in order to frustrate the federal government's legitimate law enforcement goals. In order to hold businesses and individuals accountable for their illegal activity, CFPB enforcement staff need the flexibility to craft CIDs for both cooperative and uncooperative recipients alike. Making Bureau investigators provide even more information than existing policies already require might inadvertently divulge information that bad actors could use to obstruct the investigation.

Furthermore, some investigation subjects may prefer that the Bureau not provide more detailed disclosures regarding the purpose of the CID. For example, the Bureau must often serve CIDs on third parties that are not currently under investigation in order to gather information about whether an investigation subject may be violating the law. Revealing to the third party the nature and purpose of the CID could expose the investigation subject to inadvertent reputational harm prior to an adjudication of liability. If CFPB leadership requires further disclosure of the purpose of CIDs, this information should be very general in nature and limited to the importance of law enforcement and the rule of law generally, as CID recipients have a civic duty to cooperate with law enforcement.

Finally, in 2017, pursuant to the recommendation of the Office of the Inspector General of the Federal Reserve Board of Governors and a D.C. Circuit Court of Appeals decision, the Bureau

[32] 12 CFR § 1080.5; POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 58,

[33] POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 58,

both revised its Policy and Procedures Manual and officially reminded enforcement staff of the importance of providing notice regarding the subject matter of CIDs. Further adjustment of the Bureau's CID policies in this area is unnecessary.[34]

4. The nature and scope of requests included in Bureau CIDs, including whether topics, questions, or requests for written reports effectively achieve the Bureau's statutory and regulatory objectives, while minimizing burdens, consistent with applicable law, and the extent to which the meet and confer process helps achieve these objectives.

The CFPB's existing procedures adequately achieve the Bureau's objectives while minimizing burdens on CID recipients. For example, the CFPB Office of Enforcement's Policies and Procedures Manual already provides that:

> [A] CID for the production of documentary material or tangible things should describe each class of material requested with definiteness and certainty. A reasonable return date for the material should be provided. CID recipients should comply with the detailed instructions relating to the productions of documents, including the Document Submission Standards.[35]

Moreover, the CFPB's existing meet and confer procedures are sensible and effective. Under the current policies and procedures, the recipient of a CID normally is required to attend a meeting with CFPB staff to discuss any of the recipient's questions and concerns regarding the CID. This meeting, which can occur face-to-face or over the phone, is a proactive step the CFPB has integrated into its enforcement policies that helps promote communication, identify problems, and avoid unnecessary disputes. While federal law enforcement investigations by their nature lead to contention and stress, the CFPB's meet and confer process strikes a reasonable balance in helping recipients respond to CIDs without burdening CFPB enforcement staff with procedures, disclosures, meetings, or delays that might slow down prosecution of the public interest.

CFPB leadership should bear in mind that some financial institutions and their attorneys may attempt to misuse their contacts with CFPB Enforcement Office managers and professional staff in order to lobby for a favorable investigation outcome, changes to current regulations or policies, or other forms of special treatment. Unlike investigation subjects and their attorneys, ordinary American consumers do not have the benefit of extended face-time with CFPB enforcement staff. Enforcement policies and procedures should not be amended in a way that allows investigation subjects to waste time, create needless correspondence, demand useless concessions, extensions, or other special favors.

Furthermore, for every investigation subject that may be violating the law, there are likely dozens of law-abiding companies that are suffering from a competitive disadvantage. Businesses that are complying with the law have a right to expect that CFPB political leadership will not allow the investigation process to be manipulated for purposes unconnected to law enforcement investigations. The purpose of meet and confer meetings is to allow the CFPB's investigation to move forward in an expeditious and fair manner. The CFPB must not amend its procedures to allow contact or discussions that run the risk of interfering with the law enforcement purpose and mission.

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[34] CFPB v. Accrediting Council for Indep. Colleges and Schools, 854 F.3d 683, 685 (D.C. Cir., 2017)

[35] POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 58.

5. The timeframes associated with each step of the Bureau's CID process, including return dates, and the specific timeframes for meeting and conferring, and petitioning to modify or set aside a CID.

Existing CID timeframes strike a reasonable balance between the interests of the CFPB and CID recipients. Several observations are in order: First, many CIDs are relatively simple, specific, and do not require significant costs or time for a response. For example, some CIDs merely request business records from a third party that easily are retrieved and readily available. It is critical that the Bureau's rules and procedures not be amended to create needless delay in law enforcement where there are no legitimate compliance concerns from CID recipients. The existing rules and procedures sensibly set an expectation of brisk compliance and grant professional staff the discretion to extend times for responding as necessary.

Some CID recipients, and their attorneys, may prefer additional time irrespective of whether it is truly necessary. In some circumstances, CID recipients may try to abuse requests for additional time in order to engage in spoliation of evidence, obscure computer records, or conceal assets that could be used to provide restitution to victims of illegal activity. Enforcement staff need the flexibility and discretion to exercise their professional judgment on how to balance the best interests of both the public as well as CID recipients. Although the CPFB likely will receive many comments from well-funded financial institutions and their counsel on this point, the primary focus of the Bureau should remain on ensuring that the public is protected from illegal activity by covered persons, related persons, and their service providers.

Second, investigations often require cumulative, as opposed to simultaneous, CIDs. This is to say that CFPB staff must often send a CID to a recipient in order to gather information necessary to ask the right questions of and request the needed documents from a subsequent recipient. Delaying one CID may lead to delays in a whole sequence of dependent CIDs. Any one given CID recipient may not understand that their delays can cause the Bureau to fail to ask critical questions of another recipient possibly leading to the need for a duplicative second CID that increases costs for both the Bureau and the recipient overall. While the first recipient may believe that Bureau staff are being unreasonably strident, it is more likely that staff are in fact protecting the needs and interests of CID recipients as well as the public. These questions of timing, order, and logistics are best left to the CFPB professional staff's discretion and judgment and are not likely to be assisted with amendments to existing rules or policies.

Third, it is crucial that CFPB investigations move quickly. When financial institutions are violating the law, there are often thousands of vulnerable families that may be suffering from unwarranted fees, excessive interest, privacy violations, inaccurate credit reports, inappropriate payments, or other financial problems. Each day of delay in pursuing an investigation can impose real harm on consumers as well as their children and other dependents. Moreover, delayed investigations erode the public trust and faith in our government. Indeed, investigation subjects themselves often complain when investigations remain pending too long, even though they themselves may have asked for additional time to meet and confer or respond to a CID.

Fourth, we are concerned that the CFPB should not follow unhelpful developments currently underway at the Federal Trade Commission. The FTC recently changed its investigation procedures to extend the default return date for CIDs in consumer protection matters from 14 to 21 days for third parties and from 21 to 30 days for targets of investigations. We believe that this change to FTC policy was unnecessary and will lead to delays in investigating violations of federal law. Instead, we support the traditional approach of imposing a default rule that requires prompt CID compliance with discretion given to professional staff to modify CID deadlines where appropriate.

CFPB leadership must not forget that delays in law enforcement investigations contributed to the 2008 financial crisis. The federal Financial Crisis Inquiry Commission ("FCIC") found that in the run-up to the 2008 crash, "enforcement actions came late in the day—often just as firms were on the verge of failure. In cases that the FCIC investigated, regulators either did not identify the problems early enough or did not act forcefully enough to compel the necessary changes."[36] Congress created the CFPB to prevent making this same mistake again. For these reasons, the signatories believe that existing enforcement office rules and procedures on the timeframe for meeting and conferring and petitioning to modify or set aside a CID should remain unchanged. If the CFPB leadership does make a change, the signatories believe the current Policy and Procedures Manual could be amended to provide greater emphasis on the need for quick investigations that respond forcefully to the most pressing consumer financial services problems.

6. The Bureau's taking of testimony from an entity, including whether 12 CFR § 1080.6(a)(4)(ii), and/or the Bureau's processes should be modified to make expressly clear that the standards applicable to Federal Rule of Civil Procedure 30(b)(6) also apply to the Bureau's taking of testimony from an entity.

Federal Rule of Civil Procedure 30(b)(6) ("Rule 30(b)(6)")[37] and 12 CFR 1080.6(a)(4)(ii)[38] are very similar and include comparable provisions to protect the interests of a deposed party.

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[36] U.S. FIN. CRISIS INQUIRY COMM'N, *supra* note 28, at 302.

[37] Rule 30(b)(6) states:

> (6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

FED. R. CIV. P. § 30(b)(6).

[38] Sub-section 1080.6(a)(4) states:

> (4) Oral testimony.
>
> (i)Civil investigative demands for the giving of oral testimony shall prescribe a date, time, and place at which oral testimony shall be commenced, and identify a Bureau investigator who shall conduct the investigation and the custodian to whom the transcript of such investigation shall be submitted. Oral testimony in response to a civil investigative demand shall be taken in accordance with the procedures for investigational hearings prescribed by §§ 1080.7 and 1080.9 of this part.
>
> (ii) Where a civil investigative demand requires oral testimony from an entity, the civil investigative demand shall describe with reasonable particularity the matters for examination and the entity must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf. Unless a single individual is designated by the entity, the entity must designate the matters on which each designee will testify. The individuals designated must testify about information known or reasonably available to the entity and their testimony shall be binding on the entity.

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Nonetheless, while both concern the taking of oral testimony, they serve separate and distinct purposes and are subject to completely different sets of governing procedures. To conflate the two in order to bind the CID investigatory process by the same rules that apply in a civil litigation discovery process would be totally inappropriate and would hinder unnecessarily the CFPB's exercise of its discretion in fulfilling its statutory obligations.

Both Rule 30(b)(6) and CID's are intended to provide for the use of oral testimony to deal with the problems caused by information asymmetry (i.e. where one party has virtually exclusive access to and control of relevant information and data). However, there are at least three key differences that distinguish the circumstances in which 12 CFR 1080.6(4) applies as compared to the circumstances where Rule 30(b)(6) applies.

First, 12 CFR § 1080.6(4) applies solely to a preliminary investigative process whereas Rule 30(b)(6) only applies once civil litigation has been initiated. Rule 30(b)(6) always is part of an adversarial process. The corporate defendant's Rule 30(b)(6) representative frequently is an extremely important source of proof of liability for a plaintiff, especially where the defendant corporation has sole knowledge of the events that gave rise to the lawsuit and of its own practices. By comparison, CID testimony can be used by the CFPB to fulfill any and all of the five functions delegated to the agency as it deems appropriate once it has an opportunity to review the testimony provided. Its use is not limited to enforcement or the imposition of liability and the scope of its investigatory reach should not be similarly constrained.

Second, Rule 30(b)(6) is applied within the framework of a complete set of discovery rules established to effectively and fairly manage the unique aspects of civil litigation. Taking the strictures of Rule 30(b)(6) and applying them to a CFPB CID investigation without the balancing provisions that appear in other provisions of the Federal Rules of Civil Procedure (i.e. Rule 16, Rule 26 and Rule 37) unnecessarily will limit and hamper the CFPB's legitimate investigatory efforts.

Finally, Rule 30(b)(6) is applied under the supervision of a judicial authority who has the ability to monitor and insure that the discovery process is fair to both parties. However, in a CID investigation there is no authority to enforce the rule in order to ensure that the party controlling the information does not engage in abusive, dilatory or obfuscating practices such as "bandying," coaching the witness, failing to supplement or changing testimony. The CFPB needs strong authority to overcome these obstacles on its own.

Therefore, oral testimony pursuant to a CFPB CID should be treated similarly to, but not exactly the same as depositions governed by Rule 30(b)(6). Although they share many of the same goals, and include some of the same protections, they are not identical. Rather, CID's should retain the broad flexibility they currently enjoy under 12 CFR § 1080.6(4) in order to enable the CFPB to efficiently and effectively engage in productive investigations within its jurisdiction. Rule 30(b)(6) need not, and should not, be explicitly incorporated into 12 CFR § 1080.6(4).

7. The Bureau's processes for handling the inadvertent production of privileged information, including whether 12 CFR § 1080.8(c) and/or whether the Bureau's processes should be modified in order to make expressly clear that the standards

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12 C.F.R. § 1080.6(4).

applicable to Federal Rule of Evidence § 502 also apply to documents inadvertently produced in response to a CID.

The language of 12 CFR § 1080.8(c)[39] is substantially similar to the comparable provisions of Federal Rule of Evidence § 502(b).[40] Both are intended to provide a predictable, uniform set of standards under which parties can determine the consequences of an inadvertent disclosure of a communication or information covered by an evidentiary privilege or work-product protection. Both accord with the majority judicial view on whether such an inadvertent disclosure is a waiver.

There therefore appears to be no reason why the standards applicable to the Federal Rule of Evidence need to expressly be incorporated into the CFPB's current regulation governing the same topic. At best, it would be redundant and unnecessary. At worst, it could be confusing since such a step would leave open the question of whether the remaining Federal Evidentiary Rules are, or are not, applicable to the CFPB's CID's. Accordingly, 12 CFR § 1080.8(c) should remain unaltered.

8. The rights afforded to witnesses by 12 CFR 1080.9, including limitations on the role of counsel described in 12 CFR 1080.9(b) in light of the statutory delineation of objections set forth in 12 U.S.C. 5562(c)(13)(D)(iii).

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[39] Subparagraph 1080.8(c) states:

> (c) Disclosure of privileged or protected information or communications produced pursuant to a civil investigative demand shall be handled as follows:
> (1) The disclosure of privileged or protected information or communications shall not operate as a waiver with respect to the Bureau if:
>> (i) The disclosure was inadvertent;
>> (ii) The holder of the privilege or protection took reasonable steps to prevent disclosure; and
>> (iii) The holder promptly took reasonable steps to rectify the error, including notifying a Bureau investigator of the claim of privilege or protection and the basis for it.
>
> (2) After being notified, the Bureau investigator must promptly return, sequester, or destroy the specified information and any copies; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if he or she disclosed it before being notified; and, if appropriate, may sequester such material until such time as a hearing officer or court rules on the merits of the claim of privilege or protection. The producing party must preserve the information until the claim is resolved.
> (3) The disclosure of privileged or protected information or communications shall waive the privilege or protection with respect to the Bureau as to undisclosed information or communications only if:
>> (i) The waiver is intentional;
>> (ii) The disclosed and undisclosed information or communications concern the same subject matter; and
>> (iii) They ought in fairness to be considered together.

12 CFR § 1080.8(c)

[40] Federal Rule of Evidence 502(b) states:

> b. Inadvertent Disclosure- When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:
> 1. the disclosure is inadvertent;
> 2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
> 3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

FED. R. EV. § 502.

The differences between the rights afforded to witnesses in a CFPB CID deposition incorporated in the provisions of 12 CFR § 1080.9(b),[41] as opposed to the statutory delineation of objections set forth in 12 U.S.C. § 5562(c)(13)(D),[42] can be explained by the differences between the investigatory contexts in which the rules apply.

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[41] Subparagraph 1080.9(b) states:

> (b) Any witness compelled to appear in person at an investigational hearing may be accompanied, represented, and advised by counsel as follows:
>
> > (1) Counsel for a witness may advise the witness, in confidence and upon the initiative of either counsel or the witness, with respect to any question asked of the witness where it is claimed that a witness is privileged to refuse to answer the question. Counsel may not otherwise consult with the witness while a question directed to the witness is pending.
> > (2) Any objections made under the rules in this part shall be made only for the purpose of protecting a constitutional or other legal right or privilege, including the privilege against self-incrimination. Neither the witness nor counsel shall otherwise object or refuse to answer any question. Any objection during an investigational hearing shall be stated concisely on the record in a nonargumentative and nonsuggestive manner. Following an objection, the examination shall proceed and the testimony shall be taken, except for testimony requiring the witness to divulge information protected by the claim of privilege or work product.
> > (3) Counsel for a witness may not, for any purpose or to any extent not allowed by paragraphs (b)(1) and (2) of this section, interrupt the examination of the witness by making any objections or statements on the record. Petitions challenging the Bureau's authority to conduct the investigation or the sufficiency or legality of the civil investigative demand shall be addressed to the Bureau in advance of the hearing in accordance with § 1080.6(e). Copies of such petitions may be filed as part of the record of the investigation with the Bureau investigator conducting the investigational hearing, but no arguments in support thereof will be allowed at the hearing.
> > (4) Following completion of the examination of a witness, counsel for the witness may, on the record, request that the Bureau investigator conducting the investigational hearing permit the witness to clarify any of his or her answers. The grant or denial of such request shall be within the sole discretion of the Bureau investigator conducting the hearing.
> > (5) The Bureau investigator conducting the hearing shall take all necessary action to regulate the course of the hearing to avoid delay and to prevent or restrain disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language. Such Bureau investigator shall, for reasons stated on the record, immediately report to the Bureau any instances where an attorney has allegedly refused to comply with his or her obligations under the rules in this part, or has allegedly engaged in disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of the hearing. The Bureau will thereupon take such further action, if any, as the circumstances warrant, including actions consistent with those described in 12 CFR 1081.107(c) to suspend or disbar the attorney from further practice before the Bureau or exclude the attorney from further participation in the particular investigation.

12 CFR § 1080.9(b).

[42] Subsection 5562(c)(13)(D) states:

> (D)Attorney representation
> (i)In general. Any person compelled to appear under a civil investigative demand for oral testimony pursuant to this section may be accompanied, represented, and advised by an attorney.
> (ii)Authority. The attorney may advise a person described in clause (i), in confidence, either upon the request of such person or upon the initiative of the attorney, with respect to any question asked of such person.

Specifically, the applicable scopes of the two provisions significantly are different, with the statutory provision applicable in a narrower, more focused, context (i.e. fair housing) than the general regulatory scheme. Therefore, allowing the more unlimited coaching of witnesses authorized by the statute in limited circumstances ("[t]he attorney may advise a person described in clause (i), in confidence, either upon the request of such person or upon the initiative of the attorney, with respect to any question asked of such person" as compared to "[c]ounsel for a witness may advise the witness, in confidence and upon the initiative of either counsel or the witness, with respect to any question asked of the witness where it is claimed that a witness is privileged to refuse to answer the question") to be applied to the CFPB's exercise of its broader investigatory responsibilities will unnecessarily and improperly inhibit the agency from fulfilling the full extent of its mandated duties.

Similarly, the difference in the scopes of the statutory and regulatory investigatory provisions is reflected in the different means in how the access to information is enforced. In the limited statutory context, where there is a broader right to coach and direct the witness not to answer during the course of taking oral testimony – and therefore the greater potential for abuse and obstruction – the statute explicitly provides that the CFPB may file a petition with a federal district court for an order compelling such person to answer questions. In the regulatory context, however, where the ability of counsel to coach a witness or direct them not to answer during the course of the taking of their oral testimony already is circumscribed within the applicable regulation, the need for separate enforcement mechanisms to insure proper access to relevant information is less necessary. Thus, the regulatory remedies are more limited and do not include the express right to seek judicial intervention.

Congress created a separate set of objections under 12 U.S.C. § 5562(c)(13)(D) that are permitted in distinct and limited types of investigatory interrogations undertaken by the CFPB. Congress also authorized a separate means for enforcing the agency's rights in such investigations. To apply that separate set of objections to the CFPB's general investigatory authority, especially without the associated expanded enforcement rights provided in the statute, would be inappropriate. The rights afforded to witnesses by 12 CFR 1080.9, including limitations on the role of counsel described in 12 CFR § 1080.9(b) should not be changed to adopt the statutory delineation of objections set forth in 12 U.S.C. § 5562(c)(13)(D)(iii).

9. The Bureau's processes concerning meeting and conferring with recipients of CIDs, including, for example, negotiations regarding modifications and the delegation of authority to the Assistant Director of the Office of Enforcement and Deputy Assistant

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(iii)Objections. A person described in clause (i), or the attorney for that person, may object on the record to any question, in whole or in part, and such person shall briefly state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination, but such person shall not otherwise object to or refuse to answer any question, and such person or attorney shall not otherwise interrupt the oral examination.

(iv)Refusal to answer. If a person described in clause (i) refuses to answer any question—

(I)the Bureau may petition the district court of the United States pursuant to this section for an order compelling such person to answer such question; and

(II)if the refusal is on grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of section 6004 of title 18.

Directors of the Office of Enforcement to negotiate and approve the terms of satisfactory compliance with civil investigative demands and extending the time for compliance.

Under current CFPB Office of Enforcement rules and procedures, investigation subjects already have ample opportunity to request modifications to the substance and process of CIDs for good cause. Specifically, 12 C.F.R. 1080.6 and the Enforcement Office's Policies and Procedures Manual both authorize the Enforcement Director or a Deputy Enforcement Director to limit the scope of a CID, alter the terms of a CID, and approve the terms of satisfactory CID compliance for good cause.[43] Moreover, CID recipients are free to request and the Enforcement Director or Deputy Directors are free to grant time extensions for good cause.[44] Existing policy already provides that enforcement staff "should engage in negotiations with petitioner's counsel to the extent that the requests being made are reasonable."[45]

Current policies do require investigation subjects to ask for CID modifications in a writing that includes the factual and legal information necessary to support their request. This sensible policy helps both CID recipients and enforcement staff understand and focus on what modifications a CID recipient is requesting and why the modification may be necessary. The existing CFPB "good cause" standard for CID modification provides sufficient flexibility for enforcement staff to determine whether modification requests are appropriate. Providing further exceptions, limitations, appeals, or restrictions on the authority of enforcement staff would risk limiting the effectiveness of CFPB investigations. It could also expose investigation subjects to needless delay and uncertainty.

CFPB leadership must not allow investigation subjects to turn each CID into an extended invitation to negotiate, delay, appeal, obfuscate, or otherwise impede lawful federal investigations. Indeed, CFPB leadership should bear in mind that defense counsel responding to CFPB investigations may view CIDs served on their clients as an opportunity to generate billable hours at their clients' expense. Many attorneys that are likely to submit comments on the CFPB's CID policies have a strong financial incentive to slow down and increase the cost of CFPB investigations. Some consumer financial services defense attorneys engage in scare tactics and fear mongering that at times have inaccurately portrayed CFPB staff as unreasonable in order to convince their clients to invest in unnecessary legal fees. Providing additional levels of appeal, further opportunities for negotiation, and other avenues for favors or other special treatment, may in many circumstances actually end up working against CID recipients' interests by generating delay and higher costs. Existing policies provide CFPB staff the right tools to balance the interests of CID recipients with the need to enforce federal law on behalf of the public and other law-abiding businesses.

10. The Bureau's requirements for responding to CIDs, including certification requirements, and the Bureau's CID document submission standards.

The CFPB's CID document submission standards include routine instructions on how to deliver documents to the Bureau. These instructions include practical and uncontroversial instructions such as "all productions should be produced free of computer viruses" an "a cover letter should be included with each production." Generally, the CFPB's current document submission standards

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43 12 C.F.R. § 1080.6; POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 63.

44 POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 63.

45 *Id.*

require the producing party scan and produce paper productions electronically. This allows the Bureau to store produced records more efficiently, reducing costs to the Bureau as well as recipients. However, the CFPB's Policies and Procedures Manual does allow for paper submissions when necessary, and the Office of Enforcement retains the discretion to modify these submission standards when circumstances justify doing so.

Moreover, the Inspector General's recent audit found no problems with the Bureau's document submission standards.[46] If there were any significant problems with the Bureau's document submission standards, the interviews and detailed review of CIDs, CID submissions, and petitions to set aside CIDs conducted during the Inspector General's audit would have disclosed them.[47] Our organizations are confident that the Bureau's career enforcement staff are carefully and reasonably balancing the burden imposed on CID recipients with the government's need to obtain documents that may reveal evidence of illegal activity.

We are concerned that some aggrieved subjects of enforcement actions may attempt to use this RFI to encourage unreasonable reforms that would frustrate the ability of the United States to enforce its laws. It should come as no surprise that federal investigations can impose costs and burdens on CID recipients. This is an unfortunate, but inevitable, consequence of law enforcement. Our organizations believe that the key to successfully managing these burdens is hiring highly qualified enforcement staff, treating them well, compensating them appropriately, and empowering them to do their very best to promote justice with respect to consumers as well as CID recipients. Micromanaging CFPB professional staff is unlikely to produce better outcomes and will erode the ability of the Bureau to deter illegal activity.

11. The Bureau's processes concerning CID recipients' petitions to modify or set aside Bureau CIDs, including:

a. Whether it is appropriate for Bureau investigators to provide the Director with a statement setting out a response to the petition without serving that response on the petitioner.

b. Whether petitions and the Director's orders should be made public, consistent with applicable laws; and

c. The costs and benefits of the petition to modify or set aside process, vis-à-vis direct adjudication in Federal court, in light of the statutory requirement for the petition process and the fact that CIDs are not self-enforcing.

The CFPB should not modify existing CFPB CID rules or the Policies and Procedures Manual to require professional enforcement staff to serve internal staff responses to petitions to modify or set aside on the petitioner. Enforcement staff should not be required to disclose the basis for their suspicion of legal wrongdoing at an early stage of an investigation. Conducting an effective investigation requires enforcement staff to exercise considerable judgment about the point at which to disclose information and legal theories to the subjects of investigations and other CID recipients. The CFPB leadership should not tie the hands of investigators by requiring them to share internal communication with CID recipients any time the recipient decides to petition to modify or set aside a CID. Indeed, such a requirement would turn the CID process on its head: by petitioning against the CID, it would be CID recipients that gather information from the Bureau, rather than the other way

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[46] *See* FED OIG CID EVALUATION REPORT, *supra* note 19, at executive summary.

[47] *Id.*, at 17.

around. Moreover, nothing prevents enforcement staff from sharing information relating to the basis of their legal theories and evidence prior to receiving a CID response when doing so makes sense within the strategic and tactical imperatives of an investigation.

Petitions and orders to modify or set aside CFPB CIDs should continue to be available to the public. Section 1080.6(g) of the CFPB's investigation rules states that the CFPB will make publicly available both the recipients' petition and the CFPB Director's order in response to the petition. The CFPB's approach in this regard is based on the longstanding practices of the FTC which also publishes petitions and the commission's response. Publication of petitions and the Bureau's response is necessary because it provides general transparency, allows future CID recipients to determine whether filing a petition is advisable, and how to effectively petition when it is appropriate to do so. The public has a right to know when the recipient of a federal CID is disputing the authority of the Bureau to investigate alleged violations of federal law. Over the long term, maintaining transparency in petitions to modify or set aside CIDs provides crucial sunlight that can avoid the potential for corruption, bribery, or special treatment. Under the current rules, petitioners can request confidentiality with the CFPB and ultimately seek relief in court to protect confidentiality. However, confidentiality should be highly disfavored and should not be granted without good cause. As recognized by the Inspector General, the CFPB has already instituted a process for redacting sensitive information from CID petitions when it is appropriate to do so.[48]

Additionally, if the CFPB were to extend confidentiality to CID petitions, it would encourage CID recipients to engage in dilatory and wasteful challenges. Those CID recipients that simply want additional time to respond to CIDs could confidentially file petitions to modify or set aside for the purposes of delay without facing public accountability for challenging the authority of the government to conduct a lawful investigation. The existing policy strikes a reasonable balance between the public need for transparency in government and the CID recipient's wishes to obscure the public's view of their efforts to avoid or limit the scope of federal investigations.

The existing process for petitioning to modify or set aside a CFPB CID should not be revised. Historically, it is well settled that federal agencies such as the CFPB are entitled to "wield broad power to gather information through the issuance of subpoenas."[49] As the U.S. Supreme Court has explained, under their "power of inquisition" agencies may use administrative subpoenas such as civil investigative demands to "investigate merely on suspicion that the law is being violated, or even just because [they] want[ ] assurance that it is not."[50] Courts generally defer to an agency's interpretation of the scope of its own investigation,[51] and place a "high burden" on the challenging party in order to prevent interference with federal agencies' investigations.[52]

The CFPB's existing rules and practices on challenges to CIDs make sense given the limits to judicial review of administrative CIDs. The Bureau's existing process is sufficient to allow courts to

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48 FED OIG CID EVALUATION REPORT, *supra* note 19, at 12.
49 Resolution Trust Corp. v. Thornton, 41 F.3d 1539, 1544 (D.C. Cir. 1994).
50 U.S. v. Morton Salt Co., 338 U.S. 632, 642–43 (1950).
51 *See* FTC v. Church & Dwight Co., 665 F.3d 1312, 1315–16 (D.C. Cir. 2011)
52 *See* EEOC v. Fed. Exp. Corp., 558 F.3d 842, 848-49 (9th Cir. 2009) (upholding a challenge to the jurisdictional limits of an agencies administrative subpoena).

weigh in on CIDs under appropriate circumstances.[53] CID recipients should not have the right to immediately drag the CFPB into federal court every time a recipient wants to delay, challenge, or hinder an investigation. In the vast majority of circumstances, immediate judicial review of CIDs would be inappropriate, impose excessive costs on the Bureau and the recipient, and lead to unnecessary delays.

[53] *See, e.g.*, CFPB v. Accrediting Council for Indep. Colleges and Schools, 854 F.3d 683, 691-92 (D.C. Cir. 2017).

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Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
Via email: *FederalRegisterComments@cfpb.gov*

Re: Request for Information, CFPB External Engagement
Docket No. CFPB-2018-0005

May 29, 2018

Dear Acting Director Mulvaney:

In response to the Consumer Financial Protection Bureau's (CFPB) Request for Information (RFI) number 5 on its external engagements, Consumer Action[1] writes to vigorously support the Consumer Bureau's long-standing efforts to engage consumers and advocates to obtain feedback on the financial challenges facing their communities, and to ensure that the public is aware of the various agency resources available to assist consumers.

External Engagement is fundamental to carrying out the CFPB's mission to ensure that "consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[2] The CFPB's External Engagement fosters outreach and promotes transparency and accountability. We urge the CFPB to maintain its commitment to direct and frequent engagement with consumers, their representatives and the financial companies that serve them.

The CFPB engages with the public on consumer financial issues to ensure that consumers and others have meaningful opportunities to provide input from varied perspectives. Public engagement gives a voice to those who might otherwise be overlooked by the regulatory process.

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[1] Consumer Action has been a champion of underrepresented consumers since 1971. A national, nonprofit 501(c)3 organization, Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers and regulators to advance consumer rights and promote industry-wide change particularly in the fields of consumer protection, credit, banking, housing, privacy, insurance and utilities. www.consumer-action.org
[2] 12 U.S.C. Section 5511(a).

To date, The CFPB's engagement has helped to increase the public's understanding of financial issues and listen to all parties' viewpoints to help create a safer, fairer marketplace. The CFPB conducts outreach in a myriad of ways: It has held 47 meetings of its advisory boards, 33 field hearings, and 15 town halls in more than 40 cities throughout the nation. It is vital for the agency to sustain and extend the external engagement that has been a hallmark of the Bureau's first six years. Robust external engagement ensures that the CFPB can share information with consumers, industry participants, and a wide range of others interested in and affected by CFPB actions. Moreover, external engagement ensures that the CFPB's policymakers, consumer educators, attorneys, examiners, and other staff have the information they need to understand and appropriately address consumers' needs, experiences and concerns. These public interactions allow the Bureau to receive essential input and help to hold the consumer agency accountable.

We would encourage the CFPB to expand its outreach further into culturally, linguistically and economically diverse areas, giving all consumers greater access and input into the one agency devoted to consumer financial protection.

The CFPB's four advisory groups--the Consumer Advisory Board (CAB), the Community Bank Advisory Council, the Credit Union Advisory Council, and the Academic Research Council—have been and should continue to be essential elements of External Engagement. We recommend that the CFPB increase the frequency of their meetings, and convene meetings for each advisory group at least three times per year to ensure that conversations and dialogue can address the most current and pressing issues. We support transparency: Meetings should continue to be advertised and summarized publicly, and broadcast in full, whenever possible. Additionally, we recommend that at least one of these meetings for each of these groups take place outside of Washington. Though we recognize the value that industry representatives can bring to the CAB and its advisory mission, we recommend that a majority of the CAB be composed of individual consumers, consumer advocates, scholars, or others whose work focuses on protecting consumers. As a body charged with advising the CFPB on its consumer protection functions, the CAB should be led by and primarily consist of members whose work is focused on consumer protection. Further, the CFPB already sustains two industry-based advisory boards related to community banks and credit unions. The CFPB's field hearings or town halls should be continued and we urge transparency.

We are concerned however, by a recent lack of public input: The agency has held no public events since its change in leadership. Acting Director Mulvaney has held very few external meetings, at least with consumers and their representatives, and is in direct contrast to the extensive number of meetings held under former Director Cordray.

Also alarming is the acting director's indications that he may restrict public access to the consumer complaint database. The public complaint database is an essential tool to engage, inform and protect the public, all key to the Bureau's mission.

We strongly support the CFPB's direct engagement with consumers through its complaint tool. Since its inception, the CFPB has collected more than one million consumer complaints. The complaint process is designed to achieve tailored responses directly from companies to consumers, and where possible complaint resolutions. The public database also provides important information to the CFPB, and to the public, that can help alert consumers to potential risks and prevent future problems. Also important are other CFPB engagement tools, such as the *Tell Your Story* section of the website. We urge the CFPB to explore additional mechanisms, such as "listening sessions," to allow consumers to engage in open, informal discussions about financial services concerns with senior CFPB staff. The CFPB has some experience with events like these in the industry context, through "Project Catalyst." Similar opportunities for consumers could yield valuable insight for the Bureau and help consumers better understand how the CFPB works for them.

The CFPB must foster a culture that promotes public engagement with consumers. It is essential that the CFPB commit to maintaining varied forms of external engagement, including roundtables, the public complaint database and informal feedback sessions with consumers and their advocates. Throughout the years, CFPB External Affairs and Community Affairs staff have been exceptional. Public engagement has been and should remain a hallmark of the CFPB.

The amount of time and attention required to adequately address these numerous RFIs has diverted valuable consumer group and consumer agency resources to respond to these requests for information. These RFIs are primarily an opportunity for financial firms to attempt to weaken CFPB oversight, consumer protection, public input and access to fair and affordable financial products and services. Nevertheless, we thank you for taking the time to thoughtfully review our comments.

Sincerely,

Ruth Susswein
Consumer Action, Deputy Director National Priorities

ConsumersUnion®

POLICY & ACTION FROM CONSUMER REPORTS

June 7, 2018

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW Washington, DC 20552

RE: Request for Information Regarding Bureau Rulemaking Processes [Docket No. CFPB-2018-0009]

Dear Ms. Jackson:

Consumers Union,[1] the advocacy division of Consumer Reports, writes in response to the Consumer Financial Protection Bureau's (CFPB) Request for Information (RFI) on the Bureau's rulemaking process.[2] The CFPB is seeking public input as it assesses the overall efficiency and effectiveness of this process.[3]

Consumers Union has participated, through public notice and comment, in several rulemaking efforts at the CFPB. We have found these rulemakings to be meticulous and detailed, and to provide appropriate opportunities for comment and further input from a wide range of stakeholders at numerous points in the proceedings. We urge the Bureau to maintain this inclusive and deliberative approach that has produced reasoned rules that protect consumers while allowing for continued innovation in the marketplace.

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[1] Consumers Union is the advocacy division of Consumer Reports, an expert, independent, non-profit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. Consumers Union works for pro-consumer policies in the areas of financial services, as well as telecommunications, health care, food and product safety, energy, telecommunications, privacy and data security, and competition and consumer choice, among other issues, in Washington, DC, in the states, and in the marketplace. Consumer Reports is the world's largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its magazine, website, and other publications.

[2] The RFI Regarding Bureau Rulemaking Processes is available at: https://www.gpo.gov/fdsys/pkg/FR-2018-03-09/pdf/2018-04824.pdf.

[3] *Id.*

Background – The Importance of the CFPB

The CFPB was established following the financial crisis a decade ago, when Congress recognized a gap in consumer protection and enforcement that allowed unfair, deceptive, and abusive practices in the financial sector to proliferate. Over the years, the CFPB has taken essential steps, long overdue, to protect consumers in this marketplace. Since it was launched in 2011, the CFPB has won almost $12 billion in refunds and relief for an estimated 29 million Americans[4] who were harmed by financial companies. Notable achievements by the CFPB on behalf of consumers include:

- Ensuring mortgages are affordable, by adopting rules to prevent the kind of reckless lending practices by banks that led to a record number of Americans losing their homes and that triggered the country's deep recession in 2008;
- Taking on deceptive credit card marketing, by ordering credit card companies to pay back $3.48 billion to consumers who had been defrauded into accepting unnecessary and costly add-on products and services, such as debt protection and credit monitoring;
- Providing prepaid card users with strong protections, by adopting rules that require prepaid card issuers to provide better fee disclosures, as well as the same robust protections limiting a consumer's financial exposure to unauthorized and fraudulent use that come with traditional debit and credit cards;
- Challenging abusive student loan practices, such as by suing Navient, the nation's largest student loan servicer, for giving borrowers inaccurate information, processing payments incorrectly, and failing to take appropriate action to address consumer complaints;
- Protecting consumers from deceptive reverse mortgage ads that tricked consumers into believing they could not lose their homes with a reverse mortgage; and
- Combating misleading credit score ads and promotions, by holding TransUnion and Equifax accountable for deceiving consumers about the usefulness and cost of the credit scores they marketed.

These achievements were possible, in large part, because of the CFPB's ability to listen to and gain insight from a wide range of experts, consumers, and other stakeholders whose diverse experiences and perspectives help inform its work. And that input is reflected in the Bureau's rulemakings to date. Maintaining and enhancing the CFPB's rigorous and transparent rulemaking process is critical to ensuring that these achievements can continue.

[4] See, Factsheet, Consumer Financial Protection Bureau: By the numbers (July 2017).

Discussion

Public Outreach is Essential

As we noted in response to a previous RFI, the external engagements conducted by the CFPB ensure that consumers and other interested parties have visibility into the Bureau's work, and have meaningful opportunities for public input. That in turn ensures that the CFPB's work is informed by regular input from varied perspectives representing distinct points of view. Public engagements give a voice to individuals and communities who might otherwise have difficulty accessing the regulatory process. They increase the public's understanding of financial issues and the role the CFPB plays in ensuring a safe marketplace.[5]

The CFPB has relied on these engagements to great effect in developing rules. For the Payday loan rule, for example, the Bureau spent five years gathering information, including through:

> field hearings, and hundreds of meetings with both consumer and industry stakeholders on the issues raised by small-dollar lending. In addition to meeting with lenders and other market participants, trade associations, consumer groups, community groups, and others, the Bureau has engaged with individual faith leaders and coalitions of faith leaders from around the country to gain their perspective on how these loans affect their communities and the people they serve. And the Bureau has met frequently with Federal, State, and Tribal officials to consult and share information about these kinds of loans and their consequences for consumers.[6]

Similarly, in developing the Prepaid rule, which was finalized in 2016, the Bureau started with an Advanced Notice of Proposed Rulemaking, on which it received 220 comments.[7] It then began to conduct:

> extensive and significant additional outreach and research following the Prepaid ANPR as part of its efforts to study and evaluate prepaid products. The Bureau's pre-proposal outreach included meetings with industry, consumer groups, and nonpartisan research and advocacy organizations. The Bureau also conducted market research, monitoring, and related actions pursuant to section 1022(c)(4) of the Dodd-Frank Act, which allows the Bureau to gather information from time to time regarding the organization, business

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[5] *See*, Comments to the CFPB on Request for Information Regarding Bureau External Engagement (May 29, 2018).

[6] Payday, Vehicle Title, and Certain High-Cost Installment Loans (Payday Loan Rule). Text of the CFPB rule on payday loans is available at: http://files.consumerfinance.gov/f/documents/201710_cfpb_final-rule_payday-loans-rule.pdf.

[7] Advance Notice of Proposed Rulemaking, https://www.federalregister.gov/documents/2012/05/24/2012-12565/electronic-fund-transfers-regulation-e.

conduct, markets, and activities of covered persons and service providers to aid the Bureau's market monitoring efforts. Further, the Bureau obtained information directly from consumers through focus groups and consumer testing.[8]

The Bureau's development of its arbitration rule is another particularly apt example. As detailed in Parts III and IV of the discussion in the published final rule,[9] the CFPB conducted an extremely thorough examination of the use of forced arbitration clauses in consumer financial service contracts, soliciting and accepting input from the full range of parties and perspectives, in a particularly deliberative and inclusive multi-stage process, with extensive public outreach soliciting further comment at each stage. These public outreaches included:

- an April 2012 request for information on proposals for the study directed by Congress in section 1028 of the Dodd-Frank Act;
- a 168-page preliminary report on the ongoing study in December 2013, with a detailed roadmap of the Bureau's plans for future work;
- invitations to interested stakeholders for in-person meetings in February 2014;
- notices in June 2013 for a proposed consumer survey, soliciting feedback, followed by meetings in July 2013, and two focus groups, and another notice in May 2014 soliciting further comment on the proposed survey; a 700-page Report to Congress on the study in March 2015;
- a series of roundtables with interested stakeholders following release of the report;
- a Small Business Review Panel convened in October 2015, to discuss proposals under consideration, with a detailed outline of proposals and questions published in advance, as well as other roundtables and meetings with interested stakeholders during this period;
- a report on the Small Business Review Panel findings in December 2015;
- a public field hearing in early May 2016; and
- following publication of the proposed rule in late May 2016, an additional three-month public comment period, during which more than 100,000 comments were received and numerous stakeholders met with Bureau officials to present their views.

This outreach and consultation is essential to the CFPB's development of rules that are appropriate to the marketplace, and we urge the Bureau to continue this diligent and focused information gathering that can be useful to all of the Bureau's work, including rulemaking.

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[8] Prepaid Accounts Under the Electronic Fund Transfer Act (regulation E) and the Truth in Lending Act (Regulation Z) (Prepaid rule). The prepaid rule is available on the Federal Register at: https://www.federalregister.gov/documents/2016/11/22/2016-24503/prepaid-accounts-under-the-electronic-fund-transfer-act-regulation-e-and-the-truth-in-lending-act.

[9] Arbitration Agreements. The Final Rule is available on the Federal Register at: https://www.federalregister.gov/documents/2017/07/19/2017-14225/arbitration-agreements#citation-420-p33246.

Requests for Information Are Useful if Well-Targeted and Deliberate

With respect to Requests for Information, we agree that they can be useful for "gathering information on market conditions or issues, particularly regulatory options" as noted in this RFI. Consumers Union has commented on numerous such RFIs in the past, including on the use of alternative data and modeling techniques in the credit process,[10] consumer use of reverse mortgages,[11] mobile financial services,[12] an initiative on safe student banking,[13] and the need for clear rules regarding student loan servicing.[14] All of these RFI processes enabled stakeholders from all perspectives to provide input to the Bureau as it considered questions about the consumer impact of practices in the financial marketplace.

We do caution, however, against issuing multiple RFIs in quick succession — as the Bureau is now doing — seeking comment on all aspects of the Bureau's work. This recent spate of RFIs stand in contrast to the deliberate pace of past Bureau requests for information. As part of a call for evidence described by the Bureau as being intended to "to ensure the Bureau is fulfilling its proper and appropriate functions to best protect consumers", the Bureau issued 12 requests for information over the course of less than three months at the start of this yar. Of those, six remain open as of June 5. This rapid pace does not leave enough time for full input by stakeholders, nor does it allow for thorough consideration by the CFPB. In contrast, in all of 2017, the Bureau issued 10 requests for information. The rush of recent RFIs seems to indicate a departure from the deliberate, considered pace of years past.

Final Rules Have Reflected Thoughtful Consideration

We have been impressed with the quality of the final rules issued by the Bureau. They have reflected thoughtful consideration of the comments submitted by the public and stakeholders, and have established clear and workable rules for the marketplace. And the Bureau has been

[10] *See*, CU Response to the CFPB's Request for Alternative Data in the Credit Process (August 1, 2017), https://consumersunion.org/research/cu-response-to-the-cfpbs-request-for-information-on-the-use-of-alternative-data-in-the-credit-process/.

[11] *See*, Comments to the CFPB on Request for Information Regarding Consumer Use of Reverse Mortgages (August 31, 2012), https://consumersunion.org/research/comments-to-the-consumer-financial-protection-bureau-on-request-for-information-regarding-consumer-use-of-reverse-mortgages/.

[12] *See*, CU Comment to the CFPB Regarding the Use of Mobile Financial Services (MFS)(September 10, 2015), https://consumersunion.org/wp-content/uploads/2014/09/CU_comments_CFPB_mobile_finance.pdf.

[13] *See*, CU Comments to the CFPB on a "Safe Student Account Scorecard" (March 30, 2015), https://consumersunion.org/wp-content/uploads/2015/03/CU_Ltr_CFPB_Safe_Student_Account_Scorecard.pdf.

[14] *See*, CU Comments to the CFPB on Student Loan Servicing Practices (July 3, 2015) https://consumersunion.org/wp-content/uploads/2015/07/CFPB_RFI_servicing_0715.pdf.

willing to make adjustments even after the issuance of the final rule, in response to reasonable concerns.

The final rule for prepaid accounts exemplifies the Bureau's flexibility and responsiveness. For more than a decade, Consumers Union advocated for consumer protections on prepaid cards. After a four-year process, the Bureau issued rules that extend a number of important protections to prepaid accounts, including uniform fee disclosures; protection against errors and loss, similar to legal safeguards currently available for debit and credit cards; prompt dispute resolution rights; free and easy access to account information; and clear rules of the road for the extension of credit.

As announced in October 2016, the prepaid rule was to be generally effective in October 2017. However, in April 2017, the Bureau, responding to industry feedback, extended the date to April 2018. A short while later, also in response to industry feedback, the Bureau re-opened aspects the rule for consideration, including error resolution rights for unregistered prepaid cards and linking credit cards to digital wallets. As Director Richard Cordray said at the time: "Today's request for comment shows we are listening closely to feedback on our rules to decide whether certain adjustments will help to achieve that goal."[15] Six months later, the Bureau published its changes to the rule, which included adjusting error resolution rights to exclude cards that had not completed registration; clarifying rules to provide greater flexibility in instances where credit cards are linked to digital wallets that store funds; and extending the final date for compliance by a year to April 2019.[16] As this example illustrated, the Bureau has shown that it can act quickly to address providers' concerns while still ensuring effective, protective rules for financial products and services.

Conclusion

As the RFI process moves forward, we urge the CFPB to keep its mission foremost in view: "implementing and enforcing Federal consumer financial law, for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[17]

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[15] Consumer Financial Protection Bureau press release, June 15, 2017, CFPB Seeks Comment on Proposed Changes to Prepaid Rule, Proposal Would Adjust Error Resolution Requirements and Provide More Flexibility for Credit Cards Linked to Digital Wallets, https://www.consumerfinance.gov/about-us/newsroom/cfpb-seeks-comment-proposed-changes-prepaid-rule/.

[16] Consumer Financial Protection Bureau press release, January 25, 2018, CFPB Finalizes Changes to Prepaid Accounts Rule, https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-changes-prepaid-accounts-rule/.

[17] 12 U.S.C. 5511(a).

We look forward to working with the CFPB to ensure that any changes to its rulemaking processes are carefully considered and advance the critical mission of the CFPB.

Sincerely,

Anna Laitin
Director, Financial Policy

ConsumersUnion®

POLICY & ACTION FROM CONSUMER REPORTS

June 7, 2018

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW Washington, DC 20552

RE: Request for Information Regarding Bureau Rulemaking Processes [Docket No. CFPB-2018-0009]

Dear Ms. Jackson:

Consumers Union,[1] the advocacy division of Consumer Reports, writes in response to the Consumer Financial Protection Bureau's (CFPB) Request for Information (RFI) on the Bureau's rulemaking process.[2] The CFPB is seeking public input as it assesses the overall efficiency and effectiveness of this process.[3]

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Background – The Importance of the CFPB

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These achievements were possible, in large part, because of the CFPB's ability to listen to and gain insight from a wide range of experts, consumers, and other stakeholders whose diverse experiences and perspectives help inform its work. And that input is reflected in the Bureau's rulemakings to date. Maintaining and enhancing the CFPB's rigorous and transparent rulemaking process is critical to ensuring that these achievements can continue.

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Discussion

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As we noted in response to a previous RFI, the external engagements conducted by the CFPB ensure that consumers and other interested parties have visibility into the Bureau's work, and have meaningful opportunities for public input. That in turn ensures that the CFPB's work is informed by regular input from varied perspectives representing distinct points of view. Public engagements give a voice to individuals and communities who might otherwise have difficulty accessing the regulatory process. They increase the public's understanding of financial issues and the role the CFPB plays in ensuring a safe marketplace.[5]

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willing to make adjustments even after the issuance of the final rule, in response to reasonable concerns.

The final rule for prepaid accounts exemplifies the Bureau's flexibility and responsiveness. For more than a decade, Consumers Union advocated for consumer protections on prepaid cards. After a four-year process, the Bureau issued rules that extend a number of important protections to prepaid accounts, including uniform fee disclosures; protection against errors and loss, similar to legal safeguards currently available for debit and credit cards; prompt dispute resolution rights; free and easy access to account information; and clear rules of the road for the extension of credit.

As announced in October 2016, the prepaid rule was to be generally effective in October 2017. However, in April 2017, the Bureau, responding to industry feedback, extended the date to April 2018. A short while later, also in response to industry feedback, the Bureau re-opened aspects the rule for consideration, including error resolution rights for unregistered prepaid cards and linking credit cards to digital wallets. As Director Richard Cordray said at the time: "Today's request for comment shows we are listening closely to feedback on our rules to decide whether certain adjustments will help to achieve that goal."[15] Six months later, the Bureau published its changes to the rule, which included adjusting error resolution rights to exclude cards that had not completed registration; clarifying rules to provide greater flexibility in instances where credit cards are linked to digital wallets that store funds; and extending the final date for compliance by a year to April 2019.[16] As this example illustrated, the Bureau has shown that it can act quickly to address providers' concerns while still ensuring effective, protective rules for financial products and services.

Conclusion

As the RFI process moves forward, we urge the CFPB to keep its mission foremost in view: "implementing and enforcing Federal consumer financial law, for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[17]

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[15] Consumer Financial Protection Bureau press release, June 15, 2017, CFPB Seeks Comment on Proposed Changes to Prepaid Rule, Proposal Would Adjust Error Resolution Requirements and Provide More Flexibility for Credit Cards Linked to Digital Wallets, https://www.consumerfinance.gov/about-us/newsroom/cfpb-seeks-comment-proposed-changes-prepaid-rule/.

[16] Consumer Financial Protection Bureau press release, January 25, 2018, CFPB Finalizes Changes to Prepaid Accounts Rule, https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-changes-prepaid-accounts-rule/.

[17] 12 U.S.C. 5511(a).

We look forward to working with the CFPB to ensure that any changes to its rulemaking processes are carefully considered and advance the critical mission of the CFPB.

Sincerely,

Anna Laitin
Director, Financial Policy

ConsumersUnion®

POLICY & ACTION FROM CONSUMER REPORTS

May 25, 2018

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW Washington, DC 20552

RE: Request for Information Regarding Bureau External Engagement [Docket No. CFPB-2018-0005]

Dear Ms. Jackson:

Consumers Union[1] the advocacy division of Consumer Reports, writes in response to the Consumer Financial Protection Bureau's (CFPB) Request for Information (RFI) on its public and non-public external engagements.[2] We strongly support the CFPB's external engagements as a proven conduit for the CFPB to learn first-hand about the financial challenges faced by individuals and their communities, and to detect harmful trends in the marketplace.

The CFPB is seeking comments on all aspects of conducting future external engagements, including, among other things, strategies for seeking public and private feedback from diverse external stakeholders, and strategies for distributing information about external engagements to maximize awareness and participation.[3] External engagement is a cornerstone of the CFPB's ability to carry out its mission of "ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[4] provides opportunities for the CFPB to explain the rationale for its decisions, solicit feedback on CFPB proposals, disperse information, and inform the public about steps taken to police the marketplace to protect consumers from unsafe financial products and services. It promotes transparency and accountability. The public can evaluate for itself whether the CFPB is working to accomplish its mission.

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[1]Consumers Union is the advocacy division of Consumer Reports, an expert, independent, non-profit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. Consumers Union works for pro-consumer policies in the areas of financial services, as well as telecommunications, health care, food and product safety, energy, telecommunications, privacy and data security, and competition and consumer choice, among other issues, in Washington, DC, in the states, and in the marketplace. Consumer Reports is the world's largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its magazine, website, and other publications.

[2]The RFI on supervision processes is available at: https://files.consumerfinances.gov/f/documnts/cfpb_rfi_external_engagements_022018.pdf

[3]Id. at page 6.

[4]See, 12 U.S.C. Section 5511(a).

For these reasons, we urge the CFPB to maintain its commitment to keeping a robust, direct, and ongoing engagement with the American public.[5]

Background – The Importance of the CFPB

The CFPB was established following the financial crisis a decade ago, when Congress recognized a gap in consumer protection and enforcement that allowed unfair, deceptive, and abusive practices in the financial sector to proliferate. Over the years, the CFPB has taken essential steps, long overdue, to protect consumers in this marketplace. Since it was launched in 2011, the CFPB has won almost $12 billion in refunds and relief for an estimated 29 million Americans who were harmed by financial companies, and has helped to resolve nearly one million consumer complaints involving problems with mortgages, credit cards, car loans, bank accounts, debt collection, and a variety of other issues.[6] Notable achievements by the CFPB for consumers include:

- Ensuring mortgages are affordable, by adopting rules to prevent the kind of reckless lending practices by banks that led to a record number of Americans losing their homes and that triggered the country's deep recession in 2008;
- Taking on deceptive credit card marketing, by ordering credit card companies to pay back $3.48 billion to consumers who had been defrauded into accepting unnecessary and costly add-on products and services, such as debt protection and credit monitoring;
- Providing prepaid card users with strong protections, by adopting rules that require prepaid card issuers to provide better fee disclosures, as well as the same strong protections limiting a consumer's financial exposure to unauthorized and fraudulent use that come with traditional debit and credit cards;
- Challenging abusive student loan practices, such as by suing Navient, the nation's largest student loan servicer, for giving borrowers inaccurate information, processing payments incorrectly, and failing to take appropriate action to address consumer complaints;
- Protecting consumers from deceptive reverse mortgage ads that tricked consumers into believing they could not lose their homes with a reverse mortgage; and
- Combating misleading credit score ads and promotions, by holding TransUnion and Equifax accountable for deceiving consumers about the usefulness and cost of the credit scores they marketed.

These achievements were possible, in large part, because of the CFPB's ability to listen to and gain insight from experts, consumers, and other stakeholders whose diverse experiences and perspectives help inform its work. Maintaining and enhancing the CFPB's public engagements is critical to ensuring that these achievements continue.

Discussion

- External Engagements Work

[5]See, "Open Government", Consumer Financial Protection Bureau (2017).
[6]See, Factsheet, Consumer Financial Protection Bureau: By the numbers (July 2017).

Listening and responding to consumers is central to the CFPB's mission.[7] Engaging with the public on consumer financial issues ensures that consumers and other interested parties have visibility into the CFPB's work and have meaningful opportunities to express their views. That in turn ensures that the CFPB's work is informed by regular input from varied perspectives representing distinct points of view.[8] Moreover, public engagements give a voice to individuals and communities who might otherwise have difficulty accessing the regulatory process. It increases the public's understanding of financial issues and the role the CFPB plays in ensuring a safe marketplace.

Since its inception, the CFPB has held nearly 50 open meetings, field hearings, town halls, and roundtable discussions, in more than 41 different locations throughout the country.[9] In addition, the CFPB's Office of Servicemember Affairs has visited 176 military installations providing tips and advice for servicemembers, veterans, and their families as they face financial decisions throughout the military lifecycle.[10] These kinds of meetings foster an open and transparent dialogue between the CFPB and the public that allows for the free exchange of viewpoints and constructive public discourse on financial products and services. If the CFPB is not doing enough to protect consumers in the marketplace, the CFPB will hear about it at these meetings. The CFPB will be held accountable.

We therefore support the CFPB's public engagements goals and encourage the CFPB to do more to enhance its public outreach. We urge the CFPB to increase its presence in urban, rural, culturally and economically diverse areas, giving a voice to all Americans who rely on financial products and services for their financial well-being. The CFPB should work with state and local community groups to select locations and meeting times that will maximize participation.

- Advisory Boards – The Eyes and Ears of the Marketplace

Congress did not want the Bureau to carry out its mission in isolation, keeping only its own counsel. It wanted a more formal channel of public outreach and communication to ensure actual engagement with the public. To that end, Congress directed the Director of the CFPB to establish a Consumer Advisory Board (CAB) "to advise and consult with the Bureau in the exercise of its functions under the Federal consumer financial laws, and to provide information on emerging practices in the consumer financial products or services industry, including regional trends, concerns, and other relevant information."[11]

The CAB provides external feedback on a range of topics, including consumer engagements, policy development, and research. It also obtains input from external stakeholders on some of the most challenging issues faced in the marketplace, including tools for measuring financial well-being, ways to prevent and respond to elder financial abuse, and reaching limited-English-

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[7]See, "Report of the Consumer Financial Protection Bureau Pursuant to Section 1017(e)(4) of the Dodd-Frank Act, December 30, 2013.
[8]See, "The CFPB Strategic plan, budget, and performance plan and report, February 2016.
[9]See, "Report of the Consumer Financial Protection Bureau Pursuant to Section 1017(e)(4) of the Dodd-Frank Act, December 30, 2013.
[10]Id.
[11]Dodd-Frank Act Pub. L No. 111-203, Section 1014(a). The Consumer Advisory Board was chartered and established in September 2012.

speaking consumers.[12] CAB membership is open to the public and is diverse in gender, ethnicity and geography. Importantly, through the CAB, the CFPB obtains feedback on whether its current work is on track, and gathers intelligence to ensure that its future efforts are appropriately directed.

Accordingly, we strongly support the mission and goals of the CAB. We urge the CFPB to use the CAB and other resources[13] to aggressively survey the country to identify problems, explore solutions, seek input from stakeholders, and address financial concerns before they cause consumers and the marketplace harm. We further urge the CFPB to increase the frequency of CAB meetings, continue to have CAB meetings open to the public, and continue to make the CAB materials available to the public.

- Public Consumer Complaint Database Increases Transparency and Accountability for All

The CFPB is the first federal agency solely focused on consumer financial protection, and consumer complaints are instrumental to that work.[14] The CFPB's Office of Consumer Response hears directly from consumers about the challenges they face in the marketplace, brings their concerns to the attention of financial companies, and assists in addressing the complaints. And, with the consumer's permission, the CFPB can publicly post complaint narratives that describe, in the consumers' own words, their experiences in the marketplace. The narratives put the complaint in context, and allow members of the public to assess the validity of the complaint and draw their own conclusions. For many consumers, filing a complaint with the CFPB is the last resort after they attempted, but failed, to get their complaint resolved on their own. Over a million people have filed complaints with the CFPB, and of those, approximately 97% receive a quick response from the company -- due in large part to the CFPB's involvement.[15]

The Consumer Complaint Database (Database) is an essential tool in public engagement. It, too, promotes transparency and accountability for the benefit of all stakeholders. Consumers use the Database to evaluate products and make better choices;[16] the industry uses The Database to identify and correct lapses in customer satisfaction; and regulators use it to help determine their regulatory priorities. Consumers Union fought for the creation and continued sustainability of this Database. We strongly urge The CFPB to keep the Database open to the public.

In addition, we urge the CFPB to continue publication of its Monthly Complaint Report, last published in October 2017, the Special Edition Monthly Complaint Report, and other special complaint reports. These reports provide a snapshot analysis of consumer complaint trends, and highlight complaints received about a particular product, from consumers in a particular

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[12] See, "Semi-annual report of the Consumer Financial Protection Bureau (October 15-March 31, 2016).

[13] Also see, The Community Bank Advisory Council (CBAC), The Academic Research Council, and the Credit Union Advisory Council (CUAC). The CFPB has organized 47 meetings of its advisory boards/councils.

[14] See, "CFPB Monthly Complaint Report, Vol 24, June 2017.

[15] See, cfpb.gov, last visited on May 25, 2017.

[16] See, Consumers Union, "The CFPB's Consumer Complaint Database Shines a Light on the Financial Services Industry."

state or city. The reports are an invaluable resource for consumers, researchers, regulators, and companies on what is going on in the marketplace. We will be providing detailed comments on this issue in a response to the RFI on public reporting practices.[17]

- Technology Increases Public Engagement

The use of technology is an effective, cost-saving way to engage the public. We support the CFPB's use of online outreach and social media to elicit comments on proposed rules, worksheets and disclosures.[18] For example, the CFPB used the internet to elicit feedback on its integrated Truth-in-Lending Act (TILA) and Real Estate Settlement Procedures Act (RESPA) forms.[19] The Bureau received over 150,000 visits to its "Know Before You Owe" website, and over 27,000 text box comments and emails on the form. Readers had the chance to submit comments on the sample form online, and also in response to an October 2011 blog entry on the form.[20] The comments were helpful in suggesting how to fix flaws in the prototype forms. For student loans, the CFPB blogged and posted a sample financial aid worksheet to its website for public comment. Over 20,000 consumers viewed the draft form online.[21] After reviewing the comments, the CFPB posted a summary of the feedback online and transmitted it to the Department of Education.[22] Later, the CFPB released the Financial Aid Comparison Shopper, an interactive online worksheet that helps families compare the cost of college education and financial aid offers across schools.[23] Over 3,270 colleges voluntarily adopted the worksheet.[24]

In addition, the CFPB effectively used social media to elicit early feedback on its prepaid card rule, overdraft protection, certifications and designation of financial planners and advisors, and other consumer protection issues.[25]

These are but a few examples of how the CFPB has used technology for public outreach and engagement. We urge the CFPB to continue to build upon its commitment to using technology as an efficient and useful tool for enhancing public engagement.

