CONSUMER FINANCIAL PROTECTION BUREAU

Working Towards Fundamental Reform

Center for Capital Markets Competitiveness

CENTER FOR CAPITAL MARKETS COMPETITIVENESS®

MISSION STATEMENT

The Center for Capital Markets Competitiveness's (CCMC) mission is to advance America's global leadership in capital formation by supporting diverse capital markets that are the most fair, transparent, efficient, and innovative in the world. CCMC advocates on behalf of American businesses to ensure that legislation and regulation strengthen our capital markets allowing businesses—from the local flower shop to a multinational manufacturer—to mitigate risks, manage liquidity, access credit, and raise capital.

TWITTER: @USCHAMBERCCMC | WWW.CENTERFORCAPITALMARKETS.COM

PREAMBLE

The U.S. Chamber of Commerce (Chamber) is releasing several recommendations to the Consumer Financial Protection Bureau (CFPB or Bureau) in an effort to support the agency's mission to protect consumers and to ensure clear, predictable, and efficient practices for market participants while eliminating unnecessary ambiguity. An effective CFPB will have two mutually reinforcing roles: to protect consumers against bad actors and to enable consumers to make informed decisions to responsibly access credit.

This is one in a series of reports that the Chamber has released on reforming agencies. Past reports have included recommendations on Securities and Exchange Commission (SEC) reforms, transparency and due process improvements for the Federal Reserve Board and other banking regulators, and changes for self-regulatory organizations' rulemaking procedures.

The intention of this report is to improve consumer protection, create clear rules of the road for market participants, improve the management of the agency, and ensure that the CFPB is accountable to the American taxpayer, as is every other part of the federal government.

It would be a mistake to misinterpret any of these recommendations as calling for reduced consumer protection either by weakening enforcement or creating barriers to prevent vigorous actions by the CFPB to stop or prevent wrongdoing. Consumers will only buy goods and services if they have a comfort level within the marketplace, and businesses can only exist if consumers are willing to patronize them. A strong and fair cop on the beat is needed for this system to work properly.

EXECUTIVE SUMMARY

Any consumer protection agency, including the CFPB, has a three-part mission:

1. Ensuring consumers have access to the marketplace and choice in products and services;
2. Promoting the availability of information that consumers can use to make informed decisions;
3. Providing protection against bad actors.

Sound consumer financial protection regulation plays an important role in the strength and availability of markets for these products. This is even more important for the CFPB, since consumer financial products are also used by entrepreneurs and small businesses to start new firms or fund existing ones. However, we must be clear that the CFPB's directive is to regulate consumer financial services, not small business lending.[1] Clear rules of the road allow competition to flourish, giving consumers' affordable access to the safe products they want and need. Likewise, effective regulation can help ensure that consumers receive clear, concise, and accurate disclosures about financial products and have access to robust consumer education programs. And of course, financial fraud and other predatory behaviors have no place in these critical markets. It is important for policymakers to develop programs to prevent fraud and predatory conduct while allowing consumers to make their own decisions based on accurate, understandable information.

Since the inception of the CFPB, we have been concerned that the Bureau has not achieved the proper balance.

The CFPB has failed to develop a coherent set of regulations to provide marketplace participants with clear rules of the road. Instead, the CFPB sought to regulate through litigation or settlement agreement—suing businesses without having rules on the books. Despite legal safeguards such as the Administrative Procedure Act (APA) and basic forms of due process, it has been reported that Sen. Elizabeth Warren (D-MA) said: "I don't like rules. Rules are like fence posts in the prairie—easy to get around. I prefer to make policy through enforcement."[2] In fact, the CFPB has tried to regulate industries, such as the auto industry, which Congress expressly exempted from the agency's jurisdiction. Furthermore, in using the theory of disparate impact, the CFPB sought to provide consumers with compensation despite the fact that there were no injuries. It was reported that a former CFPB official said, "[w]e wanted to send a message: There's a new cop on the beat. … Pushing the envelope is a loaded phrase, but that's absolutely what we did."[3]

During this time, the CFPB's unusual structure and funding mechanism placed it outside normal checks and balances, leading to significant managerial shortfalls. One example is the renovation of its headquarters that was announced in 2010 with a cost of $55 million. A Federal Reserve inspector general report estimated that the costs could actually top $215 million.[4]

This has led to various legal challenges that have called into question the structure of the agency and the lack of appropriate due process in decision-making and enforcement.

These flaws—lack of clear rules of the road, an unaccountable director, and lack of due process—are serious but correctable. We believe that our recommendations provide a blueprint to do just that.

Our recommendations offer a series of concrete steps to ensure that the CFPB fulfills its statutory mandates to faithfully implement and enforce federal consumer financial laws, while putting in place the controls needed to be a properly managed and effective agency.

Specifically, the Bureau and Congress should make reforms in the following six areas:

A. Provide Clear Rules of the Road
B. Enforce the Law Fairly
C. Educate Consumers with Accurate, Data-Driven Information
D. Commit to Transparency
E. Avoid Regulatory Duplication and Burden
F. Structure the Bureau for Long-Term Success

A. Provide Clear Rules of the Road

Robust competition on a level playing field enables consumer access to the innovative products they want at reasonable prices. Companies thrive when they can chart a clear path forward, but such competition cannot flourish when companies do not know the rules of the road. Uncertainty creates confusion in the marketplace, and consumers ultimately lose out because responsible, compliance-minded companies hesitate to invest in new products and services when they are unsure of the potential legal ramifications. This outcome is as unnecessary as it is unfortunate, because the Bureau has many tools to provide clear rules of the road. We urge the CFPB to use them going forward.

Recommendation 1: Promulgate regulations. Notice-and-comment rulemaking under the APA is the best tool for setting regulatory policy. It provides formal opportunities for engagement by

all stakeholders, in addition to procedural and judicial safeguards. To be clear, it is not perfect. The process can be too cumbersome in some contexts and abused in others. Still, the rulemaking process should be the Bureau's default tool for setting binding policy.

Recommendation 2: Avoid rulemaking by enforcement. Businesses work hard to understand and comply with the countless rules governing consumer financial services. It is unreasonable and inappropriate to expect companies to draw generally applicable legal principles from the limited facts included in a consent order. The Bureau should only use enforcement actions to sanction conduct that violates established legal principles and should clearly state that enforcement actions will not be used to create policy.

Recommendation 3: Limit the use of informal guidance. Best practices, advisories, and other forms of informal guidance can support public-private collaboration, provide views on emerging issues, or give a sense of regulatory priorities. However, the CFPB should refrain from using informal guidance to move markets and create new policy. The Bureau should approach informal guidance with regulatory humility, consider stakeholder views where possible, and avoid treating its preferences as de facto legal standards.

Recommendation 4: Use sound economic analysis in the rulemaking process. In addition to abiding by the APA and providing for meaningful opportunities for stakeholder input, the Bureau must base its regulations on robust evidence, including sound economic analysis, and make sure that its rules are workable, even if it takes more time to get them right. Regulations and policy do not operate in a vacuum, and the Bureau must fully understand the potential unintended consequences before finalizing a rulemaking, which includes conducting sound cost-benefit analyses.

Recommendation 5: Eliminate areas of substantial legal uncertainty. The Bureau should not leave businesses guessing as to the meaning of central aspects of its authority. For example, it should clarify what constitutes an "abusive" act or practice and the extent of a business' liability for the acts of its service providers.

Recommendation 6: Adopt a robust no-action letter and advisory opinion process. The Bureau should expand its limited no-action letter process to bring it in line with the processes used by peer regulators. The Bureau also should create a new process for issuing advisory opinions when companies have questions about a legal provision or are requesting an interpretation of an unclear aspect of the law.

B. Enforce the Law Fairly

Congress granted the CFPB substantial authority over a wide range of consumer financial services companies. Congress also established that the Bureau has an equivalent responsibility to use its powers to support fair and transparent markets. The Bureau should meet that responsibility by putting fairness at the heart of its approach to investigations, enforcement actions, administrative adjudication, and supervision.

Recommendation 7: Respect the bounds of the Bureau's authority. The Bureau should recognize that reaching beyond the statutory limits on its authority—even when it can achieve what it believes to be the "right" outcome—delegitimizes the Bureau, sends shockwaves through industries who are not expecting Bureau involvement, and is contrary to the rule of law.

Recommendation 8: Give companies fair notice of what the law requires. The Bureau should not change settled interpretations of the law through enforcement or supervisory processes. Rather, it should provide fair notice and due process, as the Constitution requires, before penalizing previously lawful conduct.

Recommendation 9: Respect statutes of limitations. Congress enacts statutes of limitations to ensure that conduct is subject to regulatory scrutiny during a defined period of time and that companies are not punished if rules are changed down the road. The Bureau should recognize the important ways statutes of limitations ensure fairness in the regulatory system and should give them the deference they deserve.

Recommendation 10: Reform the investigative process. The Bureau should focus its investigations on clearly defined topics with an articulated scope and purpose. It should not undertake untargeted fishing expeditions or use burdensome investigations to bully target companies. Rather, the Bureau should adopt common-sense reforms to reduce unnecessary burdens in an investigation, develop reasonable time frames for responses, and allow for meaningful internal review of claims of overreach.

Recommendation 11: Ensure the adjudication process is fair. Administrative adjudication by the Bureau should provide a fair hearing to all parties. Reforms should focus on building appropriate checks into the administrative adjudication process so that it does not function as an extension of the Bureau's enforcement division.

Recommendation 12: Reform supervision. The Bureau should reform its approach to supervisory examinations to ensure that standards are applied consistently and fairly across companies, information requests are not unduly burdensome, and examinations are completed in a timely manner. Further, the Bureau should coordinate exams with the prudential regulators to ensure there is minimal overlap.

C. Educate Consumers with Accurate, Data-Driven Information

The Bureau's words and actions carry enormous influence in the marketplace, which is why it is imperative that it act judiciously and only publish information that is accurate and appropriately vetted. In particular, it should enhance its consumer education function through effective collaboration with industry stakeholders and refrain from publishing complaint data that is misleading and unverified. Taking these critical actions will paint a more accurate picture of the financial services landscape and lead to more-informed consumers.

Recommendation 13: Emphasize consumer financial education. The Bureau should expand its consumer education work to help consumers make the best financial decisions for their unique needs. In doing so, the Bureau should draw upon companies' financial education initiatives and close relationships with their customers and employees. Many financial services companies have robust financial education tools and programs. The Bureau should partner with these organizations to maximize resources, which will ultimately better serve consumers.

