CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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

Re: Request for Information Regarding Bureau Supervision Program, Docket No. CFPB-2018-03358

Dear Ms. Jackson:

The U.S. Chamber of Commerce (the Chamber) is the world's largest business federation, representing the interests of more than three million companies of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness (CCMC) to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy. Strong and appropriate consumer protections are an important and necessary component of efficient capital markets.

We appreciate the opportunity to respond to the Bureau of Consumer Financial Protection's (the Bureau) Request for Information (RFI) regarding the Supervision Program. We believe the Bureau should reform its approach to supervision in the following three key ways:

- Refrain from treating supervision as a pipeline to enforcement;
- Reform supervisory processes to promote consumer protection and reduce unnecessary burdens; and
- Implement supervisory authorities clearly, consistently, and fairly across companies.

Below we recommend specific reforms that the Bureau should make to achieve these important goals and build a stronger foundation for the long-term success of its supervisory function.

Background

Supervision has long been an important tool for prudential regulators as they oversee financial institutions. Congress likewise granted the Bureau authority to supervise financial services companies. Indeed, this authority is very broad as Congress expressly granted the Bureau supervisory authority over banks, thrifts, and credit unions with assets over $10 billion, as well as nonbank mortgage originators and servicers, payday lenders, and private student lenders of all sizes.[1] Moreover, Congress also granted the Bureau authority to expand its supervisory authority, by rule, to cover "larger participants" in markets identified by the Bureau.[2] The Bureau already has exercised this authority in issuing "larger participant" rules in the markets for auto lending, non-bank international money transfers, student loan servicing, debt collection, and consumer reporting. Finally, the Bureau may examine any covered person, after notice and "a reasonable opportunity for such covered person to respond," whenever it has reasonable cause to determine by order that "such covered person is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services."[3]

Congress' broad grant of supervisory authority to the Bureau created a number of inherent implementation challenges. First, because Congress gave the Bureau authority to supervise financial institutions already subject to supervision by the prudential regulators, it simultaneously tasked it with avoiding regulatory duplication.[4] Second, because Congress allowed the Bureau to supervise companies that have not historically been subject to supervision, the Bureau was now responsible for implementing supervision programs in new contexts. Third, the very creation of a new agency with supervisory authority put substantial pressure on the Bureau to create a new supervisory regime from scratch. 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 and mistakes.

[1] 12 U.S.C. §§ 5514-5515.
[2] *Id.* § 5514(a)(1)(B).
[3] *Id.* § 5514(a)(1)(C).
[4] *See, e.g.*, *id.* § 5514(b)(3)-(4).

It is thus perhaps unsurprising that the Bureau's supervisory program remains a work in progress. The Bureau's Inspector General (IG) has detailed some of the growing pains of the supervisory program. The IG recommended in 2013, for example, that the Bureau rethink its practice of integrating enforcement attorneys into supervisory examinations.[5] Subsequently, the Bureau appropriately heeded this recommendation. In 2014, the IG found 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.[6] In 2017, moreover, the IG issued reports concluding that the Bureau could enhance the effectiveness of its examiner commissioning program and on-the-job training program,[7] and that it could improve its examination workpaper documentation practices.[8]

The IG's recommendations and the experiences of supervised businesses confirm that the Bureau still has plenty of room for improvement in its supervisory program. While the relevant statutory provisions create inherent challenges for the Bureau as it continues to refine this program, the Bureau can and must do better. As in other areas of the Bureau's activities, we believe that simple, common-sense reforms can substantially strengthen the Bureau's supervisory program and help establish the Bureau for long-term success. We detail these recommendations below and strongly urge the Bureau to adopt them in order to put its supervisory program on a solid foundation for the future.

Discussion

(1) Refrain from Treating Supervision As A Pipeline To Enforcement.