Conclusion

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[17]Request for Information Regarding Bureau Public Reporting Practices of the Consumer Complaint Information, Docket No. CFPB -2018-0006.

[18]See, Patricia McCoy, "Public Engagement in Rulemaking: The Consumer Financial Protection Bureau's New Approach, Boston College Law School. (2012).

[19]See, CFPB, "Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (regulation Z): Proposed Rule with Request for Public Comment, at 29-32 (2012).

[20]See, See, Rohit Chopra, "Know Before You Owe: Let's Tackle Student Loans, CFPB (October 26, 201).

[21] Id.

[22] See, Rohit Chopra, Your Feedback on Know Before You Owe: Student Loans, CFPB (Jan. 27, 2012), http://www.consumerfinance.gov/blog/your-feedback-on-know-before-you-owe-student-loans/.

[23]CFPB Press Release, "Consumer Financial Protection Bureau Releases Financial Aid Comparison Shopper (April 11, 2012), http://www.consumerfinance.gov/blog/paying -for-college-help-us-make-it-easier-for-you-to-choose/

[24]See, Factsheet, CFPB by the numbers (2017).

[25] See, Patricia McCoy, supra.

The CFPB's public engagement activities help it shape policy, set priorities, develop regulatory options, and evaluate the effectiveness of its regulatory choices. It increases public awareness and promotes transparency and accountability. The public can determine for itself if the CFPB is fulfilling its mission. As the RFI process moves forward, we urge the CFPB to keep its mission foremost in view: "implementing and enforcing Federal consumer financial law, for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[26]

We look forward to working with you to ensure that any changes to the CFPB external engagement mandate are carefully considered and advance the important mission of the CFPB.

Sincerely,

Pamela Banks

Pamela Banks
Senior Policy Counsel
Consumers Union

Sincerely,

Christina Tetreault

Christina Tetreault
Senior Staff Attorney
Consumers Union

[26] 12 U.S.C. Section 5511(a).

ConsumersUnion
POLICY & ACTION FROM CONSUMER REPORTS

April 19, 2018

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW Washington, DC 20552

RE: Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes [Docket No. CFPB-2018-0001]

Dear Ms. Jackson:

Consumers Union, the advocacy division of Consumer Reports,[1] writes in response to the Consumer Financial Protection Bureau's Request for Information (RFI) on its use of civil investigative demands and their critical role in enabling the agency to achieve its mission and objectives.

As many federal law enforcement agencies have long recognized, the ability to obtain information from an investigatory target is an essential enabling those agencies to fulfill their statutory missions to enforce the law. The CFPB is one of many agencies that obtains its information through civil investigative demands (CIDs).[2] The CFPB has used its CID authority appropriately and successfully in recent years to uncover evidence of widespread misconduct at large banks, loan servicers, for-profit colleges and other companies subject to CFPB jurisdiction. Without its CID authority, it is not clear that these violations would ever have come to light. This RFI asks whether CIDs are imposing undue burdens on entities who receive CIDs. We urge the CFPB to carefully review any comments received and to consider the many benefits that CIDs provide to consumers, law enforcement, and a fair and even-handed marketplace. It is essential to ensure that CIDs remain an effective tool for enforcing the law and upholding the agency's core mission: to protect consumers from harmful financial practices that violate the law.

The mission of the CFPB is spelled out in the law establishing it: "The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair,

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[1] Consumers Union is the advocacy division of Consumer Reports. Consumers Union works for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves, focusing on the areas of financial services, as well as telecommunications, health care, food and product safety, energy, and competition and consumer choice, among others. Consumer Reports is the world's largest independent product-testing organization. Using its more than 60 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.
[2] *See, e.g.*, 15 U.S.C. § 57b-1, 15 U.S.C. § 1312, 31 U.S.C. § 3733 (2018).

transparent, and competitive."[3] In the nearly seven years since the CFPB opened its doors, action in service of this mission has improved the market for consumer financial products, benefiting both American consumers and responsible providers.

Congress set five specific objectives for the Consumer Financial Protection Bureau. The CFPB is to ensure that "(1) consumers are provided timely and understandable information to make responsible decisions about financial transactions; (2) consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination; (3) outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens; (4) Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and (5) markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation."[4]

In working to meet these objectives, the CFPB conducts financial education programs; collects, investigates, and facilitates responses to consumer complaints; researches and publishes information on how markets for consumer financial products are functioning, identifying both risks to consumers as well as the proper functioning of such markets; supervises covered entities, taking appropriate enforcement action to address violations of Federal consumer financial law; and issues rules, orders, and guidance implementing Federal consumer financial law. For consumers, these efforts mean more educated financial decisions, fewer risks in the marketplace, help in getting much-needed resolution to problems, and protections under law that ensure they are treated fairly.

The CFPB was established following the financial crisis a decade ago, when Congress recognized a gap in consumer protection and enforcement that allowed unfair, deceptive, and abusive practices in the financial sector to proliferate. Over the last seven years, the CFPB has taken essential steps to protect consumers in this marketplace.

Since it was launched in 2011, the CFPB has won almost $12 billion in refunds and relief for an estimated 29 million Americans who were harmed by financial companies, and has helped to resolve nearly one million consumer complaints involving problems with mortgages, credit cards, car loans, bank accounts, debt collection, and a variety of other issues. Additional notable achievements by the CFPB for consumers include:

- Ensuring mortgages are affordable, by adopting rules to prevent the kind of reckless lending practices by banks that led to a record number of Americans losing their homes and triggered the country's deep recession in 2008;
- Taking on deceptive credit card marketing, by ordering credit card companies to pay back $3.48 billion to consumers who were defrauded into accepting unnecessary and costly add-on products and services, such as debt protection and credit monitoring;
- Providing prepaid card users with strong protections by adopting rules that require prepaid card issuers to provide better fee disclosures, as well as the same strong protections limiting a consumer's financial exposure to unauthorized and fraudulent use that come with traditional debit and credit cards;
- Challenging abusive student loan practices, such as by suing Navient, the nation's largest student loan servicer, for giving borrowers inaccurate information, processing payments incorrectly, and failing to take action to address consumer complaints;

[3] Pub. L. 111–203, title X, § 1021, 124 Stat. 1979 (July 21, 2010).

[4] *Id.*

- Protecting consumers from deceptive reverse mortgage ads that tricked consumers into believing they could not lose their homes with a reverse mortgage; and
- Combating misleading credit score ads and promotions, by holding TransUnion and Equifax accountable for deceiving consumers about the usefulness and cost of the credit scores they marketed.

The CFPB's CID authority, found in 12 U.S.C. section 5562, is modeled closely on the CID authority of the Department of Justice under the Antitrust Civil Process Act of 1962[5] and that of the Federal Trade Commission under section 20 of the FTC Act.[6] As with its use in DOJ and FTC investigations, this provision clarifies the CFPB's authority, when it "has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to a violation," to obtain the information it needs to satisfactorily determine whether a violation has been committed. The availability of this authority has enabled the agency to obtain the needed information while minimizing legal uncertainty that would lead to unnecessary litigation or other burden on the entities involved.

The CFPB issued CIDs over the course of several months to obtain compelling evidence of systematic failures at Navient, the nation's largest servicer of both federal and private education loans. According to its SEC filings, Navient received CIDs from the CFPB and state attorneys general between December 2013 through August 2015 regarding its loan servicing practices.[7] The resulting CFPB complaint charged Navient and its affiliated debt collection arm, Pioneer Credit Recovery, with failing or misleading borrowers at every stage of repayment: incorrectly applying payments; steering borrowers into interest-accruing forbearances instead of affordable alternative repayment plans; frustrating borrowers' attempts to renew affordable repayment plans; and harming borrowers' credit histories, among other things.[8]

The Wells Fargo "fake account scandal" is another key example of the effectiveness of the CID authority in enabling the CFPB to stop harmful financial misconduct and obtain redress for harmed consumers. The CFPB's probe into Wells Fargo's sale practices uncovered a massive scheme to sign existing customers up for additional banking and credit card accounts without their knowledge or consent -- resulting in $185 million in fines, with restitution back to harmed consumers.[9] In its consent order with the bank, announced in September 2016, the CFPB

[5] 15 U.S.C. §§ 1311-1314.
[6] 15 U.S.C. § 57b-1 (added 1980).
[7] Supplement to the Remarketing Prospectus for SLM Student Loan Trust 2005-8 (filed Jan. 19, 2017), *available at* https://www.sec.gov/Archives/edgar/data/1338038/000091412117000069/sl36487583-ex99_1.htm (notifying SEC and investors of litigation that could affect value of student loan-backed securities).
[8] Complaint at 1-5, Consumer Fin. Protection Bureau v. Navient Corp., Case No. 17-cv-00101 (filed M.D. Penn. Jan. 18, 2017), *available at* https://files.consumerfinance.gov/f/documents/201701_cfpb_Navient-Pioneer-Credit-Recovery-complaint.pdf.
[9] *See* Consent Order, Consumer Fin. Protection Bureau v. Wells Fargo Bank, N.A. (filed Sept. 8, 2016), *available at* https://files.consumerfinance.gov/f/documents/092016_cfpb_WFBconsentorder.pdf (setting $100 million fine to be paid to CFPB); Press Release, Consumer Financial Protection Bureau Fines Wells Fargo $100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts (Sept. 8, 2016), *available at* https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/ (announcing additional $85 million to be paid to state and local agencies).

revealed that Wells Fargo's misconduct caused more than two million unauthorized accounts to be opened, with many of the customers incurring unexpected fees on those unauthorized accounts.[10]

The CFPB's investigative activities also uncovered an illegal predatory lending scheme at Corinthian Colleges, a massive for-profit college chain that aggressively marketed its career training programs to students and encouraged them to take out expensive private loans to pay for tuition.[11] According to its SEC filings, Corinthian tried repeatedly to set aside CIDs that the CFPB issued in 2012 and 2013.[12] However, the agency's persistence was crucial in uncovering widespread predatory lending and illegal debt collection practices at the company. The agency uncovered internal communications in which Corinthian employees described their target student demographic as having "low self-esteem," and "minimal understanding of basic financial concepts," among other things - indicating their interest in recruiting students from vulnerable populations.[13] The CFPB brought suit against Corinthian in September 2014, and a few months later announced a $480 million settlement negotiated in cooperation with the Department of Education to provide debt relief to harmed students.[14]

As far as we are aware, the CFPB has used its CID authority in an appropriately measured way. And as with the DOJ and FTC authority, there are processes available to entities who receive a CID, to work with the CFPB to further tailor a request more precisely to the relevant and useful information in its possession, custody, or control, or to petition the court to narrow the scope of a CID or to disallow it in its entirety. We believe these are sufficient procedural safeguards against inappropriate use.

Conclusion

The Bureau has stated that it has begun this call for evidence in order to "ensure the Bureau is fulfilling its proper and appropriate functions to best protect consumers." As this process moves forward, we urge the Bureau to keep its mission foremost in view: of implementing and enforcing Federal consumer financial law "for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."

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[10] *See* Consent Order, *supra* note 9, at 5-7.
[11] Complaint at 3-4, Consumer Fin. Protection Bureau v. Corinthian Colleges, Inc., Case No. 14-cv-07194 (filed N.D. Ill. Sept. 16, 2014), *available at* https://files.consumerfinance.gov/f/201409_cfpb_complaint_corinthian.pdf.
[12] Form 8-K at 16-17, Corinthian Colleges, Inc. (Aug. 12, 2014), *available at* https://www.sec.gov/Archives/edgar/data/1066134/000110465914060150/a14-18886_18k.htm.
[13] Complaint at 2-3, Consumer Fin. Protection Bureau v. Corinthian Colleges, Inc., Case No. 14-cv-07194 (filed N.D. Ill. Sept. 16, 2014), *available at* https://files.consumerfinance.gov/f/201409_cfpb_complaint_corinthian.pdf.
[14] Agreement at 1, ECMC Group, Inc.'s purchase of certain Corinthian Colleges, Inc. assets (Feb. 2, 2015), *available at* https://files.consumerfinance.gov/f/201502_cfpb_bulletin_cfpb-ecmc-agreement.pdf (letter from CEO of ECMC to CFPB Director Cordray, confirming debt relief as condition for sale of Corinthian campuses to ECMC).

We look forward to working with you to ensure that any changes are carefully considered and advance the important mission of the CFPB.

Sincerely,

Suzanne Martindale	George P. Slover
Senior Attorney	Senior Policy Counsel
Consumers Union	Consumers Union

Comments of Financial Regulation and Consumer Protection Scholars on Docket No. CFPB-2018-0002

May 7, 2018

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Dear Ms. Jackson:

The Consumer Financial Protection Bureau (the "Bureau") has requested, in its notice dated February 5, 2018, "comments and information from interested parties to assist the Bureau in considering whether and how to amend the Bureau's Rules of Practice for Adjudication Proceedings." 83 Fed. Reg. 5055 (Feb. 5, 2018), Docket No. CFPB-2018-0002.

We are lawyers and law professors, some of whom have studied administrative adjudication by financial regulators, and the principal drafters of our comment have no financial or other relationship with parties that have participated in the Bureau's administrative proceedings. We can provide evidence that can inform the Bureau's assessment of where to direct its regulatory reform resources. Many of the below signatories also have experience in public enforcement of consumer protection laws. We appreciate the opportunity to submit these comments for your consideration.

David Zaring,
Associate Professor of Legal Studies & Business Ethics, The Wharton School

Jayme Wiebold
Penn Law '18

William Black
Associate Professor of Economics and Law, University of Missouri-Kansas City

Prentiss Cox
Associate Professor of Law, University of Minnesota Law School

Kathleen Engel
Research Professor of Law, Suffolk University Law School

Robert Fellmeth
Price Professor of Public Interest Law, University of San Diego School of Law

Jeffrey Gentes
Visiting Clinical Lecturer, Yale Law School

Robert Hockett
Edward Cornell Professor of Law, Cornell University

Dalié Jiménez
Professor of Law, University of California, Irvine School of Law

Kathryn Judge
Professor, Columbia Law School

Adam Levitin
Agnes N. Williams Research Professor and Professor of Law, Georgetown University Law Center

Jeffrey Lubbers
Professor of Practice in Administrative Law, American University, Washington College of Law

Cathy Lesser Mansfield
Professor of Law, Drake University Law School

Nathalie Martin
Frederick M. Hart Chair in Consumer and Clinical Law, University of New Mexico School of Law

Patricia McCoy
Professor of Law, Boston College Law School

Gary Pieples
Teaching Professor, Syracuse University College of Law

David Reiss
Professor of Law, Brooklyn Law School

Jacob Russell
Assistant Professor of Law, Rutgers Law School

Amy J. Schmitz
Elwood L. Thomas Missouri Endowed Professor of Law, University of Missouri School of Law

Alexandra Sickler
Associate Professor of Law, University of North Dakota School of Law

John Spanogle
Professor of Law, Emeritus, George Washington University

Lauren Willis
Professor of Law, Loyola Law School, Los Angeles

Arthur Wilmarth
Professor of Law, George Washington University Law School

Eric Wright
Professor of Law, Santa Clara University School of Law

Introduction

In our view, the Bureau should put its limited regulatory reform resources to use in other, more pressing areas. We write to make three main points.

First, the Bureau has not made much use of its Administrative Law Judge (ALJ) program – and indeed, for a long time did not have its own ALJ. To begin, the Bureau borrowed an ALJ from the Securities and Exchange Commission. It has utilized administrative adjudication in eight contested matters in its entire history. All but two of these cases were settled, for, in the case of Auto Cash Leasing, a $10,000 civil monetary penalty,[1] in the case of Interstate Lending, a $4,000 civil monetary penalty,[2] in the case of Oasis Title Loans, a $20,000 civil monetary penalty,[3] in the case of Phoenix Title Loans, a $40,000 civil monetary penalty,[4] in the case of Presto Auto Loans, a $125,000 civil monetary penalty,[5] and in the case of 3D Resorts-Bluegrass, a $1 civil monetary penalty and a restitution order that could amount to $50,000.[6] These modest penalties were accompanied by other commitments from the defendants, but the sums involved do not raise the prospect of great hardships. There has been only one large award in the history of the Bureau's administrative proceedings – PHH Corp. was ordered to pay restitution and disgorgement in the amount of $6,442,399,[7] an award increased on review by the director, which in turn was reversed by the D.C. Circuit at both the panel and *en banc* level. *See* PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 83 (D.C. Cir. 2018).

Diverting regulatory reform resources to solve purported problems in a program that is utilized so rarely by the Bureau would be an inefficient use of the Bureau's limited, and very valuable, time. Indeed, there has not yet been a chance to see whether the current rules are good ones. Once more cases are sent to administrative adjudication, a more informed decision can be made about whether and how to reform the process. In the meantime, the Bureau would be poorly served by choosing to invest its resources in reforming a program that it barely makes use of, that

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[1] The CFPB's order may be found at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/20170130_cfpb_2016-CFPB-0017_Document-026.pdf.

[2] The CFPB's order may be found at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201612_cfpb_0018-Document030-12202016.pdf.

[3] The CFPB's order may be found at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/2016-CFPB-0019_Document_017_11012016.pdf.

[4] The CFPB's order may be found at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201703_cfpb_2016-CFPB-0020_Document-027.pdf.

[5] The CFPB's order may be found at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201612_cfpb_0021-Document027-12202016.pdf.

[6] The CFPB's order may be found at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201312_cfpb_consent-order_3dresorts-bluegrass.pdf.

[7] The CFPB's order may be found at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201411_cfpb_recommend-decision-final_205.pdf.

has been adequately policed through judicial review, and where it can, at the Director's discretion, reduce Bureau usage still further.

Second, even though they are rarely utilized by the Bureau, administrative proceedings are not a miscarriage of justice that requires attention in the first place. Empirical studies of ALJ decision-making in financial regulation matters, one of which one of us conducted, show that defendants win about as often before ALJs as they do in federal court. *See* David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1184-85 (2016). And decades of precedent establish the principle that the lengthy process afforded defendants in formal administrative proceedings is comparable to that of federal court and is adequate under the law. ALJ cases are resolved more quickly, as a general matter, than district court cases, but the Supreme Court has consistently held that those cases are comparable with regard to the quality of process provided. we expand upon this point in the discussion below.

Third, if the Bureau does wish to devote its resources to reforming its administrative proceedings, we have reviewed those rules and the questions in the Bureau's request for information, and recommend one small change. We find its proceedings to be consistent with the way those proceedings work in other agencies. The SEC has, however, recently extended the length of time for decision from four to eight months. A longer timeline, while still being short and efficient for all parties, gives the defendant more time to prepare the case. The Bureau could do something similar with its own rocket docket, though it may be that section 1081.400, which permits a 300 day timeframe without Director approval, meets this need. We expand on this point in the discussion section below.

Discussion

Formal administrative proceedings vary somewhat between agencies, but all such proceedings must meet the minimum requirements of the Administrative Procedure Act, and so broadly involve an impartial decisionmaker, the opportunity to present evidence, a hearing, cross-examination, and a panoply of other procedural rights. As the Bureau has observed, "The APA is designed to guarantee the decisional independence of administrative law judges and ensure fairness in administrative proceedings before federal government agencies."[8] ALJs conduct hearings "in a manner similar to federal bench trials," giving parties the opportunity to submit briefs, and preparing decisions that contain proposed findings of fact and conclusions of law.[9]

The Supreme Court has confirmed that procedural protections offered by administrative hearings are comparable to federal district court procedures. *See e.g.*, Fed. Mar. Comm'n v. S.C. Ports Auth., 535 U.S. 743, 758 (2002) ("[T]he role of the ALJ . . . is similar to that of an Article III judge."); Butz v. Economou, 438 U.S. 478, 513 (1978) ("[T]he role of the modern . . . administrative law judge . . . is 'functionally comparable' to that of a judge."). The Court has held that the fact that proceedings that are brought inside an agency before an ALJ indicate that the requirements of due process are satisfied rather than violated. *See e.g.*, Marshall v. Jerrico, Inc., 446 U.S. 238, 248–52 (1980) (holding that a civil penalty system permitting payment of

[8] CFPB, Administrative Adjudication Proceedings, https://www.consumerfinance.gov/administrative-adjudication-proceedings/ (last visited April 17, 2018).

[9] Office of Administrative Law Judges, U.S. SEC & Exchange Commission, https://www.sec.gov/alj (last visited Mar. 28, 2018).

fines assessed by an administrative law judge to a federal agency did not violate due process because it was "the administrative law judge, not the [Employment Standards Administration], who performs the function of adjudicating child labor violations"); Withrow v. Larkin, 421 U.S. 35, 58 (1975) (broadly affirming the consistency of agency adjudicative procedures with due process). Moreover, there is no evidence that ALJs treat defendants unfairly.

While the CFPB has a relatively short history using ALJs, the SEC has used ALJs for many decades. Thus, studies of SEC ALJs are illustrative as the Bureau evaluates its ALJ rules. These studies have uniformly found that SEC ALJs are impartial and are not more favorable to the SEC than federal judges are.

One of us conducted a study of a five-year sample of SEC ALJ cases. *See* David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1184-85 (2016). According to a regression analysis, no one ALJ was more or less likely to rule for the SEC than any other SEC ALJ. And while the agency lost only a handful of cases during that period, in either administrative proceedings or in federal court, the ALJs did not award the SEC the full relief the agency had sought in 29% of cases. The results of the SEC study are consistent with the rule-of-thumb rate for victories by any federal agency in federal court which, when various studies are pooled, comes out to about 69%. David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 170 (2010). The 71% success rate for administrative proceedings, in other words, was right in line with the success rate of most agencies in federal court.

We can be even more specific: the record for cases brought in federal court by the SEC is very similar to the agency's record in administrative proceedings. A comparison between the cases brought by the SEC in the Southern District of New York during the five years following the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act and administrative proceedings the SEC commenced against defendants during the same period are revealing. The district, which covers Manhattan, is ground zero for securities enforcement in the federal courts. The judges have extensive experience with securities fraud cases, both civil and criminal, and some of the judges have a reputation for putting the agency through its paces. Of the 119 such reported cases in the district, the SEC success rate was high; it received a positive result in 111 of the tracked cases, a 92% win rate.

Over the sample period, these results make the SEC look like a comparably victorious enforcer regardless of the forum in which it chose to pursue enforcement; there is no statistically significant distinction between the rates of success. With 8 failures in Manhattan district court in the five years following the passage of Dodd-Frank, and only 6 losses in the 168 enforcement proceedings the SEC brought before its ALJs during the same period, a 96% win rate, there is little evidence that the forum chosen by the SEC resulted in stark advantages for the agency either way.

Other empirical studies of the ALJs have also found no evidence of bias towards the agency. *See* Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315 (2017); Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 FORDHAM L. REV. 1143, 1178 (2016) ("there is no statistically significant difference between the SEC's success rate before ALJs and its success rate in federal court").

All the evidence suggests, in sum, that defendants receive abundant process in formal administrative proceedings, and that they do as well in those proceedings as they do in federal court. There is no injustice in administrative proceedings in general that would be solved by increasing the procedural burdens on those proceedings. Nor has the Bureau utilized enforcement proceedings in contested cases frequently enough to reveal any problems with those proceedings, making a redo premature.

We finish with some specific comments addressing some of the Bureau's specific questions, and describe why most of the rules should not be altered. In the final comment, we propose one modest change that might be worth the Bureau's consideration if it does decide to revisit the administrative proceedings rules:

1. The Bureau has asked whether "a policy of proceeding in federal court in all instances would be preferable." Administrative proceedings benefit both the Bureau and other agencies when it comes to recording settlements and processing uncontested enforcement actions. In these cases, administrative proceedings can serve as an efficient alternative for vindicating agency policy without the expense and complications of going to federal court. These cost savings inure to respondents as well as to agencies.

Although it has only diverted eight initially contested cases to administrative proceedings, the Bureau has filed 110 stipulation and consent orders before ALJs during this period; these cases were settled the day they were brought, and therefore required little process from the agency adjudicator. The SEC, for its part, has relied on its administrative law judges to handle settlements and enforcement actions against nonreporting companies, or to process follow-on civil sanctions, after court convictions for violations of the securities laws. This sort of routine enforcement work makes up the bulk of what those agency ALJs do. The Bureau would benefit from having the option of pursuing administrative cases in these contexts even if it decided to handle contested and other enforcement matters in federal court. At the very least, this option should be preserved. But of course, in addition to uncontested cases, administrative proceedings can be useful in contested actions as well. As mentioned above, administrative proceedings provide the Bureau with an option that will save both the Bureau and the defendant time and resources, while still providing the defendant sufficient due process.

2. The Bureau has asked whether it should "expressly adopt the Federal Rules of Evidence" and in particular the hearsay rule. Anyone who has appeared before an adjudicator knows that the adjudicator can discount third party evidence, and no one thinks that the hearsay rule, as expressed in the Federal Rules of Evidence, with all of its exceptions, is a paragon of consistency. The Bureau sensibly adopted section 1081.303(b) to establish rules of evidence that were "consistent with general administrative practice." It would be far better to retain the usual rules of evidence that non-jury adjudications employ.

3. Permitting defendants to be "afforded the opportunity to stay a decision of the Director pending appeal by filing a *superseadeas* bond, consistent with Federal Rule of Civil Procedure 62(d)" poses two different problems, depending upon the meaning of the inquiry. If the point of such a change would be to permit litigants to avoid Director review of a preliminary decision by an ALJ, the amendment would not be consistent with the separation of powers doctrines expressed by cases such as Free Enterprise Fund v. Public Company Accounting Oversight

Board, 130 S. Ct. 3138 (2010), which stood for the proposition that executive officers accountable to the President had to make the final decisions in administrative adjudications. Staying an interim executive branch action before an officer of the United States could review the decision would unconstitutionally permit the courts to review enforcement actions before politically accountable executive branch officers had a chance to conduct their own review of the initial decisions made in those actions. Similar problems would be posed if the stay of a Director decision would be automatic, under the agency's rules, upon the posting of a bond. On the other hand, if the amendment of the rules is meant to make the *superseadeas* bond more available in judicial proceedings reviewing the Director's decision, then the Federal Rules of Civil and Appellate Procedure would apply, and the Bureau's own administrative proceedings rules would be irrelevant.

4. The Bureau asks whether there should be changes to the requirements that the Bureau make documents available to the party for inspection, and whether there should be changes to the requirements for issuing subpoenas, specifically whether counsel for a party should be entitled to issue subpoenas without leave of the hearing officer. These provisions both work to ensure that administrative proceedings are fair and efficient. The production rule ensures that defendants have access to all materials the Bureau relied on in its investigation. This renders the traditional discovery process unnecessary, and therefore the subpoena power much less useful. The hearing officer's input on a subpoena request ensures that frivolous requests do not delay the process, and presents very minimal due process concerns because the party already has access to all the same information that the Bureau possesses.

5. The Bureau asks whether it should revise the limitations on the number of expert witnesses that may be called as provided in 12 CFR 1081.210(b). As discussed above, it is well established that the administrative hearings at the SEC afford defendants appropriate due process, including limits on the number of expert witnesses that may be called. Expert witnesses are sometimes valuable, but can increase the complexity and costs of proceedings for all parties, their use should accordingly be measured. The long history of ALJ utilization of experts, at the SEC and elsewhere, in proceedings that the Supreme Court has reviewed dozens of times without complaint, suggests that there is no concern that limitations on expert witnesses infringe on due process rights. The Bureau also asks whether it should incorporate the Federal Rules of Civil Procedure in regards to the required disclosures of expert witnesses. It is reasonable to expect an ALJ to have the legal competence necessary to understand an expert witness' function and qualifications without recourse to the full panoply of procedures required by the court procedural rules.

6. Regulated industry has indicated that it finds mandatory arbitration to be an attractive way to resolve consumer disputes. In many ways, the benefits of efficiency and cost that accrue to mandatory arbitration also accrue when the CFPB enforces claims through ALJs. Both processes would seem to ultimately lower costs to consumers and regulated industry.

7. A benefit to both the agency and regulated industry is the fast nature of administrative proceedings. The Bureau's rules call for proceedings to commence within 30 to 60 days of the notice of charges, and currently disfavors motions for extensions of time. If the Bureau does decide to re-examine its procedural rules, it might lengthen the window for this process to guarantee that the proceedings are resolved within a year, rather than within six months. The

SEC doubled the length of time between complaint and hearing to eight months from four.[10] It did so after complaints that defendants had insufficient time to prepare for litigation, while the agency could spend unlimited time investigating a case before filing. On the other hand, formal proceedings that last too long are expensive and burdensome for both defendants and the agency. Finally, it may be that section 1081.400, which permits a 300 day timeframe for the resolution of administrative proceedings without Director approval, meets this need, though the question has come up so infrequently, that it is not entirely clear (it is true, however, that in one case, administrative proceedings did not commence until seven months after the filing of the complaint). It might be appropriate to ensure that administrative proceedings are resolved within one year.

Conclusion

For the foregoing reasons, the Bureau should not revisit its administrative proceedings regulations. Administrative adjudication in and of itself is not a problematic process, but rather is a process that provides sufficient due process and saves both sides time and expense. Further, the Bureau should not choose to invest its resources in reforming a program that it barely makes use of, that has been adequately policed through judicial review, and where it can reduce Bureau usage further at the Director's discretion. Please do not hesitate to get in touch with David Zaring if you have any questions about this comment, or wish to enlarge upon the issues therein in any way.

[10] 17 C.F.R. § 201.360.

May 29, 2018

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection CFPB
1700 G Street NW
Washington, DC 20552

Via email: *FederalRegisterComments@cfpb.gov*

RE: Request for Information, CFPB External Engagement/Docket No. CFPB-2018-0005

Dear Ms. Jackson,

On behalf of the undersigned, we offer the following comment in response to the Request for Information (RFI) regarding the Consumer Financial Protection Bureau's (CFPB) External Engagements.

Congress created the CFPB following widespread abuse of consumers by financial companies that led to the financial crash of 2008. Congress assigned the new agency a singular consumer protection mission and directed it to focus on six key functions: supervising entities for compliance with the law, taking enforcement action to address violations, conducting financial education, addressing consumer complaints, monitoring markets to identify risks to consumers, and issuing rules to implement consumer protection law.[1]

"External engagement"—ongoing, robust communication with external stakeholders—is vital to all of these functions. As organizations attuned to consumer interests, we enthusiastically support such engagement, and especially encourage CFPB conversation with individual consumers. Our organizations and members participate regularly in civic discourse, and we believe strongly in the value of the information that individual consumers and their representatives can provide to the CFPB's policymaking and decision-making processes.

The CFPB has built a tradition and culture of robust public engagement.

From its inception through November, 2017, external engagements have figured as a hallmark of the CFPB. The CFPB has organized 47 meetings of its advisory boards, 33 field hearings, and 15 town halls in more than 40 cities. In addition, the CFPB has thoughtfully and routinely engaged with stakeholders through a range of other important mechanisms. These include meetings with stakeholders, speaking engagements, and conferences. Also, to engage with individual consumers and other stakeholders on a daily basis, the CFPB has established a consumer complaints system, its "Tell your story" website,[2] and social media accounts.[3]

The CFPB's culture of engagement began early. In the first months of the CFPB, Treasury Special Advisor Elizabeth Warren noted: "Members of the CFPB team and I sat in on foreclosure court in Miami,

[1] 12 USC § 5511(b), (c)
[2] *Your Money. Your Story.* CONSUMER FINANCIAL PROTECTION BUREAU (website visited May 4, 2018) https://www.consumerfinance.gov/your-story/
[3] *Consumer Financial Protect, by the numbers,* CONSUMER FINANCIAL PROTECTION CFPB (website visited April 16, 2018) https://files.consumerfinance.gov/f/documents/201701_cfpb_CFPB-By-the-Numbers-Factsheet.pdf

met with victims of predatory lending in San Antonio and the Mission District of San Francisco, and held a roundtable in Columbus, Ohio. We have listened to the diverse voices of the Chicago community at Lakeview Lutheran Church and the concerns of consumer advocates in Little Rock, Arkansas. The stories we have heard from so many people across the country have only deepened our conviction that better consumer financial protection is urgently needed."[4]

And, as the CFPB has grown, it has continued to engage, regularly and deeply, with the diverse set of stakeholders that care about and are affected by the consumer protection activities it engages in as a function of its mandate.

The CFPB's organization appropriately reflects the importance of external engagement across many sectors. Its Division of External Affairs includes offices focused on outreach to the nonprofit sector, financial institutions, and other government entities, as well the agency's advisory groups. The Office of Consumer Response engages with consumers and other stakeholders, through its consumer complaint system. Other offices in the Division of Consumer Education and Engagement have focused on the needs of servicemembers, students and young Americans, older Americans, and economically vulnerable consumers. The Division of Research, Markets, and Regulations conducts additional outreach to various regulated industries. And, pursuant to statutory responsibilities, the Office of the Ombudsman engages the public. In 2017, for example, the Ombudsman held three teleconferences with state banking associations from 20 states. It also held teleconferences with regional consumer groups in the Northeast and West regions.[5]

The CFPB must continue this important engagement with external stakeholders

We believe it is vital for the agency to sustain and extend the external engagement that has been a hallmark of its first six years. Robust external engagement ensures that the CFPB can share information with consumers, industry participants, and the wide range of other entities interested in and affected by the CFPB's actions. Moreover, external engagement ensures that the CFPB's policymakers, consumer educators, attorneys, examiners, and other staff have the information they need to understand and appropriately address consumers' needs and experiences. Any engagement forum, from a one-on-one conversation to a large town-hall meeting to a social media exchange, can provide the CFPB with invaluable information about how the markets for consumer financial products and services operate and the risks that consumers may face, and this information is vital for the CFPB to develop and target its initiatives appropriately.

Because of the importance of external engagement to CFPB operations, we are troubled by recent indications that a change in leadership has been leading the CFPB away from external engagement with consumers and consumer representatives since he arrived at the agency in late November, 2017. For example, while the CFPB held three public events during the five months through November 2017, the agency has held no public events in the five months since then[6] and cancelled a meeting of the

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[4] *Testimony of Elizabeth Warren before the Committee on Oversight and Government Reform,* Elizabeth Warren, CONSUMER FINANCIAL PROTECTION CFPB (July 14, 2011) https://www.consumerfinance.gov/about-us/newsroom/testimony-of-elizabeth-warren-before-the-committee-on-oversight-and-government-reform/

[5] *2017 Annual Report to the Director, CFPB Ombudsman's Office*, CONSUMER FINANCIAL PROTECTION CFPB (website visited April 23, 2018) https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_ombudsman-office-annual-report_fy2017.pdf

[6] Events, Consumer Financial Protection Bureau (website visited May 4, 2018) https://www.consumerfinance.gov/about-us/events/

Community Bank Advisory Board,[7] the Credit Union Advisory Council,[8] with other cancellations expected. Moreover, while seeking to direct dramatic policy shifts at the Bureau, Mr. Mulvaney appears to have largely insulated himself from external input. To take March 2018 as an example, according to his calendar, Mr. Mulvaney held only three external meetings during that month. These three meetings were with two government groups and one industry entity: the Chamber of Commerce, the Florida Commissioner of Financial Regulation, and the Small Business Administration Administrator.[9] There are no meetings listed with consumers, or consumer groups. We are aware of only one meeting by Mr. Mulvaney with the broad set of consumer and community based organizations with which we are familiar during his tenure. By contrast, in March 2017, then-CFPB Director Cordray met with 15 consumer, student or faith groups; nine business leaders or trade associations, including the Chamber of Commerce; and 10 government officials, including two members of Congress.[10]

We are especially concerned about signs that the agency seeks to reduce external engagement with individual consumers. We are particularly alarmed that Mr. Mulvaney has indicated that he may restrict public access to the consumer complaint database, a key way that the CFPB engages with members of the public. And while the CFPB's RFI on external engagement notes the agency's expectation that "entities that have engaged with the Bureau are likely to have useful information and perspectives about Bureau engagements," this document makes no mention of individual consumers.[11] More broadly, we are troubled that this RFI along with the others threaten to lead to less consumer protection, not more.

We urge CFPB leadership, as well as staff across all levels of the agency, to dedicate time to engaging directly with consumers and their representatives, as well as other stakeholders. Additionally, we urge the entire staff of the CFPB both to expand the agency's existing engagement practices, and to continue developing and refining ways to analyze and use the information that the CFPB receives through its external engagements.

Additional specific recommendations follow below.

A. Advisory Groups

The CFPB has established four advisory groups: the Consumer Advisory Board, the Community Bank Advisory Council, the Credit Union Advisory Council, and the Academic Research Council. By February 2018, the CFPB had conducted 47 meetings of its advisory groups, many of which included a public component. Meetings have been publicly announced, live streamed, and followed by summaries on the CFPB website.

We believe in the importance of these meetings both for advising the CFPB and for engaging the members of the public who view the proceedings. The Consumer Advisory Board (CAB), for example

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[7] *(Cancelled) Spring 2018 Community Bank Advisory Council Meeting,* CONSUMER FINANCIAL PROTECTION BUREAU (website visited April 16, 2018) https://www.consumerfinance.gov/about-us/events/archive-past-events/spring-2018-community-bank-advisory-council-meeting-washington-dc/

[8] *(Cancelled,) Spring 2018 Credit Union Advisory Council Meeting,* CONSUMER FINANCIAL PROTECTION BUREAU (website visited May 21, 2018) https://www.consumerfinance.gov/about-us/events/archive-past-events/spring-2018-credit-union-advisory-council-meeting-washington-dc/

[9] *Leadership calendar, Mick Mulvaney, March 2018,* CONSUMER FINANCIAL PROTECTION BUREAU (March 2018) https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_mick-mulvaney-calendar_03-2018.pdf

[10] *Leadership calendar, Richard Cordray, March 2017,* CONSUMER FINANCIAL PROTECTION BUREAU (March 2017) https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Director_Richard_Cordray_March_2017_Calendar.pdf

[11] *Request for Information, CFPB External Engagements,* 83 Fed. Reg. 8247, 8248 (Feb. 26, 2018)

provides market intelligence and expertise, and appropriately, its members bring a wide range of expertise to the CFPB. Its members include the director of Texas Appleseed, a public interest nonprofit dedicated to promoting social and economic justice, a legal aid attorney from Florida, a Boston law professor, a retired PNC Bank executive, and many others.[12] CAB Chairperson Ann Baddour, writes that "we have been able to offer new insights to the CFPB and ensure the agency work remains relevant in the face of evolving community experiences and market practices."[13]

We recommend that the CFPB increase the frequency of their meetings, and convene meetings for each advisory group at least three times per year to ensure that conversations and dialogue can address the most current and pressing issues. Further, we strongly support the continued transparency of the advisory group meetings. Meetings should continue to be advertised and summarized publicly, and broadcast in full whenever possible. Additionally, we recommend that at least one of these meetings for each of these groups take place outside of Washington.

Finally, though we recognize the value that industry representatives can bring to the CAB and its advisory mission, we recommend that a majority of the CAB be composed of individual consumers, consumer advocates, scholars, or others whose work focuses on protecting consumers.[14] As a body charged with advising the CFPB on its consumer protection functions, the CAB should be led by and consist of members whose work is focused on consumer protection. Further, the CFPB already sustains two industry-based advisory boards related to community banks and credit unions.

B. Field Hearings, Town Halls, and Roundtables

Through February 2018, the CFPB had held field hearings or town halls in 38 cities.[15] Each focused on a designated topic and engaged members of the public through public attendance and discussion and the showing of a live video that is later available on the CFPB's website.[16]

We strongly support and encourage further use of town halls, field hearings and roundtables to engage the public. We particularly urge the CFPB to maintain the transparency of these mechanisms, to continue including senior CFPB staff, including associate directors, in these events, and to continue holding them in locations across the country to provide a diverse range of consumers and other interested members of the public to attend and participate in person.

We also support the CFPB's focus on key issues that are before the agency in these meetings. One town hall meeting in 2012 focused on issues affecting military personnel, and included "26 representatives from such organizations as the Military Officers Association of America (MOAA), the Veterans of

[12] *Consumer Advisory Board, member biographies*, CONSUMER FINANCIAL PROTECTION CFPB, (September 2017) https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_CAB-Biographies_2017-2018.pdf

[13] *Annual Report Consumer Advisory Board,* CONSUMER FINANCIAL PROTECTION CFPB (2017) https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_cab-annual-report_fy2017.pdf

[14] We note this has been a strength of the CFPB in the past, contrasting with certain advisory boards associated with other financial regulators. For example, at the Commodity Futures Trading Commission, the Energy and Environmental Markets Committee contains only one public advocate; the balance represent commercial interests, with one professor funded by industry. *Energy and Environmental Markets Advisory Committee,* COMMODITY FUTURES TRADING COMMISSION (February 17, 2016) https://www.cftc.gov/About/CFTCCommittees/EnergyEnvironmentalMarketsAdvisory/emac_members.html

[15] *Consumer Financial Protect, by the numbers,* CONSUMER FINANCIAL PROTECTION CFPB (website visited April 16, 2018) https://files.consumerfinance.gov/f/documents/201701_cfpb_CFPB-By-the-Numbers-Factsheet.pdf

[16] Field hearings are available to view as archived videos on the CFPB's website at *https://www.consumerfinance.gov/about-us/events/archive-past-events/*

Foreign Wars (VFW), Iraq and Afghanistan Veterans of America (IAVA), the National Military Family Association (NMFA), and others as we talked about how the CFPB works to protect servicemembers, veterans, and military families."[17] Another town hall in 2011 in Maine focused on elder abuse, where "there are an estimated 14,000 incidents of elder abuse annually in Maine and at least 84 percent go unreported."[18] A field hearing in 2017 in Los Angeles focused on small business lending and featured testimony from the US Chamber of Commerce, a director of Union Bank, the owner of Plum Restaurants, community advocates, and others.[19]A field hearing in 2012 focused on payday lending included consumer and industry panels.[20] Town halls and field hearings play an important role in giving consumers a direct opportunity to talk to the CFPB about their most important issues and should be held as often as possible to allow the CFPB to hear directly from consumers as it decides how to handle pertinent issues.

C. Consumer Complaints, Stories, and Additional Engagement Venues

Other engagement mechanisms are also critical to the CFPB's ability to understand, react to, and inform consumers and other key stakeholders. We especially support the CFPB's direct engagement with consumers through its complaint tool and other mechanisms.

The CFPB's consumer complaint tool is an invaluable way for the CFPB to engage with the public.[21] Since its inception, the CFPB has collected more than 1 million consumer complaints. [22] Those complaints allow consumers to obtain tailored help. They also provide important information to the CFPB and to the public, as the CFPB publishes complaint data that can help other consumers learn about consumer financial products and potential risks.

Equally important are the CFPB's other day-to-day engagement mechanisms. The CFPB website allows consumers to tell "their stories," explaining: "We want to hear about your experiences with money and financial services, good and bad. The CFPB is listening."[23] Like individual complaints, these consumer stories can help inform the CFPB about key issues in the marketplace, and areas that may warrant further research. Through social media, the CFPB can promote and explain other engagement opportunities.[24]

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[17] Holly Petraeus, *Making new partners at our first VSO-MSO town hall,* CONSUMER FINANCIAL PROTECTION CFPB (March 19, 2012) https://www.consumerfinance.gov/about-us/blog/making-new-partners-at-our-first-vso-mso-town-hall/

[18] Skip Humphrey, *Older Americans Need to be Armed Against Financial Fraud,* CONSUMER FINANCIAL PROTECTION CFPB (Dec. 10, 2011) https://www.consumerfinance.gov/about-us/newsroom/older-americans-need-to-be-armed-against-financial-fraud/

[19] *Field hearing on small business lending in Los Angeles,* CONSUMER FINANCIAL PROTECTION CFPB, (May 10, 2017) https://www.consumerfinance.gov/about-us/events/archive-past-events/field-hearing-about-small-business-lending-los-angeles-ca/

[20] *CFPB Convenes Field Hearing In Birmingham, Alabama On Payday Lending*, CONSUMER FINANCIAL PROTECTION CFPB (Jan 18, 2012) https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-CFPB-convenes-field-hearing-in-birmingham-alabama-on-payday-lending/

[21] *Consumer Complaint Data Base*, CONSUMER FINANCIAL PROTECTION CFPB (website visited April 26, 2018) https://www.consumerfinance.gov/data-research/consumer-complaints/

[22] *Consumer Complaint Data Base*, CONSUMER FINANCIAL PROTECTION CFPB (website visited April 26, 2018) https://www.consumerfinance.gov/data-research/consumer-complaints/

[23] *Your Money. Your Story*. CONSUMER FINANCIAL PROTECTION BUREAU (website visited May 4, 2018) https://www.consumerfinance.gov/your-story/

[24] For example, a Facebook posting explained that after opening remarks from a senior CFPB official, "we'll get right to the most important part of this event: a community panel and an open mic session. We'll listen to and learn from community members' experiences with student loans, credit cards, mortgages, and other consumer financial

Small group meetings, attendance at conferences, and other opportunities to meet and speak with consumers, consumer advocates, scholars, and industry and government entities are also critical ways for CFPB staff to engage with key stakeholders and should be widely encouraged.

The CFPB's efforts to engage with consumers in languages other than English help ensure that the CFPB can understand and react to the full range of consumer experiences and should be continued and expanded.[25]

We urge the CFPB to continue to promote and expand these mechanisms for engagement. In particular, we recommend:

1) Continued engagement with a diverse set of stakeholders. Through meetings, conferences, and other venues, the CFPB should engage with consumers and consumer groups that represent the full range of consumer experiences. The experiences and needs of low-income consumers may differ from those of higher-income consumers, for example. Similarly, consumers with bank accounts likely have different concerns from those without bank accounts, as do those consumers who are frequent internet users and those who are not. It is important that the CFPB engage with and understand the experiences of all these sets of consumers.

2) Continued development of mechanisms to reach a diverse set of stakeholders. To reach a wide and diverse range of consumers, the CFPB should continue to promote and develop its consumer complaint tools, its "Tell Your Story" website, its other technology-based tools, and its language-access initiatives. This promotion and development should include making all of the CFPB's tools easily available on the CFPB's website. For example, the "Tell Your Story" website and other tools should be under the "Consumer Tools" menu. To increase the CFPB's reach, we recommend media releases directed to regional and community media, including local newspapers that may notice upcoming public events at no cost. The CFPB should also continue exploring partnerships with community groups to organize and promote events. Similarly, the CFPB should explore or continue exploring partnerships with other federal, local and state agencies (such as courts and libraries) to inform consumers and other stakeholders about engagement opportunities.

3) Explore new mechanisms to engage with individual consumers. For example, the CFPB could organize "listening sessions," which would allow consumers to engage in open ended discussions about financial services concerns with senior CFPB staff. The CFPB has some experience with events like these in the industry context. Through "Project Catalyst," the CFPB has held four or five "office hours" annually in San Francisco, New York, and Austin, Texas to connect with financial technology practitioners.[26] Similar opportunities for consumers could yield valuable insight and help consumers better understand how the CFPB works for them.[27]

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products and services."*CFPB Town Hall Event in Minneapolis,* FACEBOOK (website visited April 16, 2018) https://www.facebook.com/events/1022158967808354/

[25] *CFPB in Your Language,* CONSUMER FINANCIAL PROTECTION BUREAU (website visited May 4, 2018) https://www.consumerfinance.gov/language/.

[26] CFPB Annual Report 2017, Consumer Financial Protection Bureau (2017) https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201706_cfpb_Semi-Annual-Report.pdf

[27] We are concerned with rebranding the CFPB as a "bureau", which will frustrate the efforts to date to establish a public face.

In addition to structures and strategies, the CFPB must nurture a culture that promotes public engagement with consumers. Moreover, the lessons learned and information gathered from public engagement, especially with consumers, should drive policy decisions at the agency. Already, financial firms retain lobbyists with ample access to all federal agencies, including the CFPB. The CFPB must work diligently to hear from those without generous sponsorship from industry.

It is essential that the CFPB maintain a policy and procedure for external engagements, such as a minimum number of roundtables, advisory board meetings, and/or teleconferences. It is equally important to take public engagement seriously. Many of the engagements structures now in place didn't exist when the CFPB began operations, or were not identified in the statute, but emanated from that initial culture of engagement. Public engagement has been and should remain a hallmark of the CFPB. Congress created this agency to protect consumers, and this consumer protection mandate requires a pro-active posture of public engagement.

Sincerely,

Allied Progress

Americans for Financial Reform

Atlanta Legal Aid Society, Inc

California Reinvestment Coalition

Center for Responsible Lending

Consumer Action

Consumer Advocacy & Protection Society (CAPS)

Consumer Federation of America

Demos

Housing and Economic Rights Advocates

Interfaith Center on Corporate Responsibility

Jacksonville Area Legal Aid, Inc.

Main Street Alliance

Mississippi Center for Justice

NAACP

National Association of Consumer Advocates

National Consumers League

National Consumer Law Center (on behalf of its low-income clients)

Public Citizen

Public Justice Center

Public Law Center

Tennessee Citizen Action

Tzedek DC

US PIRG

Virginia Organizing

Consumer Financial Protection Bureau
1700 G St., N.W.
Washington, DC 20552
Bureau of Consumer Financial Protection

Docket No. CFPB-2018-0014

Re: CFPB RFI - Request for Information Regarding the Bureau's Consumer Complaint and Consumer Inquiry Handling Processes

July 16, 2018

Dear Acting Director Mulvaney:

Thank you for your interest in our feedback to your Request for Information (RFI) regarding the Bureau's consumer complaint and consumer inquiry handling processes. The undersigned consumer protection, civil rights, fair lending, higher education and community groups welcome the opportunity to express our fervent support of the Consumer Financial Protection Bureau's (CFPB) public complaint process and address your request as to whether changes to existing practices would be appropriate.

Our organizations are grateful for the Bureau's historical appreciation for stakeholder feedback in refining these vital processes for consumers. Since the Consumer Bureau's inception, the agency has had a record of thoughtfully considering input from a variety of sources in creating its first-class complaint system. Individuals with unresolved financial complaints often find the CFPB is one of the very few options left for them to turn to for help in solving a dispute with a financial services company.

The Bureau's primary objective for its consumer complaint and inquiry process must remain focused on consumers: to assist them in receiving timely responses and resolutions to their financial questions and complaints.

Our organizations represent the consumers, seniors, servicemembers, veterans, students and underrepresented communities across our nation who rely on the consumer protections that the CFPB was created to support and enforce. It is essential that the CFPB not retreat from its core mission to protect and inform consumers, and to make our financial markets more fair, accountable, transparent and competitive.

The Bureau should improve transparency in its complaint process.
The Bureau should not focus its time and effort on "reclassifying" consumers' complaint submissions, rather it should increase and improve complaint transparency by making details of financial problems and resolutions a primary

source of information for the public in both the public complaint database and in regularly published reports.

We urge the Bureau to expand the use of the complaint feedback process to include public access. Specifically, the CFPB could enhance its complaint process by making the newest portion of the system, the Feedback portion, publicly available as soon as the feedback is reported to the Bureau. Complaint outcomes offer invaluable information to individuals who are trying to evaluate a company's commitment to its customers. Consumers who use the complaint process as a pre-purchase tool would be well served to review the detailed feedback that individuals provide once they've received a response to a complaint filed with the CFPB. Consumer satisfaction or dissatisfaction in a complaint's outcome – and the *details why*--are precisely the kind of information consumers value to indicate if a company has a habit of standing behind its products and services.

This excellent addition to the complaint process provides firsthand feedback for consumers to determine whether a company stands behind its services and customer service claims. It allows the public to seek out firms that have positive complaint resolution practices.

The CFPB's system permits for both positive and negative feedback from consumers which allows businesses that cater to customers to stand out in this sort of system, and for other companies to strive to achieve that recognition through the feedback process. Sharing complaint outcome details with the public would enhance the valuable complaint tool the Bureau currently offers, and reduce the need to rely on its supervision and enforcement authority. Making consumer complaint feedback more transparent inspires corporate accountability and encourages the market to monitor itself.

Public access to this final portion of a complaint's lifecycle offers the public the opportunity to hold the CFPB accountable as well. Direct consumer feedback helps the CFPB better recognize companies that are consistently providing excellent customer service and companies that are falling short. Firsthand feedback on complaint outcomes can alert the Bureau and businesses to remaining unresolved problems, communications breakdowns, and the potential existence of festering harmful trends.

Here are some other recommendations to improve the CFPB's complaint process:

Complaint resolution details should be featured in an annual public report. The Bureau should make it possible for consumers to see how individual companies are handling the complaints they receive in the database. A company "snapshot" could include an overview of response times, explanations and relief. Resolutions should be broken down by monetary relief and include dollar amounts received, combined with the type of complaint filed and company name. Non-monetary relief should report the specific actions taken by a company, such as "Error removed from credit bureau records" and "interest rate reduced." Additional complaint resolution information such as the percentage of complaints resolved--broken down by method and company--should be released in an annual specialty report. A summary of resolution details could also appear when a consumer hovers over a company name in the public database.

Complaint explanation details should be publicly reported. The vast majority of consumers receive a private explanation in response to their complaints. Consumers have frequently reported that they are not provided with a meaningful company response to their complaint, receiving instead a nebulous, unresponsive reply. Details from company explanations should be transparent to the public and reported in summary form. The Bureau should compile company responses and provide the public with the primary explanations consumers are receiving. Response examples might include why a credit line was not increased or a loan was denied. Companies are required to provide complainants with *tailored* responses, rather than a stock, vague reply that does not address the consumer's concerns. In a monthly or specialty report, the Bureau should publicly disclose companies' most common response examples, including vague replies. How a company typically responds to its customers' complaints is precisely the type of helpful information consumers can use when evaluating which businesses to engage with. Highly responsive companies would benefit from this public disclosure, even when the response is not in the consumer's favor.

Consumer inquiries should be recorded and reported.
A CFPB record should be kept registering the type of financial product or service a consumer has called to inquire about, as well as detailed categories of topics raised. The CFPB should track the topics inquired about. If the Bureau's Division of Consumer Education and Engagement has not already addressed the most requested topics in its publications it should create new financial education materials or additions to the Ask CFPB section of its website. Names of companies should also be logged along with a note as to whether the consumer's inquiry has been addressed.

Consumers--not companies--should distinguish if their inquiry is a complaint or a question. If it is not abundantly clear to a CFPB phone representative, consumers should be asked if their inquiry is a complaint, and if so, they should be assisted in filing a formal complaint. Conversely, the consumer should be the one to reclassify her complaint as an inquiry if appropriate, but the focus of the Bureau's attention should be on response and resolution to the consumer rather than what category to classify their communication.

Consumer representation must continue for complaint assistance.
It is essential that the Bureau continue to allow consumers' credit and housing counselors, attorneys and other representatives assist individuals in filing a financial complaint. Consumer advocates are often more familiar with the complaint

system and better able to effectively describe the issue(s) to enable the company to better understand the problem to properly address it. This assistance benefits the Bureau as well as the consumer.

CFPB should maintain its indispensable language access line for inquiries and complaints from limited English consumers.
To its credit, the Bureau accepts questions, complaints and comments regarding financial products and services in more than 180 languages. Limited English Proficiency (LEP) consumers have a place to lodge a complaint, expect a response and hopefully receive a solution to their financial problem. This access to information and action provides a vital service to LEP consumers that should be maintained. In addition to critical phone line access, the CFPB should develop an online system that allows LEP consumers to submit written complaints in their preferred language, which will expand access and protection for LEP consumers.

The Bureau should report on company communication with complainants.
How a company communicates with consumers reflects its customer responsiveness. For instance, if a company does not respond to a consumer complaint, the Bureau should report it in the database as "No response." Companies that fail to provide a response to a complaint within 60 days should be disclosed to the public in monthly or specialty reports. This type of public reporting would allow consumers to see the percentage of complaints to which a specific company does *not* respond in a timely manner or at all.

The Bureau should require timely, tailored company responses.
The Bureau should require all companies supervised by the CFPB to adequately respond to and attempt to resolve consumer complaints within the 15 and 60-day time frames. The CFPB should pursue companies that do not respond to or resolve consumer complaints and hold them more accountable. If a company is too reliant on a boilerplate, standardized response to customers, the CFPB should review its response history during supervisory examinations. The Bureau should follow up with unresponsive companies directly and press them to provide more detailed, tailored responses and resolutions, both publicly and privately.

All consumer complaints received by the Bureau should be reported publicly.
All complaints filed with the CFPB should become part of the public database, including complaints referred to other agencies or involved in a lawsuit. These complaints can include a note that they were referred to a specific agency or not addressed by the Bureau due to litigation, but the existence of these complaints should nonetheless be reported publicly. Complaint reports should also include all complaints to allow researchers and the public to review the full complement of complaints received and evaluate how widespread a harmful practice may be.

All complaints should be listed by the specific company the consumer complained about, as well as by the parent company's name. The Bureau should add a field to the database that lists each complaint in the public database by the company subsidiary name used by the consumer in the complaint. Currently complaints are listed typically by a field containing just the parent company's name. For example, the only place that the specialty consumer reporting agency ChexSystems appears currently is in optional complaint narratives section, since it is owned by Fidelity National Information Services, Inc. (FNIS). No consumer knows FNIS. Reporting complaints by the company subsidiary name that a consumer would recognize makes the complaint far more useful to consumers wanting to check on previous complaints about a firm. The additional field would greatly help the public evaluate a company's overall practices and help to hold the company accountable.

Complaints should be transmitted from the Bureau to each company complained about. Depending on the financial product or service, only a portion - in some cases less than half of complaints received (only 47% of debt collection cases, for example) are transmitted by the CFPB to the aggravating company. This fails to achieve one of the Bureau's primary functions of "collecting, investigating, and responding to consumer complaints," nor does it provide the public with the vital information needed to help consumers make responsible financial decisions. Every effort must be made (including use of U.S. Postal mail) to ensure that a consumer's complaint reaches the company, even if the company is not connected to the portal, to increase the likelihood of resolution.

The Bureau should improve the targeting of its scrubbing standard. While consumer privacy is imperative, sometimes too much information is redacted from complaint details (dates, times and numbers), and what data is removed often seems inconsistent. While personally identifiable information should remain redacted, details about the situation forming the basis of the complaint should be made publicly available so that consumers can better understand what happened.

Consumer complaint data should be made more accessible and more user-friendly. The Bureau should be commended for continuously seeking feedback from the public and for its constant improvements to the database, which are regularly published in updated release notes. For example, as recently reported, the interface has seen improved tools for filtering and visualizing complaints [Consumer Financial Protection Bureau, *Consumer Complaint Database Release Notes for 14 November 2017*, 14 November 2017, archived at https://web.archive.org/web/20180514030347/http://cfpb.github.io/api/ccdb/release-notes.html]. Nevertheless, the Bureau should continue to demand that its online database vendor Socrata create a more entry-level, user-friendly interface so consumers can more intuitively select the most useful dataset views. Power users often simply download the dataset into their preferred analysis software. It makes sense to better optimize the online viewer for entry-level users—average consumers. The *Read Consumer Narratives* section is the most valuable option for consumers because it supplies complaint details. The *View Complaint Data* section is too similar to *Read Narratives* and should be made easier for consumers to sort or filter. Consumers will not know to convert data to columns in *View data in Socrata*, nor how to best review the columns.

The consumer complaint database should be made more accessible to small business owners. The complaint database should be more available as a tool for small business owners seeking to submit concerns about financial products and services. While individual consumers have filed approximately 1.4 million complaints with the Bureau, an estimated 911 small business-related complaints have been filed with the CFPB from 2011 through the first half of 2017, according to a review by the California Reinvestment Coalition. The Consumer Bureau should improve outreach and enhance its website to make clear that small business owners are welcome to file financial complaints. Making the complaint database more accessible to consumers who own small businesses would empower small business owners to apply this tool and help the CFPB exercise its existing authority to identify and enforce fair lending laws, and to develop a critically needed small business data collection rule.

The Bureau must maintain public access to its invaluable complaint database. The CFPB's public complaint database is a trustworthy tool that empowers individuals to inform and protect themselves in the marketplace. It helps consumers evaluate a company's practices and creates incentives for companies to treat their customers fairly. It helps both consumers and businesses resolve problems when they arise and helps the market reward good products and services by providing consumers with the ability to publicly share their experiences. The complaint database also allows companies to identify and correct problems on their own without the impetus of a new rule or enforcement action.

Providing consumers access to a public complaint database fulfills the Bureau's obligations to ensure that:

1) "consumers are provided with timely and understandable information to make responsible decisions about financial transactions"; and

2) consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination."[1]

These obligations, combined with the Bureau's statutory function of "collecting, researching, monitoring, and *publishing* information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers" all add up to a powerful argument for the vital role a public database plays in advancing the legally mandated work of the Bureau.

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[1] Dodd-Frank Section 1021

The CFPB's public complaint reporting and analysis is beyond useful; the Bureau's collection and dissemination of consumer complaint information is an indispensable resource for consumers to empower and protect themselves in the marketplace.

Conclusion

We call on the Bureau to focus on response and resolution to consumer inquiries and complaints. Any changes to existing practices would *not* be appropriate or helpful in delivering on its duty to provide consumers with timely and understandable information about consumer financial products and services, and to protect consumers from harm.

We urge the Bureau to maintain public access to the complaint database and to include additional detailed data in its statutory reports to provide the most meaningful information possible for consumers to make responsible financial decisions.

We must once again note our objection to the CFPB's reliance on burdensome RFIs that appear designed primarily to divert valuable consumer advocacy and third-party resources and create unnecessary opportunities for industry to circumvent or eliminate thoughtful, thorough positions and processes already evaluated and crafted by the Consumer Bureau. We remain gravely concerned about attempts to weaken consumer protection through this RFI process.

