June 1, 2020

Comment Intake
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Request for Information to Assist the Taskforce on Federal Consumer Financial Law – Docket No. CFPB-2020-0013, 85 Fed. Reg. 18214 (Apr. 1, 2020)

Dear Consumer Financial Protection Bureau:

Better Markets Inc.[1] appreciates the opportunity to comment on the above-captioned notice and request for comment ("Request" or "RFI"), issued by the Consumer Financial Protection Bureau ("Bureau" or "CFPB").

In October of 2019, the Bureau established the Taskforce on Federal Consumer Financial Protection Law ("Taskforce") and charged it with "developing recommendations on harmonizing, modernizing, and updating the Federal consumer financial laws." The RFI describes a number of more specific goals for the Taskforce, which are only tangentially related to consumer protection or actually focused on providing *relief* to the regulated industry. They include reducing regulatory burdens, addressing gaps in the Bureau's knowledge base that it should address through further research, and promoting consumer understanding.[2] The RFI seeks input on these and related topics, including "areas of consumer protection on which it should focus its research and analysis during the balance of its one-year appointment."[3] .

INTRODUCTION AND SUMMARY

The Request raises serious concerns. It is possible that the Taskforce will make a valuable contribution by identifying weaknesses in the current regulatory framework established to protect consumers from fraud and abuse in the financial services marketplace and by recommending

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1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans' jobs, savings, retirements, and more.

2 Release at 18214-15.

3 *Id.*

measures that will better protect consumers. Unfortunately, however, we fear that the Taskforce is more likely to produce recommendations that give a nod to consumer protection but actually do little to safeguard consumers from fraud and abuse, or even weaken existing protections. And if the Taskforce were to issue genuinely pro-consumer recommendations, we have doubts that the CFPB would actually implement them. Rather, it appears more likely that the agency will continue catering to the financial industry's relentless campaign to roll back regulatory requirements and promote weak alternatives so it can take ever-more-profitable advantage of consumers.

We base this pessimistic assessment on a number of factors, including most prominently the CFPB's track record over the past three years in weakening previously adopted consumer protections and dramatically scaling back enforcement. In that timeframe, particularly during the tenure of former Acting Director Mick Mulvaney, the CFPB has deviated dramatically from its core investor protection mission, which Congress firmly and clearly established in the Dodd-Frank Act.

Our concerns are also fueled by the nature and composition of the Taskforce, including 1) the paucity of available information regarding its formation, its charter, and its underlying purposes; 2) the fundamentally de-regulatory undertones of its publicly-stated mission; and 3) the apparently anti-regulatory ideologies held by the Taskforce chair, Professor Todd Zywicki, who has been vested with final authority over the content of any report or set of recommendations that the Taskforce develops.

We recognize that more recently, the Bureau has shown a few signs that it is recommitting to consumer protection to some degree. But the Bureau's overall performance under the current Administration, along with many aspects of the Taskforce itself, strongly reinforce the view that the agency continues to fail in carrying out its mandate as Congress intended. Accordingly, in this comment letter—

- We review the Bureau's dramatic change in direction away from consumer protection;

- We detail our concerns about the origins, goals, and members of the Taskforce; and

- We urge the Taskforce to prove that our skepticism is unfounded by taking a number of steps and adhering to a number of principles as it discharges its duty and formulates its recommendations. Specifically—

    - We call upon the Taskforce to seek a more balanced composition, one that includes at some genuinely pro-consumer and pro-regulatory advocates. We also urge the Taskforce to operate with full and ongoing transparency, along with a commitment to developing independent, evidence-based recommendations that serve the best interests of consumers, not the financial services industry.

- We also call upon the Taskforce 1) to embrace the view that the single best way to advance the cause of consumer protection is to immediately halt the pattern of de-regulation that has dominated the CFPB under the current Administration; 2) to issue a recommendation calling upon the agency to return to the core pillars of effective consumer protection, including strong rules, diligent oversight, and aggressive enforcement; and 3) to point the Bureau in the direction of strong new rules and enforcement actions to more effectively address a variety of specific abuses clearly infecting many areas of our financial services marketplace.

- Finally, we urge the Taskforce to reject a series of unfounded and fundamentally de-regulatory themes or mantras typically advanced by industry to justify weak oversight, some of which are reflected in the RFI: 1) that a top priority must be to harmonize or streamline laws or rules, even while other more important consumer protection initiatives are neglected; 2) that consumer "choice" must be preserved no matter how toxic or harmful the available options may be; 3) that the industry must be protected from strong regulation for fear that it will suffer crushing regulatory burdens, even though such sky-is-falling claims have proven baseless for a 100 years; 4) that additional disclosure obligations can take the place of strong regulatory requirements and prohibitions, even though experts have shown that disclosure alone cannot protect consumers from dishonest and abusive conduct in financial services; and 5) that quantitative cost-benefit analysis must be applied in the rulemaking process, notwithstanding Congress's decision to avoid imposing that unreliable, burdensome, and biased methodology on most regulators, including the CFPB.

COMMENTS

I. UNDER THE CURRENT ADMINISTRATION, THE CFPB HAS VEERED SHARPLY AWAY FROM ITS CONSUMER PROTECTION MISSION, BECOMING INSTEAD MORE OF AN INDUSTRY PROTECTION ADVOCATE.

A. Congress created the Bureau and gave it broad authority so that it could more broadly and effectively protect consumers in the financial services markets.

Congress created the CFPB in the 2010 Dodd-Frank Act and charged it with a broad mandate to "regulate the offering and provision of consumer financial products and services under the Federal consumer financial laws."[4] Its overarching purpose or goal is to ensure that "all

[4] Dodd-Frank Act § 1011.

consumers have access to markets for consumer financial products and services," and that those markets "are fair, transparent, and competitive."[5]

Its key objectives are to ensure that (1) consumers are provided with 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.[6]

To enable the Bureau to fulfill this mandate and achieve this purpose, Congress tasked the agency with five core functions: 1) educating consumers, 2) responding to consumer complaints, 3) conducting research to identify risks to consumers, 4) supervising institutions and taking enforcement actions to address violations of Federal consumer financial laws, and 5) issuing rules, orders, and guidance to implement those laws.[7]

All of these provisions reflect Congress's clear intent that the Bureau achieve a broader and higher level of consumer protection, for the benefit of the millions of Americans who depend on a wide range of financial products and services to improve the quality of their lives.

B. During the first five years of its operation, the CFPB served as an exceptionally effective consumer protection agency.

Under the previous Administration and Bureau Director Richard Cordray, as detailed below, the Bureau discharged its duties effectively and in keeping with Congress's intent by writing strong rules; bringing aggressive enforcement actions that delivered almost $12 billion in monetary relief to consumers injured by fraud, abuse, and unscrupulous practices in financial services; and addressing over a million consumer complaints about deceptive or unfair practices in the financial services industry. The Bureau achieved these milestones without unfairly burdening the industry or depriving consumers of meaningful choices in products or services.

Rulemaking

- **Payday Lending**. In January of 2012, the Bureau began a rulemaking process to craft a payday loan rule that would protect consumers from the endless debt traps and crushing interest rates that so often come with small dollar loans, while ensuring that consumers

[5] *Id.* at § 1021.
[6] *Id.*
[7] *Id.*

had access to a fair, competitive, and transparent market for that type of credit.[8] This rulemaking process spanned five years, during which time the Bureau published a white paper and an empirical report on payday lending[9], in addition to two separate reports on online payday loan payments and single payment vehicle title lending.[10] The Bureau solicited public feedback on this process through both a small business advisory panel and a request for information.[11] The result of this exhaustive rulemaking process was the Bureau's 2017 Payday, Vehicle Title, and Certain High-Cost Installment Loans[12] rule establishing important new protections for consumers in that marketplace. The rule identifies it as an unfair and abusive practice for a lender to make covered short-term or longer-term balloon-payment loans, including payday and vehicle title loans, without reasonably determining that consumers have the ability to repay the loans according to their terms. The rule also places limits on the ability of lenders to directly withdraw payments from consumers' bank accounts.

- **Debt Collection Practices**. The Dodd-Frank Act conferred regulatory authority under the Fair Debt Collection Practices Act of 1977 on the CFPB. In 2011, the Bureau acted expeditiously to fill that role by publishing an interim final rule to bring existing regulatory standards under its purview.[13] Once again taking a thorough and data-driven approach, in 2014, the Bureau issued an advanced notice of proposed rulemaking to gather input about the debt collection system, with an eye toward establishing new and stronger protections

8 *See* Consumer Financial Protection Bureau, *CFPB Convenes Field Hearing in Birmingham, Alabama on Payday Lending* (January 18, 2012), available at https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-convenes-field-hearing-in-birmingham-alabama-on-payday-lending/.

9 *See* Consumer Financial Protection Bureau, *Payday Loans and Deposit Advance Products: A White Paper of Initial Data Findings* (Apr. 24, 2013), available at https://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf; Consumer Financial Protection Bureau, *CFPB Data Point: Payday Lending* (Mar. 2014), available at https://files.consumerfinance.gov/f/201403_cfpb_report_payday-lending.pdf

10 *See* Consumer Financial Protection Bureau, *Online Payday Loan Payments (*Apr. 2016), available at https://files.consumerfinance.gov/f/201604_cfpb_online-payday-loan-payments.pdf; Consumer Financial Protection Bureau, *Single-Payment Vehicle Title Lending* (May 2016), available at https://files.consumerfinance.gov/f/documents/201605_cfpb_single-payment-vehicle-title-lending.pdf.

11 *See* Consumer Financial Protection Bureau, *Small Business Advisory Review Panel for Potential Rulemakings for Payday, Vehicle, Title, and Similar Loans* (Apr. 27, 2015) available at https://www.consumerfinance.gov/policy-compliance/rulemaking/small-business-review-panels/payday-vehicle-title-and-similar-loans/; Request for Information on Payday Loans, Vehicle Title Loans, Installment Loans, and Open-End Lines of Credit, 81 Fed. Reg. 47781 (July 2016), available at https://www.federalregister.gov/documents/2016/07/22/2016-13492/request-for-information-on-payday-loans-vehicle-title-loans-installment-loans-and-open-end-lines-of.

12 *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472 (Nov. 2017), available at https://www.federalregister.gov/documents/2017/11/17/2017-21808/payday-vehicle-title-and-certain-high-cost-installment-loans.