Supervision provides companies an opportunity to receive feedback from the Bureau on their compliance systems, while the Bureau is able to gather more information about potential risks to the consumer financial services market. The Bureau likewise can use it to confirm that covered entities have appropriately remedied any compliance issues that may have arisen. Indeed, Congress even made clear that it viewed supervision as an alternative to enforcement when the Bureau had

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[5] *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).
[6] *See* Office of the Inspector General, *The CFPB Can Improve the Efficiency and Effectiveness of Its Supervisory Activities* (Mar. 27, 2014).
[7] *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).
[8] *See* Office of the Inspector General, *The CFPB Can Improve Its Examination Workpaper Documentation Practices* (Sept. 27, 2017).

concern about practices in the marketplace.[9] However, instead of treating supervision as a tool to support collaboration with covered entities toward the shared goal of legal compliance, it seems the Bureau has at times used it as a pipeline for turning minor compliance issues into public enforcement actions. By turning an opportunity for collaboration into an entry point for adversarial and public enforcement processes, the Bureau has limited the supervisory program's long-term effectiveness. Going forward, the Bureau should take steps to ensure that its supervision program is an independent and robust function, and that only the most egregious violators of consumer laws are turned over to Enforcement for further investigation.

a. The Bureau should reserve enforcement actions for knowing misconduct where public deterrence is necessary.

Fraud and predatory behavior have no place in the market for consumer financial products and services. We feel strongly that the Bureau should prioritize the pursuit of such malicious behavior. It is unnecessary and a poor use of resources, in contrast, for the Bureau to use its enforcement tools on companies for minor or unknowing violations. Responsible, compliance-minded companies expend substantial time and resources working hard to comply with consumer financial laws, but compliance lapses can still happen in complex institutions with thousands of employees.

It merits emphasis that the Bureau has ample authority to ensure, through supervision, that customers are made whole after a compliance issue arises. Refraining from bringing an enforcement action, thus, would not negatively impact customers if they are appropriately made whole through supervision. Consumers would often receive remediation in a quicker manner in the supervisory setting instead of going through the lengthy enforcement process. We believe that the Bureau should consider two key factors in making that determination: (a) whether a civil money penalty should be collected; and (b) whether it is necessary to enter an enforcement action in order to send a public message deterring other companies from engaging in similar activity. With respect to the first question, we believe, as we discussed in more detail in our response to the enforcement RFI, that the Bureau should only seek civil money penalties in cases involving knowing violations. To the second question, the Bureau should institute an enforcement action on only truly egregious compliance violations. The Bureau thus does not need to undertake an enforcement action to clarify the details of what the law requires, especially because it is impossible to draw general lessons from consent orders because of the limited public information provided and unique factual circumstances. Instead, the Bureau

[9] *See* 12 U.S.C. § 5514(a)(1)(C) (allowing the Bureau to use supervisory tools whenever it has reasonable cause to determine that a covered entity is engaging in conduct that exposes consumers to risk).

should only undertake an enforcement action when there is a particular need to provide a deterrent to such illegal behavior—such as if irresponsible businesses persist with conduct that the Bureau has made clear is contrary to law.

b. The Bureau should work with supervised entities to identify solutions to perceived compliance problems.

The supervision program provides an opportunity for companies and the Bureau to work together to identify and address potential compliance issues. The Bureau's failure to take advantage of this opportunity to this point is regrettable since responsible compliance-minded companies want to fix violations and prevent future issues. The Bureau should encourage this mindset by collaborating with a supervised company to determine a satisfactory resolution of any issue discovered during supervision, including, for example, when a compliance gap has arisen because of a company's difficulty navigating seemingly contradictory regulatory requirements or guidance. Likewise, while the Bureau should not use supervision to interpret regulations, the Bureau can work with companies during the supervisory process to help them understand and comply with new or recently changed regulations in the context of their specific business operations. In this way, the Bureau should provide support for a company if it in good faith does not understand a new requirement, instead of targeting the company for violating a rule.

c. Allow meaningful dialogue between the Bureau and supervised entities.

The Bureau can use a variety of processes for notifying a supervised company of a potential compliance issue discovered during a supervisory examination. These procedures are intended to foster meaningful communication between the Bureau and the supervised entity. To date, however, these procedures have served to convey the Bureau's conclusions, not to open any meaningful dialogue. We recommend two ways that the Bureau should improve these processes to achieve their proper aim of facilitating meaningful dialogue about issues identified during a supervisory examination.