Recommendation 14: Reform the complaint database. The Bureau should avoid confusing consumers by publishing misleading complaint data. The Dodd Frank Wall Street Reform and

Consumer Protection Act (Dodd-Frank Act) mandates the collection of complaints but does not require the Bureau to publish them. For years, we have voiced concern about publishing unverified data. Further, we have serious concerns about the privacy risks of sensitive data being breached or re-identified. We believe the Bureau should refrain from publishing the data until these issues have been resolved. At a minimum, it should remove clearly erroneous content, encourage customers to first reach out to companies, and stop publishing misleading reports based on the database.

D. Commit to Transparency

The Bureau should welcome an open dialogue with all of the stakeholders in the consumer financial services market, whether consumers, market participants, members of Congress, or other stakeholders. While there might be sensitive information that the Bureau cannot release without redaction or some delay, the Bureau should strive to be open with the full range of stakeholders and truly listen to their concerns.

Recommendation 15: Facilitate appropriate congressional oversight. While policy disputes regarding the Bureau remain, honest and reasoned discussion will help build trust on both sides of the aisle. The CFPB should support appropriate congressional oversight since it offers a more secure foundation for the Bureau's long-term success.

Recommendation 16: Facilitate meaningful public dialogue. The Bureau should not shield itself from public engagement by holding highly scripted discussions with no chance for actual engagement. It instead should look to the examples of other peer regulators to foster authentic public discussion of critical regulatory issues. Only through a constructive dialogue with multiple viewpoints will the best policies be forged.

Recommendation 17: Reorganize the Consumer Advisory Board. In the vein of open dialogue, the Bureau should reorganize the Consumer Advisory Board (CAB) to hear from multiple stakeholders, including financial institutions. While there are a few financial institutions on the CAB, it is not an even balance, and the other participants would benefit from understanding how the industry works. Hopefully, with candid dialogue between opposing views, the CAB will tackle challenges and find solutions that benefit consumers most.

Recommendation 18: Rescind the proposed gag order. The CFPB has proposed a rule that would prevent businesses from disclosing civil investigative demands (CIDs) The U.S. Chamber of Commerce and other stakeholders view this as a violation of businesses' free speech rights.

E. Avoid Regulatory Duplication and Burden

The consumer financial services market is regulated by multiple federal agencies. A lack of coordination among these agencies can impose substantial unnecessary costs on a business or—even worse—put it in the impossible position of trying to meet contradictory expectations. The Bureau should prioritize avoiding such regulatory duplication given the wide range of authorities it holds and the manner in which many overlap with those of other regulators. In particular, the Bureau should:

Recommendation 19: Coordinate regulatory activities with other agencies. The Bureau should coordinate with other regulators across all of its functions. Such coordination will support the development of coherent regulatory policy while avoiding unnecessary disruption of other regulators' activities and duplicative burdens on industry members.

Recommendation 20: Defer to regulators with primary authority. The Bureau does not need to be the leader in every field. Instead, it should focus on its areas of core competence and defer to other agencies with longstanding expertise and experience regulating other market segments.

Recommendation 21: Avoid unnecessarily burdensome information requests. Unnecessarily burdensome information requests can create huge costs for companies and create data-security risks for consumers. The Bureau should gather information only when authorized by law and where the benefits clearly outweigh the associated costs and risks.

F. Structure the Bureau for Long-Term Success

Consumers and market participants will benefit in the long run from the stable regulation of consumer financial products and services. While political changes affect any independent agency, sound financial regulatory policy will not be achieved if priorities change substantially every five years. Consequently, Congress should reform the CFPB structurally so it can develop a stable regulatory approach over time. To achieve that goal, Congress should:

Recommendation 22: Adopt a commission structure. The Bureau was initially conceived of as a multimember commission like many of its peer regulators. Nothing has justified the subsequent decision to create a unique leadership structure for the Bureau with a single, enormously powerful director. Congress should bring the structure of the Bureau in line with that of other independent regulators that have bipartisan commissions.

Recommendation 23: Institute congressional control over the Bureau's budget. Congress should place the CFPB in the regular appropriations process and exercise meaningful oversight over the Bureau. Only with congressional oversight will the Bureau be subject to the will of the people instead of strictly a sole director's whim.

Conclusion

In adopting these recommendations, as well as those made by others, the Chamber believes that the CFPB will achieve its intended purpose of providing consumers with access to products, decision-useful information, and protection. At the same time, entrepreneurs and small businesses will be able to use consumer financial products to start new ventures or fund existing businesses. This will help consumers as well by helping to raise all ships in a rising tide of economic growth. These changes will make the agency more effective in achieving that mission and allowing for an efficient marketplace that will benefit consumers and the businesses that provide them with financial goods and services.

INTRODUCTION

Consumer financial products and services allow countless Americans to achieve their goals by allowing them to start the businesses they have always dreamed of, afford the cars they need to get to their jobs, build equity in their homes, or go to college. Credit cards enable consumers to participate fully in today's credit-based and digital economy, while building the credit necessary to finance a large purchase such as a home or car. Bank accounts and prepaid cards allow millions of people to safely receive and store their hard-earned paychecks. The list goes on. From payment processing to student lending, real estate settlement services to money transmitting, consumer financial products and services are part of the fabric of 21st-century life.

It is important that policymakers remember that consumers not only benefit from strong consumer protections, but also from a robust marketplace with access to a broad range of competitive financial products and services. Choice empowers consumers, allowing them to find the right product to serve their unique needs. Finding the balance between supporting consumer choice and maintaining consumer protections is critical, because regulatory overreach or uncertainty can make it harder and more expensive for consumers to access the products they rely on. Thus, it is vital that policymakers ensure that competitive and fair markets flourish within the bounds of clear and consistently enforced rules. By doing so, policymakers prevent fraud and predatory conduct while allowing consumers to make their own decisions based on accurate, understandable information.

The U.S. Chamber of Commerce strongly supports sound consumer protection regulation that deters and punishes financial fraud and ensures that consumers receive clear, concise, and accurate disclosures about financial products. Everyone—businesses as well as consumers—benefits from a marketplace free of fraud and other predatory practices.

The Chamber also firmly believes that consumers benefit from access to a broad range of competitive financial products and services. To be clear, choice and strong consumer protections are not mutually exclusive. Choice empowers consumers, allowing them to find the product that will best allow them to go to college, participate in the digital economy, build equity in their homes, or deal with financial adversity. A regulator's responsibility is to ensure that competitive and transparent markets flourish within the bounds of clear and consistently enforced rules of the road. That allows consumers to make their own decisions based on accurate, understandable information.

Notably, Congress shared this belief when it established the Consumer Financial Protection Bureau in passing the Dodd-Frank Act. It specifically tasked the Bureau with implementing and enforcing "federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and those markets for consumer financial products and services are fair, transparent, and competitive."[5]

Over its first six years, the Bureau has moved rapidly across—and often beyond—its full range of authorities. Those aggressive actions have come at a cost. While we recognize the hard work and challenges associated with building a regulatory agency, it is impossible to ignore that the Bureau fell short of its statutory mission in important respects. These shortcomings have included:

The failure to clarify governing rules in a wide range of areas;

- The use of enforcement actions, rather than rulemakings, to create wholesale changes in regulatory policy;

- Overreach beyond the bounds of the Bureau's authorities, including through the use of bullying enforcement tactics;
- Limited emphasis on consumer education and the dissemination of inaccurate information into the marketplace;
- A preference for secrecy over transparency in the Bureau's engagement with Congress and other stakeholders; and
- Unnecessary regulatory duplication because of the Bureau's overreach and lack of coordination with other regulators.

A. Provide Clear Rules of the Road

The Bureau should provide clear rules of the road that allow financial services companies to compete vigorously on a level playing field. Keeping the rules opaque may allow the Bureau to bring "gotcha" enforcement actions, but it turns compliance efforts into a gamble, causing responsible companies to limit consumer access to products and leaving irresponsible companies to fill the void. The Bureau must prevent this unfortunate outcome by following the formal rulemaking process, developing new tools for clarifying legal requirements, and refraining from using enforcement actions to establish broadly applicable policy.

Recommendation 1: Promulgate regulations.

The Bureau has repeatedly used enforcement actions and informal guidance to make new policies. This approach has caused uncertainty about the rules governing regulated companies, creating new costs for businesses that are passed on to consumers or reducing access to preferred products. We believe that when the Bureau identifies areas in which it wants to fundamentally alter the rules, it should take the time to write new rules. Not only is this our belief, it is also required under the APA. While there may be circumstances in which a rulemaking is not feasible, the Bureau should make rulemaking its default choice for changing regulatory policy.

The Bureau is tasked with protecting consumers and supporting a well-functioning and transparent financial services market. It must carefully explore the effects of contemplated actions on consumers and the markets as it works to make informed, balanced decisions, including considering unintended consequences and conducting sound cost-benefit analyses. Indeed, the Bureau's use of the rulemaking process, while not perfect, has led to better outcomes than setting standards through informal means. Thus, as early as 2013, the Bipartisan Policy Center explained:

> [W]hen the Bureau operated in a transparent, open, and iterative manner, repeatedly seeking input from all stakeholders throughout a process, the results were generally positive. However, when the Bureau made unilateral decisions, rolled out initiatives, rules, or processes as a result of a more closed, internal deliberation process, the results were far more likely to be problematic.[6]

The Bipartisan Policy Center further noted that "[a]ll stakeholders, including regulated entities, would benefit substantially if the CFPB emphasized rule-making rather than guidance and consent orders."[7] Businesses subject to the Bureau's jurisdiction are spending billions of dollars annually to design and maintain sophisticated systems to ensure their activities comply with the many standards governing the consumer financial services marketplace. They should not also be forced to play an additional guessing game to anticipate new standards. The Bureau should promulgate transparent rules to create strong consumer protections while minimizing the guesswork.

Recommendation 2: Avoid rulemaking by enforcement.

The Bureau has used enforcement actions and consent orders in an attempt to establish new policies in a wide range of fields, including credit-card add-on products, indirect auto lending, and debt sales. This approach has led to unnecessary confusion, regulatory duplication, and uncertainty, which in turn have yielded increased costs and decreased opportunities for customers. While the Bureau has defended this practice, we think the rulemaking process produces far better regulatory outcomes. We therefore encourage the Bureau to shift from the previous regulation-by-enforcement approach to one involving greater transparency and collaboration with a full range of stakeholders.