13 *See* Fair Debt Collection Practices Act (Regulation F), 76 Fed. Reg. 78121 (Dec. 2011), available at https://www.govinfo.gov/content/pkg/FR-2011-12-16/pdf/2011-31733.pdf.

against unfair, deceptive, and abusive practices by debt collectors, without imposing unnecessary burdens on industry.[14]

- **Mandatory Arbitration**. In accordance with the Dodd-Frank Act, the Bureau initiated an extensive rulemaking process regarding mandatory arbitration agreements, which included a thorough study, multiple field hearings, and a small business review panel.[15] Those efforts culminated in 2017 with the final arbitration rule.[16] The Bureau's rule prohibited the use of mandatory arbitration agreements governing consumer financial products that barred consumers from participating in class action lawsuits, often the only way that injured consumers can obtain meaningful relief. It also required providers that are involved in an arbitration pursuant to a pre-dispute arbitration agreement to submit specified arbitral records to the Bureau. In November of 2017, the rule was nullified by Congress and the President under the Congressional Review Act.

- **Mortgages**. In 2013, the Bureau issued two sets of mortgage rules establishing better protections for consumers in the area of mortgage servicing.[17] The first, under the Real Estate Settlement Procedures Act of 1974, addressed servicers' obligations to correct errors asserted by mortgage loan borrowers; to provide certain information requested by such borrowers; and to provide protections to such borrowers in connection with force-placed insurance. The second, under the Truth in Lending Act, addressed initial rate adjustment notices for adjustable-rate mortgages, periodic statements for residential mortgage loans, prompt crediting of mortgage payments, and responses to requests for payoff amounts. It also amended current rules governing the scope, timing, content, and format of disclosures to consumers regarding interest rate adjustments of their variable-rate transactions.

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14 *See* Debt Collection (Regulation F), 78 Fed. Reg. 67847 (Nov. 2013), available at https://www.federalregister.gov/documents/2013/11/12/2013-26875/debt-collection-regulation-f.

15 *See* Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress, Pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (Mar. 2015), available at https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf; Consumer Financial Protection Bureau, *Field Hearing on Arbitration in Dallas, TX* (Dec. 13, 2013), available at https://www.consumerfinance.gov/about-us/events/archive-past-events/field-hearing-arbitration-dallas-tx/; Consumer Financial Protection Bureau, *Field Hearing on Arbitration in Newark, NJ* (Mar. 10, 2015), available at https://www.consumerfinance.gov/about-us/events/archive-past-events/field-hearing-on-arbitration/; Consumer Financial Protection Bureau, *Final Report of the Small Business Review Panel on the CFPB's Potential Rulemaking on Pre-Dispute Arbitration Agreements* (Dec. 11, 2015), available at https://files.consumerfinance.gov/f/documents/CFPB_SBREFA_Panel_Report_on_Pre-Dispute_Arbitration_Agreements_FINAL.pdf.

16 *See* Arbitration Agreements, 82 Fed. Reg. 33210 (July 2017), available at https://www.federalregister.gov/documents/2017/07/19/2017-14225/arbitration-agreements.

17 *See* Consumer Financial Protection Bureau *Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)* (January 17, 2013), available at https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/mortgage-servicing-rules-under-real-estate-settlement-procedures-act-and-truth-lending-act/.

- **Discriminatory Lending.** In May of 2013, the Bureau issued guidance making clear that prohibitions under the Equal Credit Opportunity Act against discriminatory lending apply to "indirect lenders" involved in discretionary loan markups by auto dealers.[18] In May of 2018, that guidance was nullified by Congress and the President under the Congressional Review Act, based in part on a controversial determination that the guidance was in fact a rule.

- **Prepaid Accounts.** In November of 2016, the Bureau issued the first of its prepaid account rules, which increased disclosure requirements for prepaid accounts and regulated prepaid overdrafts.[19]

- **Deposit Accounts.** The CFPB took the lead on a joint effort by financial regulators to establish clear guidance on how banks should handle deposit account discrepancies.[20]

Enforcement

- **Overall.** During the prior Administration, the Bureau made enforcement a top priority, conducting thorough investigations, initiating an exceptionally high volume of enforcement actions, and securing a vast amount of monetary relief for the direct benefit to consumers.

- **Actions.** The Bureau brought over 200 enforcement actions to address abuses in a wide variety of areas, including mortgage lending, credit reporting, debt collection, student loans, and equal credit opportunity.

- **Monetary Relief.** The total amount of relief provided to consumers as a result of those actions was almost $12 billion. It took the form of monetary compensation as well as other benefits, such as principal reductions and cancelled debts. The Bureau separately collected hundreds of millions of dollars in fines. The chart attached in Appendix A sets forth an overview of the Bureau's primary enforcement activity and the results it obtained.

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18 *See* Consumer Financial Protection Bureau, *CFPB Bulletin 2013-02: Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act* (Mar. 21, 2013), available at https://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf.

19 *See* Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z), 81 Fed. Reg. 83934 (Nov. 2016), available 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.

20 *See* Consumer Financial Protection Bureau, *CFPB and Financial Regulators Issue Guidance on How Banks Handle Consumer Deposit Account Discrepancies* (May 18, 2016), available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-financial-regulators-issue-guidance-how-banks-handle-consumer-deposit-account-discrepancies/.

- **Example: Student Loan Abuses.** Exemplifying the Bureau's enforcement approach was its activity in the area of student loan abuses. Under Director Corday, the CFPB announced 15 separate student lending related enforcement actions. These actions not only yielded an average $47.5 million in consumer restitution per case,[21] they also shut down operations that stole millions by impersonating government employees; debt relief scams that preyed on the already destitute; and Corinthian Colleges, a for-profit university network that systematically mislead students about post-graduation job prospects while taking in $1.4 billion in federal funds annually.[22]

Other Actions

- **Consumer Complaint Database.** The Bureau established the consumer complaint database, which handles tens of thousands of consumer complaints a year. The database has proven effective at resolving disputes between consumers and financial firms, identifying patterns of abuse for regulators, and through transparency, exerting pressure on firms to comply with the law.[23]

- **Consumer Finance Civil Penalty Fund.** The Bureau also established the Consumer Finance Civil Penalty Fund,[24] in accordance with the Dodd-Frank Act. Money in the fund may be used for payments to the victims of activities for which civil penalties have been imposed under Federal consumer financial laws. In addition, to the extent that such victims cannot be located, or such payments are otherwise not practicable, the Bureau may use the funds for the purpose of consumer education and financial literacy programs. As of September 2019, the fund has collected over $1.2 billion in consumer redress payments.[25]

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21 *See* Christopher L. Peterson, *Dormant: The Consumer Financial Protection Bureau's Law Enforcement Program in Decline,* Consumer Federation of America (Mar. 12, 2019), available at https://consumerfed.org/wp-content/uploads/2019/03/CFPB-Enforcement-in-Decline.pdf.

22 *See* Consumer Financial Protection Bureau, *CFPB Takes Action Against Nationwide Student Financial Aid Scam* (Oct. 29, 2015), available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-nationwide-student-financial-aid-scam/; Consumer Financial Protection Bureau, *CFPB Takes Action to End Student "Debt Relief" Scams* (Dec. 11, 2014), available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-end-student-debt-relief-scams/; Consumer Financial Protection Bureau, *Corinthian Colleges, Inc. d/b/a Everest College, WyoTech, and Heald College* (Sept. 16, 2014), available at https://www.consumerfinance.gov/policy-compliance/enforcement/actions/corinthian-colleges/; Floyd Norris, *Corinthian Colleges Faltering as Flow of Federal Money Slows,* N.Y. TIMES (June 26, 2014), available at https://www.nytimes.com/2014/06/27/business/Corinthian-Colleges-Falters-as-Federal-Cash-Wanes.html.

23 *See* Consumer Financial Protection Bureau, *Consumer Complaint Database,* available at https://www.consumerfinance.gov/data-research/consumer-complaints/.

24 *See* Consumer Financial Civil Penalty Fund, 78 Fed. Reg. 26489 (May 2013), available at https://www.federalregister.gov/documents/2013/05/07/2013-10320/consumer-financial-civil-penalty-fund.

25 *See* Consumer Financial Protection Bureau, *Frequently Asked Questions About Civil Penalty Fund,* available at https://www.consumerfinance.gov/about-us/payments-harmed-consumers/civil-penalty-fund/.

C. Under the current Administration, the Bureau has turned sharply away from its consumer protection mission in ways that favor the regulated industry.

Beginning with the new Administration in 2017, and largely under Assistant Director Mulvaney, the Bureau has fundamentally altered its approach to consumer protection, catering to industry preferences, seeking to roll back protections, and dramatically scaling back its enforcement efforts, as reflected in both the numbers of actions and the amount of monetary relief obtained.

Rulemaking

- **Payday Lending.** In February of 2019, the Bureau proposed to rescind key provisions of the 2017 payday lending rule.[26] Specifically, the Bureau seeks to eliminate a core underwriting provision that would require those making payday or vehicle title loans to reasonably determine that consumers actually have the ability to repay those loans according to their terms. The proposal is a deplorable example of arbitrary and capricious rulemaking clearly intended to do the bidding of the payday loan industry. The Bureau's original rule was the product of an exhaustive rulemaking process spanning years, finding that millions of Americans living paycheck-to-paycheck needed new protections against unfair and abusive loan practices that were trapping them in interminable cycles of costly short-term debt. In the rollback proposal, the Bureau relied on the thinnest of reeds, quarreling with two studies that comprised a small portion of the vast archive assembled in support of the rule and drawing the ludicrous conclusion that the entire factual and legal justification for the underwriting provisions was insufficiently robust.

  The rulemaking is fraught with eye-popping flaws.[27] The Bureau quite literally concedes that it has no idea whether or not the findings that originally supported the underwriting standards were actually valid. It goes further, declaring that it now "does not believe it is cost-effective for itself and for lenders and borrowers to conduct the necessary research" to confirm or refute the Bureau's previous determinations that supported the underwriting provisions.[28] In addition, the Bureau not only ignored the vast body of evidence of harm to consumers that the underwriting standards were designed to prevent, the Bureau explicitly refused to consider consumer harm, stating that for "purposes of this rulemaking

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[26] *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. 4252 (May 2019), available at https://www.federalregister.gov/documents/2019/02/14/2019-01906/payday-vehicle-title-and-certain-high-cost-installment-loans#footnote-6-p4252.