First, the Bureau should provide detailed information to companies on the Bureau's view of the facts and the legal basis for any identified compliance issue. A company cannot effectively respond to the Bureau if it does not understand the legal and factual basis on which the Bureau's concerns rest. Further, more specificity will assist the company in producing documents requested by the Bureau. The Bureau thus should adopt policies requiring more detail in communications so that they:

- Identify the exact legal obligation at issue;

- Cite the regulation or statute that is the source of that obligation;
- State the Bureau's view of the facts regarding the company's conduct; and
- Provide the Bureau's analysis explaining why the facts constitute a violation of the relevant obligation, including identifying governing interpretations of relevant legal standards.

In following these steps, the Bureau also should be careful to avoid overreliance on template language. While we recognize that standardized forms can support consistency across examinations and companies, the Bureau historically has relied excessively on form letters and template language, particularly in its supervisory letters and examination reports. As a result, companies have been left confused by the receipt of apparently stock examination reports that do not appear to have been appropriately tailored to their specific company. We ask the Bureau to refrain from providing such formulaic reports.

Second, the Bureau should prioritize meaningful discussion with supervised companies and support this goal with appropriate changes to its procedures. Currently, companies may respond to issues, but there are few meaningful opportunities to actually discuss issues with the Bureau before it makes up its mind on how to proceed. The Bureau should establish procedures that create more channels for communication between the Bureau and companies. Specifically, we recommend that the Bureau:

- Allow companies to preview the facts to be used in a supervisory report and propose corrections as appropriate; and
- Hold meetings with companies after the written results of an examination are provided.

i. Matters Requiring Action ("MRAs")

MRAs should only be issued when there is a serious concern found in the supervision process. Currently, MRAs are seemingly being issued when there is an individual complaint or a minor issue. MRAs should really be reserved for when issues need to be raised to a heightened level. Once an MRA is issued, we emphasize the importance of a meaningful dialogue between the institution and the Bureau to better understand the concern as discussed above.

We ask for more flexibility in the timeline for responding to MRAs because the timelines are very aggressive, especially given the amount of MRAs currently being issued by the Bureau. Moreover, unlike the responses discussed below, companies find responding to an MRA unnecessary in certain circumstances. Accordingly, the Bureau should allow companies to choose not to reply to an MRA where appropriate, such as when the MRA was already issued over the company's written objections. Requiring replies to the Bureau's actions that do not further the conversation serve little purpose and merely unnecessarily increase the burden placed on companies by the supervision process. Instead, the Bureau should focus on encouraging meaningful opportunities for dialogue between the Bureau and supervised entities.

Further, we ask the Bureau to formalize a process for notifying the company when an MRA has been closed between exam cycles. Institutions have reported having open-ended MRAs for years even though there is no current action on them. While the Bureau might have internally closed out the MRA, we ask the Bureau to notify the institution that it has been closed because the institution will remained focused on the MRA.

ii. Potential action and request for response ("PARR") letters

PARR letters should only be used for serious matters that should be raised to the enforcement level, and not to identify potential issues during the exams that did not receive an MRA. The main purpose of the PARR letter is for supervision to identify issues for potential referral to enforcement and consideration by the Action Review Committee, however the Bureau has been using these letters very broadly over the past couple years.

Institutions should be able to meet with the attorneys involved with drafting the PARR letters and supervisory reports to have the opportunity to clarify any confusion on the legal interpretations or factual conclusions. The legal issues raised in these letters can be very complex and the attorneys drafting them should be able to get clarity from the institution without having to rely on the supervision staff.

Further, the deadline for companies to respond to PARR letters should be increased to at least 30 days with the option to request an extension. The existing 14-day deadline simply does not provide companies with enough time to respond to the Bureau's claims.[10] Extending the deadline will give companies sufficient time to provide a meaningful response to a PARR letter and will more effectively move the case forward.

[10] We recognize that the Office of the Comptroller of the Currency (OCC) issues letters with 15-day deadlines. However, the OCC uses these letters much less frequently than the Bureau.

d. The Bureau should reform the process for appealing supervisory findings.