Reliance on consent orders to establish new policies is problematic for an array of reasons. Unlike rulemaking, consent orders do not announce rules of general applicability, and instead are based on a unique fact scenario. Moreover, consent orders represent only the Bureau's view of the law and have no judicial imprimatur. Indeed, the fact that a company agreed to enter a consent order does not mean it would necessarily be found liable in a court. The Bureau's aggressive enforcement tactics and companies' general reluctance to litigate with their regulators combine to make it regrettably common for companies to agree to the Bureau's overreach to settle the matter.

We urge the CFPB to put in place reasonable procedures to protect against rulemaking by enforcement. First, we urge the Bureau to make sure that it is only enforcing established law before bringing any enforcement action. For example, the Bureau could require that any internal memorandum seeking authorization to bring an enforcement action also explain how the targeted company should have known that its conduct violated the law. Second, we would urge the Bureau to make statements in consent orders, or contemporaneously, that emphasize that a consent order does not attempt to establish any rule of general applicability. (Conversely, the Bureau should refrain from making statements in accompanying statements that suggest that companies should draw particular standards from a consent order.) Third, should the Bureau believe it important to articulate a general, prospective principle relating to conduct at issue in a consent order, we would urge the Bureau to seek notice and comment on such a principle before enforcing it in future actions. More broadly, we also would urge the Bureau to recognize the complexities associated with regulatory compliance. It should abandon its simplistic notion that a company can draw meaningful lessons from consent orders that omit countless relevant facts and generate many more questions than answers.

Recommendation 3: Limit the use of informal guidance.

In addition to rulemaking, the Bureau can convey its views through the issuance of informal guidance and best practices. These tools can be helpful when used prudently. They can provide initial views of an emerging regulatory issue, distill best practices developed in collaboration between the Bureau and industry stakeholders, or provide a sense of regulatory priorities.

However, the Bureau has used publication of best practices and informal guidance to announce new policies without soliciting input from stakeholders, which has created tremendous uncertainty in the financial services industry. Letters from the Bureau to financial institutions "urging" them to take a particular action not required by law, for example, raise questions about what will happen if they do not take the action requested. Since the Bureau has not been informed by public comment, its issuances often fail to take into account practical realities, causing significant confusion. Thus, in announcing its preference that credit card companies provide credit scores to borrowers, the Bureau left countless unanswered questions as to how the companies were supposed to meet that expectation without misleading consumers about the actual credit scores used in underwriting decisions (not to mention why credit card companies should take this step in the first place). Likewise, the Bureau's advisory regarding fair lending in indirect auto lending created enormous uncertainty on all but one point: that the Bureau was trying to move the market without undertaking a necessary rulemaking.

The Bureau should acknowledge that its preferences are nothing more than that—and that they certainly should not be elevated to the status of de facto legal requirements. Instead, the Bureau should bring regulatory humility to its use of informal guidance. In particular, the Bureau should provide opportunities for notice and comment whenever possible before issuing such policy pronouncements. Likewise, the Bureau should ensure that any resulting policy statements leave companies with flexibility on how to meet any stated policy.

Recommendation 4: Use sound economic analysis in the rulemaking process.

The Bureau's rulemaking record reflects both successful use of notice and comment rulemaking and significant departures from rulemaking best practices, which were most notable in its arbitration rulemaking. The Bureau should learn from these experiences as detailed below.

Provide real opportunities for stakeholder input.

The Bureau should embrace the benefits of providing stakeholders notice of and opportunities to comment on proposed policies, whether developed through rulemaking or less formal processes. It should not treat those opportunities for comment as mere formalities or provide them only in circumstances where they are strictly required. Instead, the Bureau should ensure that stakeholders have meaningful opportunities to comment at all appropriate times during a policymaking process—not just "check the box" meetings.

The Bureau unfortunately provided a case study on how not to provide stakeholders an opportunity for input during its failed arbitration rulemaking process. For example, the Chamber and other stakeholders repeatedly asked the Bureau for more opportunities to provide feedback on the study process. Specifically, in June 2012, the Chamber urged the Bureau to prepare and publish a draft study plan describing the substantive issues to be addressed in the study, to employ roundtables with interested stakeholders, and to solicit additional input on its draft conclusions before releasing its final study. The Bureau unfortunately chose another path. As 13 senators and 61 representatives explained:

> The Bureau ignored requests from senior Members of Congress for basic information about the study preparation process. The Bureau also ignored requests to disclose the topics that would be covered by the study, and failed to provide the general public with any meaningful opportunities to provide input on the topics. Because the materials were kept behind closed doors, the final Arbitration Study included entire sections that were not included in the preliminary report that was provided to the public.[8]

This failure to allow stakeholder comment in the early stages of the process infected the rest of the Bureau's arbitration rulemaking. It not only undermined trust in the Bureau's willingness to work in good faith with stakeholders of diverse views, but it also ensured that glaring weaknesses in the study's approach were not addressed. The result was the creation of a deeply flawed foundation for an equally flawed rule that was rejected under the Congressional Review Act.

We ask the Bureau to learn from these past mistakes and refrain from making them again. It should

ensure that stakeholders have adequate opportunity to comment at all critical stages of a rulemaking. In particular, we urge the Bureau to allow public comment before proposed rules are issued and to solicit comment on the evidence that the Bureau intends to rely on in developing a rule.

Engage in evidence-based rulemaking.

Federal rules can move industries and dramatically affect lives. Even a small detail in a Bureau rule, for example, can mean the difference between a consumer having access to a mortgage or being unable to buy a house. The enormous significance of Bureau rulemaking demands that any rule not be based on speculation or personal preferences. Instead, it must be based on sound evidence that supports informed judgments about the effects of the proposed rule in the marketplace.

The Bureau has asserted that it is a data-driven agency. Unfortunately, its record on evidence-based rulemaking tells a different story. As above, the Bureau's arbitration rulemaking provides a useful example. There, the Bureau had a specific statutory duty to study consumer arbitration. Even so, it pursued a study that focused on the wrong issues and thus failed to gather data about the relevant questions. The Bureau's own rulemaking, in fact, revealed these inadequacies. Thus, one of the key components of the Bureau's proposed rule was a requirement that arbitration providers submit information about individual arbitrations to the Bureau, which would publish and study the data in order to "better understand arbitrations that occur now and in the future and to ensure that consumers' rights are being protected."[9] But this aspect of the proposal raised an obvious question: If the Bureau believed it would benefit from a greater understanding of arbitration, why did it not elect to collect this type of information about arbitration and wait to impose additional regulation until it could be truly confident in its conclusions?[10]

Going forward, the Bureau should ensure that its rule writers, proposals, and studies ask the right questions and that it has adequate evidence to answer them conclusively before writing the rule. The Bureau should not repeat the mistake of imposing a rule and planning to collect data to justify that rule after it goes into effect.

Ground rulemaking in sound economic analysis.

The Bureau should conduct robust economic analysis of proposed rules to ensure their benefits outweigh their costs. The Bureau must understand how a given rule will work in the real world if it is to have the desired effect, and the Bureau must understand what the unintended consequences might be in order to mitigate them. A rigorous cost-benefit analysis, grounded in facts, is essential to ensure that rules actually work by maximizing the benefits for consumers and promoting fair and efficient markets. As explained in a previous report published by the Chamber, "[t]hrough the use of cost-benefit analysis in financial services regulation, regulators can determine if their proposals will actually work to solve the problem they are seeking to address. Basing regulations on the best available data is not a legal 'hurdle' for regulators to overcome as they draft rules, as some have described it, but rather a fundamental building block to ensure regulations work as intended."[11] Thus, instead of treating it as a check-the-box exercise after conclusions are already drawn and the ink is dry, the Bureau should use cost-benefit analyses as a central tool in its regulatory tool box.

The Bureau should facilitate this work by establishing a new division to focus on risk and economic analysis led by a new chief economist. Similar to the SEC's Division of Risk, Strategy, and Financial Innovation, this division would enhance the Bureau's cost-benefit analysis and identify how rulemaking, enforcement, supervision, and other policies will affect the consumer financial marketplace and the economy more broadly. This division also would look across the federal government to identify

cost-benefit analysis best practices at other agencies that can further strengthen the Bureau's work.

Moreover, we would urge the Bureau to put in place a memorandum of understanding with the Office of Information and Regulatory Affairs (OIRA) under which the Bureau will submit future rulemakings through the OIRA review process. In this way, the Bureau should take advantage of OIRA's established expertise on cost-benefit analysis.

- The Bureau should pay particular care not to allow its small business data collection rulemaking under Section 1071 of the Dodd-Frank Act to create an unworkable scenario that makes it materially harder for small businesses to access much-needed credit. To achieve this goal, we particularly recommend that the Bureau: (1) conduct a rigorous cost-benefit analysis in developing a rule that is subject to public comment; (2) establish a narrowly tailored definition of what it means to be a "small business;" (3) confirm that only the statutorily mandated data points need to be collected; (4) ensure that the data will not be public to mitigate privacy concerns; and (5) work closely with the Small Business Administration to understand the nuances of the small business market.
- The Bureau should ensure that any future regulatory action with respect to payday lending products does not prevent banks from offering safe small-dollar loans. In 2013, the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC) issued an overly restrictive guidance that effectively banned deposit advance products (DAPs), which were consumer-friendly small-dollar loan products. The Bureau should facilitate access to credit and the return of products similar to DAPs to ensure the 44 percent of Americans who cannot cover an emergency $400 expense[12] can get the credit they desperately need from safe, reliable institutions.

Prioritize quality over speed.

The Bureau should prioritize sound rulemaking over swift rulemaking. It is far better for the Bureau to slowly get rules right than for it to quickly get them wrong, especially if it does not realize the consequences. We appreciate that the Bureau has been eager to put its new rules in place, but it should take its time to get the rules right. In some cases, this will mean being willing to undertake additional rounds of notice and comment when it becomes clear that substantial changes will be made in a proposed rule. In other cases, it will mean working with companies for an extended period of time before implementing a regulation. Failure to take these steps could lead to unintended consequences in a final rule that were not previously evaluated by stakeholders (e.g., as in the prepaid card rulemaking)[13] or delays in implementation (e.g., as in the TRID implementation).[14] We appreciated that the Bureau eventually reopened the prepaid rule for comments and extended the TRID deadline, but it would have been much more efficient and better for the marketplace if the Bureau had heeded concerns prior to a revision being necessary.

Recommendation 5: Eliminate areas of substantial legal uncertainty.