[27] *See generally* Better Markets Comment Letter to the CFPB on Payday, Vehicle Title, and Certain High-Cost Installment Loans, Docket No. CFPB-2019-0006, RIN 3170-AA80 (May 15, 2019), available at https://bettermarkets.com/sites/default/files/Better%20Markets%20CL%20CFPB%20Payday%20Underwriting%20Rescission%205-15-2019_0.pdf.

[28] *Id.*

proposal, the Bureau need not consider that the 2017 Final Rule found that the identified practice causes or is likely to cause substantial injury."[29]

The Bureau also exhibits an almost desperate desire to prop up the payday lending industry. To support the proposal, the Bureau mourns the adverse impact that the underwriting standards are expected to have on the payday lending industry, claiming that they may force many lenders to go out of business.[30] The Bureau further expresses concern that the Final Payday Rule would result in a reduction in payday lender revenue of between 71 and 76 percent, and a reduction in vehicle title lender revenue of between 89 and 93 percent.[31] The proposal then makes clear that it is proposing to rescind the underwriting provisions of the Final Payday Rule because those provisions "would impose substantial burdens on the industry" and "significantly constrain lenders' offering of products."[32]

The Bureau has compounded its mistake in seeking to roll back the underwriting requirements in the payday lending rule by also officially delaying the compliance date for 15 months, until November 2020.[33] Again it blatantly catered to the payday lending industry, asserting that because the underwriting requirements may be rescinded altogether pursuant to the rollback proposal, payday lenders should be spared the potentially unnecessary—but only vaguely identified—costs of preparing to comply with requirements that may or may not go into effect. Meanwhile, the Bureau paid no heed to the enormous harm that borrowers are likely to suffer if the underwriting standards are delayed for yet another 15 months beyond the already generous compliance deadline the Bureau originally established.

The delay release brazenly claimed that the delay would actually benefit consumers by limiting industry disruption and preserving "consumer access to credit."[34] In reality, under-regulated and toxic financial products do not benefit financially desperate consumers—any more than poison benefits those who are starving. More to the point, the notion that

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29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.* Even the rulemaking process underlying the proposal is contaminated. Recent reports reveal that the proposal has been inappropriately influenced through secret meetings with the payday lending industry—meetings that the CFPB attempted to cover up. In addition, it now appears that the rulemaking record includes reports paid for and effectively written by the payday lending industry but portrayed as valid, credible, and independent academic studies. *Id.*

33 *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance Date; Correcting Amendments, 84 Fed. Reg. 27907 (June 2019), available at https://www.federalregister.gov/documents/2019/06/17/2019-12307/payday-vehicle-title-and-certain-high-cost-installment-loans-delay-of-compliance-date-correcting; *see generally* Better Markets Comment Letter to the CFPB on Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance Date, Docket No. CFPB-2019-0007, RIN 3170-AA95 (Mar. 18, 2019), available at https://bettermarkets.com/sites/default/files/Better%20Markets%20CL%20CFPB%20Payday%20Compliance%20Date%20-%20Final%203-18-19.pdf

34 *Id.*

consumers would be harmed by the implementation of the underwriting requirements in the Final Payday Rule directly conflicts with the conclusion that the Bureau reached when it promulgated the rule in 2017.

- **Debt-Collection Practices**. In May of 2019, the CFPB issued a proposed rule which would amend the regulations governing debt collection practices under the Fair Debt Collection Practices Act.[35] The Bureau stated that the aim of the proposal was to address communications in connection with debt collection; to interpret and apply prohibitions on harassment or abuse, false or misleading representations, and unfair practices in debt collection; and to clarify requirements for certain consumer-facing debt collection disclosures. While some aspects of the proposal will help protect consumers, it still leaves substantial room for abuse by debt collectors.

  For example, it would allow an excessive number of consumer contacts, in conflict with data generated by the Bureau itself showing that the permissible frequency of telephone calls under the rule would generate significant consumer harm. It would also allow debt collectors to escape liability for the misleading and deceptive practice of filing suit or threatening to file suit over time-barred debt, so long as the debt collector did not know, or have reason to know, that the statute of limitations had expired—effectively placing on consumers the burden of sifting through often complex statutes of limitation in various state jurisdictions. Finally, the proposal would allow debt collectors to send important documents via text or email despite the fact that millions of Americans do not have easy access to the internet.[36]

  A supplementary notice of proposed rulemaking[37] issued on March 3, 2020 includes some disclosure requirements that would apply to debt collectors seeking to collect on time-barred debt, although significant problems remain.[38]

35 *See* Debt Collection Practices (Regulation F), 84 Fed. Reg. 23274 (May 2019), available at https://www.federalregister.gov/documents/2019/05/21/2019-09665/debt-collection-practices-regulation-f.

36 *See* National Consumer Law Center, *Digital Divide: Millions of Americans Have Limited or No Meaningful Access to the Internet* (August 2019), available at https://www.nclc.org/issues/ib-limited-access-to-internet.html; *see generally* Better Markets Comment Letter to the CFPB on Debt Collection Practices (Regulation F), Docket No. CFPB-2019-0022, RIN 3170-AA41 (Sept. 18, 2019), available at https://bettermarkets.com/sites/default/files/Better%20Markets%2C%20Inc.%20%20Comment%20Letter%20on%20RIN%203170-AA41%2C%20Debt%20Collection%20Practices%20%28Regulation%20F%29%20dated%20September%2018%2C%202019.pdf

37 *See* Debt Collection Practices (Regulation F), 85 Fed. Reg. 12672 (Mar. 2020), available at https://www.federalregister.gov/documents/2020/03/03/2020-03838/debt-collection-practices-regulation-f.

38 *See* National Consumer Law Center, *Time-Barred Debt Disclosures in CFPB's Supplemental Rulemaking Fall Short* (May 2020), available at https://www.nclc.org/images/pdf/debt_collection/IB_Concerns_About_Proposed_CFPB_Rule.pdf.

- **Mandatory Arbitration.** As noted above, the Bureau's landmark arbitration rule, which protected the right of consumers to participate in class actions notwithstanding mandatory arbitration clauses, was nullified by Congress and the President under the Congressional Review Act. While the CRA limits an agency's ability to re-issue a substantially similar rule, the Bureau is not barred from exploring alternative regulatory approaches that could mitigate the consumer harmed caused by the widespread use of mandatory arbitration clauses. However, the Bureau has made no identifiable attempts to do so.[39] Mandatory arbitration remains an important issue to a millions of Americans: In arbitration, costs are high, panels are industry-biased, recoveries for consumers are low, the process is secretive, and arbitrations displace civil litigation, which reduces a deterrent against misconduct and prevents the Bureau and others from discovering abuses that would otherwise come to light in court cases.

Enforcement

- **Overall.** The Bureau's enforcement efforts have dropped dramatically, to levels "that are either nonexistent or significantly below that of the prior Administration, even in the areas where consumer complaint activity is the highest."[40]

- **Number of cases.** Under Acting Director Mulvaney, the Bureau brought only 11 cases. While that number has risen to 31 under Director Kraninger, it still remains many multiples below the agency's enforcement record of 201 cases under Cordray. In the four areas where complaints and abuses remain high—credit reporting, debt collection, home mortgages, and student loans—few cases have been brought under the current Administration. And under the current Administration, the Bureau has not announced or resolved a single case alleging unlawful discrimination in financial services.

- **Monetary relief.** Further, under the current Administration, the amount of monetary relief for consumers has plummeted. Under Acting Director Mulvaney, it totaled approximately $345 million. Under Director Kraninger, the number has increased to $700 million, but both levels of recovery remain paltry in comparison to the nearly $12 billion that the Bureau obtained for the benefit of consumers under Director Cordray.

- **Student Loans.** During the tenure of Acting Director Mulvaney, the CFPB did not announce a single student lending related enforcement action. A lawsuit filed by Student Debt Crisis, a non-profit that works to reform student debt and higher education loan

39 *See* Better Markets Comment Letter to the CFPB on Request for Information Regarding Consumer Credit Card Market, Docket No. CFPB– 2019–0002 (May 1, 2019) (arguing, for example, that the Bureau should gather data about the use of forced arbitration clauses in credit card agreements), available at https://www.regulations.gov/document?D=CFPB-2019-0002-0011.

40 *See* Christopher L. Peterson, *Dormant: The Consumer Financial Protection Bureau's Law Enforcement Program in Decline*, Consumer Federation of America (Mar. 2019).

policies, alleges that this drop in enforcement actions was the result of the Bureau's deliberate and unlawful retreat from its duty to police the student loan market.[41] A letter signed by a former student loan ombudsman at the Bureau similarly alleges that the Bureau's leadership has hobbled career staff attempts to protect student borrowers (and call attention to predatory lenders), by among other tactics, suppressing a report showing that large banks were exploiting student borrowers.[42] Under Mulvaney, the Bureau apparently attempted to derail a settlement in a major enforcement action against one of the nation's largest student loan servicers, Navient.[43] The episode prompted concerns among state Attorneys General that they would need to play a more aggressive role in light of the Bureau's apparent retreat.[44]

- **Organizational Changes to Gut Enforcement.** During his tenure, Acting Director Mulvaney used wrenching internal changes at the Bureau to hobble some of the agency's important enforcement units. In February of 2018, he stripped the Bureau's fair lending division of its enforcement powers by relocating it to an internal personnel office with no enforcement role.[45] In a nearly identical move in May of 2018, the Acting Director folded the Student Loan Division into the Bureau's consumer information unit.[46] While officials from the Bureau called this a "very modest organizational chart change,"[47] student loan advocates condemned the move and identified it as part of a wider effort by the Acting Director to scale back enforcement. The precipitous drop in new fair lending and student loan related enforcement cases initiated under the Acting Director shows that these fears were well-founded.

- **Using Process to Stifle Enforcement.** The Bureau is apparently exploring a number of other ways to weaken its enforcement program. In 2018, it issued a request for information

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[41] *See* Democracy Forward, *Student Debt Crisis v. CFPB and Department of Education,* available at https://democracyforward.org/lawsuits/student-debt-crisis-v-cfpb-education/.

[42] *See* Seth Frotman, Letter to Acting Director Mulvaney (Aug. 27, 2018), available at https://www.nclc.org/images/pdf/student_loans/Frotman_Letter.pdf.