The Bureau likewise has room to improve its approach to appeals of supervisory findings. An effective appeals process should give companies an opportunity to push back on the Bureau's findings before an enforcement action may be brought forward. Unfortunately, the current appeals process does not provide companies a meaningful opportunity to contest the Bureau's conclusions. Moreover, companies are wary of appealing out of fear that the Bureau will respond by increasing the damages alleged. This fear is not unfounded considering that in the *PHH* enforcement action, the Director increased the money judgment imposed on the company by a factor of eighteen from the amount recommended by the presiding administrative law judge.[11] This intervention undermined any semblance of impartiality in the proceedings and sent a clear message to companies not to appeal or question actions brought against them. The Bureau consequently should take seriously the need to address fears about the impartiality of the appeals process. The appeals process would also benefit from increased transparency so that companies can better evaluate whether pursuing an appeal would help correct the Bureau's understanding of the practices under review.

To address these concerns, we would urge the Bureau to adopt the following four reforms:

- The Bureau should establish a policy that binds it to its pre-appeal damages determination to eliminate the fear that the Bureau will raise the damages if the company appeals.
- Appeals should be heard by a separate entity within the Bureau, rather than by the supervisory team that reached the original conclusion.
- The Bureau should provide meaningful responses to any legal arguments the company sets forth in an appeal if the Bureau contests the company's view.
- The Bureau should publish anonymous data on the results and issues addressed in appeals to increase transparency.

(2) Reform Supervisory Processes to Promote Consumer Protection and Reduce Unnecessary Burdens.

[11] Decision of the Director, *In re PHH Corp.*, CFPB File No. 2014-CFPB-0002, Doc. No. 226 (June 4, 2015).

The Bureau's ability to require companies to produce information and allow on-site examinations gives great visibility into company practices. But the use of these tools comes at a significant cost for companies complying with the Bureau's – and other regulator's – requests. The Bureau consequently must use its supervisory authority effectively and fairly – balancing its responsibility to ensure compliance with federal consumer financial laws with the burden that information requests and on-site examinations impose on companies. Otherwise, the benefits of the supervisory program will be outweighed by costs borne by companies that ultimately could result in higher prices or reduced product choices for consumers. Below we recommend four steps the Bureau should take to avoid this harmful result.

a. Ensure that information requests are not unduly burdensome.

Information requests long have been a costly component of the supervisory process. Recognizing these costs, Congress specifically directed the Bureau to avoid unnecessary information requests.[12] The Bureau's information requests nonetheless have imposed unnecessarily high costs on companies subject to the Bureau's supervisory requests. The Bureau, for example, frequently has issued requests seeking information on an unnecessarily broad set of topics or information not readily available to the business. Moreover, the Bureau has used supervisory information requests seemingly out of sheer curiosity about conditions in the marketplace or to collect information for other purposes. Complying with these requests has imposed a significant and unnecessary burden on companies, and particularly smaller institutions that do not have experience with supervision or large scale compliance teams.

The Bureau should better tailor its information requests going forward. Its information requests should reflect the subject of an examination and not be used for general information gathering or fishing expeditions. The Bureau should also limit its requests to materials that already exist, instead of forcing institutions to create new reports in new formats. This is especially true when the information requested is available, but simply in a different format. It can be very cumbersome to create new reports because information has to be pulled from different – and often legacy – systems that do not necessarily interact. The Bureau should also be especially careful in the context of follow-up requests, since these requests can substantially – and needlessly – increase the burden imposed on a company.

b. Make sure sensitive information is adequately protected.

[12] *See* 12 U.S.C. § 5514(b)(4) (directing the Bureau to utilize "to the fullest extent possible" information that is publically available or previously gathered by a federal or state agency).