Thank you for taking the time to thoughtfully review our comments.

Sincerely,

Allied Progress
Atlanta Legal Aid Society
Americans for Financial Reform
Arizona PIRG
Association for Neighborhood and Housing Development
Bronx Legal Services
Brooklyn Legal Services
CALPIRG
California Reinvestment Coalition
Center for Digital Democracy
Center for Economic Integrity
Center for NYC Neighborhoods
Center for Responsible Lending
COPIRG
Community Legal Services of Philadelphia
Connecticut Fair Housing Center
ConnPIRG

Consumer Action
Consumer Federation of America
Consumers Union
Demos
Empire Justice Center
Florida PIRG
Georgia PIRG
HomeSmart NY
Illinois PIRG
Indiana PIRG
Interfaith Center on Corporate Responsibility
Iowa PIRG
Legal Services NYC
Main Street Alliance
Manhattan Legal Services
Maryland PIRG
MASSPIRG
MoPIRG
Mobilization for Justice
National Association of Consumer Advocates
National Association of Consumer Bankruptcy Attorneys
National CAPACD
National Community Reinvestment Coalition
National Consumer Law Center (on behalf of its low income clients)
National Consumers League
National Fair Housing Alliance
National Housing Resource Center
National Urban League
New Yorkers for Responsible Lending
NCPIRG
NHPIRG
NJPIRG
NMPIRG
Ohio PIRG
Oregon PIRG
PennPIRG
PIRG in Michigan
Privacy Rights Clearinghouse
Privacy Times
Public Citizen
Public Justice
Public Law Center
Queens Legal Services
RIPIRG
Staten Island Legal Services
Student Debt Crisis

The Institute for College Access & Success
Tennessee Citizen Action
TexPIRG
UnidosUS
U.S. PIRG
WASHPIRG
WISPIRG
Woodstock Institute
World Privacy Forum

Comment Submitted by Benet Magnuson, Kansas Appleseed Center for Law and Justice

The is a Comment on the **Consumer Financial Protection Bureau** (CFPB) Notice: **Requests for Information: Bureau Civil Investigative Demands and Associated Processes**

For related information, **Open Docket Folder**

Comment Period Closed
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Submitter Information

Submitter Name:
Benet Magnuson

Organization Name:
Kansas Appleseed Center for Law and Justice

Comment

April 26, 2018

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Request for Information (RFI) Regarding the Bureau Civil Investigative Demands and Associated Processes (Docket No. CFPB-2018-001)

Dear Ms. Jackson:

Thank you for the opportunity to comment in response to the Consumer Financial Protection Bureaus (CFPBs) Request for Information regarding Civil Investigative Demands (CIDs) and associated processes.

These comments are submitted on behalf of the Kansas Appleseed Center for Law and Justice (Kansas Appleseed). Kansas Appleseed is a 501c3 nonprofit, nonpartisan justice center dedicated to the belief that Kansans, working together, can build a state full of thriving, inclusive, and just communities. We conduct research, intensive grassroots engagement, and policy advocacy to work towards a future where all Kansans have the resources they need to support themselves and raise a healthy family; where all Kansans can participate fully in the community under equal protection of the law; and where all Kansans benefit from a fair and effective judicial system.

The CFPB plays a critically important role in realizing Kansas Appleseeds vision of a state where all Kansans have the resources they need to support themselves and raise a healthy family. The CFPB was created to address the systemic consumer protection problems that led to the Great Recession in which thousands of Kansas families were harmed (in fact, Kansas fell further than the nation as a whole during the Great Recession). Since its creation, the CFPBs investigations and enforcements have returned nearly $12 billion to 29 million Americans who were harmed by consumer protection violations.

Recent apparent changes in the CFPBs investigation and enforcement processes have raised significant concerns for Kansas communities (see, e.g., the January 19, 2018, article CFPB drops Kansas payday lending case, stoking fears Trump is backing off the industry in the Kansas City Star).

Kansas Appleseed therefore urges the CFPB not to adopt any changes regarding CIDs and associated processes that would weaken the CFPBs investigations of consumer protection violations. CIDs and associated processes must remain responsive enough to provide CFPB staff with the ability to quickly and effectively initiate and execute investigations into consumer protection violations, and CFPB staff must be able to conduct CIDs independent of political pressures.

Thank you for the opportunity to submit these comments.

April 25, 2018

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Dear Ms. Jackson

Please see the submission below in response to the Consumer Financial Protection Bureau's Request for Information ("RFI") Regarding Bureau Civil Investigative Demands and Associated Processes (Docket No. CFPB-2018-0001). We are legal academics who research and teach about consumer protection law, public enforcement of civil law, administrative law and related topics.[1] Many of the below signatories also have experience in public enforcement of consumer protection laws. We appreciate the opportunity to submit these comments for your consideration.

Prentiss Cox
Associate Professor of Law, University of Minnesota Law School
Former Manager, Consumer Enforcement Division, Minnesota Attorney General's Office

Christopher L. Peterson
John J. Flynn Endowed Professor of Law, University of Utah, S.J. Quinney College of Law
Senior Fellow, Consumer Federation of America
Former Senior Counsel, Office of Enforcement, Consumer Financial Protection Bureau

Richard Alderman
Professor Emeritus, Director Center for Consumer Law, University of Houston Law Center

William Black
Associate Professor of Economics and Law, University of Missouri - Kansas City

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

Lauren Dreshman
Associate Professor, Paralegal and Law Program Director, Sinclair College

[1] Affiliations of signatories are for identifications only and do not represent the views of the various institutions.

Kate Elengold
Clinical Associate Professor of Law, University of North Carolina School of Law
Director, Consumer Financial Transactions Clinic
Former Trial Attorney, United States Department of Justice

Kathleen Engel
Research Professor, Suffolk University Law School

Jeffrey Gentes
Visiting Clinical Lecturer, Yale Law School

Robert Fellmeth
Price Professor of Public Interest Law, University of San Diego School of Law

Linda Fisher
Professor of Law, Seton Hall University School of Law

Anne Fleming
Associate Professor of Law, Georgetown University Law Center

Pamela Foohey
Associate Professor of Law, Indiana University, Maurer School of Law

Judith Fox
Clinical Professor, Notre Dame Law School

Michael Greenfield
George Alexander Madill Professor of Contracts and Commercial Law, Washington University in St. Louis

Dalie Jimenez
Professor of Law, University of California, Irvine School of Law

Kathleen Keest
Retired
Former Iowa Attorney General's Office, Consumer Protection Division

Daniela Kraiem
Associate Director, Women and the Law Program, American University, Washington College of Law

Lea Krivinskas Shepard
Professor of Law, Loyola University Chicago School of Law

Adam Levitin
Agnes N. Williams Research Professor, Professor of Law. Georgetown University Law Center

Angela Littwin
Ronald D. Krist Professor of Law, University of Texas

Cathy Mansfield
Professor of Law, Drake University Law School

Nathalie Martin
Frederick M. Hart Chair in Consumer and Clinical Law, University of New Mexico School of Law

Patricia McCoy
Professor of Law, Boston College Law School

Christopher Odinet
Horatio C. Thompson Assistant Professor of Law, Southern University Law Center

Gary Pieples
Teaching Professor & Clinic Director, Syracuse University

David Reiss
Professor of Law, Brooklyn Law School

Jacob Rugh
Assistant Professor of Sociology, Brigham Young University

Ann Shalleck
Professor of Law and Carrington Shields Scholar, American University Washington College of Law

Alexandra Sickler
Associate Professor of Law, University of North Dakota School of Law

Norman I Silber
Professor of Law, Maurice A. Deane School of Law, Hofstra University
Senior Research Scholar, Yale Law School

Neil Sobol
Professor of Law, Director of Legal Analysis, Research & Writing, Texas A&M University School of Law

Gregory Squires
Professor of Sociology and Public Policy & Public Administration, George Washington University

Mark E. Steiner
Professor of Law, South Texas College of Law Houston

Mark Totten
Associate Professor, Michigan State University College of Law

Rebecca Tushnet
Frank Stanton Professor of First Amendment Law, Harvard Law School

William Vukowich
Professor of Law, Georgetown University

Alan White
Professor, CUNY School of Law

Amy Widman
Associate Professor, Northern Illinois University College of Law

Arthur Wilmarth
Professor of Law, George Washington University Law School

SUMMARY

* The statutory authority and regulations for Bureau CID issuance are modeled on FTC powers. Decades of experience by the FTC and state attorneys general with substantially similar CID authority support broad discretion and flexibility in CID use for effective public enforcement of UDAP laws. Courts have consistently so held.

* The Bureau's enforcement actions to date have produced remarkable results for consumers. Even if the Bureau decides to shift its enforcement strategy, there is no need to change its CID procedures to accomplish this new direction, especially given the Bureau's statutory mandate to enforce consumer protection under a plethora of different federal laws.

* The Office of the Inspector General of the Federal Reserve Board recently conducted an independent examination of the Bureau's use of CIDs and concluded that its procedures maintained an appropriate balance between the Bureau's investigatory needs and the burden on CID recipients, and found no substantial irregularities or deficiencies in Bureau CID use.

THE BUREAU NEEDS BROAD AND FLEXIBLE CID AUTHORITY TO SUPPORT EFFECTIVE UDAP AND OTHER CIVIL LAW ENFORCEMENT.

One of the most salient features of public enforcement of federal and state UDAP law is the authority of public enforcers to engage in pre-complaint investigations. Numerous public enforcement officials and academic commentators have remarked on the importance of Civil Investigative Demand ("CID") authority to effective public enforcement.[2]

Although the Bureau is a relatively recent creation, its CID authority reflects decades of experience in public enforcement of UDAP laws, and in particular the experience of the other

[2] Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 Notre Dame L. Rev. 747, 761 (2016) (Professor Citron is the Morton & Sophia Macht Professor of Law, University of Maryland Carey School of Law; an Affiliate Scholar, Stanford Center on Internet & Society; and an Affiliate Fellow, Yale Information Society Project. Writing about UDAP actions on privacy issues, she observes that "… civil investigative demands (CIDs), are crucial to investigations."); Pamela H. Bucy, *Federalism and False Claims*, 28 Cardozo L. Rev. 1599, 1608 (2007) (Professor Bucy, Research Professor of Law, University of Alabama School of Law, is a former Assistant United States Attorney. She completed a study of thirteen states with state laws similar to the federal False Claims Act. Based on interviews, she concluded based on interviews that "[a]ll of the offices with CID authority agree that CIDs are extremely powerful prosecutorial tools. In the Attorney General's offices in the eight states without CID powers, all but two indicated that such powers would be helpful."); Darren Bush, *The Incentive and Ability of the Federal Trade Commission to Investigate Real Estate Markets: An Exercise in Political Economy*, 35 Real Est. L.J. 33, 37 (2006) (Professor Bush, University of Houston Law School, holds a Ph.D. in economics and J.D. and is a former DOJ attorney in antitrust enforcement. He notes that "the FTC's ability to obtain complete and accurate information primarily rests with the Civil Investigative Demand (CID) and subpoena.")

primary federal UDAP regulator, the Federal Trade Commission (FTC).[3] The Bureau's CID powers also align with the authority given to state attorneys general to enforce UDAP laws. We urge the new leadership of the Bureau to consider any reforms to CID processes in light of the accumulated knowledge gained from decades of public enforcement experience of UDAP laws by a diverse range of public officials.

A. The Bureau's CID Authority Parallels the CID Authority of the FTC and Other Public Enforcers of Consumer Protection Laws.

Any consideration of possible changes to the CID authority of the Bureau must start with an understanding of the place of pre-complaint investigatory procedures in public enforcement. The specific CID authority of the Bureau and its procedures for exercising that authority, as articulated in the Dodd-Frank Act and in the Bureau's regulations, are substantially similar to the authority and procedures that govern other public enforcers.

The other primary federal regulator with UDAP authority, the FTC, is the closest point of comparison. The substance of what constitutes a deceptive or unfair practice for Bureau-regulated entities mirrors the UDAP standards developed by the FTC in the early 1980s.[4] Similarly, the CID authority of the Bureau in the Dodd-Frank Act is substantially derived from and comparable to the FTC's CID authority.[5]

The same is true of the Bureau's regulations implementing its CID authority. In adopting its CID regulations, the Bureau expressly noted its reliance on existing FTC procedures:

> [T]he Final Rule is modeled on investigative procedures of other law enforcement agencies. For guidance, the Bureau reviewed the procedures currently used by the FTC, the Securities and Exchange Commission (SEC), and the prudential regulators, as well as the FTC's recently proposed amendments to its nonadjudicative procedures. In light of the similarities between section 1052 of the Dodd-Frank Act and section 20 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 et seq., the Bureau drew most heavily from the FTC's nonadjudicative procedures in constructing the rules.[6]

The Office of the Inspector General of the Federal Reserve Board of Governors concluded in its recent report on the Bureau's use of CIDs that, "the FTC's CID authority is similar to the CFPB's."[7]

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[3] We use the abbreviation "UDAP" to mean either Unfair or Deceptive Acts or Practices, the law enforced by the FTC, or any other federal or state variant of that law, including the Bureau's authority over abusive conduct.

[4] *Compare* 12 U.S.C. § 5531(c) *with* FTC Policy Statement on Unfairness (appended to International Harvester Co., 104 F.T.C. 949, 1070 (1984)); *Compare* CFPB Supervision and Examination Manual UDAAP 5-7 (August 2017) *with* FTC Policy Statement on Deception, 103 F.T.C. 174 (1984).

[5] *Compare* 12 U.S.C. § 5562 (CFPB Authority) *with* 15 U.S.C. § 57b-1 (FTC authority)

[6] 77 Fed. Reg. 39101 (June 29, 2012).

[7] The Office of Inspector General of the Board of Governors of the Federal Reserve System, *The CFPB Generally Complies with Requirements for Issuing Civil Investigative Demands but Can Improve Certain Guidance and Centralize Recordkeeping*, Evaluation Report 2017-SR-015 at 5 n.9 (September 2017) [hereinafter "Inspector

Courts resolving disputes over the proper use of CID authority by the FTC have consistently upheld the need for a broad and flexible application of this investigative authority. In the seminal case on the use of CIDs by federal agencies, *U.S. v. Morton Salt Co.*,[8] the United States Supreme Court made clear that CID authority of the FTC is not to be confused with, and thus cannot be restricted by, the limits on discovery in judicial actions. As the Court explained:

> The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.[9]

Federal courts have consistently given a wide berth to the FTC in structuring its CIDs and rejected challenges from CID recipients premised on the relevance of the requested information. These judicial opinions note the importance of not prematurely limiting the flexibility and scope of FTC investigations. As one court observed, it is improper to ask the FTC to "prove what it is investigating as a condition of the legitimacy of the investigation."[10] In an oft-cited *en banc* decision of the United States Court of Appeals for the District of Columbia, rejecting a challenge to a CID issued by the FTC, the court held that "a wide range of investigation is necessary and appropriate where, as here, multifaceted activities are involved, and the precise character of possible violations cannot be known in advance,"[11] and the CID was proper because it was not "obviously wrong."[12]

Similar CID authority also is a cornerstone of the power that state attorneys general hold as public enforcers of state UDAP laws. Almost every state attorney general can use CIDs when investigating possible violations of state laws.[13] While the specific powers and requirements vary by state,[14] the need for some general statement of notice as to the possible violations and the

General Report"]. The Inspector General also observed that "[t]he CFPB modeled the investigation rules on the investigative procedures of other federal agencies with enforcement authority, such as the FTC and the U.S. Securities and Exchange Commission." *Id.* at 5. *Compare* 12 C.F.R. 1080.5-6 (CFPB CID regulations) *with* 16 C.F.R. 2.7 (FTC CID regulations).

[8] 338 U.S. 632 (1950).

[9] *Id.* at 633-634.

[10] *F.T.C. v. Church & Dwight Co.*, 747 F. Supp. 2d 3, 6 (D.D.C. 2010), aff'd, 665 F.3d 1312 (D.C. Cir. 2011),

[11] *FTC v. Texaco*, 555 F.2d 862, 877 INTERNAL (D.C. Cir. 1977) (en banc).

[12] *Id.* at 877 n.32.

[13] National Association of Attorneys General (Emily Myers, Ed. And Principal Author), *State Attorney General Powers and Responsibilities* 232-233 (3d Ed. 2013) (noting that all but four state attorneys general have CID authority for consumer protection enforcement, and in two of those states the CID authority rests with a different consumer protection regulator).

[14] *See generally* National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 13.3 (9th Ed. 2016) (analyzing requirements of varying state CID laws).

power to compel document production and testimony are common.[15] Like their federal counterparts, state courts reviewing CID requests typically allow state attorneys general a broad purview in their use of CIDs. As Professors Dee Pridgen and Richard Alderman observe, state "pre-complaint discovery power is usually construed quite liberally by the courts to allow the state attorney general's office to effectively enforce the state consumer protection statute."[16]

Judicial decisions on the Bureau's authority to enforce its CIDs reflect the broad discretion afforded the agency to pursue its investigations. Federal courts have overwhelmingly granted enforcement of Bureau CIDs.[17] As a district court observed in a February 28, 2018 decision granting a Bureau petition to enforce a CID, "like every other administrative agency, the CFPB can define the contours of its investigation 'quite generally' while still complying with its statutory obligations."[18] Of course, CID authority has limits. In particular, courts will not enforce a CID that describes an investigation beyond the authority of the agency, which occurred with the Bureau when a court rejected enforcement of a CID on determining the Bureau lacked authority over the CID recipient.[19]

B. Discretion and Flexibility in CID Authority Allows the Bureau to Tailor CID Requirements to Specific Applications of Its Broad Enforcement Authority.

Decades of experience with CID use by a variety of federal and state enforcers demonstrate that broad and flexible CID authority is critical to effective, efficient and fair public enforcement of consumer protection laws. A concern raised by the focus of the RFI solely on the rights of investigatory targets is that the Bureau will consider promulgating rules that would later prevent it from adapting its investigatory procedures to the needs of the different sorts of investigations undertaken by the Bureau. Even if rules restricting CID use were consistent with the Bureau's substantial statutory investigative authority in the Dodd-Frank Act, it is difficult imagine how the Bureau can impose limitations on the use of CIDs that would be equally appropriate in the wide variety of enforcement contexts for which it is responsible to act under the Dodd-Frank Act.

1. Varying Enforcement Cases Require Varying Uses of CID Authority.

The Bureau has an exceptionally broad enforcement mandate. To fulfill that mandate, CID authority cannot be bound by the kinds of rigid rules that govern litigation. In some situations, the Bureau needs to request relatively small amounts of material from an investigatory target. In

[15] *Id.*
[16] Dee Pridgen and Richard Alderman, *Consumer Protection and the Law* § 7:2 (2017).
[17] *Consumer Fin. Prot. Bureau v. Great Plains Lending, LLC*, 846 F.3d 1049 (9th Cir.), cert. denied, 138 S. Ct. 555 (2017) (affirming district court refusal to set aside Bureau CID); *Consumer Financial Protection Bureau, V. Heartland Campus Solutions, Esci.*, No. CV 17-1502, 2018 WL 1089806 (W.D. Pa. Feb. 28, 2018) (granting Bureau petition to enforce CID); *Consumer Fin. Prot. Bureau v. Seila Law, LLC*, No. 817CV01081JLSJEM, 2017 WL 6536586 (C.D. Cal. Aug. 25, 2017) (granting Bureau petition to enforce CID); *Consumer Fin. Prot. Bureau v. Source for Pub. Data, LP*, No. 3:17-MC-16-G-BN, 2017 WL 2443135 (N.D. Tex. June 6, 2017) (same).
[18] *Consumer Financial Protection Bureau, V. Heartland Campus Solutions, Esci.*, No. CV 17-1502, 2018 WL 1089806, at *3 (W.D. Pa. Feb. 28, 2018) (quoting the district court in *Seila Law*, which cited FTC cases).
[19] *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colleges & Sch.*, 854 F.3d 683 (D.C. Cir. 2017) (affirming district court refusal to grant Bureau petition to enforce CID for lack of authority over the CID recipient).

others, particularly where there are multiple potential legal claims, numerous institutions, or very large targets, the CIDs must reflect the complexity of the investigation.

The Bureau combines authority to enforce its UDAP law with the authority to enforce violations of numerous product specific or area specific consumer finance regulatory regimes. The Bureau's enforcement reach varies across multiple dimensions, including the following:

Investigatory Stage. Public enforcement investigations are initiated with varying amounts of information acquired from an array of possible sources. One source is the Bureau's complaint portal which receives millions of complaints. The FTC Bureau of Consumer Protection, for instance, "reported receiving over 3 million complaints, not including Do Not Call Registry complaints, during 2016. And staff commence investigations based on information uncovered in other investigations; requests from Congress, other federal agencies, and state enforcers; the staff's own experiences as consumers; and after monitoring industry activities, particularly after issuing new guidance."[20] The same is true of the Bureau.

Focusing its investigatory resources. The Bureau, like other government entities, cannot pursue all the possible violations of the law that come to its attention. While it has the authority to bring enforcement actions against entities of various sizes, compared to other public UDAP enforcers, the Bureau rarely proceeds against small companies.[21] Similarly, the Bureau typically does not target individuals except as part of an investigation of a targeted entity with which the individuals are connected.[22] The Bureau has been judicious in its selection of targets and use of CIDs.

Supervisory Structure. The Bureau has used its enforcement powers to bring cases against banks and non-banks, including -- among others -- mortgage servicers and credit reporting agencies.[23] The type of institution and its products or actions under investigation influence the content of the CIDs.

Type of Law Violation. Congress charged the Bureau with enforcing a complex and diverse array of statutes. In addition to the Consumer Financial Protection Act, which Congress adopted as Title X of the Dodd-Frank Act, Congress tasked the Bureau with responsibility for eighteen "enumerated" consumer financial laws. These statutes include nearly all federal consumer credit consumer protection statutes.[24] The statutes

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[20] Howard Morse & Sarah Swain, *Defending Federal Trade Commission Consumer Protection Investigations: A How-to Guide*, Antitrust, Summer 2017, at 26, 27. *See also* David C. Shonka, *Responding to the Government's Civil Investigations*, 15 Sedona Conf. J. 1, 2 (2014) (noting that public enforcement actions begin with "news stories, consumer complaints, requests from Congress, leaks from informants, first-hand observations by government employees, self-reporting, or any number of other sources".)

[21] Prentiss Cox, Amy Widman, and Mark Totten, *Strategies of Public UDAP Enforcement*, 55 Harv. J. on Legislation 37 (providing data showing substantial gap between mean and median size of defendants by both annual revenue and number of employees, suggesting substantial variance in company size).

[22] *Id.;* Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 Tulane L. Rev. 1057, 1080-1083 (2016).

[23] Peterson, *supra* note 21 at 1084-1085.

[24] 12 U.S.C. § 5481(a)(12). Also, Congress later gave the CFPB enforcement authority under the Military Lending Act. 10 U.S.C. § 987(f)(6).

cover a range of subject matters that include credit, debt collection practices, payment systems, savings accounts, prepaid cards, interstate land purchases, reputational information, advertising, information sharing, discrimination, and personal privacy. Even within the topic of consumer credit, the Bureau is responsible for enforcing the law with respect to both secured and unsecured credit, large and small loans, as well as open-ended lines of credit and closed-end loans. Collectively, these statutes touch the lives of virtually every American consumer. Professor Peterson's study shows that through 2016 the Bureau brought enforcement actions not only under UDAP, but also for violations of TILA, FCRA, ECOA, FDCPA, EFTA, and RESPA.[25]

Remedial Purpose. The Bureau can seek to resolve cases with injunctive or supervisory terms regulating future conduct, public compensation to consumers and/or a civil penalty. The type of relief sought also influences the material sought in CIDs. To date, the Bureau appears to seek all these forms of relief when it treats a matter as an enforcement action; however, it has the option of seeking only some forms of relief in each case.

For all the permutations of investigations based on the above and many other factors, the Bureau has one CID pre-complaint investigatory power. The experience of a systemically important national bank in responding to a CID indicating possible UDAP concerns in the sale of ancillary products through credit card or other account add-ons may raise concerns that are wholly different from a CID issued in an investigation of a regional furniture rent-to-own company engaged in possible violations of the Truth in Lending Act. The CID powers provided in the Dodd-Frank Act and the Bureau's existing regulations can be adapted on a case by case basis to accommodate the proper balance between justifiable burden on the CID recipient and the need for information to protect consumers in that market or type of transaction.

Again, the long FTC experience in public UDAP enforcement is instructive when it comes to understanding the need for the Bureau to have flexible CID authority. The FTC has developed different investigatory regimes for its antitrust work and its UDAP work. Former FTC attorneys Howard Morse and Sarah Swain provide a summary of this difference:

> In contrast to merger investigations, where the FTC has issued a model Second Request and announced a presumptive limit on the number of custodians to be searched and number of years to be covered, CIDs in consumer protection matters vary widely. A 2014 ABA study found the cost of responding to a Second Request ranges from $2 million to $9 million, with a median cost of $4.3 million and a per custodian median cost of $151,000. In our experience, the burden of complying with a consumer protection CID varies widely though is generally less than the burden of responding to a Second Request.[26]

Because the Bureau's enforcement authority is even more diverse than that of the FTC, encompassing both UDAP and a broader range of other regulatory regimes, the need for

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[25] Peterson, *supra* note 21 at 1090.
[26] Morse and Swain, *supra* note 19, at 29.

the Bureau to maintain broad and flexible investigative powers is even greater than for the FTC. Accordingly, the CID authority of the Bureau should remain sufficiently flexible to allow for effective investigation of all types of law violations. In sum, there is no one-size-fits-all CID for Bureau investigations. Limits on the complexity and number of topics in CIDs could have the unintended consequence of privileging the entities most determined to obfuscate responses so as to prevent the Bureau from discovering the worst abuses.

The FTC requires in consumer cases that one Commissioner approve a CID prior to issuance. This process allows the FTC to have review by one official who is in the line of authority for making determinations about violations of UDAP law. The Bureau has no similar procedure. The existing Bureau procedure reflects the difference in structure between the FTC as a multi-member Commission and the Bureau with its Director. The Bureau would have no analogous higher level review by a single official who is not also the person ultimately solely responsible for enforcement decision-making.

2. Flexible CIDs Allow the Bureau to Adopt Differing Enforcement Strategies.

The enforcement record of the Bureau to date has been remarkable. The Bureau's enforcement and supervision actions have led to $11.8 billion in ordered relief for more than 29 million consumers.[27] There has been broad public support for the Bureau and its enforcement work.[28] Professor Christopher Peterson has published a detailed empirical study of Bureau enforcement actions in its first four years that reveals an agency that is both remarkably effective and completely at odds with descriptions of the agency by its critics. The study shows a balanced set of cases between banks and nonbanks and enforcement through administrative and judicial action. The study also shows that the Bureau focused less on technical rule violations and more on UDAP violations in actions that returned money to consumers, and used sparingly the new "abusiveness" power it has as part of its UDAP authority.[29] As the study observes

> …if the CFPB were continually overstepping its bounds, then perhaps critics of the agency ought to be able to point to many decisions of district court judges, administrative law judges, or U.S. courts of appeal dismissing the agency's unlawful actions. Yet, from its inception through 2015, the agency publicly announced 122 enforcement actions without losing a single case. And after the

[27] CFPB Factsheet, *Consumer Financial Protection Bureau: By the Numbers* (December 2016)
[28] Steve Eder, Jessica Silver-Greenberg & Stacy Cowley, *Republicans Want to Sideline This Regulator. But It May Be Too Popular*, N.Y. Times, Aug. 31, 2017 ("'The public does not share the G.O.P.'s ire toward the agency and its mission,' said Dean Clancy, a Tea Party activist who worked in the White House under Preident George W. Bush and is now a policy analyst who tracks actions of the consumer bureau. 'It's an agency about protecting the little guy, and that is tough to oppose.'"); Celinda Lake, Bob Carpenter, David Mermin, and Zoe Grotophorst, New Poll Reveals Strong Bipartisan Support for Financial Regulation; Americans Say Wall Street's Influence in Washington is Too High (July 18, 2017), available at http://ourfinancialsecurity.org/2017/07/afr-polling-memo-fifth-consecutive-year-broad-backing-cfpb-wall-street-reform/ (finding that 77 percent of independents and 66 percent of Republicans "favor somewhat" or "favor strongly" the CFPB).
[29] Peterson, *supra* note 21.

study period, but prior to publication of this Article, the Bureau had lost only 1 precomplaint discovery dispute.[30]

Even in well-publicized challenges to later Bureau actions, the Bureau retains an overwhelmingly successful track record in litigation.

An example of the positive impact on consumer markets of Bureau enforcement actions is the series of cases it brought to curb a practice variously known as credit card add-on, data pass, or pre-acquired account charges.[31] In short, the nation's largest banks have sold to direct marketing companies special contract rights allowing them to charge a range of consumer bank accounts (including credit card, checking and mortgage accounts), without obtaining traditional forms of consent from the consumer, such as having the consumer provide his or her account number. Predictably the result has been massive deception of consumers charged for unwanted membership clubs and insurance policies of dubious value. The elderly and those with limited English language capacity were especially hard hit by this deceptive practice.[32]

Years of UDAP enforcement cases by state attorneys general to attack this problem made progress, but they were unable to comprehensively attack this deceptive conduct.[33] The Bureau, however, has effectively used its enforcement authority to systematically constrain this deception. Starting with its first enforcement action in 2012, the Bureau brought a series of cases against the nation's largest financial institutions challenging this conduct as a UDAP violation, resulting in over $2 billion in returned account charges to consumers.[34]

High levels of monetary recoveries and expansive injunctive and supervisory relief by the Bureau contrast with the approach of other public enforcers with substantially similar UDAP authority. A study of all public UDAP enforcement actions completed in 2014 by federal and state entities with primary UDAP enforcement authority found different strategies employed by different public entities.[35] Compared to other UDAP enforcers, the Bureau brought cases against defendants of much larger size and consistently obtained much larger public compensation dollars returned to consumers and much larger civil penalties. FTC enforcement showed a preference for cases against larger defendants to resolve with only injunctive relief, and effectively used asset freezes and appointment of receivers to ensure public compensation in

[30] *Id.* at 1094.
[31] *See* General Accounting Office, *Credit Cards: Consumer Costs for Debt Protection Products Can Be Substantial Relative to Benefits but Are Not a Focus of Regulatory Oversight* (March 2011) (describing credit card add-on products); Prentiss Cox, *The Invisible Hand of Preacquired Account Marketing*, 47 Harv. J. on Legislation 425 (2010) (describing how seller "preacquired account" rights obtained from account issuers result in consumer deception); Staff Of The Senate Comm. On Commerce, Science, And Education, *Aggressive Sales Tactics On The Internet And Their Impact On American Consumers* (Comm. Print 2009) (discussing the problem of "data pass" of account charging rights from retailers causes consumer deception).
[32] Cox, *supra* note 30 at 445-446 and 452 (providing data showing, among other things, that the elderly proportion of those charged was twice the expected rate).
[33] *Id.* at 439-441 and 467-468.
[34] CFPB Factsheet, *Consumer Financial Protection Bureau: Enforcing Federal Consumer Protection Laws* 2-4 (July 13, 2016) (listing the following add-on enforcement actions with associated consumer refunds in million $: Bank of America/727; Citibank/700; Chase/309; Discover/200; Capital One/140; American Express/59.5; Fifth Third/3).
[35] Cox, Widman and Totten, *supra* note 20.

cases with numerous small entity and individual defendants engaged in fraudulent schemes. State enforcers (primarily state attorneys general), in contrast, varied widely in their approach to UDAP enforcement. For example, almost a third of the states, including even some large states, showed relatively little use of their UDAP authority while another group of states brought a substantial number of cases against the defendants. In all, the study identified eight different enforcement strategies employed by groups of states.[36]

Importantly, these various public enforcers used different strategies for UDAP enforcement while maintaining similar, flexible CID procedures. Nothing in the current CID procedures of the Bureau prevent a re-focus of enforcement priorities on one of the other types of enforcement strategies, including the less active enforcement strategies employed by some state attorneys general. Broad discretion and flexibility in CID procedures are consistent with both the Bureau's enforcement strategy to date and other approaches to public UDAP enforcement.

As the Bureau looked to the FTC and other agencies with similar authority in developing its initial CID rules, we encourage this review of CID procedures to engage with and be judged against the experience of decades of public enforcement use of pre-complaint investigative procedures in enforcement of UDAP and other consumer protection laws.

C. The Report of the Office of Inspector General of the Federal Reserve Board Confirms Bureau Policies and Practices Appropriately Balance the Bureau's Need for Information with the Burden on CID Recipients.

The many signatories to this letter who have extensive experience in public enforcement actions, and UDAP public enforcement specifically, know the importance of balancing the burdens imposed on the CID recipient against the possible gain in the specific enforcement investigation at hand. A public enforcer who asks too much given the likely value to the investigation will face an administrative or judicial challenge to the demand. If the enforcer asks too little, the investigation can be unreasonably delayed or the enforcer may fail to obtain information that would alert the agency to a violation of a consumer protection law, and thus fail in its essential public protection mission.

After a thorough and independent review of the Bureau's issuance of CIDs, the Office of the Inspector General of the Federal Reserve Board found no deficiencies in the Bureau's policies, procedures and conduct in balancing these concerns, concluding that:

> Preparing and modifying a CID involves significant professional judgment to carefully balance the burden the CID places on the recipient against the CFPB's need to obtain information necessary to conduct an investigation. The Office of Enforcement's processes for CID approval and modification seek to strike that balance by allowing for substantial input from the CID recipient.[37]

The Inspector General reached its conclusion after examining the Bureau's rules and policies, including its "records management policy" and the file plans for Office of Enforcement and

[36] *Id.*
[37] Inspector General Report, *supra* note 6, at 10.

Office of the Director records", and the Bureau's actual practice of CID use, including a random selection of CIDs issued over a three-year period along with related documentation, such as CIDs, petitions, recommendation memorandums, and communications between the Office of Enforcement and the CID recipient."[38]

The report found that the Bureau's Enforcement Office effectively identified the information needed for the investigation as part of each CID sampled by the Inspector General.[39] It also found procedural compliance with all reviewed CIDs.[40] As noted above, the Inspector General found the Bureau carefully weighed investigative need and the burden on the CID recipient. It also determined that after issuance the Bureau appropriately uses "modifications and extensions of time to alleviate some of the potential burden associated with CID requests".[41] The report described this practice as follows: "[W]e found that Office of Enforcement attorneys engage CID recipients in continuous dialogue during the CID issuance process, using meet and confers, modification letters, extension letters, and extension emails to address the potential burden and allow the recipient to successfully comply with the CID."[42] The only recommendations for change to Bureau CID procedures concerned a reminder to the staff in the Guidance concerning crafting notices of CID purposes and two record-keeping items.[43]

To the extent that the RFI suggests a broad policy realignment of enforcement priorities toward the needs and concerns of CID recipients, rather than a review akin to the evaluation of the Federal Reserve Board's Inspector General, it is important that the Bureau carefully weigh how such changes would impact the extraordinary results achieved by the Bureau's enforcement actions to date. The complaints of CID recipients -- an inevitable feature of public enforcers actively doing their job -- should be carefully weighed against the impact of any shift in enforcement efforts that have to date focused primarily on the needs of American consumers. We urge that any proposed rule or guidance changes be accompanied by an analysis of specific examples of past Bureau enforcement outcomes that realistically would have been affected by restricted CID use in the context of the uncertain information available to Bureau enforcement staff at the time of CID issuance. Of course, it also is critical that the Bureau implement any such policy changes in a manner consistent with the law for CID use enunciated in the Dodd-Frank Act.

[38] *Id.* at Appendix A.
[39] *Id.* at 8 ("We found that each of the sampled CIDs had a complete and accurate Action Required section, in which the litigation team indicated the appropriate type of information requested for each CID.)
[40] *Id.* at 9-10.
[41] *Id.* at 10.
[42] *Id.* at 10-11. In describing these Bureau practices, the Inspector General noted that the FTC and Bureau use "similar safeguards to help alleviate potential burdens in its CIDs." *Id.* at 11.
[43] *Id.* at 8-9 and 13-15.

Comments of Financial Regulation and Consumer Protection Scholars, and former Regulators on Docket No. CFPB-2018-0006

June 4, 2018

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Dear Ms. Jackson:

Please see the submission below in response to the Consumer Financial Protection Bureau's Request for Information ("RFI") Regarding Bureau Public Reporting Practices of Consumer Complaint Information (Docket No. CFPB-2018-0006).

We are scholars, who research and teach about consumer protection law, financial regulation, administrative law, and related topics. Some of the below signatories also have experience in public enforcement of consumer protection laws.

Many of the below signatories have used the consumer complaint function for our research. Affiliations of signatories are for identification only and do not represent the views of the various institutions.

We appreciate the opportunity to submit these comments for your consideration.

Sincerely,

Kathleen Engel (on behalf of Pamela Foohey, Angela Littwin and Amy J. Schmitz)

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SUMMARY

- Publicly releasing information about consumer complaints received by the Consumer Financial Protection Bureau ("Bureau") is essential to its primary purpose of ensuring that "markets for financial products and services are fair, transparent, and competitive."[1]
- Making public a database with data from consumers' complaints (the "Database") advances the Bureau's statutory duty to release marketplace data "as is in the public interest."[2]
- When consumers can make better choices, market efficiency improves. If the Bureau makes the Database non-public, consumers will lose a key source of high-quality information and an important means of holding companies accountable. Ultimately, the marketplace will suffer.
- An easily-searchable Database provides consumers with a resource they can trust for researching financial services and products. This Database is essential because it provides far superior and more reliable information than "gripe sites" such as Yelp. Consumers lost in a sea of unreliable information on the Internet need the Database to make informed decisions.
- The public Database helps legitimate financial service companies provide valuable services to consumers without being undercut by unscrupulous competitors. By casting out companies that cut corners and injure consumers from the marketplace, the Database ensures that law-abiding companies can continue to compete fairly.
- Each data field in the Database serves an important purpose in fulfilling the Bureau's mission. But one of the most important is the name of the company subject to the complaint. Including the company name provides consumers "with timely and understandable information to make

[1] 12 U.S.C.A. § 5511
[2] *Id.* at § 5512(c)(3)(B).

responsible decisions about financial transactions,"[3] which is the Bureau's first statutory objective.

- Publishing company names incentivizes companies to monitor their reputations by responding to consumer complaints in a timely manner and providing meaningful relief. Companies also may improve practices based on this valuable feedback.

- To increase transparency and enhance the marketplace benefits provided by the Database, the Bureau should make additional data fields public, particularly data about companies' specific responses to complaints. This information is vital to evaluating the complaint mechanism's role in resolving disputes between consumers and companies.

- The Bureau's reports educate consumers, highlight industry trends, and fill key information gaps about issues that may balloon into larger problems. The Bureau should continue publishing monthly and occasional reports about specific products, services, and trends, as well as enhance these reports with more analysis.

- Allowing financial product and service providers to comment on reports prior to publication will compromise the reports' integrity.

- User friendliness is a key reason for the success of the Bureau's complaint mechanism and Database but there is significant room for improvement. The Bureau should devote resources to improving accessibility. Providing the public with easily-accessed data will increase transparency, empower consumers, and allow for dissemination of robust information, all of which further market efficiency and fairness and thus are central to the Bureau's mission.

ACCESSIBLE CONSUMER COMPLAINT INFORMATION IS VITAL TO TRANSPARENCY, EFFICIENCY, AND FAIRNESS

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") authorizes the Consumer Financial Protection Bureau ("Bureau") to make information public about the consumer financial product and service market.[4] One of the most prominent ways the Bureau does so is through its statutorily-mandated consumer complaint function.[5] This allows consumers to lodge grievances against financial products and service providers through the Bureau, usually through its website.[6]

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[3] *Id.* at § 5511(b) (emphasis added).

[4] *Id.* at § 5511(b).

[5] *Id.* at § 5493(b)(3) (requiring the Bureau to collect, monitor, and respond to consumer complaints regarding consumer financial products and services).

[6] Submit a Complaint, CFPB, http://www.consumerfinance.gov/complaint/ (last visited Apr. 19, 2018); *see also* Pamela Foohey, *Calling on the CFPB for Help: Telling Stories and Consumer Protection*, 80 LAW & CONTEMP. PROBS. 177, 178 (2017); Angela Littwin, *Why Process Complaints? Then and Now*, 87 TEMP. L. REV. 895, 911 (2015) (finding that consumers preferred to submit complaints online, with submission percentages of 85% online versus 15% by telephone).

The Bureau adds value to its complaint function by publishing reports and making public a complaint database ("Database").[7] The Database includes certain information about individual complaints and, with consumers' permission, consumers' narratives accompanying their complaints.[8] The information in the Database and the Bureau's reports support and enhance a fair, transparent, and efficient marketplace for consumer financial products and services.

First and foremost, the Bureau must continue to make the Database publicly-accessible. Acting Director Mick Mulvaney noted recently during the American Bankers Association Annual Conference that the Bureau is "supposed to ensure that consumers are provided with timely understandable information" and that the Bureau is "going to make sure that markets for consumer financial products and services operate transparently and efficiently."[9] For the reasons detailed below, making consumer complaints public via the Database is integral to the Bureau's pursuit of these two goals.

Nevertheless, Acting Director Mulvaney went on to state, "I don't see anything . . . that says that I have to make all of those [consumer complaints] public. I am thinking that . . . having a database that is publicly facing but is not completely vetted is probably not consistent with our overall mission."[10] This statement is at odds with the Bureau's statutorily-enumerated goals and severely mischaracterizes the Bureau's thoughtful consideration about when and how to populate the public Database.[11] It fails to acknowledge the Database's crucial role in providing consumers with high-quality information that is not available elsewhere and ensuring that markets operate efficiently and transparently.

If the Bureau makes part or all of the Database non-public, an important check on companies will disappear and, ultimately, the marketplace will suffer. Companies that engage in misconduct will be free to evade accountability and sweep their misdeeds under the rug. The Database itself provides evidence that companies and Acting Director Mulvaney will benefit by the removal of the Database from the public view, possibly to consumers' and the marketplace's detriment. In the past, companies and trade associations have lobbied Congress and the Bureau to remove the Database from public view. They also supported a bill put forth by Acting Director Mulvaney in 2016 that would have fundamentally altered how the Bureau responds to consumer complaints and that would have effectively gutted the Database.[12] One of the lobbying trade associations has received contributions from fourteen of the thirty companies most complained about, as evident by the

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[7] Consumer Complaint Database, CFPB, https://www.consumerfinance.gov/data-research/consumer-complaints/ (last visited Apr. 19, 2018).

[8] *See* Foohey, *supra* note 6, at 183 (discussing the Database).

[9] *Remarks by Mick Mulvaney, Acting Director, Consumer Financial Protection Bureau*, American Bankers Association Annual Conference, Washington, D.C., 3-4 (April 24, 2018), https://www.documentcloud.org/documents/4446622-Transcript-Mulvaney-ABA-Conference-4-24-2018.html.

[10] *Id.* at 5.

[11] *See infra* note 29 and accompanying text.

[12] *Companies with the Most Complaints in the CFPB Database Were Mulvaney Donors*, PUBLIC CITIZEN (May 8, 2018), https://www.citizen.org/media/press-releases/companies-most-complaints-cfpb-database-were-mulvaney-donors.

Database.[13] Acting Director Mulvaney himself has received contributions from half a dozen of the most complained about companies, also as evident by the Database.[14]

A public Database allows for this information to be discovered and discussed—that is, a public Database promotes transparency in the marketplace for financial goods and services. Hiding the Database from public view will harm consumers, who rely on the data to inform them about which companies play by the rules and which companies engage in unlawful practices. It will also harm law-abiding companies because, without transparency, they will not be able to compete effectively against their unscrupulous counterparts. Thus, the public Database is essential to an efficient and competitive marketplace for consumer financial products and services.

Particularly in light of the Bureau's recent marked slowdown in enforcement actions,[15] the Database has become an integral tool to identify company practices that are potentially harmful to consumers, by the Bureau and by advocates and other policymakers. If the Bureau eliminates public access to the Database as well, the potential harm to consumer is staggering.

Additionally, the Bureau does not post unfiltered complaints and narratives to the Database, as Acting Director Mulvaney seemed to suggest. As stated by the Bureau itself, "[a] complaint is listed in the database when the company responds to the complaint and confirms a commercial relationship with the consumer or after the company has had the complaint for 15 days, whichever comes first. Complaints are not published if they do not meet all of the publication criteria."[16] Thereby, financial service providers have the opportunity to validate information in the Database.

Consumers, advocates, companies, academics, and policymakers—most notably the Bureau—benefit from the Database because it fosters transparency and data analysis. Consumers use the Database to learn about the companies and industries they do business with, while advocates, academics, and policymakers analyze trends and identify problems in the marketplace.[17] The primary policymaker that the Database informs is the Bureau itself. The Bureau gathers invaluable information through the complaints process and Database that informs all of the Bureau's functions, from supervision and enforcement to rulemaking to consumer education. The Database thus provides data critical to the Bureau's market monitoring required by the Dodd-Frank Act.

The Database also provides important feedback to companies about concerns consumers encounter with their products and services. For example, industry consulting firms now advise companies to "turn what they hear from the [Bureau]'s consumer complaint database into a business advantage."[18] The Bureau has reported that some companies have begun to tie executive compensation to how

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13 *Id.*

14 *Id.*

15 *See* Emily Stewart, *The Government's Top Consumer Watchdog Hasn't Taken a Single Enforcement Action Since Trump's Pick Took Over*, VOX (Apr. 10, 2018), https://www.vox.com/policy-and-politics/2018/4/10/17218774/mick-mulvaney-cfpb-consumer-wells-fargo-equifax.

16 *See Semi-Annual Report of the Consumer Financial Protection Bureau*, CFPB, 19 (Spring 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201706_cfpb_Semi-Annual-Report.pdf.

17 *See infra* Part II.

18 *CFPB's Consumer Complaint Database*, DELOITTE (2018), https://www2.deloitte.com/us/en/pages/financial-services/articles/consumer-financial-protection-bureau-cfpb-consumer-complaint-database.html.

well the company has responded to complaints, while other companies have addressed noted and potential concerns, such as improving customer service response.[19]

In short, the public Database is far from a "Yelp for financial services."[20] The public Database is essential because it provides far superior and more reliable information than such "gripe sites." It compels accountability to consumers from providers of financial goods and services, and provides invaluable information to consumers, advocates, and policymakers. Consumers, companies, the Bureau, and third parties use this information to inform their practices.

Given the compelling benefits of the Database to consumers, advocates, policymakers, companies, and the marketplace, we urge the new leadership at the Bureau to continue to publish reports and maintain the public Database. We also urge the Bureau's leadership to evaluate the benefits of adding more data to the Database, of publishing more tailored reports based on the complaint data, and of evaluating the design of the online interfaces through which consumers lodge complaints and access the Database. These improvements will further enhance the operation of a transparent and efficient marketplace.

I. Statutory and Regulatory Requirements to Guide the Bureau's Complaint Information Reporting Practices

Title X of the Dodd-Frank Act contains minimum statutory and regulatory requirements that constrain and should guide the Bureau in evaluating its current complaint information reporting practices. The Dodd-Frank Act specifies the purpose, objectives, and functions of the Bureau. As relevant here, one purpose is to ensure that "markets for financial products and services are fair, *transparent,* and *competitive*."[21] Transparency is a basic requirement of competitive markets, and publicly sharing information is key to transparency. To this end, the first objective listed in Title X relates to sharing information with consumers: "The Bureau is authorized to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services— (1) *consumers are provided with timely and understandable information to make responsible decisions about financial transactions*."[22] Similarly, the Dodd-Frank Act lists one of the "primary functions of the Bureau" as "collecting, researching, monitoring, and publishing information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets."[23]

The Dodd-Frank Act requires that the Bureau provide information about the complaints it receives in three reports. First, the Bureau must present an annual report to Congress "on the complaints received by the Bureau in the prior year regarding consumer financial products and services."[24] That report must at minimum "include information and analysis about complaint numbers, complaint types, and, where applicable, information about resolution of complaints."[25] Second, the Bureau must provide as part of its semi-annual reports to Congress "an analysis of complaints about

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19 Nathan Cortez, *Regulation by Database*, 89 U. COLO. LAW R. 1 at 50 (2017).
20 *Remarks by Mick Mulvaney*, *supra* note 9, at 5.
21 12 U.S.C.A. § 5511 (emphasis added).
22 *Id.* at § 5511(b) (emphasis added).
23 *Id.*
24 *Id.* at § 5493(c).
25 *Id.*

consumer financial products or services that the Bureau has received and collected in its central database on complaints during the preceding year."[26] Notably, this provision *requires* the Bureau to create a "central database of complaints."[27] Finally, the Bureau is required to "monitor for risks to consumers in the offering or provision of consumer financial products or services, including developments in markets for such products or services." The Bureau must publish at least one report each year detailing "significant findings of its monitoring" including, *inter alia*, information gathered from consumer complaints.[28]

In addition to these statutorily-prescribed reporting requirements, the Bureau has issued policy statements detailing its reasoning behind making the Database public and including each of the categories of information about individual complaints in the Database.[29] These policy statements explain why the information the Bureau makes public through the Database comports with the principles set forth in the Dodd-Frank Act, including how the Database enhances transparency and benefits the functioning of the marketplace for consumer financial products and services.[30]

II. MAINTAINING AND AUGMENTING THE DATA INCLUDED IN THE DATABASE

It is essential that the Bureau continues to maintain current data in, as well as add data points to the Database to enhance its value and further the Bureau's policy statements about the Database.

A. Currently Available Data Comport with the Bureau's Statutory Authority to Make Complaint Information Available "As Is In the Public Interest"

When consumers file complaints with the Bureau, they identify the name of the company, select the type of product or activity to which their complaint pertains, choose the issue or sub-issue most closely associated with their complaint, specify whether they tried to resolve the issue with the company, write a narrative of their complaint, and state their desired resolution of the complaint.[31] After ensuring that complaints meet all of the Bureau's publication requirements,[32] the Bureau populates the Database with some of the data from consumers' complaints. It does not raise privacy concerns because it does not include personally identifying fields.[33]

Accordingly, the Database contains the following fields: date received, product, sub-product, issue, sub-issue, consumer complaint narrative and whether the consumer consented to publishing of the

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[26] *Id. at* § 5496(c)(4).
[27] *Id.* (emphasis added).
[28] *Id. at* § 5512(c)(3)(A), (c)(4)(B)(i).
[29] Disclosure of Consumer Complaint Narrative, 80 FR 15572 (March 24, 2015), https://www.gpo.gov/fdsys/pkg/FR-2015-03-24/pdf/2015-06722.pdf; Disclosure of Certain Credit Card Complaint Data, 77 FR 37558 (June 22, 2012), https://www.gpo.gov/fdsys/pkg/FR-2012-06-22/pdf/2012-15163.pdf.
[30] *See generally* Disclosure of Consumer Complaint Narrative, *supra* note 29; Disclosure of Certain Credit Card Complaint Data, *supra* note 29.
[31] For a discussion of the complaint mechanism, *see* Foohey, *supra* note 6, at 181-82; Littwin, *supra* note 6, at 897-99; Katherine Porter, *The Complaint Conundrum: Thoughts on the CFPB's Complaint Mechanis*m, 7 BROOK J. CORP. FIN. & COM. L. 57, 65 (2012).
[32] *See supra* note 16 and accompanying text.
[33] *See* Disclosure of Consumer Complaint Narrative, *supra* note 29, at 15575; Disclosure of Certain Credit Card Complaint Data, *supra* note 29, at 37568.

narrative, company public response, company, state, zip code, tags such as "Older American" that align with populations that the Bureau is statutorily-tasked with monitoring, how the consumer submitted the complaint, date the complaint was sent to the company, general company response, whether the company response was timely, whether the consumer disputed the company response, and a unique complaint ID.[34] Members of the public can search the Database using a variety of subject fields, including product, issues, and company.

Each of these fields serves an important purpose in advancing the Bureau's goal of fulfilling its statutory authority to disseminate marketplace data "as is in the public interest."[35] Policy statements issued by the Bureau demonstrate the usefulness of each of these fields.[36] Policymakers, advocates, and academics have used or referenced all these fields in their work based on the Database.[37] For example, since 2013, the U.S. Public Interest Research Group has published nine data reports examining specific subject matters ranging from debt collection and credit reporting abuses to the common financial service problems faced by older Americans and by service members.[38] Many of these works further call for the inclusion of more data or expansion of certain fields to allow for more detailed and complete analysis.[39] The Database has become an essential source for analyzing the consumer financial marketplace.

The Database is also an essential tool for consumer empowerment. Consumers need high-quality, clear, and accessible data to make informed choices when shopping for financial products and services.[40] Consumers have become skeptical of the information they see on Facebook and Twitter, and feel lost in a sea of questionable information on Yelp and other similar "gripe sites."[41] Information such as the Database on the Bureau's website has therefore become necessary. Consumers respect and rely on information coming from a trusted source, such as the Bureau.

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[34] *See* Consumer Complaint Database, *supra* note 7.

[35] *See* 12 U.S.C. 5512(c)(3)(B); Disclosure of Consumer Complaint Narrative, *supra* note 29, at 15575.

[36] *See generally* Disclosure of Certain Credit Card Complaint Data, *supra* note 29; Disclosure of Consumer Complaint Narrative, *supra* note 29.

[37] *See, e.g.*, Ian Ayres et al., *Skeletons in the Database: An Early Analysis of the CFPB's Consumer Complaints*, 19 FORDHAM J. CORP. & FIN. L. 343 (2014) (relying on company name, ZIP code, product, sub-product, issue, sub-issue, and consumer disputed, among other fields); Foohey, *supra* note 6 (relying on data received, product, sub-product, issue, sub-issue, and narrative fields); Littwin, *supra* note 6 (relying on state and ZIP code, among other fields, and noting the limited value of the company response and consumer response fields); Christopher K. Odinet, *Consumer Bitcredit and Fintech Lending*, 69 ALA. L. REV. 100 (2018) (relying primarily on date received, product, narrative, and company name fields); Porter, *supra* note 31 (noting time between when the complaint was received and when it was sent to the company, which relies on the "date sent" field, and noting the percentage of complaints received via the web, which relies on the "submitted" field); Gideon Weissman & Ed Mierzwinski, *Older Consumers in the Financial Marketplace*, U.S. PIRG (Oct. 2017), https://washpirgfoundation.org/sites/pirg/files/reports/WAP%20CFPB%20Older%20Report_0.pdf (relying on the "tags" field to identify older Americans).

[38] *See Reports: The CFPB Gets Results for Consumers*, U.S. PIRG, https://uspirg.org/page/usp/reports-cfpb-gets-results-consumers (last visited Apr. 20, 2018).

[39] *See generally* Littwin, *supra* note 6; Porter, *supra* note 31.

[40] Todd Zywicki, *Complex Loans Didn't Cause the Crisis*, WALL ST. J. (Feb. 18, 2010), https://www.wsj.com/articles/SB10001424052748704804204575069102749893246 (discussing the value of common proposals that clearly disclose key mortgage costs).

[41] Amy J. Schmitz, *Remedy Realities in Business to Consumer Contracting*, 58 ARIZ. L. REV. 213, 215-236 (2016) [hereinafter Schmitz, *Remedy Realities*].

In short, to fulfill its statutory duty to release data about the consumer financial marketplace "as is in the public interest," the Bureau should maintain and increase rather than decrease the data fields included in the public Database.[42]

B. Continuing to Publish Company Names Will Maintain Transparency and Enhance the Marketplace

One of the most important fields included in the Database is the company which is the subject of a consumer's complaint. If this portion of the Database becomes more generalized, such as by providing only the company's industry group, then much of the Database's utility will be lost.

The Bureau already has determined that the public disclosure of company names is in the interest of consumer protection and furthers the Bureau's charge to collect, monitor, and respond to consumer complaints. In its 2012 policy statement regarding disclosures related to credit card complaints, the Bureau carefully considered various arguments that raised either the undesirability or illegality of making company names public.[43] The Bureau made a reasoned determination that these arguments did not legally prevent or persuasively caution against the publication of company names. It made clear that the Dodd-Frank Act directly authorizes the Bureau to disclose complaint information when it is "in the public interest" to do so.[44] It further determined that sufficient safeguards were already in place to authenticate complaints after submission, thus reasonably guarding against a flood of sham complaints.[45]

In its policy statement, the Bureau also noted the importance of giving context for the complaints—a laudable goal that revealing the company names helps achieve.[46] For consumers in particular, they make better choices when they have access to information about other consumers' experiences. Consumers do not do business with generalized sectors of the financial products and services industry. They do business with specific banks, specific credit card companies, and specific mortgage lenders, among others. Knowing the identity of the company is the best way for consumers to have the necessary information to make meaningful decisions when choosing among multiple companies.

Similarly, the Database helps legitimate financial service companies provide valuable services to consumers without being undercut by unscrupulous competitors. By casting out companies that cut corners and injure consumers from the marketplace, the Database ensures that law-abiding companies continue to compete fairly.[47] In this respect, the financial marketplace has recognized the Database's importance in evaluating financial products and services. For example, in 2015, US News and World Report created a ranking for the best credit cards based, in part, on filed and resolved complaints with the Bureau.[48]

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[42] *See* Disclosure of Consumer Complaint Narrative, *supra* note 29, at 15575.
[43] Disclosure of Certain Credit Card Complaint Data, *supra* note 19, at 37560.
[44] *Id.* at 37560-65.
[45] *Id.* at 37564-65.
[46] *Id.* at 37561-62.
[47] *See Semi-Annual Report of the Consumer Financial Protection Bureau*, *supra* note 16, at 15
[48] U.S. News Staff, *Best Credit Cards for Bad Credit of 2018*, U.S. NEWS AND WORLD REPORT (Apr. 18, 2018), https://creditcards.usnews.com/bad-credit.

Further, publishing companies' names promotes self-regulation among industry participants. Companies build their reputations by improving practices based on feedback from consumer complaints. A company that appears less frequently in the database may draw more business as compared to a competitor that is the subject of numerous complaints. The Bureau has stated that "disclosure has the potential to sharpen competition over product quality and customer service."[49] Thus, the Bureau's "naming-names" approach to complaints encourages firms to avoid abusive or questionable behavior when engaging with consumers.

Finally, the Database reveals to the public which companies are responsive to complaints. The "company response field" shows whether a company provided a timely response. When combined with company name, this field serves a useful reputational function for consumer finance firms because it allows them to tell their side of the story. For instance, entries in this field can include "company believes the dispute was the result of a misunderstanding" or "company disputes the facts presented in the complaint." Similarly, the "company response to consumer" field allows companies to address complaints, further providing consumers with information about whether a company actively engaged with the consumer through the complaint mechanism. Companies within the same line of business can use these fields to distinguish themselves from competitors.

To use its own statements regarding openness and transparency, the Bureau is committed to allowing "the marketplace of ideas to determine what the [complaint] data show."[50] Publicly disclosing company names, so the Bureau has stated, allows "researchers to inform consumers about potentially significant trends and patterns in the data . . . has the potential to sharpen competition over product quality and customer service" and "help[s] ensure that the Bureau remains accountable for tackling the complaints that it receives."[51]

We thus urge the Bureau to continue publishing company names in the public Database so that the Bureau can properly and effectively execute its authority to make complaint information accessible "as is in the public interest."[52]

C. Publishing Additional Data Will Enhance Transparency, Help the Marketplace, and Allow for Better Assessment of the Complaint Mechanism

In establishing the Database and later adding consumer narratives to the Database, the Bureau articulated that a key goal of publishing data in the public-facing Database is to fulfill its statutory authority to make complaint information accessible "as is in the public interest," which includes disseminating sufficient data to "empower consumers to better understand the context of the data currently provided in the [Database]."[53] More data and context provided by the Bureau will enhance the dissemination of robust information that consumers and third-parties can use to empower market participants, promote transparency, and enhance fairness and efficiency.

1. More Data Is Needed to Fully Assess the Complaint Mechanism

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[49] Disclosure of Certain Credit Card Complaint Data, *supra* note 29, at 37564.
[50] *Id.* at 37561.
[51] *Id.* at 37564.
[52] *See* Disclosure of Consumer Complaint Narrative, *supra* note 29, at 15575.
[53] *Id.* at 15575-76.

Although the Database presently contains information key to assessing the markets for financial products and services, it does not include enough data to allow for the assessment of the Bureau's complaint mechanism as a dispute-resolution function.[54] Arbitration clauses have become ubiquitous in consumer contracts as means for preventing class actions.[55] At the same time, legal aid is limited, and it generally makes little economic sense to incur legal costs to pursue small claims in court or arbitration on an individual basis.[56] This means that most consumers have little legal recourse when they believe they have been wronged by a company.[57]

Consumers therefore turn to company "complaint systems" and social media in attempts to obtain redress. This often results in frustration when companies provide no response to complaints on social media, ignore e-mails, or send rote replies that provide little assistance.[58] These internal customer assistance processes may favor the "squeaky wheels" who are proactive in pursuing their problems.[59] Meanwhile, those consumers considered less lucrative for the companies, often due to lower incomes and buying resources, may receive little redress through these private systems.[60]

The Bureau's complaint mechanism affords consumers a trusted avenue for attempting to resolve their problems and vindicate their rights. When a consumer submits a complaint, the Bureau screens the complaint to ensure that it falls within the Bureau's statutory authority and that is it complete, whereupon the Bureau forwards the complaint to the subject company.[61] The company is required to communicate with the consumer, if needed, determine what action to take, and report back to the consumer and Bureau through a secure portal. Consumers then may provide feedback to the Bureau about the company's response.[62] As described by the Bureau, this process "seeks to ensure that consumers receive timely responses to their complaints and that the Bureau, other regulators,

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[54] Schmitz, *Remedy Realities*, *supra* note 41, at 220-26.