The Bureau should prioritize areas of substantial legal uncertainty as it works to provide clear rules of the road. Over the past five years, for example, two areas that have caused particular uncertainty for financial services companies have been the interpretation of "abusive" acts and practices and the scope of a company's liability for the actions of a service provider. The Bureau should seek stakeholder comment and use appropriate tools to bring clarity to these priority areas and others that emerge over time.

The Chamber has repeatedly called upon the Bureau to issue formal guidance on the meaning of the Dodd-Frank Act's new prohibition on "abusive" acts or practices. The Bureau instead has preferred to point to the vague statutory language and has required companies to guess the meaning from a limited number of consent orders. Fundamental questions persist, particularly with respect to the relationship of "abusiveness" to the prohibitions on unfair and deceptive conduct. While the common meaning of the word and congressional expectations strongly suggest that "abusive" conduct is a more malicious and intentional form of conduct, the Bureau has seemed to indicate that the term empowers it to require companies to make suitability determinations. Given this fundamental uncertainty, businesses remain unsure whether to implement a compliance system based on the broadest possible interpretation of the term—even if that will have adverse consequences for product availability—or implement a system based on a narrower view (such as reporting intentional wrongdoing) and risk the possibility that the Bureau will subsequently interpret the term more broadly. The Bureau should answer these complex questions by seeking feedback from stakeholders and articulating an interpretation.

Similarly, the Bureau has allowed unnecessary ambiguity to persist regarding the scope of a financial service company's liability for the actions of a service provider. The Bureau has authority to issue rules covering service providers, to supervise those providers, and to bring enforcement actions against them. In contrast, the Dodd-Frank Act does not specify a basis for holding a company liable for the unlawful acts of its service provider. The absence of statutory guidance on this significant question argues strongly for the Bureau to undertake a rulemaking—or at least issue clear guidance—before imposing liability on a business for the unlawful acts of its service providers. Nonetheless, the Bureau has used its enforcement authority to impose what appears to be strict liability on businesses for the acts of their service providers. It is hard to believe that the Bureau could assert that a company should be held liable even for deliberately fraudulent actions of its service provider that it expressly prohibited. The Bureau thus should provide notice and opportunity for comment and use appropriate tools to provide clarity on this important topic.

Recommendation 6: Adopt a robust no-action letter and advisory opinion process.

A wide range of federal agencies—including the Consumer Product Safety Commission, Justice Department, Federal Trade Commission (FTC), and SEC—routinely issue written opinions that clarify governing legal requirements. These opinions typically take one of two forms: a "no-action" letter stating that staff would not recommend that an enforcement action be pursued under stipulated facts, or an advisory opinion that interprets a governing legal standard for an entire market. These letters support the foundational principle of transparent and open government. The ability of a business to ask the government whether the law permits a specific practice or activity brings valuable clarity to the law and fairness to its enforcement. After all, "no" is a much better answer, from a business perspective, than "I'm not going to tell you and I reserve the right to punish you later."

Unfortunately, the Bureau has not seen the importance of these letters. First, it has not created an advisory opinion process at all. Second, it has created a no-action letter policy that is, by design, helpful in only the rarest of circumstances. This is because an applicant must satisfy a series of burdensome and intrusive requirements that find no equivalent within other federal agencies, with no assurance that the company will be protected from liability.[15] No wonder only one no-action letter[16] has been granted since the process was established two years ago. Indeed, the Bureau itself estimated that it would receive no more than three actionable requests for no-action letters each year.[17]

The Bureau's limited informal processes for answering questions from regulated entities do not compensate for the absence of meaningful no-action and advisory opinion processes. Advisory opinions and no-action letters provide well-considered, prospective guidance to an entire market. In contrast, providing one-off advice to companies that call the Bureau with questions or to entities during supervision does nothing to standardize industry behavior. Instead, the effect of those private conversations is the creation of varying standards and an uneven regulatory playing field; some companies know the Bureau's expectations because they called and got some verbal advice, while others do not.

The Bureau should follow the lead of other agencies and provide meaningful regulatory clarity through no-action letters and advisory opinions. In doing so, the Bureau should start from a clean slate and build upon the best practices of agencies such as the SEC, the FTC, the Consumer Product Safety Commission, and the Commodity Futures Trading Commission. In particular, the Bureau should, after appropriate notice and opportunity for comment:

- Create both advisory opinion and no-action letter processes that may be relied upon by the recipient and similarly situated companies until formally withdrawn by the Bureau;
- Frame advisory opinions and no-action letters as nonbinding views of Bureau staff, with review by the Bureau chief of staff; and
- Use requests for advisory opinions and no-action letters to identify topics that regularly cause regulatory confusion and merit clarification in a subsequent rulemaking.

It has seemed as though the Bureau believed that keeping legal lines concealed would somehow better protect consumers. But, as we have explained, uncertainty about where legal lines lie disrupts competition, causes responsible companies to pull back from offering products that benefit consumers, and favors unscrupulous businesses. The Bureau should use new no-action and advisory opinion processes to avoid these outcomes.

B. Enforce the Law Fairly

The Bureau should put fairness at the heart of everything it does. Without this commitment, the Bureau will lack the legitimacy necessary to succeed over the long term in ensuring that consumers have access to safe products in an innovative and competitive marketplace.

Recommendation 7: Respect the bounds of the Bureau's authority.

The Bureau has enormous powers. But even those powers have limits—imposed by Congress and the Constitution—that must be respected. It is simply wrong for the Bureau to use its huge authority—and the threat that it will impose the heavy sanctions it authorizes—to bully a company or an individual. As Acting Director Mick Mulvaney recently wrote:

> It is not appropriate for any government entity to "push the envelope" when it comes into conflict with our citizens. The damage that we can do to people could linger for years and cost them their jobs, their savings, and their homes. If the CFPB loses a court case because we "pushed too hard," we simply move on to the next matter. But where do those that we have charged go to get their time, their money, or their good names back? If a company closes its doors under the weight of a multi-year Civil Investigative Demand, you and I will still have jobs at CFPB. But what about the workers who are laid off as a result? Where do they go the next morning?[18]

The Bureau's history to date has reflected a regrettable willingness to "push the envelope," even when it explicitly did not have authority, such as over auto dealers,[19] and was trying to change dealer behavior. An internal memorandum, for example, revealed that the Bureau pursued an enforcement strategy against indirect auto lenders while knowing that its legal authority was uncertain at best and that it did not know whether that approach would help or hurt consumers.[20]

The Bureau should learn from these mistakes and commit itself to careful adherence to the limits of its authority going forward. While doing so may limit the Bureau's reach (and properly so), this step will be critical to building the sustainable success of the CFPB.

Recommendation 8: Give companies fair notice of what the law requires.

In addition to generally avoiding regulation by enforcement—i.e., expecting industry stakeholders to draw generally applicable principles from enforcement actions—the Bureau must refrain from enforcing changes to established principles in retroactive enforcement actions. The Supreme Court has explained that the "requirement of clarity in regulation is essential to the protections provided by the Due Process Clause" of the Constitution.[21] A regulator that "changes course" in its interpretation of the law must provide "constitutionally sufficient notice" of the change in interpretation prior to sanctioning companies.[22] It is thus not only good policy, but also constitutionally required for the Bureau to provide regulated companies with fair notice of what consumer financial laws require before bringing enforcement proceedings against them.

A case in point is the PHH litigation, in which the Bureau announced a new interpretation of the Real Estate Settlement Procedures Act (RESPA) in an enforcement proceeding against PHH, a mortgage lender—and then unilaterally inflated an administrative law judge's fine of $6 million to $109 million for conduct that had been legal under regulators' prior interpretation of the law. A District of Columbia Circuit Court of Appeals panel unanimously held (in a decision that was left undisturbed by the en banc court) that the lender "did not have fair notice of the [Bureau's] interpretation" of the law when it acted and that the Bureau "therefore violated due process by retroactively applying its changed interpretation to PHH's past conduct and requiring PHH to pay $109 million for that conduct."[23] The Bureau must avoid any similar mistakes in the future and should commit itself to fair enforcement of the law consistent with the demands of the Constitution.

Recommendation 9: Respect statutes of limitations.

The Bureau has also contributed to regulatory uncertainty by repeatedly seeking to enforce consumer financial laws after the applicable statutes of limitations have run. Again, the PHH action is illustrative. There, the Bureau purported to impose liability under RESPA for conduct that had occurred outside the statute's three-year limitations period. The Bureau argued that the statute of limitations applied only to actions brought in court and not to administrative enforcement proceedings. The Bureau thus claimed that it can bring administrative actions under any of the numerous laws it enforces years or even decades after the fact.

The D.C. Circuit rightly rejected that argument as "flatly wrong." It held that the statute of limitations applied equally to administrative proceedings.[24] Indeed, the court held, it would be "absurd" to read the law as the Bureau did, because doing so would "allow the [Bureau] to bring administrative actions for an indefinite period, years or even decades after the fact"—a result "'utterly repugnant to the genius of our laws.'"[25]

A statute of limitations reflects a "congressional concern for finality."[26] By enacting such a provision,

Congress intends that after the limitations period has run, a matter should no longer be actionable. The assurance of finality provided by a statute of limitations brings certainty to the law and protects the legal system as a whole from litigation over events that no one remembers clearly. These benefits would be lost if, by proceeding administratively rather than in court, the Bureau could avoid statutes of limitations altogether. The Bureau should therefore commit to respecting applicable statutes of limitations, both in court actions and administrative enforcement proceedings.

Recommendation 10: Reform the investigative process.