[43] *See* Stacy Cowley, *How a Potential $1 Billion Student Loan Settlement Collapsed After Trump Won,* N.Y. Times (Oct. 7, 2018), available at https://www.nytimes.com/2018/10/07/business/student-loans-navient.html.

[44] *See* Danielle Douglas-Gabriel, *Navient Tries to End Years-Long CFPB Lawsuit Over Its Student Loan Servicing Practices,* WASH. POST (May 19, 2020), available at https://www.washingtonpost.com/education/2020/05/19/navient-bids-end-years-long-cfpb-lawsuit-over-its-student-loan-servicing-practices/.

[45] *See* Kate Berry, *CFPB's Mulvaney Strips His Fair-Lending Office of Enforcement Powers,* AMERICAN BANKER (Feb. 1, 2018), available at https://www.americanbanker.com/news/cfpbs-mulvaney-strips-his-fair-lending-office-of-enforcement-powers.

[46] Danielle Douglas-Gabriel, *Mick Mulvaney Takes Aim at Consumer Bureau's Student Protection Unit,* WASH. POST (May 9, 2018), available at https://www.washingtonpost.com/news/grade-point/wp/2018/05/09/mick-mulvaney-takes-aim-at-cfpbs-student-protection-unit/.

[47] *See* Glenn Thrush and Stacy Cowley, *Mulvaney Downgrades Student Loan Unit in Consumer Bureau Reshuffle,* N.Y. TIMES (May 9, 2018), available at https://www.nytimes.com/2018/05/09/us/student-loans-consumer-financial-protection-bureau-cfpb.html.

regarding its enforcement processes. The stated purpose of the request is to gather information that will be used "to achieve meaningful burden reduction or other improvement to the processes used by the Bureau to enforce Federal consumer financial law."[48] Specifically, the request seeks input on a number of possible changes that could favor industry by adding unnecessary mandatory pre-litigation procedures, weakening the Bureau's ability to conduct investigations through civil investigative demands, and encumbering cases by making the "Notice and Opportunity to Respond" process mandatory.

Other Actions

- Acting Director Mulvaney actually sought to reduce the Bureau's budget, which was cut from $630 million in 2017 to $553 million in 2018.[49] And in November of 2018, he requested further budget cuts on the order of 20%, resulting in substantially less funding.[50] Since then, fortunately, Director Kraninger has sought additional funds for the Bureau, but while the agency's budget has increased for 2020, it remains below its peak levels under Director Cordray.[51]

- **Abandoning the defense of its own structure.** In an extraordinary development, the Bureau actually reversed course and abandoned its defense in a case pending before the Supreme Court challenging the structure of the Bureau as unconstitutional based on its single-director leadership and the for-cause removal limitations that Congress imposed to protect the agency's independence.[52] Although the Bureau defended itself successfully in the Ninth Circuit,[53] it did an about-face before the Supreme Court, via the Solicitor General and in accordance with Director Kraninger's determination.[54] It suddenly embraced the view that the agency's structure did in fact violate the Separation of Powers Clause of the U.S. Constitution, thus undermining the principle of independence that motivated Congress when it established the agency.

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48 *See generally* Better Markets Comment Letter to the CFPB on Requests for Information: Bureau Enforcement Processes (Docket No. CFPB-2018-0003) (May 14, 2020), available at https://bettermarkets.com/sites/default/files/CFPB-%20CL-%20Enforcement%20Process%20-%20Final%205-14-2018.pdf

49 *See* Consumer Financial Protection Bureau, *Budget and performance,* available at https://www.consumerfinance.gov/about-us/budget-strategy/budget-and-performance/.

50 *See* Lalita Clozel, *CFPB Acting Chief Asks Staff to Cut Budget by 20%,* WALL ST. J. (June 12, 2018), available at https://www.wsj.com/articles/cfpb-acting-chief-asks-staff-to-cut-budget-by-20-1528842446.

51 *See* Kate Berry, *Kraninger Wants More Money for CFPB. White House Has a Different Plan,* AMERICAN BANKER (February 20, 2020), available at https://www.americanbanker.com/news/kraninger-wants-more-money-for-cfpb-white-house-has-a-different-plan.

52 *Selia Law LLC v. CFPB,* No. 19-7 (S. Ct.) (docketed June 28, 2019).

53 *Consumer Financial Protection Bureau v. Seila Law LLC*, 923 F.3d 680 (2019).

54 *See* Tucker Higgins, *The head of the CFPB Now Believes that the Financial Regulator Is Unconstitutionally Structured,* CNBC (Sept. 17, 2019), available at https://www.cnbc.com/2019/09/17/cfpb-head-tells-supreme-court-agency-is-unconstitutional.html.

- **<u>Weakening the Consumer Complaint Database.</u>** The CFPB's publicly accessible consumer complaint database has proven to be a valuable tool for affording consumers meaningful informal relief for fraud and abuse, helping regulators identify patterns of illegal conduct, and even incentivizing and equipping well-meaning financial firms to better serve their customers in accordance with the law. However, the Bureau is exploring ways to undermine the database, specifically by limiting public access to it, through a request for information issued in March of 2018[55] That comes as no surprise, as Acting Director Mulvaney was openly hostile to it, suggesting that the database should no longer be public and that it was merely "a Yelp for financial services sponsored by the federal government."[56] There is, of course, no credible evidence that the database unduly burdens financial service providers or has any other adverse effects. The RFI is especially troubling because it fails to explain the legitimate basis for any modifications to the public database.[57]

These clearly de-regulatory steps and the dramatic downturn in the enforcement program are indefensible, especially in light of the successes of the Bureau in protecting consumers for the first five years of its existence, all without the adverse consequences that those in the industry, and some in the Bureau itself, have attempted to use as a justification.

II. <u>THE ORIGINS OF THE TASKFORCE, ITS STATED OBJECTIVES, AND ITS MEMBERSHIP ALL INDICATE THAT ITS TRUE FOCUS WILL BE ON WEAKENING OR THINNING, NOT FORTIFYING, REGULATORY PROTECTIONS FOR CONSUMERS.</u>

In addition to the CFPB's poor track record on consumer protection catalogued above, other factors raise further doubts that the Taskforce will recommend changes that serve the best interests of consumers.

A. <u>The origins of the Taskforce remain unclear.</u>

The Bureau announced the Taskforce in a press release dated October 11, 2019. It explained that "an objective and independent evaluation of our current regulatory framework . . .

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[55] *See* Request for Information Regarding Bureau Public Reporting Practices of Consumer Complaint Information, 83 Fed. Reg. 9499 (Mar. 2018), available at https://www.federalregister.gov/documents/2018/03/06/2018-04544/request-for-information-regarding-bureau-public-reporting-practices-of-consumer-complaint.

[56] *See* Stacy Cowley, *Consumer Bureau Looks to End Public View of Complaints Database*, N.Y. TIMES (Apr. 25, 2018), https://www.nytimes.com/2018/04/25/business/cfpb-complaints-database-mulvaney.html.

[57] *See* Better Markets Comment Letter to the CFPB on Request for Information Regarding Bureau Public Reporting Practices of Consumer Complaint Information (Docket No. CFPB-2018-0006) (June 4, 2018), available at https://bettermarkets.com/sites/default/files/CFPB-%20CL-%20Consumer%20Complaint%20Database%20Final.pdf

is needed to help us more effectively carry out our mission of protecting consumers."[58] It offers little explanation as to who or what drove the decision; whether it was internally motivated or resulted from the urgings of the industry, consumer advocates, others; and why such a new "evaluation" is needed at this time.

The press release states that the Taskforce was "inspired" in part by an earlier commission established under the "Consumer Credit Protection Act of 1968, known as the National Commission on Consumer Finance (the Commission). While the two bear some surface-level similarities, a deeper analysis reveals important differences between their approaches to regulation. The 1968 Commission was instructed by Congress to report on the adequacy of existing regulation to protect against unfair practices, ensure the informed use of consumer credit, and to provide consumer credit at reasonable rates, as well as to examine the desirability of Federal regulations and statutes. The resulting report was an even-handed analysis of the consumer credit market that identified markets in desperate need of government intervention and areas where consumers would benefit from decreased regulatory barriers to entry.[59] In fairness, it is too soon to make a final comparison between the Taskforce and the Commission, but based on the stated mission of the current Taskforce and its membership, both discussed below, it does not appear to be headed in a similar direction.

B. The stated goals of the Taskforce reflect a thinly-veiled yet powerful de-regulatory slant.

The stated goals of the Taskforce suggest that its focus will be less on improving consumer protections than on harmonizing or modernizing the regulatory framework and reducing regulatory burdens. The press release and the RFI each lead with a focus on harmonizing and modernizing the Federal Consumer financial laws, terms that often serve as code words for deregulatory initiatives. And while the press release, the RFI, and the charter each make passing reference to ways to improve or strengthen consumer laws, they translate that reference into issues and topics that are only tangentially related to consumer protection or in some respects antithetical to it.

For example, according to these documents, improving consumer laws means "resolving conflicting requirements or inconsistencies," "reducing unwarranted regulatory burdens," "improving consumer understanding of markets and products," and "identifying gaps in knowledge that the Bureau should address through future research."[60] In reality, that list amounts

58 Press Release, *CFPB Announces Taskforce on Federal Consumer Financial Law* (Oct. 11, 2019), available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-taskforce-federal-consumer-financial-law/.

59 *See* National Commission on Consumer Finance, *Report: Consumer Credit in the United States* (Dec. 1972), available at https://play.google.com/books/reader?id=vehKAQAAIAAJ&hl=en&pg=GBS.PP1.

60 *See* Consumer Financial Protection Bureau, *Charter of the Bureau's Taskforce on Federal Consumer Financial Law* (Jan. 8, 2020), available at https://files.consumerfinance.gov/f/documents/cfpb_taskforce-charter.pdf.

to legislative and regulatory housekeeping, relief for industry, and at best, a push for consumer education and disclosure—none of which go to the core of genuine consumer protection.

C. <u>The Taskforce members, and most notably the Chair, have decidedly de-regulatory perspectives.</u>

The Chair of the Taskforce, Todd Zywicki, is a Professor of Law at Antonin Scalia Law School at George Mason University, Senior Fellow at the Cato Institute, and former Executive Director of the George Mason Law and Economics Center. His work exemplifies the laissez-faire school of regulatory thought that exalts the value of "consumer choice" over any and all harms caused by predatory lenders and unscrupulous practices in financial services.