[55] *Id.*

[56] According to the U.S. Census Bureau's 2011 statistics on poverty, 60 million Americans–one in five–qualified for free civil legal assistance. Unfortunately, more than 50 percent of those seeking help are turned away because of the limited resources available. These statistics describe only those below the poverty line and do not reflect the tens of millions of moderate income Americans who also cannot afford legal help. *Civil Legal Aid 101*, U.S. DEPT. OF JUSTICE (Oct. 21, 2014), https://www.justice.gov/atj/civil-legal-aid-101.

[57] Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPPERDINE L. REV. 279, 290-366 (2012) [hereinafter Schmitz, *Squeaky Wheel Systems*].

[58] Judy Strauss & Donna J. Hill, *Consumer Complaints by E-mail: An Exploratory Investigation of Corporate Responses and Customer Reactions,* 15 J. INTERACTIVE MARKETING 63, 63–64 (2001). One study of the Facebook and Twitter accounts of thirty-four large U.S. companies found that the companies ignored nearly half of the complaints consumers submitted, and when companies did respond, they left consumers dissatisfied in about 60% of the cases. Sabine A. Einwiller & Sarah Steilen, *Handling Complaints on Social Network Sites – An Analysis of Complaints and Complaint Responses on Facebook and Twitter Pages of Large US Companies*, 41 PUB. REL. REV. 195, 197–202 (2015) (highlighting results of the study).

[59] *See* Schmitz, *Squeaky Wheel Systems*, *supra* note 57, at 280; Peter A. Alces & Jason M. Hopkins, *Carrying A Good Joke Too Far*, 83 CHI.-KENT L. REV. 879, 895-96 (2008) (discussing how businesses may discriminate in favor of sophisticated consumers).

[60] *See* Amy J. Schmitz, *Secret Consumer Scores and Segmentations: Separating Consumer "Haves" from "Have-Nots"*, 2014 MICH. ST. L. REV. 1411, 1411–74 (2014) [hereinafter Schmitz, *Secret Consumer Scores*] (exploring businesses determine what contracts and benefits to provide to consumers).

[61] *See Semi-Annual Report of the Consumer Financial Protection Bureau*, *supra* note 16, at 20.

[62] *See id.*

consumers, and the marketplace have the complaint information needed to improve the functioning of the consumer financial markets for such products and services."[63]

A recent survey of consumer attorneys found that in lieu of full-representation, 48% of these attorneys had helped consumers submit complaints against financial institutions and 23% of all respondents said they had submitted complaints that were resolved in the consumers' favor.[64] A significantly higher proportion of responding legal services attorneys (74%) reported that they had submitted complaints to the CFPB for consumers, and 42% of legal services attorneys said that a complaint submitted to the database was resolved in the consumers' favor.[65] Further, it now is accepted legal aid practice to advise consumers whom legal aids offices are unable to represent to submit complaints themselves to the Bureau.[66]

The Bureau's complaint process thus may provide consumers with an effective avenue to pursue issues that others might bring directly to companies, thereby serving as a "litigation substitute."[67] But the Database does not contain sufficient data to fully assess the complaint mechanism as a dispute resolution function. Without data about companies' responses to complaints beyond the basic information currently provided, there is no way for policymakers, advocates, scholars, and consumers themselves to know the effectiveness of the complaint process. We urge the Bureau to take this opportunity to increase the variety of data available in the Database and, when appropriate, in reports and other publications.

2. More Data Will Increase Consumer Knowledge About Companies and Enhance the Marketplace

The results of inclusion of consumers' narratives demonstrate the benefits of including as much data as feasible. Inclusion of narratives has allowed policymakers, advocates, and academics to analyze the additional data, in combination with other data, for trends. Based on these analyses, they have proposed ways for the Bureau to enhance the complaint process, for the Bureau to monitor distinct market segments, and for consumers to better utilize the complaint process.[68]

Consumers likewise can read the narratives to assess their own problems, which may enhance how they frame their complaints and deal with companies in a way that leads to more productive resolutions and more consistent resolutions across consumers. As noted above, consumers also can use the narratives to decide which companies with which to do business.

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63 *Id.* at 21.

64 *Advocates Reflect on the Consumer Bureau's Role in Achieving Justice for Consumers: An Online Survey*, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES 6 (Feb. 2018), https://www.consumeradvocates.org/sites/default/files/NACA_survey_CFPB_in_our_communities022018_1.pdf.

65 *Id.*

66 *Id.*

67 *See* Porter, *supra* note 31, at 77-78.

68 *See, e.g.*, Foohey, *supra* note 6, at 177-79 (discussing how consumers use the complaint function and suggesting ways in which the Bureau can enhance its responses to consumers); Odinet, *supra* note 37, at 105 (relying on consumer narratives to analyze fintech lenders); David Ascienzo, *Cryptocurrency CFPB Complaints Rise as Prices Fall*, VALUEPENGUIN, https://www.valuepenguin.com/cfpb-complaints-about-cryptocurrencies (discussing complaints about cryptocurrency); Weissman & Mierzwinski, *supra* note 37 (analyzing complaints submitted by older Americans).

The company response fields provide for useful examples of how the Bureau can augment the data it publishes. At present, the Database includes only superficial data about company response and complaint resolution. It details the company's public response, the company's response to the consumer, and whether the response was timely. The company's public response field is blank for the majority of complaints. The company's response field is limited to seven options (closed, closed with explanation, closed with monetary relief, closed with non-monetary relief, closed with relief, closed without relief, and in process).[69] And the timely received field is a binary yes, no (and N/A).

The information about timely responses and seven response options alone can help consumers decide if they want to do business with particular companies. But additional information about the relief a company did or did not provide would help consumers make better decisions. Without additional data, questions remain about whether and which companies respond to complaints with resolutions that address consumers' complaints. If these questions go unanswered, speculations about companies' practice, both positive and negative, may proliferate. Supplementing data in the Database with observations of companies' responses to complaints will enhance the transparency of the complaint process and provide researchers with data necessary to more fully assess the complaint mechanism, which will benefit all stakeholders—companies, advocates, researchers, and consumers.

The Bureau also should make public additional data it collects through the complaint process. When consumers submit complaints, they may state what they think will be a fair resolution of the issue, but this information is not publically available. Consumers also indicate whether they tried to resolve their issues with the company before turning to the Bureau's complaint mechanism. Including these data will help policymakers, advocates, researchers, and other interested citizens learn how consumers conceptualize and deal with their financial issues.

Further, to provide more context for the company names and resolution information in the Database, the Bureau should consider adding fields that detail the market size for the subject product or service and the share of the market held by the subject company. These data points will allow consumers, researchers, and others to place consumers' complaints in the context of the broader marketplace, which will increase transparency about the prevalence of complaints about particular companies.

Importantly, the Bureau can add these fields to the Database without jeopardizing consumers' privacy or risking re-identification. Overall, in adding these fields, the Bureau will enhance transparency and allow for more detailed analysis by third parties, which will inure to the benefit of all stakeholders.

III. REPORTS PUBLISHED BY THE BUREAU PROMOTE MARKET TRANSPARENCY AND EFFICIENCY

The Bureau's reports based on complaint data are helpful tools that educate consumers and highlight industry trends that otherwise might not be easily recognizable. Reports provide consumers with information about financial products and services in one place via a website that is

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[69] *See* Foohey, *supra* note 6, at 182 (noting these options).

relatively easy to access. This is a vast improvement over the piecemeal information available to consumers prior to the Bureau's publication of reports.

Similarly, the reports fill key information gaps about issues that have the potential to balloon into larger problems. Policymakers tend to rely on economic studies that examine larger data sets, information that by its nature lags in time. The Bureau's reports augment these studies with real-time information. Researchers and advocates also can draw from these reports to pinpoint particular products and services for future detailed inquiry and to identify areas where consumers may need more information to understand their options.

The reports also provide guidance to companies to insure the integrity of the marketplace. This is particularly important when consumers have little ability to choose which companies to interact with, such as in the context of mortgage servicers, which are contracted with by mortgage lenders. In these instances, companies may find their reputations tarnished by their contracting parties. The Bureau's reports can provide valuable information for companies about which other companies to contract with and whether or not to intervene with their contractual partners to require different practices. Likewise, reports' summaries of data may assist advocates, states' attorneys general, and other stakeholders in advocating for changes to industry standards, such as credit reporting practices.

Overall, the reports provide key information that, when used by advocates, policymakers, researchers, and consumers themselves, help consumers avoid financial mistakes and make better financial decisions, which in turn promotes marketplace efficiency. We urge the Bureau to continue publishing monthly reports and occasional reports about specific products, services, and trends, as well as to enhance these reports with additional analysis and a schedule.

A. Enhancing the Usefulness of the Bureau's Reports

The Bureau should capitalize on the opportunity to leverage the data it collects as part of its complaint mechanism to publish reports that add to the public's knowledge about the financial products and services marketplace. In general, additional analysis and tailored reporting increases the information available to consumers and other parties interested in cultivating marketplace efficiency.

1. Frequency

The Bureau's current reports, both monthly snapshot reports and special reports about specific industries and issues, provide valuable information for consumers, researchers, advocates, companies, and policymakers. Special reports that the Bureau issues along with educational materials and reports focusing on vulnerable populations, such as service members, lower income consumers, and the elderly, are particularly useful to advocates and researchers who focus on these populations and their particular issues. As such, we urge the Bureau to continue publishing monthly reports and special reports that deal with particular products, services, or vulnerable populations.

2. Content

Particular to the monthly reports, the inclusion of month-to-month trends is especially beneficial to research and advocates in pinpointing products, services, or issues that merit in-depth focus. In addition to continuing to include month-to-month trends in its monthly and other reports, the Bureau should consider adding more in-depth analysis of monthly trends. For example, more in-depth analysis may focus on a particular sub-product or sub-issues, as indicated by consumers through the complaint mechanism. Adding this tailored analysis will enhance consumers' ability to make financial decisions, and similarly will allow others to decide which particular issues, products, or services merit extra focus. For all parties, the Bureau's reports likely are one of the most easily accessed and most up-to-date sources about these issues, products, or services.

Likewise, the Bureau's reporting on State and local complaint trends provides key and otherwise often unavailable information to consumers and others about regional trends. The same is true for reports that focus on particular products and services, and reports that pinpoint seasonal fluctuations. In addition to including these trends, products, and services in monthly and other reports, we urge the Bureau to publish tailored special reports that provide more in-depth analysis of trends, seasonal fluctuations, products, and services.

Particular to seasonal fluctuations, some ideas that the Bureau should consider include fluctuations that occur: during summer, when students and younger individuals take on extra work; during the winter holidays; during the beginning of semesters when companies may target college students to sign up for credit cards; and during peaks in housing market searches and sales, such as in the spring.[70]

Similarly, reports that focus on products and services will be even more useful to consumers, policymakers, advocates, and others if they include more information about specific categories and questions asked of consumers. For example, instead of stating the percentage of consumers who complained about issues with debt collection, the Bureau's reports will be more effective if they detail the percentage of consumers who complained about particular issues with debt collection, such as receiving calls after 9 p.m. or the collectors' use of illegal threats.

The Bureau can further enhance the effectiveness of its reports by adding more context for complaint information, particularly with regards to companies. We suggest above adding information about market size and company market share to the Database. Including this information in published reports will promote transparency and aid consumers and others in assessing complained about companies' place within the market for financial products and services. This transparency, in turn, will provide companies with an opportunity to distinguish themselves from other companies.

Overall, the information the Bureau collects through the complaint mechanism places it in a unique position to publish tailored reports about trends, regional and seasonal fluctuations, vulnerable populations, and particular products and services. In many instances, the Bureau may be in the best position to disseminate this information. We thus urge the Bureau to continue releasing monthly reports, along with special reports that provide more in-depth analysis.

B. Publishing a Schedule of Reports Will Promote Transparency

The Bureau also should provide a publication schedule of its reports and other materials relying on complaint data. As noted, the Bureau is statutorily obligated to provide an annual report to Congress

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[70] *See* Jed Kolko, *The Best Time to Look for a House, By State*, CITYLAB (Jan 30, 2013), https://www.citylab.com/equity/2013/01/best-months-buy-house-city/4540/.

on its complaint operations every March 31. It also must provide semi-annual reports that cover a range of topics, including consumer complaints.[71] The Bureau further publishes additional reports and summaries of data. These reports and the Database collectively allow policymakers, industry, advocates, and consumers to assess the CFPB's complaint mechanism, and to leverage information in reports and data in the Database to likewise assess markets for financial products and services. Publication of a schedule will promote transparency and allow users of the reports and other publications to plan for how they will use to-be-published data.

C. Notifying Companies of Their Inclusion in Reports

If the Bureau notifies companies of their inclusion in Bureau reports, the Bureau should release information about how and when it notified companies of their inclusion in its reports along with the publication schedule. This likewise will promote transparency of the process by which the Bureau analyzes and distributes data based on consumer complaints.

We further urge that if the Bureau decides to notify companies of their inclusion in Bureau reports, it do so without including the companies' responses in the reports. If companies decide to provide comments about their inclusion, they may do so on their own websites or by response to the Bureau, which the Bureau can later publish, for instance, as part of its blog. This procedure will ensure that the reports continue to be based solely on information as submitted by consumers via the complaint mechanism. We urge the Bureau to avoid allowing companies to provide input into the reports before publication. This would run the risk that companies could suppress negative information about them in the reports and at the very least would create the appearance of such improprieties.

IV. THE BUREAU SHOULD DEVOTE RESOURCES TO CONTINUING TO IMPROVE THE ACCESSIBILITY OF THE COMPLAINT PORTAL AND DATABASE

A key reason for the complaint mechanism and Database's successes has been the accessibility, design, and user-friendliness of the mechanism and the Database. Since the Database's inception, the Bureau has affirmed the benefits of providing a publicly-accessible and searchable database of complaints. In its final policy statement issued when it first established the Database, the Bureau detailed the benefits of providing a publicly-accessible and searchable database of complaints.[72] These benefits include, among others, facilitating "data visualizations, which can then be embedded on other Web sites and shared via social media," allowing for users "to disseminate information from the database, reducing transaction costs in the marketplace of ideas," and providing machine-readable data such that third-parties can "build their own tools for leveraging the data, further reducing transaction costs and improving dissemination."[73]

It is of utmost importance to the effectiveness of the complaint mechanism that the Bureau's website and the Database be easily accessible and understandable by third-parties, including the general public. Consumers must be able to easily submit complaints and use the Database to research potential creditors and financial products. This policy was at the heart of the Bureau's

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[71] *See supra* Part I.
[72] Disclosure of Certain Credit Card Complaint Data, *supra* note 29, at 37567-68.
[73] *Id.* at 37567.

addition of complaint narratives to the Database. In issuing its final policy statement, the Bureau affirmed that easily-accessible, downloadable, and searchable data about consumers' complaints empowers consumers, promotes transparency, and enhances market efficiency and fairness.[74] Conversely, if consumers face barriers in understanding or using the complaints process or Database, then the complaint portal has less value, and the transparency, efficiency, and fairness benefits of the Database are diminished.

As noted above, consumers look to the complaints process as a trusted means for gathering information and seeking to obtain redress. Since 2011, the Bureau has handled more than a million complaints from consumers nationwide, the vast majority of which were submitted through the Bureau's complaint portal.[75] The Bureau provides a safe and tested complaint process that responds to all consumers, as compared to companies' privatized and generally uneven customer services.[76]

Accordingly, the Bureau's provision of a user-friendly complaint portal and Database can help narrow the divide between consumers' access to remedies, while providing more robust data that consumers and third parties use to promote transparency, efficiency and fairness.[77] To that end, there are three key improvements and related tools the Bureau can use to expand accessibility and usability of the complaint portal and Database.

A. The Complaint Portal Should Be Simple and Easy to Understand

The usefulness of the Database decreases substantially if it is not simple and understandable for average Americans. The language on the Bureau's website and complaint portal detailing how to submit complaints must be readable and encouraging to people to speak out about problems, beginning with the Bureau's homepage. The average American reads at an eighth-grade level. Text for the general public should aim for a reading level of around grade 6, at most grade 8.[78]

For example, the Bureau's webpage that directs consumers about starting the complaint process is written at grade level 16, meaning that they are appropriate for someone who has graduated from college or has pursued an advanced degree.[79] At present, the page contains two key paragraphs:

> We've handled over 1 million complaints, helping consumers connect with financial companies to get direct responses about problems with mortgages, student loans,

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[74] Disclosure of Consumer Complaint Narrative, *supra* note 29, at 15573 (March 24, 2015).
[75] *See supra* note 6.
[76] *See supra* note 59 and accompanying text.
[77] *See* Porter, *supra* note 31, at 79 (discussing the general "knowledge value" of complaint data).
[78] The American Medical Association and the National Institutes of Health recommend readability of patient education materials to not exceed a sixth-grade reading level. The average reading skill of U.S. adults is at the eighth-grade level. *See* Adam E. M. Eltorai, et al., *Readability of Patient Education Materials on the American Association for Surgery of Trauma Website*, 3 ARCH. TRAUMA RES. 1 (2014); *see also* Barry D. Weiss, *Health Literacy and Patient Safety: Help Patients Understand*, AMA Foundation (2007), https://med.fsu.edu/userFiles/file/ahec_health_clinicians_manual.pdf.
[79] Reading level was assessed using Microsoft Word's readability statistics, which includes the Flesch-Kincaid grade level. *See* Test Your Document's Readability, OFFICE SUPPORT, https://support.office.com/en-us/article/Test-your-document-s-readability-85b4969e-e80a-4777-8dd3-f7fc3c8b3fd2#__toc342546558 (last visited May 12, 2018).

> payday loans, debt collection, credit reports, and other financial products and services.
>
> Every complaint we receive gives us insights into problems that people are experiencing in the marketplace and helps us to identify and prioritize problems for potential action. The result: better outcomes for consumers, and a better financial marketplace for everyone.[80]

These paragraphs should be easy to understand for all, and not geared for college graduates. Decreasing the reading level of this language is particularly key for improving accessibility. In particular, decreasing the reading level of these paragraphs may increase consumer's propensity to submit complaints, which will provide more data.

At the same time, the Bureau can enhance accessibility by deleting some filters and introductory paragraphs. Indeed, in prior months, this webpage did not contain any introductory paragraphs. Rather, the page prompted consumers to begin the complaint process by "choos[ing] a product or service to get started," and provided several options, each with a basic picture that represented the type of product or service.[81] Not only is this previous language better because it is at a much lower reading level, the fewer times people must click through a webpage will increase their ability to successfully lodge complaints, which again will provide more data.

Now consumers must click through the initial page that contains the above two paragraphs about submitting a complaint. And they also must read another page of text that details the five steps to submitting a complaint and contains language warning consumers about all the information they will need to submit a complaint and that they generally will not be allowed to submit a second complaint about the same problem.[82] The warning itself is at a reading level of grade 10.5.[83] More concerning is that such a warning will deter people from submitting a complaint in the first instance. Although it is important to counsel consumers about what information is needed, easier to read language combined with more visual cues will better help people submit complaints.[84] Similarly, the complaint process steps previously included more visual cues, such as a basic drawings of an automobile. Adding back these visual cues will aid people in understanding their options for submitting complaints.

B. The Database Should Be Easily Downloadable and Analyzable

For the Database to be effective, it should provide information in a way that is easy to analyze for consumers and other stakeholders. Currently, the Bureau's website provides three options for consumers and other parties to access the data: read narratives, view complaint data, and download data in CSV and JSON file formats.[85] Consumers and other third-parties use each of these options

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80 Submit a Complaint, *supra* note 6.

81 *See* Submit a Complaint, CFPB (Jan. 15, 2016), via Wayback Machine, https://web.archive.org/web/20160115040559/http://www.consumerfinance.gov/complaint/.

82 Submit a Complaint, *supra* note 6.

83 *See supra* note 79.

84 *See* J. David Greiner, Dalie Jimenez, & Lois Lupica, *Self-Help, Reimagined*, 92 IND. L.J. 1119, 1154-56 (2017) (discussing organizing and structuring content to make content understandable by laypeople).

85 Consumer Complaint Database, *supra* note 7.

differently, suggesting that the Bureau should tailor tools to enable users to analyze the data based on how they access the data.

For the "read narratives" option, the Bureau should continue to provide the easy sorting of complaints by date, product, sub-product, issue, and sub-issue, among other options, within its website. Once sorted, the current presentation of the information with headings and subheadings of different font sizes and styles, and ample white space comports with best practices about information presentation.[86] Any changes that the Bureau makes to how complaints are displayed should continue to adhere to these practices.

For the "view complaint data" option, the Bureau should create an interface that displays a spreadsheet in a web browser on users' personal computers and tablets similar to the Bureau's current mobile-device ready version of this option. The mobile-device ready version of this option at present brings users to a sortable spreadsheet that displays the data on their smart phones. In contrast, at present, the webpage's "view complaint data" brings users to the same page as "read narratives."[87] The duplication is confusing, and misses the opportunity to provide users with the ability to easily access a sortable spreadsheet of data online.[88]

In prior years, this page of the Bureau's website included "download the data" options that allowed users to pre-sort the downloaded data based on product or service.[89] At present, if a user clicks on "download options," the user is brought to two options (CSV, JSON) and a link to "filter the data set." The "filter" link brings the user once again to the same page with complaints as the "view complaint data" option. Such duplication is again confusing, and misses an opportunity to present consumers and third-parties with easily accessible data without needing to download the database. This analysis shows that one tool that the Bureau should consider devoting resources to developing in the near future is a more-easily accessed full version of the Database online, in addition to the Database download tools that the Bureau already provides. This will allow users to be better able to analyze complaint information via multiple interfaces.

C. The Complaint Portal and Database Should Be Mobile Friendly

The complaint portal and Database must be accessible by all consumers regardless of the technology they use to connect to the Internet. Many individuals in America use their mobile devices, such as smart phones, to access the Internet, particularly lower-income users and racial and ethnic minorities.[90] Smartphone usage has helped narrow the prior gap in Internet access based on race and

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86 *See* Greiner, et al., *supra* note 84.
87 Search the Consumer Complaint Database, CFPB, https://www.consumerfinance.gov/data-research/consumer-complaints/search/ (last visited Apr. 22, 2018).
88 A spreadsheet currently is accessible through the "view complaint data in Socrata" link on the Search the Consumer Complaint Database page. *Id.* Many consumers and third parties who may benefit from this display of data likely do not understand that this is what they will be routed to if they click this link.
89 *See* Consumer Complaint Database, CFPB (May 7, 2016), via Wayback Machine, https://web.archive.org/web/20160507102109/https://www.consumerfinance.gov/data-research/consumer-complaints/
90 Internet / Broadband Fact Sheet, PEW RES. CTR. (Feb. 5, 2018), http://www.pewinternet.org/fact-sheet/internet-broadband/.

economic level.[91] As of 2016, 12% of Internet users relied on their smart phones as the only means for gaining access to the web.[92]

At present, the Bureau's website, complaint portal, and particularly the Database, are best viewed through a computer or laptop Internet browser, such as Internet Explorer or Firefox. For instance, the complaint portal prompts consumers to submit a complaint through five steps.[93] Each of these five steps requires consumers to click through a number of options to specify the type of product and problem at issue. To enable consumers to submit complaints, particularly on mobile devices, the Bureau should continue to refine tools that provide cues about content and upcoming questions, allowing people to read text and questions non-linearly.[94]

The Bureau's website also includes a page whereby consumers and third-parties can search complaints. On some mobile devices, this page displays complaints in linear and searchable formats. It also provides an interface to view and download the data in a mobile-friendly format. This is important in advancing access for those without home computers or broadband Internet access. The Bureau should continue to refine tools that ensure that the complaint data are viewable and downloadable in a way that promotes access from mobile devices.

V. Conclusion

Most importantly, the Bureau must continue to make the Database public in order to fulfill its statutory duty to promote transparency and efficiency in the marketplace for financial goods and services. Particularly when combined with the Bureau's lack of new enforcement actions, eliminating the public Database would remove an important check on companies. Ultimately, consumers, law-abiding companies, and the marketplace would suffer. The public Database provides transparency, empower consumers, allows for the dissemination of robust information, and enables market efficiency and fairness.

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91 Kathryn Zickuhr & Aaron Smith, *Home Broadband 2013*, PEW RES. CTR. 4–5 (2013), http://www.pewInternet.org/files/old-media//Files/Reports/2013/PIP_Broadband%202013_082613.pdf.
92 Internet / Broadband Fact Sheet, *supra* note 90.
93 Submit a Complaint, *supra* note 6 (detailing the "five steps to submit your complaint").
94 *See* Greiner, et al., *supra* note 84, at 1154-56 (discussing organizing and structuring content to make content understandable by laypeople).

Comments of Financial Regulation and Consumer Protection Scholars on
Docket No. CFPB-2018-0005
May 29, 2018

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Dear Ms. Jackson:

The undersigned professors of consumer law and financial regulation and former regulators submit the following comments in response to the Consumer Financial Protection Bureau's Request for Information ("RFI") Regarding Bureau External Engagements (Docket No. CFPB-2018-0005). Each signatory's affiliation is indicated below his/her signature to provide institutional affiliation, but this comment does not represent the views of their institutions.

Sincerely,

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William Black
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Eric Wright
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I. IT IS APPROPRIATE AND NECESSARY FOR THE BUREAU TO ENGAGE IN REGULAR OUTREACH AND CONVERSATION WITH A BROAD RANGE OF INDIVIDUALS AND ENTITIES AFFECTED BY CFPB ACTIVITIES, INCLUDING INDUSTRY, CONSUMERS, AND THEIR REPRESENTATIVES.

The work of the Bureau impacts the lives of tens of millions of consumers as well as consumer financial service providers within its jurisdiction. For this reason, it is essential that as the CFPB does its work, it engages in robust outreach and conversation with all parties affected by its work, including consumers, consumer groups and advocates that focus on an array of different consumer markets and issues, and the various industry participants within the Bureau's jurisdiction. Broad and transparent engagement with all sectors of affected stakeholders will ensure that the Bureau receives the fullest possible information for sound decision-making while preserving its legitimacy as a neutral independent agency.

The undersigned believe that the Bureau's outreach and engagement efforts with affected constituencies have been appropriate and robust in the past, and that the resulting regulations, supervisory activities, enforcement actions, educational efforts, and other work of the Bureau reflect a balanced, responsive, and inclusive approach by the Bureau. We encourage the Bureau to continue to engage with and listen to all affected constituencies, as more fully described herein.

II. THE BUREAU HAS EFFECTIVELY REACHED OUT TO AND HEARD FROM EXTERNAL PARTIES, INCLUDING INDUSTRY AND CONSUMERS, IN NUMEROUS WAYS.

A. THE BUREAU HAS EFFECTIVELY REACHED OUT TO AND HEARD FROM INDUSTRY AND CONSUMERS IN ITS RULEMAKING ACTIVITIES.

In the course of the Bureau's process before issuing a final rule, the Bureau has, in the past, regularly engaged with affected parties through numerous avenues. These avenues have included, but are not limited to, discussions with advisory boards, field hearings, roundtables, town halls, small business review panels (SBREFAs), and training and implementation activities.

It would be impossible to catalog the numerous ways the Bureau, in its rulemaking, has engaged externally over the short life of the Bureau. Instead, in this comment we focus on the many external engagement activities of the Bureau in regards to one key rule adopted by the Bureau: the Mortgage Servicing Rule.[1]

In 2012, in accordance with Dodd-Frank, the Bureau proposed major changes to the mortgage servicing rule.[2] The final rule was adopted on February 14, 2013,[3] and became effective January 10, 2014.[4] The Bureau later adopted amendments to the rule on October 19, 2016,[5] which became effective (in large part) on October 19, 2017.[6]

In writing the proposed rules the Bureau took into account numerous sources of external input. These varied sources included studies and enforcement actions by other governmental agencies, including the terms of the National Mortgage Settlement, actions by the Office of the Comptroller of the Currency and the Federal Reserve Board,[7] law review articles,[8] mortgage market news accounts,[9] studies by consumer advocacy groups,[10] and testimony before Congress.[11] In developing the mortgage servicing proposals, "Bureau staff met with mortgage servicers, force-placed insurance carriers, industry trade associations, consumer advocates, other Federal regulatory agencies, and other interested parties to discuss various aspects of the statute and the servicing industry."[12] The Bureau "consulted with relevant Federal regulators both regarding the Bureau's specific proposals and the need for and potential contents of national mortgage servicing standards in general."[13]

In its notice of proposed rule-making, the Bureau specifically asked commenters to address the potential burden the regulations might have on small businesses, and to recommend adjustments to the rule that might be appropriate.[14] In setting the effective date, the Bureau also asked for input from industry regarding the speed with which servicers would be able to modify their software, adopt policies and procedures, train staff, and otherwise implement new rules.[15] The Bureau set the review timelines for loss mitigation applications (30 days), and the rule prohibiting foreclosure while a borrower was making payments pursuant to a trial loan modification, based on the existing industry standard.[16]

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[1] 12 C.F.R. 1024.30 – 1024.41. For additional discussion of the Bureau's public outreach efforts with respect to its rulemaking process, see the forthcoming Comments of Financial Regulation and Consumer Protection Scholars on Docket No. CFPB-2018-0009.
[2] 77 Fed. Reg. 57199 (Sept. 17, 2012).
[3] 78 Fed. Reg. 10695 (Feb. 14, 2013).
[4] *Id.* at 10696.
[5] 81 Fed. Reg. 72160 (October 19, 2016).
[6] *Id.* There were some interim amendments to the rule as well, catalogued in the 2016 rule at 81 Fed. Reg. 72160.
[7] Proposed Rule with Request for Public Comment, 77 Fed. Reg. 57199, 57200, 57201, 57204, 57205 (Sept. 17, 2012).
[8] *Id.* at 57202.
[9] *See, e.g., id.* (citing to *Inside Mortgage Finance*).
[10] *Id.* at 57203.
[11] *Id.*
[12] *Id.* at 57207.
[13] *Id.*
[14] *Id.* at 57206, 57209.
[15] *Id.* at 57208.
[16] *Id.* at 57268, 57270.

The Bureau's early intervention requirements were formed based on existing requirements on servicers imposed by private mortgage investors, the GSEs, Ginnie Mae, or government agencies offering guarantees or insurance for mortgage loans, such as FHA, the VA, or the Rural Housing Service.[17] Similarly, in response to information obtained from consumer advocates, the Bureau proposed requiring that servicers provide information requested by borrowers and respond to errors identified by borrowers even if they were delinquent on their loans.[18] The Bureau also set up a loss mitigation process that addressed "concern among mortgage market participants…regarding servicers' performance of loss mitigation activity in connection with the mortgage market crisis."[19]

In writing the rules, the Bureau considered the impact regulations might have on small businesses by convening a Small Business Review Panel and asking specifically, in the proposed rule, for comments regarding appropriate rule adjustments for small businesses.[20] The SBREFA panel consisted of representatives from 16 companies as small entity representatives.[21] The Bureau tailored its proposed rule based on input from small servicers, including feedback received in the SBREFA panel, after which it decided not to exempt small servicers from the early intervention requirements of the loss mitigation rule, but asked "whether the Bureau should consider alternative means of compliance with proposed § 1024.39 that would provide small servicers with additional flexibility, such as by permitting small servicers to develop a more streamlined written notice under proposed § 1024.39(b)."[22]

When the time came to draft and adopt final rules, the Bureau once again took into consideration the input received from various stakeholders and governmental entities.[23] It received over 300 comments, the majority of which "were submitted by mortgage servicers, industry groups representing servicers and businesses involved in the servicing industry."[24] Comments were received from "[l]arge banks, community banks and credit unions, non-bank servicers, and industry trade associations. The Small Business Administration Office of Advocacy submitted a comment and the remaining comments were submitted by vendors and attorney's [sic] representing industry interests. The Bureau also received a significant number of comments from consumer advocacy groups."[25] The Cornell e-Rulemaking Initiative submitted a 50-page comment synthesizing submissions of 144 registered participants to Cornell's Regulation Room project.[26] The Bureau's explanation of its regulatory choices discussed in great deal the comments received by all external parties and the rationales for the final rules.

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[17] *Id.* at 57281.
[18] *Id.* at 57237.
[19] *Id.* at 57265.
[20] *Id.* at 57206-57207. The SBREFA report can be found at https://files.consumerfinance.gov/f/201208_cfpb_SBREFA_Report.pdf [hereinafter SBREFA Report].
[21] SBREFA Report, *supra* note 20, at 13.
[22] 77 Fed. Reg. 57199, 57260 (Sept. 17, 2012).
[23] Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X), Final Rule; Official Interpretations, 78 Fed. Reg. 10695 (Feb. 14, 2013).
[24] *Id.* at 10705-06.
[25] *Id.* at 10706.
[26] *Id.*

Once the rule was adopted, the Bureau continued its significant engagement with external stakeholders.[27] It adopted an implementation plan through which the Bureau worked with industry to implement the rules, including publication of plain language and interpretive guides.[28] It hired as its program manager for servicing the late Laurie Maggiano, who was hailed as the "architect of the Home Affordable Modification Program" and named a "woman of influence" in 2013 by HousingWire.[29] It conducted extensive trainings for housing counselors, reaching over 5000 housing counselors in over 20 cities.[30] It issued compliance guides.[31] It issued plain language guides for consumers.[32] In its own words: "After the January 10, 2014 effective date of the rules, the Bureau has continued to engage in ongoing outreach and monitoring with industry, consumer advocacy groups, and other stakeholders."[33]

When the Bureau learned of servicer implementation challenges, it "issued two final rules amending discrete aspects of the 2013 Mortgage Servicing Final Rules."[34] In its change to the rules in 2016, the Bureau noted that the changes were meant "to address important questions raised by industry, consumer advocacy groups, and other stakeholders."[35]

The Bureau's external engagements on this one rule demonstrate both the need for and the effectiveness of the Bureau's focus on input from all external stakeholders. The undersigned encourage the Bureau to continue this sort of varied and robust dialogue with the many and varied external stakeholders impacted by the Bureau's work.

B. THE BUREAU HAS EFFECTIVELY REACHED OUT TO AND HEARD FROM INDUSTRY AND CONSUMERS THROUGH ITS FIELD HEARINGS AND ROUNDTABLES.

The Bureau has made effective use of field hearings and roundtables, held all over the United States, as a way of hearing from and reaching out to average Americans, be they consumers, business owners, or industry representatives, where they live and work. Field hearings generally consist of prepared remarks by the Bureau Director and a welcome by a local public official whose portfolio includes financial services or consumer affairs, followed by a panel discussion consisting of Bureau employees, industry representatives, and consumer representatives. After the panel discussion, attendees are invited to sign up to make a comment. All of the field

27 81 Fed. Reg. 72160, 72162-63.

28 81 Fed. Reg. 72160, 72162.

29 2013 Women of Influence, available at https://www.housingwire.com/articles/27764-women-of-influence?page=21.

30 *See* HUD Champion of Service Award for CFPB trainings, available at https://www.hudexchange.info/resources/documents/Housing-Counseling-Bridge-Newsletter-2014-07.pdf; Brenda Muniz, "We're training housing counselors on the new mortgage servicing rules", CFPB Blog, July 7, 2014, available at https://www.consumerfinance.gov/about-us/blog/were-training-housing-counselors-on-the-new-mortgage-servicing-rules/.

31 *See, e.g.*, https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/mortserv/.

32 Help for Struggling Borrowers, a guide to the mortgage servicing rules effective on January 10, 2014, available at https://files.consumerfinance.gov/f/201402_cfpb_mortgages_help-for-struggling-borrowers.pdf.

33 81 Fed. Reg. at 72163.

34 *Id.*

35 *Id.*

hearings are live-streamed. They are also video recorded and available through the CFPB's website and YouTube.

For example, the field hearing on Consumer Access to Financial Records, held in Salt Lake City, Utah on November 17, 2016,[36] had the following agenda:

Introduction
Zixta Martinez
Associate Director for External Affairs, CFPB

Opening remarks
Richard Cordray
CFPB Director

Welcome
Honorable G. Edward Leary
Commissioner of the Utah Department of Financial Institutions

Panelists
David Silberman
Acting Deputy Director,
Associate Director, Research, Markets and Regulations
CFPB

Holly Petraeus
Assistant Director, Office of Servicemember Affairs
CFPB

Keo Chea
Acting Assistant Director, Office of Community Affairs
CFPB

Ed Mierzwinski
U.S. PIRG

Joe Valenti
Center for American Progress

Ryan Falvey
Center for Financial Services Innovation

Rob Morgan
American Bankers Association

[36] The video of the field hearing can be found at https://www.consumerfinance.gov/about-us/events/archive-past-events/field-hearing-consumer-access-financial-records-salt-lake-city-utah/.

Alaina Gimbert
The Clearing House

Steven Boms
Envestnet Yodlee

In conjunction with each field hearing, the Director and staff generally participate in a roundtable discussion in which individuals from consumer groups and industry get a chance to talk to the Director and staff about issues relevant to and of concern to the local community.

The undersigned encourage the Bureau to continue engaging with average American citizens through field hearings and roundtables. By taking the Bureau to the people where they live, the Bureau can gather important information about markets, and continue to make the work of the Bureau more transparent and more accessible to all Americans.

C. THE BUREAU HAS EFFECTIVELY REACHED OUT TO AND HEARD FROM INDUSTRY AND CONSUMERS THROUGH ITS CONSUMER ADVISORY BOARD.

The Bureau has historically sought advice and input from its Consumer Advisory Board (CAB), which consists of industry representatives, consumer advocates, and academics. The current CAB has equal numbers of industry representatives and advocates plus three academics. All the CAB members provide service to the CFPB and the country without any compensation

The CAB has played an important role in all aspects of the Bureau's work. When the Bureau first came into being, the initial CAB members were deeply involved in crafting the many rules that the Dodd-Frank Act required the Bureau to issue. The CAB's feedback was invaluable to these many rule-makings. Although the pace of rule-making has slowed, it has not stopped and the CAB continues to participate in rule-making discussions.

CAB members learn a great deal from the Bureau and, in turn, provide feedback on the Bureau's educational efforts, enforcement priorities, the Catalyst program, and other activities. The CAB members also bring issues that they observe in the field to the Bureau for discussion and possible investigation. Topics can range from the challenges that fintech providers are facing to new, exploitative credit products. They also bring information from Bureau staff back to their communities, for example, resources for community organizations and banks to provide their customers.

The value of the CAB lies in its constitution. Having industry people and consumer advocates work through issues in the financial marketplace has led to more agreement than one would expect. The culture of the CAB is for each person to listen carefully to other people's opinions and to render their own opinions with grace and openness. This culture makes for lively, respectful, and productive discussions.

Until Mr. Mulvaney's appointment, CAB members held two days of meetings in Washington, D.C., twice a year, and another set of two-day meetings elsewhere in country. The bulk of the meeting time involved only CAB members and Bureau staff. This structure enabled people to speak openly and encouraged honest dialogue over grandstanding.

On the second day of the two-day meetings, the Bureau would hold two CAB sessions open to the public. At these sessions, CAB members discussed their perspectives on different consumer issues, presented information on their own work, and listened to staff descriptions of Bureau research and projects.

Between meetings, CAB members participated on conference calls to plan for upcoming meetings and to work on the various projects of three CAB subcommittees. In sum, until the fall of 2017, the CAB played an important role at the CFPB and was able to reach consensus on many complicated issues.

Since joining the Bureau, Acting Director Mulvaney has taken steps that undermine the value of the CAB. In the name of transparency, he has mandated that all CAB conference calls and in-person meetings be open to the public. This has had the effect of silencing people who worry that there could be repercussions if their statements are made public. Instead of thoughtful conversations, members of the CAB are now more likely to take entrenched positions that do not serve consumers or industry, and certainly do not advance the work of the CFPB.

In an interesting twist, the Acting Director does not want transparency to apply to him. In the one call the CAB had with the Acting Director, he refused to make the call public. In addition, in a meeting scheduled for February 2018, the CAB was advised that when Mr. Mulvaney engaged with the CAB, the public could not be present.

Mr. Mulvaney ultimately cancelled the long-scheduled February meeting because of his travel schedule.[37] CAB members, who purchased their tickets for the meetings, are still waiting reimbursement from the CFPB.

More recently, Mr. Mulvaney announced that the June CAB meeting, which had been scheduled for two days, was going to be cut down to one day for budgetary reasons and because of his schedule. (Richard Cordray made himself available for all CAB meetings on both days unless he had a critical conflict such as having to testify before Congress).

In another example of Mr. Mulvaney's lack of transparency, CAB members are no longer informed of which CFPB staff are participating or listening to CAB conference calls. To the extent this new practice makes CAB members feel they are being "watched," Mr. Mulvaney has created yet another impediment to the effectiveness of the CAB.

We urge the Bureau to and reinstate the practices Director Cordray adopted in support of the CAB and transparency.

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[37] As we discuss in the next section, unlike Director Cordray, Mr. Mulvaney refuses to be transparent about his activities.

D. THE BUREAU STRUCTURE ENSURES THAT EXTERNAL PARTIES AFFECTED BY THE WORK OF THE BUREAU HAVE A VOICE INSIDE THE BUREAU.

The Bureau is structured in a way that ensures external engagement with different constituencies affected by the Bureau's work. For example, in April 2013 the Bureau established the Office of Financial Institutions and Business Liaison.[38] This office was designed "to facilitate and coordinate dialogue with all industry participants."[39] As of spring 2017, the office had "hosted hundreds of meetings, briefing calls, and public appearances with financial institutions and financial industry trade associations."[40]

On the consumer side, the Bureau maintains a division focused on consumer education and engagement.[41] Within that division are offices focused on consumer engagement, financial education, students and young consumers, older Americans, service-member affairs, and financial empowerment.[42]

The undersigned encourage the Bureau to continue with a structure that allows certain offices and positions to be consumer-facing, and others to be industry-facing, so that all external voices will be heard.

III. THE BUREAU HAS, HISTORICALLY, ATTAINED TRANSPARANCY REGARDING EXTERNAL ENGAGEMENT THROUGH PUBLICATION OF CALENDARS FOR THE DIRECTOR AND SENIOR STAFF.

In order to ensure that the Director and senior Bureau staff are engaging in wide and varied external engagements, and meeting with all affected constituencies, the Bureau must ensure that the calendars and activities of senior staff are transparent and available for public view. Through this transparency, the American public can be assured that the Director of the Bureau and senior staff have personally heard from all relevant constituencies, and any actions will be taken with a wide lens.

The CFPB posts on its websites the calendars of the director, other agency heads, and senior staff. In this regard, the CFPB website currently hosts the calendars for Elizabeth Warren (2010-2011); Raj Date (2012-2013); Steve Antonakes (2013-2015); Richard Cordray (2012-2017); Leandra English (2017-2018); and Mick Mulvaney (2017-2018).

A sampling of these calendars shows that before 2018, the calendars were complete and transparent, showing the hourly activities of each of the named Bureau staff. The calendars reveal that these individuals divided their time among the Bureau's many constituencies, and also spent time on internal bureau items. For example, in March 2015 (picked randomly), the

[38] Semi-Annual Report of the CFPB, spring 2017 at 52, available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201706_cfpb_Semi-Annual-Report.pdf.
[39] *Id.*
[40] *Id.*
[41] Semi-Annual Report of the CFPB, spring 2017, *supra* note 38, at 43-51.
[42] A Bureau organizational chart can be found at https://www.consumerfinance.gov/about-us/the-bureau/bureau-structure/.

schedule for Director Richard Cordray shows numerous items in each of these categories, including preparing for and participating in a Congressional Hearing, two community roundtables (Arbitration and Payday), two field hearings (Arbitration and Payday); and one industry roundtable (Payday); and meetings/calls with industry representatives, including the CEO of Citigroup, the CEO of the Independent Community Bankers of America, the CEO of the American Bankers Association, the Urban Financial Services Coalition, the U.S. Chamber of Commerce Board of Directors, the CEO of LinkedIn, and the President of the Mortgage Bankers Association.

Unfortunately, this detailed transparency has virtually disappeared under Director Mulvaney's leadership. For example, Director Mulvaney's March 2018 Calendar has almost no information on it.[43] Deputy Director English's calendar for February 2018 is similarly devoid of information.[44] This paucity of information and transparency is particularly alarming in light of Director Mulvaney's remarks at an American Bankers Association meeting on April 24, 2018 that as a Congressman he would only meet with constituents and with lobbyists who had given him money.[45] By retreating from the transparency that characterized the Bureau through 2017, the CFPB has embarked on a dangerous path that threatens to endanger its integrity, accountability, and legitimacy.

The undersigned urge the Bureau to continue seeking public and private feedback through diverse outreach by senior staff and the Director to all constituencies impacted by the work of the Bureau, and to make this outreach transparent through publication of comprehensive calendars for the Director and senior staff.

CONCLUSION

In conclusion, we urge the Bureau to continue its robust strategies for external engagements. Starting from its inception, the Bureau had a goal of engaging with outside groups in all fifty states.[46] In bringing that goal to fruition, the Bureau has reached out to and taken into consideration the views of large banks, small banks, credit unions, small businesses, large businesses, progressive groups, chambers of commerce, trade groups, consumers, consumer advocates, student groups, Hispanic-American groups, seniors groups, African-American groups, military families, members of Congress, mayors and governors, state attorneys general, and many more. The Bureau has admirably sought, and should continue to seek, public and private feedback from diverse external stakeholders through rulemaking outreach, field hearings and roundtables outside of Washington, D.C., and the other external engagements discussed in this

[43] Director Mulvaney's calendar is available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_mick-mulvaney-calendar_03-2018.pdf (visited May 18, 2018).

[44] Deputy Director English's calendar is available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_leandra-english-calendar_02-2018.pdf (visited May 18, 2018).

[45] *See, e.g.*, Glenn Thrush, *Mulvaney, Watchdog Bureau's Leader, Advises Bankers on Ways to Curtail Agency*, New York Times, April 24, 2018.

[46] *See, e.g.*, Victoria McGrane & Maya Jackson Randall, *Banking's Scourge on Charm Offensive*, Wall St. J., March 15, 2011, available at https://www.wsj.com/articles/SB10001424052748703749504576172510974842034 (showing CFPB map tracking contacts in states).

comment. We encourage the Bureau to maintain the diversity and activities of its advisory groups. We encourage the Bureau to plan well in advance for public and private events, such as field hearings, to maximize public participation and constructive input, and to set up a mechanism for the public to suggest topics, locations, timing, frequency, participants, and other important elements of public events.

We discourage the Bureau from conducting events and external engagements that are private, and also encourage the Bureau to continue improving transparency by keeping comprehensive executive calendars that are up to date and available to the public.

Comment of Financial Regulation and Consumer Protection Scholars on Docket No. CFPB-2018-0012

June 25, 2018

Comment Intake
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Dear Sir or Madam:

Please see the submission below in response to the Consumer Financial Protection Bureau's Request for Information (RFI) Regarding the Bureau's Inherited Regulations and Inherited Rulemaking Authorities (Docket No. CFPB-2018-0012). We are concerned scholars and former regulators, including scholars specializing in financial regulation, consumer financial law, and administrative law.*

This comment builds on our prior comments on the Bureau's RFIs Regarding General Rulemaking Processes (Docket No. CFPB-2018-009) and Adopted Regulations and New Rulemaking Authorities (Docket No. CFPB-2018-0011). The three should be read together.

Thank you for the opportunity to submit this comment for your consideration.

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EXECUTIVE SUMMARY

The CFPB is Using RFIs for Sham Purposes

- The CFPB has revealed that its stated reason for its many RFIs is not the real reason. The stated reason is "to seek public input" on the various RFI topics that the Bureau planned to evaluate. Instead, the CFPB is using the RFI responses as "cover" for various policy changes, when, in fact, the responses do not support such changes.

This RFI impedes public input by being impossibly vague and broad

- This RFI seeks input on twenty different sets of unrelated regulations and all their component parts. Nowhere did the CFPB specify which provisions it is considering changing. Likewise, it failed to ask specific questions that would enable meaningful responses. The Acting Director, by conducting closed-door meetings with industry, has privileged the financial services industry and left consumers in the dark about the changes industry wants and that the CFPB is considering.

The CFPB is Disguising what Should have been Notice and Comment Rulemaking as Requests for Information

- The CFPB has stated that the rule-related RFIs are for the purpose of obtaining information on desired changes to existing rules and recommendations for new rules. This type of inquiry falls under the Administrative Procedure Act, which requires very specific steps in the "process for formulating, amending, or repealing a rule."[1]

If the CFPB's Illegitimate RFI Process is Successful, the Financial Security of Consumers, Hardworking American Families, and Financial Markets will be in Jeopardy

- If the CFPB's illegitimate RFI process is successful, the financial security of consumers, hardworking American families, and financial markets will be in jeopardy.

[1] 5 U.S.C.A. 551(5).

Comment of Financial Regulation and Consumer Protection Scholars on Docket No. CFPB-2018-0012

The Request for Information (RFI) by the Consumer Financial Protection Bureau ("CFPB" or "Bureau") Regarding the Bureau's Inherited Regulations and Inherited Rulemaking Authorities asks whether the Bureau should make any changes to existing inherited regulations or add any new regulations.[2]

I. <u>Description of "Inherited Regulations" and Incorporation of Prior Responses</u>

This RFI is one of three CFPB RFIs on rulemaking. Previously, the Bureau issued an RFI on its rulemaking processes.[3] We filed a separate comment on that RFI.[4] The second RFI was on Adopted Regulations.[5] We also submitted a comment on that RFI.[6] The Inherited Regulations RFI is the final rule-related RFI. Our response to this RFI should be read together with the previous two responses.

Inherited Regulations are "the various regulations that" other federal agencies issued before the Dodd-Frank Act transferred their consumer-related rulemaking authority to the CFPB.[7] In circumstances where the Bureau amended an Inherited Regulation, it classifies that rule as an Adopted Regulation.[8] Inherited Regulations include:

- Truth in Lending Regulation Z
- Homeownership Equity Protection Act
- Credit Card Act of 2009
- SAFE Mortgage Licensing Act
- Fair Debt Collection Practices Act
- Federal Trade Commission Act
- Fair Credit Reporting Act

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2 Consumer Financial Protection Bureau, *Request for Information Regarding the Bureau's Inherited Regulations and Inherited Rulemaking Authorities*, 83 Fed. Reg. 12,881 (March 26, 2018) [hereinafter Inherited Regulations RFI].

3 Consumer Financial Protection Bureau, *Request for Information Regarding Bureau Rulemaking Processes*, 83 Fed. Reg. 10,437 (March 9, 2018).

4 Comment of Financial Regulation and Consumer Protection Scholars and Former Regulators on Docket No. CFPB-2018-0009 (June 7, 2018) (available at https://lawdigitalcommons.bc.edu/cfpb-comments/6/).

5 Consumer Financial Protection Bureau, *Request for Information Regarding the Bureau's Adopted Regulations and New Rulemaking Authorities*, 83 Fed. Reg. 12,286 (March 21, 2018) [hereinafter Adopted Regulations RFI].

6 Comment of Financial Regulation and Consumer Protection Scholars and Former Regulators on Docket No. CFPB-2018-0011 (June 19, 2018).

7 Adopted Regulations RFI, *supra* note 5, at 12,287.

8 *Id.*

- Gramm–Leach–Bliley Act
- Consumer Leasing Act
- Real Estate Settlement Practices Act
- Equal Credit Opportunity Act
- Home Mortgage Data Act
- Electronic Funds Transfer Act
- Interstate Land Sales Full Disclosure Act
- Truth in Savings Act
- Fair Credit Billing Act
- Homeowners Protection Act
- Alternative Mortgage Transaction Parity Act
- Expedited Funds Availability Act
- 12 U.S. Code § 1831t - Depository Institutions Lacking Federal Deposit Insurance

II. The CFPB is Using RFIs for Sham Purposes

The CFPB has revealed that its stated reason for its many RFIs is not the real reason. The stated reason is "to seek public input" on the various RFI topics that the Bureau planned to tevaluate.[9] Instead, the CFPB is using the RFI responses as "cover" for various policy changes, when, in fact, the responses do not support such changes.

The RFI process is important for all stakeholders because it enables them to share their experiences, insights, and concerns about the CFPB and the rules and policies it adopts. For the CFPB, the RFI responses can be used to justify its actions. The importance of the RFIs cannot be overstated and, for this reason, the CFPB must act with integrity in requesting, evaluating and relying on responses to RFIs.

To our consternation, the CFPB leadership's RFI process is a sham A few days after the deadline for RFI responses on external engagements closed, the CFPB announced that it was canceling all future meetings of all its advisory boards, having previously canceled every meeting since Mr. Mulvaney took office. The CFPB informed the advisory board members in two phone calls on June 6, 2018. In justifying the cancellations and effectively terminating the advisory boards, including the statutorily mandated Consumer Advisory Board (CAB), one of Mr. Mulvaney's political appointees, Anthony Welcher, stated that "the RFIs was [sic] a big driver for [the] process"[10] of shutting down the advisory boards. When a CAB member asked for more information about the RFI responses that recommended dismissing the advisory boards, Mr. Welcher admitted that "no comments were made about dissolving [the advisory boards]. . . . The RFI process allowed—there were comments that had been submitted along the way, and then in the final review, nothing changed from the direction we were headed."[11] In sum, the CFPB

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9 Inherited Regulations RFI, *supra* note 2, at 12,882.

10 6.6.18 11am Advisory Boards and Councils Recorded Call (available from the CFPB).

11 *Id.* The termination of the CAB also prevented the CFPB from hearing about emerging problems in consumer financial markets, which is one of the duties of the CAB. By silencing the CAB, the political

did not tell the truth when saying that the leadership relied on the RFI responses in terminating the advisory boards. And, the CFPB had planned the terminations before the RFI response period had ended.

Meanwhile, Mr. Mulvaney moved to commandeer or dismantle other core functions of the Bureau before the RFI responses on those functions were even due. For instance, on May 9, 2018, he announced that he was creating a new Office of Cost-Benefit Analysis that would be housed within the director's office.[12] He made that announcement even though the RFI on Bureau rulemaking processes seeking public comments on *that exact topic* was still open and did not close for another month.

On April 24, 2018, Mr. Mulvaney announced plans to shutter the CFPB's consumer complaint database[13] even though the RFI on that topic did not close for public comment until June 4.

Lastly, as we discuss in the next section, the CFPB's Adopted Regulations RFI and Inherited Regulations RFI were equally vague and sweeping, raising concerns that both RFIs are smokescreens for existing plans by the Acting Director to reverse landmark CFPB rules protecting consumers.

These events revealed that:

1. even when not telling the truth, one of Mr. Mulvaney's chosen staff pointed to the RFI responses to support his position, which reflects just how important the RFI responses are for bolstering the CFPB's positions;
2. the CFPB leadership is willing to mislead members of the CAB and the larger public to stifle public input through its advisory boards;
3. the CFPB has given the public the impression that it will make critical decisions about its activities based on public input through the RFI process when, in fact, the CFPB has already made at least some decisions on topics related to the RFIs before the deadlines for the public responses to RFIs; and
4. although it is a public agency, the CFPB does not care what the American people think or want.

III. <u>This RFI impedes public input by being impossibly vague and broad</u>

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appointees at the CFPB have eliminated a significant vehicle for the staff to learn of such wrongdoing. 12 U.S.C.A. 1014.

[12] Memorandum from Mick Mulvaney to DL DFPB All Hands, A Note on Staffing and Bureau Organization, (May 9, 2018), https://www.documentcloud.org/documents/4454936-CFPB-Memo.html (viewed May 22, 2018); Evan Weinberger, *Mulvaney Brings More Political Oversight in CFPB Restructuring*, BLOOMBERG LAW BANKING DAILY, May 9, 2018.

[13] *See* Remarks by Mick Mulvaney, Acting Director, Consumer Financial Protection Bureau, April 24, 2018, American Bankers Association Annual Conference, Washington, D.C., at 5 (available at https://www.documentcloud.org/documents/4446622-Transcript-Mulvaney-ABA-Conference-4-24-2018.html) (viewed May 3, 2018) [hereinafter April 24, 2018 Remarks].

The inherited rules RFI impedes consumer input by being impossibly vague and impossibly broad. The Inherited Regulations RFI "seeks public input regarding the substance of the Inherited Regulations, including whether the Bureau should issue additional rules. . . .The Bureau is seeking feedback on all aspects of the inherited regulations."[14] It then asks for suggestions for updates or modifications to the rules, and any aspects of the Inherited Regulations that should not be modified. The substantive portion of the RFI is 5 pages long. Nowhere does the RFI state the specific provisions the Bureau is considering revising. Similarly, the RFI does not specify any regulations that the Bureau is contemplating adopting.

For obvious reasons, the standard practice is for RFIs to ask very specific questions. For example, the substantive portion of the RFI seeking input on Payday Loans, Vehicle Title Loans, Installment Loans and Open End Lines of Credit,[15] was 34 pages long and included background information and numerous detailed questions.[16] The very first question reflects the approach of the standard CFPB RFI:

> Is there a viable business model in extending high-cost, non-covered loans for terms longer than 45 days without regard to the borrower's ability to repay the loan as scheduled? If so, what are the essential characteristics of this business model or models and what consumer protection concerns, if any, are associated with such practices?[17]

Vagueness is not the only problem with the Inherited Regulations and other rule-related RFIs. The breadth of the regulations covered by this RFI is astounding. Unlike the payday lending RFI discussed above, the Inherited Regulations RFI covers twenty sets of rules, each of which has many components. To give a sense of the scope of the Inherited Regulations RFI, we have listed the parts of just one of the many regulations that fall within the RFI:[18]

PART 226—TRUTH IN LENDING (REGULATION Z)

Subpart A—GENERAL

§226.1	Authority, purpose, coverage, organization, enforcement, and liability.
§226.2	Definitions and rules of construction.

14 Inherited Regulations RFI, *supra* note 2, at 12,882-83.

15 Consumer Financial Protection Bureau, *Request for Information on Payday Loans, Vehicle Title Loans, Installment Loans and Open End Lines of Credit* (June 1, 2016) (available at https://files.consumerfinance.gov/f/documents/RFI_Payday_Loans_Vehicle_Title_Loans_Installment_Loans_Open-End_Credit.pdf).

16 *Id.*

17 *Id.* at 17.

18 12 C.F.R. pt. 1026. Regulation Z was issued pursuant to the Truth in Lending Act, 15 U.S.C.A. 1601 *et seq*.

§226.3	Exempt transactions.
§226.4	Finance charge.

Subpart B—OPEN-END CREDIT

§226.5	General disclosure requirements.
§226.5a	Credit and charge card applications and solicitations.
§226.5b	Requirements for home equity plans.
§226.6	Account-opening disclosures.
§226.7	Periodic statement.
§226.8	Identifying transactions on periodic statements.
§226.9	Subsequent disclosure requirements.
§226.10	Payments.
§226.11	Treatment of credit balances; account termination.
§226.12	Special credit card provisions.
§226.13	Billing error resolution.
§226.14	Determination of annual percentage rate.
§226.15	Right of rescission.
§226.16	Advertising.

Subpart C—CLOSED-END CREDIT

§226.17	General disclosure requirements.
§226.18	Content of disclosures.
§226.19	Certain mortgage and variable-rate transactions.
§226.20	Subsequent disclosure requirements.
§226.21	Treatment of credit balances.
§226.22	Determination of annual percentage rate.
§226.23	Right of rescission.
§226.24	Advertising.

Subpart D—MISCELLANEOUS

Subpart E—SPECIAL RULES FOR CERTAIN HOME MORTGAGE TRANSACTIONS

Subpart F—SPECIAL RULES FOR PRIVATE EDUCATION LOANS

§226.47	Content of disclosures.
§226.48	Limitations on private education loans.

Subpart G—SPECIAL RULES APPLICABLE TO CREDIT CARD ACCOUNTS AND OPEN-END CREDIT OFFERED TO COLLEGE STUDENTS

§226.51	Ability to Pay.
§226.52	Limitations on fees.
§226.53	Allocation of payments.
§226.54	Limitations on the imposition of finance charges.
§226.55	Limitations on increasing annual percentage rates, fees, and charges.
§226.56	Requirements for over-the-limit transactions.
§226.57	Reporting and marketing rules for college student open-end credit.
§226.58	Internet posting of credit card agreements.
§226.59	Reevaluation of rate increases.
Appendix	Appendix A to Part 226--Effect on State Laws
Appendix	Appendix B to Part 226—State Exemptions
Appendix	Appendix C to Part 226—Issuance of Staff Interpretations
Appendix	Appendix D to Part 226—Multiple Advance Construction Loans
Appendix	Appendix E to Part 226—Rules for Card Issuers That Bill on a Transaction-by-Transaction Basis
Appendix	Appendix F to Part 226—Optional Annual Percentage Rate Computations for Creditors Offering Open-End Plans Subject to the Requirements of §226.5b
Appendix	Appendix G to Part 226—Open-End Model Forms and Clauses
Appendix	Appendix H to Part 226— Closed-End Model Forms and Clauses
Appendix	Appendix I to Part 226—Federal Enforcement Agencies
Appendix	Appendix J to Part 226—Annual Percentage Rate Computations for Closed-End Credit Transactions
Appendix	Appendix K to Part 226—Total Annual Loan Cost Rate Computations for Reverse Mortgage Transactions

Appendix	Appendix L to Part 226—Assumed Loan Periods for Computations of Total Annual Loan Cost Rates
Appendix	Appendix M1 to Part 226—Repayment Disclosures
Appendix	Appendix M2 to Part 226—Sample Calculations of Repayment Disclosures
Appendix	Appendix N to Part 226—Higher-Priced Mortgage Loan Appraisal Safe Harbor Review
Appendix	Appendix O to Part 226—Illustrative Written Source Documents for Higher-Priced Mortgage Loan Appraisal Rules
Appendix	Supplement I to Part 226—Official Staff Interpretations

The vagueness and breadth of the Inherited Regulations RFI makes it impossible for any stakeholders to meaningfully respond unless, that is, they already know the changes that the Bureau is considering. Responses to FOIA requests reveal that Mr. Mulvaney and his political appointees have been meeting regularly with representatives from financial services and related industries. The CFPB has kept many of these meetings and their contents secret. The closed-door meetings, coupled with Mr. Mulvaney's express commitment[19] to put business concerns ahead of consumers' financial welfare, lead to the ready conclusion that the meetings enable the Bureau to tell industry which rule changes it is contemplating. By the same token, these secret meetings give industry an opportunity to tell the Bureau what changes it hopes it will make to benefit companies subject to CFPB oversight.