Fair and rigorous investigations are a central tool for the CFPB in fulfilling its statutory responsibilities. Congress gave the Bureau wide discretion in the use of this power; however, we caution that the Bureau should use this discretion wisely. Unfortunately it has not done so to date. It instead has engaged in untargeted fishing expeditions that place unreasonable burdens on companies even before any allegation of wrongdoing. The Bureau even drew a rare rebuke from the D.C. Circuit when the court rejected the Bureau's tactics in the investigation of a college accrediting agency.[27]

Going forward, the Bureau should recognize that it has an obligation to limit the huge burden that an investigation imposes on a target company—not use it as a tool to bully companies into submitting to the Bureau's demands. To do so, the Bureau should frame its demands for information appropriately and then work with target companies to ensure that the Bureau is neither seeking more information than it needs nor exceeding its authorities. In particular, the Bureau should take the following four steps:

1. The Bureau should ensure that it does not engage in untargeted fishing expeditions. Each civil investigative demand (CID) searching for information must "state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation."[28] Clearly, the statute requires there to be a specific alleged law that has been violated and presumed conduct violating the law before a CID is to be issued. The Bureau may not subject a company to that burden out of mere curiosity or out of hopes that it might find something worth exploring. Each Bureau investigation should have a clear purpose and seek information that is clearly tied to achieving that purpose. Simply asking a company to provide every piece of information it holds relating to a certain product without any basis to believe that a violation has occurred needlessly deprives companies of critical resources and should not be the practice of the agency.
2. The Bureau should work in good faith with companies to reduce investigatory burden. Companies often make reasonable requests to the Bureau to be allowed to narrow CIDs, but the Bureau has been reluctant to do so. There are various reasons to narrow the scope beyond simply the burden imposed. For example, certain categories of documents or information from certain time periods might not include relevant data. Alternatively, the burden associated with pulling data from legacy systems and generating new reports might far outweigh any investigatory value. A limited set of data also might provide the Bureau all the information it needs to decide whether to pursue the investigation further. Whatever the reason, the Bureau should seriously consider requests to narrow the scope of CIDs and work with companies to understand the data they currently have that could yield the same information.
3. The Bureau should set reasonable return dates for CIDs. Assembling the data required by a CID is enormously challenging, especially considering the need to review the information for privileged communications and the challenges associated with pulling data from a wide range of internal systems. We would recommend that the Bureau adopt a 30-day return date as its default, coupled with a reasonable approach to extensions. As discussed above, the

Bureau should negotiate in good faith with companies who face challenges to meet that return date as to some or all of the information sought by the Bureau.

4. The Bureau should reform the process for hearing petitions to set aside CIDs. For example, the Bureau's publication of decisions on petitions to set aside CIDs significantly discourages any company from filing a petition in the first place. The existence of a CID is entirely confidential unless a company pushes back on the Bureau. This leaves companies with a choice: Should they produce the documents even though they do not think the allegations have merit, or do they publicly disclose that they are under investigation by their regulator? These perverse incentives leave many companies quietly producing documents even when there is not a clear articulation of the law or conduct surrounding the violation. More fundamentally, the Bureau's unique structure leaves petitions to set aside CIDs to be heard only by the Bureau's director.

A restructuring of the Bureau to a commission structure that allows for differing viewpoints would provide the most lasting protection against investigatory overreach. Although that reform is one that can only be accomplished by Congress, in the meantime, the Bureau should take practical steps now to reform its petition process. For example, the Bureau could stop publishing decisions on petitions to set aside CIDs—at least prior to the initiation of an enforcement action or a petition to enforce the CID. In addition, the Director could require relevant enforcement attorneys to demonstrate, prior to ruling on a petition to set aside, that they have taken reasonable steps to accommodate requests to narrow the scope of a CID. Finally, the Bureau could allow challenges to its authority in the petition process in order to allow early consideration of potential overreach.

Recommendation 11: Ensure the adjudication process is fair.

The CFPB may choose to bring an enforcement action either in federal court or in the Bureau's own administrative forum.[29] The ultimate authority in such administrative proceedings belongs to the Bureau's director, who reviews the recommended decisions of Bureau hearing officers. The director must exercise that authority in a manner that respects due process for all parties.

Under past leadership, administrative proceedings before the Bureau lacked the hallmarks of impartiality that due process requires. Most notably, the PHH decision raised serious questions about the impartiality of that process. In that case, the director increased the money judgment imposed on the company by a factor of 18 from the amount recommended by the presiding administrative law judge.[31] As discussed above, the director accomplished this by ignoring long-standing precedent and proclaiming the statute of limitations did not apply. This intervention undermined any semblance of impartiality in the proceedings. The director's action instead sent a clear message to companies not to appeal to the director or to question the enforcement actions brought against them.

Replacing the Bureau's unitary director with a multimember commission, such as those that head SEC and the FTC, is the most important step Congress can take to enhance the impartiality of the adjudication process. However, Congress and the Bureau also can make discrete reforms that would help strengthen the adjudication process regardless of the Bureau's structure. For example, Congress should allow defendants in administrative enforcement proceedings to remove the proceedings to federal district court rather than have to wait for judicial review until after the director has entered the Bureau's final decision. Congress also should clarify that the Bureau may not seek civil penalties in administrative proceedings. In addition, the Bureau should use its administrative proceedings only when:

- The proceeding is based upon well-established legal principles that have been adopted by Article III courts, not on claims that have not been fully considered by courts (e.g., abusiveness);
- The factual predicate for the alleged violations is substantially equivalent to those successfully litigated in past enforcement actions; and
- The matter does not entail an extensive investigative record such that considerations of fairness warrant providing a company with the fuller procedural protections available in federal court.

Recommendation 12: Reform supervision.

The Bureau's supervisory function has long been a work in progress. Its scale is enormous, covering both a large number of financial institutions familiar with supervision and a vast number of companies subject to examination for the first time. As a result, the Bureau has had to hire and train a large number of examiners, create appropriate examination policies and documentation, and manage performance across its regional offices—all while working through inevitable growing pains.

The Bureau's inspector general has detailed some of these growing pains. The inspector general recommended in 2013, for example, that the Bureau rethink its practice of integrating enforcement attorneys into supervisory examinations.[32] We applaud the Bureau for heeding this recommendation. In 2014, the inspector general made findings including that the Bureau did not meet reporting timeliness requirements, did not consistently use standard compliance rating definitions, did not record examination milestones in a timely manner, had inconsistent scheduling practices, and could enhance coordination with the prudential regulators. In 2017, the inspector general issued reports concluding that the Bureau can enhance the effectiveness of its examiner commissioning program and on-the-job training program,[34] and that it can improve its examination workpaper documentation practices.[35]

The Bureau has corrected some of its initial mistakes, but we urge it to commit itself to the hard work of continued improvement of its supervisory program. For example, the Bureau should:

- Ensure that examiners have received necessary training;
- Ensure consistent standards across equivalent examinations across an industry;
- Complete examinations and provide closing reports in a timely manner;
- Coordinate effectively with prudential regulators;
- Ensure that examiners are not using the supervisory process to articulate standards or expectations that are not stated in rules or published guidance; and
- Issue an internal memorandum or other appropriate policy document to ensure that examinations do not collect unnecessary information.

C. Educate Consumers with Accurate, Data-Driven Information

As it has recognized, the Bureau holds a "megaphone" that gives it great power to steer consumer decision-making. To date, the Bureau has not used this "megaphone" effectively. It can do much more to provide consumers with meaningful financial education. And it has an opportunity to disseminate valuable and accurate information to consumers, rather than the misleading information held in the complaint database. Likewise, the Bureau should end its practice of destroying consumer confidence in companies that are working hard to comply with the many different federal consumer finance laws.

Recommendation 13: Emphasize consumer financial education.

Congress identified six "primary functions" for the Bureau. It is no accident that the first on this list of priorities is to "conduct financial education programs."[36] Congress put financial education at the very heart of the Bureau's activities because it recognized that an informed consumer is the most financially successful consumer. Not only does education help an individual consumer make better-informed decisions about the financial products to use, but it also provides substantial, broader positive consequences across the industry and the economy. Consumer demand will always drive the products that companies choose to offer. Educated consumer demand will push the marketplace to provide the types of products that are the best fit for consumers.

The CFPB's track record does not reflect a decision to treat consumer education as a central part of its mission. The Bureau has produced thought pieces on consumer education strategy,[37] and it has posted a range of different product summaries and other materials on its website. But the Bureau has not delivered large-scale consumer education programs with measurable consumer education benefits. It instead has focused its efforts elsewhere and allowed the possible benefits of consumer education to go unrealized.

By putting consumer education front and center, the Bureau will truly protect consumers by giving them the tools to do so themselves. It should start by collaborating with leaders in the financial and education industries and with its sister agencies, such as Treasury's Financial Literacy and Education Commission.[38] Adequately educating Americans on financial products and services is no small task, so it is critical that the government is not fractured and instead uses all resources effectively. Moreover, the Bureau's Office of Servicemember Affairs should partner with the Department of Defense for its expert knowledge on the unique needs of our men and women in uniform.

The Chamber stands ready to partner with the Bureau on this important work. Representing the interests of more than 3 million businesses of all sizes, sectors, and regions, our members range from mom-and-pop shops and local chambers to leading industry associations and large corporations. These members have deep, long-standing relationships with their communities, allowing them to serve as conduits of valuable financial education in schools or other local venues. And they employ many millions of Americans, allowing them to deliver valuable educational materials to individuals in whose financial well-being they are heavily invested.

The Bureau should embrace the opportunity to work with stakeholders across the spectrum to tackle the critical goal of establishing strong consumer financial education throughout our country. While it will require hard work and will likely not win the media attention of a splashy enforcement action, the Bureau's efforts in this field promise enormous, long-standing benefits for consumers and the marketplace as a whole.

Recommendation 14: Reform the complaint database.

Congress tasked the Bureau with collecting and responding to consumer complaints.[39] The Bureau went beyond the statutory requirements by deciding to publish its complaint database and periodic complaint reports. In doing so, the Bureau put its official government stamp upon information that it knew was unverified and that had the potential to mislead consumers. Because of the risk of misinformation and privacy breaches, we believe the Bureau should stop publishing the complaint database until it has adopted appropriate reforms to ensure that it does not mislead consumers.

There is little serious dispute about the flaws in the complaint database. For example:

- The Bureau has acknowledged that the complaint database is subject to manipulation, such as by a potential litigant seeking to inflate apparent complaints against a prospective defendant.[40]
- As the Bureau has put it, complaints may be based on "factually incorrect information as a result of, for example, a complainant's misunderstanding or misrecollection of what happened."[41]
- Two-thirds of the "complaints" in the database are not really complaints at all and are closed with an explanation, not relief, from the company.[42] The bulk of these "complaints," in other words, involve no wrongdoing by the financial institution.[43]
- The complaint data is not representative and has not been normalized based on the size of an institution. For example, the largest institutions will likely have the most complaints because they have the most customers.