For example, Professor Zywicki has written extensively about consumer credit regulation and has almost universally opposed new safeguards, disclosure requirements, and consumer protections. In 2007, he called sub-prime mortgages "unequivocally beneficial" and argued that new mortgage regulations would have the primary effect of denying financing to responsible borrowers.[61] In a 2010 paper entitled *The Case Against New Payday lending Restrictions,* he asserted, without substantial evidence, that payday lending restrictions have minimal consumer benefits and would likely lead to a boom in illegal loan sharking.[62] Also in 2010, he suggested that payday and auto title lending were "playing a positive role in mitigating the fallout from the crisis" and concluded that "[m]isguided paternalistic regulation of nontraditional lending will deprive consumers of this valuable option and inevitably hurt those who the laws are purportedly intended to help."[63]

Professor Zywicki actually opposed the creation of the then-titled Consumer Financial Protection Agency on the grounds that the 2008 crisis was not caused by consumer abuse.[64] Expanding on this view, he wrote that the lax mortgages regulations were not to blame for the explosion in sub-prime loans leading up to the crisis. Rather, he insisted, it was poor monetary policy and "default friendly" anti-deficiency laws that encouraged the propagation of unstable mortgages.[65] In 2009 an op-ed for *The Wall Street Journal*, he went so far as to speculate that a

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61 *See* Joseph Adamson and Todd J. Zywicki, *Subprime Mortgage Lending*, The Mercatus Reports (Summer 2011), available at https://www.cato.org/sites/cato.org/files/serials/files/regulation/2007/7/v30n2-mercreport.pdf#page=2.

62 *See* Todd J. Zywicki with Astrid Arca, *The Case Against New Restrictions on Payday Lending,* Mercatus on Policy, No. 64 (Jan. 2010), available at https://www.mercatus.org/system/files/MOP64_FMWG_Payday%20Lending_web.pdf.

63 *See* Todd J. Zywicki, *Money to Go*: *Auto Title Lending Has an Important Role in the Financial Services Marketplace*. Regulation (Summer 2010), available at https://www.cato.org/sites/cato.org/files/serials/files/regulation/2010/6/regv33n2-7.pdf.

64 *See* Todd Zywicki, *The Consumer Financial Protection Agency,* Mercatus Research Summaries, available at https://www.mercatus.org/system/files/Recess_Reading_-_CFPA_-_Zywicki.pdf.

65 *See* Todd J. Zywicki and Stefanie Haeffele-Balch, *Loans Are Not Toasters: The Problems with a Consumer Financial Protection Agency,* Mercatus on Policy, No. 60 (Oct. 2009), available at https://ppe.mercatus.org/system/files/MOP_-_60_Loans_are_not_Toasters_web.pdf.

consumer protection agency with the power to impose large fines could undermine the soundness of financial institutions.[66]

Unsurprisingly, Professor Zywicki was an outspoken critic of the CFPB under the previous Administration. He was highly critical of the Bureau's use of behavioral economics,[67] and wrote papers rejecting the Bureau's empirical and regulatory approach to debt collection, mandatory arbitration agreements, and overdraft fees.[68] Perhaps his most worrying comments are from a 2014 paper entitled *The Consumer Financial Protection Bureau: Savior or Menace?* There he writes that due to the CFPB's single director structure and budgetary independence, "unless reformed, the likely result of the CFPB in operation will be a result completely contrary to that intended by its founders: an increase in fraud against consumers, an increase in foreclosures in the event of a future housing market downturn, and an increase in cost and reduction in access to high-quality credit products for consumers."[69] In addition to his obvious bias against the CFPB and consumer protection, Sen. Elizabeth Warren's office reports that Zywicki previously worked to help defend a debt relief company against a CFPB investigation and was employed by a consulting firm that lobbied the Bureau on behalf of major banks.[70]

The other members of the Taskforce raise similar concerns. While earlier in their careers they appear to have served the public in consumer protection-related positions at the FTC or the Federal Reserve, they have moved on to law firms, consultancies, or other positions where they espouse anti-regulatory views or actively defend firms in the financial services industry, including payday lenders. For example—

- After leaving the FTC, Howard Beales III joined a consulting firm that advises the financial services industry. In one case, he defended a payday lender in an enforcement

66 *See* Todd J. Zywicki, *Let's Treat Borrowers Like Adults,* WALL ST. J. (July 8, 2009), available at https://www.wsj.com/articles/SB124701284222009065.

67 *See* Thomas A. Durkin, Gregory Elliehausen, and Todd J. Zywicki, *An Assessment of Behavioral Law and Economics Contentions and What We Know Empirically About Credit Card Use By Consumers,* George Mason University Law and Economics Research Paper Series (Aug. 31, 2014), available at https://www.law.gmu.edu/assets/files/publications/working_papers/1446.pdf.

68 *See* Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation,* Mercatus Working Paper (Sept. 2015), available at https://www.mercatus.org/system/files/Zywicki-Debt-Collection-v2.pdf; *see also* Jason Scott Johnston and Todd Zywicki, *The Consumer Financial Protection Bureau's Arbitration Study: A Summary and Critique,* Mercatus Working Paper (Aug. 2015), available at https://www.mercatus.org/system/files/Johnston-CFPB-Arbitration.pdf; Todd Zywicki and Michael Flores, *Commentary on CFPB Report: Data Point: Checking Account Overdraft,* Mercatus Working Papers (Sept. 2014), available at https://ppe.mercatus.org/publications/commentary-cfpb-report-data-point-checking-account-overdraft.

69 Todd J. Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?* George Washington L. Rev., Vol. 81, No. 3, 856-928, (Apr. 2013), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2130942#:~:text=It%20is%20an%20independent%20agency,agency%20(the%20Federal%20Reserve).&text=Astonishingly%2C%20the%20CFPB%20is%20structured,imperialism%2C%20and%20agency%20tunnel%20vision.

70 *See* Senator Warren and Senator Brown's Comment Letter to the CFPB (Feb, 5, 2020), available at https://www.banking.senate.gov/imo/media/doc/2020-02-05%20Brown,%20Warren%20to%20KK%20re%20Taskforce.pdf.

action by the CFPB, arguing that payday loans with interest rates of almost 450% were "beneficial to consumers." [71]

- Since retiring from the Federal Reserve, Thomas Durkin has called for the rollback of financial regulations in favor of payday lenders, and he co-wrote a book with Zywicki in which they argue against the need for consumer protection in lending markets.[72]

- Since leaving the FTC, William C. MacLeod has joined a law firm where he has defended companies against government investigations and "resolutely fought against onerous regulations."[73]

- Since leaving the FTC, L. Jean Noonan has joined a law firm that represents payday lenders under investigation or sued by the Bureau for abusive practices.[74]

All of this biographical evidence raises obvious doubts that the Taskforce will produce recommendations in favor of strong consumer protections. Professor Zywicki's anti-regulatory and even anti-CFPB ideologies are especially significant, because as Chair of the Taskforce and under the express terms of its charter, he controls all Taskforce meetings and agendas; he has "authority over the final report or recommendation content that will be presented to the Director for approval;" and he is responsible for "addressing dissent" on the Taskforce, with support "as needed" from the Staff Director of the Bureau.

The Bureau has chosen to disclose none of this pro-industry, anti-regulatory bias in the otherwise impressive profiles posted on the webpage for the Taskforce. Nor has the Bureau disclosed how these members were selected, what criteria were applied, and why a more balanced group of experts did not result from the process. Thus, the selection and composition of the Taskforce, and the lack of transparency in the process, all reinforce the concern that it will aim for weak if not affirmatively de-regulatory changes in the laws and rules governing financial services.

III. <u>THE TASK MUST ADHERE TO THREE CORE PRINCIPLES AS IT DISCHARGES ITS DUTIES.</u>

To be effective and to truly serve the public interest in keeping with the mission of the Bureau and Congress's intent, the Taskforce must observe a number of basic principles as it develops its recommendations.

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71 *Id.*

72 *See* Todd J. Zywicki and Thomas A. Durkin, *Why Everything Elizabeth Warren Told You About Consumer Credit Is Wrong,* Forbes (Oct. 10, 2014), available at https://www.forbes.com/sites/realspin/2014/10/10/why-everything-elizabeth-warren-told-you-about-consumer-credit-is-wrong/#7c866517301f.

73 *See* Kelly Drye, *About William C. MacLeod,* available at https://www.kelleydrye.com/Our-People/William-C-MacLeod.

74 *See* Hudson Cook Overview, available at https://www.hudsoncook.com/firm/overview.cfm.

A. <u>The membership of the Taskforce must be expanded to become more balanced.</u>

The membership of the Taskforce must be expanded to include a more balanced mix of perspectives, including public interest advocates and others who have an unequivocal commitment to consumer protection through strong regulation and enforcement. There is no shortage of such advocates and no excuse for not including them on the Taskforce.

B. <u>The Taskforce must operate transparently.</u>

Although not off to an auspicious start, the Taskforce can and should operate with the utmost transparency. First and foremost, it must adhere to the requirements embodied in the Federal Advisory Committee Act ("FACA"). While the Bureau has not expressly acknowledged that FACA applies, the Taskforce would clearly appear to fall within the law's definition of an "advisory committee:"

> (2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is--
>
> (A) established by statute or reorganization plan, or
> (B) established or utilized by the President, or
> (C) established or utilized by one or more agencies,
>
> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, . . .[75]

Consequently, the Taskforce must adhere to a number of important transparency requirements, retroactively to the extent possible, and prospectively:

- Meetings must be open to the public;
- Timely notice of each meeting must be published in the Federal Register;
- Members of the public must be permitted to appear before, or file statements with, the Taskforce;
- The records of the Taskforce, including reports, transcripts, minutes, working papers, drafts, agendas, and other documents made available to or prepared by or for the Taskforce, must be made available to the public; and
- Detailed minutes of each meeting, including a record of all persons present, the matters discussed, and copies of any reports approved by the Taskforce, must be made public.

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[75] 5 U.S.C. App. 2, § 3.

In addition, the Taskforce must take a number of other steps. It must disclose exactly how the Taskforce came into existence, who conceived of it and why, who participated in that process, and what goals or objectives, beyond those stated in the Release or its Charter, will guide its deliberations and work product. Furthermore, the Taskforce must disclose, retroactively and prospectively, the identities of any persons who communicate with or lobby the Taskforce, along with a detailed account of the substance of those communications. And in preparing any reports or recommendations, the Taskforce must include any dissenting views. Finally, the Taskforce should disclose any attempts by the Director or other members of the Administration directly or indirectly to shape or alter the Taskforce's conclusions and recommendations.