The cozy relationship between the CFPB and financial firms gives industry representatives a tremendous advantage because they can craft their RFI responses to address the changes the CFPB anticipates making. They can also recommend any changes that were well received by the CFPB during the meetings with Mr. Mulvaney and his political appointees.

Consumers and advocates are in the dark, attempting to address issues that are hidden from their view and pleading their cases to an Acting Director who is allied with industry and who has made it clear that he wants to reduce the consumer protection regulations under which financial firms must operate. In sum, the CFPB's RFI practices handicap consumers and American families and privilege the representatives from financial services industry. The RFI process that should be and looks to be transparent has actually become the opposite.

The CFPB has engaged in the same short-circuiting of public feedback by imposing very short deadlines to respond. The response time is 90 days, which is about the same amount

[19] *See* April 24, 2018 Remarks, *supra* note 13, at 5; Rachel Witkowski, *Mulvaney vows to 'bring sanity' to Qualified Mortgage rule*, AM. BANKER, May 15, 2018.

of time that was given for people to comment on the very narrow topic of payday lending regulation discussed above.

The unworkable RFIs, tight deadlines, and the mischaracterization of the RFI responses demonstrate that the CFPB's RFI process is a mockery and illegitimate.

IV. The CFPB is Disguising what Should have been Notice and Comment Rulemaking as Requests for Information

The CFPB has stated that the rule-related RFIs are for the purpose of obtaining information on desired changes to existing rules and recommendations for new rules. This type of inquiry falls under the Administrative Procedure Act, which requires very specific steps in the "process for formulating, amending, or repealing a rule."[20]

Specifically, if the CFPB is contemplating a new rule, or an amendment or repeal of an existing rule, it must:

- publish a notice of proposed rulemaking in the Federal Register;
- provide the public with information about the rulemaking proceedings, including the governing legal authority for the rulemaking; and
- specify "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[21]

In addition, during notice-and-comment rulemaking, people outside the CFPB are prohibited from having *ex parte* communications with "any decision-making personnel that imparts information or argument directed to the merits or outcome of a rulemaking proceeding."[22] In its rulemaking RFIs, the CFPB appears to be doing all the things you would expect to see in a Notice of Proposed Rulemaking, but without giving adequate notice or following proper procedures. Of equal importance, the CFPB cannot escape its own prohibition on *ex parte* communications by mischaracterizing proposed rulemakings as requests for information.

V. If the CFPB's Illegitimate RFI Process is Successful, the Financial Security of Consumers, Hardworking American Families, and Financial Markets will be in Jeopardy

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20 *Id.* at 1.

21 5 U.S.C.A. 553(b)(1-3)

22 Consumer Financial Protection Bureau, *Policy on Ex Parte Presentations in Rulemaking Proceedings*, 82 Fed. Reg. 12,687, 18,689 (April 21, 2017).

The CFPB will consider *ex parte* communications if specific requirements are met: "A person who makes an oral *ex parte* presentation shall . . . submit to the CFPB's Executive Secretary and the CFPB employee point of contact for the presentation, a memorandum summarizing the presentation." *Id.* at 18,689-90. Any person making *ex parte* written communications must likewise submit the presentation to the same entities. The CFPB then posts the submissions to the public rulemaking docket. *Id.*

The points we make here are not simply to contest the RFI process. They are about history. Prior to the financial crisis, the Office of Thrift Supervision and the Office of the Comptroller of the Currency were captured by the financial services industry. In addition, the one regulator that could have imposed market-wide discipline on the lending industry—the Federal Reserve – refused to exercise its Congressional mandate to protect consumers. When Congress created the CFPB, it was in response to industry capture and the unwillingness of the Federal Reserve to curtail abusive lending. Now, the current administration of the CFPB is mimicking the past federal bank regulators, which is sure to again harm the American people.

Comment of Financial Regulation and Consumer Protection Scholars And Former Regulators on Docket No. CFPB-2018-0009

June 7, 2018

Comment Intake
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Dear Sir or Madam:

Please see the submission below in response to the Consumer Financial Protection Bureau's Request for Information (RFI) Regarding Bureau Rulemaking Processes (Docket No. CFPB-2018-0009). We are concerned scholars and former regulators, including scholars specializing in financial regulation, consumer financial law, and administrative law.[*] Thank you for the opportunity to submit these comments for your consideration.

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Former Assistant Director, Mortgage Markets, Consumer Financial Protection Bureau

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Professor Emeritus and Director of the Center for Consumer Law, University of Houston Law Center

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[*] Affiliations of signatories are for identification only and do not represent the views of the various institutions.

[1] 5 U.S.C. § 553.

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1012(a)(10), 1022

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EXECUTIVE SUMMARY

We Oppose Any Rollbacks That Would Water Down the Strengths of CFPB Rulemaking

- Since the Consumer Financial Protection Bureau opened its doors, the Bureau has created one of the most *inclusive*, *transparent*, *fact-based* and *responsive* rulemaking processes of any federal regulator. But now the Bureau is starting to roll back these four key strengths of its rulemaking process. We oppose that retreat and explain why it is essential to preserve and expand the strengths of the Bureau's rulemaking going forward.

Strength One: Preserve and Expand Fact-Based, Independent CFPB Rulemaking

- The CFPB has been committed to impartial, data-driven rulemaking and its empirical research benefits consumers and industry alike. The Bureau must refrain from any actions that would undermine that commitment, including:
  - Creating artificial obstacles to on-boarding quantitative data;
  - Prohibiting the use of qualitative data and consumer anecdotes when appropriate;
  - Compromising the independence of its cost-benefit analyses; and
  - Relying on new data, studies or reports after a Notice of Proposed Rulemaking appears without disclosing that reliance or re-opening the docket for additional public comment where appropriate.

- As the concurrent OMB Director, Acting Director Mick Mulvaney must: (1) preserve the CFPB's independence by rescinding his plan to move CFPB cost-benefit analysis into his office; and (2) recuse himself from further involvement in CFPB impact analyses.

Strength Two: Preserve and Expand the Bureau's Strong Tradition of Inclusive Public Outreach

- The Bureau should expand its strong tradition of inclusive public outreach to all segments of society, including its innovative use of social media and online feedback tools.

- The CFPB should continue to consider comments received after the comment period for a rulemaking has closed, so long as it does so transparently.

Strength Three: Maintain and Improve the Bureau's Transparency

- We oppose any efforts by new leadership to back-pedal from the Bureau's strong tradition of transparency during rulemakings.

- Because the Acting Director has praised industry lobbyists and received campaign contributions from them in the past, the Bureau should strengthen its *ex parte* policy to ensure timely public posting of all *ex parte* communications involving rulemakings.

Strength Four: Continue CFPB Responsiveness to the Public During the Implementation Phase

- The Bureau should continue its level of public responsiveness during implementation.

Comment of Financial Regulation and Consumer Protection Scholars And Former Regulators on Docket No. CFPB-2018-0009

Agency rulemakings are inherently exercises in democratic participation. That is why, when Congress enacted the notice-and-comment provisions of the Administrative Procedure Act (APA),[1] it provided an opportunity for *all* members of the public – regardless of their occupation, political affiliation, state of residence, income or wealth – to express their views on and help shape forthcoming agency rules. This opportunity for broad public participation is especially important in our representative democracy because agency heads are not elected by the public.

In the seven short years since the Consumer Financial Protection Bureau (CFPB or the Bureau) came into being, the Bureau has seriously embraced both the letter and the spirit of the APA. It has operated one of the most inclusive, transparent, fact-based and responsive rulemaking processes of any federal regulator. In the process, the Bureau has demonstrated its unswerving commitment to serving the American public. Its rulemaking history is one that the Bureau should be proud of and that all agencies should emulate.

We are now concerned that under its new leadership, the Bureau is retreating from its commitment to fair, open, and data-driven rulemakings and is responding to external pressure from industry. That would be a grave mistake. No major Bureau rule *can or will* satisfy every stakeholder on every issue it holds dear, whether the stakeholders are consumer advocates or members of industry. Rulemakings, especially major ones, are the product of compromise. But the Bureau's fact-finding processes, its notice-and-comment rulemaking procedures, and its implementation efforts provide every stakeholder with three important assurances: *one,* that public engagement will be transparent, *two,* that decisions will be informed wherever possible by thorough data analysis, and *three,* that industry, consumers and other members of the public will have ample opportunities to express their views and be heard. In these ways, the Bureau's rulemaking process affords fundamental respect and fairness to all members of the public. It is essential that these assurances not be abridged.

We open this comment letter in Section 1 by explaining the special role that CFPB rulemaking plays in protecting consumers and the economy at large. Section 2 provides a general description of the Bureau's rulemaking process and related activities. In Section 3, we detail four key strengths--fact-based rulemaking, inclusiveness, transparency, and responsiveness--that make the CFPB's rulemakings publicly accountable, grounded in fact and carefully decided. In this section, we discuss at length our concerns about recent indications that the Bureau is taking steps to undermine those strengths:

- *One,* by undermining the ability of the Research and Markets Teams to on-board and analyze key data;
- *Two,* jeopardizing the statutory independence of the CFPB by moving the cost-benefit analysis function to the Director's office, while the Acting Director is concurrently an official of the White House; and

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1 5 U.S.C. § 553.

- *Three,* by openly expressing partiality to lobbying by industry representatives.

These steps are inimical to the impartiality, fairness, and transparency of CFPB rulemakings and we oppose them.

1. The Special Role of CFPB Rulemaking

By Congressional design, CFPB rulemaking plays a special role in safeguarding consumer welfare and our nation's financial stability. When Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act or Dodd-Frank), it made a carefully considered decision to assign exclusive rulemaking responsibility to the Bureau for the federal consumer financial laws.[2] In doing so, Congress sought to address three important problems that culminated in the 2008 financial crisis.

The first problem involved the previous allocation of key rulemaking authority for consumer financial protection to the Board of Governors of the Federal Reserve System before 2008. When the mortgage bubble was expanding, the Board refused to use its rulemaking authority to prohibit risky and exploitative mortgage lending.[3] Part of that reticence was due to the Board's conflicting missions (causing it to elevate short-term bank profitability over long-term financial stability and consumer welfare) and part of it was due to then-Chairman Alan Greenspan's philosophical aversion to government intervention into markets.[4] Because the Board refused to adopt rules that Congress had mandated by statute, in the Dodd-Frank Act, Congress transferred the Board's rulemaking powers for consumer financial protection to the newly created Bureau and made consumer financial protection its sole mission. [5]

The second problem involved regulatory arbitrage. The lack of strong federal consumer protection rules for mortgages pre-crisis caused about half the states to enact anti-predatory lending laws of their own. The uneven strength of those laws, the lack of such laws in many states, and the effects of federal preemption for national banks, federal savings associations, and their operating subsidiaries together produced an uneven playing field in which lenders switched to federal banking charters with weaker rules to escape strong state laws. Congress ended this ability to shop for the most permissive laws by consolidating rulemaking authority in the CFPB

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2 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1012(a)(10), 1022 (2010).

3 For a description of that history, see KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE AND NEXT STEPS 194-98 (New York, N.Y.: Oxford Univ. Press, 2011). Specifically, the Board refused to promulgate two rules mandated by Congress -- one implementing provisions in the Home Ownership and Equity Protection Act (HOEPA) that required the Board to adopt a rule prohibiting unfair or deceptive mortgage practices and the other requiring the Board to promulgate a rule implementing integrated mortgage disclosures. *See id.*

4 *See id.* at 189-94; Prepared Statement of Patricia A. McCoy, Hearing on "Consumer Protections in Financial Services: Past Problems, Future Solutions" before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, March 3, 2009, at 25-27 (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1367977.

5 Specifically, in the Dodd-Frank Act, Congress instructed the Bureau to "implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services" [that] "are fair, transparent, and competitive." Dodd-Frank Act, § 1021(a).

and making CFPB rules applicable to virtually all providers of consumer financial services nationwide, regardless of their charter or location.[6] In so doing, Congress leveled the competitive playing field and established a federal floor that protects reputable providers from ruinous competition by unscrupulous companies.

Finally, when Congress created the CFPB's rulemaking powers, it was mindful of the weak rulemaking powers of the Federal Trade Commission (FTC). In the 1975 Magnuson-Moss Act, Congress hobbled the FTC's rulemaking ability by imposing rigid rulemaking procedures on top of those already required by the APA. After Congress enacted Magnuson-Moss, the FTC adopted no significant rules governing nonbank providers[7] and relied on enforcement actions instead.

Congress took pains to avoid replicating that situation in Dodd-Frank by conferring standard, more flexible APA rulemaking powers on the CFPB and applying those rules to banks and nonbanks alike. Because its rulemaking powers are more workable than those of the FTC, the CFPB does not have to rely on enforcement actions alone to exercise its jurisdiction. This benefits industry because, unlike enforcement, the rulemaking process affords regulated entities advance notice of the Bureau's expectations and ample opportunities for input. The rulemaking process also avoids the moral approbation that enforcement actions entail.

In the Dodd-Frank Act, Congress made sure to protect the independence of CFPB rulemakings to the same extent as rules promulgated by other federal banking regulators. Under Executive Order 12866, the Bureau and all other federal banking regulators are exempt from submission of their rules to the Office of Information and Regulatory Affairs (OIRA) of the White House's Office of Management and Budget (OMB) for review and cost-benefit analysis.[8] This exemption is designed to ensure the neutrality of CFPB rules and to insulate them from manipulation for short-term political gain by the White House and OMB. In the place of White House oversight, Congress retains ultimate control over CFPB rules.

2. <u>General Description of the Bureau's Rulemaking Process and Related Activities</u>

We now turn to a description of the Bureau's rulemaking process. Normally, discussions of agency rulemaking focus on the formal legal aspects of that process. These include the public notice-and-comment procedures for informal rulemakings under the APA and other rulemaking requirements and authorities enacted by Congress in the Dodd-Frank Act.[9]

But these formal legal aspects are just one part of the story. The CFPB precedes major rulemaking proceedings with an extensive initial period of study, public consultation and

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6 *Id.* § 1022(b)(4)(A).

7 *See, e.g.*, Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979 (2015).

8 Executive Order 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993). This results from an exemption in Executive Order 12866 for agencies deemed to be "independent regulatory agencies" under the Paperwork Reduction Act, including the CFPB. *Id.* § 3(b); 44 U.S.C. § 3502(5) (listing independent regulatory agencies, including the CFPB).

9 Congress conferred general rulemaking authority on the Bureau in that legislation. Dodd-Frank Act, §§ 1012(a)(10), 1022.

empirical analysis before a proposed rulemaking is even launched. Later, more study, public input, and empirical analysis occur during the proposed rule stage through to the unveiling of a final rule. After adoption, the Bureau takes its responsibility seriously to help industry participants and other members of the public with implementation of final rules by providing them with official commentaries, compliance aids and guidances, informal consultation, and online tools. More than once, when implementation problems have surfaced, the Bureau has even issued follow-on amendments to the rules to address those problems.

In short, CFPB rulemaking is thoughtful, analytical, and scrupulously fair. On the front end, it is built on a deep foundation of broad public input and rigorous data analysis. On the back end, it is followed by a detailed implementation process that provides guidance to regulated entities and continued opportunity for public input. It is important that these features be fostered and preserved.

a. Preliminary Consultation and Study

Major federal rulemakings do not occur in a vacuum. To the contrary, policymakers must decide that a rule is necessary to begin with. Assuming policymakers make the judgment to proceed with a rule, further input and analysis is needed to diagnose exactly what needs to be solved and assess the pros and cons of different courses of action.

For CFPB rulemakings that are mandated by statute, Congress makes the decision to initiate a rulemaking, but entrusts the details of the rule to the Bureau's discretion.[10] For rulemakings that Congress empowered the Bureau to issue at its discretion, Congress tasked the Bureau with analyzing whether a rulemaking should go forward in the first place.[11]

When the Bureau contemplates exercising its discretion, it is important not to leap to judgment. For that reason, the Bureau has made it a practice to elicit broad public input and conduct substantial preliminary analysis in advance of any proposed rulemaking to assure that all rulemaking decisions reflect balanced judgment. This assures that a wide range of perspectives are considered and options are carefully weighed before the Bureau chooses among those options for a Notice of Proposed Rulemaking.

i. Broad Public Input

Getting input from a broad spectrum of stakeholders—including consumers, non-profit advocates, and industry representatives--is key to the Bureau's initial period of neutral evaluation. By fostering active public engagement, the Bureau receives needed facts and viewpoints from a full range of perspectives that helps it ensure neutral and well-informed policy decisions.

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10 Examples include the ability-to-repay rule and the TILA-RESPA integrated disclosure rule for residential mortgages. *See, e.g., id.* §§ 1100A(5), 1411-1414.

11 A recent example was the mandatory arbitration rule. *Id.* § 1028(b). These discretionary rulemakings include potential amendments to the inherited regulations and discretionary rulemakings under other new agency powers conferred by Congress in the Dodd-Frank Act.

The TILA-RESPA integrated disclosure rulemaking for residential mortgages provides a useful case study of the CFPB's broad public outreach. The mortgage disclosure outreach process started in September 2010, ten months before the CFPB formally opened its doors. That fall, members of the CFPB Implementation Team (Team)[12] held multiple meetings with community banks, credit unions, settlement agents, other mortgage industry representatives, vendors, consumer groups, and other banking regulators to educate themselves on the challenges consumers and industry faced with the-then federal mortgage disclosures.[13] In December 2010, the Team held a mortgage disclosure symposium where industry members, marketing experts, designers, public interest groups, and other interested stakeholders briefed the Team on various potential approaches for improving the disclosures.[14]

Later, as part of its outreach process for the mortgage disclosure rulemaking, the Bureau developed Internet tools to make it easy for members of the public—including financial services providers and consumers alike—to share their suggestions and concerns.[15] For instance, when it was developing the mortgage disclosure prototypes in 2011, the Bureau posted two prototypes on its "Know Before You Owe" website each month and elicited public feedback on the designs through an online interactive tool. In the first seven rounds of input, the Bureau received 27,000 comments on the prototypes, about half from consumers and half from industry, either through its online portal or by email. The comments proved extremely helpful to the staff by pinpointing where the prototypes fell short and identifying useful solutions. Using those comments, the Bureau's staff was able to quickly process the feedback, revise the sample forms, and then post the new prototypes online for a fresh round of public comments.[16]

This iterative and intensive feedback process played a crucial role by informing Bureau staff of the most important problems with various disclosure prototypes, of stakeholders' key goals, and of design, cost and implementation considerations. Drawing on this experience, the Bureau later

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12 The Treasury Department created the Team in early fall 2010 to stand up the CFPB. The Team members who worked on the mortgage disclosure project later transitioned to the Bureau.

13 For a description, see Bureau of Consumer Financial Protection, *Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z); Final Rule*, 78 Fed. Reg. 79,730, 79,741-44 (Dec. 31, 2013) [hereinafter TRID Final Rule].

14 The preamble to the final TILA-RESPA integrated disclosure rule gave a sense of the impressive depth and breadth of the Bureau's public outreach efforts pre-rulemaking (*id.* at 79,744):

> While developing the proposed forms and rules to integrate the disclosures, and throughout its qualitative testing of the prototype disclosure forms, the Bureau continued to conduct extensive outreach to consumer advocacy groups, other regulatory agencies, and industry representatives and trade associations. The Bureau held meetings with individual stakeholders upon request, and also invited stakeholders to meetings in which individual views of each stakeholder could be heard. The Bureau conducted these meetings with a wide range of stakeholders that may be affected by the integrated disclosures, even if not directly regulated by the final rule. The meetings included community banks, credit unions, thrifts, mortgage companies, mortgage brokers, settlement agents, settlement service providers, software providers, appraisers, not-for-profit consumer and housing groups, and government and quasi-governmental agencies. Many of the persons attending these meetings represented small business entities from different parts of the country.

15 Leonard J. Kennedy, Patricia A. McCoy, & Ethan Bernstein, *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century*, 97 CORNELL L. REV. 1141, 1158, 1165-66 (2012).

16 For a fuller description of this public feedback process, see *id.* at 1165-66; TRID Final Rule, *supra* note 13, at 79,744.

developed prototype disclosures for student loans and credit cards and, again, solicited public input from citizens, consumer groups, and the financial services industry.[17]

These outreach efforts are not limited to mortgages, student loans, or credit cards.[18] Since its launch date in July 2011, the Bureau has continued to solicit the views of consumers, community leaders, industry representatives, and government officials on other policy questions through hundreds of meetings, roundtables, town halls, other public meetings, briefing calls, and the complaint and inquiry process. To broaden these efforts, the Bureau has also issued Requests for Information (RFIs)[19] and Advance Notices of Proposed Rulemakings[20] inviting public input to illuminate areas needing study and to identify data sources.[21] Instead of relying on *Federal Register* publication and press releases alone, the Bureau regularly spreads word of the opportunity to comment through the Internet and social media.[22]

The Bureau also has expanded its avenues for public input in other ways. In one important step, the CFPB kicked off regular field hearings around the country to hear from individual consumers, advocates, and industry about the issues in specific consumer financial services markets. One such field hearing was on payday lending in Birmingham, Alabama, another was on mandatory arbitration clauses in Albuquerque, a third was on credit card lending in Chicago, and there have been many more. In another step, the Bureau convened four new advisory councils--the Consumer Advisory Board, the Community Bank Advisory Council, the Credit Union Advisory Council, and the Academic Research Council--to provide it with ongoing, informed perspectives from different sectors on potential rulemakings.[23] The Bureau also adopted its "Policy for Consultation with Tribal Governments" in 2013 in order to facilitate feedback from tribal governments and tribal members before issuing Notices of Proposed Rulemaking.[24]

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17 Kennedy et al., *supra* note 15, at 1166.

18 For a description of these broader post-launch outreach efforts, see, *e.g.*, Consumer Financial Protection Bureau, Semi-annual report of the Consumer Financial Protection Bureau, October 1, 2016-March 31, 2017, at 52-53 (Spring 2017) [hereinafter March 2017 Semi-annual Report].

19 *See, e.g.*, Consumer Financial Protection Bureau, *Impacts of Overdraft Programs on Consumers*, 77 Fed. Reg. 12,031, 12,031-33 (Feb. 28, 2012); Consumer Financial Protection Bureau, *Request for Information Regarding Private Student Loans and Private Educational Lenders*, 76 Fed. Reg. 71,329, 71,330 (Nov. 17, 2011).

20 Bureau of Consumer Financial Protection, *Debt Collection (Regulation F); Advance Notice of Proposed Rulemaking*, 78 Fed. Reg. 67,848, 67,853 (Nov. 12, 2013); Bureau of Consumer Financial Protection, *Electronic Fund Transfers (Regulation E); Advance Notice of Proposed Rulemaking*, 77 Fed. Reg. 30,923, 30,925 (May 24, 2012) (prepaid cards).

21 *See, e.g.*, Consumer Financial Protection Bureau, *Request for Information Regarding Bureau Rulemaking Processes*, 83 Fed. Reg. 10,437, 10,439 (March 9, 2018) [hereinafter Rulemaking RFI].

22 For a description of the Bureau's various social media campaigns inviting the public to comment on inquiries into prepaid cards, overdraft protection, private student loans, reverse mortgages, and payday loans through live-streaming, blog posts, Twitter, and Facebook, see Patricia A. McCoy, *Public Engagement in Rulemaking: The Consumer Financial Protection Bureau's New Approach*, 7 BROOKLYN J. CORP., FINAN. & COMMERCIAL L. 1, 13-15 (2013) [hereinafter McCoy 2013].

23 *See* Consumer Financial Protection Bureau, Advisory Groups, https://www.consumerfinance.gov/about-us/advisory-groups/ (viewed Apr. 25, 2018); Dodd-Frank Act, § 1014.

24 Consumer Financial Protection Bureau, Policy for Consultation with Tribal Governments (2013), https://files.consumerfinance.gov/f/201304_cfpb_consultations.pdf (viewed Apr. 27, 2018).

In some cases, Congress mandated preliminary consultation in the Dodd-Frank Act. For instance, the Bureau by law must consult with specific federal regulators prior to proposing a rule (and later during the comment period) concerning the rule's consistency with fellow regulators' prudential, market, or systemic objectives.[25] In addition, Congress required the Bureau to set up a separate major feedback channel for draft proposed rules that could have a significant economic effect on a substantial number of small businesses. This channel has made the preliminary stage even more responsive to public input, as we now discuss.

ii. <u>Small Business Review Panels</u>

This special feedback channel is known as the small business review panel process and was mandated by the Dodd-Frank Act.[26] In that legislation, Congress imposed special procedural requirements on any CFPB notice-and-comment rulemaking "which will have a significant economic impact on a substantial number of small entities"[27] under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).[28] The only other federal agencies that are subject to SBREFA requirements are the Environmental Protection Agency and the Department of Labor's Occupational Safety and Health Administration.[29]

SBREFA, among other things, requires the formation of a review panel with representatives from the CFPB, the Chief Counsel for Advocacy of the Small Business Administration, and the Office of Management and Budget's Office of Information and Regulatory Affairs.[30] Before the Bureau may publish a proposed rule that falls under SBREFA, the review panel must meet with a selected group of representatives from small businesses to get their feedback on the potential economic benefits and burdens of a future proposed rule and to explore alternative approaches that might minimize the regulatory burden on small businesses.[31] Later, within sixty days of convening, the review panel must issue a public report on the comments of the small business representatives.[32] The report must also present the review panel's findings on the potential economic impacts of any proposed rule on small businesses and any significant alternatives that could accomplish the rule's objectives while minimizing its impacts.[33] The CFPB takes the comments and findings into account when drafting a proposed rule.[34]

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[25] Dodd-Frank Act, § 1022(b)(2)(B)-(C). The CFPB and the Federal Trade Commission also entered into a Memorandum of Understanding for consultation prior to any rulemaking on unfair, deceptive, or abusive acts or practices. *See* Rulemaking RFI, *supra* note 21, at 10,438-39.

[26] Dodd-Frank Act, § 1100G(a). This discussion of the SBREFA process is taken from McCoy 2013, *supra* note 22, at 18-20.

[27] 5 U.S.C. § 609(a). For a list of CFPB rulemakings that have utilized the SBREFA process so far, see Rulemaking RFI, *supra* note 21, at 10,438 n.9. For a general description of the CFPB's SBREFA process, see CFPB, Small Business Review Panels, https://www.consumerfinance.gov/policy-compliance/rulemaking/small-business-review-panels/ (visited Apr. 26, 2018).

[28] Pub. L. No. 104-121, 110 Stat. 857 (1996).

[29] 5 U.S.C. § 609(d).

[30] *Id.* § 609(b)(3).

[31] *Id.* § 609(b); Press Release, CFPB, Consumer Financial Protection Bureau Convenes Small Business Panel for Know Before You Owe Mortgage Disclosures (Feb. 21, 2012) [hereinafter Small Business Panel].

[32] 5 U.S.C. § 609(b)(5).

[33] *Id.* § 609(b)(5); CFPB, FACT SHEET: SMALL BUSINESS REVIEW PANEL PROCESS (2012) [hereinafter FACT SHEET].

[34] *See, e.g.*, CFPB Mortgage Disclosure Team, *SBREFA, Small Providers, and Mortgage Disclosure*, CFPB (Feb. 21, 2012).

The main purpose of SBREFA was to elicit comments from small businesses on the effects of potential CFPB regulations. But the SBREFA process had an unanticipated benefit, which is written disclosure to the public at large of rulemaking options under consideration by the Bureau before a proposed rule is published. This benefit stems from the fact that before every SBREFA outreach meeting, the CFPB typically distributes briefing materials to the small business representatives who are chosen for outreach as well as to the general public.[35] The materials provide a rich overview of the options that the CFPB has under consideration, including information on the background of the rulemaking, a description of the alternative approaches being considered, a preliminary analysis of the likely economic impacts of those approaches on small businesses, and a list of questions and issues on which the review panel will seek input.[36] Thus, the SBREFA process offers the added benefit of informing the entire public of the direction in which the Bureau is headed before any proposed rule comes out. That gives the public added opportunity for input before the Bureau's approach becomes hard-baked into a proposal.

iii. <u>Market and Data Analysis</u>

The CFPB does not rush into rulemakings. To the contrary, the Bureau has preceded virtually all of its major proposed rulemakings with careful empirical analyses.[37] Further, where the Bureau has discretionary rulemaking authority, the agency does not pre-judge the need for a rule. Instead, the Bureau's Regulations, Markets, and Research Division (RMR) conducts economic studies of the market in question, usually based on large data sets following consultation with industry, academia, think tanks, consumer groups and others, to evaluate whether a rule should even be considered in light of the competing benefits and costs. If a discretionary rulemaking moves forward, the Bureau will run more empirical analyses to pinpoint how the market has failed and to evaluate competing approaches for how to fix it.[38]

Take the payday lending rule, which was one of the Bureau's discretionary rules. RMR studied the payday lending market for more than four years before the Bureau issued its final payday lending rule in fall 2017.[39] During that period, RMR issued four empirical reports analyzing and measuring consumer welfare outcomes in the payday lending industry.[40] Similarly, the Bureau

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35 For example, by August 2012, the Bureau made its SBREFA briefing materials available online to the public for three mortgage rulemakings. The first time was for the integrated mortgage disclosure rulemaking discussed earlier; later, the Bureau released the briefing materials for the mortgage loan originator and mortgage servicing rulemakings. *Id.*; Ashley Gordon, *What the Proposed Mortgage Servicing Rules Could Mean for You*, CFPB (Apr. 10, 2012); Press Release, CFPB, Consumer Financial Protection Bureau Considers Rules to Simplify Mortgage Points and Fees (May 9, 2012); *see also* Small Business Panel, *supra* note 31; Press Release, CFPB, Consumer Financial Protection Bureau Outlines Borrower-Friendly Approach to Mortgage Servicing (Apr. 9, 2012).

36 FACT SHEET, *supra* note 33.

37 The ability-to-repay rule was a special case. Because the Bureau inherited that rulemaking from the Board of Governors of the Federal Reserve System, which had issued the proposed rule, this initial research occurred both at the Bureau and at the Federal Reserve.

38 These analyses build on an existing foundation of the ongoing monitoring of consumer financial markets for developments and any risks to consumers required by Section 1022(c) of the Dodd-Frank Act.

39 Consumer Financial Protection Bureau, *Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 82 Fed. Reg. 54,472 (Nov. 17, 2017).

40 Consumer Financial Protection Bureau, Supplemental findings on payday, payday installment, and vehicle title loans, and deposit advance products (June 2, 2016); Consumer Financial Protection Bureau, Online Payday Loan Payments (Apr. 20, 2016); Consumer Financial Protection Bureau, CFPB data point: Payday lending (March

preceded the issuance of its mandatory arbitration rule in summer 2017[41] with two major empirical studies of problems with arbitration clauses in the two preceding years.[42]

These episodes epitomize the Bureau's longstanding commitment to in-depth, neutral evaluation before making any decision to initiate discretionary rulemakings. Here, again, the TILA-RESPA integrated disclosure rulemaking for residential mortgages provides a good example of this research process. Before issuing a proposed rule, the Bureau considered it important to design sample disclosure forms that informed mortgage applicants about the features, benefits, and risks of their loans as effectively as possible. To come up with those forms, the CFPB undertook the most sophisticated testing of disclosures in history of any U.S. banking regulator. During the qualitative testing phase, the Bureau did field testing of ten rounds of prototype forms in nine cities over a year.[43] This extensive course of testing afforded multiple opportunities to fine-tune the forms in response to experiences with real consumers and lending officials in the field.

Nothing in this process, moreover, prejudges the need for discretionary rulemakings. To the contrary, the CFPB has conducted many studies on consumer financial markets without commencing rulemakings. Examples include, but are not limited to, reverse mortgages,[44] overdrafts,[45] and student loans.[46] This research stage is designed to guard against any rush to judgment resulting in unnecessary or overbroad rulemaking proceedings. Indeed, in one instance, serious problems in the debt collection market suggested a need for a rule but the Bureau concluded that further study was required, so it issued an Advance Notice of Proposed Rulemaking (ANPR) instead to gather additional data on the consumer welfare implications of debt collection practices.[47]

In short, the CFPB has done a remarkable job of public engagement and empirical research during the information-gathering phase before rulemakings are initiated. It has gone above and beyond by pioneering innovative technologies to reach out to people. It has made its thinking transparent through the public release of the SBREFA briefing materials, before any proposals solidify. It has studied consumer problems empirically and neutrally to determine whether the facts support intervention before the Bureau initiates a rule. This is how rulemaking should be.

24, 2014); Consumer Financial Protection Bureau, White Paper on Payday Loans and Deposit Advance Products (Apr. 24, 2013).

41 Consumer Financial Protection Bureau, *Arbitration Agreements: Final rule; official interpretations*, 82 Fed. Reg. 33,210 (July 19, 2017). Congress subsequently nullified this rule under the Congressional Review Act.

42 Consumer Financial Protection Bureau, Arbitration Study: Report to Congress 2015 (March 10, 2015); Consumer Financial Protection Bureau, Arbitration study preliminary results (Dec. 12, 2013).

43 TRID Final Rule, *supra* note 13, at 79,743.

44 *See, e.g.,* Consumer Financial Protection Bureau, A closer look at reverse mortgage advertisements and consumer risks (June 3, 2015); Consumer Financial Protection Bureau, Reverse Mortgages Report (June 28, 2012). Congress gave the Bureau authority to issue rules on reverse mortgages in Section 1076 of the Dodd-Frank Act.

45 *See* Consumer Financial Protection Bureau, Consumer voices on overdraft programs (Nov. 21, 2017); Consumer Financial Protection Bureau, CFPB Data Point: Frequent overdrafters (Aug. 4, 2017); *see* Jeff Bater, *CFPB Rulemaking Agenda Under Trump Pared Back*, Bloomberg Law Banking Daily, May 9, 2018.

46 *See, e.g.,* Consumer Financial Protection Bureau, CFPB Data Point: Student loan repayment (Aug. 16, 2017).

47 *See, e.g.,* Bureau of Consumer Financial Protection, *Debt Collection (Regulation F); Advance Notice of Proposed Rulemaking*, 78 Fed. Reg. 67,848, 67,853 (Nov. 12, 2013).

b. APA Rulemaking Proceeding Process

Normally, the CFPB commences the notice-and-comment APA rulemaking process by publishing a Notice of Proposed Rulemaking (NPRM) in the *Federal Register*.[48] Among other things, the NPRM details the text or substance of the proposed rule, the justification for the proposal, and the statutory authority for the rule. Following publication of the proposed rule, the public has the opportunity to submit written comments on the proposal by a stated deadline. Comments may be submitted electronically and are available for public viewing online at *regulations.gov*. After the official comment period has closed but while a rulemaking is pending, the Bureau has also had an informal practice of allowing members of the public to submit additional written replies to the first round of comments.

After the formal comment period has closed, the Bureau's staff reviews the comments with an eye to needed changes.[49] Then, management and staff conduct further internal deliberations involving all of the divisions of the Bureau to decide on the final path and shape of the rule.

Sometimes, the Bureau reopens proposed rulemakings or conducts additional data analysis rather than proceed directly to issuance of the final rule. This happened in the ability-to-repay rulemaking, where new issues came to the fore after the Board of Governors of the Federal Reserve Board published the proposed rule on May 11, 2011, before the Bureau had opened its doors and inherited the rulemaking.[50] Because some of these issues had not been aired for comment in the original notice of proposed rulemaking, the Bureau decided to reopen the comment period to allow the public to comment on the new issues, information, and data.[51]

Meanwhile, most major CFPB rulemaking proceedings continue to undergo intensive empirical research by RMR's markets experts and economists after the NPRM is issued to evaluate new issues, including those flagged in the comments. For example, following publication of the proposed TILA-RESPA integrated disclosure rule, the Bureau conducted quantitative testing of the final disclosure forms with 858 consumers in twenty locations across the country to make sure that the new forms were more effective than the old ones before issuing the final rule.[52]

Once the Bureau decides to issue the final rule, more analysis and writing remains. The Bureau will make any needed changes to the final text of the rule. In addition, much care will go into writing the preamble to the final rule. The preamble will include responses to the comments and justifications for the final form of the rule. Importantly, the preamble also will set forth the Bureau's impact analysis of the potential benefits and costs to consumers and covered persons, including any potential reduction of access by consumers to consumer financial products or services due to the rule.[53]

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48 5 U.S.C. § 553. The only exception is where the Bureau issues an ANPR. *See* Rulemaking RFI, *supra* note 21, at 10,438, for a summary of the contents of NPRMs.

49 In some circumstances, the Bureau could even decide, based on the comments, to postpone a discretionary rulemaking.

50 *See* Board of Governors of the Federal Res. Sys., *Regulation Z; Truth in Lending*, 76 Fed. Reg. 27,390 (proposed May 11, 2011) (noting that the CFPB was scheduled to open on July 21, 2011).

51 *See* Bureau of Consumer Financial Protection, *Truth in Lending (Regulation Z)*, 77 Fed. Reg. 33,120, 33,120-21 (June 5, 2012).

52 TRID Final Rule, *supra* note 13, at 79,748-49.

53 *See* Dodd-Frank Act, § 1022(b)(2).

To issue the final rule, the Bureau must publish the final text plus the preamble to the rule in the *Federal Register* at least thirty days before its effective date.[54] In practice, to give affected parties sufficient time to comply, the Bureau provides much more time before major rules take effect.

The CFPB is accountable for its rulemakings both through Congressional oversight plus multiple avenues of review. Aggrieved parties can challenge the Bureau's final rules under the APA in federal court.[55] In addition, upon the petition of any member agency of the Financial Stability Oversight Council (FSOC), FSOC may set aside any final CFPB rule in whole or in part if it decides that the regulation or provision would put the safety and soundness of the U.S. banking system or the stability of the U.S. financial system at risk.[56] Congress, with approval from the President, can nullify a CFPB rule within sixty days of publication or receipt of a mandatory report on the rule to Congress,[57] whichever is later, under the Congressional Review Act.[58] Congress can also amend the U.S. Code to overturn a CFPB rule.

c. Implementation

The CFPB's rulemaking process does not end with the promulgation of a final rule. Once a final rule has been announced, the Bureau undertakes a thorough implementation process to facilitate industry's compliance with the rule.[59]

The Bureau thinks seriously about implementation issues long before a final rule is announced. In the testing and online public comment on the mortgage disclosure prototypes, for example, the CFPB asked lenders and brokers to identify implementation problems so that they could be addressed.[60] Similarly, the public comment process and small business review panel closely examined the ease of implementation for the new data standards for expanded data reporting under the Home Mortgage Disclosure Act (HMDA).[61] The agency's focus on the practical implementation runs throughout all of its substantive rulemakings.

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54 *See* 5 U.S.C. § 553(d). For a description of the preamble to a final rule, see Rulemaking RFI, *supra* note 21, at 10,438.

55 5 U.S.C. § 702. 5 U.S.C. § 706(2) sets forth the standard for review:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> . . .

56 Dodd-Frank Act, § 1023(a); *see also id.* § 1023(b)-(f).

57 For a description of this report, see Rulemaking RFI, *supra* note 21, at 10,438.

58 5 U.S.C. § 801.

59 Meanwhile, the Bureau's RMR Division conducts assessments of existing rules to gauge their effectiveness and any need for change. We plan to discuss that assessment process in a response to the Bureau's Request for Information on Adopted Rules.

60 *See* Kennedy et al., *supra* note 15, at 1164; McCoy 2013, *supra* note 22, at 6. The Bureau has also instituted and expanded its eRegulations platform to make CFPB regulations and their commentaries easier to navigate and understand. March 2017 Semi-annual Report, *supra* note 18, at 69.

61 Bureau of Consumer Financial Protection, *Home Mortgage Disclosure (Regulation C); Proposed Rule*, 79 Fed. Reg. 51,732, 51,761-62 (Aug. 29, 2014).

After the Bureau unveils a final rule, the staff devotes substantial resources to supporting industry implementation through written materials, public outreach, conference speeches, outreach meetings, phone calls, and coordination with other federal regulators.[62] Central to this process is the creation of compliance aids to assist market participants with the transition. Typically, these aids include guides, instructional videos and webinars, summaries of the rule, compliance timelines, coverage charts and other reference charts, relevant sections of the examination manual, consumer education materials, online tools, FAQs, and, in the case of disclosure rules, sample forms and design files.[63] In addition to these compliance aids, the CFPB issues official guidance on specific rules from time to time.[64]

For the TILA-RESPA mortgage disclosure rule, for example, the Bureau created five separate compliance guides: a small entity compliance guide, a guide to the loan estimate and closing disclosure forms, a guide for real estate professionals, a guide for settlement professionals, and a readiness guide to prepare for examinations. The Bureau updated these guides as needed. In addition, the Bureau created seven compliance videos and posted a "question index" to find out which video answered which question.[65]

The CFPB makes official guidances and compliance aids easily accessible on the agency's website. For each major rule, the Bureau creates a public website for implementation.[66] On top of links to the final rule in question, any official guidance, and the compliance aids, each website provides a link where industry professionals can ask the staff compliance questions. In addition, service providers can sign up online for email updates about the rule's implementation. Another link connects readers to the "Supervisory Highlights" webpage, where CFPB examination staff describe any compliance problems they have encountered to date with the rule.

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62 March 2017 Semi-annual Report, *supra* note 18, at 65, 67.

63 Consumer Financial Protection Bureau, Implementation and Guidance, https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/ (viewed Apr. 27, 2018). The HMDA implementation materials are even more extensive. The Bureau's Resources for HMDA Filers website contains filing instruction guides, links to a technology preview webpage and a page to file online, and online tools including a Loan/Application Register (LAR) formatting tool, a file format verification tool, a rate spread calculator, and a check digit tool. March 2017 Semi-annual Report, *supra* note 18, at 66-67; Consumer Financial Protection Bureau, Resources for HMDA Filers, https://www.consumerfinance.gov/data-research/hmda/for-filers (viewed Apr. 28, 2018).

64 *See, e.g.,* March 2017 Semi-annual Report, *supra* note 18, at 65-69; Consumer Financial Protection Bureau, Implementation and Guidance, https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/ (viewed Apr. 27, 2018); Consumer Financial Protection Bureau, Status of New Uniform Residential Loan Application and Collection of Expanded Home Mortgage Disclosure Act Information about Ethnicity and Race in 2017 under Regulation B, https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/status-new-uniform-residential-loan-application-and-collection-expanded-home-mortgage-disclosure-act-information-about-ethnicity-and-race-2017-under-regulation-b/ (viewed Apr. 27, 2018).

65 Consumer Financial Protection Bureau, TILA-RESPA Integrated Disclosure rule implementation, https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/tila-respa-disclosure-rule/ (viewed Apr. 27, 2018).

66 *See, e.g.,* Consumer Financial Protection Bureau, Title XIV rules: mortgage origination, https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/title-xiv-mortgage-rules/ (viewed Apr. 27, 2018).

Fine-tuning the rules when needed through amendments is another important part of the implementation process. Rules may have clerical errors that need to be fixed. Amendments may be needed to solve compliance difficulties in the field. Examples include the need to harmonize a rule to facilitate compliance with other requirements under state law or to create a safe harbor for information obtained by providers using CFPB online tools. In these and other circumstances, the Bureau has not hesitated to amend its final rules when needed. In addition, the CFPB has repeatedly amended its rules to expand exemptions for small business participants and to extend effective dates upon industry request. All in all to date, the Bureau has amended its Home Mortgage Disclosure Act rule twice, [67] its prepaid rule twice,[68] its TILA-RESPA mortgage disclosure rule five times,[69] its loan originator compensation rule twice,[70] its escrow rule once,[71] its mortgage servicing rule seven times,[72] and its electronic fund transfer rule eight times.[73] The CFPB also issued two interpretive rules for its 2013 final rule under the Home Ownership and Equity Protection Act (HOEPA),[74] another interpretive rule for its 2013 mortgage servicing rule[75] and still another for the ability-to-repay rule,[76] plus a supplemental final rule for appraisals on high-cost mortgages.[77]

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67 Consumer Financial Protection Bureau, Home Mortgage Disclosure Act (Regulation C), https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/regulation-c-home-mortgage-disclosure-act/ (viewed Apr. 27, 2018).

68 Consumer Financial Protection Bureau, Prepaid Accounts under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z), https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/prepaid-accounts-under-electronic-fund-transfer-act-regulation-e-and-truth-lending-act-regulation-z/ (viewed Apr. 27, 2018).

69 Consumer Financial Protection Bureau, 2013 Integrated Mortgage Disclosure Rule Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/2013-integrated-mortgage-disclosure-rule-under-real-estate-settlement-procedures-act-regulation-x-and-truth-lending-act-regulation-z/ (viewed Apr. 27, 2018).

70 Consumer Financial Protection Bureau, Loan Originator Compensation Requirements under the Truth in Lending Act (Regulation Z), https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/loan-originator-compensation-requirements-under-truth-lending-act-regulation-z/ (viewed Apr. 27, 2018).

71 Consumer Financial Protection Bureau, Escrow Requirements under the Truth in Lending Act (Regulation Z), https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/escrow-requirements-under-truth-lending-act-regulation-z/ (viewed Apr. 27, 2018).

72 Consumer Financial Protection Bureau, Title XIV Rules: Mortgage Servicing, https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/mortserv/ (viewed Apr. 27, 2018).

73 Consumer Financial Protection Bureau, Electronic Fund Transfers (Regulation E); Amendments, https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/electronic-fund-transfers-regulation-e/ (viewed Apr. 27, 2018).

74 Consumer Financial Protection Bureau, High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Regulation X), https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/high-cost-mortgage-and-homeownership-counseling-amendments-truth-lending-act-regulation-z-and-homeownership-counseling-amendments-real-estate-settlement-procedures-act-regulation-x/ (viewed Apr. 27, 2018).

75 Consumer Financial Protection Bureau, Safe Harbors from Liability under the Fair Debt Collection Practices Act for Certain Actions Taken in Compliance with Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/safe-harbors-liability-under-fair-debt-collection-practices-act-certain-actions-taken-compliance-mortgage-servicing-rules-under-real-estate-settlement-procedures-act-regulation-x-and-truth-lending-act-regulation-z/ (viewed Apr. 27, 2018).

In sum, the CFPB has prided itself on inclusive public engagement, a high degree of transparency, a strong factual basis for its rules, and responsiveness to the public in its rulemaking process. Now, with the new leadership, it is essential to preserve and build on this strong tradition going forward.

3. Key Strengths of CFPB Rulemaking and the Importance of Preserving Them

The CFPB has run one of the most impressive rulemaking processes of any federal agency to date, chiefly due to four key strengths. The Bureau's rulemakings have been evidence-based, inclusive, transparent, and responsive to the public. By embracing these four strengths, the CFPB has taken to heart the purpose behind APA rulemaking, which Congress intended to be an inherently democratic, public-facing process. There are recent concerns, however, that the Bureau's current leadership is backing away from that tradition, as we now discuss.

a. Data-Driven Decision-Making [RFI Questions 1.b, 4.c, 10]

From its creation, the CFPB has prided itself on decision-making that is firmly based on empirical research and facts. The CFPB has been scrupulous to avoid interpreting its statutory mission of consumer financial protection as a rush to judgment. Rather, every time the CFPB has contemplated substantive rulemaking, it has based its decisions on rigorous social science research.

This commitment to fact-based rulemaking is one of the most impressive aspects of the Bureau's rulemaking process. Right from the start, the Bureau put a priority on data-driven analysis and hard-baked that culture into its structure and rulemaking process. The research team within RMR employs highly regarded Ph.D. researchers in economics, psychology, and behavioral decision-making[78] who analyze large data sets using sophisticated quantitative methods to examine key questions raised by rulemakings. Separately, the markets teams in RMR monitor the U.S. consumer financial markets for emerging risks and provide empirical policy analyses of those markets, including mortgages, credit cards, small dollar lending, student loans, deposits, debt collection, and credit reporting.[79] Meanwhile, the Bureau's Academic Research Council,

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[76] Consumer Financial Protection Bureau, Application of Regulation Z's Ability-To-Repay Rule to Certain Situations Involving Successors-in-Interest, https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/application-regulation-zs-ability-repay-rule-certain-situations-involving-successors-interest/ (viewed Apr. 27, 2018).

[77] Consumer Financial Protection Bureau, Appraisals for Higher-Priced Mortgage Loans, https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/appraisals-higher-priced-mortgage-loans/ (viewed Apr. 27, 2018).

[78] *See* Consumer Financial Protection Bureau, CFPB Researchers, https://www.consumerfinance.gov/data-research/cfpb-researchers/?page=1#o-filterable-list-controls (viewed Apr. 30, 2018).

[79] *See* Kennedy et al., *supra* note 15, at 1155-56. For examples of this monitoring, see Consumer Financial Protection Bureau, Consumer credit trends, https://www.consumerfinance.gov/data-research/consumer-credit-trends/ (viewed Apr. 30, 2018); Consumer Financial Protection Bureau, Mortgage Performance Trends, https://www.consumerfinance.gov/data-research/mortgage-performance-trends/ (viewed Apr. 30, 2018).

comprised of leading economists and other academics, provides expert advice to RMR on research methodologies, data collection, and analytic strategies.[80]

Far from working in a vacuum, the CFPB's markets and research teams are fully integrated into the rulemaking process from start to finish. Once a rulemaking has been initiated, members of those teams and staff from the Bureau's other divisions actively work with RMR's attorneys to ensure that the Bureau's rulemaking decisions are based on a firm grasp of the market in question and are tailored to address real consumer harms at the least cost.[81]

The CFPB brings its research and markets teams to bear on all major questions raised in major rulemakings: Is there harm to consumers? If so, what is the nature of the market failure and can the market self-correct? Exactly which segment of consumers is harmed and what is the extent of their harm? What are the countervailing benefits to consumers, in type and in size? Assuming that a rule is called for, what is the best way to tailor that rule to address the problem while preserving current benefits to consumers and minimizing costs to industry?

The Bureau draws on a broad range of quantitative and qualitative data to tackle these questions. The research economists and markets experts in RMR analyze large data sets, some assembled by the federal government[82] and others purchased from private vendors. Their work is augmented with qualitative analysis and field insights from CFPB examinations, consumer complaints, public responses to RFIs, and other sources,[83] which are used, among other things, to identify potential problems for further research. This breadth and depth of data sources ensure that CFPB's rulemakings rest on strong empirical foundations.

In short, in just the few short years of its existence, the CFPB has done a remarkable job in establishing its capacity for thorough empirical analysis. It on-boarded major data sets and attracted some of the best experts from around the country to staff its research and markets teams. And it has made good on its commitment to data-driven rulemaking through its process of in-depth, neutral social science research before embarking on rulemaking initiatives.

Given the CFPB's strength in empirical research and markets analysis, the CFPB should refrain from any action that would undermine that strength. *We stress that the CFPB's impartial empirical research benefits consumers and industry alike.* CFPB research guards against over-regulation by the Bureau by zeroing in on the exact nature of any consumer harm and by crafting

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80 March 2017 Semi-annual Report, *supra* note 18, at 56; *see also* Consumer Financial Protection Bureau, Academic Research Council, https://www.consumerfinance.gov/about-us/advisory-groups/academic-research-council/ (viewed Apr. 30, 2018). For examples of such recommendations, see Annual report of the Academic Research Council, October 1, 2016-September 30, 2017, at 6-7 (2017), https://www.consumerfinance.gov/about-us/advisory-groups/academic-research-council/ (viewed Apr. 30, 2018).

81 Kennedy et al., *supra* note 15, at 1156.

82 Examples include the Home Mortgage Disclosure Act dataset and the National Mortgage Database. *See* Federal Financial Institutions Examination Council (FFIEC), HMDA & PMIC Data Products, https://www.ffiec.gov/hmda/hmdaproducts.htm (viewed Apr. 30, 2018); Federal Housing Finance Agency, National Mortgage Database (NMDB®), https://www.fhfa.gov/PolicyProgramsResearch/Programs/Pages/National-Mortgage-Database.aspx (viewed Apr. 30, 2018).

83 *See, e.g.,* Consumer Financial Protection Bureau, How We Use Complaint Data, https://www.consumerfinance.gov/complaint/data-use/ (viewed Apr. 30, 2018); March 2017 Semi-annual Report, *supra* note 18, at 64.

tailored solutions. The Bureau's research into costs and benefits keeps the agency keenly attuned to the twin concerns of minimizing regulatory burden while maintaining consumer access to financial products and services. At the same time, the Bureau's commitment to research is vital to making sure that questionable market conduct is analyzed and addressed instead of being swept under the rug.

We are deeply concerned about a number of recent developments at the Bureau that could jeopardize the agency's evidence-based rulemaking going forward:

i. Obstacles to On-boarding Quantitative Data

The CFPB relies heavily on data, including outside data collected by the Bureau, in its rulemaking process. This information includes consumer data on credit cards and mortgages reported in company disclosures to the CFPB, data in commercial databases and government datasets, and information on trends gleaned from the Bureau's examinations, enforcement actions, and consumer complaint database. Without these robust data originating from the private sector and other external sources, the rigor and impartiality of CFPB rulemaking would be seriously threatened.

In a press conference on December 4, 2017, Acting Director Mulvaney announced that he had frozen the CFPB's collection of personal information, including loan level data, on privacy and information security grounds. In imposing the freeze, Mr. Mulvaney halted the collection of data that could trace back to *either* consumers or businesses.[84] Subsequently, in an email to Bureau employees on May 31, 2018, he announced plans to resume the collection of consumers' personally identifiable information because an outside consultant had determined that the agency's information security systems "appeared to be well-secured."[85]

The data freeze had an immediate and damaging effect on essential data flows to the rulemaking process. The Bureau shut down the Extranet, which CFPB examiners depended on to upload company data in advance of examinations. This crippled Supervision's ability to conduct examinations and analyze trends. Meanwhile, the Bureau's Enforcement attorneys were barred from reviewing electronic evidence produced in discovery, which hampered enforcement.[86] The agency also stopped the Research team from the long-planned onboarding of data that was required to carry out the reviews of certain rulemakings mandated by Congress in the Dodd-

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84 *See, e.g.,* Yuka Hayashi, *New CFPB Chief Curbs Data Collection, Citing Cybersecurity Worries,* WALL ST. J., Dec. 4, 2017.

85 Evan Weinberg, *CFPB to Resume Data Collection After Data Security Review,* BANKING DAILY, BLOOMBERG BNA, May 31, 2018.

86 *See* James Kim & Bowen "Bo" Ranney, *CFPB data collection freeze impacting CFPB examinations*, Consumer Finance Monitor (Ballard Spahr, Dec. 15, 2017); Letter from Sen. Elizabeth Warren to Leandra English & Mick Mulvaney 2-4 (Jan. 4, 2018), https://www.housingwire.com/ext/resources/files/Editorial/2018_01_04_Letter_to_English_and_Mulvaney_on_CFPB_Data_Collection.pdf [hereinafter Warren letter].

Frank Act.[87] Questions also linger about the freeze's effect on the processing and handling of the consumer complaint process.[88]

We strongly agree that protecting data privacy and the security of sensitive data is of the utmost importance. However, the December data freeze was unprecedented and unnecessary and served to paralyze key functions of the Bureau. No other federal agency has ever halted data onboarding in response to a data breach. Instead, if a data breach occurs, federal agencies typically plug the leak as quickly as possible while resuming data collection.[89] Accordingly, the CFPB's data freeze was outside of accepted cybersecurity norms, particularly because the Bureau's IT systems "appeared to be well-secured." Instead, we fear its purpose was to impede core responsibilities of the Bureau.

Since May 2017, the Bureau's Inspector General (IG) has issued several reports on data security at the Bureau.[90] In the most important of these reports, the IG found that the Bureau's information security program was operating at a level-3 maturity (consistently implemented), on a scale of 1 to 5, and that several of the program's activities were operating at a higher level-4 maturity. Despite room to improve, the CFPB's cybersecurity readiness exceeded that of the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Securities & Exchange Commission, and the Department of the Treasury, which never stopped data collection.[91] While the IG proposed improvements, it *never* recommended a halt to the Bureau's data collection, whether for personally identifiable information (PII) or otherwise. Meanwhile, the Bureau concurred with all of the IG's recommendations and has taken action to implement them.

In short, nothing in the CFPB's continuing efforts to rectify any shortcomings in its data security program justified the data freeze imposed on December 4. If any aspects of that freeze persist, they do serious damage to the Bureau's core functions, including rulemaking, and should be rescinded immediately.

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[87] Dodd-Frank Act, § 1022(d).

[88] Separately, we have strong concerns about Acting Director Mulvaney's planned closure of the consumer complaint database and any possible degradation of the consumer complaint process, both for the welfare of aggrieved consumers and the vigor of the CFPB's internal data collection and risk monitoring processes. *See* Remarks by Mick Mulvaney, Acting Director, Consumer Financial Protection Bureau, April 24, 2018, American Bankers Association Annual Conference, Washington, D.C., at 5, https://www.documentcloud.org/documents/4446622-Transcript-Mulvaney-ABA-Conference-4-24-2018.html (viewed May 3, 2018) [hereinafter April 24, 2018 Remarks]; Comments of Financial Regulation and Consumer Protection Scholars, and former Regulators on Docket No. CFPB-2018-0006.

[89] Kate Berry, *Mulvaney response to CFPB data security gaps baffles cyber experts,* AM. BANKER, Apr. 23, 2018; Warren Letter, *supra* note 86, at 2-4.

[90] Office of Inspector General, Board of Governors of the Federal Reserve System and Consumer Financial Protection Bureau, Report on the Independent Audit of the Consumer Financial Protection Bureau's Privacy Program, Audit Report 2018-IT-C-003, at 2 (Feb. 14, 2018); Office of Inspector General, Board of Governors of the Federal Reserve System and Consumer Financial Protection Bureau, Audit of the CFPB's Encryption of Data on Mobile Devices, Executive Summary, 2018-IT-C-002R (Jan. 25, 2018); Office of Inspector General, Board of Governors of the Federal Reserve System and Consumer Financial Protection Bureau, 2017 Audit of the CFPB's Information Security Program, Audit Report 2017-IT-C-019, at 2-3 (Oct. 31, 2017); Office of Inspector General, Board of Governors of the Federal Reserve System and Consumer Financial Protection Bureau, The CFPB Can Improve Its Practices to Safeguard the Office of Enforcement's Confidential Investigative Information, Evaluation Report 2017-SR-C-011 (May 15, 2017).

[91] Warren Letter, *supra* note 86, at 4-5.

ii. Use of Qualitative Data and Consumer Anecdotes

The Bureau's recent data freeze intersects with another issue that has appeared in this RFI, which is the appropriate use of qualitative data in CFPB research and rulemaking. There have been suggestions that qualitative data—including descriptive information about problems encountered by individual consumers in the consumer financial marketplace—should not be used in research or decision-making by the Bureau. The discounting of consumer experience by regulators in the years leading up to the financial crisis shows the dangers of this position, and we strongly urge the Bureau to seek out and treat seriously qualitative data on consumer use of financial products.

Qualitative data serve an important role in the Bureau's research efforts. The Bureau relies on copious qualitative data in analyzing market structures, market dynamics, company internal controls, incentive systems, and consumer psychology. This reliance on qualitative data is intrinsic to the CFPB's research efforts and must continue.

There are many types of qualitative data, including what are sometimes derisively called anecdotes. Consumers or their advocates report individual people's experiences with financial services or products, including the harm American consumers have experienced from unfair and deceptive practices. These anecdotes are relayed through a variety of channels, including responses to RFIs, ANPRs, or NPRMs, field hearings, town halls, or other face-to-face meetings, other forms of external engagement, public inquiries, consumer complaints, enforcement actions, and supervisory findings. This evidence is crucial to the development of rules that create a fair marketplace for three reasons.

First, understanding actual consumer experience is critical to formulating inquiries about the types of data needed to understand the functioning of the market and the questions to be tested. Until the Bureau grasps how consumers actually use and perceive consumer financial products, and how they are sometimes misled and harmed in the use of those products, it cannot know which quantitative datasets or data fields could show the existence or extent of the problems which the rulemaking aims to correct. For example, during the explosive growth of abusive subprime mortgages in the 2000s, the subprime mortgage industry defended the quality of its loans by noting the manageable level of defaults on these loans. But loan default rates usually do not rise during property bubbles because troubled borrowers can retire their debts by selling their homes or refinancing their loans. Instead, the loan default rates masked systematic efforts during the latter years of subprime growth to "churn" refinancing loans through sharply higher use of loans with false "stated incomes," fraudulent appraisals and other tactics reflecting deteriorated underwriting standards. Consumer reports should have been used to point to the collection of data that would have exposed the misleading reliance on overall default rates, and thus that could have led the Federal Reserve to promulgate HOEPA rules to constrain this destructive lending.

