CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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The Honorable Richard Cordray
Director
Consumer Financial Protection Bureau
1801 L Street, NW
Washington, DC 20036

Dear Director Cordray

You have said on a number of occasions that legitimate businesses have nothing to fear from the CFPB, provided they play by the rules. Our concern, however, is that in many cases, those rules remain ambiguous because terms are undefined, and the regulatory and supervisory processes are overlapping and inconsistent.

In many ways, the creation of the CFPB, with its broad responsibility for overseeing supervision, regulation, and enforcement of existing consumer financial protection laws, and the implementation of new federal standards, has made it more, rather than less difficult for companies to know what is expected of them. And while a measure of uncertainty is unavoidable under these circumstances, the CFPB can do more to help honest companies navigate this difficult "start up" phase of the CFPB's work without compromising its ability to protect consumers from fraud.

The Bureau has already taken a few very helpful, productive steps to clear the air that we applaud, and we hope these examples can be replicated in other areas. First, the regulatory streamlining project the CFPB has undertaken demonstrates a desire to reform and simplify your patchwork regulatory system. Second, the Memorandum of Understanding (MOU) the CFPB signed with the Federal Trade Commission (FTC) following consultations with representatives of the business community could be a good first step toward preventing duplicative enforcement and inconsistent standards. And third, the Bureau has been very helpful in clarifying its position on the protection of privileged supervisory information shared with the Bureau and has been an ally in our push for a decisive legislative solution. These

efforts have been well received because the CFPB recognized the potential for legitimate confusion or concern from the business community, and undertook a public, transparent process to simplify and clarify its processes and intentions.

Unfortunately, the Bureau has also taken a number of steps that have caused confusion and uncertainty in the business community. For example, including enforcement personnel in examination teams is unprecedented, and transforms the examination process from the cooperative exchange of information that has been the hallmark of federal bank examinations into an adversarial process overseen by lawyers on both sides that inevitably will be less informative and less productive in terms of promoting candid consultations that will enhance compliance. And the Bureau released a bulletin stating that companies can be held liable for the actions of their service providers, without explaining the standard governing this sort of vicarious liability—surely the Bureau does not intend a strict liability standard, but it did not explain the level of oversight that it expects companies to maintain. Opaque releases of this type simply create uncertainty and confusion and do nothing to promote compliance with the law.

We are proposing 12 additional concrete steps the CFPB should take to improve its supervision and regulatory processes, and to give some much needed clarity to American businesses who only want to follow the rules.

1. **Define "Abusive"**

The CFPB should issue, following an opportunity for public input, a policy statement defining the conduct that constitutes an "abusive" act or practice in the consumer financial market. This is particularly important because State AGs and state regulators can bring enforcement actions based on the "abusive" standard, and it is the Bureau's responsibility to ensure the law is enforced consistently and disparate standards do not impose excessive compliance burdens and fragment our national credit market at a time when it is already under serious strain. A policy statement defining the term—similar to the FTC's policy statement issued by the FTC defining the Commission's consumer "unfairness" authority—will help to prevent divergent interpretations of the "abusive" standard around the country, and provide much needed clarity to legitimate businesses trying their best to ensure that their actions comply with the law.

2. Explain Covered Person Liability for Service Provider Actions

If the CFPB intended to create a new liability standard in its April 12, 2012 bulletin, then the Bureau should propose and finalize a regulation with public input to establish clear guidelines delineating the circumstances in which companies can be held liable for the acts of their service providers. The April CFPB bulletin stated "[d]epending on the circumstances, legal responsibility may lie with the supervised bank or nonbank as well as with the supervised service provider," but provides no guidance regarding the "circumstances" that the Bureau deems relevant. Surely a random act of negligence by a well-supervised service provider cannot be attributed to the supervised bank or nonbank—but the bulletin provides no information regarding the selection and monitoring procedures that the Bureau believes that a bank or nonbank should put in place to protect against this liability. Again, a company trying its best to comply with the law is left without any guidance whatsoever. If, however, the CFPB did not intend to create a new liability standard, then that should be clearly communicated to the public.

3. Supervision

The CFPB should take steps to ensure an open, efficient, coordinated supervision program. Specifically:

a. The CFPB should cease the practice of bringing enforcement attorneys to examinations. This fundamentally alters the supervisory relationship, transforming it into an adversarial proceeding. If the goal of the supervision process is an open exchange of information between the Bureau and the companies it supervises, this practice is counterproductive.

b. The CFPB should adopt the OCC standards for sharing confidential supervisory information, including an express presumption against disclosure; specific procedures for requesting disclosure of such information; distinctions between federal and state financial institution supervisory agencies, and other government agencies, which must make a showing of need in order to obtain such information; and requirements

that requestors generally must agree to protect the confidentiality of any information provided to them.

c. The CFPB should scope their exams before supervisory action commences and communicate such information to covered firms, thereby making clear to regulated entities what to expect, and the CFPB and other supervisory agencies should accept feedback on the process and substance of the exam, including breakdowns, duplication, etc.

d. The CFPB should make it clear that, until notified otherwise through new regulation, compliance with pre-Dodd Frank laws and standards (including informal guidance) that transferred from other agencies is sufficient.

e. The CFPB should not attempt to regulate through supervision, or to use the supervision process to coerce changes in products or practices based on secret "standards" that have not been adopted through the public notice-and-comment process. Similarly, the Bureau should not invoke new, undefined standards—such as "abusive"—in the supervision process to pressure for changes in company activity that those standards do not in fact require as a matter of law. It is unclear whether companies today are being held to higher, one-off standards, or whether these standards are being equitably applied to all supervised entities.

f. The CFPB should conduct focused examinations, requesting only the data needed to ensure compliance with applicable consumer protection laws, rather than demanding huge volumes of extraneous data about other non-consumer lines of business.