The Bureau is well aware of these fundamental flaws. However, rather than fix them, it has aggressively publicized the complaint database, providing what it has described as a government "megaphone."[44] And it has done so while claiming in its legally required information-quality guidelines that it "strives to ensure and maximize the quality, objectivity, utility, and integrity of the information that it disseminates to the public."[45]

The Bureau has attempted to justify its publication of misleading information with the claim that a "marketplace of ideas" will determine what the complaint data shows.[46] But a "marketplace of ideas" cannot correct for flaws in the underlying data. And a government stamp of approval bestows much more legitimacy to the complaint than simply a free-flowing "marketplace of ideas." Instead, the continued publication and marketing of the database will mislead consumers, disrupt existing customer care relationships, impose undue reputational harm on responsible companies, and create privacy risks for consumers who submit complaints to the database.[47]

Given these negative consequences, the Bureau should stop publishing the database until these flaws have been addressed. In doing so, the Bureau would bring its approach in line with that of other agencies that do not publish their complaint databases, such as the FTC, and those that only publish limited complaint information, such as the Federal Communications Commission (FCC). At a very minimum, the Bureau should take immediate steps to strengthen the database. For example, the Bureau should:

- **Improve the accuracy of the database:** The Bureau contains numerous complaints that include transparently incorrect information. For example, there have been complaints lodged against companies that were not the root of the dispute, and there are complaints when the company was simply acting in accordance with the law and the person did not like the outcome. There is no justification for publishing plainly wrong and misleading information.
- **Better disclose the limitations of the database:** The complaint database currently bears very limited, easily overlooked disclosures about the limitations of the database. The Bureau should highlight these disclosures more visibly and state the limitations of the database more clearly.
- **Stop publishing summary reports that unfairly punish larger businesses:** Reports on the "most-complained-about companies" will always name the companies that affect the greatest numbers of consumers (i.e., the national consumer reporting agencies and the largest banks). Publishing a report that suggests that these companies have done something wrong by appearing on the "top 10" list is unfair because they have the largest amount of customers.
- **Encourage consumers to speak first with the relevant company before filing a complaint:** The Bureau's complaint database should support customer service relationships.

The Bureau should follow the model of the FCC, which specifically directs consumers to speak first with companies.[48]

- **Redact irrelevant information from the database:** The Bureau should remove any personal information that is unnecessary to the complaint. There are huge security concerns with collecting sensitive financial information from consumers, especially given that governmental entities are not immune from hacks. Further, the Government Accountability Office (GAO) has raised concerns about the CFPB's data-security processes and protections.[49]

D. Commit to Transparency

The CFPB often references Supreme Court Justice Louis Brandeis' famous quote, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." We could not agree more. Public dialogue makes the Bureau stronger, which is why we urge the Bureau to engage with members of Congress, industry stakeholders, or other members of the public. Only with truly transparent engagement can the public have a broad understanding of the Bureau's plans and priorities. It also allows a sense of trust to develop between the Bureau and its various stakeholders.

Recommendation 15: Facilitate appropriate congressional oversight.

Due to its politicized inception, the CFPB had tension in its first days with some members of Congress. But the Bureau also has missed opportunities to look for common ground on both sides of the political aisle.

The Bureau should put its partisan history behind it and work with both sides of the aisle toward the common goal of consumer protection. We do not expect the Bureau to agree with every member of Congress all of the time, and we are fully aware that deep policy disagreements will persist. But other agencies have shown that it is possible to build relationships across Congress even on contentious issues, and we are hopeful the CFPB can do the same.

Providing additional transparency to Congress will be critical to achieving that goal. Rather than engaging in frank discussion, the Bureau too often has chosen to conceal its enforcement and other priorities from committees of jurisdiction. Such concealment is sure to poison a relationship with Congress and breed distrust between the parties. It will be far more productive to approach subjects on which reasonable minds can differ honestly than to conceal the Bureau's views. Candid discussion might not foster agreement, but it may at least foster trust. In contrast, in the case of indirect auto lending, congressional committees repeatedly requested details on how the Bureau performed its proxy analysis and what controls it considered in performing its regression analysis. But the Bureau chose to conceal that information rather than have a frank discussion about its methodology. As a result, the Bureau lost any chance to build confidence in its approach to the issue. We urge the Bureau not to repeat that mistake. It should work to build a broad base of trust within Congress by responding to reasonable oversight requests in a transparent and timely manner.

Recommendation 16: Facilitate meaningful public dialogue.

The risk of lost credibility also is clearly depicted at the previous Bureau's field hearings. While the Bureau purported to use these hearings to listen to interested stakeholders, it is plain to any disinterested observer that the hearings were part of the Bureau's media strategy to promote its initiatives. Thus, while industry representatives nominally are allowed to participate, they are permitted only to make a short statement and then answer two or three scripted questions posed by Bureau staff. Never is there any actual engagement; the Bureau does not answer any questions raised by panelists, and there is no meaningful dialogue among the panelists themselves.

Again, there is a better approach. Other agencies host highly substantive roundtables and daylong conferences that permit longer presentations and extended exchanges among panel members as well as with agency staff—along with an opportunity for all interested people to submit written comments. For example:

- In 2011, the FTC conducted three roundtables to learn about automobile financing. It began this process with a notice in the Federal Register, solicited public comments (100 were received and docketed), and invited 31 speakers representing consumers, industry, and other government agencies (including the Bureau) to participate in even-handed discussions at each of the three events.[50]
- In 2014, the SEC hosted a cybersecurity roundtable that featured 29 panelists, permitted notice and comment (14 comments were received), and published the resulting transcript.[51]

The Bureau can apply these practices in its own deliberative process. Our democratic system is based on the assumption that public debate makes policies stronger, not weaker. The Bureau should accept that principle and seek meaningful public engagement on its initiatives—not just hold events that qualify as political theater.

Recommendation 17: Reorganize the Consumer Advisory Board.

Congress tasked the Bureau with creating a Consumer Advisory Board (CAB) to "advise and consult with the Bureau in the exercise of its functions" and to "provide information on emerging practices in the consumer financial products or services industry."[52] Congress directed the Bureau to "assemble experts in consumer protection, financial services, community development, fair lending and civil rights, and consumer financial products or services," including through "representation of the interests of covered persons and consumers."[53] In directing the Bureau to incorporate the expertise of financial institutions and other covered people, Congress recognized a basic fact: Financial services companies can offer the Bureau enormously valuable insights from their experience serving consumers. Companies have the expertise on the products that consumers actually want and use, how consumers want to access products, how consumers respond to educational materials, how product access will be affected by regulatory policies, and much more. Incorporating these perspectives into the CAB not only would have the direct benefit of informing the Bureau, but it also would allow for a candid exchange of ideas among the range of stakeholders who work on consumer financial protection issues. This would allow the CAB to help build trust among the diverse groups who work on the shared goal of ensuring consumer access to safe financial products.

To date, the Bureau unfortunately has failed to use the CAB to take advantage of the enormous expertise that financial services companies have to offer. Instead, the Bureau has used the CAB to release the Bureau's initiatives, give policy speeches, and create news. Under previous leadership, there was limited dialogue between CAB members, and there was a lack of time for members to prepare because the materials were not given to them in advance. For example, at a CAB meeting in the summer of 2017, the CFPB presented its conclusions about deferred interest products for credit cards, then members of the CAB discussed. The members had not been prepped with the correct terms of the deferred interest agreements, so they discussed hypotheticals about longer-term layaway items and how this type of financing must be bad for consumers—all without the truth on how deferred interest financing works and the low amount of people who actually pay interest

on the loans.

We believe that the Bureau will be served best by receiving perspectives from diverse viewpoints—and particularly by fostering opportunities for frank dialogue between those different views. In particular, the Bureau should expand opportunities for companies to provide their relevant expertise to the CAB, including through increased membership. We urge the Bureau to make appropriate changes to the bylaws of the CAB, provide briefing materials beforehand to prepare the CAB members, and restructure its meetings to achieve these goals.

Recommendation 18: Rescind the proposed gag order.

The Bureau should not be afraid of dissent. There is no justification for any attempt to gag companies that are targets of its investigations. No peer regulator has a comparable general policy that stops companies from pushing back on investigations. The Bureau should follow this example and refuse to revive any proposal that would attempt to silence companies that receive CIDs.

In August 2016, the Bureau "propose[d] expanding the scope of" its rules governing "the extent of financial institutions' discretion to further disclose confidential investigative information."[54] In short, this proposed change would have silenced recipients of CIDs and violated companies' right to free speech under the First Amendment to the Constitution. Specifically, it would have prohibited investigatory targets from disclosing anything "prepared by, on behalf of, received by, or for the use by the CFPB or any other Agency in the conduct of enforcement activities, and any information derived from such materials" with a few minor exceptions for disclosures to insurance providers,[55] co-workers, counsel, or other service providers. Any other disclosure would require the Bureau's approval.

Other agencies allow investigatory targets to disclose an investigation for a simple reason: The targets of government investigation should not need the government's permission to complain about abuses of investigatory power. Gag orders that allow the government to decide when an investigatory target can speak out are a prior restraint on speech, raising substantial First Amendment concerns. Public scrutiny is a vital check on the abuse of power, and investigatory targets cannot avail themselves of that check if they are silenced.

Congress long has understood this principle. For example, Congress has allowed the government to restrain speech in this manner in certain limited circumstances in the national security context, but it has also provided a clear authority to issue such orders and required the adoption of robust procedures to protect against abuse of this exceptional authority. (Even so, the resulting gag orders still have raised substantial concern among the public.) If Congress had wanted the Bureau to deviate from this common practice, it could have done so in the same way it provided for legal gag orders on investigatory targets in other contexts.

We understand that the Bureau has shelved its proposal to gag investigatory targets. We would urge the Bureau to formally rescind this mistaken proposal.

E. Avoid Regulatory Duplication and Burden

The Bureau should coordinate closely with other regulators to ensure that companies are not subject to overlapping and unnecessary regulatory burdens that drive up costs for businesses—and prices

for consumers.

Recommendation 19: Coordinate regulatory activities with other agencies.

The 2016 GAO report said it best: "The U.S. financial regulatory structure is complex, with responsibilities fragmented among multiple agencies that have overlapping authorities."[56] This inherently convoluted structure makes it critical that regulators overseeing the same institutions consciously and deliberately coordinate their efforts. While the Bureau has announced various formal tools for cooperation in the past, we have received ample feedback that the actual level of coordination between the Bureau and other agencies appears to have been low. The Bureau should commit itself to enhancing coordination in two ways:

1. Provide consistent standards across regulators with overlapping jurisdiction; and
2. Avoid duplication in exam schedules and data requests.