Consumer inquiries and complaints, examination findings, and enforcement investigations are canaries in the mine, alerting the Bureau to new and emerging types of consumer harm. While one report is not a trend, it puts the Bureau on notice that there may be a need to inquire whether other consumers are suffering the same harm.

During the lead-up to the financial crisis, the Federal Reserve Board heard countless accounts from community leaders and others about the dangers of subprime mortgages, but it discounted those reports and sat on its hands.[92] In the ensuing crisis, millions of households lost their homes to foreclosure and the global financial system nearly collapsed. Congress later responded by transferring the Board's rulemaking powers over consumer financial protection laws to the CFPB. If the CFPB were to start ignoring anecdotes as did the Federal Reserve, it would do so at high risk to itself and the public that it serves. Instead, consumer narratives should be the impetus for further research and inquiry, not something to be discarded.

Second, some problems are not effectively captured by quantitative data. Lenders, for instance, can produce data showing pristine compliance with existing disclosure laws while training its sales force to use oral practices that effectively mislead consumers. Identifying how consumers actually experience consumer finance and how they perceive being harmed in that market can point to consumer misunderstandings that are not easily captured in data that can be harvested from industry records.

The Bureau's December data freeze exacerbated the treatment of anecdotes inordinately. If anecdotes count for nothing standing alone *and* the Bureau could not analyze those claims using large data sets due to supposed privacy or data security concerns, then consumer harms, for all intents and purposes, would end up being ignored.

A dismissive stance toward consumer reports runs the added danger of one-sided decision-making. Consumers are not the only source of anecdotes. Industry provides the Bureau with plentiful anecdotes of its own to illustrate compliance problems or regulatory costs, which is helpful to understanding how to make efficient rules that promote compliance. The danger is that industry anecdotes will be credited, while consumer anecdotes will not, leading to biased and myopic rulemakings and impact analyses.

Third, consumer reports of experience can inform how to make rules effective in practice. The Bureau, for instance, has mounted extensive and widely praised qualitative studies of laboratory test results for proposed disclosures.[93] This is no different than the routine use by industry of consumer focus groups and qualitative data gathering in developing new consumer products. The wisdom produced by varied sources of information about how the marketplace functions is essential to understanding how to act effectively in promulgating rules that will work in practice. This is no less true for Bureau rulemaking than it is for lenders and other businesses developing strategies to sell consumer financial services.

We close this discussion with one related point. The Bureau should continue to make data publicly available to the greatest extent possible, consistent with consumer privacy and the protection of truly proprietary data. This will allow outside researchers to test the magnitude and ramifications of anecdotal reports. Otherwise, data will end up being locked up in government and industry hands, leaving the larger public with anecdotes alone. That would be a serious

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[92] Binyamin Appelbaum, *Fed Held Back As Evidence Mounted on Subprime Loan Abuses,* WASH. POST, Sept. 27, 2009.

[93] *See* Kleimann Communication Group, Inc., Know Before You Owe: Evolution of the Integrated TILA-RESPA Disclosures (July 9, 2012).

problem, particularly if the Bureau failed to test those anecdotes using quantitative data when possible. The Bureau's recent decision to re-open the 2015 HMDA final rule[94] is the most important episode to raise this concern, but it is not the only one.

iii. Impact Analyses [RFI Question 4.c]

In RFI Question 4.c, the Bureau solicits comment on "[i]mpact analyses for the proposed rule, including the qualitative and quantitative analysis therein, and the data on which they rely."

The CFPB is required to produce impact analyses when conducting rulemakings. The main impact analysis is the so-called "Section 1022(b)(2) Analysis" mandated by Section 1022(b)(2) of the Dodd-Frank Act, which states:

> In prescribing a rule under the Federal consumer financial laws—
> (A) the Bureau shall consider—
> (i) the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule; and
> (ii) the impact of proposed rules on covered persons, as described in section 1026,[95] and the impact on consumers in rural areas . . .

In addition, the Regulatory Flexibility Act (RFA)[96] requires the CFPB to consider whether proposed and final rules would have a significant economic impact on a substantial number of small entities.

The CFPB takes both types of impact analyses extremely seriously. While not required to do so by statute, the Bureau goes to great lengths to quantify and monetize its impact analyses whenever possible.

It is difficult to respond to RFI Question 4.c because the Bureau has not identified any issues surrounding its assessment of its impact analyses and its methodologies and underlying data. Given this lack of context, we confine our comments on the impact analyses to six points.

First, if the Bureau wishes to properly solicit public feedback on its approach to impact analyses, it should issue a separate, new Request for Information in which it fully fleshes out the methodologies that it currently uses for impact studies and any resulting issues. That RFI should give specifics about the qualitative and quantitative analyses that the Bureau uses and any issues concerning those approaches and the data relied on. The Bureau should also describe what new

94 Consumer Financial Protection Bureau, CFPB Issues Public Statement On Home Mortgage Disclosure Act Compliance (Dec. 21, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-public-statement-home-mortgage-disclosure-act-compliance/ (viewed May 3, 2018). The public statement announcing the new rulemaking raises at least two concerns in that regard: (1) that numerous entities that are now required to report under HMDA would be exempted from HMDA reporting; and (2) that some new, important data fields added in the 2015 HMDA rule would be rolled back. *See id.*

95 This refers to depository institutions and credit unions with $10 billion or less in assets. Dodd-Frank Act, § 1026(a).

96 5 U.S.C. §§ 601-612.

approaches it might consider to its impact analyses going forward. Without a detailed enumeration of the Bureau's current approach and any critiques or issues, it is virtually impossible to comment on any changes the Bureau might be contemplating to its impact studies.

Second, we need to stress that in ordinary rulemakings, the Bureau has no statutory obligation to perform a net benefit analysis. Instead, Section 1022(b)(2) of Dodd-Frank mandates the Bureau to "consider" the potential costs and benefits, without requiring it to calculate net benefit. While we applaud the Bureau for seeking to quantify and monetize costs and benefits whenever possible, we oppose *requiring* the agency to do more than its authorizing statute requires.

Third, and in this regard, we must emphasize that OIRA standards for impact analyses *do not* apply and may not be lawfully imposed on CFPB rulemakings. This legal requirement is intrinsic to Congress' decision in the Dodd-Frank Act to establish the CFPB "in the Federal Reserve System, [as] *an independent bureau* . . ."[97] For this reason, the Bureau, like all other federal banking regulators, is exempt from submitting its rules to OIRA for review and cost-benefit analysis.[98]

Fourth, there are important reasons why Congress exempts impact analyses by federal banking regulators, including the CFPB, from OIRA and OMB oversight. First, the exemption insulates the Bureau, its fellow federal banking regulators, and the health of the economy at large from interference for purposes of short-term political gain by OMB and the White House. Second, in financial regulation, often it is harder to quantify benefits in the form of harms avoided than it is to quantify costs. The Bureau and other federal banking regulators must make many rulemaking decisions under circumstances of incomplete data and future uncertainty. Requiring federal banking regulators, including the Bureau, to fully monetize harms avoided—which might prove impossible--would dangerously tilt rulemaking analyses toward inaction and the status quo.

Fifth, if Mr. Mulvaney were serious about impact analyses, then he would allow the Bureau to collect and analyze the complete data needed to properly do them. But his data freeze raised questions about the Bureau's ability going forward to collect data on consumer benefits. If the freeze had that effect, then there was a serious danger that any impact analyses would be artificially heavy on costs while understating the benefits.

Finally, we are deeply concerned that Mr. Mulvaney's dual service as the heads of both the CFPB and OMB undermines the independence that Congress required from OMB and OIRA. Mr. Mulvaney's recent statements and actions have confirmed those concerns. After he took over the helm of the CFPB, he was quoted saying: "You could imagine that the Office of Management and Budget under the Trump administration might look very cautiously, even cynically, against rules that were produced by" the previous CFPB Director, Richard Cordray.[99] Later, in an email to staff, Mr. Mulvaney demanded even more quantitative cost-benefit analysis

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[97] 12 U.S.C. § 5491(a).

[98] Executive Order 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993); *see* note 8 *supra*.

[99] Ian McKendry, *Mulvaney's first days at CFPB: payday, personnel and a prank,* AM. BANKER, Dec. 4, 2017.

of proposed agency rules than the Bureau already provides.[100] In the most alarming development to date, Mr. Mulvaney announced plans to create an Office of Cost Benefit Analysis that would be housed within the director's office.[101] He made that announcement even though this RFI seeking public comment on *that very topic* remained open.

As these statements show, Mr. Mulvaney is scrutinizing CFPB rulemakings under the aegis of OMB and OIRA. His plan to move the cost-benefit analysis researchers into his office and have them report directly to him is the culmination of that assault and a serious affront to the agency's independence as mandated by Congress. Further, the timing of his announcement raises concerns that this RFI is nothing more than cover for what he is intent on doing anyway. To comport with the law, Mr. Mulvaney must immediately rescind the plan to move the cost-benefit unit into his office and recuse himself from further involvement in CFPB impact analyses.

iv. Consideration of New Data, Studies and Reports After the NPRM is Released [RFI Questions 10 and 11]

Finally, in RFI Question 10, the Bureau asked for input on the "[c]onsideration of new data, studies, and reports issued by other agencies or third parties after the NPRM is released."

In many cases, consideration of those data will bolster the evidence base for any final rule that is issued, thereby improving the quality of the rule and its ability to withstand review. Public transparency is essential, however, when considering those sources. Consequently, we firmly support the Bureau's consideration of new data, studies and reports after an NPRM's issuance, but only on three conditions.

The first condition is that the Bureau should mention any new data, studies and reports it considered (to the extent that they are relevant) in the written preamble to the final rule. If the information was instrumental or dispositive in the shape of the final rule, the Bureau's written description should discuss and evaluate those data, studies and reports in detail [see RFI Question 11].

The second condition is that all data, studies and reports that are received through *ex parte* contacts between the issuance of an NPRM and that of a final rule should be timely posted to the public rulemaking docket. Normally, the Bureau's Policy on Ex Parte Presentations in Rulemaking Proceedings will apply to such submissions.[102] As we will discuss, however, there

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100 Memorandum from Mick Mulvaney (Jan. 23, 2018), http://bit.ly/2DZELLC. In that email, Mr. Mulvaney said this about the Bureau's impact analyses:

> Speaking of data: the Dodd Frank Act requires us to "consider the potential costs and benefits to consumers and covered persons." To me, that means quantitative analysis. And while qualitative analysis certainly can play a role, it should not be to the exclusion of measurable "costs and benefits." In other words: there is a lot more math in our future.

Here it is worth noting that Mr. Mulvaney's efforts to hamper data collection by the Bureau makes the cost-benefit analysis he advocates all the harder.

101 Memorandum from Mick Mulvaney to DL DFPB All_Hands, A Note on Staffing and Bureau Organization, (May 9, 2018), https://www.documentcloud.org/documents/4454936-CFPB-Memo.html (viewed May 22, 2018); Evan Weinberger, *Mulvaney Brings More Political Oversight in CFPB Restructuring*, BLOOMBERG LAW BANKING DAILY, May 9, 2018.

102 *See* Section 3.c.i *infra*.

have been serious delays in posting such submissions to regulations.gov. Below, we recommend a change to the Ex Parte Policy to ensure timely posting.

The last condition is that the Bureau should seriously consider re-opening the record to allow the public to comment and respond to those data, studies and reports, particularly where additional information or interpretations could alter the outcome of the final rule. This is especially important where those sources raise new issues and the original NPRM did not put the public on notice of the issue in question. Admirably, the CFPB took precisely this step in the ability-to-repay rulemaking. After the original NPRM appeared (it was issued by the Federal Reserve Board shortly before the Bureau opened its doors), two new issues—the extent of liability exposure and where to set a possible debt-to-income ratio cap for qualified mortgages—rose to the fore in the Bureau's deliberations. Accordingly, the Bureau reopened the rulemaking to solicit public comment on those two issues and the underlying data sources.[103] The CFPB should follow the same approach whenever newly received information could affect the outcome of final rules.

b. Inclusiveness [RFI Questions 1-3, 5-7, 9, 12]

The CFPB deserves praise for its commitment to inclusiveness in its rulemaking proceedings to date. Its External Engagement staff and all other Bureau staff involved in those outreach efforts take the goal of democratic participation seriously and have bent over backwards to solicit public comment from all affected stakeholders, consumers and industry alike. Staff have made tireless efforts to go into local communities and engage the public face to face. Most impressively, they have harnessed new technologies—including emails, social media, and online interactive tools—to seek comment from ordinary Americans located in the farthest reaches of the country.

This broad and imaginative outreach is true not only to the letter, but also to the spirit of, the Administrative Procedure Act. In the APA, Congress sought to allow *all* members of the public – regardless of their occupation, political affiliation, state of residence, income or wealth – to express their views on and help shape forthcoming agency rules. For this reason, all NPRMs are published in the *Federal Register*, which the federal government disseminates online at no cost to the public. Industry participants, trade associations, national consumer advocacy groups, and scholars such as ourselves know to scan *Federal Register* notices daily for upcoming comment periods of interest. However, the average consumer and local community organizations probably do not scan *Federal Register* notices and may not be aware of the *Federal Register* to begin with.

Accordingly, if publicity of upcoming comment periods were confined to *Federal Register* notices alone, public comment would be badly tilted toward special interests. Commendably, in its external engagement to date, the Bureau has been sensitive to that problem and has gone to great lengths to elicit rulemaking comment from the general public in innovative ways (especially outside the Beltway). To that end, the CFPB has deployed twenty-first century communications methods to achieve the original intent of the APA. Thanks to those efforts and

103 Bureau of Consumer Financial Protection, *Truth in Lending (Regulation Z): Notice of reopening of comment period and request for comment*, 77 Fed. Reg. 33,120 (June 5, 2012). To its credit, the Bureau re-opened the comment period despite a tight Congressional deadline for the final rule.

innovations, the CFPB's rulemaking process is better as a result. Meanwhile, through its deep public engagement, the CFPB has made itself accountable to the entire American populace.

It is important, at this key juncture in the Bureau's young life, not to retreat from its deep and vibrant engagement with the public in rulemaking proceedings. The Bureau should continue to engage in all of its types of public outreach to the same wide spectrum of stakeholders and with the same frequency as it has since its inception.

During the information-gathering phase before the publication of any NPRM, we support all of the added ways in which the Bureau has sought public participation. We encourage the continued use of RFIs "concerning market conditions or issues, particular regulatory options, or the process or content of Bureau Research" [RFI Question 1.a] to give the public a chance for input *before* the agency solidifies a proposal. Similarly, we applaud the Bureau's "[e]fforts to gather data from industry, academics, think tanks, consumer groups, and others to support quantitative analysis" [RFI Question 1.b], on the condition that such use be transparent. Such data can provide a stronger factual foundation for any eventual rule and should be expanded, not curtailed.

Turning to publication of NPRMs and final rules in the *Federal Register*, we similarly support the Bureau's practice of releasing those documents in advance on the agency's website, as well as supporting materials and activities such as press releases, summaries, consumer-facing blog posts, and remarks by the Director at public events or on press calls [RFI Questions 5 and 12]. These materials assist public understanding of proposed or final rules and are a far more effective way for the Bureau to explain its rules than the standard *Federal Register* preamble.

We also urge the Bureau to continue its use of online tools and other innovative mechanisms to solicit public feedback on NPRMs [RFI Question 7]. The Bureau's smash success eliciting public feedback on the integrated mortgage disclosures through its online tool shows the power of such engagement. Sadly, it appears that the Cornell University's eRulemaking Initiative,[104] which the Bureau interfaced with from 2012 to 2014, has closed; we hope the Bureau will explore new and better alternatives to the Cornell website. In keeping with the Bureau's tradition of transparency, the agency should make all such feedback available online on a timely basis for public view, either through regulations.gov or through the Bureau's own website.

In a similar vein, the Bureau raises the issue whether it should provide "'reply periods' for commenters to review and formally respond to other commenters' comment letters, and whether and to what extent the Bureau should consider comments received after the close of the comment period" [RFI Question 6]. We start by noting that the APA does not formally address this question. At the same time, the APA does not prohibit the Bureau from receiving or considering responses to the original round of written comment letters after the comment period has closed. In addition, under the APA, the Bureau has discretion to re-open public comment periods. More often, the Bureau can (and does) receive oral and written responses to written comments on an *ex parte* basis after the deadline for the comment period has passed.

[104] Regulation Room, http://regulationroom.org/ (viewed May 3, 2018).

The ability to submit and receive these responses is invaluable to stakeholders and the Bureau alike. Major written comments submitted during the comment period are often long and can present new information or arguments that were not aired in the NPRM. Frequently, the meaning or validity of that information or arguments is subject to interpretation. Permitting responses to written comments after the comment period has closed allows all affected stakeholders to be heard. It also improves the quality and impartiality of the rulemaking by making sure that counterarguments and differing viewpoints are taken into account.

That said, we do oppose a *formal* second reply period. Setting a formal reply period would cause several problems. First, it would increase the burden on all commenting parties, who would feel compelled to read and respond to prior comments and to submit a second set of comments. Second, it would add to the burden of CFPB staff to read all of those comments. Third, it would drag out the rulemaking process.

But the biggest problem with a formal reply period is that it would result in one-sided input by industry players, to the severe detriment of ordinary consumers and the general public, including academics and consumer advocacy organizations. Ordinary people who file comments do not review other comments and are not going to have the time to submit a second set of comments. Even academics and public interest organizations rarely have the time to do so. Simply spending the time to review a proposed rule and to write comments also already imposes a considerable burden on those who do not have a financial interest in a rule and takes time away from other obligations to submit comments.

On the other hand, industry players, trade associations and their attorneys and lobbyists pay salaried staff who have ample time to submit a second set of comments. If a formal reply period existed, they would submit lengthy replies to comments by consumers and other consumer-facing commenters with nothing to balance them out.

In addition, having a formal reply period could disincline the Bureau to consider additional input beyond the reply period or the formal comment process. Yet it may be important for the public to be able to provide input through more informal channels or through written means long after the comment period has closed when the key issues have become more crystallized.

Thus, so long as the Bureau has enough time before finalizing a rule, we encourage it to accept informal input after the comment period has closed, *so long as the Bureau is transparent*. To that end: In the rare circumstances when the Bureau re-opens a public comment period to solicit responses to initial comments, transparency is guaranteed. However, when the Bureau receives those responses on an *ex parte* basis, there is a danger that those responses will result in closed-door rulemaking unless they are timely posted online for public view. Consequently, we make recommendations below to ensure that the Bureau's policy on *ex parte* communications results in faster posting of those responses online. This will give transparency to what otherwise is a valuable form of public input.

c. Transparency and Concerns About Agency Capture [RFI Questions 1.a, 2.d, 7-10]

Early in its existence, the Bureau made a strong and impressive commitment to transparency so that its rulemaking proceedings would be impartial and fully informed. Now with the change in leadership, we have grave concerns that the Bureau, under Acting Director Mulvaney, is back-pedaling from its strong tradition of neutral and broad-based public engagement. There has been only one public announcement of an upcoming field hearing or town hall since his appointment.[105] Similarly, Mr. Mulvaney has not published his complete calendar on the Bureau's website.[106] Meanwhile, on June 6, 2018, he disbanded the current membership of one of its most effective consumer-facing feedback channels--the Consumer Advisory Board —after refusing to meet with it,[107] even though he had proceeded to meet with the Bureau's Community Bank Advisory Council in May.[108]

These actions, combined with Mr. Mulvaney's recent remarks before the American Bankers Association (ABA) indicating that he engaged in "pay to play" as a Congressman, are alarming and raise concerns that the Bureau under his aegis is curtailing consumer input while meeting with industry behind closed doors. As he explained to the ABA, he only met with constituents and with lobbyists who contributed money, stating:[109]

> If you were a lobbyist who never gave us money, I didn't talk to you. If you were a lobbyist who gave us money, I might talk to you.

Mr. Mulvaney then praised industry lobbying as one of the "fundamental underpinnings of our representative democracy, and you have to continue to do it."[110] Meanwhile, eight of the ten financial companies that received the most complaints in the Bureau's consumer complaint database contributed to Mr. Mulvaney when he served in Congress.[111]

These pay-to-play remarks put a cloud over the Bureau's impartiality and commitment to consumer welfare. To remove that cloud, full transparency is necessary to ensure that the

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105 *See* Consumer Financial Protection Bureau, Town hall in Topeka, Kan., on fighting elder financial exploitation in your community (May 16, 2018), https://www.consumerfinance.gov/about-us/events/town-hall-topeka-kan-fighting-elder-financial-exploitation-your-community/.

106 *See* Consumer Financial Protection Bureau, Leadership calendar, https://www.consumerfinance.gov/about-us/the-bureau/leadership-calendar/ (viewed May 3, 2018); Comment of Financial Regulation and Consumer Protection Scholars and Former Regulators on Docket No. CFPB-2018-0005.

107 *See* Email from Delicia Hand (CFPB) dated June 6, 2018, at 10:18:57 AM EDT; Kate Berry, *Is Mulvaney trying to purge CFPB's advisory board?*, Am. Banker, June 4, 2018; National Consumer Law Center, Texas Appleseed & California Reinvestment Coalition, Press Release, Acting Director Mulvaney Fires Members of Advisory Boards of Consumer Financial Protection Bureau, Endangering Financial Well-Being of American Families (June 6, 2016).

108 *See* Consumer Financial Protection Bureau, Spring 2018 Community Bank Advisory Council meeting in Washington, D.C. (May 14, 2018), https://www.consumerfinance.gov/about-us/events/spring-2018-community-bank-advisory-council-meeting-washington-dc/.

109 *See* April 24, 2018 Remarks, *supra* note 88, at 11.

110 *See id.*

111 *See* Public Citizen, *Companies With the Most Complaints in CFPB Database Were Mulvaney Donors* (May 8, 2018), https://www.citizen.org/media/press-releases/companies-most-complaints-cfpb-database-were-mulvaney-donors.

Bureau is listening to all affected stakeholders--consumers and industry members alike--as we now discuss.

i. CFPB Policy on Ex Parte Presentations in Rulemaking Proceedings [RFI Question 9]

When an NPRM is issued and through the time a final rule comes out, the APA contemplates that the written comment process will provide the main channel for public input into rulemakings. This process has two important features that promote transparency: *one*, a deadline that provides a cut-off on written comments; and *two*, public posting of the written comments (which are available for reading online at regulations.gov).

The rulemaking process can be long, however, and external parties may want to communicate with the Bureau about pending rulemakings one-on-one about recent developments, outside of the written comment process. These communications and discussions can provide valuable information to the Bureau and help it craft better tailored and more responsive rules. At the same time, *ex parte* communications pose the danger of undue influence if conducted behind closed doors. Accordingly, the Bureau issued its CFPB Policy on Ex Parte Presentations in Rulemaking Proceedings (Ex Parte Policy)[112] to ensure that potentially useful *ex parte communications* take place during pending rulemakings in an atmosphere of openness. The Ex Parte Policy is the cornerstone of the Bureau's transparency efforts.

The CFPB's Ex Parte Policy seeks to strike a balance with this straightforward requirement: *ex parte* communications with decision-making personnel at the Bureau about pending rulemakings, starting with the publication of an NPRM through issuance of a final rule, must be documented in writing within ten days and posted to the public rulemaking docket for online view.[113]

The Bureau's Ex Parte Policy was one of the strongest policies of its type when it was first adopted. It has cast laudable sunshine onto the Bureau's rulemaking process. We recommend four improvements, however, to ensure that the Ex Parte Policy in fact provides transparency on a timely basis:

- *First:* Under the original version of the Policy, outside parties making oral presentations to CFPB decision-making personnel concerning pending rulemakings had three days to post a written summary of the communications to the rulemaking docket. According to the Bureau, outside parties had technical difficulties posting these submissions on regulations.gov. Accordingly, in 2017, the Bureau reviewed the Policy to excuse outside parties from posting the written summary to the rulemaking docket. Now, instead, outside parties simply need to email the required materials to the CFPB's Executive

[112] Bureau of Consumer Financial Protection, *Policy on Ex Parte Presentations in Rulemaking Proceedings*, 82 Fed. Reg. 18,687 (Apr. 21, 2017) [hereinafter Ex Parte Policy]. The 2017 policy revised the Bureau's original *ex parte* policy, which was issued on August 16, 2011. Consumer Financial Protection Bureau, Policy on Ex Parte Presentations in Rulemaking Proceedings, CFPB Bull. 11-3 (Aug. 16, 2011), https://files.consumerfinance.gov/f/2011/08/Bulletin_20110819_ExPartePresentationsRulemakingProceedings.pdf (viewed May 4, 2018); *see* Kennedy et al., *supra* note 15, at 1158-59; McCoy 2013, *supra* note 22, at 20-21.

[113] *See* Ex Parte Policy, *supra* note 112, at 18,689-90. The disclosure requirement does not apply to *ex parte* presentations by other federal agencies, offices, or their staff, by members of Congress or their staff in many cases, by state attorneys general or certain state regulators, or to the General Counsel's office that concern judicial review of a decision by the Bureau. *See id.* at 18,690.

Secretary and to the CFPB employee point of contact for the presentation. The new Policy provides that CFPB staff will post the summaries and other required written materials "on the public rulemaking docket in accordance with this policy, including making reasonable efforts to do so within a reasonable period of time before publication of the final rule."[114]

Unfortunately, this new procedure has been known to result in lengthy delays in the posting to the public rulemaking docket of summaries of *ex parte* discussions and written materials. In some cases, the written materials have not been posted publicly until after the written rule has been issued. We are highly sympathetic to the often crushing demands on RMR staff's time. At the same time, these delays defeat the purpose of the Ex Parte Policy and make it needlessly difficult or impossible for other interested parties to respond when *ex parte* summaries are posted soon before a final rule is unveiled or, worse, afterwards. Accordingly, we urge the Bureau to revise the Policy to set a hard but reasonable deadline from receipt (of, say, ten business days) for Bureau staff to post written records of *ex parte* contacts to the public rulemaking docket. The CFPB should also dedicate the necessary additional staff time and resources to make that possible.

- *Second:* In a similar vein and given these delays, we further recommend that the CFPB post on its website for public view a log of each *ex parte* contact with CFPB decision-making personnel directed to the merits or outcome of a rulemaking proceeding. The log should list each such *ex parte* contact (whether oral or written) within five business days of its occurrence or receipt and state: (1) the names of all outside persons who attended or otherwise participated in any presentation to the Bureau and their institutional affiliation(s); (2) the date of any presentation; (3) the names and institutional affiliations of all individuals who prepared any written materials presented *ex parte* to the Bureau; (4) the names of all Bureau officials and staff who attended the presentation; and (5) the street address, city and state of the contact. Meanwhile, the Acting Director, Deputy Director, and senior staff, including political appointees, who now oversee all division heads, should post their complete daily calendars of their work for the Bureau to the CFPB's website immediately.

- *Third:* In its provisions on the handling of written materials with potentially confidential material, the Ex Parte Policy states, among other things, that the outside party should provide the Bureau with two versions of the document with the confidential information: one redacted and one not. However, the Policy does not commit the Bureau to posting the redacted version of the document to the public rulemaking docket. The CFPB should amend the policy to ensure that all redacted versions of written materials containing confidential information can in fact be timely viewed on regulations.gov.

- *Fourth:* Under the current Ex Parte Policy, the CFPB reserves the discretion "not to apply the policy" during certain rulemaking proceedings under Section 553 of the APA where public interest requires. While the Policy mentions that this could occur where the CFPB has determined that no final rule will be issued, the Preamble states that this is only "an example."[115] Currently, when leadership's commitment to transparency at the Bureau is in question, we have concerns that this exception could be improperly expanded to situations where a final rule is ultimately issued. Under this provision, what

114 Ex Parte Policy, *supra* note 112, at 18,688, 18,690.
115 *Id.* at 18,688-90.

would stop the Bureau, for example, from suspending publication of *ex parte* contacts pending internal debates whether to proceed to a final rule, based on the reasoning that a final rule might *not* be issued? Because there is no way to cabin this exception against misuse, it should be eliminated.

ii. Transparency During the Initial Information-Gathering Stage and the Implementation Stage [RFI Questions 1.a, 2.d]

The Ex Parte Policy does not apply to the initial information-gathering stage, before an NPRM is ever issued, or the implementation stage. Consequently, the degree to which these stages are transparent is largely at the discretion of the Bureau.

Under its former leadership, the Bureau staked out and carried through on its commitment to transparency during the information-gathering in impressive and innovative ways. We have catalogued the depth and breadth of that outreach and transparency above, ranging from requests for information and the occasional ANPR soliciting public comment, to the posting of data sets for public analysis. We applaud all those efforts while stressing that it is imperative to continue to solicit the same inclusive feedback while assuring transparency to the same high degree.

In this regard, it is important to continue posting written comments in response to requests for information and ANPRs to regulations.gov. Further, it is essential to continue publicly releasing the outline of a proposed rule under consideration, along with outreach to other stakeholders, as part of the SBREFA process [RFI Question 2.d]. Doing so helps encourage broad public input when it really counts, before a proposed rule crystallizes. Moreover, *not* releasing that outline to the public during the SBREFA process would secretly and unfairly tilt the playing field toward industry because nothing would stop small business participants in the SBREFA process from privately disseminating the outline to other industry members. That would prejudice the very consumers whom the Bureau was established to protect and undermine the Bureau's integrity.

iii. Level of Detail in Preambles [RFI Questions 4, 11]

The detailed content of the Bureau's preambles to major rulemakings should also be preserved because it injects transparency into the rulemaking process. The extended discussion of the legal basis, evidentiary record, and impact analyses helps Bureau rules withstand any possible judicial challenge. Detailed preambles also provide a historical record for future policymakers to consult.

To the extent the length of the CFPB's rulemaking preambles poses a concern, the answer is not to artificially truncate those documents. Instead, the CFPB should continue to rely on other tools such as press releases, summaries, highlights, outreach calls and public events, and the like to help explain rules to the public in an easy-to-understand and digestible manner.

d. Ongoing Responsiveness [RFI Questions 4.a, 4.d, 12]

The CFPB has gone to great lengths to be responsive to industry and other stakeholders throughout the implementation phase. That level of responsiveness is praiseworthy and should be maintained and deepened as necessary.

Above, we discussed in detail the wide suite of implementation aids and tools and the CFPB's efforts to facilitate implementation through public outreach. The Bureau's responsiveness also extends to its development of commentary, appendices and model and sample forms [RFI Question 4.d]. In this respect, we wish to draw attention to an especially helpful feature of the Bureau's eRegulations tool. This tool imbeds links to Official Interpretations by the CFPB into each affected subsection of the Bureau's rules.[116] Under this feature, when readers consult a specific subsection of a rule, the Official Interpretation link is easy to find, immediately following the subsection. This simple but ingenious CFPB innovation makes it extremely convenient for readers and substantially aids their understanding of a rule.

Similarly, to the extent possible, the CFPB should continue to conduct implementation outreach and roll out implementation materials simultaneously with the release of a final rule instead of waiting until the *Federal Register* announcement or later [RFI Question 12]. Doing so provides timely answers to the natural and inevitable questions that surround the unveiling of a major rule. In addition, the CFPB's current practice advances compliance by giving regulated entities the maximum time possible to implement the rule.

4. <u>Conclusion</u>

Under the new leadership, there are signs that the Bureau is headed toward a Catch-22 that would paralyze principled, impartial rulemaking. If the Bureau cannot consider qualitative data, including consumer anecdotes, and if it cannot analyze consumer issues using large data sets due to supposed privacy or data security concerns, then there will be no evidentiary basis to redress serious consumer harms. At the same time, the Bureau will not be able to perform the impact studies that the Acting Director demands, let alone quantitative impact studies at all. Meanwhile, there are serious fears that agency capture of the rulemaking process is unfolding behind closed doors. We call upon the Bureau to reverse these developments immediately and return to the data-driven decision-making, inclusiveness, transparency, and responsiveness that the American public deserves from the CFPB and the process it employs when writing rules.

[116] For an example, see the eRegulations page for 12 C.F.R. § 1026.43(a)(3)(iv), located https://www.consumerfinance.gov/eregulations/1026-43/2016-14782_20160627#1026-43-a.

June 7, 2018

Kristine M. Andreassen
Owen Bonheimer
Senior Counsels
Office of Regulations
Consumer Financial Protection Bureau
1700 G St., NW
Washington, DC 20552

Re: Docket # - CFPB-2018-0009 - Request for Information Regarding Consumer Financial Protection Bureau Rulemaking Processes

Dear Ms. Andreassen and Mr. Bonheim:

The 45 undersigned consumer, community, civil rights and legal services groups submit these comments in response to the Consumer Financial Protection Bureau ("CFPB")'s Request for Information ("RFI") regarding its rulemaking processes. In its first several years of operation, the CFPB's rulemaking process has been inclusive, transparent, evidence-based and comprehensive. It is essential to preserve this robust process.

1) Objections to the CFPB's Request for Information Process

We must first note our objections to the burdensome RFI process. The amount of time and attention required to adequately address the CFPB's numerous RFIs on a multitude of subjects in a very short amount of time has diverted valuable consumer advocacy and third-party resources to respond to these requests. The very structure of these RFIs, the nature of many of the questions, and the fact that many focus on processes known mostly to industry actors and their lawyers, favor financial institutions with greater resources at their disposal, and we are gravely concerned about any attempts to weaken consumer protection through this process.

These issues have prevented us from responding in more detail, seeking more input and signatories, or publicizing the comment opportunity more widely. The CFPB must not take the limited number of comments from the public as indicative of a lack of broad objections to changes the CFPB might make that would weaken its role in effectively protecting the consumer public.
These comments summarize in brief our vigorous support of the current rulemaking process.

2) The CFPB should maintain and expand opportunities for public input in its rulemaking process.

We applaud the CFPB for embracing an inclusive approach to public outreach and including additional opportunities for public input in its rulemaking processes. The CFPB should continue its efforts to hear from consumers as much as possible to inform its rulemaking at all stages of the rulemaking process.

The CFPB's field hearings and meetings provide a valuable avenue for the general public to share their experiences directly with the CFPB, and the agency should hold more field hearings and meetings with consumer groups to allow the public more direct access to the CFPB throughout the rulemaking process. The CFPB should continue to explore innovative ways to broaden opportunities for input, including online tools and social media. It is crucial that the CFPB preserve this strong tradition of inclusive public outreach because the agency needs information from a variety of different perspectives. Public input has helped the CFPB make informed decisions in its rulemaking, and outreach should be expanded to allow for even greater public participation.

In particular, we strongly urge the CFPB to seek broad public input in the early stages of identifying problems and potential solutions and as proposed rules are being developed. Once the CFPB has developed a Notice of Proposed Rulemaking ("NPRM"), we support continuation of the practice of first publishing the proposal on the CFPB website, before it is published in the Federal Register. This practice gives the public more time to respond, and often the public is more familiar with the CFPB website. We also strongly support publishing both proposed and final rules along with a press release, blog post, summaries, fact sheets, videos and other materials to make the rulemaking process more accessible and more comprehensible to a wider audience.

While the public should be encouraged to submit comments on a timely basis, the CFPB should not impose any hard rules against continuing input after the comment period closes. Many rulemakings take many years, during which new information can become available, new issues may arise, or the public may become newly aware about the importance of a rulemaking.

The CFPB should also be proactive about reaching out to consumer groups for additional input when new information has come to light, or circumstances have changed, and in particular when industry has provided new information. We also encourage the CFPB to hold more joint roundtables so that all parties can be in the room at the same time. These roundtables have encouraged helpful dialogue in the past.

The CFPB should not impose a formal reply period to comments. Doing so would burden consumers, industry, and other stakeholders with a double comment obligation and would burden CFPB staff with reading additional comments. Such an approach would also unduly favor industry, which has the resources to read and respond to numerous comments, whereas neither our organizations nor certainly the general public has comparable capacity to do so.

3) The CFPB should stay transparent in its rulemaking process to ensure that the agency stays accountable to the public.

Since its beginning, the CFPB made a strong commitment to transparency so that its rulemaking process would be impartial and fully informed. For example, while the CFPB is required by law to meet with small business representatives before commencing rulemaking, the CFPB's commitment to transparency is demonstrated in its practice of distributing the briefing materials to the general public before these meetings, which provide insight into what options the CFPB is considering and an opportunity for all sides to provide input before the rulemaking process begins. Another example is the agency's ex parte policy. Recognizing the danger of undue influence from one-sided communications behind closed doors, the CFPB implemented a policy requiring ex parte communications to be documented in writing and publicized.

The CFPB should continue these practices and publish as much information as possible to stay accountable to the public about the information it is considering in its rulemaking deliberations. We urge the CFPB to complete and publish ex parte memoranda promptly and to post a log of each ex parte contact that occurs regarding a rulemaking process. Consistent with prior practice, we also recommend that the Acting Director and Deputy Director post their complete daily calendars to the website to further improve the CFPB's transparency. If the CFPB considers information after the comment period ends for a rulemaking, this information should be made public too. Transparency is one of the CFPB's greatest strengths, and it should be preserved and expanded to protect the credibility of the rulemaking process.

4) The CFPB should continue to rely on all types of objective empirical research to inform its decisions in rulemaking and should not politicize the analytical process.

The CFPB has prioritized empirical research by integrating its Research and Markets team's impartial research into its rulemaking process. One major source of quantitative data used in this research is the information the CFPB collects through its examinations, enforcement actions, and consumer complaint database. It is important for the CFPB to continue collecting this data so that it can do its own empirical analysis, which preserves its impartiality.

Moreover, recognizing that numeric fields may not tell an entire story, the CFPB enhances its analysis with qualitative data and field insights. This qualitative data, including individual stories, is a fundamentally important part of meaningful research into the impact of consumer financial products and services, and must not be disregarded. Examples of consumer problems play a valuable role in alerting the CFPB to new issues, possible trends, emerging types of consumer harm, and gaps in or evasions of existing protections.

Disregarding consumer stories as unrepresentative "anecdotes" is particularly dangerous because it encourages one-sided decision-making. Consumers are well-equipped to describe their personal experiences with financial institutions, but in many cases neither consumers nor consumer advocates are likely able to assemble quantitative data that could show how widespread any problems are. Nor are they likely to have access to quantitative data from industry or third-party vendors. Without access to industry data, consumers are also in no position to respond to one-sided presentations. Yet their descriptions of their experiences can point to market trends, and to areas where further scrutiny is needed, and should not be ignored. As the agency has done throughout its history, it should use consumer stories as a starting point for further inquiry and an essential part of its analysis.

For the same reasons, while the CFPB is required to consider costs and benefits, it is not required to conduct a quantitative net benefit analysis and should not be required to do so. Industry will provide projections of costs, which may be overstated, while many benefits are inherently not quantifiable. Any requirement to quantify benefits downplays the very real but often unquantifiable benefits that CFPB regulations provide, including enhanced disclosures for consumers, stability and soundness in mortgage markets, and preventing abusive and deceptive practices that harm consumers.

Similarly, the CFPB should not politicize the analytical process. The CFPB is by design independent from the White House and is not required to, and should not, submit its rules to the Office of Management and Budget ("OMB") for review. An OMB review would be a fundamental violation of the CFPB's independence and contradictory to congressional intent in maintaining the agency's independence from the executive branch. We also object to moving the cost-benefit analysis section into the director's office and urge that the function remain in the hands of non-political staff.

To its credit, the CFPB has always relied on a broad range of both quantitative and qualitative data in its analyses to inform its rulemaking. It is imperative that the CFPB continue to draw from a variety of sources for this type of research going forward.

The CFPB rulemaking process is thoughtful and thorough. From beginning to end, the CFPB's rulemaking process provides all stakeholders with the opportunity to weigh in and allows for the CFPB to have data and information from a wide variety of sources in order to make informed decisions. This robust and responsive rulemaking process is effective in producing rules that carry out the consumer protection mission of the agency and should be maintained for the CFPB's future rules.

Sincerely,

30th District Democrats
Allied Progress
American Consumer Justice Fellowship
Americans For Financial Reform
Arizona PIRG Education Fund
Arkansans Against Abusive Payday Lending
Boston Tax Help Coalition
Center for NYC Neighborhoods
Center for Responsible Lending
Chaudhri Group
Citizens For Honest Government
Common Cause
Connecticut Fair Housing Center
Consumer Action
Delaware Community Reinvestment Action Council, Inc.
Dragonfly Financial Solutions LLC
The Financial Clinic
Florida Consumer Action Network
Green Party of Taos County
Heartland Alliance for Human Needs & Human Rights
Interfaith Center on Corporate Responsibility

Mac's Transit Authority, LLC
Main Street Alliance
Massachusetts Communities Action Network
Mobilization for Justice Inc.
MoBo Bicycle Cooperative
Montana Organizing Project
NAACP
Naples Florida League of Women's Voters
National Active and Retired Federal Employees Association
National Alliance of Community Economic Development Associations - NACEDA
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low-income clients)
NEA/CTA
New Jersey Citizen Action
Oregon Food Bank
Prosperity Now
Public Justice Center
Self-Help Federal Credit Union
Society of Saint Vincent DePaul
South Carolina Appleseed Legal Justice Center
Tennessee Citizen Action
U.S. PIRG
Virginia Organizing
Wilshire Baptist Church

National Association of Consumer Advocates

April 26, 2018

Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Via: http://www.regulations.gov

Re: Docket ID CFPB-2018-0001

Comments to the Consumer Financial Protection Bureau's (CFPB) Request for Information Regarding Civil Investigative Demands

The National Association of Consumer Advocates (NACA) is a nonprofit association whose members are private and public sector attorneys, legal services attorneys, law professors, and law students committed to representing consumers' interests. NACA is actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means. We respectfully submit these comments responding to the Consumer Financial Protection Bureau's (CFPB or bureau) Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes.

NACA is concerned that the CFPB has issued this and other public Requests for Information to begin an effort to revamp its internal processes and functions for the benefit of covered financial entities and to the detriment of consumers and the financial markets. We offer our comments below to reflect our full support of the bureau's current functions. Specifically, CFPB investigations and ensuing enforcement actions have had spectacular results, benefitting tens of millions of consumers across the country. The bureau must refrain from making any changes that would hamper its ability to fulfill its statutory mission to protect consumers in the financial marketplace, including its ability to initiate and carry out investigations of potential violations of consumer financial protection laws. The examination of civil investigative demands, i.e. administrative subpoenas, should not be used to "relax" standards for present and future investigations of financial industry misconduct.

Background

Just a decade ago the reckless behavior of big banks and predatory lenders and the lack of safeguards to hold them responsible for their actions caused the Great Recession, leaving millions of Americans without jobs, wiping out their savings, and causing devastating losses of homes. Consumer protection was neglected for far too long in the lead up to the financial crisis. In 2010, Congress created the CFPB, one of the core features of the Dodd-

Frank Act Wall Street Reform and Consumer Protect Act. The financial reform law gave the CFPB the massive responsibility to enforce the Consumer Financial Protection Act (Title X of the Dodd-Frank Act) and 18-plus additional consumer financial protection statutes. It also armed the CFPB with the tools it would need to fulfill its mission, including vigorous supervisory and enforcement authorities to investigate and act on potential violations of those laws.

The evidence shows that the CFPB has had tremendous success. Its work has led to the return of $12 billion in relief to 27 million consumers who were harmed by wrongful corporate conduct. It has stopped harmful conduct, provided restitution and other remedies to harmed consumers, and facilitated improved business practices for financial entities it oversees.

With its investigative and enforcement authorities, the CFPB has taken legal actions against credit card companies for engaging in unfair, deceptive, and abusive practices related to marketing, billing, and enrollment for credit add-on products and services; banks for charging overdraft fees to consumers who had not agreed to overdraft services; payday lenders for pressuring borrowers into debt traps; for-profit colleges for exploiting students and pushing them into unaffordable loans; debt collectors for using illegal tactics to intimidate consumers into paying debts they may not owe; mortgage companies for wrongly foreclosing on consumers' homes.

CFPB's Statutory Authority is Consistent with its Past Approach to CIDs
The Dodd-Frank Act makes clear that protecting consumers is the CFPB's top priority. For example, the CFPB is required to "enforce federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[1] The CFPB must also ensure that "consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination."[2] One of its "primary functions" is to "supervise covered persons for compliance with federal consumer financial law, and tak(e) appropriate enforcement action to address violations of Federal consumer financial law."[3]

To pursue its statutory mission and objectives, the CFPB must actively seek out information to stay abreast of developments that could potentially harm consumers in the offering, selling, servicing, marketing, etc. of financial products and services. CIDs, i.e. administrative subpoenas, are important for covering "substantial information gaps" on potential violations of consumer financial protection laws to help the agency decide whether to initiate formal enforcement actions.[4] Therefore, this process must be efficient and substantive to enable the agency to carry out broad investigations as it is specifically authorized and tasked to do for the public's benefit. Adopting onerous requirements for

[1] 12 U.S.C. § 5511(a).
[2] 12 U.S.C. § 5511(b).
[3] See, *Consumer Fin. Prot. Bureau v. Heartland Campus Sols., ESCI*, Civil Action No. 17-1502, 2018 U.S. Dist. LEXIS 31952 (W.D. Pa. Feb. 28, 2018) *citing* 12 U.S.C. § 5511 (c)(4).
[4] E.S. Kisluk, *"Fishing" for Trouble?: On the Appropriate Limits of a Civil Investigative Demand Issues by the CFPB*, 21 N.C. Banking Inst. 299 (2017).

civil investigative demands that would make investigations more difficult for CFPB staff to obtain information they need, or weakening or narrowing the process that would enable bad financial actors to evade and hinder investigations would betray the public interest.

Entities Have Appropriate Avenues, including Courts, to Question CIDs

The CFPB thoughtfully structured the CID process through a public rulemaking and notice-and-comment period.[5] In addition, businesses have multiple avenues to seek relief or challenge the validity of civil investigative demands that they receive. The process includes opportunities for appeal of CID requests at the agency, and businesses also can turn to courts to seek to set aside or limit investigations.[6] CFPB investigations do not need additional hurdles that would prevent the agency from taking action in a timely manner to protect consumers from illegal and predatory financial conduct.

Entities have sued in federal court to dispute CID notices and breadth of investigations. Notably, a number of courts have examined and mostly have concluded that the CFPB's exercise of its statutory authority to investigate, including its notices to entities of investigations and its requests for information, has been carried out within the scope of the statute.[7]

For example, courts have ordered entities to comply with CFPB CIDs seeking:
(1) Information as part of an investigation to determine whether consumer reporting agencies, persons using consumer reports, or other persons may be violating federal consumer financial protection laws, including the Fair Credit Reporting Act.[8]
(2) Information to determine whether debt relief providers, lead generators, or other unnamed persons are engaging in unlawful acts or practices in the advertising, marketing, or sale of debt relief services or products, in violation of the Consumer Financial Protection Act and the Telemarketing Sales Rule.[9]
(3) Information to determine whether student-loan servicers or others, in connection with servicing of student loans, including processing payments, charging fees, transferring loans, maintaining accounts, and credit reporting, engaged in unfair, deceptive or abusive acts or practices.[10]
(4) Information to determine whether small-dollar online lenders or others engaged or are engaging in unlawful acts or practices relating to the advertising, marketing, provision, or collection of small-dollar loan products, in violation of the Dodd-Frank Act, the Truth in Lending Act, the Electronic Funds Transfer Act, and the Gramm-Leach-Bliley Act.[11]

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[5] See, Christopher Peterson, *Symposium Article: Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, at 12 (June 2016). Rules Relating to Investigations, 12 C.F.R. pt. 1080.

[6] Rules Relating to Investigations, 12 C.F.R. pt. 1080.

[7] See, e.g. *Consumer Fin. Prot. Bureau v. Heartland Campus Sols., ESCI*, Civil Action No. 17-1502, 2018 U.S. Dist. LEXIS 31952 (W.D. Pa. Feb. 28, 2018); *Consumer Fin. Prot. Bureau v. Seila Law, LLC*, No. 8:17-cv-01081-JLS-JEM, 2017 U.S. Dist. LEXIS 217692 (C.D. Cal. Aug. 25, 2017); *Consumer Fin. Prot. Bureau v. Source for Pub. Data, L.P.*, No. 3:17-mc-16-G-BN, 2017 U.S. Dist. LEXIS 86856 (N.D. Tex. June 6, 2017); *Consumer Fin. Prot. Bureau v. Great Plains Lending, LLC*, 846 F.3d 1049 (9th Cir. June 6, 2016).

[8] *Consumer Fin. Prot. Bureau v. Source for Pub. Data, L.P.*, No. 3:17-mc-16-G-BN, 2017 U.S. Dist. LEXIS 86856 (N.D. Tex. June 6, 2017).

[9] *Consumer Fin. Prot. Bureau v. Seila Law, LLC*, No. 8:17-cv-01081-JLS-JEM, 2017 U.S. Dist. LEXIS 217692 (C.D. Cal. Aug. 25, 2017).

[10] *Consumer Fin. Prot. Bureau v. Heartland Campus Sols., ESCI*, Civil Action No. 17-1502, 2018 U.S. Dist. LEXIS 31952 (W.D. Pa. Feb. 28, 2018).

[11] *Consumer Fin. Prot. Bureau v. Great Plains Lending*, LLC, 846 F.3d 1049 (9th Cir. 2017).

These and other investigations are critical to protect American consumers, the public interest, and the health of the financial market. The current CID process, which is within the statutory scope for its investigations, necessarily gives the CFPB sufficient flexibility and authority to enforce multiple consumer financial protection laws, such as those mentioned above.

Financial institutions responding to CIDs have complained that the CID process constitutes an "undue burden," on their businesses. In reality, the inconveniences that CIDs may pose to financial institutions likely do not meet the definition of "undue burden." Courts have reasoned that an "undue burden" related to responses to administrative subpoenas is met when businesses "supply evidence establishing that compliance "threatens to unduly disrupt or seriously hinder normal operations of a business."[12] It is a high and necessary standard to meet to ensure that the CFPB can issue valid requests for information and require substantive and timely responses from corporate entities.

CFPB Should Enforce Substantive Law and Disregard Political Industry Pressure

Finally, Congress, through the Dodd-Frank Act, recognized that an independent CFPB also needed broad authority to investigate potential wrongdoing by entities in a sophisticated industry that has vast resources and wields tremendous political influence. Bad actors in the financial industry have been successful in their political efforts to loosen safeguards and shield themselves from liability for their wrongdoing. CFPB's ability to initiate investigations and to issue investigative demands in adherence of the law must be free from political considerations. CFPB should focus on its mandate to comply with the Dodd-Frank Act, protect consumers in the finance markets, and enforce the consumer protection laws under its jurisdiction.

Sincerely,

Christine Hines
Legislative Director

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[12] See, e.g., *Consumer Fin. Prot. Bureau v. Future Income Payments,* LLC, 252 F. Supp. 3d 961, 970 (C.D. Cal. 2017).

National Association of Consumer Advocates

May 29, 2018

Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Via https://www.regulations.gov/comment?D=CFPB-2018-0005-0001

RE: Request for Information, CFPB External Engagement/Docket No. CFPB-2018-0005

Comments to the Consumer Financial Protection Bureau's (CFPB) Request for Information: Bureau External Engagements

The National Association of Consumer Advocates (NACA), a nonprofit organization actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means, respectfully submits these comments responding to the Consumer Financial Protection Bureau's (CFPB or bureau) Request for Information on its External Engagements (RFI). Overall, NACA is concerned that the CFPB has issued this and other public Requests for Information as an opening to revamp its internal processes and functions in a way that would hinder CFPB activities meant to protect consumers and the financial markets.

The Dodd-Frank Wall Street Reform and Consumer Protection Act – the law passed to remedy flaws in the U.S. economic system that led to the Great Recession in 2008 and the loss of homes, jobs, businesses and economic security for millions of Americans – created the CFPB to specifically protect the interests of financial consumers. Since opening its doors, the CFPB has utilized its powers and authority to bring about fairness in a marketplace that almost was toppled during the financial crisis.

The bureau must reject dangerous proposals in this RFI process, regarding External Engagements and other key agency functions such as Investigations, Enforcement, Rulemaking and Complaint Response, that would sabotage its work and mission to ensure consumers are treated fairly by powerful financial institutions. The bureau must continue its record of seeking public input and taking action to hold bad actors accountable for wrongdoing and harm they cause.

External Engagement, Generally

From its inception through November 2017, the bureau's external engagements (organized events with the public and various stakeholders) have been central to its functions, with 47 meetings of its advisory boards, 33 field hearings, and 15 town halls in more than 40 cities, among other efforts. There have been significantly fewer public engagements so far in 2018.

It is vital for the agency to sustain and extend the external engagement that has been a hallmark of its first six years. Robust external engagement ensures that the CFPB can exchange information with its stakeholders, including millions of consumers, as well as industry participants and entities interested in and affected by the CFPB's actions. Moreover, external engagement ensures that the CFPB's policymakers, consumer educators, attorneys, examiners, and others have the information they need to understand and appropriately address consumers' needs and experiences.

Currently, it appears that the bureau is prioritizing the concerns of regulated industry entities. All of its released RFIs appear to be drafted from the perspective and interests of financial institutions. For example, the current RFI states that the "[b]ureau expects that entities that have engaged with [it] are likely to have useful information and perspectives about Bureau engagements." There is little mention of engagement with consumers. The bureau's work and mission have a broad impact on a variety of stakeholders, and particularly diverse groups of consumers, such as the elderly, minority communities, students, low-income consumers, and military members. The CFPB must provide a forum on a regular basis, through various public events and meetings, to hear concerns from its diverse array of stakeholders, particularly those – examples mentioned above – who lack comparable political power and influence over decision makers as financial industry players.

Advisory Groups

The CFPB's four advisory groups, the Consumer Advisory Board, the Community Bank Advisory Council, the Credit Union Advisory Council, and the Academic Research Council, have been and should be the core of external engagements. Section 1014 of the Dodd-Frank Act required the CFPB director to establish the Consumer Advisory Board (CAB) "to advise and consult with the bureau in its functions, and to provide information on emerging practices in the consumer financial products or services industry, including regional trends, concerns, and other relevant information."[1]

The statute is also clear on the qualities and expertise of the CAB membership. It specifies stakeholders for membership whose voices traditionally would be heard far less than industry players, if at all: "experts in consumer protection, financial services, community development, fair lending and civil rights, and consumer financial products or services and

[1] 12 U.S. Code § 5494 - Consumer Advisory Board.

representatives of depository institutions that *primarily serve underserved communities, and representatives of communities that have been significantly impacted by higher-priced mortgage loans*."[2]

As a body charged with advising the CFPB on its consumer protection functions, the CAB should be led by and consist of representatives for these communities and whose work is focused on consumer protection. It is important to obtain views and hear voices of smaller organizations and individuals in the marketplace that have important information to share about consumers' experiences with financial products and services. Therefore, we recommend that a majority of the CAB be composed of individual consumers, consumer advocates, scholars, or others whose work focuses on protecting consumers.

Further, it is important to note that the CFPB has held no public events since late 2017, and has cancelled advisory board meetings. We recommend that the CFPB increase the frequency of advisory group meetings, and convene meetings for each advisory group at least three times per year to ensure that conversations and dialogue can address the most current and pressing issues. The CAB must continue its previously established work to provide venues to hear and consider on a regular basis diverse voices in vulnerable, underserved, and less politically-influential communities.

Transparency with External Engagement

Given the impact of its role and mission on the lives of everyday consumers, the bureau has a responsibility to be open and transparent in its engagement with the public.

First, advisory group meetings and activities should continue to be advertised and summarized publicly, and broadcast in full whenever possible. Additionally, we recommend that at least one of these meetings for each of its advisory groups take place outside of Washington.

Second, the CFPB leadership must be transparent with their engagement with external groups and individuals. The bureau calendar for leadership, beginning with the bureau director, including the current "acting" director," must provide public and updated information of meetings with all external stakeholders. Based on recent information derived from the CFPB website, the CFPB's leadership calendar appears to be outdated and incomplete.

Third, we strongly support the CFPB's direct engagement with consumers through its complaint tool and other mechanisms. Public access to the consumer complaint database is a key way that the CFPB engages with consumers. The complaint database should not be restricted or curbed in any way.

[2] 12 U.S. Code § 5494 (b).

Since its inception, the CFPB has collected more than one million consumer complaints. Those complaints allow consumers to obtain tailored help. They also provide important information to the CFPB and to the public, as the CFPB publishes complaint data that can help other consumers learn about consumer financial products and potential risks. Equally important are the CFPB's other day-to-day engagement mechanisms. The CFPB website also allows consumers to tell "their stories," another valuable resource.

Additional Mechanisms

We urge the CFPB to explore additional mechanisms, such as "listening sessions," which would allow consumers to engage in open ended discussions about financial services concerns with senior CFPB staff. The CFPB has some experience with events like these in the industry context. Through "Project Catalyst," the CFPB has held four or five "office hours" annually in San Francisco, New York, and Austin, Texas to connect with financial technology practitioners. Similar opportunities for consumers could yield valuable insight and help consumers better understand how the CFPB works for them.

Finally, the CFPB must nurture a culture that promotes public engagement with consumers. The CFPB must work diligently to hear from those without generous sponsorship from industry. It is essential that the CFPB take public engagement seriously. It must maintain a policy and procedure for external engagements, such as a minimum number of roundtables, advisory board meetings, and/or teleconferences. It is imperative that the bureau regularly seeks input from a diverse array of stakeholders, particularly those who lack the power and influence of regulated industry entities. Congress created this agency to protect consumers, and this consumer protection mandate requires a proactive posture of public engagement.

Sincerely,

Christine Hines
Legislative Director

NCL
NATIONAL CONSUMERS LEAGUE

Consumer Financial Protection Bureau
1700 G St., N.W.
Washington, DC 20552
Bureau of Consumer Financial Protection
Via email: *FederalRegisterComments@cfpb.gov*

Docket # - CFPB -2018-0006

Re: CFPB RFI # 6 - Request for Information Regarding Bureau Public Reporting Practices of Consumer Complaint Information

June 4, 2018

Dear Acting Director Mulvaney:

The National Consumers League (NCL) writes to express our strong support of the CFPB's public complaint process and to respond to the Consumer Financial Protection Bureau's (CFPB) Request for Information (RFI) on the public reporting of consumer complaint information.

At NCL, we are keenly aware of the power of complaint data to protect consumers. NCL's Fraud.org campaign relies on thousands of fraud complaints we collect from consumers annually. If our own complaint data, or another government agency's data, identifies a new fraud trend we can preemptively draft educational materials educate consumers before the scam becomes widespread. Our complaints also allow us to offer consumers direct counseling to help prevent them from becoming victims and help victims of fraud recover as quickly as possible.

As the sole federal financial regulator created for the purpose of consumer financial protection, the Bureau has rightly developed a robust and trustworthy complaint process that includes access to a public complaint database to meet its consumer protection mandate.

The public complaint database is a crucial tool that empowers individuals to inform and protect themselves. The database also allows consumers to evaluate a company's practices and decide where to take their business. This database empowers the free market to work as it should by creating incentives for companies to treat their customers fairly. In addition, the complaint database enables companies to quickly identify and correct emerging problems on their own without the burden of a new rule being issued or an enforcement action being required.

It is the responsibility of the the CFPB, to use all of the tools they possess, including complaint data, to provide the public with "timely and understandable information to make responsible decisions about financial transactions."[1]

Providing consumers access to a public complaint database also fulfills the Bureau's obligations to protect consumers from "unfair, deceptive, or abusive acts and practices and from discrimination"[2] and identify risks to consumers in the "collecting, researching, monitoring, and *publishing* (of) information relevant to the functioning of markets for consumer financial products and services."[3]

Usefulness of complaint reporting and analysis

The firsthand accounts of consumer's financial complaints are a valuable tool for consumers when researching who they want to conduct business with. Consumers can review the details of a complaint and then draw their own conclusions on whether the complaint is valid or not and choose their financial institution accordingly.

While many companies may argue against the need for public disclosure of complaints, Americans have long known that sunlight is the best disinfectant for questionable business practices. The public database not only allows consumer education groups like ours to spot new trends, but it also allows consumers who are completing their due diligence before selecting a business to determine if the company they are considering does right by their customers.

Suggestions to improve the complaint process

- **We urge the Bureau to allow public access to the feedback process.** Knowing the outcome of complaints would better allow consumers to complete their due diligence before selecting a company as they would understand how companies respond once a issue has been raised. Adding additional transparency in this area will not only allow consumers to research vendors more accurately, but it will also allow increased competition amongst companies in the area of customer service.

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[1] Dodd-Frank Section 1021
[2] Dodd-Frank Section 1021
[3] *Ibid*

- **Complaints should be sortable by the specific company the consumer complained about.** The Bureau should list complaints not by the parent company's name but by the name the consumer complained about.

- **Complaint resolution details should be publicly reported**. The Bureau should make it possible for consumers to see how individual companies are handling the complaints they receive in the database. A company "snapshot" could include an overview of complaint relief. Resolutions should be broken down by monetary relief (dollar amounts received) and type of complaint filed. Non-monetary relief should report a company's specific actions, such as "Error removed from credit bureau records."

- **Complaint explanation details should be publicly reported**. The vast majority of consumers receive a private explanation in response to their complaints. Companies are required to provide complainants with *tailored* responses, rather than a vague reply. Details from company explanations should be transparent to the public and reported by the Bureau in summary form in a special report.

It is essential that the CFPB not retreat from its core mission to protect and inform consumers and to make our financial markets more fair, accountable, transparent and competitive.

The CFPB consumer complaint database allows consumers to make better financial choices, drives nonprofits' education efforts, and encourages firms to improve their customer service and take notice of competitors' practices that they should avoid. We urge the Bureau to maintain public access to the consumer complaint database.