C. The Taskforce should focus on the need to reverse course at the CFPB, recommit to the basic principles of effective regulation, and address a host of consumer abuses that clearly persist.

First and foremost, the Taskforce should call upon the Bureau to abandon the predominantly anti-consumer approach it has followed under the current Administration in both regulation and enforcement. Accordingly, the Taskforce should urge the Bureau to suspend work on harmful pending initiatives, such as the dilution of the underwriting requirements in the payday lending rule, and resume any investigations or enforcement actions that have been delayed or suspended.

More generally, the Taskforce should call upon the Bureau to re-commit to the core principles of a strong consumer protection agenda—promulgating strong rules, both principles-based and prescriptive; conducting thorough investigations; and bringing enforcement actions culminating in broad remedial relief for injured consumers and sanctions against both firms and responsible individuals that are robust enough to punish and deter misconduct.

Finally, the Taskforce should urge the Bureau to pursue measures that will address ongoing abuses that are already widely recognized and reported on, as well any others that come to light as the Taskforce gathers input from the public. Some examples include the following:

Automobile financing

A growing number of consumers are being forced to take on unsustainable levels of debt simply to purchase an automobile, and they are being exposed to increasing levels of deception and abuse in the process. A third of consumers who trade in their vehicles now find themselves with negative equity due to auto-loans.[76] The terms for auto loans have continued to grow over

[76] *See* AnnaMaria Andriotis and Ben Eisen, *A $45,000 Loan for a $27,000 Ride: More Borrowers Are Going Underwater on Car Loans,* WALL ST. J. (Nov. 9, 2019), available at https://www.wsj.com/articles/a-45-000-loan-for-a-27-000-ride-more-borrowers-are-going-underwater-on-car-loans-11573295400?mod=article_inline.

the past decade: In 2019, a third of new loans had terms longer than six years, while a decade ago less than one in ten auto loans had terms that long.[77] And automobile financing has seen a rise in predatory, deceitful, and outright fraudulent practices at dealerships, who often act as the primary point of contact for consumers seeking auto-financing. *The Wall Street Journal* reports that dealerships are actively encouraging consumers to default on auto-loans through a practice known as "kicking the trade".[78] This practice is even more worrying in light of reports of auto-dealers enabling the origination of mathematically unaffordable auto-loans by fraudulently inflating customers incomes on loan applications, often without the knowledge of the borrower.[79] These behaviors practically guarantee a default, with devastating impacts on borrowers' financial well-being and future access to credit.

With financing service fees representing an ever-increasing share of auto-dealers' income, these behaviors will undoubtedly become more prevalent.[80] The Bureau brought an enforcement action against Santander for its role in abusive practices in the auto-loan market, but the civil monetary penalty was a modest $2.5 million, hardly enough to deter future misconduct.[81] However more needs to be done in this area long neglected by the Bureau.[82] In addition, the Bureau must address discrimination in this market and reject the hands-off approach fostered by Acting Director Mulvaney, who in 2019 called rules preventing discriminatory markups on auto-loans "a solution in search of a problem."[83]

Credit cards

The credit card market continues to involve consumer abuses and pose regulatory challenges, especially in light of the pandemic. An estimated 47% of U.S. adults are now carrying

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[77] *See* AnnaMaria Andriotis and Ben Eisen, *The Seven-Year Auto Loan: America's Middle Class Can't Afford Its Cars,* Wall St. J. (Oct. 1, 2019), available at https://www.wsj.com/articles/the-seven-year-auto-loan-americas-middle-class-cant-afford-their-cars-11569941215?mod=article_inline.

[78] *See* AnnaMaria Andriotis and Ben Eisen, *Dealerships Give Car Buyers Some Advice: Just Stop Paying Your Loan,* WALL ST. J. (Feb. 15, 2020), available at https://www.wsj.com/articles/dealerships-give-car-buyers-some-advice-just-stop-paying-your-loan-11581762601?mod=article_inline.

[79] *See* AnnaMaria Andriotis and Ben Eisen, *An $809 Car Payment, a $660 Income: How Dealers Make the Math Work,* WALL ST. J. (Dec. 21, 2019), available at https://www.wsj.com/articles/an-809-car-payment-a-660-income-how-dealers-make-the-math-work-11576924201?mod=article_inline.

[80] *See* Adrienne Roberts, *Add-On Services Emerge as Car Dealers' Profit Generator*, WALL ST. J. (Apr. 7, 2019), available at https://www.wsj.com/articles/add-on-services-emerge-as-car-dealers-profit-generator-11554634800?mod=article_inline.

[81] Consumer Financial Protection Bureau, *Bureau of Consumer Financial Protection Settles with Santander Consumer USA Inc.* (Nov. 20, 2018) (including $9 million in restitution), available at https://www.consumerfinance.gov/about-us/newsroom/bureau-consumer-financial-protection-settles-santander-consumer-usa-inc/.

[82] *See* National Consumer Law Center, *Time to Stop Racing Cars: The Role of Race and Ethnicity in Buying and Using a Car* (Apr. 2019), available at https://www.nclc.org/images/pdf/car_sales/report-time-to-stop-racing-cars-april2019.pdf.

[83] *See* Neil Haggerty, *Trump Makes Repeal of CFPB Auto Lending Rule Official,* AMERICAN BANKER (May 21, 2018), available at https://www.americanbanker.com/news/trump-makes-repeal-of-cfpb-auto-lending-rule-official.

credit card debt, up from 43% in March of this year, and 15 million credit-card accounts are now in financial hardship programs.[84] Even before the pandemic, total household debt in the U.S. had hit all time-high, reaching $14.3 trillion in the first quarter of 2020.[85] The effects of this rush for credit in a highly leveraged market are already being felt, with credit card companies slashing consumers credit limits, sometimes with little to no warning.[86] According to one survey, up to 25% of card holders saw their credit limits reduced, and 41% of respondents were unaware that credit card companies could generally cut their limits without notification.[87]

"Deferred interest" products in the marketplace can be especially harmful to consumers. These products offer consumers zero interest rate loans for a set period as long as the balance is paid off before the period ends. However, they can hit consumers with high retroactive interest rates and payment obligations if the balance is not paid off in time. As the Bureau acknowledged in 2017, this pricing structure can obscure the true costs of these products, resulting in consumers unknowingly taking out high interest loans.[88] In fact, a 2015 study published by the Bureau found that a plurality of consumers who failed to pay their balance by the end of the grace period did so within two billing cycles, often incurring large interest charges and facing much larger payments then they did during the interest free period. This behavior pattern suggests that many consumers are unaware of the costs of failing to pay down their balances. The same study found that the number of purchases made with deferred interest cards rose by 21% between 2010 and 2013.[89] The Taskforce should address this issue and call upon the Bureau to pursue additional protections for consumers.

Debt collection and payday lenders

Debt collection practices also call for additional regulatory measures. State regulators continue to struggle to provide adequate protections to borrowers, especially as debt collection in

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84 *See* Barri Segal ,*Poll: 23% of Consumers Added to Their Card Debt During the Pandemic*, CreditCards.com (May 4, 2020), available at https://www.creditcards.com/credit-card-news/coronavirus-spring-debt-poll/; *see also* AnnaMaria Andriotis, *Millions of Americans Skip Credit-Card and Car Payments,* WALL ST. J. (May 20, 2020), available at https://www.wsj.com/articles/millions-of-americans-skip-credit-card-and-car-payments-11589985381.

85 *See* The Federal Reserve Bank of New York, *Pre-COVID-19 Data Shows Total Household Debt Increased in Q1 2020, Though Growth in Non-Housing Debt Slows* (May 5, 2020), available at https://www.newyorkfed.org/newsevents/news/research/2020/20200505.

86 *See* Jessica Dickler, *Card Issuers Are Cutting Credit Limits Without Warning,* CNBC (Apr. 23, 2020), available at https://www.cnbc.com/2020/04/23/card-issuers-are-cutting-credit-limits-without-warning.html.

87 *See* Matt Schulz, *Nearly 50 Million Cardholders Had Credit Limits Reduced, Card Closed Involuntarily in Past Month,* Compare Cards (May 4, 2020). available at https://www.comparecards.com/blog/credit-card-limit-reduced-card-closed/.

88 *See* Consumer Financial Protection Bureau, *Consumer Financial Protection Bureau Encourages Retail Credit Card Companies to Consider More Transparent Promotions* (June 8, 2017), available at https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-encourages-retail-credit-card-companies-consider-more-transparent-promotions/.

89 *See* Consumer Financial Protection Bureau, *The Consumer Credit Card Market* (Dec. 2015), available at https://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf.

small claims courts rises. A 2019 report by the National Consumer Law Center on state debt collection laws found that not a single jurisdiction met its basic standards for debt collection fairness.[90] Between 1993 and 2013, the number of debt collection cases rose from 1.3 million annually to almost 4 million annually, an increase of over 200%. Consumers in these cases have difficulty defending themselves, as only 10% of defendants have counsel and over 70% of cases result in a default judgment against the defendant. Yet data on these cases remains sparse, according to the Pew Charitable Trust, because 38 states report almost no details on debt collection cases within their jurisdiction.[91]

In the small claims court system, high cost lenders, such as payday lenders, are responsible for an overwhelming number of cases. These lenders are the plaintiffs in 68% of small claims court actions. In Utah, cases brought to small claims by high-cost lenders on average generate 3100 arrest warrants per year, representing 91% of all arrest warrants issued from the state's small claims courts.[92] The Taskforce should examine what more the Bureau could do at the federal level to address this evidence of unfairness and abuse.

Small-dollar loans (installment, payday, vehicle title loans)

It is clear that abuses in the payday lending industry continue in abundance, based, for example, on the numerous enforcement actions taken recently by the Federal Trade Commission.[93] Accordingly, the Bureau should be increasing rather than scaling back its enforcement effort in this market. With respect to rulemaking, a growing body of research confirms that effective regulation of the payday loan industry does not restrict consumer access to credit and lending. A review of payday loan research by Luigi Zingales of the Chicago Booth School indicates that consumer outcomes are uniformly improved by restrictions on payday lending strategies. In particular, the study highlights the experience of Colorado, which in 2010 mandated that payday loans be offered in the form of installment loans. Not only did borrowers pay 44% less interest under this model, resulting in savings of $41.9 million, they also received increased access to credit, as the total supply of loans increased.[94] As the Pew Charitable Trust explains, Ohio was

90 *See* National Consumer Law Center, *No Fresh Start in 2019: How Sates Still Allow Debt Collectors to Push Families into Poverty* (November 2019), available at https://www.nclc.org/images/pdf/debt_collection/report-still-no-fresh-start-nov2019.pdf.