Regarding divergent standards, the Bureau and other regulators sent mixed messages to banks on deposit advance products/small-dollar loan regulation. Further, there are divergent standards on what constitutes unfair and deceptive acts and practices between the agencies—not to mention that the CFPB enforces the "abusiveness" prong as well. There are also differing work streams on no-action letters, financial technology, and limited English proficiency standards, just to name a few. Such confusion benefits no one. The Bureau may be an independent agency, but it should not work in isolation. Rather, the Bureau and other agencies should work together to ensure that their guidance is not at cross purposes and that their actions do not point to different policy outcomes.

Likewise, the Bureau should ensure that its supervisory work does not duplicate or conflict with the examinations performed by other regulators. It should coordinate examination schedules and document requests with the prudential regulators, using protocols and practices established or refined, to the extent necessary, under any governing memorandum of understanding.[57] In addition, to help avoid unnecessary repetition of information requests, it should develop an agreement under which a triaging agency, such as Treasury Department's Office of Financial Research or the Financial Stability Oversight Council, serves as the custodian of information of common interest to the Bureau and other regulators.

Recommendation 20: Defer to regulators with primary authority.

Basic principles of good government would limit the Bureau—like any other federal regulator—to its congressionally assigned role, not encourage it to interfere with the regulatory efforts of another agency to whom Congress expressly has granted authority.

The Bureau unfortunately has not heeded these principles. Instead, it repeatedly has intruded into areas that are properly subject to the authority of other regulators. For example:

- The Bureau has sought to change the practices of auto dealers that are actually subject to the authority of the FTC and the Justice Department.
- The Bureau has sought to regulate the practices of for-profit colleges (and even their accreditation agency) that are primarily subject to the authority of the Department of Education.
- The Bureau has sought to regulate the servicing of public student loans, thereby interfering with the authority of the Department of Education.

- The Bureau has brought an enforcement action alleging inadequate data-security practices, stepping into a field that has been led by the FTC (even despite Congress' decision to deny the Bureau the authority to enforce the Safeguards Rule issued under the Gramm-Leach-Bliley Act).
- The Bureau has brought multiple enforcement actions for alleged "cramming" on mobile phone bills, even though both the FCC and the FTC previously had brought such actions.

The Bureau should stop these presumptuous intrusions into fields that are already occupied by other federal regulators. The Bureau should focus on doing its job well and allow other regulators to fulfill their responsibilities free from Bureau interference.

Recommendation 21: Avoid unnecessarily burdensome information requests.

The Bureau rightly seeks to be a data-driven agency. But it has wrongly used this goal to justify massive, unnecessary collections of information from companies. In doing so, the Bureau has imposed substantial costs on businesses and created huge risks for consumers by gathering vast pools of personally identifiable information. The Bureau should stop these data-collection practices, whether purportedly justified by Section 1022 of the Dodd-Frank Act or approved under the Paperwork Reduction Act. Other regulators have long used sampling methods to collect only the information necessary to inform their policy decisions. The Bureau should follow these best practices and take seriously the burdens that data collections can cause and the risks they can create for consumers.

The Bureau's excessive data collecting began shortly after it opened its doors. At the time, some employees indicated that the Bureau planned to use supervisory information to enhance its understanding of the financial services marketplace, not to perform its examination function. Any such requests would have been improper; the Bureau is obligated to make such requests for information "by rule or order" under Section 1022(c)(4)(B)(ii) of the Dodd-Frank Act. Moreover, Section 1022(c)(4) of that statute flatly bars collections "for purposes of gathering or analyzing the personally identifiable financial information of consumers," and it only permits information-reporting requirements that are "necessary for the Bureau to fulfill the monitoring, assessment, and reporting responsibilities imposed by Congress." As we explained at the time, other agencies have not demanded comprehensive data; they use a sampling approach. The Bureau has never explained why it cannot likewise rely on the random-sampling approach utilized by a wide variety of other agencies, from the SEC to the National Highway Traffic Safety Administration to the U.S. Department of Agriculture.

Congress long ago recognized the public interest in preventing federal government agencies from undertaking unduly burdensome or intrusive collections of information from members of the public. It consequently enacted the Paperwork Reduction Act to impose procedural safeguards—including public notice and comment—to help guard against unduly broad and burdensome data collections.

In the past, the Bureau has treated the Paperwork Reduction Act as a "check the box" exercise instead of an opportunity to understand the potential burden. For example:

- As detailed in a Sept. 22, 2014, report, the GAO concluded that the OCC and the Bureau agreed to each collect credit card data from nine financial institutions (one less than the threshold for triggering the statute) and then share that information with each other. The OCC could not even manage to limit itself to this cynical attempt to sidestep the statute but blatantly violated it by collecting credit card data from 16 financial institutions.[58]
- The Bureau has relied heavily on "generic" collection proposals that seek approval for an

entire means of information collection. For example, the Bureau has sought and received approval "to gather primary data from purposive samples through controlled trials in field and economic laboratory settings."[59] By providing inadequate notice of the contents of future individual collections, these generic requests frustrate the key goal of allowing informed stakeholder comment on data collections.

Collecting and holding vast amounts of data creates risks for both companies and consumers, even beyond the obvious burdens it puts on companies. Data collected from large companies and financial institutions often contain individual consumers' addresses, employment history, medical history, religion, ethnicity, and Social Security numbers. Collection of such information increases the risk of identity theft and fraud, as a data breach could result in the dissemination of all this personal information. We have seen from recent breaches at numerous agencies that the federal government is not immune from fraudsters. The Bureau should take these risks seriously and reconsider requests for large swaths of data.

F. Structure the Bureau for Long-Term Success

The CFPB's goal should be the long-term, successful regulation of the consumer financial services market. A stable approach to regulation is critical to achieving this goal. In contrast, dramatic shifts in approach with each presidential appointment make long-term success impossible. Congress thus should reform the structure of the Bureau in order to allow it to achieve its mission of protecting

	Checks and Balances on Leadership Power and Decision Making						Budget Oversight
	Commission/ Board Structure	Requirement of Bipartisan Representation on Commission/ Board	Outside Officials Serve on Agency's Decisionmaking Body or Appoint Some of Its Top Officials	Head Subject to At-Will Removal by the President	Cabinet Official Statutorily Authorized to Supervise Agency	Dedicated Inspector General	Budget Dependent on Appropriations
CONSUMER FINANCIAL PROTECTION BUREAU	✗	✗	✗	✗	✗	✗	✗
Federal Reserve System	✓					✓	
National Credit Union Administration	✓	✓				✓	
Office of the Comptroller of the Currency			✓	✓	✓		
Office of Thrift Supervision			✓	✓	✓		
Social Security Administration			✓			✓	✓
Consumer Product Safety Commission	✓	✓				✓	✓
Federal Communications Commission	✓	✓				✓	✓
Federal Deposit Insurance Corporation	✓	✓	✓			✓	
Commodity Futures Trading Commission	✓	✓				✓	✓
Securities and Exchange Commission	✓	✓				✓	✓
Federal Energy Regulatory Commission	✓	✓					✓
Federal Trade Commission	✓	✓				✓	✓

consumers while giving businesses the regulatory clarity they need to offer consumers the best possible products and services.

Congress has historically subjected independent regulators to robust checks and balances that ensure their accountability and fidelity to law. In particular, Congress has structured many independent regulatory agencies as commissions[60] and subjected agencies to the congressional appropriations process as shown in the following chart. Indeed, the Bureau's structure of a single director with funding free from the appropriations process is a historical anomaly. Only the Federal Housing Finance Agency (FHFA), the U.S. Office of Special Counsel,[61] and the Social Security Administration also have single heads who are removable only for cause. But these agencies do not enforce laws against private citizens—the FHFA, for example, oversees government-sponsored entities, two of which are in conservatorship with the FHFA as the conservator.[62] Moreover, the Office of Special Counsel and the Social Security Administration are subject to the appropriations process.

The Bureau's decisions to impose unjustified regulatory costs on financial services companies have limited consumer choice and have allowed the Bureau to choose winners and losers in the marketplace. American consumers deserve better. Restructuring the Bureau to bring it in line with other independent agencies is the most certain tool for maximizing its benefit to consumers.

Recommendation 22: Adopt a commission structure.

As seen above, independent regulatory agencies like the Bureau typically are headed by multimember bipartisan commissions whose members serve for fixed terms. The Bureau's structure should be brought in line with that of peer regulators such as the FDIC, the Federal Reserve System, the National Credit Union Administration, the FTC, the SEC, the Commodity Futures Trading Commission, and the FCC, along with numerous other agencies. There simply is no reasonable basis for treating the Bureau, which currently is headed by a single director with tenure protection and a fixed five-year term, differently.

This difference in structure has a great impact on the policy outcomes reached by different agencies. "[A] multimember structure can foster more deliberative decision making, a higher level of expertise, and continuity of policy."[63] These benefits lead to "better-informed and reasoned policy outcomes," "development of institutional memory," and more continuity and stability in the agency's actions.[64] In short, a Commission structure would allow the Bureau to make better, more stable policy over time—and avoid huge swings in policy every time a new presidential appointee takes over the reins.

Thus, while it remains under dispute whether the Bureau's single-director structure is constitutional, there can be no doubt that it is bad policy. Concentrating the Bureau's power in one individual leads to less deliberation, rasher decisions, and policies that can change at any time if a new director takes office. The public and the industry would be better served by having a multimember commission in charge of the Bureau.

A few examples are illustrative. Processes for issuing informal guidance are far more likely to be sound if multiple views have to be consulted before it is issued. Likewise, interpretations of the Bureau's authority are less likely to change drastically over time if they incorporate diverse viewpoints. And, in contrast, a single viewpoint is likely to continue to infect the adjudication process and the process for petitioning to set aside a CID as long as the ultimate decision-maker is the same person who authorized the issuance of the CID or enforcement action in the first place. Indeed, moving to a commission structure would help the Bureau give lasting effect to many of the reforms discussed in this paper.

Recommendation 23: Institute congressional control over the Bureau's budget.

The Constitution grants Congress the "power of the purse" to ensure that it can provide effective oversight of the executive branch. The founders of this country placed great weight on this power. James Madison explained in Federalist Paper No. 58 that "[t]his power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."[65]

As noted above, however, the Bureau is exempt from the congressional budget process. It is funded by a transfer of money from the Federal Reserve in an amount to be determined by the director—an amount that reached $602 million in fiscal year 2017. Congress consequently has less control over the Bureau than over other independent agencies. While the Bureau is subject to certain reporting requirements, Congress lacks the power that really matters. Without the power of the purse, it cannot meaningfully influence the Bureau's actions.[66]

The decision to insulate the Bureau from congressional influence in this manner was a mistake. Congress should unwind this error and take back control by subjecting its funding to the appropriations process like most of its peer regulators.