4. Fix the Process for Publishing Company-Specific Complaint Information

The CFPB should halt the practice of publishing company-specific complaint information until a few fundamental changes are made to the database to ensure the government is not disseminating misleading information. The CFPB should take stronger steps to verify complaints of all kinds, regardless of whether the complaints are made public, to protect the integrity of the database and to ensure enforcement

targeting based on the database is reliable. One way to guard against fraudulent or malicious manipulation of the database is for the CFPB to publish only company-specific figures related to the resolution of complaints. This will help to ensure the validity of the underlying complaint, and help to ensure the information is actually useful to consumers.

5. **Cost Benefit MOU with the White House Office of Information and Regulatory Affairs (OIRA)**

The CFPB should sign an MOU with OIRA to ensure the Bureau's cost benefit analyses are rigorous and complete. In May, 2012, following two lawsuits challenging the CFTC's analytical work and a letter from a Commissioner to OIRA asking for assistance, the Commission signed an MOU with OIRA to improve its regulatory process and output. The SEC has had similar problems conducting proper cost-benefit analysis. The Bureau will save time and taxpayers' money if it puts in place a process to ensure that its analytic approach is correct from the outset.

6. **Improve and Consistently Apply Small Business Impact Provisions of Dodd Frank**

The CFPB should take a number of steps to better comply with the Section 1100(g) requirements to consult, and mitigate small business impact as part of the rulemaking process. Specifically, the CFPB should:

a. Immediately convene a small business panel to discuss the implications of the "larger participant" proposed rule for small business access to credit

b. Commit to convening panels and reproposing rules that transferred to the CFPB from other agencies (e.g., the Fed's QM rule) when the Bureau believes there will be a significant impact on a substantial number of small businesses

c. Ensure that Small Entity Representatives on all panels going forward have adequate time to prepare responses to the Bureau's questions

d. Publish panel reports when they are completed, rather than holding them to be released as part of a proposed rule

7. Improve Regulatory Review

The CFPB should address the recommendations made by GAO in its November 10, 2011 report, including developing formal plans for retrospective review of Dodd Frank rules, and taking steps to ensure OMB's regulatory guidance is followed carefully.

8. Improve Coordination with the FTC

The CFPB should provide an update on the implementation of its February 6, 2012 MOU with the FTC, and engage stakeholders to help assess the agencies' effectiveness in preventing duplication and conflicts between the regulators, and to develop recommendations for strengthening the MOU to draw a brighter line between the responsibilities of the two agencies.

9. Ensure the Arbitration Study is Comprehensive

As we suggested in our June comment letter, the Bureau should make it clear that its study will look at pre-dispute arbitration in comparison to the alternative—litigation. Any analysis of arbitration must be informed by the costs and benefits of eliminating arbitration and leaving only the remedies available through the judicial system.

10. Update Interim final Rules (IFR):

The CFPB should make clear whether it intends to make changes to IFRs based on public comments the Bureau sought. The CFPB has published a number of IFRs as a means of preventing the delay of certain activities. However, it has asked for comment as part of those IFRs and some rules have not been updated. This makes it difficult to know if the rules are truly final, and whether the CFPB read and considered public comments. A number of critical issues were raised through IFRs, including the treatment of confidential information.

11. <u>Publish more Organizational Information on your Website</u>

The Bureau should be taking practical steps to facilitate compliance with the inherited regulations (such as publishing a staff directory or other information that identifies the person or persons responsible for each relevant subject-matter area, statute, or regulation; and improving access to regulatory information on the Bureau's website). These measures would require few resources and would help facilitate compliance with the existing regulations.

12. <u>Publish and Update a Market-Based Regulatory Schedule</u>

The CFPB should publish and periodically update a schedule of proposed and final rules by market. The CFPB, like other agencies, publishes a regulatory agenda twice a year, but the agenda does not set forth a logical, practical schedule for the Bureau's rule writing that takes into consideration sequencing issues and market connections between rules that must be addressed.

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Congress created the CFPB to get rid of fraud in the marketplace, not to bog down the consumer financial product and service market with red tape and uncertainty that will make an already lean credit market unworkable. The CFPB has shown that it can be sensitive to reasonable concerns about regulatory uncertainty and inefficiency. By taking these additional steps, the CFPB will make clear its commitment to transparent, efficient supervision and regulation, and give honest businesses clear, consistent standards so they can continue to help consumers and small businesses access the credit they need.

We thank you for consideration of these comments and would happy to discuss these issues further with you or your staff.

Sincerely,

David Hirschmann