Thank you for taking the time to thoughtfully review our comments.

Sincerely,

Brian Young

Brian Young
Public Policy Manager
The National Consumers League

Comments of

Americans for Financial Reform
Center for Responsible Lending
Consumer Action
The Consumer Federation of America
National Association of Consumer Advocates
National Consumer Law Center (on Behalf of Its Low-Income Clients)
Public Citizen
U.S. PIRG

May 21, 2018

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Request for Information ("RFI") Regarding the Bureau's Supervision Program (Docket No. CFPB-2018-004)

Dear Ms. Jackson:

The undersigned consumer groups submit these comments in response to the Consumer Financial Protection Bureau's (CFPB's) Request for Information ("RFI") regarding the Bureau's Supervision Program. Our key points are:

- The CFPB's supervision program should not be weakened. Supervision is critical for the Bureau's mission. It is very different from enforcement. It is also often a faster, less resource-intensive, and more flexible tool. It has resulted in enormous benefits to millions of consumers across a number of markets, as well as to the entities being supervised in terms of better compliance and operations.
- The CFPB's supervision activities should not and cannot be delegated to prudential or state regulators. The Dodd-Frank Act is clear that the Bureau has *exclusive* authority to supervise banks with over $10 billion in assets for consumer protection compliance and is *required* to supervise certain nonbanks for the same. Furthermore, prior to the Dodd-Frank Act, prudential regulators failed at supervision for compliance with consumer financial laws, due in part to structural issues and in part to a perceived conflict between protecting consumers and bank safety and soundness. State regulators often lack the authority and resources to supervise nonbank financial services providers, and relying on them would leave consumers without uniform protection across the country.
- The CFPB has appropriately defined which debt collectors, consumer reporting agencies, student loan servicers, international money service transfer companies, and auto finance companies should be supervised as "larger participants" in their respective markets. The Bureau should engage in rulemakings to similarly define larger participants in the prepaid account, installment loan, vehicle title lending, and financial data aggregator markets.

- The CFPB should continue to issue Supervisory Highlights reports. The reports provide valuable information, transparency, and guidance. They help consumers, the general public, the media, and members of industry.
- CFPB supervision has greatly improved compliance by supervised entities with consumer financial laws. Examples of four markets that have benefitted from CFPB supervision include consumer reporting, debt collection, mortgage servicing, and student loan servicing.
    - In the consumer reporting market, CFPB supervision has forced the Big Three credit bureaus to institute some much-needed fundamental reforms, such as establishing robust quality control programs and overseeing information furnishers to ensure they are meeting legal and other obligations.
    - In the student loan servicing market, examiners have halted unfair practices such as servicers declaring loans to be automatically in default when a co-signer has died or declared bankruptcy, where the loan contracts were ambiguous.
    - CFPB supervision of mortgage servicers has resulted in hundreds of thousands of homeowners avoiding millions of dollars in improper charges, sometimes through measures as simple as fixing a software flaw. CFPB examinations of the loss mitigation practices of servicers have led to substantial improvements, helping put homeowners in a better position to avoid foreclosure.
    - In the debt collection market, examiners uncovered multiple violations of the Fair Debt Collection Practices Act and directed collectors to take remedial actions to address these violations. Violations included practices that are often the subject of complaints, such as attempting to collect from authorized users who were not liable for credit card debts, impermissibly communicating with third parties about a debt, and communicating with consumers at inconvenient times.

I. Supervision is Critical to the CFPB's Mission

A. The Dodd-Frank Act gives exclusive authority and, in some cases, actually requires the CFPB to engage in supervision for compliance with federal consumer financial laws.

The CFPB's supervision program is a crucial and indispensable component of the Bureau's work. We completely agree with the statement in the RFI that "[t]he Bureau's ability to supervise entities is an essential part of the Bureau's statutory mission of enforcing Federal consumer financial laws." 83 Fed. Reg. 7166, 7167. We urge the CFPB to fully honor the spirit of this statement and continue its supervision program with the same vigor as it has during these past six years since it began.

Supervision by the CFPB is critical given that that the Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act gives the Bureau sole supervision authority over certain entities for compliance with federal consumer laws. Section 1025(b)(1) of the Dodd-Frank Act, 12 U.S.C. § 5515(b)(1), states:

> The Bureau shall have *exclusive authority* to require reports and conduct examinations on a periodic basis of persons described in subsection (a) [financial institutions with over $10 billion in assets] for purposes of—
> (A) assessing compliance with the requirements of Federal consumer financial laws;
> (B) obtaining information about the activities subject to such laws and the associated compliance systems or procedures of such persons; and
> (C) detecting and assessing associated risks to consumers and to markets for consumer financial products and services.
>
> (emphasis added).

For other entities, specifically non-bank companies, the Act actually mandates that the CFPB engage in supervision. Section 1024(b)(1) of the Dodd-Frank Act, 12 U.S.C. § 5514(b)(1), states:

> The Bureau *shall require reports and conduct examinations* on a periodic basis of persons described in subsection (a)(1) [nonbank mortgage lenders and services; larger participants in a consumer financial services market, private student lenders, payday lenders] for purposes of—
> (A) assessing compliance with the requirements of Federal consumer financial law;
> (B) obtaining information about the activities and compliance systems or procedures of such person; and
> (C) detecting and assessing risks to consumers and to markets for consumer financial products and services.
>
> (emphasis added)

Given that the Bureau is the only regulator with the authority to examine banks with more than $10 billion in assets for consumer protection issues, a failure by the CFPB to adequately supervise these banks means that no regulator will be looking out for the interest of consumers with respect to them. Supervising these banks is particularly important since their actions affect many millions of consumers. Since many of them dominate such a large share of the consumer financial services market and are "too big to fail," the market itself is unlikely to correct their errors.

For nonbank entities, the Dodd-Frank Act actually requires the CFPB to periodically examine covered entities for compliance with federal consumer financial laws. A failure to adequately supervise nonbank entities would violate both the letter and the spirit of the Act.

B. Supervision is not the same as enforcement, and has aspects that are superior.

Supervision is very different from, and a necessary complement to, the Bureau's enforcement program. Supervision is a proactive activity, with regularly scheduled examinations on an ongoing basis. With supervision, a regulator is empowered to review the policies, procedures, systems and data of the regulated entity. The regulator may send representatives to conduct on-site visits; send questions and demand answers; and examine the internal operations of the supervised entity. Supervision provides the ability to detect violations and correct them without the need to go to court or an administrative body.[1]

In contrast, enforcement requires a regulator to learn of potential legal violations, undertake an investigation, and collect enough evidence for a *prima facie* legal case. Such investigations are often resource-intensive and less efficient than supervision, especially if there is a significant amount of discovery and other litigation activities.[2] Enforcement is also much slower than supervision, as it may take years to build and prosecute a case. In the meantime, a harmful practice might still continue to cause injury to consumers. Enforcement is an after-the-fact method of regulation, whereas supervision can be proactive. Supervision can fix a problem before it escalates into a more serious matter.

Enforcement is also a much blunter tool, as it is very binary – either a company gets sued or it doesn't. Supervision can be a much more surgical tool, with a gradient of responses such as a memorandum of understanding (MOU) or a potential action and request for response (PARR) letter. Furthermore, these responses can be kept out of the public eye. Supervision means that a regulator can give the business feedback without creating a public relationships nightmare.

Indeed, even those entities supervised by the Bureau have pointed to benefits of the precision and flexibility of supervision, albeit in a backhanded way. In the early days of CFPB supervision, the U.S. Chamber of Commerce's financial services arm complained that:

> Perhaps because of the uneven quality of examination teams, businesses consistently report that that the Bureau's examination teams have little authority to make decisions—the Bureau's examiners must obtain permission from "Washington" before making even the most minor decisions. That lengthens examinations considerably and eliminates *the situation-specific approach that has traditionally characterized, and is one of the key benefits of, the examination process.*[3]

C. *Coordination is important, but should not amount to de facto delegation of authority to another regulator.*

In the final topic in its Request for Information, the CFPB asks for feedback regarding:

> The manner and extent to which the Bureau can and should coordinate its supervisory activity with Federal and state supervisory agencies, including through use of simultaneous exams, where feasible and consistent with statutory directives.

We agree that coordination between the CFPB and other regulatory agencies is helpful and important. Section 1025(b)(2) of the Dodd-Frank Act explicitly requires such coordination,

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[1] See Jean Braucher & Angela Littwin, Examination as a Method of Consumer Protection, 87:4 Temple L. Rev. 807 (Summer 2015).
[2] *Id.* at 808 ("Although examination is time-consuming and commands devotion of resources both by the agency and regulated entities, it is still less resource-consuming than litigation. It thus provides a relatively cost-effective way for an agency to obtain both changes in company practices and compensation for victims.").
[3] Comment from David Hirschmann, Center for Capital Markets Competitiveness, February 14, 2013 (emphasis added).

including consultation over examination schedules and reporting, in order to minimize regulatory burden on banks.[4] Section 1024(b)(3) requires similar coordination in the supervision of nonbank entities.[5]

Some of the comments that will be filed in response to this RFI may complain about deficiencies in coordination between the CFPB and prudential regulators. But developing the ability to have good coordination, to work well together, takes time. It has been a mere six years since the CFPB began its supervision program. During those six years, the Bureau was required to hire staff, put a structure in place, create protocols and draft a nearly 1600 page Examinations Manual. At the same time, the Bureau was developing relationships with the prudential regulators, figuring out roles, and establishing channels of communications. Such undertakings require time to properly develop, and we assume they are still being worked on to this day. But such efforts do not require new regulations. And they certainly will not be helped by weakening the Bureau's supervision program.

One outcome that cannot happen is for the Bureau to cede supervision activity to these other federal and state agencies. Media reports indicate that the Acting Director has raised such a possibility.[6] However, such an outcome is both inadequate, contrary to the Dodd-Frank Act, and detrimental to the CFPB's mission of protecting American consumers.

With respect to bank supervision, as discussed in Section I.A above, the Dodd-Frank Act gives the CFPB sole and exclusive authority to examine banks with over $10 billion in assets for compliance with consumer protection laws. The prudential regulators simply do not have the authority to supervise the big banks for consumer protection – period. If the CFPB does not supervise big banks for consumer protection, no one will be doing it. Such lack of oversight is not just harmful to consumers, it can literally jeopardize the national and world economies. After all, it was consumer protection abuses and lack of oversight over such abuses that created the mortgage meltdown and financial crisis ten years ago.

Even if the prudential regulators hypothetically had the legal authority to supervise banks over $10 billion for consumer protection, delegating or ceding such a role to them is ill-advised. As discussed in the next section, the financial crisis of 10 years ago was caused in part because the prudential regulators had a conflict of interest when it came to consumer protection, and placed

[4] That paragraph specifically states: "To minimize regulatory burden, the Bureau shall coordinate its supervisory activities with the supervisory activities conducted by prudential regulators and the State bank regulatory authorities, including consultation regarding their respective schedules for examining such persons described in subsection (a) and requirements regarding reports to be submitted by such persons."

[5] That paragraph states: "To minimize regulatory burden, the Bureau shall coordinate its supervisory activities with the supervisory activities conducted by prudential regulators, the State bank regulatory authorities, and the State agencies that licence, supervise, or examine the offering of consumer financial products or services, including establishing their respective schedules for examining persons described in subsection (a)(1) and requirements regarding reports to be submitted by such persons."

[6] Kate Berry, *CFPB should take back seat to bank regulators on supervision: Mulvaney*, American Banker, March 1, 2018 ("Mick Mulvaney, the acting director of the Consumer Financial Protection Bureau, said Thursday the agency may allow prudential regulators to take the lead on more supervisory matters to cut down on duplication and ease the burden of exams on financial firms.… suggesting regulators like the Office of the Comptroller of the Currency and the Federal Reserve Board could have a greater supervisory role on consumer compliance matters. 'There's no reason why folks have to go through sequential regulations for the same thing,'")

the profit margins of banks over consumer protection. Ceding supervision of consumer protection to the prudential regulators raises the distinct possibility that they will not doing a proper job and will once again jeopardize our economy.

With respect to nonbank entities, ceding authority or delegation is impossible, because the Dodd-Frank Act literally mandates that the CFPB must examine covered entities for compliance with consumer financial laws. As discussed above, the Bureau "*shall*" require reports and conduct examinations on a periodic basis" of covered entities. Section 1024(b)(1) of the Dodd-Frank Act.

Furthermore, there is no way to delegate or cede supervision of many nonbank entities to another regulator, whether federal or state, because these companies simply do not have another supervising regulator. The other regulators for these companies, such as the Federal Trade Commission or state Attorneys General, may be able to take enforcement action. But as discussed above, enforcement is very different from supervision.

State regulators in particular cannot fill the gap if the CFPB ceases or reduces its supervision of nonbank entities.[7] Relying on state regulators would leave consumers without uniform protection across the country. Many state agencies lack the financial resources to go after well-funded national corporations. State Attorneys General usually do not have supervision authority. Many non-bank entities, such as credit reporting companies, do not have any state agency with supervision authority over them. Specific industries are discussed below.

D. Consumer protection supervision by bank prudential regulators has historically been hampered by a perceived conflict of interest.

Before the Dodd-Frank Act, the prudential regulators were primarily responsible for overseeing banks for compliance with federal consumer financial laws. Oversight was spread among several agencies, including the Office of Comptroller of Currency (OCC), the former Office of Thrift Supervision (OTS), the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the National Credit Union Administration.

A review of the history of consumer protection by these prudential regulators demonstrates consistent inattention, at best, and opposition, at worst, to the needs of consumers. These regulators not only ignored the glaring abuses of predatory subprime mortgages, but in some cases they actively opposed efforts by other regulators, such as state agencies and legislatures, to rein in the abuses. These failures encompass many years and many different subject areas, and show that the problems were institutional, not occasional lapses.[8]

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[7] *See generally*, Evan Weinberger, States Face Limits in Stepping Up as CFPB Retreats, Bloomberg BNA, Apr. 30, 2018.

[8] *See* Regulatory Restructuring: Safeguarding Consumer Protection and the Role of the Federal Reserve, Hearing Before the Subcomm. on Domestic Monetary Policy of the H. Comm. on Fin. Serv. 111 Congr. 183 (2009)(statement of Lauren Saunders, National Consumer Law Center); Jean Braucher & Angela Littwin, Examination as a Method of Consumer Protection, 87:4 Temple L. Rev. 807, 821-26 (Summer 2015).

Part of the problem was a perceived conflict of interest between consumer protection and bank financial health that frequently resulted in prudential regulators giving short shrift to the former in favor of the latter. Prudential regulators often considered consumer protection to conflict with bank safety and soundness, because protecting consumers from harmful yet profitable products could hurt banks' bottom lines.

Another contributing factor was that banks could essentially choose their own regulator by changing their charters. This was especially problematic because federal regulators' budget depended on the fees paid by the banks within their jurisdiction. Thus, a regulator had an extremely strong incentive to refrain from taking robust action to protect consumers, and in fact to take the side of the banks against consumers – a bank that was unhappy with its prudential regulator's consumer protection activities could simply switch charters (and take its fees) to a friendlier regulator. Indeed, this type of charter shopping occurred with one of the most notorious purveyors of subprime mortgages – Countrywide Financial, which reorganized as a thrift and moved from the OCC to the OTS when the latter promised a friendlier regulatory environment.[9]

These problems caused such great harm to the American economy, and Congress addressed them by placing consumer financial protection in one federal agency irrespective of the charter or legal structure of the institution. This design gives consumer protection the attention and clear focus it deserves. It provides consistent regulation no matter who offers the product or service, and results in a regulator that can take a holistic view. Perhaps most importantly, by preventing charter shopping, it ensures the Bureau's regulatory independence and freedom from regulatory arbitrage.

The CFPB's design reflects an understanding of why the prudential regulator model of consumer protection failed and a goal of reversing course. Consumer protection is the CFPB's only mission. Thus, it does not face the perceived conflict of interest between that mission and the need to boost the bottom line of banks in the name of safety and soundness.

E. Supervision of nonbank has made a critical difference.

In addition to appointing a single regulator for consumer protection for the big banks, Congress made the very deliberate and wise decision to include non-banks within the CFPB's authority. By doing so, Dodd-Frank prevents a company from removing itself from the CFPB's jurisdiction by changing its structure. It also levels the proverbial playing field between banks and nonbanks, the former of which have sometimes complained that other market players are not as regulated as they are. The CFPB's supervision program for nonbanks directly addresses that complaint. Indeed, one of Congress's explicit objectives in creating the CFPB was to ensure that "Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition." Section 1021(b)(4) of the Dodd-Frank Act, 12 U.S.C. § 5511(b)(4).

[9] Jean Braucher & Angela Littwin, Examination as a Method of Consumer Protection, 87:4 Temple L. Rev. 807, 823 (Summer 2015).

More importantly, nonbank supervision has benefitted consumers immensely and improved compliance by supervised entities with federal consumer financial laws. As discussed below in Section II, it has resulted in a sea change in the way critical industries such as credit reporting agencies, debt collectors, student loan servicers, and mortgage servicers have treated consumers.

F. The CFPB has appropriately defined which companies to supervise as "larger participants," but should also supervise other important financial services markets.

Under the Dodd-Frank Act, one category of nonbanks that the CFPB is required to supervise are "larger participants of a market for other consumer financial products or services." Section 1024(a)(1)(B). The Bureau is required to define by regulation what entities are considered "larger participants". *Id.* (referring to § 1024(a)(2)).

Thus far, the CFPB has issued regulations defining "larger participants" in five markets – consumer reporting, debt collection, student loan servicing, international money transfers, and automobile financing. 12 C.F.R. Part 1090. The CFPB appropriately defined which larger participants to supervise in each of these markets. In most cases, the CFPB adopted a narrower definition than urged by consumer advocates. For example:

- In the debt collection market, the CFPB chose a threshold of $10 million in annual receipts from debt collection,[10] whereas consumer advocates had urged a threshold of $7 million.[11] Furthermore, the Bureau excluded debt collectors that primarily collect medical debt, despite our urgings.[12]
- In the consumer reporting market, the CFPB excluded furnishers of information from coverage as larger participants[13] (although some furnishers may fall into other categories of covered persons subject to supervision, such as banks with over $10 billion in assets).
- With respect to money transfer providers, the CFPB only covered providers of international transfers.[14] Consumer advocates had urged that larger participant providers of domestic money transfers also be covered.[15]
- In the student loan servicing market, the CFPB chose a threshold of 1 million loans,[16] whereas consumer advocates urged a threshold of 200,000 loans.[17]

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[10] 12 C.F.R. § 1090.106(b).
[11] National Consumer Law Center, Comments to the CFPB on Defining Larger participants
in Certain Consumer Financial Product and Service Markets (Debt Collection and Consumer Reporting), April 17, 2012, *available at*
https://www.nclc.org/images/pdf/rulemaking/nclc_larger_participant_debt_collector_april2012.pdf.
[12] *Id.*
[13] 12 C.F.R. § 1090.104(a)(ii).
[14] 12 C.F.R. § 1090.107(b).
[15] National Consumer Law Center, et al., Comments to the CFPB on Defining "Larger Participants" of the International Money Transfer Market, April 1, 2014, *available at*
https://www.nclc.org/images/pdf/banking_and_payment_systems/comments-larger-participants-imf-04012014.pdf
[16] 12 C.F.R. § 1090.106(b).
[17] Center for Responsible Lending, et al., Comments to the CFPB on Defining Larger Participants of the Student Loan Servicing Market, May 28, 2013, *available at* http://www.studentloanborrowerassistance.org/wp-content/uploads/2007/03/comments-servicer-larger-markets-may2013.pdf.

Thus, the CFPB's definitions of larger participants in all of these markets were conservative and modest. In the long run, we hope the CFPB will expand these definitions. But while the CFPB did not cover as many entities as we had urged, overall the Bureau's rules capture the primary larger participants that need oversight in these markets and represent a reasonable approach.

The major task that remains for the CFPB is to address additional markets for which a definition of larger participants must be established. These markets include prepaid account issuers, installment lenders, vehicle title lenders, and financial data aggregator markets.

G. The CFPB's Supervisory Highlights reports provide valuable information and guidance.

In the Request for Information, the CFPB asks for feedback about "[t]he usefulness of Supervisory Highlights to share findings and promote transparency." We urge the CFPB to keep producing Supervisory Highlights reports. They provide valuable feedback and information to consumers, members of industry, the general public, academics, and the media. They serve the role of providing transparency without naming individual companies and causing public relations problems for them. They provide a high level view of how CFPB supervision is working.

We have conducted a review of all five years' worth of Supervisory Highlights reports, which reveals some striking trends. It appears that in several markets, supervised companies have gone from struggling to set up compliance systems (or totally ignoring the need for them) to being more proactive about correcting non-compliant practices and conducting internal evaluations. The deficiencies noted in the reports have become less structural (*i.e.* companies with no compliance system at all) and more particular (e.g., specific deceptive practices). The reports also note that companies themselves are noticing data or systems errors that they are self-correcting.

We discuss individual observations in the Supervisory Highlights reports in Section II with respect to the particular markets analyzed in those sections. We also have included a chart summarizing our review of all sixteen Supervisory Highlights reports in Appendix A.

In addition to providing transparency and documenting improvements in supervised markets, the Supervisory Highlights reports provide critical guidance for industry. And the industry is eager for such guidance. For example, in one of the earlier-filed comments to this RFI, the Operational Compliance Manager of a mortgage lender requested that:

> The vast majority of lenders genuinely want to get things right the first time, but sometimes struggle getting guidance on issues that aren't clear in the written regulatory literature.
>
> Therefore, although the CFPB is generally good about calling back with informal answers to those who submit questions, it would be most helpful to provide written responses, even if it contains qualifying comments about it not being legal advice.

> Otherwise, we have nothing to rely on when dealing with Auditors, State & Prudential Regulators, and business partners. Instead, we are left with mere recollections of informal telephone conversations – which doesn't have much credibility.[18]

Thus, the CFPB should continue to issue Supervisory Highlights reports to provide the kind of written guidance that is greatly desired by members in industry.

II. Examples of Consumer Financial Services Markets Where CFPB Supervision Has Resulted in Significant Reform

A. Credit reporting

One of the most important CFPB achievements in its supervision program has been to tackle the intransigent deficiencies in the credit reporting industry. The Big Three credit reporting companies (CRCs) occupy a unique role in the American credit economy. They serve a vitally important function for both the credit industry and in the financial lives of Americans. A good credit history is necessary for consumers to obtain credit, and to have that credit be fairly priced. Credit reports are also used by other important decisionmakers, such as insurers, landlords, utility providers, and unfortunately, even employers. Thus, it is no exaggeration to say that a credit history can make or break a consumer's finances.

Yet CRCs are entirely private companies, and the fact that there are only three of them makes them an oligopoly. The CRCs are publicly traded, which means their highest duty is to shareholder profit, not to consumers or creditors or the American economy. Consumers do not have any leverage over these private companies, unlike most other industries, because market forces do not apply to this industry - we are not the customer, but rather the commodity, of the CRCs. We cannot vote with our feet or our purse strings. For example, we cannot choose to avoid Equifax even after its negligence resulted in the theft of sensitive data for over half of the U.S. adult population. This characteristic – lack of consumer choice – is a common theme among those markets with the worst abuses, such as debt collection and student loan servicing, where consumers have benefitted the most from CFPB's supervision.

In addition to the lack of market forces to rein them in, the CRCs were insufficiently regulated until the Bureau began supervising them. Until 2012, their primary regulator was the beleaguered Federal Trade Commission (FTC), which only had the power to take enforcement action when something went wrong. As discussed in Section I, enforcement is very different from supervision. In the case of the CRCs, it was also far less effective. In addition, even with respect to enforcement, the FTC was outstaffed and outgunned by the CRCs and their deep pocketed resources. As for the states, there was (and still is) no state agency that could exercise supervision authority over the CRCs[19] - the most that states can do is take enforcement action through their Attorneys General.

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[18] Comments from Vernon Tanner, Sr. Vice President – Operational Compliance Manager, Crescent Mortgage Company, Feb. 26, 2018.

[19] The one future possible exception would be New York State, which has proposed but not finalized rules requiring consumer reporting agencies to register with its Department of Financial Services and permitting the Department to conduct examinations. New York State Department of Financial Services, Proposed 23 N.Y. Comp. Codes R. &

Due to this insufficient oversight and the lack of consumer choice, the CRCs developed a culture of impunity and arrogance. For decades, they abused consumers, cut corners in personnel and systems, and failed to invest in measures that would promote accuracy or handle disputes properly. Their idea of a dispute system was a travesty of automation, converting painstakingly written consumer disputes and supporting documentation into two- or three-digit codes and sending only those codes to the creditor or debt collector (the "furnisher") that provided the erroneous information.[20] After the furnisher responded, the CRCs' main response was to repeat or "parrot" whatever the furnisher claimed. The CRC always took the side of the furnisher, like a judge that always sides with the defendant. And they often spent minimal resources on disputes -- at one point, Equifax paid a mere $0.57 per dispute letter to a Philippines-based vendor to handle disputes.[21]

The CRCs also have had error rates that are simply unacceptable. The definitive FTC study on credit reporting errors found that 1 in 5 consumers have verified errors in their credit reports, and 1 in 20 consumers have errors so serious they would be denied credit or need to pay more for it.[22]

It is no surprise then that the CRCs are often the top three most complained-about companies to the Bureau, with the vast majority of complaints involving incorrect information on credit reports.[23] These problems with accuracy stem fundamentally from a culture where compliance and quality control take a back seat to profits and marketing, and where cutting corners is the norm.

A CFPB's Supervisory Highlights report documented these problems, noting major deficiencies at the CRCs such as:[24]

- Lacking programs to test the accuracy of credit reports that the CRCs produced. CFPB personnel were surprised to find that the CRCs' quality control systems were either rudimentary or virtually non-existent.
- Insufficient monitoring and re-vetting of furnishers to ensure they were continuing to meet their legal and other obligations. Furnishers were rarely provided with feedback regarding data quality, and were sometimes charged fees for data-quality reports.

Regs. 201, *available at* https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/DFS_CRA_Reg.pdf#_blank

[20] *See* Chi Chi Wu, National Consumer Law Center, Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports (Jan. 2009), *available at* www.nclc.org/images/pdf/pr-reports/report-automated_injustice.pdf.

[21] *Id.* at 32.

[22] Federal Trade Comm'n Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003 (Dec. 2012).

[23] *See, e.g.*, Consumer Financial Protection Bureau, Monthly Complaint Report, Vol. 21, March 2017, *available at* https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201703_cfpb_Monthly-Complaint-Report.pdf.

[24] Consumer Financial Protection Bureau, Supervisory Highlights Consumer Reporting Special Edition, Issue 14 (Mar. 2, 2017), available at http://files.consumerfinance.gov/f/documents/201703_cfpb_Supervisory-Highlights-Consumer-Reporting-Special-Edition.pdf.

- Deficiencies regarding dispute handling: not only in conducting cursory reviews as discussed above, but also in failing to consistently notify furnishers of disputes and to describe the results of dispute investigations in federally-mandated notices to consumers.

CFPB supervision has made a significant difference in addressing these problems and compelling the CRCs to institute reforms for the first time. While there are still plenty of problems and concerns with the CRCs, the Bureau's supervision program "moved the needle" and started the CRCs along the right path. The same Supervisory Highlights report documents how supervision has resulted in the CRCs:[25]

- formalizing and centralizing data governance policies;
- establishing robust quality control programs;
- enhancing standards for public records data including greater frequency of updates and stricter identity-matching criteria;
- monitoring furnishers on an ongoing basis, including a process to temporarily stop accepting data from furnishers that have accuracy problems or that fail to provide regular updates;
- tracking furnisher dispute data;
- providing data-quality reports to data furnishers at no cost; and
- correcting the deficiencies in dispute handling by ensuring appropriate review of consumer proof documents, and proper provision of notices to both furnishers and consumers.

The CFPB has also engaged in supervision of other key players in the credit reporting system, including furnishers, resellers and specialty reporting agencies. This supervision has resulted in similar reforms.[26]

The FTC, state agencies, and consumer litigants have been fighting with the Big Three CRCs for over forty years regarding their abuse of consumers, but they have never been able to make the CRCs change their culture or institute fundamental reforms. It is *only* CFPB supervision that has resulted in large-scale improvements finally being made. While this is admittedly a work in progress, the Bureau has succeeded in forcing the CRCs to adopt systemic policies and procedures to improve accuracy. Instituting "compliance management systems" may not seem sexy, but it's the type of reform that is necessary in order to improve the overall accuracy of data on a large scale.

Reform of the credit reporting system will potentially benefit tens of millions of consumers. As discussed above, 5% of consumers with a credit file – about 11 million Americans – have serious errors in their reports that could cause them to pay more for credit or result in a denial of credit. Each of these 11 million consumers could be losing thousands of dollars by being forced to pay more for car loans or mortgages – or worse they may lose out on jobs or homes by being denied employment or credit based on their credit reports. If the CFPB reforms fix the serious deficiencies in their systems, these 11 million Americans will benefit to the tune of potentially

[25] *Id.*
[26] *Id.*

billions of dollars. More importantly, the CFPB will be helping these consumers restore their good names and financial reputations, which may be more precious to them than dollar savings.

However, the reforms announced by the CFPB in its report are only the first step. Whether the CFPB is successful in obtaining meaningful and lasting reform of the credit reporting system depends on continued vigorous supervision of the Big Three CRCs. If the CFPB's supervision program is weakened, the progress made by Bureau may be undone and the Big Three CRCs may backslide into their old ways.

B. Student Loan Servicing

Currently in the United States, roughly 44 million people owe more than $1.5 trillion on their student loans.[27] This makes student loan debt the second largest source of debt in the United States, just behind mortgages.[28] Unfortunately, federal data show that more than 1 in 4 of these borrowers are delinquent or in default on their federal student loans.[29]

At the National Consumer Law Center (NCLC), advocates see and hear the human toll of the tattered student loan safety net every day from the low-income borrowers that they represent in Massachusetts. Vulnerable students attempting to improve their lives and better provide for their families through education face severe consequences if they default on federal student loans. The federal government has nearly boundless powers to collect student loans, far beyond those of most unsecured creditors. It can garnish a borrower's wages without a judgment, seize tax refunds (even those that include the Earned Income Tax Credit, a special tax break intended to boost low wage workers out of poverty[30]), place a levy on federal benefits such as Social Security,[31] and deny eligibility for new education grants or loans.

Even borrowers who avoid default and repay their debts can face additional charges if they fall behind on their payments at any point. For borrowers facing financial hardship, competent and accurate servicing can be the difference between missing a payment and staying on track.

Servicing in the private student loan market poses even more challenges to borrowers. Within the private loan market, there is a general lack of information about servicing and debt collection practices.[32] The CFPB has provided information on some revealing trends, including that private

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[27] *See* Fed Reserve St. Louis, 2018 Q1 Student Loans Owned and Securitized, Outstanding (updated May 7, 2018), https://fred.stlouisfed.org/series/SLOAS.

[28] *See* Federal Reserve Bank of New York, Quarterly Report on Household Debt and Credit (May 2017), https://www.newyorkfed.org/microeconomics/hhdc.html.

[29] Consumer Financial Protection Bureau, Student Loan Servicing: Analysis of Public Input and Recommendations for Reform, (Sept. 2015), http://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf. Default is defined as being more than 270 days behind on payment.

[30] For stories from borrowers on the impact of EITC offsets *see* Persis Yu, National Consumer Law Center, Voices Of Despair: Student Borrowers Trapped In Poverty When The Government Seizes Their Earned Income Tax Credit (March 2018).

[31] *See* Persis Yu, National Consumer Law Center, Pushed into Poverty: How Student Loan Collections Threaten the Financial Security of Older Americans (May 2017).

[32] For more detailed comments, *see* NCLC Comments to CFPB on Proposal to Collect Student Loan Servicing Data (federal and private), Docket No. CFPB-2017-0002, April 24, 2017, and NCLC Comments to the Consumer

student loan servicers generally receive a flat monthly fee per account serviced with compensation generally not tied to any specific services performed on behalf of the borrower. This compensation structure disincentivizes servicers from providing any services to borrowers.

A common complaint we hear from borrowers is that they are unable to obtain even basic information, such as amounts owed and paid, from their private student lenders or servicers. A borrower from New York who contacted NCLC through its website summarized this problem concisely: "I have a private loan that has been passed around and I can't seem to get ahold of anyone about it."

Accountability is critical to ensuring that borrowers receive consistent and high quality services.[33] As the CFPB aptly identified in its 2015 report on student loan servicing:

> Borrowers depend on servicers to offer an error resolution process that is accessible, effective, and transparent. Adequate customer service and error resolution is especially important in the student loan market, where the consequences of borrowers' failure to satisfy an obligation can be particularly injurious, given many borrowers' limited credit history. When errors occur and are not quickly addressed, harm to borrowers may not be limited to problems with the individual loan or loans in question. Increasingly, consumer credit profiles serve as a precondition to employment, housing, and access to credit, and consequently, servicing errors can have spillover effects on many other aspects of borrowers' lives and livelihoods.[34]

CFPB supervision is a critical component to providing that accountability, and when done aggressively, can make a meaningful difference for ensuring consumer protections. As the CFPB highlighted in its latest annual Student Loan Ombudsman report,[35] in 2014, the Bureau reported on complaints from student borrowers about surprise automatic defaults that required borrowers to pay back the loans in full immediately if their co-signer had died or declared bankruptcy. Among them were borrowers who had been making their loan payments on time each month. In March 2016, the Bureau reported that CFPB examiners halted one or more servicers' unfair automatic defaults where loan contracts were ambiguous. Soon after, at least six of the nation's largest private student lenders eliminated the contract terms that led to automatic defaults. According to today's report, at least two-thirds of all private student loans made in the 2016-17 academic year, estimated to total approximately $8 billion, did not permit automatic defaults for borrowers who are successfully repaying their private loans.

A $1.5 trillion market cannot go without supervision. It is the congressionally mandated duty of the CFPB to supervise the student loan market and ensure that student loan borrowers are protected from abusive and predatory student lending practices.

Financial Protection Bureau on Request for Information Regarding Complaints from Private Education Loan Borrowers, Docket No. CFPB-2012-0024, August 13, 2012.

[33] For more detailed comments, *see* NCLC Comments to CFPB on Proposal to Collect Student Loan Servicing Data (federal and private), Docket No. CFPB-2017-0002, April 24, 2017.

[34] Consumer Fin. Prot. Bureau, Student Loan Servicing: Analysis of Public Input 140-141 (Sept. 2015).

[35] Consumer Fin. Prot. Bureau, Annual report of the CFPB Student Loan Ombudsman, Strategies for consumer-driven reform (Oct. 2017).

C. Supervision of Mortgage Servicers

i. The importance of getting mortgage servicing right

Servicing plays a central role in the home mortgage market. Servicers communicate with homeowners about every aspect of their mortgage loans. They prepare the written account statements and notices that tell homeowners about the status of their loans. They collect payments, manage escrow accounts, and decide whether to offer help when homeowners experience financial distress. Servicers ultimately make the decisions about whether to foreclose. Yet, homeowners have no ability to choose their mortgage servicers. Servicing rights are bought and sold like a marketable commodity. The investors that own mortgage loans exercise little direct control over servicers. The servicer's compensation is not tied directly to how well a loan performs.[36]

Servicing is also vulnerable to abuse because the terms of servicing contracts and economies of scale make it highly profitable for servicers to collect even relatively small charges from an individual homeowner. For example, one court noted that Wells Fargo, with a servicing portfolio of 7.7 million mortgages, could earn $115,000,000.00 if it collected a single $15.00 fee once annually from each homeowner.[37] In 2006, a relatively stable period before delinquencies skyrocketed, Countrywide Mortgage received $285 million in revenue from late fees alone.[38]

By 2013, over four million American families had lost their homes to foreclosures. Millions more were in default and facing foreclosures. Investors in these mortgages faced staggering losses. As the crisis deepened, the loss to investors from each foreclosure averaged about $145,000.[39] These losses hit in particular the public and non-profit entities that invested heavily in mortgage-backed securities.[40]

As the crisis intensified, it was servicers, not the investors who owned the loans, that continued to decide when foreclosures would proceed. In many instances, servicers foreclosed unnecessarily. An array of loss mitigation options provided alternatives to foreclosures, but servicers failed to implement them. Unnecessary foreclosures occurred because servicers made little effort to consider the alternatives. Despite growing evidence that affordable loan modifications were sustainable, servicers did not communicate with more than half of all borrowers with seriously delinquent loans about loss mitigation options.[41]

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[36] *See e.g.* Adam J. Levitin and Tara Twomey, *Mortgage Servicing,* 28 Yale J. on Reg. 1 (2011).
[37] *In re Stewart*, 391 B.R. 327, 343 n. 4 (Bankr. E.D. La. 2008).
[38] Gretchen Morgenson, Dubious Fees Hit Borrowers in Foreclosures, N.Y. Times, Nov. 6, 2007, at A1 (reporting that Countrywide received $285 million in revenue from late fees in 2006).
[39] Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications*, 41 Conn. L. Rev. 1107 (2009).
[40] American Association of Mortgage Investors, *White Paper, The Future of the Housing Market for Consumers After the Housing Crisis: Remedies to Restore and Stabilize America's Mortgage and Housing Markets* (January 2011) available at http://the-ami.com/wp-content/uploads/2011/01/AMI_State_AG_Investigation_Remedy_Recommendations_Jan_2011.pdf
[41] State Foreclosure Prevention Working Group, Memorandum on Loan Modification Performance (Aug. 2010) (consisting of representatives of twelve states' attorneys general and Conference of Bank Supervisors), *See* https://www.dfs.ny.gov/about/press/pr100824.htm

Government investigations have consistently identified certain servicer practices that aggravated the foreclosure crisis.[42] Servicers misled and confused homeowners about their loss mitigation options. They lost borrowers' paperwork, demanded redundant and unnecessary documents, misrepresented the reasons for denying loss mitigation requests, imposed unfair charges, and foreclosed before completing assessments of borrowers' options.[43]

ii. The CFPB's crucial role in supervising mortgage servicers

The CFPB began to supervise mortgage servicers in 2011, while the country was in the midst of the gravest foreclosure crisis in its history. As discussed above, the CFPB is *required* to supervise nonbank mortgage servicers' compliance with federal consumer protection laws. 12 U.S.C. § 5514(b)(1)(A). These laws include the Real Estate Settlement Procedures Act (RESPA) and the Truth-in-Lending Act (TILA), which together regulate a wide range of mortgage servicing activities.[44]

The Bureau has also issued regulations that address many aspects of mortgage servicing as part of its duty to implement RESPA and TILA. Much of the CFPB's supervision has focused on ensuring that servicers follow the new RESPA and TILA rules, as well as detecting unfair and deceptive servicer practices.

A review of the CFPB's Supervisory Highlights reports shows the effectiveness and importance of the Bureau's oversight so far. For example, a report from 2013 focused on problems with servicers' loss mitigation practices, such as long application processing delays, missing notices to borrowers, incomplete and disorganized files, and gaps in written policies and procedures.[45] In the report, the CFPB stressed the importance of compliance with the new RESPA rules scheduled to go into effect in January 2014, emphasizing that "the examination materials that will be used to assess compliance with these new provisions have been published, well in advance of the compliance deadline."[46]

Three years later, the CFPB reported that servicers had made significant improvements "in part by enhancing and monitoring their servicing platforms, staff training, coding accurately,

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[42] U.S. Government Accountability Office, GAO-11-433, *Mortgage Foreclosures: Documentation Problems Reveal Need for Ongoing Regulator Oversight* (2011); U.S. Government Accountability Office, GAO Report 11-288 *Troubled Asset Relief Program Treasury Continues to Face Implementation Challenges and Data Weaknesses in its Making Home Affordable Program* (2011); U.S. Government Accountability Office Report to Congressional Committees, GAO-09-837, *Troubled Asset Relief Program: Treasury Actions Needed to Make the Home Affordable Modification Program More Transparent and Accountable* (2009); March Oversight Report: The Final Report of the Congressional Oversight Panel (2011); Congressional Oversight Panel, *Foreclosure Crisis: Working Toward a Solution: March Oversight Report* (2009).

[43] National Consumer Law Center, *At a Crossroads, Lessons from the Home Affordable Modification Program (HAMP)* January 2013, *available at* https://www.nclc.org/issues/at-a-crossroads.html .

[44] The CFPB also examines servicers for compliance with other federal statutes that broadly apply to financial transactions beyond mortgage lending and servicing, including the Electronic Fund Transfer Act (EFTA), the Fair Debt Collection Practices Act (FDCPA), the Fair Credit Reporting Act (FCRA), the Gramm-Leach-Bliley Act (GLBA), and the Equal Credit Opportunity Act (ECOA).

[45] Consumer Financial Protection Bureau, Supervisory Highlights Issue 3 (Summer 2013).

[46] *Id* at 15.

auditing, and allowing for greater flexibility in operations."[47] The CFPB's procedures for identifying problem areas and working with servicers to resolve them were working well.[48] Many deficiencies were due to servicers' use of outdated or defective "information technology structures."[49] CFPB supervision led servicers to replace this outdated technology and better manage their documents.[50]

Mortgage servicing relies heavily on software programs and platforms. Servicers also depend on other service providers to perform discrete tasks. The service providers in turn use their own platforms to store and transfer documents and data. An error imbedded in any of these computer programs can impact hundreds of thousands of homeowners, leading potentially to improper assessment of fees, denials of loss mitigation options, and even foreclosures. As we discuss below, the CFPB repeatedly found these types of computer program errors in servicers' systems. CFPB supervision led to prompt and effective remedial actions, with crucial improvements saving homeowners and investors millions of dollars. In addition, the effective supervision obviated public enforcement actions that could have been costly to the servicers, their reputations, and to the CFPB.

Finally, reporting these outcomes in the CFPB's Supervisory Highlights reports is very beneficial to all parties. Publication of these results points other mortgage servicers in the direction they should look to improve their own systems.

iii. Supervision of mortgage servicers' loss mitigation activities

When servicers mishandle homeowners' applications for loss mitigation help, they open the floodgate to unnecessary foreclosures. The CFPB's RESPA rules brought some order to this chaotic application process, but it must be combined with rigorous supervision. Otherwise the chaos will return.

CFPB examinations of servicers' loss mitigation practices have led to substantial improvements, including fixing flaws in computer programs and improving standardized forms, at a minimal cost to servicers. Supervision encouraged staff training and control mechanisms to ensure that loss mitigation worked properly. Loss mitigation reduces the financial hit both to homeowners and to the investors who own, insure, and guarantee mortgage loans.

CFPB's supervision shows that simple requests to revise a computer program can dramatically change outcomes for hundreds of thousands of homeowners. For example:

- One examination revealed that a servicer's software was improperly charging all homeowners a fee when it approved them for a loss mitigation option. At the CFPB's

[47] Consumer Financial Protection Bureau, Supervisory Highlights Mortgage Servicing Special Edition Issue 11 (June 2016), at 19.
[48] *Id.*
[49] *Id.*
[50] *Id.* pp. 19-20.

request, the servicer removed the charge from its software program and refunded the improperly collected fees.[51]

- A CFPB audit found that a servicer's loss mitigation processing platform had been malfunctioning repeatedly over a substantial period of time. The program failed to acknowledge receipt of homeowners' loss mitigation applications, as required by the RESPA rules. The CFPB told the servicer to correct the software and then monitored to make sure that it did so.[52]
- Another CFPB audit found that a servicer's underwriting program routinely inflated homeowners' income by using gross income instead of net income to calculate eligibility for loss mitigation. This was contrary to the guidelines set by the investors who owned the loans. The CFPB directed the servicer to revise its underwriting formula and beef up training of its underwriters.[53]

The CFPB Supervisory Highlights reports show repeatedly that examinations led to changes in forms that had far-reaching impact on entire loan portfolios. For example, letters sent by "one or more servicers" to homeowners offering them a loss mitigation option listed a date for acceptance that had already passed before the homeowners received the letters.[54] A different servicer sent out letters giving homeowners thirty days to submit documents to complete loss mitigation applications, but denied the applications before thirty days were up.[55] The CFPB directed these servicers to implement controls to properly date their notices to homeowners.

Servicers' overly burdensome requests to homeowners for documents have consistently impeded loss mitigation. CFPB supervision has resulted in servicers revising document requests, making them more comprehensible and limited to relevant information.[56] Other servicers sent homeowners letters denying loss mitigation options without including information about the option to appeal the decisions, in violation of the RESPA rules.[57] As part of its Supervision, the CFPB directed the servicers to revise the standardized language in their denial letters to inform homeowners that they could appeal the denials.

iv. Improving servicing transfers practices

The rights to service a mortgage are routinely transferred from one servicer to another, which can sometimes create a host of problems for homeowners. In recent years, many new players have entered the mortgage servicing market, but they often lack trained staff and must develop new technology platforms. Even with an experienced servicer, incompatible servicing programs can lose track of essential borrower information. The RESPA rules set certain standards for the exchange of documents upon servicing transfers.[58]

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[51] Consumer Financial Protection Bureau, Supervisory Highlights Issue 2 (Winter 2013).
[52] Consumer Financial Protection Bureau, Supervisory Highlights Issue 8 (Summer 2015).
[53] Consumer Financial Protection Bureau, Supervisory Highlights, Mortgage Servicing Special Edition, Issue 11 (June 2016).
[54] *Id.* at p. 10.
[55] Consumer Financial Protection Bureau, Supervisory Highlights Issue 9 (Fall 2015).
[56] Consumer Financial Protection Bureau, Supervisory Highlights Issue 3 (Summer 2013); Issue 8 (Summer 2015); Issue 11 (June 2016).
[57] *Id.* Issue 9 (Fall 2015).
[58] 12 C.F.R. §§ 1024.38(b)(4), 1024.41(k). *See also, Servicing Transfers,* CFPB Bulletin 2014-01 (Aug. 19, 2014).

CFPB supervision has frequently addressed problems caused by servicing transfers.[59] For example, examinations found that new servicers did not respect loan modifications approved by prior servicers, even when the investor had approved the modifications and the homeowners had been making all required payments on the modified loans. Instead of recognizing the modifications, the new servicers demanded the higher monthly payment amounts due before the modifications. In these cases, the CFPB directed the servicers to revise their policies and procedures to link databases from the prior servicers to their own platforms. In the June 2016 Supervisory Highlights report, the CFPB documented that servicers had improved their data transfer systems after earlier examinations had cited these types of servicing transfer problems.

v. <u>Accomplishments in other mortgage servicing areas</u>

Supervision has focused on a number of important servicing issues. For example, CFPB examinations gave particular attention to safeguarding the rights of servicemembers, who receive special protections against foreclosures under federal law. The CFPB compelled corrections by two servicers found to have inadequate checks in place to verify a homeowner's military status before proceeding with foreclosures.[60]

CFPB examinations also addressed the following issues:

- CFPB found servicers charging late fees contrary to investor guidelines. These servicers were required to take corrective measures.[61]
- TILA rules require servicers to be specific in their monthly statements and to clearly disclose the nature of each charge assessed to an account.[62] As part of a review, the CFPB informed a servicer that it must stop using labels such as "Misc. Expense" and "Charge for Service" on monthly statements and instead provide homeowners with a comprehensible explanation for each charge.[63]
- The RESPA rules require that servicers meet certain accountability standards in handling homeowners' escrow accounts.[64] Supervision led servicers to stop practices that routinely caused the late payment of property taxes, resulting in penalties assessed against the homeowners.[65]
- In another case, CFPB supervision discovered a servicer disbursing funds from some homeowners' escrow accounts to pay for insurance premiums owed by other homeowners.[66] The CFPB ordered the servicers to implement appropriate corrective policies and practices.

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[59] Consumer Financial Protection Bureau, Supervisory Highlights Issue 2 (Winter 2013); Issue 3 (Summer 2013); Issue 8 (Summer 2015); Issue 11 (June 2016).
[60] Consumer Financial Protection Bureau, Supervisory Highlights Issue 2 (Winter 2013).
[61] *Id.* Issue 3 (Summer 2013).
[62] 12 C.F.R. § 1026.41(d).
[63] Consumer Financial Protection Bureau, Supervisory Highlights Issue 15 (Spring 2017).
[64] 12 C.F.R. §§ 1024.17, 1024.34.
[65] Consumer Financial Protection Bureau, Supervisory Highlights Issue 3 (Summer 2013).
[66] *Id.* Issue 15 (Spring 2017).

In summary, the CFPB's supervision of mortgage servicers has focused on important and appropriate subjects. As a result, hundreds of thousands of homeowners avoided millions of dollars in improper charges. Many homeowners were put in a better position to avoid foreclosures through more effective loss mitigation procedures. And it was only because of the CFPB's supervision program that these homeowners received relief—homeowners themselves would never have been able to uncover the cause of the problems they were experiencing. Yet in many cases a simple letter from an oversight agency was able to pinpoint a problem affecting thousands of consumers and put an end to a widespread practice that was leading to unfounded charges and could potentially take away their homes.

D. Debt Collection

Debt collection is a pervasive part of American life, affecting a huge number of consumers. In 2016, 33% of Americans with a credit report had at least one debt in collection.[67] In predominantly nonwhite zip codes, the share with debt in collection reached 45%.[68]

The need for CFPB supervision of debt collectors is clear from the prevalence of consumer complaints about the debt collection industry. Debt collection is a leading source of consumer complaints to the CFPB,[69] the FTC,[70] the Better Business Bureau,[71] and others.[72] The categories of the 84,500 complaints received by the CFPB in 2017 were:

- Attempts to collect debt not owed (39%)
- Written notification about debt (22%)
- Communication tactics (13%)
- Took or threatened to take negative or legal action (11%)
- False statements or representation (10%) and

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[67] Urban Institute, Debt in America: An Interactive Map (Apr. 2018), *available at* http://apps.urban.org/features/debt-interactive-map/.

[68] *Id.*

[69] Consumer Fin. Protection Bur., Annual Report 2018: Fair Debt Collection Practices Act (Mar. 2018), available at http://files.consumerfinance.gov ("In 2017, the Bureau handled approximately 84,500 debt collection complaints, making it one of the most prevalent topics of complaints about consumer financial products or services received by the Bureau.").

[70] Fed. Trade Comm'n, Consumer Sentinel Network Data Book 2017 (608,535 complaints, or 22.74% of all complaints).

[71] U.S. Better Bus. Bureau, 2016 Statistics Sorted by Complaints, available at www.bbb.org (in 2016 it received 16,817 complaints and more than three million inquiries about collection agencies). *See also* Emma Fletcher and Rubens Pessanha, BBB Institute for Marketplace Trust, 2016 BBB Scam Tracker Annual Risk Report: A New Paradigm for Understanding Scam Risk, available at www.bbb.org (the Better Business Scam Tracker received reports of a number of debt-related scams in 2016, including tax collection scams (7902), debt collection scams (2798), and credit repair/debt relief scams (487)).

[72] CFA & NACPI, 2016 Consumer Complaint Survey Report (July 27, 2017), available at www.consumerfed.org (investigators who survey state and local consumer protection agencies to ask about their top complaints found that credit and debt complaints ranked fourth).

- Threatened to contact someone or share information improperly (4%)[73]

In addition to receiving complaints from consumers, the CFPB has also surveyed consumers about their experiences with debt collection. In 2017, the CFPB published the results of this survey, in which respondents indicated that they had experienced a variety of debt collection abuses.[74] For example, of respondents who had been contacted about a debt:

- 53% "indicated that the debt was not theirs, was owed by a family member, or was for the wrong amount";
- 63% "said they were contacted too often";
- 36% were called after 9 p.m. or before 8 a.m. (presumed inconvenient times);
- 27% were threatened; and
- 75% of consumers who requested that the creditor or debt collector stop contacting them reported that the contact did not stop.[75]

CFPB supervision has addressed several of these abuses. For example, examiners found that debt collectors had violated the Fair Debt Collection Practices Act by attempting to collect from authorized users who were not liable for credit card debts, impermissibly communicating with third parties about a debt, and communicating with consumers at inconvenient times. Examiners directed the debt collectors to take remedial actions to address each of these violations.[76]

CFPB supervision of debt collectors is critical. Although the CFPB's supervisory authority only extends to larger participants in the debt collection market,[77] its impact is extensive and important. First, the larger participants in the debt collection market have massive portfolios of debts in collection, meaning that their collection practices impact large numbers of Americans. For example, the debt buyer Encore Capital Group, Inc. claims that twenty percent of American consumers either owe it money currently or have owed it money in the past.[78] Second, CFPB supervision provides guidance to the rest of the debt collection industry through the publication of the Supervisory Highlights reports, as well as through the publication of Guidance documents that address emerging industry practices that the Bureau becomes aware of through its supervision and enforcement activities.[79] Thus, CFPB supervision of the larger participants in the debt collection market allows the Bureau to monitor and respond to emerging trends quickly in a way that is beneficial to the industry as a whole.

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[73] Consumer Fin. Protection Bur., Annual Report 2018: Fair Debt Collection Practices Act (Mar. 2018), available at http://files.consumerfinance.gov.

[74] Consumer Fin. Protection Bur., Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt (Jan. 2017).

[75] Id. at 5, 35, 46.

[76] Consumer Financial Protection Bureau, Supervisory Highlights Issue 16 (Summer 2017)

[77] 12 C.F.R. § 1090.105(b).

[78] Chris Albin-Lackey, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor (Human Rights Watch, Jan. 2016).

[79] *See, e.g.*, CFPB Compliance Bulletin 2017-01, Phone Pay Fees (July 31, 2017).

There is simply no substitute for CFPB supervision. The states cannot provide the same level of oversight, because the existing state regulatory framework is insufficient to protect all consumers from abusive debt collection practices. Although some states require debt collectors to be licensed, others do not.[80] Even those states that do require licensure for debt collectors may have significant gaps in coverage. For example, some states specifically exempt certain debt buyers from licensure.[81] Whether they arise due to an absence of state licensing laws or an exemption for a particular type of debt collector, these gaps mean that the states cannot adequately supervise the 8,513 debt collection agencies that were active in the United States in 2017.[82] Moreover, the type of oversight that states provide varies greatly,[83] as do the level of resources and types of tools that each state that does require licensure provides to its regulator. States also differ as to the degree in which state licensing statutes focus on protecting consumers compared to preventing the misappropriation of creditor funds.[84]

Conclusion

The CFPB supervision program has done what Congress intended it to do – improve the lives of millions of Americans by ensuring that providers of financial services and products follow the law. There is simply no substitute – not by prudential regulators nor by state agencies nor by other federal authorities. The CFPB has the tools, it has the mission, it has the expertise, and most importantly, it has the authority and mandate under the Dodd-Frank Act. The CFPB has used all of these tools to make significant and important reforms to the industries that it supervises, to the benefit of everyone – consumers, industry members, and the American public. The CFPB should – indeed it must – continue this vigorous and excellent work.

* * *

[80] *See* National Consumer Law Center, Fair Debt Collection, Appx. D (9th ed. 2018), *updated at* www.nclc.org/library (summarizing state debt collection practices statutes, including debt collection licensing statutes); insideARM, State Licensing Interactive Map, *available at* www.insidearm.com/state-laws/

[81] *See, e.g.,* Tenn. Code Ann. §§ 62-20-103(a)(9) (exempting "[a]ny person that holds or acquires accounts, bills or other forms of indebtedness through purchase, assignment, or otherwise; and only engages in collection activity through the use of a licensed collection agency or an attorney authorized to practice law in this state"); *Dorrian v. LVNV Funding, L.L.C.*, 479 Mass. 265, 94 N.E.3d 370 (2018) (concluding that the debt buyer LVNV is not a debt collector under the Massachusetts licensing statute).

[82] IBISWorld, Debt Collection Agencies – US Market Research Report (Dec. 2017), *available at* www.ibisworld.com/industry-trends/market-research-reports/administration-business-support-waste-management-services/administrative/debt-collection-agencies.html.

[83] *See* insideARM, State Licensing Interactive Map, *available at* www.insidearm.com/state-laws/ (showing maps for license requirements, bond requirements, and licensing fee requirements).

[84] *Compare* Alaska Stat. §§ 08.24.290 (grounds for revocation of license focused on preventing misappropriation of creditor's funds) with Ark. Code Ann. § 17-24-307(grounds for revocation of agency license focus on abusive debt collection practices against consumers).

Thank you for the opportunity to submit these comments. If you have questions about them, please contact Chi Chi Wu at cwu@nclc.org or 617-542-8010.