91 Pew Charitable Trust, *How Debt Collectors Are Transforming the Business of State Courts* (May 6, 2020), available at https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts.

92 *See* Christopher L. Peterson & David McNeill, *Unwarranted: Small-Claims Court Arrest Warrants in Payday Loan Debt Collection,* Consumer Federation of America (Feb. 2020), available at https://consumerfed.org/wp-content/uploads/2020/02/Payday-Lending-in-Small-Claims-Court.pdf.

93 *See, e.g.,* Al Barbario, *FTC Says Payday Lenders 'Bled Consumers' Of $93M*, Law360 (May 26, 2020), (announcing lawsuit alleging that a network of payday lenders violated a variety of lending and disclosure laws and executed unauthorized bank account debits that "bled consumers").

94 *See* Lugi Zingales, *Does Finance Benefit Society?* (Jan. 2015), available at https://faculty.chicagobooth.edu/luigi.zingales/papers/research/finance.pdf.

similarly able to limit predatory small dollar lending without restricting competition in the market.[95]

This evidence, along with the prodigious research the Bureau compiled in connection with its payday lending rule, should finally eliminate any pretext for the Bureau's attempt to weaken the payday lending rule by eliminating the underwriting requirement. The Taskforce should urge the Bureau to act accordingly and to explore additional measures necessary to protect consumers in this market notoriously fraught with abuse.

Student loans and student loan servicing

Here too, abuses persist, and the Bureau must do more in the enforcement arena. Enforcement work by *other* regulators reinforces the point.[96] More is necessary in regulation as well, especially in light of some new trends. For example, income share agreements (ISAs) have garnered an increasing amount of attention over the past few years as a potential alternative to conventional student loans. Under an income share agreement, a student receives funding for their education and in returns agrees to pay a percentage of their income for a fixed period following their graduation. ISAs typically only require the graduate to make payments if they earn above a certain salary threshold.

These agreements have loan-like properties and they can include onerous provisions, conceal risks, and inflate benefits. For example, they may set the terms of their ISAs based on the expected income associated with the student's degree. Students in lower-earning majors who accept an ISA have to pay back a higher portion of their income for a longer period of time.[97] In other words, greater repayment challenges may be paired with more onerous terms, just as payday lenders attempt to justify crushing interest rates with higher borrower risks. These agreements may also include mandatory arbitration clauses and the school's right to invoke punitive terms if borrowers fail to make payments.[98] Consumer education and disclosure are undoubtedly important components in addressing these issues, but in this area, and as to student loan abuses more widely, more regulation and enforcement is necessary. The Taskforce should move the Bureau in this direction, with the goal of helping students, not benefiting lenders.

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95 *See* Alex Horowitz, *A Wealth of Evidence Backs High-Cost Loan Reform,* The Pew Charitable Trust (Feb. 11, 2020), available at https://www.pewtrusts.org/en/about/news-room/opinion/2020/02/11/a-wealth-of-evidence-backs-high-cost-loan-reform.

96 *See* Emilie Ruscoe, *Student Debt Firms Settle With New York For $5.5M,* Law360 (May 22, 2020).

97 *See* Perdue University, *Back a Boiler Comparison Tool,* available at https://www.purdue.edu/backaboiler/comparison/index.html.

98 *See* Julie Margetta Morgan, Brittany Farr, and Daniel Hornung, *Income Share Agreements: A Student Debt Promise Falling Short Of Reality,* ROOSEVELT INSTITUTE (Jan. 10, 2019), available at https://rooseveltinstitute.org/income-share-agreements-student-debt-promise-falling-short-reality/.

D. <u>The Taskforce must reject a host of classic de-regulatory approaches often advanced in the guise of pro-consumer initiatives.</u>

To produce genuinely meaningful recommendations that actually provide better protections for consumers against fraud and abuse in financial services, the Taskforce must reject deregulatory measures cloaked in a variety of familiar and seemingly benign terms. Some of those recurrent themes, typically invoked by the industry in a disingenuous effort to side-track, dilute, or rollback effective regulations, include the following:

- **<u>Harmonizing or modernizing rules can be an excuse for thinning or weakening important layers of consumer protection.</u>** Opponents of regulation often insist that laws and rules must be harmonized or modernized, even when other more important challenges in rulemaking and enforcement confront regulators. Modernizing rules may sometimes be necessary to better protect consumers, enabling regulators to keep pace with constantly evolving, often technology-based tactics that predators use to exploit consumers. But these calls for harmony and modernity are also deployed as camouflage for what are in reality, deregulatory changes. For example, harmonizing can in fact be a call for a race to the regulatory bottom, a push to adopt the least effective standards. It can also be invoked to remove multiple layers of regulation and enforcement, which are in fact essential attributes in financial market oversight. Given the scope of financial fraud and abuse, and the ingenuity and ruthlessness of many predators offering financial products and services, we must have multiple laws, sets of rules, and agencies with the power and authority to police these complex markets, both within the federal system and between state and federal authorities.

- **<u>Preserving consumer "choice" often simply means allowing predators unfettered access to consumers.</u>** Opponents of regulation often contend that softer or weaker rules are necessary to better protect consumer "choice," no matter how toxic or harmful those "choices" may be. This clamor, dressed up as a concern for the welfare of consumers, is misleading on multiple levels. First, it rests on the false premise that consumers are making clear-eyed, well-informed choices. In fact, through tactics ranging from outright deceit, to incomprehensible fine-print disclosures, to subtle use of behavioral psychology, the financial services industry has all too often *robbed* consumers of meaningful choice. Second, where financial products and services are inherently abusive—from usurious interest rates to conflicted investment advice to some hopelessly complex and disadvantageous annuities—such options or "choices" confer no real benefits on consumers. There is in reality no inconsistency between strong regulation and ample consumer choice, and no credible data shows otherwise.

- **<u>Overblown, "the sky will fall" claims that regulation will stifle financial services to the detriment of consumers must be discounted, as they have proven false time and time again.</u>** Closely related is the claim that regulation threatens to crush the financial services industry with compliance burdens and limits on profitable business models, supposedly limiting choices among products and providers, driving up prices, and threatening the livelihoods of an entire economic sector. Yet time and time again, for over a century, these claims have proven to be false. Indeed, it is precisely because of strong regulation that the financial services industry has been able to thrive. And even as regulation has grown since the 2008 financial crisis and the passage of the Dodd-Frank Act, the financial services industry has generated record profits and bonuses.

  For example, a century ago, when securities regulation first emerged at the state level, Wall Street railed against it as an "unwarranted" and "revolutionary" attack upon legitimate business that would cause nothing but harm.[99] However, in the years following this early appearance of financial regulation, banks and their profits grew handsomely.[100] Subsequently, when the federal securities laws were adopted, Wall Street staunchly opposed them, claiming that they would slow economic recovery by impeding the capital formation process and discouraging the issuance of new securities. In fact, in the years after the enactment of the federal securities laws, the nation's securities markets flourished. The same pattern has been repeated with each new effort to strengthen financial regulation, including deposit insurance, the Glass-Steagall Act, mutual fund reform, and the national market initiatives of the mid-1970s.[101]

  In a particularly telling recent example, the mortgage lending industry fiercely opposed new mortgage underwriting standards to be administered by the Consumer Financial Protection Bureau. The lending industry hysterically predicted that the new rules would "cripple credit availability and spur banks, credit unions, and mortgage lenders to *quit the*

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99 *See* Marcus Baram, *The Bankers Who Cried Wolf: Wall Street's History of Hyperbole About Regulation*, THE HUFFINGTON POST (Jun. 21, 2011, 6:56 PM), available at http://www.huffingtonpost.com/2011/06/21/wall-street-historyhyperbole-regulation_n_881775.html.

100 Paul G. Mahoney, *The Origins of the Blue-Sky Laws: A Test of Competing Hypotheses*, 46 J.L. & ECON. 229, 249 (2003) ("In the 5 years following adoption of a merit review statute [the most stringent type of blue-sky law statute], bank profits increased on average by nearly 5 percentage points . . .").

101 Marcus Baram, *supra*; *see also* Nicholas Economides et al., *The Political Economy of Branching Restrictions and Deposit Insurance: A Model of Monopolistic Competition Among Small and Large Banks*, 39 J. L. & ECON. 667, 698 (1996) ("The American Bankers Association fights to the last-ditch deposit guarantee provisions of the Glass-Steagall Bill as unsound, unscientific, unjust and dangerous. Overwhelmingly, the opinion of experienced bankers is emphatically opposed to deposit guarantee which compels strong and well-managed banks to pay losses of the weak . . .The guarantee of bank deposits has been tried in a number of states and resulted invariably in confusion and disaster . . . and would drive the stronger banks from the Federal Reserve System.") (quoting Francis H. Sisson, president of the American Bankers Association).

business entirely."[102] However, the available data show that this has not happened, and that in fact, lending activity has increased.[103] The lesson to be learned from this history is that when faced with new regulations, members of the regulated industry routinely argue that the costs and burdens are too heavy—but then they invariably adapt and thrive, while consumers are vastly better off.

- **Disclosures by themselves cannot substitute for strong regulatory requirements and prohibitions.** Opponents of regulation often advance the view that disclosure is the cure-all for fraud and abuse in the financial markets, an approach that supposedly enables consumers to protect themselves. While clear, accessible, and timely disclosures for consumers are a vital part of financial regulation, over-reliance on them at the expense of substantive rules is an enormous mistake. The norm in financial services for many years has been an outright failure to make required disclosures or at best a formalistic approach to disclosure that often does consumers and investors little good: Firms make disclosures hard to find, hard to read, hard to understand, and ill-timed. And some financial professionals use common ploys to belittle disclosures or actually negate them with reassurances that the fine print doesn't actually apply to the client's product, service, or situation. Rarely do firms, or regulators for that matter, seek expert input about to make disclosures truly helpful in content and form for consumers.