CONCLUSION

These recommendations are not an exhaustive list of changes that can make the CFPB a more effective, mature agency. Strong consumer finance markets make small businesses grow and consumers able to meet their household needs. Only with consistent, transparent, data-driven policy will financial institutions be able to confidently lend and create new and innovative products without fear of retribution. We hope that this report spurs a debate and provides a road map for critical improvements needed at the Bureau. This is only the beginning of the conversation, and we look forward to working with the CFPB and interested stakeholders toward a common goal: enriching the U.S. economy and protecting consumers.

ENDNOTES

1. Any reference to small business credit in this paper is regarding consumer financial products that consumers use for their businesses. One notable example is Section 1071 of the Dodd-Frank Act, which mandates the collection of data in the small business lending market. We will continue to urge the CFPB to act with caution on this challenging rulemaking that may negatively impact small businesses' ability to access credit.
2. Thomas M. Boyd, *A Civiletti Lesson for Elizabeth Warren*, The Wall Street Journal (Mar. 5, 2018), https://www.wsj.com/articles/a-civiletti-lesson-for-elizabeth-warren-1520292500.
3. Mick Mulvaney, *The CFPB Has Pushed Its Last Envelope*, The Wall Street Journal (Jan. 23, 2018), https://www.wsj.com/articles/the-cfpb-has-pushed-its-last-envelope-1516743561.
4. Tim Devaney, *GOP Blasts $215M Cost for Consumer Bureau Office with Waterfall*, The Hill, (July 2, 2014), http://thehill.com/regulation/211235-ig-report-cfpbs-renovations-spiral-to-215m-in-rented-building.
5. Dodd-Frank Act, Pub. L. 111-203, § 1021(a) (July 21, 2010) (codified at 12 U.S.C. § 5511(a)).
6. Bipartisan Policy Center, *The Consumer Financial Protection Bureau: Measuring the Progress of a New Agency*, at 5 (Sept. 2013).
7. *Id.* at 19.
8. Rep. Patrick McHenry and Sen. Tim Scott et al., Letter to Director Richard Cordray (June 17, 2015).
9. Arbitration Agreements, 81 Fed. Reg. 32,830, 32,869 (May 24, 2016).
10. *E.g., id.* at 32,855 ("The Bureau does not believe that, based on the evidence currently available to the Bureau, it can determine whether the mechanisms for the arbitration of individual disputes … are more or less fair or efficient in resolving these disputes than leaving these disputes to the courts.").
11. U.S. Chamber Center for Capital Markets, Paul Rose and Christopher Walker, *The Importance of Cost-Benefit Analysis in Financial Regulation* at v (March 2013), http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/CBA-Report-3.10.13.pdf.
12. Federal Reserve, *Report on the Economic Well-Being of U.S. Households in 2016* at 2 (May 2017), https://www.federalreserve.gov/publications/files/2016-report-economic-well-being-us-households-201705.pdf.
13. *See* Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z); Delay of Effective Date, 82 Fed. Reg. 18975 (April 25, 2017).
14. *See* Statement by CFPB Director Richard Cordray on Know Before You Owe Mortgage Disclosure Rule (June 17, 2015) (acknowledging error in submitting the rule for congressional review that caused delay).
15. *See* Policy on No-Action Letters; Information Collection, 81 Fed. Reg. 8686 (Feb. 22, 2016).
16. Press Release, CFPB Announces First No-Action Letter to Upstart Network (Sept. 14, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-first-no-action-letter-upstart-network.
17. 81 Fed. Reg. at 8691.
18. E-mail from Mick Mulvaney to CFPB staff (Jan. 23, 2018).
19. 12 U.S.C. § 5519.
20. *See* Rachel Witkowski, *The Inside Story of the CFPB's Battle Over Auto Lending*, American Banker (Sept. 24, 2015).
21. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).
22. *Id.* at 254-258.
23. *PHH Corp. v. Consumer Fin. Protection Bureau*, 839 F.3d 1, 48 (D.C. Cir. 2016), *vacated* Feb. 16, 2017, *reinstated* in part, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

24. 839 F.3d at 53.
25. Id. at 54 (quoting *Gabelli v. SEC*, 568 U.S. 442, 452 (2013) (in turn quoting *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805))).
26. *Montana v. Clark*, 749 F.2d 740, 744 (D.C. Cir. 1984).
27. *See CFPB v. Accrediting Council for Independent Colleges and Schools*, 854 F.3d 683, 692 (D.C. Cir. 2017) (concluding that the civil investigative demand "failed to advise ACICS of 'the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation'") (quoting 12 U.S.C. § 5562(c)(2)).
28. 12 U.S.C. § 5562(c)(2).
29. *See* 12 U.S.C. §§ 5563, 5564.
30. 12 C.F.R. § 1081.405(a).
31. Decision of the director, *In re PHH Corp.*, CFPB File No. 2014-CFPB-0002, Doc. No. 226 (June 4, 2015).
32. *See* Office of the Inspector General, The CFPB Should Reassess Its Approach to Integrating Enforcement Attorneys Into Examinations and Enhance Associated Safeguards (Dec. 16, 2013).
33. *See* Office of the Inspector General, The CFPB Can Improve the Efficiency and Effectiveness of Its Supervisory Activities (Mar. 27, 2014).
34. *See* Office of the Inspector General, The CFPB Can Enhance the Effectiveness of Its Examiner Commissioning Program and On-the-Job Training Program (Sept. 20, 2017).
35. *See* Office of the Inspector General, The CFPB Can Improve Its Examination Workpaper Documentation Practices (Sept. 27, 2017).
36. 12 U.S.C. § 5511(c)(1).
37. *See*, e.g., CFPB, *Effective Financial Education: Five Principles and How to Use Them* (June 2017).
38. U.S. Dep't of the Treasury, Financial Literacy and Education Commission, https://www.treasury.gov/resource-center/financial-education/Pages/commission-index.aspx.
39. 12 U.S.C. § 5493(b)(3).
40. Disclosure of Certain Credit Card Data, 77 Fed. Reg. 37,558, 37,562 (June 22, 2012).
41. *See* Disclosure of Consumer Complaint Narrative Data, 79 Fed. Reg. 42,765, 42,767 (July 23, 2014).
42. CFPB, Consumer Response Annual Report: Jan. 1-Dec. 31, 2014, at 41 (Mar. 2015).
43. For example, the Bureau has reported that various consumers have not realized that they generally must dispute a charge on a credit card statement within 60 days or that a credit card issuer may not override a merchant's "no-return policy." See CFPB, Consumer Response: A Snapshot of Complaints Received 20 (July 2014).
44. *See* Prepared Remarks of CFPB Director Richard Cordray at the Consumer Response Field Hearing (July 16, 2014).
45. *See* CFPB, Information Quality Guidelines, https://www.consumerfinance.gov/open-government/information-quality-guidelines. The Information Quality Act (also known as the Data Quality Act), under which these guidelines are required, can be found at Treasury and General Government Appropriations Act for Fiscal Year 2001 § 515, Pub. L. No. 106-554.
46. *See* Disclosure of Certain Credit Card Data, 77 Fed. Reg. at 37,561.
47. *See* Disclosure of Consumer Complaint Narrative Data, 79 Fed. Reg. at 42,768 ("[T]he Bureau will take reasonable steps to remove personal information from the complaint to minimize (but not eliminate) the risk of re-identification.").
48. *See* Federal Communications Commission, Consumer Complaint Center, https://consumercomplaints.fcc.gov/hc/en-us ("We encourage you to contact your provider to resolve your issue prior to filing a complaint.").

49. *See, e.g.*, GAO, *Some Privacy and Security Procedures for Data Collections Should Continue Being Enhanced*, GAO-14-758 (Sept. 2014).

50. *See generally* Fed. Trade Comm'n, The Road Ahead: Selling, Financing & Leasing Motor Vehicles (Aug. 2011).

51. *See generally* Secs. & Exch. Comm'n, SEC Announces Agenda, Panelists for Cybersecurity Roundtable (Mar. 24, 2014).

52. Dodd-Frank Act § 1014(a).

53. Dodd-Frank Act § 1014(b).

54. *See* Amendments Relating to Disclosure of Records and Information, 81 Fed. Reg. 58,310, 58,316 (Aug. 24, 2016).

55. *Id.* at 58,335.

56. Gov't Accountability Office, Financial Regulation: Complex and Fragmented Structure Could Be Streamlined to Improve Effectiveness (Feb. 2016), https://www.gao.gov/assets/680/675400.pdf.

57. *See* CFPB, Memorandum of Understanding on Supervisory Coordination (May 16, 2012).

58. *See* Gov't Accountability Office, Consumer Financial Protection Bureau: Some Privacy and Security Procedures for Data Collections Should Continue Being Enhanced 47 (Sept. 2014).

59. Agency Information Collection Activities: Submission for OMB Review; Comment Request, 79 Fed. Reg. 53,422 (Sep. 9, 2014).

60. *See*, e.g., 7 U.S.C. § 2(a)(2)(A) (Commodity Futures Trading Commission composed of five Commissioners, with no more than three from any political party); 12 U.S.C. § 241 (Federal Reserve System headed by seven-member Board of Governors); id. § 1812(a)(1) (Federal Deposit Insurance Corporation headed by five-member board); 15 U.S.C. § 41 (Federal Trade Commission composed of five bipartisan Commissioners); id. § 78d(a) (Securities and Exchange Commission composed of five bipartisan Commissioners).

61. The U.S. Office of Special Counsel safeguards the merit system in federal employment as well as whistleblower protections. *See* 5 U.S.C. § 1214. It is distinct from any special counsel appointed by the Justice Department.

62. *See* 12 U.S.C. § 4511(b).

63. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 794 (2013).

64. *Id.*

65. Federalist Paper No. 58 (Madison).

66. As Judge Brett Kavanaugh recently explained, "the single-Director CFPB would constitute an Article II problem even if the CFPB were subject to the usual appropriations process. The CFPB's exemption from the ordinary appropriations process is at most just 'extra icing on' an unconstitutional 'cake already frosted.'" *PHH Corp. v. Consumer Fin. Protection Bureau*, 881 F.3d 75, 100 n.19 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (quoting *Yates v. United States*, 135 S. Ct. 1074, 1093 (2015) (Kagan, J., dissenting)).

NOTES

NOTES