Respectfully submitted,

National Consumer Law Center (on behalf of its low-income clients)
Americans for Financial Reform
Center for Responsible Lending
Consumer Action
The Consumer Federation of America
National Association of Consumer Advocates
Public Citizen
U.S. PIRG

Appendix A – Chart with Highlights from CFPB Supervisory Highlights Reports

September 2017

Industry	Act	CFPB Action
Auto loan servicing	(H) Despite loan extensions or other repossession avoidance options, servicers repossessed cars after repossession was canceled	Directed to stop and refund customers repossession fees. Servicers now required to verify that repossession orders are still active immediately before repossessing cars.
Credit card account management	(H) Failed to provide full tabular disclosures when opening accounts	Directed to review and strengthen procedures for opening accounts
Credit card account management	(H) Deceptive communications to consumers regarding costs and availability of pay-by-phone options	Directed to reimburse consumers paying unnecessary fees, and ensure consumers are informed of all payment options before paying
Credit card account management	(H) Service reps did not follow call scripts for debt cancellation products & did not give consumers accurate info on fees & benefits	Directed to reimburse consumers and ensure service reps are following scripts & providing accurate information
Credit card account management	(H) Did not follow error resolution process in Regulation Z (late communications, no investigation of charges, etc.)	Directed entities to remediate affected consumers, develop stronger error resolution plans, and in some cases to change service providers
Debt collection	(H) Did not verify that the correct person was contacted before trying to collect debt	Directed to improve consumer verification processes; retrained collection agents
Debt collection	(H) Deceptively implied that a credit card user (not cardholder) was responsible for a debt	Remedial & corrective actions under review
Debt collection	(H) False representations regarding the credit score effect of paying a debt in full rather than settling the debt	Directed to change training materials and language used by collectors
Debt collection	(H) Deliberately contacting consumers at inconvenient times	Directed to enhance compliance monitoring of dialer systems & call times
Deposits	(H) Unnecessary freezing of deposit accounts after suspicious activity	Directed to review freezing policy and communications with consumers about hard holds on accounts
Deposits	(H) Misrepresentations about which payments qualified for waiver of monthly service fees	Cited for deceptive acts and practices; required to ensure that disclosures are accurate & not misleading
Deposits	(H) Violations of Regulation E's error resolution requirements,	Directed to come into compliance with Regulation E

	including delays in communications and failure to investigate claims	
Deposits	(H) Deceptive statements about coverage of overdraft protection	Directed to cease misrepresenting overdraft protection products
Mortgage origination	(H) Failure to fully comply with Know Before You Owe mortgage rule (lack of documentation, incomplete disclosures)	Reimbursement to affected consumers, corrective actions depending on the cause of the harmful act
Mortgage origination	(H) Failure to reimburse unused service deposits	Refunds to affected consumers
Mortgage origination	(H) Arbitration language in residential loan documents, in violation of Regulation Z	Directed to remove the language
Mortgage servicing	(H) Failed to fully complete loan modification applications, accepted incomplete applications	Directed to implement procedures that would ensure servicers obtain all available documents & information for applications
Mortgage servicing	(H) Broad waivers of rights in loss mitigation agreements	Directed to remove all waivers from agreements
Remittances	(H) Failed to treat int'l mobile top-ups and bill payments over $15 as remittance transfers	Directed to include disclosures and compliance management with these transactions
Mortgage servicing	(H) Servicers' billing failed to give total charges on statements	Directed to include this info on periodic statements
Payday loans	(H) Repeated collection calls to workplace or other third parties	Remedial & corrective actions under review
Payday loans	(H) Misrepresentations re: actions collectors would take if not paid (in-person visits, etc.)	Remedial & corrective actions under review
Payday loans	(H) Misrepresentations about loan products (availability, competitor comparisons, online applications)	Directed to revise marketing materials & remove misleading information
Payday loans	(H) Using borrower references to market loans to them or attempt collections	Directed to ensure disclosures include full use of references
Payday loans	(H) Unauthorized debits on borrowers whose loans were already paid	Remedial & corrective actions under review
Mortgage servicing	(H) Failed to provide borrowers with foreclosure protections	Directed to pay $1.15M to harmed borrowers

April 2017

Industry	Act	CFPB Action
Mortgage servicing	(H) Failed to request all documents needed for loss mitigation programs, then denied applications that were missing documents	Directed to review and strengthen policies & procedures
Mortgage servicing	(H) Failed to timely register loss mitigation applications, causing consumers to lose foreclosure protections	Directed to remediate consumers & strengthen policies for processing and registering applications
Mortgage servicing	(H) Paid consumers' insurance premiums with other consumers' escrow funds	Directed to strengthen policies regarding how escrow funds are used
Mortgage servicing	(H) Issued periodic statements without fully itemized charges	Directed to provide specific descriptions
Student loan servicing	(H) Failed to remediate borrowers for wrong deferment terminations, resulting in greater fees and interest	Directed to conduct audit to locate affected accounts for remediation
Student loan servicing	(H) Deceptive statements regarding interest during deferment periods	Directed to conduct audit to locate affected accounts for remediation
Credit bureau	(H) Falsely reported that credit scores sold to consumers were the same seen by lenders	Directed to truthfully represent credit scores and pay $3 million civil penalty
Mortgage servicing	(H) Businesses paid for referrals for mortgage services	Ordered to pay $4 million civil penalty
Mortgage servicing	(H) Did not notify consumers of foreclosure relief options	Ordered to pay $21.4 million in remediation to consumers, and $7.4 million in civil penalties

Consumer Reporting Special Edition (March 2017)

Industry	Act	CFPB Action
Consumer reporting	(P) Strengthened policies & systems for data governance & handling consumer info	
Consumer reporting	(P) Developed systems to track patterns and trends in consumer reports and possible errors	
Consumer reporting	(P) Greater monitoring of data from outside furnishers, including ceasing to accept data from furnishers who do not meet	

	standards	
Consumer reporting	(H) Reseller CRCs used systems with programming errors that introduced errors into data	Directed to review & strengthen accuracy procedures
Consumer reporting	(P) Increased use of tech systems, call scripts, training for dispute handling	
Consumer reporting	(H) Failed to review all consumer dispute documentation	Directed to revise policies to ensure all consumer information is considered
Consumer reporting	(H) Failed to give timely or clear notice of dispute investigation results	Directed to state results of investigations quickly and clearly
Consumer data furnishing	(H) Weak data oversight & monitoring	Directed to address system weaknesses
Consumer data furnishing	(H) Failed to have clear and reasonable written policies	Directed to develop such policies
Consumer data furnishing	(H) Failed to maintain full documentation and records	Directed to retain dispute documentation for a reasonable amount of time
Consumer data furnishing	(H) Reported consumer info that furnisher knew was incorrect	Directed to correct the data

General market observations:

- Overall CRCs have made advances to promote greater accuracy, oversight of furnishers, and enhancements to dispute resolution
- Continued improvements are necessary; many CRCS lack clear incentives to do better and under-invest in accuracy

October 2016

Industry	Act	CFPB Action
Auto loan origination	(H) Weak complaint systems, lacking policies & training	Directed to implement & strengthen CMS
Auto loan servicing	(H) Held borrowers' personal property found in repossessed cars and charging fees for storing the property	Directed to stop charging for storing property or refusing to return property
Debt collection	(H) Charged unlawful convenience or collections fees	Remedial & corrective actions
Debt collection	(H) Made false statements to get consumer info or collect debts, including impersonating consumers	Remedial & corrective actions
Debt collection	(H) Unlawful communication with third party about the debt	Remedial & corrective actions
Debt collection	(H) Failed to train employees to record & analyze dispute records	Directed to develop stronger policies & training for dispute records & analysis
Debt collection	(H) Failed to investigate FCRA	Remedial & corrective actions

	disputes	
Debt collection	(H) Failed to give consumers authorization terms for recurring electronic fund transfers	Directed to strengthen policies & employee training
Debt collection	(P) Had a well-organized, monitored compliance system with trained employees & call scripts	
Mortgage origination	(H) Failed to verify total monthly income as part of ability to pay	Directed to revise policies to ensure proper verification
Mortgage origination	(H) Failed to provide timely disclosures after applications	Directed to strengthen monitoring and compliance systems
Mortgage origination	(H) Failed to ensure loan originators were properly licensed under the SAFE Act	Directed to discontinue using unlicensed loan originators
Student loan servicing	(H) Denied or failed to approve income-driven repayment plan applications	Directed to remedy harmed borrowers and follow up all applications
Student loan servicing	(H) Failed to provide borrowers choice in payment allocation	Directed to hire consultants to improve communications with borrowers about payment allocation
Student loan servicing	(H) Failed to notify borrowers that interest would accrue during paid-ahead periods	Directed to hire consultants to improve communications with borrowers about paid-ahead periods
Student loan servicing	(H) Data & systems errors that skew interest payments	Directed to remediate consumers & fix data errors
Fair lending	(H) Marketed different or fewer products to non-English speaking consumers	Revised marketing materials to be more comprehensive in Spanish
Fair lending	(H) Failed to provide info about any debt-relief offers to non-English speaking consumers	Directed to remediate affected consumers and begin communicating with them in their preferred language
Fair lending	(H) Deceptive marketing in Spanish of products; subsequent info provided only in English	Directed to remediate affected consumers and cease all deceptive marketing/communications
Credit (bank)	(H) Deceptive marketing and illegal billing of add-on products	Required to end unfair billing, pay $27.75 million in relief and $4.5 million civil penalty
Student loan servicing	(H) Failed to communicate with consumers; charged illegal fees	Required to pay $410 K to borrowers & $3.6 million civil penalty, and improve billing & processing procedures

Mortgage Servicing Special Edition (June 2016)

Industry	Act	CFPB Action
Mortgage servicing	(H) Failed to notify customers about options to avoid foreclosure	Cited violating servicers & directed them to remediate borrowers and monitor communications platforms. New rules standardize servicer receipt of loss mitigation applications.
Mortgage servicing	(H) Deceptive notices regarding foreclosure in loss mitigation programs.	Remedial & corrective actions are under review.
Mortgage servicing	(H) Deceptive notices regarding fees & charges in loss mitigation programs	Cited for deceptive & abusive practices, required servicers to provide accurate info on fee assessment.
Mortgage servicing	(H) Delayed sending loss mitigation offer letters until deadlines were imminent or past	Cited for unfair practice; remedial & corrective actions under review
Mortgage servicing	(H) Changed loss mitigation agreements after borrowers had signed	Directed to take remedial & corrective actions
Mortgage servicing	(H) Treated borrower gross income as net income when evaluating loss mitigation applications	Cited for violating Regulation X; directed servicer to train personnel on guidelines for income reporting
Mortgage servicing	(H) Failed to convert trial loan modifications to permanent ones after trial period ended, charging borrowers higher interest	Directed to take remedial & corrective actions
Mortgage servicing	(H) Deceptive disclosures of when deferred mortgage payments would be collected	Directed to clearly disclose the interest accrual and payment schedule for deferred payments
Mortgage servicing	(H) Sent incorrect foreclosure warnings to customers who were current on payments	Directed to cease sending these letters
Mortgage servicing	(H) Required borrowers to sign loan modification/mortgage repayment agreements that included consumer rights waivers	Directed to remove this language from agreements
Mortgage servicing	(H) Loss mitigation denials did not give specific or correct reasons for denials, and did not explain borrowers' right to appeal	Directed to state the specific reason borrowers were denied and explain appeal options
Mortgage servicing	(H) Transferring loans/documents between	Directed transferees to develop policies & trainings to ease loan transfers and quickly

	incompatible platforms meant that some information was lost and some loan agreements not honored	identify loan agreements
Mortgage servicing	(P) Transferee servicers began using new technological tools & platforms to maintain loan data during transfers	Directed servicers to continue and expand use of loan data tools

General market observations:

- CFPB has increased supervision of servicers' loss mitigation and loan modification communications with consumers, who previously were often unaware of options other than foreclosure or had received deliberately confusing, deceptive, or late communications from servicers.
- Servicers have improved in actively reviewing and analyzing complaints against themselves for instances of law violations, created new complaint departments/personnel, and even designated primary contacts for state and federal regulators to address complaints.

Summer 2016

Industry	Act	CFPB Action
Auto loan origination	(H) Deceptive marketing of gap-coverage products	Under review
Auto loan origination	(H) Generally weak compliance management system	Remedial & corrective action
Debt collection	(H) Sold debts that were in bankruptcy, fraudulent, or already settled	Directed to redress affected consumers and increase oversight of debt records
Debt collection	(H) False and misleading statements about repayment options	Directed to find out why collectors made false statements and determine appropriate corrective action
Mortgage origination	(H) Incorrect calculations of finance charges	Review procedures to be sure charges are calculated correctly
Mortgage origination	(H) Referrals did not fit the rules of affiliated business arrangements, requiring unnecessary affiliated services	Directed to revise disclosures to avoid improper referrals
Mortgage origination	(H) Failed to provide adverse action notices	Directed to revise training and policies to ensure disclosures/notices are provided
Mortgage origination	(H) Failed to properly disclose interest on interest-only loans	Directed to review whether payments were correctly applied to interest and principal
Mortgage origination	(H) Weak or otherwise inadequate complaint management systems	Directed to enhance monitoring & corrective actions and to revise training, policies, & procedures for compliance
Payday loans	(H) Loan agreements included a vaguely-defined range of	Directed to specify an acceptable range of transfer amounts, or notify consumers each

	amounts to be debited from consumers' accounts, rather than individual notice of transfers	time a transfer is initiated
Fair lending	(H) Recorded conditional approvals of loan applications as denials if applicants withdrew	Directed to review recording practices and resubmit HDMA Loan Application Register if there were many errors
Debt sales	(H) Gave inflated APR info on credit card accounts sold to debt buyers, who used the inflated APRs when trying to collect	Ordered to pay $5 million in customer relief and $3 million in penalties

March 2016

Industry	Act	CFPB Action
Consumer reporting	(H) Furnishers of consumer info failed to have written policies/procedures regarding info accuracy & verification	Directed to establish & strengthen such policies/procedures
Consumer reporting	(H) Failed to timely update outdated or incorrect information	Directed to update information for all accounts
Consumer reporting	(H) CRAs failed to ensure & maintain data quality	Directed to develop monitoring for data quality
Debt collection	(H) Failed to honor consumers' cease-communications requests	Directed to improve training for handling cease-communications requests
Debt collection	(H) Threatened garnishment against consumers not eligible for garnishment (student loans)	Directed to investigate why employees made threats & to stop in future
Mortgage origination	(H) Failed to maintain written policies/procedures for loan origination	Directed to establish such policies
Remittance transfers	(H) Gaps in compliance systems resulting in inaccurate communications with consumers	
Remittance transfers	(H) Inaccurate or incomplete disclosures & receipts	Cited for violation of Remittance Rule
Remittance transfers	(H) Deceptive statements re: conditions to receive funds	Directed to cease making deceptive statements
Remittance transfers	(H) Transfer fees resulted in no-money-received transactions	Not a violation, but providers should be sure consumers are aware of this
Student loan servicing	(P) Restructured payment allocations to be most beneficial to borrowers	
Student loan servicing	(H) Auto-default clauses in case of bankruptcy or death – loan becomes immediately due	Directed to immediately cease this practice
Student loan	(H) Failed to disclose that	Directed to make this clear in disclosures

servicing	forbearance could mean loss of cosigner release	
Student loan servicing	(H) Servicing conversion errors result in inaccurate higher interest rates	Directed to reimburse affected consumers
Student loan servicing	(H) Weak or confused policies & procedures for furnishing consumer data, ensuring accuracy, etc.	Directed to strengthen policies/procedures
Fair lending	(H) Excluded borrowers from debt relief offers because of national origin	Paid $201 million in redress to consumers
Payday loans	(H) Illegal debt collection practices	Ordered to refund $7.5 million to consumers and pay $3 million civil penalty; barred from future in-person debt collection
Mortgage loan origination	(H) Discriminatory redlining	$25 million in direct subsidies to qualified consumers in affected neighborhoods, $2.25 million in community programs, and $5.5 million civil penalty

General market observations:

- The accuracy of consumer information given to consumer reporting agencies needs to be improved across all industries/product areas

__Winter 2015__

Industry	Act	CFPB Action
Consumer reporting agencies	(P) Improved dispute handling systems in response to CFPB directives	
Consumer reporting agencies	(H) Failed to forward all consumer information submitted in disputes	Directed to strengthen training for handling consumer information
Debt collection	(H) Made false representations re: loan rehabilitation and legal action taken against borrowers	Remedial & corrective actions under review
Debt collection	(H) False statements re: borrowers' ability to change or cancel ACH payments	
Deposits	(H) Failed to disclosure changes in overdraft calculation and fee assessment	
Mortgage origination	(H) Staff received compensation based on terms of specific transactions	Redirected transaction compensation to proper parties
Mortgage	(H) Failed to provide revised	Refunded consumers

origination	GFEs, resulting in greater settlement charges to consumers	
Mortgage origination	(H) Failed to timely provide Good Faith Estimates (GFEs)	Appropriate corrective action
Mortgage origination	(H) Advertised products without required disclosures	Appropriate corrective action
Mortgage origination	(H) Failed to timely and properly notify applicants of action taken on applications	Directed to review denied applications for compliance issues
Mortgage origination	(H) General deficiencies in compliance management systems & audits	Directed to address weaknesses in systems
Fair lending	(H) Declined applicants who relied on non-employment income	Directed to identify & remediate wrongly denied applicants

Fall 2015

Industry	Act	CFPB Action
Consumer reporting agencies	(H) Did not have written procedures or training ensuring accuracy of consumer data furnished to CRAs	Directed to standardize policies/system used for provision of data to CRAs
Debt collection	(H) Failed to state that calls were from a debt collector	Directed to train employees to properly identify themselves
Debt collection	(H) Failed to comply with consumer requests re: time and means of communication	Directed to train employees to properly note consumer communication requests
Debt collection	(H) Inadequate policies & procedures for consumer data furnished to CRAs under Reg V	Directed to develop stronger policies
Mortgage origination	(H) Failed to keep charges at settlement reasonably below the good faith estimate for the origination charge	Required to provide restitution for harmed borrowers, & develop procedures for documenting circs. that would cause charges to increase
Mortgage origination	(H) Inaccurate completion of HUD-1 settlement statements	Directed to provide restitution to harmed consumers, and strengthen oversight of statements
Mortgage origination	(H) Failed to provide loan applicants with homeownership counseling services	Directed to strengthen compliance management system
Mortgage origination	(H) Failed to provide fully accurate loan disclosure statement after application	Directed to strengthen compliance management system
Mortgage origination	(H) Failed to provide adequate consumer financial privacy	Directed to strengthen compliance management system

	notices	
Mortgage origination	(H) Failed to properly register employees involved in loan origination with NMLSR	Directed to identify all such employees & get them properly registered
Mortgage origination	(H) Failed to reimburse borrowers for understated APRs and other charges	Directed to reimburse harmed borrowers and upgrade systems to identify borrowers owed money
Mortgage servicing	(H) Failed to timely & completely communicate with borrowers re: loss mitigation options, application status, deceased borrowers' successors	Directed to establish policies & procedures compliant with Regulation X
Mortgage servicing	(H) Failed to properly evaluate loss mitigation applications	Directed to allow borrowers time to submit all required documents before evaluating applications
Mortgage servicing	(H) Included misleading waivers designed to make borrowers think they could not bring claims against servicers	Directed to remove language from loan agreements
Mortgage servicing	(H) Failed to timely terminate mortgage insurance, resulting in greater cost to borrowers	Directed to reimburse borrowers and revise termination policies
Mortgage servicing	(H) Charged illegal fees for payments made over the phone	Directed to only collect phone fees when authorized by law
Mortgage servicing	(H) Failed to send timely or accurate debt validation letters	Directed to review debt validation policies to ensure correct communications
Student loan servicing	(H) Did not allow borrowers a choice in allocating partial payments, causing higher fees	Directed to change allocation process and give comprehensive disclosures about allocation
Student loan servicing	(H) Auto payment system issues (early debits, fees when payment falls on a non-business day)	Directed to review auto payment system & cease charging unwarranted fees
Student loan servicing	(H) Deceptive statements re: dischargeability of student loans in bankruptcy	Directed to cease deceptive statements
Student loan servicing	(H) Deceptive statements re: late fees charged by DOE	Directed to cease stating that DOE charges late fees
Student loan servicing	(P) Clear communication with borrowers re: balance owed during a paid-ahead period	
Student loan servicing	(H) Failure to verify and audit consumer data provided to CRAs	Directed to strengthen policies & procedures
Fair lending	(H) Denied minority loan applicants more frequently than similarly situated whites	Cited for ECOA violation & required to provide relief
Auto loans	(H) Charged minority borrowers	Required to pay $80 million in damages

	higher interest	
Credit cards	(H) Deceptive marketing & billing of credit card add-ons	Required to refund consumers $700 million and pay $35 million in civil penalties
Student loan servicing	(H) Overstated minimum payments & denied info needed for tax benefits	Ordered to refund $16 million to consumers & pay $2.5 million civil penalty
Mortgage servicing	(H) Deceptive marketing of mortgage payment program	Ordered to return $33.4 million in fees to consumers & pay $5 million civil penalty
Mortgage servicing	(H) Did not honor modifications in transferred loans	Paid $1.5 million in restitution to consumers
Deposit bank	(H) Failed to credit full deposits to consumers' accounts	Required to pay $11 million in restitution and $7.5 million civil penalty
Credit cards	(H) Deceptive marketing of add-ons	Required to pay $3 million in restitution and $500K in civil penalties

Summer 2015

Industry	Act	CFPB Action
Consumer reporting agencies	(H) Policies were outdated; furnishers were not checked to be adhering to them	Directed to revise and maintain policies
Consumer reporting agencies	(H) No quality control policies to test consumer data for accuracy	Directed CRAs to establish quality controls
Debt collection	(H) Inadequate compliance management systems	Directed to strengthen policies and trainings, and remedy management weaknesses
Debt collection	(H) Failed to investigate disputes	Directed to begin tracking and investigating reported disputes
Debt collection	(H) Failed to have written policies on furnishing consumer data to CRAs	Directed to develop such policies
Student loan servicing	(H) Deceptive statements about tax deductibility of student loan interest	Directed to remove deceptive language
Student loan servicing	(H) Did not provide complete FRCA adverse action notices	Remedial & corrective actions
Mortgage origination	(H) Failed to maintain written policies in compliance with the Loan Originator Rule	Directed to develop such policies
Mortgage origination	(H) Failed to timely provide applicants with homeownership counseling services	Corrected
Mortgage origination	(H) Failed to timely or fully provide a Good Faith Estimate	Directed to strengthen training and monitoring procedures
Mortgage	(H) Failed to fully complete	Directed to refund consumers and

origination	HUD-1 settlement statements	strengthen training
Mortgage origination	(H) Loan agreements included misleading waivers of notices and demands	Directed to remove language from agreements
Mortgage servicing	(H) Misleading or inadequate communication with consumers re: loss mitigation applications	Directed to remediate consumers and fix servicing platforms
Mortgage servicing	(H) Loss of information when transferring loans, resulting in higher interest and fees	Directed to develop policies & audits to maintain consumer information during transfers
Mortgage servicing	(H) Sent foreclosure notices to borrowers already approved for trial modifications	Directed to track foreclosure notices more carefully
Mortgage servicing	(H) Failed to send clear periodic statements of transaction history	Directed to send such statements
Mortgage servicing	(H) Collected unearned premiums on mortgage insurance after failing to automatically terminate it	Directed to remediate affected consumers
Fair lending	(H) Denied loan applications from borrowers with non-employment income	Provided borrowers financial remuneration and opportunity to reapply after unfair denial
Mortgages	(H) Paid managers based on interest rates of loans they closed	Paid $228K in civil penalties
Deposit banks	(H) Charged illegal overdraft fees	Directed to fully refund all consumers; fined $7.5 million

Fall 2014

Industry	Act	CFPB Action
Consumer reporting agencies	(H) Failed to notify consumers that investigations were underway or complete, and gave inconsistent information on dispute reporting	Directed to strengthen policies and procedures for consumer communication
Debt collection	(H) Charged illegal convenience fees	Directed to identify and reimburse harmed consumers
Debt collection	(H) Made false threats of litigation	Directed to cease making threats
Debt collection	(H) Gave prohibited disclosures to third parties	Directed to conduct remedial training for employees and monitor collections agents
Debt collection	(H) Inflated APRs when selling debts	Remedial & corrective action
Deposits	(H) Delayed in investigating reported errors	
Deposits	(H) Denied consumers' error	Directed to develop policies in line with

	claims, citing consumer negligence	Reg. E
Deposit	(H) Did not give consumer documentation supporting denial of error claim	Directed to correct notices of denial
Mortgage servicing	(H) Lacked policies for oversight of service providers	Directed to strengthen policies
Mortgage servicing	(H) Failed to timely convert trial loan modifications to permanent ones, resulting in higher interest	Determined unfair practices
Mortgage servicing	(H) Changed terms of loan modification agreements without warning	Determined unfair practices
Student loan servicing	(H) Allocated partial payments to maximize late fees	Cited as unfair practices
Student loan servicing	(H) Misrepresented minimum payments to include interest on deferred loans	
Student loan servicing	(H) Charged late fees on loans still in grace period	Directed to stop charging these fees
Student loan servicing	(H) Failed to provide accurate tax info for deducting loan interest payments, required additional certification that money was used for education	Found to be deceptive
Student loan servicing	(H) Misrepresented that student loans are not dischargeable in bankruptcy	Directed to clarify communications and cease these statements
Student loan servicing	(H) Routinely autodialled borrowers late at night or early in the morning	Directed to improve internal controls to stop inconvenient autodialled calls
Fair lending	(H) Advertised free checking accounts without disclosing eligibility & activity requirements	Ordered to pay $2.9 million to consumers and $200K in civil penalties
Mortgage servicing	(H) Denied and delayed loss mitigation, foreclosure relief, loan modification applications	Ordered to pay $27.5 million to consumers and $10 million in civil penalties; barred from acquiring default loan portfolios until entity shows compliance
Credit/bank	(H) Illegal billing of add-on products and services consumers did not receive	Ordered to pay $48 million to consumers and $9 million in civil penalties
Payday loans	(H) Used illegal debt collection practices to pressure borrowers into taking out more loans	Ordered to pay $5 million in refunds and $5 million in civil penalties

Auto Lending Special Edition (Summer 2014)

Industry	Act	CFPB Action
Auto lending	(H) Discretionary pricing that resulted in discrimination against minority borrowers	Redress for consumers, maintain strong policies on discretionary pricing to avoid future discrimination
Auto lending	(P) Limited discretionary pricing adjustment to reduce discrimination against borrowers	
Auto lending	(P) Developed dealer compensation not based on discretionary markup, also to reduce discrimination	

General market observations:

- After supervisory actions targeting discriminatory lending, some lenders are more strictly monitoring dealers and, when seeing evidence suggesting discrimination, are implementing limits to discretionary pricing adjustments or taking other actions to manage or reduce risks of discrimination
- So far maintaining strong compliance management, imposing strict caps on discretionary pricing adjustments, and/or adopting non-discretionary dealer compensation models has looked like a good way to limit fair lending risk

Spring 2014

Industry	Act	CFPB Action
Consumer reporting agencies	(H) Insufficient oversight of complaint management systems	Directed to establish more active authority over CMS
Consumer reporting agencies	(H) Failed to exercise oversight of third-party service providers	Directed to establish policies to be sure service providers are adequately trained, complying with federal law, etc.
Consumer reporting agencies	(H) Failed to monitor & track consumer complaints and documentation	Directed to establish a complaint management process
Consumer reporting agencies	(H) Refused to accept online or phone-filed disputes if consumers did not have a recent CRA report or disclosure	Directed to stop requiring this before filing disputes
Debt collection	(H) Inadequate and outdated complaint management systems	Directed to update and strengthen CMS
Debt collection	(H) Failed to assess debt buyers' compliance with federal law	Directed to carefully examine business relationships with other entities
Debt collection	(H) Sold cancelled debts to debt buyers	Directed to remediate harmed consumers, and establish new procedures to keep this from happening
Debt collection	(H) Deleted disputed accounts	Directed to investigate going forward

	instead of investigating dispute	
Debt collection	(H) Failed to get written authorization before starting recurring transfers from consumers' accounts	Directed to fully comply with Reg. E when setting up payment plans
Debt collection	(H) Harassing phone calls to borrowers	
Debt collection	(H) Misleading claims of debts owed that entities could not back up in court	
Payday loans	(H) Ineffective compliance management programs	Directed to strengthen policies, training, & oversight
Payday loans	(H) Improper collections calls (to references, third parties, after do-not-call requests, etc.), in-person visits	Cited for unfair and abusive practices, directed to cease violations
Credit cards	(H) Deceptive marketing and illegal billing of credit card add-on products	Ordered to pay $727 million to consumers and $20 million in civil penalties; temporarily barred from marketing add-on products

Winter 2013

Industry	Act	CFPB Action
Mortgage servicing	(H) Failed to honor existing loan modifications after a servicing transfer	Directed to remediate consumers and revise policies relating to servicing transfers
Mortgage servicing	(H) Required borrowers to waive existing claims in order to apply for loan modifications	Directed to cease using waivers
Mortgage servicing	(H) Deceptive marketing regarding money saved through biweekly payment programs	Directed to cease making deceptive statements
Mortgage servicing	(H) Failed to verify data provided to consumer reporting agencies	Directed to strengthen reporting processes to avoid giving false information
Mortgage servicing	(H) Failed to honor deferred payment plan for a soldier on active duty, charged fees	Directed to revise policies for greater oversight of payment plans
Mortgage servicing	(H) Failed to honor borrowers' requests to contact attorneys for future collections attempts	Directed to implement training & monitoring to avoid recurrence
Credit services	(H) Charged consumers for credit monitoring products they did not receive	Refunded $309 million to consumers, directed to pay $20 million in civil penalties
Payday loans	(H) Robo-signed court	Refunded $14 million to consumers,

	documents; overcharged servicemembers & their families	directed to pay $5 million fine
Auto loans	(H) Charged minority borrowers higher interest rates	Paid $80 million to consumers, $18 million in penalties, established new compliance system
Credit cards	(H) Unfair billing practices & deceptive marketing of add-on products	Paid $59.5 million to consumers, $9.6 million in civil penalties, $6.6 million in other fines

Summer 2013

Industry	Act	CFPB Action
Nonbanks	(H) Less likely than banks to have any kind of complaint management system	Directed entities to establish CMS
Mortgage servicing	(H) Carelessness in transferring loans – lack of review or organization of documents, no disclosures	Directed to carefully review and organize all documents received in transfers
Mortgage servicing	(H) Changes in payment process without notice to borrowers, resulting in late payments	Directed to remediate affected borrowers and provide notice going forward
Mortgage servicing	(H) Delayed and disorganized loss mitigation process	Directed to review entire loss mitigation process for efficiency and accuracy, as well as specific fees and charges to borrowers
Fair lending	(H) Failed to provide timely adverse action notice	Directed to review CMS to ensure timing requirements are met
Auto loans	(H) Deceptive marketing and lending targeting active-duty military	Directed to reimburse harmed consumers, stop deceptive practices, improve disclosures

Fall 2012

Industry	Act	CFPB Action
Financial institutions (unspecified)	(H) Institutions had nonexistent or weak compliance management systems	Directed institutions to establish CMS and adopt policies & procedures to ensure compliance with consumer law
Financial	(H) Failed to properly oversee third-party service providers	Directed to ensure servicers are complying with the law
Credit cards	(H) Deceptive product marketing	Directed to end such marketing, be audited, remediate affected consumers, and pay civil penalties
Mortgage origination	(H) Failed to completely disclose interest rates & payment schedules	Directed to follow the law on disclosures

NEW YORK STATE
DEPARTMENT *of*
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

Maria T. Vullo
Superintendent

April 12, 2018

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes (Docket No. CFPB-2018-0001)

Dear Ms. Jackson:

I write as Superintendent of the New York State Department of Financial Services (NYDFS) in response to the Consumer Financial Protection Bureau (Bureau)'s Request for Information regarding Civil Investigative Demands and related processes (CIDs). As a state banking regulator that has partnered with the Bureau, NYDFS appreciates the opportunity to offer our thoughts on this crucial and core tool of the Bureau.

NYDFS supervises approximately 3,800 institutions with assets of approximately $7 trillion, including state-chartered banks operating in New York; branches of foreign banks licensed in New York; U.S. and foreign insurance companies operating in New York; and licensed lenders, money transmitters, check cashers and other non-bank financial companies, some of which are also supervised by the Bureau. NYDFS has worked with the Bureau since its creation on supervisory matters, such as joint examinations, and is party to an information-sharing agreement with the Bureau to enhance our cooperative relationship. NYDFS has also taken joint enforcement action with the Bureau; we were co-plaintiffs in a suit against two companies and three of the companies' individual managers for deceiving consumers about the costs and risks of their pension advance loans.[1] Our federal-state partnership has shown the Bureau to be a leader in protecting financial markets and institutions and enforcing consumer financial laws.

I write to urge the Bureau to maintain its CID processes because they are an essential and important part of the Bureau's statutory mission of enforcing federal consumer financial laws.

[1] Press Release, CFPB, CFPB and New York Department of Financial Services Sue Pension Advance Companies for Deceiving Consumers About Loan Costs (Aug. 20, 2015), *available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-new-york-department-of-financial-services-sue-pension-advance-companies-for-deceiving-consumers-about-loan-costs/

The Consumer Financial Protection Act (CFPA) grants the Bureau broad authority to investigate suspected violations of law. This reflects the important governmental interest in the swift and efficient investigation of possible unlawful activity. The Bureau's effectiveness in carrying out its congressionally-mandated duty of enforcing federal consumer financial laws requires this authority and the concomitant tools to conduct fulsome investigations of potential wrongdoing.

CIDs are a principal means by which the Bureau engages in investigating possible violations and determining whether enforcement is warranted, in order to protect consumers. Indeed, two of the Bureau's "primary functions," set forth in 12 U.S.C. § 5511(c), concern the Bureau's ability to investigate: first, regarding "collecting, investigating, and responding to consumer complaints," *id.* at § 5511(c)(2), and second, regarding the Bureau's ability to take appropriate enforcement action to address violations by covered persons of federal consumer financial law, *id.* at § 5511(c)(4). The Bureau is thus statutorily compelled to discover and procure evidence of compliance, or non-compliance, with federal consumer financial laws. The Bureau may wield this broad power through the issuance of CIDs, which enable it to investigate and collect relevant facts without requiring the commencement of any proceedings before information may be obtained. It is well-settled that an agency such as the Bureau should be given wide latitude to investigate via CIDs, a type of administrative subpoena, so that potential violations are quickly found and scrutinized. The faster an agency can get to the facts of any situation, the faster it can act to halt wrongdoing and determine whether enforcement should follow.

Importantly, while the Bureau is a relatively new agency, its CID processes are not—they come directly from the CID processes provided for in the Federal Trade Commission Act (FCTA), which were added to the FCTA in 1980. *Compare* 12 U.S.C. § 5562 *with* 15 U.S.C. § 57b-1. Both statutes set out similar processes: specifying who can initiate and conduct investigations;[2] requiring notification of the purpose of the CID;[3] mandating that CID recipients meet and confer with the agency;[4] providing processes for filing petitions for an order to modify or set aside CIDs, including the time to so file;[5] establishing requirements and procedures for oral testimony and the rights of witnesses;[6] and so forth. Just as the Bureau's CID processes replicate the FCTA's, the FCTA itself was based on the CID procedure utilized by the Department of Justice under the Antitrust Civil Process Act, 15 U.S.C. § 1311. Given these other laws and regulations, it is clear that the Bureau's CID processes arise out of and join a well-established tradition of administrative investigation, one repeatedly upheld by the courts[7] and duplicated through legislation.

At the same time as the CID processes give the Bureau the means and methods to investigate violations of federal consumer financial laws, they also provide recipients of investigative

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[2] 12 C.F.R. §§ 1080.4, 1080.6; 16 C.F.R. §§ 2.1, 2.5
[3] 12 U.S.C. § 5562(c)(2); 12 C.F.R. § 1080.5; 15 U.S.C. § 57b-1(c)(2); 16 C.F.R. § 2.6.
[4] 12 C.F.R. § 1080.6(c); 16 C.F.R. § 2.7(k).
[5] 12 U.S.C. § 5562(f)(1); 12 C.F.R. § 1080.6(e); 15 U.S.C. § 57b-1(f)(1); 16 C.F.R. § 2.10.
[6] 12 C.F.R. §§ 1080.6(a)(4), 1080.9; 16 C.F.R. §§ 2.7(b)(4), 2.9.
[7] *United States v. Morton Salt*, 338 U.S. 632 (1950); *United States v. Powell*, 379 U.S. 48 (1964); *FTC v. Texaco, Inc.*, 555 F.2d 862 (1977); *United States v. Markwood*, 48 F.3d 969 (6th Cir. 1995); *CFPB v. Source for Public Data, LP*, No. 17-16, 2017 WL 2443135 (N.D.T.X. June 6, 2017).

demands opportunities and procedures to clarify, modify, and challenge such demands. The requirement that CID recipients meet and confer with the Bureau soon after receiving a demand enables early discussion and clarification of any issues. 12 C.F.R. § 1080.6(c). Further, the Bureau must give notice to CID recipients of the nature of the conduct constituting the alleged violation under investigation and the provision of law applicable to such violation. 12 U.S.C. § 5562(c)(2); 12 C.F.R. § 1080.5. While the Bureau defines the scope of its own jurisdiction when issuing CIDs, *CFPB v. Habour Portfolio Advisors, LLC*, No. 16-14183, 2017 WL 631914, at *2 (E.D. Mich. Feb. 15, 2017) (quoting *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001)), this provision gives the CID recipient fair notice about the conduct and alleged violation that prompted the demand. Recipients may also petition to modify or set aside CIDs, first to the Bureau itself and then to a federal court. 12 U.S.C. § 5562(f)(1). Courts consider whether a CID's subject matter is outside of the agency's jurisdiction, whether the demands are too indefinite, or whether the requests are unduly burdensome. *See CFPB v. Heartland Campus Solutions, ESCI*, No. 17-1502, 2018 WL 1089806, at *4 (W.D. Pa. Feb. 28, 2018); *United States v. Markwood*, 48 F.3d 969, 979 (1995) (reviewing cases). These processes, taken together, show that CID recipients are afforded multiple opportunities to challenge improper requests. At the same time, the CID is a crucial governmental investigatory tool that allows the Bureau, like other governmental authorities, to obtain information essential to its mission.

In short, the Bureau's CID processes enable the Bureau to efficiently carry out its statutory duty to investigate possible violations of federal consumer financial law, are consistent with the known and accepted processes for CIDs by other agencies, and offer CID recipients fair and reasonable ways to challenge any improper requests. Any alterations to these processes may weaken, slow, or unnecessarily complicate the Bureau's important and leading role in investigating and enforcing federal consumer financial laws and protecting consumers in the financial marketplace.

Sincerely,

Maria T. Vullo
Superintendent
New York State Department of Financial Services

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April 25, 2018

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Via email: FederalRegisterComments@cfpb.gov

Re: Request for Information, Civil Investigative Demands/Docket No. CFPB-2018-0001

Dear Executive Secretary Jackson,

On behalf of more than 400,000 members and supporters of Public Citizen, we offer the following comment in response to the Request for Information (RFI) regarding the Consumer Financial Protection Bureau's (Bureau, CFPB, agency) Civil Investigative Demand (CID) processes.

At the outset, we object to this foundational exploration of both the CID process and the other elements of the Bureau's basic operations. Currently, the Bureau lacks a director that has been confirmed by the Senate. Congress conceived the Bureau as an agency independent of political interference. Instead, this RFI comes at the direction of Mick Mulvaney, who serves as a caretaker at the pleasure of the President and is otherwise the Director of the Office of Management and Budget. This is the opposite of independence. Further, as a member of Congress, Rep. Mulvaney objected to the existence of the Bureau, calling it a "sad, sick joke."[1] Since then, many of his actions at the Bureau have reversed the course of the mission of consumer protection that Congress mandated.[2]

We nevertheless offer the following comments to emphasize the important role that CIDs play in protecting consumers.

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[1] Emily Stewart, *Mick Mulvaney once called the CFPB a "sick, sad" joke. Now he might be in charge of it,* VOX (NOV. 16, 2017)
https://www.vox.com/policy-and-politics/2017/11/16/16667266/mick-mulvaney-cfpb-cordray-omb-joke

[2] *Letter From Sen. Elizabeth Warren to OMB Director Mick Mulvaney,* OFFICE OF SEN. WARREN (March 16, 2018)
https://www.warren.senate.gov/imo/media/doc/2018.03.16%20Letter%20to%20Mulvaney1.pdf

Background

Congress created the Bureau in response to the financial crash of 2008. This crash followed massive abuse of consumers in the lending market. This abuse and subsequent calamity stripped millions of Americans of their homes, jobs and savings. While bank regulators might have arrested this misconduct, they subordinated their mandate to protect consumers to their additional mandate to protect the safety of the financial system. These regulators apparently viewed Wall Street profits as a proxy for safety, even when those profits ultimately derived from consumer abuse. Congress created the Bureau with a singular purpose: "to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[3] In doing so, Congress made the CFPB the first federal regulator to supervise both banks and non-bank financial companies, including mortgage companies, private student lenders, and payday lenders.[4]

Congress drew from a number of practices in government through extensive congressional hearings and other expert input when it devised the Bureau. It crafted investigative tools so as to help the Bureau detect, prosecute and win recompense for wrongdoing. By July 2017, the Bureau's enforcement and supervision actions had netted roughly $12 billion in ordered relief for more than 29 million consumers victimized by unlawful activity.[5] Other consumers likely benefit from the deterrence value of these actions.

The Civil Investigative Demand

One of these investigative tools is the CID. A CID, similar to a subpoena, is a tool for the agency to gather information in investigating potential wrongdoing. It is expressly authorized by the Dodd-Frank Wall Street Reform and Consumer Protection Act and that statute, in combination with the Bureau's regulation, establishes appropriate parameters for the Bureau's CID processes.[6] The Bureau issues CIDs to entities and persons whom the CFPB believes may have information relevant to a violation of laws the Bureau enforces. These demands require recipients to provide the Bureau with information in varying forms, including written answers to questions, documents, and testimony. Recipients are required to produce the requested information to the Bureau, which uses such information to further investigations of potential violations of Federal consumer financial laws. Under 12 U.S.C. § 5562, each civil investigative demand must state the nature of the conduct constituting the alleged violation that is under investigation and the provision of the applicable law. That provision also requires, for example, that demands for documents prescribe a return date that is "reasonable", and that those for

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[3] 12 U.S.C. § 5511(a)
[4] *See* 12 U.S.C. §§ 5514-15
[5] Zixta Martinez, *Six Years Serving You,* CONSUMER FINANCIAL PROTECTION BUREAU (July 21, 2017) https://www.consumerfinance.gov/about-us/blog/six-years-serving-you/

[6] *See* 12 U.S.C. § 5562; *see also*12 CFR § 1080.6

written reports or answers "propound with definiteness and certainty the reports to be produced or the questions to be answered."

The RFI asks about the "processes for initiating investigations, including the . . . delegation of authority." We support the current process whereby senior staff at the Bureau issue CIDs. A CID bears the signature of either the enforcement director of the deputy enforcement director. Authority for this important tool should not be politicized by requiring approval from the Director. Requiring additional approvals can impede the efficiency of an investigation.

The RFI further asks about ways to "improve CID recipients' understanding of investigations," including the nature, purpose and scope of the query. The Bureau's policies already require a clear declaration of purpose, including the alleged violation. Initial requests may be and are often narrowed following the course of communication between the Bureau and a firm. [Of note, consumers who may be victims of these firms are not accorded the same time with enforcement staff about the purpose of the CID.] The Bureau's manual regarding CIDs directs staff to "consider the burden the CID will impose on the recipient. A CID should be narrowly tailored to solicit the information necessary for the investigation."[7] Providing additional information could lead abusive firms to conceal or destroy evidence. Further, as some CIDs go to third parties, even the subject firm may not wish for the Bureau to expand on this information for fear of potential reputational harm.

The Inspector General examined the CID process in 2017. It concluded that its CID processes were sound. It provided several suggestions, such as for record keeping, and noted that the Bureau had implemented these recommendations. [8]

Conclusion

Finally, we express concern about the nature of this review of CIDs. The RFI seeks this information, the Bureau explains, to identify ways that the "CIDs may be . . . streamlined . . . while minimizing burdens."[9] In fact, the RFI uses the term "burden" five times in its two-page request. It does not use the term "protection" at all, other than to name the Bureau.

Further, the request makes clear that the Bureau is most interested in hearing from recipients of CIDs, that is, firms that the Bureau has some reason to believe are violating the law. It asks to hear from firms that "have received one or more CIDs from the Bureau, or members of the bar who represent these entities." Many of these companies will be ones that the CFPB believed

[7] *Policies and Procedures Manual, Office of Enforcement,* CONSUMER FINANCIAL PROTECTION BUREAU (May 2017) https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-and-procedures-memo_version-3.0.pdf

[8] The CFPB Generally Complies With Requirements For Issuing Civil Investigative Demands But Can Improve Certain Guidance And Centralize Recordkeeping, OFFICE OF INSPECTOR GENERAL, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM CONSUMER FINANCIAL PROTECTION BUREAU(Sept. 20, 2017), https://oig.federalreserve.gov/reports/cfpb-civil-investigative-demands-sep2017.pdf

[9] *Request for Information: Civil Investigative Demands,* CONSUMER FINANCIAL PROTECTION BUREAU/REGULATIONS.GOV (website visited February 19, 2018) https://www.regulations.gov/document?D=CFPB-2018-0001-0002

violated the law. Building a record based on complaints by abusive firms can only debase the CFPB's important investigative tools, and certainly undermines the mission of the agency. In 1950, the Supreme Court recognized this natural antagonism to investigative questions when it recognized, in a related context, an agency's "power to get information from those who best can give it and who are most interested in not doing so."[10]

We recognize that a CID imposes some responsibilities on firms. That is the nature of oversight. It is the duty of firms and individuals to comply with Bureau questions where there are suspicions of misconduct. The cost to consumers of financial industry abuse far outweighs these compliance duties.

For questions, please contact Bartlett Naylor at **Redacted**

Sincerely,

Public Citizen

[10] *United States v. Morton Salt Co.*, 338 U.S. 632, 640 (1950).

Redacted www.citizen.org

June 7, 2018

Submitted via www.regulations.gov

Consumer Financial Protection Bureau 1700 G Street, NW Washington, DC 20552

Re: Docket No. CFPB-2018-0009, Request for Information Regarding Bureau Rulemaking Processes

Dear Mr. Mulvaney:

Public Citizen thanks the Bureau for the opportunity to submit comments regarding the Bureau's Request for Information regarding Bureau rulemaking processes. Public Citizen is a non-profit organization with 400,000 members and supporters nationwide. We represent the public interest through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues that include consumer protections with respect to financial products.

In just the few short years of its existence, the CFPB has issued rules that protect consumers in the markets for mortgages, prepaid cards, remittances, payday loans, and other financial products. The CFPB's process for writing rules has been thoughtful, considered, robust, and transparent in part due to special procedural and analytical requirements that Congress placed on the CFPB when it created the new agency. Like all agencies across the federal government, the CFPB seeks and responds to public comment, as required by the Administrative Procedure Act (APA). On top of the existing rulemaking requirements under the APA that apply to all federal agencies when promulgating regulations and seeking input, Congress has placed specific analytical and procedural requirements on the CFPB that are in some cases unique to this agency and result in a rulemaking process that is significantly more extensive than virtually every other federal agency's rulemaking process. Given the additional burden the CFPB faces when promulgating, amending, or repealing its rules as compared to other agencies, there is simply no basis (beyond a backdoor attempt to slow the process), for the CFPB to use any potential discretionary authority to modify its rulemaking process as grounds to add even more procedural and analytical requirements to a rulemaking process that is already one of the most inclusive, transparent, and comprehensive among all agencies.

For instance, when issuing rules, the CFPB considers the potential benefits and costs of the regulation to both consumers and regulated entities, as well as the impact on depository institutions with $10 billion or less in assets and consumers in rural areas. *See* 12 U.S.C. § 5512(b)(2). These tailored requirements to assess impacts on smaller financial institutions and rural consumers are unique among financial agencies. The CFPB's consideration of these potential benefits and costs and impacts has involved thoughtful and detailed analyses that the CFPB publishes with both its proposed and final rules. We applaud the CFPB's careful attention to these topics. We recommend that in considering the potential benefits, costs, and impacts of its regulations, that the CFPB continue to use meaningful data from a wide range of sources including both quantitative data and consumer anecdotes and other qualitative information, from the CFPB's own sources (such as consumer complaints) and external sources.

We especially urge the CFPB to continue recognizing the value of qualitative data in identifying and describing benefits that are real and tangible for consumers, but that cannot be reduced to monetary or quantified values. Federal agencies across the government have long been encouraged to treat qualitative benefits on equal footing as quantified benefits or costs for purposes of impact analyses in order to achieve statutory goals set out in authorizing legislation to protect people. For example, OMB has encouraged Executive agencies that when agencies are not able to express all of the benefits or costs in monetary units, which occurs often, cost-benefit analysis "is less useful, and it can even be misleading, because the calculation of net benefits in such cases does not provide a full evaluation of all relevant benefits and costs."[1] Analysts should therefore attempt to quantify benefits or costs as much as possible but "exercise professional judgment" in determining whether non-quantified factors are important enough to justify consideration of the regulation.[2]

Pursuant to statute, the CFPB also devotes particular attention to the concerns of small entities. The CFPB is one of only three agencies, and the sole financial regulator, that creates a special process to consider the input of small businesses, pursuant to the Small Business Regulatory Enforcement and Fairness Act (SBREFA). Pursuant to the Dodd-Frank Act's amendments to SBREFA, the CFPB actively seeks small business input prior to proposing any rule that is determined to have a significant impact on a significant number of small entities. Under the statute, representatives of small businesses that would be impacted by the rule are identified and asked to provide feedback that is reflected in a formal report that is issued publicly. *See generally* 5 U.S.C. § 609(b), (d). We encourage the CFPB to continue using its SBREFA process with an eye toward seeking the full range of perspectives from small businesses, including perspectives on the benefits to small businesses from CFPB rules. For example, in the pending rulemaking on Business Data Lending (Regulation B),[3] which is intended to provide the CFPB with available data on lending to women and minority-owned small businesses, the CFPB should consider seeking feedback directly from minority and women small business owners as part of its SBREFA Panel in the course of the rulemaking.

In addition, the CFPB's statute includes a requirement for "retrospective review." The CFPB must assess each significant rule five years after its effective date. *See* 12 U.S.C. § 5512(d). This statutory requirement is particularly notable because under it, the CFPB will evaluate its rules more frequently than agencies that follow only the Regulatory Flexibility Act, which applies to agencies across the federal government and requires review of certain rules only every 10 years. *See* 5 U.S.C. § 610.The CFPB has taken its retrospective review requirement seriously, publishing detailed plans for its reviews and seeking public comment on those plans.[4]

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[1] OMB Circular A-4, "Regulatory Analysis," September 17, 2003. The circular is available at http://www.whitehouse.gov/omb/assets/regulatory_matters_pdf/a-4.pdf.

[2] *Id.*

[3] https://www.gpo.gov/fdsys/pkg/FR-2017-05-15/pdf/2017-09732.pdf#page=1

[4] See CFPB, *We Are Seeking Comment on Our Plan for Assessing the ATR/QM Rule*, https://www.consumerfinance.gov/about-us/blog/we-are-seeking-comment-our-plan-assessing-atrqm-rule/ (May 25, 2017); CFPB, *We Are Seeking Comment on Our Plan for Assessing the Mortgage Servicing Rule*, https://www.consumerfinance.gov/about-us/blog/we-are-seeking-comment-our-plan-assessing-mortgage-

In developing its rules, as well as its retrospective review plans, the CFPB has been creative, thorough, thoughtful, and transparent in seeking input and conducting outreach to interested parties. For example, the CFPB's recently issued rule regarding payday and vehicle title loans relies on more than five years of research and outreach, including multiple public events and hundreds of stakeholder meetings. *See* 82 Fed. Reg. 54472, 54503-19 (Nov. 17, 2017). We urge the agency to continue its commitment to outreach, research, and transparency, which we believe supports robust and informed rulemaking processes.

The CFPB should not politicize its important outreach and research processes or its consideration of the benefits, costs, and impacts of its rules. For this reason, Public Citizen opposes the CFPB's recent decision to move to create a new Office of Cost Benefit Analysis within the director's office. The CFPB should continue trusting its senior career staff to lead objective and thorough analyses of the relevant benefits and costs.

Public Citizen also strongly opposes any attempt to require centralized regulatory review of CFPB regulations by the White House's Office of Management and Budget (OMB). Moreover, any requirement for OMB review would be in severe tension with Congress's decision to expressly designate the CFPB as independent, 12 U.S.C. § 5491(a), and to restrict the OMB's authority "over the affairs or operations of the Bureau," 12 U.S.C. § 5497(a)(4)(E). As the CFPB's only Senate-confirmed director explained, "[t]his would give any President unprecedented authority to influence the policy and rulemaking functions of independent regulatory agencies and would constitute a fundamental change in the role of independent regulatory agencies."[5] It would be especially problematic because the CFPB is currently under the authority of Acting Director Mick Mulvaney, who simultaneously heads OMB. By the very nature of his dual roles, Mulvaney's presence at the CFPB guts the agency's independence. Any increase in the OMB's authority over the CFPB would only exacerbate the problem. Further, such review is entirely unnecessary, since Congress has already directed the CFPB to conduct its own extensive analyses of its regulations.

The CFPB rulemaking process is among the most comprehensive, rigorous, and driven by data and evidence, of any rulemaking process across the federal government, which was the intent of Congress in fashioning the CFPB's rulemaking process. The CFPB should carefully consider this Congressional design, and the limits of the CFPB's discretionary authority in making changes to its rulemaking process, as it continues to assess its rulemaking processes.

For questions, please contact Amit Narang at anarang@citizen.org

Sincerely,

Public Citizen

servicing-rule/ (May 4, 2017); CFPB, *We Are Seeking Comment on Our Plan for Assessing the Remittance Rule*, https://www.consumerfinance.gov/about-us/blog/cfpb-seeks-comment-its-plan-assessing-remittance-rule/ (Mar. 17, 2017.

[5] See https://sensiblesafeguards.org/wp-content/uploads/Financial-Regulators-Oppose-IARAA-2015.pdf.

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Your Voice in Federal Decision-Making

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Agency: Consumer Financial Protection Bureau (CFPB)
Document Type: Nonrulemaking
Title: Requests for Information: Bureau Public Reporting Practices of Consumer Complaint Information
Document ID: CFPB-2018-0006-0001

Comment:
The Consumer Financial Protection Bureau's public complaint database is an invaluable resource for Hoosier consumers. Members of the Indiana Assets & Opportunity Network have used the database in a variety of ways in their work to promote public policies that allow low-wealth Hoosiers to build assets. We ask that the CFPB continue to offer this important tool for consumers, researchers, and policymakers, and commit to keeping the data publicly available.

Collectively, we have referred a number of individuals and organizations to the complaint database to seek redress. One Hoosier was made aware of a pending lawsuit against the tribal lender she was struggling to pay back through the complaint process, while others have reported that filing a complaint with the database secured a more prompt and satisfactory response than their individual efforts garnered. Over 16,000 Hoosiers have submitted complaints to the CFPB on issues ranging from debt collection tactics to student loan servicing problems.

We have also used the data to inform our publications and policy priorities. In an upcoming policy brief on debt collection, the ability to sort complaints by type revealed that many Hoosiers have complained about collection attempts for debts they feel they do not owe and tactics they find inappropriate. This enabled our researcher to focus policy recommendations on the areas of greatest concern. In the aggregate, complaints provide compelling information about the policy and program areas that could benefit from further attention.

A public database connected to a regulatory body leads to greater accountability and swifter resolution of consumer concerns. Private ratings websites, while meaningful, are not backboned by an agency that can seek out patterns of practice or go after bad actors. Further, they have no commitment to maintain operations; they could be here today and gone tomorrow. Maintaining this particular database is important to lending weight to consumer feedback and resolving problems quickly.

Again, the Indiana Assets & Opportunity Network respectfully requests that the CFPB keep this powerful consumer tool and the data it produces accessible.

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First Name: Kathleen
Last Name: Lara
Organization Name: The Indiana Assets & Opportunity Network

This information will not appear on Regulations.gov:

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For further information about the Regulations.gov commenting process, please visit https://www.regulations.gov/faqs.

June 4, 2018

Comment Intake
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

RE: Public Comment on Docket No. CFPB-2018-0006 (83 FR 9499)

Dear Sir or Madam:

Veterans and military service organizations appreciate and benefit from the public reporting and database of consumer complaints received by the US Consumer Financial Protection Bureau.

Because servicemembers, veterans, their families, and survivors are targets for consumer fraud by predatory financial companies, it is essential that their complaints are not hidden from the public and the organizations that represent and serve them.

The Bureau's current practices of publishing monthly complaint reports, special reports on servicemembers, and other similar tools are extremely useful to external stakeholders. Most notably, the public consumer complaint database allows service members, veterans, and their families to explain challenges they have had in just a few words. Seeing these comments is extremely helpful for the public and the organizations that serve veterans, servicemembers, and their families and survivors to understand the true nature of problems faced by them. The database is essential to ensuring quality customer service and accountability and helping prevent others from falling victim to the same types of consumer fraud. By providing an early warning system about fraud and a sense of the trends in consumer concerns, the database also helps prevent waste, fraud, and abuse of taxpayer dollars that flow to consumer financial companies.

We urge you not to curtail or cut back on the Bureau's public reporting and not to curtail the level of access to complaint information currently available to external stakeholders and the public through the public consumer complaint database, including the ability to search complaints for specific types of abuses by specific financial companies. If anything, we would encourage the Bureau to build additional tools to enable users to better analyze complaint information to better protect American consumers.

Sincerely,

Joseph Chenelly
National Executive Director
AMVETS

Neil Van Ess
National Commander
Military Order of the Purple Heart

[continued on next page]

Kristofer Goldsmith
President
High Ground Veterans Advocacy

Phil Gore
Legislative Director
National Association of Veterans' Program Administrators

Anthony Hardie
National Chair & Director
Veterans for Common Sense

Deirdre Parke Holleman, Esq.
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National Military Family Association

Randy Reid
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U.S. Coast Guard Chief Petty Officers Association & Enlisted Association

Kathy Roth-Douquet
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President
Veterans Education Success

[Regulations.Gov: Your Comment Tracking Number: 1k2-93j9-70xd]

WOODSTOCK INSTITUTE

Advancing Economic Security and Community Prosperity

June 7, 2018

Kristine M. Andreassen
Owen Bonheimer
Senior Counsels
Office of Regulations
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Docket No. CFPB-2018-0009 -- Request for Information Regarding Consumer Financial Protection Bureau Rulemaking Processes

Dear Ms. Andreassen and Mr. Bonheimer:

Woodstock Institute submits these comments in response to the Consumer Financial Protection Bureau (CFPB)'s Request for Information (RFI) regarding its rulemaking processes. In its first several years of operation, the CFPB's rulemaking process has been inclusive, transparent, evidence-based and comprehensive. It is essential to preserve this robust process.

1. About Woodstock Institute

Woodstock Institute is a leading nonprofit research and policy organization in the areas of equitable lending and investment, wealth creation and preservation, and access to safe and affordable financial products and services. We work locally and nationally to create a financial system in which lower-wealth persons and communities of color can safely borrow, save, and build wealth so that they can achieve economic security and community prosperity. Our key tools include: applied research; policy development; coalition building; and technical assistance.

In recent years, Woodstock played a leading role on reforms regarding payday and other high-cost lending, currency exchanges/check-cashers, debt collection, public fines & fees, children's savings accounts, and retirement savings programs for private sector workers. Woodstock also plays a leading role in helping to ensure banks invest in and provide safe and affordable services to low- and moderate-income communities, communities of color, and older people.

2. Objections to the CFPB's Request for Information Process

This RFI is one of a litany of RFIs that have been issued under the direction of Acting Director Mick Mulvaney. The number of RFIs and their frequency is overly burdensome to small not-for-profits like Woodstock. Industry, with its greater resources in terms of staff and otherwise, is far more capable than the consumer advocacy community in developing thorough responses to this flood of RFIs. The amount of time and attention required to try to address the flood of RFIs has diverted scarce nonprofit resources that might otherwise be spent on other issues like the gutting of Dodd-Frank or the multitude of Congressional efforts to repeal agency rulemakings through the Congressional Review Act. The information provided through this RFI process will be inherently skewed in industry's favor simply because it has the necessary resources to create an official record reflecting its position. Accordingly, at the end of the day, the official record that will have been established through this process is not an accurate reflection of the variety and force of opinions on the many issues covered by the RFIs. We anticipate the need to raise objections insofar as this process is used to back off enforcement, lessen oversight, or gut the CFPB itself.

3. The CFPB should maintain and expand opportunities for public input in its rulemaking process.

We applaud the CFPB for embracing an inclusive approach to public outreach and including additional opportunities for public input in its rulemaking processes. The CFPB should continue its efforts to hear from consumers as much as possible to inform its rulemaking at all stages of the process.

The CFPB's field hearings and meetings provide a valuable avenue for the general public to share their experiences directly with the CFPB, and the agency should hold more field hearings and meetings with consumer groups to allow the public more direct access to the CFPB throughout the rulemaking process. The CFPB should continue to explore innovative ways to broaden opportunities for input, including online tools and social media. It is crucial that the CFPB preserve this strong tradition of inclusive public outreach because consumer protection is the core the agency's mission. Public input has helped the CFPB make informed decisions in its rulemaking, and outreach should be expanded to allow for even greater public, i.e., consumer, participation. Field hearings and roundtable discussions should take place as a complement to, and not as a substitute for, regular in-person meetings of the duly constituted Consumer Advisory Board.

In particular, we strongly urge the CFPB to seek broad public input in the early stages of identifying problems and potential solutions and as proposed rules are being developed. Once the CFPB has developed a Notice of Proposed Rulemaking (NPRM), we support continuation of the practice of first publishing the proposal on the CFPB website, before it is published in the Federal Register. This practice gives the public more time to respond, and often the public is more familiar with the CFPB website.

We also strongly support publishing both proposed and final rules along with a press release, blog post, summaries, fact sheets, videos and other materials to make the rulemaking process more accessible and more comprehensible to a wider audience.

While the public should be encouraged to submit comments on a timely basis, the CFPB should not impose any hard rules against receiving input after the comment period closes. Many rulemakings take many years, during which new information can become available, new issues may arise, or the public may become newly aware about the importance of a rulemaking.

The CFPB should also be proactive about reaching out to consumer groups for additional input when new information has come to light or circumstances have changed and, in particular, when industry has provided new information. We also encourage the CFPB to hold more joint roundtables so that all parties can be in the room at the same time. These roundtables have encouraged helpful dialogue in the past.

The CFPB should not impose a formal reply period to comments. Commenting on any relevant topic, including comments submitted by others, should be encouraged, but a formal reply period unduly favors industry, which has the resources to read and respond to numerous comments, whereas neither our organizations nor certainly the general public has comparable capacity to do so.

4. The CFPB should stay transparent in its rulemaking process to ensure that the agency stays accountable to the public.

Since its beginning, the CFPB made a strong commitment to transparency so that its rulemaking process would be impartial and fully informed. For example, while the CFPB is required by law to meet with small business representatives before commencing rulemaking, the CFPB's commitment to transparency is demonstrated in its practice of distributing the briefing materials to the general public before these meetings, which provide insight into what options the CFPB is considering and an opportunity for all sides to provide input before the rulemaking process begins. Another example is the agency's *ex parte* policy. Recognizing the danger of undue influence from one-sided communications behind closed doors, the CFPB implemented a policy requiring *ex parte* communications to be documented in writing and publicized.

The CFPB should continue these practices and publish as much information as possible to stay accountable to the public about the information it is considering in its rulemaking deliberations. We urge the CFPB to complete and publish *ex parte* memoranda promptly and to post a log of each *ex parte* contact that occurs regarding a rulemaking process. Transparency is one of the CFPB's greatest strengths, and it should be preserved and expanded to protect the credibility of the rulemaking process.

5. The CFPB should continue to rely on all types of objective empirical research to inform its decisions in rulemaking and should not politicize the analytical process.

The CFPB has prioritized empirical research by integrating its Research and Markets team's impartial research into its rulemaking process. One major source of quantitative data used in this research is the information the CFPB collects through its examinations, enforcement actions, and consumer complaint database. It is important for the CFPB to continue collecting this data so that it can do its own empirical analysis, which preserves its impartiality.

Moreover, recognizing that numeric fields may not tell an entire story, the CFPB enhances its analysis with qualitative data and field insights. These qualitative data, including individual stories, are a fundamentally important part of meaningful research into the impact of consumer financial products and services, and must not be disregarded. Examples of consumer experiences play a valuable role in alerting the CFPB to new issues, possible trends, emerging types of consumer harm, and gaps in or evasions of existing protections.

Disregarding consumer stories as unrepresentative "anecdotes" is particularly dangerous because it encourages one-sided decision-making. Consumers are well-equipped to describe their personal experiences with financial institutions but, in many cases, neither consumers nor consumer advocates are likely able to assemble quantitative data that could show how widespread any problems are. Nor are they likely to have access to quantitative data from industry or third party vendors. Without access to industry data, consumers are also in no position to respond to one-sided presentations. Yet consumers' descriptions of their experiences can point to market trends, and to areas where further scrutiny is needed, and should not be ignored. As the agency has done throughout its history, it should use consumer stories as a starting point for further inquiry and an essential part of its analysis.

Similarly, the CFPB should not politicize the analytical process. The CFPB is, by design, independent from the White House and is not required to, and should not, submit its rules to the Office of Management and Budget (OMB) for review. An OMB review would be a fundamental violation of the CFPB's independence and contradictory to Congressional intent in maintaining the agency's independence from the executive branch. We also object to moving the cost-benefit analysis section into the director's office and urge that the function remain in the hands of non-political staff.

To its credit, the CFPB has always relied on a broad range of both quantitative and qualitative data in its analyses to inform its rulemaking. It is imperative that the CFPB continue to draw from a variety of sources for this type of research going forward.

The CFPB rulemaking process is thoughtful and thorough. From beginning to end, the CFPB's rulemaking process provides all stakeholders with the opportunity to weigh in and allows for the CFPB to have data and information from a wide variety of sources in order to make informed decisions. This robust and responsive rulemaking process is effective in producing rules that carry out the consumer protection mission of the agency and should be maintained for the CFPB's future rules.

Sincerely,

WOODSTOCK INSTITUTE