  In fact, there is a growing consensus among experts, especially in the area of financial advice but more generally as well, that regulation by disclosure is not only ineffective but also counterproductive. Evidence indicates that disclosures are capable of undermining consumer and investor protection goals by emboldening advisers to ignore the client's best interest once they have "checked the disclosure box," and by rendering investors even more vulnerable to conflicted advice once they receive disclosures.[104]

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102 John Heltman, *Mortgage Rules Not Chilling Market as Feared, Data Shows,* AMERICAN BANKER (Sep. 24, 2015), http://www.americanbanker.com/news/law-regulation/mortgage-rules-not-chilling-market-as-feared-data-shows-1076899-1.html (emphasis added).

103 *Id.*

104 *See* Angela Hung et al., Effective Disclosures in Financial Decisionmaking (2015), *available at* https://www.rand.org/pubs/research_reports/RR1270.html; George Loewenstein et al., *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest*, 101 American Economic Review: Papers and Proceedings 423 (2011); Robert Prentice, *Moral Equalibrium: Stock Brokers and the Limits of Disclosure*, 2011 WIS. L. REV. 1059 (2011) (concluding that disclosures do not give sufficient information to investors and may even cause brokers to give more biased advice); Omri Ben-Shahar & Carl Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011) (finding that disclosure as a regulatory tool has a history of being ineffective); Daylian Cain et al., *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. OF LEGAL STUDIES 1 (2005). Similar findings were presented at a 2017 meeting of the SEC's Investor Advisory Committee, where four panelists discussed the limitations and sometimes counterproductive effects of disclosures as a remedy to conflicts of interests. *See* Meeting of the Securities and Exchange Commission Investor Advisory Committee (Dec. 7, 2017), https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac120717-agenda.htm; Sunita Sah et al., *The Burden of Disclosure: Increased Compliance with Distrusted Advice*, 104 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 289 (2013) (describing 6 experiments revealing that disclosure can increase pressure to comply with advice if the advisees feel obliged to satisfy their advisors' personal interests).

- **<u>Calls for the application of quantitative cost-benefit analysis typically represent attempts to weaken and slow regulation, contrary to what Congress has intended.</u>** For years, opponents of regulation have used cost-benefit analysis as a weapon, deploying it to challenge agency rules in court and urging Congress to impose it on all financial regulatory agencies to encumber their rulemaking process and dilute their rules. In reality, the application of rigorous cost-benefit analysis to financial regulation is fraught with problems. [105]

  Cost-benefit analysis conveys a false impression of precision and objectivity. In fact, cost-benefit analyses are unreliable, especially in financial regulation, because the analysis relies far too much on imprecise predictions and assumptions that are difficult, if not impossible, to make with any degree of accuracy or confidence. Cost-benefit analysis is also inherently biased towards the industry. The costs of regulation are typically concrete and easy to quantify, while the benefits are often diffuse and difficult to quantify or predict. As a result, cost-benefit analysis will often lead to the incorrect conclusion that the benefits of strong regulation are outweighed by the costs, but that is simply the result of bias, not objective fact. And conducting cost-benefit analysis drains agency resources and sets the stage for legal challenges.

  For all of these reasons, quantitative cost-benefit analysis is rarely what Congress has required or intended an agency to apply in the rulemaking process. Whether or not an agency must conduct cost-benefit or economic impact analysis in its rulemakings, and the exact nature of that analysis, is determined by what Congress has actually required in the agency's organic statute. The Supreme Court has declared that an agency's duty to conduct

[105] Better Markets has extensively analyzed the issues surrounding the application of cost-benefit analysis in financial regulation, explaining the legal and policy implications of cost-benefit analysis in reports, amicus briefs, and comment letters. *See, e.g.,* Better Markets, Setting the Record Straight on Cost Benefit Analysis and Financial Reform at the SEC (July 30, 2012), availale at https://bettermarkets.com/sites/default/files/Setting%20The%20Record%20Straight.pdf; Update: Recent Trends in the Law Governing Cost-Benefit Analysis by the Securities and exchange (Dec. 29, 2017), available at https://bettermarkets.com/resources/update-recent-trends-law-governing-cost-benefit-analysis-securities-and-exchange; Brief Amicus Curiae of Better Markets, Inc. in Support of Respondent at 15-25, *N.Y.S.E v. SEC*, No. 19-1042 (D.C. Cir. Aug. 1, 2019), available at https://bettermarkets.com/resources/court-filing-sec-attempts-protect-investors-and-market-integrity-exposing-exchange-pricing; Brief Amicus Curiae of Better Markets, Inc. in Support of the Defendant-Appellant at 25, *MetLife, Inc. v. FSOC*, No. 16-5086 (D.C. Cir. June 23, 2016), available at https://bettermarkets.com/resources/better-markets-amicus-brief-metlife-v-fsoc; Brief of Better Markets, Inc. as Amicus Curiae in Support of Defendant FSOC, *MetLife, Inc. v. FSOC*, 177 F. Supp. 3d 219 (D.D.C. 2016) (15-cv-0045), available at https://bettermarkets.com/resources/better-markets-amicus-brief-case-metlife-v-fsoc; Better Markets Comment Letter to the CFPB on Debt Collection Practices (Regulation F) at 12-13 (Sept. 18, 2019), available at https://bettermarkets.com/rulemaking/better-markets-comment-letter-cfpb-abusive-debt-collection-practices; Better Markets Comment Letter to the Federal Reserve on Resolution Plans Required (Living Wills) at 12 (June 21, 2019), available at https://bettermarkets.com/rulemaking/better-markets-comment-letter-frs-fdic-resolution-plans-required-living-wills; Better Markets Comment Letter to the FSOC on Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies at 5-6, 14-19 (May 24, 2019), available at https://bettermarkets.com/rulemaking/better-markets-comment-letter-fsoc-authority-require-supervision-and-regulation-certain.

cost-benefit analysis is not to be inferred lightly or without a clear indication from Congress.[106] Congress may require cost-benefit analysis, prohibit it altogether, or provide for something in between, such as the duty to "consider" certain factors.

That limited obligation is in fact what Congress imposed on the Bureau—a duty to "consider the potential costs and benefits to consumers and covered persons" when prescribing a rule. 12 U.S.C. § 5512(b)(2). The Supreme Court has long recognized that statutorily mandated "considerations" are not "mechanical or self-defining standards," and that they "in turn imply wide areas of judgment and therefore of discretion."[107] And the D.C. Circuit has reaffirmed this principle. For example, in *Inv. Co. Inst. v. Commodity Futures Trading Comm'n*, a case involving a similar statutory duty to consider factors, the court made clear that "[w]here Congress has required 'rigorous, quantitative economic analysis,' it has made that requirement clear in the agency's statute, but it imposed no such requirement here."[108]

<u>CONCLUSION</u>

We hope these comments are helpful as the Taskforce conducts its analysis and prepares its final report for the Director.

Sincerely,

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[redacted]

106 *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-512 & n. 30 (1981) ("Congress uses specific language when intending that an agency engage in cost-benefit analysis.").

107 *Sec'y of Agriculture v. Cent. Roig Refining Co.*, 338 U.S. 604, 611- 12 (1950) ("Congress did not think it was feasible to bind the Secretary as to the part his 'consideration' of these three factors should play in his final judgment—what weight each should be given, or whether in a particular situation all three factors must play a quantitative share in his computation.").

108 *Inv. Co. Inst. v. Commodity Futures Trading Comm'n*, 720 F. 3d 370, 379 (D.C. Cir. 2013); *see also Nat'l Ass'n of Mfrs. v Sec. & Exch. Comm'n.*, 748 F. 3d 359, 369 (D.C. Cir. 2014).

[redacted]

Appendix A

Total Consumer Restitution by Director			
	Cordray	Mulvaney	Kraninger
# of Cases	201	11	31
Total Consumer Restitution	$ 11,980,130,720.00	$ 345,094,707.00	$ 696,886,346.64
Average Restitution Per Week	43,016,627	$ 6,390,643.00	$ 9,169,557.19
Average Restitution Case	$ 59,602,640.00	$ 31,372,246.00	$ 22,092,187.89

Total Consumer Restitution in Cases Enforcing the Fair Credit Reporting Act by Director			
	Cordray	Mulvaney	Kraninger
# of Cases	24	2	5
Total Consumer Restitution	$ 390,157,992	$0	$ 24,341,301
Average Restitution Per Week	$ 1,400,926	$0	$ 320,280
Average Restitution Case	$ 16,256,583	$0	$ 4,868,260

Total Consumer Restitution in Cases Enforcing the Fair Debt Collection Practices Act by Director			
	Cordray	Mulvaney	Kraninger
# of Cases	20	1	3
Total Consumer Restitution	$ 783,276,813	$ -	$ 36,800
Average Restitution Per Week	$ 2,812,484	$ -	$ 484
Average Restitution Case	$ 39,163,841	$ -	$ 12,267

Total Consumer Restitution in Mortgage-Related Enforcement Cases by Director			
	Cordray	Mulvaney	Kraninger
# of Cases	61	2	4
Total Consumer Restitution	$ 2,969,543,550	$ 268,869	$ 1,311,500
Average Restitution Per Week	$ 10,662,634	$ 4,979	$ 17,257
Average Restitution Case	$ 48,681,042	$ 134,435	$ 327,875

Total Consumer restitution in Student-Lending-Related Enforcement Cases by Director			
	Cordray	Mulvaney	Kraninger
# of Cases	15	0	3
Total Consumer Restitution	$ 712,530,184	$ -	$ 228,000,000
Average Restitution Per Week	$ 2,558,457	$ -	$ 3,000,000
Average Restitution Case	$ 47,502,012	$ -	$ 76,000,000

Total Consumer Restitution in Cases Enforcing the Enforcing the Equal Credit Opportunity Act by Director			
	Cordray	Mulvaney	Kraninger
# of Cases	15	0	0
Total Consumer Restitution	$ 712,530,184	$ -	$ -
Average Restitution Per Week	$ 2,558,457	$ -	$ -
Average Restitution Case	$ 47,502,012	$ -	$ -

Restitution amounts are drawn from Christopher L. Peterson, *Dormant: The Consumer Financial Protection Bureau's Law Enforcement Program in Decline*, Consumer Federation of America (Mar. 2019), available at https://consumerfed.org/wp-content/uploads/2019/03/CFPB-Enforcement-in-Decline.pdf, and from publicly available CFPB enforcement filings, available at https://www.consumerfinance.gov/policy-compliance/enforcement/actions/.