Relatedly, the Bureau should use this RFI as an opportunity to address the confidentiality of the information the Bureau obtains through the supervisory process. As we have explained in previous comment letters, the Bureau should formally rescind its proposed revisions to the rules governing the confidentiality of information that would allow the Bureau to broadly share confidential information with any "Federal, State, or foreign governmental authority or an entity exercising governmental authority."[13] Moreover, there is no definition of what constitutes "an entity exercising governmental authority" so that type of governing body is essentially limitless. This sharing of information is inconsistent with other regulators and goes far beyond the scope of what is appropriate. Likewise, as we stated in our comment letter responding to the Bureau's RFI on civil investigative demands (CIDs), the Bureau should not hinder free speech by prohibiting entities from disclosing civil investigative demands if they wish to do so, which was also proposed. The confidentiality of investigations exists to support the rights of investigated parties to not be unjustly tarnished by the mere existence of a government investigation. However, companies should remain free to disclose the existence of the investigation as they deem appropriate with the necessary stakeholders or shareholders. The Bureau should formally abandon its 2016 proposal that would gag companies should they wish to discuss the investigation against them.

Finally, the Bureau should also take steps to better protect information covered by attorney-client privilege. Under 12 U.S.C. § 1828(x), the submission of privileged materials to the Bureau as part of the supervisory process does not waive privilege. However, it is less clear the extent to which this provision protects privileged materials once further distributed by the Bureau. Any sharing of privileged information particularly raises concerns if the supervisory exam proceeds to an enforcement action. The Bureau's access to privileged materials in an enforcement proceeding could severely and unfairly prejudice the targeted company. The Bureau should establish a strong firewall between enforcement and supervision to prevent the sharing of any materials covered by attorney-client privilege obtained from an information request or during an examination.

c. Complete examinations in a timely manner.

Supervisory exams are incredibly time consuming for covered businesses. When executing exams, companies need time to prepare requested materials and schedule meeting times for employees, and the examination can require a significant commitment of time and resources once underway. Unfortunately, some financial institutions and financial services companies have been subject to seemingly unending

[13] Amendments Relating to Disclosure of Records and Information, CFPB–2016–0039, 81 Fed. Reg. 58310 (Aug. 24, 2016).

examinations.[14] Going forward, we hope the Bureau will ensure that examinations are completed within a reasonable timeframe. We propose three recommendations to limit burdensome, seemingly unending examinations.

First, the Bureau should provide ample time for companies to prepare for examinations. Companies need time to organize materials and set up schedules for examiners to meet with employees. Sufficient time is especially critical when responding to the Bureau's data requests, which require extensive time and resources to develop and validate the results of a request. Efforts to accelerate examinations should not deprive companies of time to prepare.

Second, the Bureau's on-site activities should be limited to the specific subjects that were addressed in the pre-arrival information requests. Allowing examiners to stray from the previously specified subjects encourages scope creep and unexpectedly increases the burden on companies.

Third, examinations should focus on the proper role of the supervision program: examining business practices against the relevant legal standards, not wordsmithing individual policies and procedures. The Bureau's role is to lay out the requirements, not implement them. Implementation should be left to the companies who are more experienced with their business and past practices. Examiners being focused on the minutia of policies and procedures is not a good use of the Bureau's or a company's time. Instead, the Bureau's examiners should be trained to evaluate the company's compliance program holistically, instead of getting caught up in the details that do not impact robust compliance.

d. Avoid unnecessary or premature examinations.

Undertaking unnecessary or premature examinations is not a wise use of the Bureau's supervisory resources. Excessive examinations also burden companies as they keep businesses from having a period of normalcy in which they can conduct their business without being subject to yet another examination. To prevent unnecessary or premature examinations, we suggest two reforms.

First, the Bureau generally should allow companies to experience a reasonable, six-month period of normal operations between examinations. Examinations take extensive time and resources away from a company's normal operations and impose substantial costs. This six-month window would allow for appropriate time to implement the feedback from the previous exam. Without time in between exams, it

[14] *See, e.g.*, Office of the Inspector General, *The CFPB Can Improve the Efficiency and Effectiveness of Its Supervisory Activities* (Mar. 27, 2014) (noting concerns about timeliness in Bureau examinations).

is virtually impossible to make the necessary changes because the same staff is already focused on fielding questions from a new exam.

Second, the Bureau should not undertake examinations on new rules before giving companies time to adapt to the change. Responsible, compliance-minded companies expend significant effort on creating and maintaining compliance systems. These systems cannot be instantly updated when the Bureau imposes a new rule, which is why companies need adequate time to develop and implement processes that ensure compliance with a new rule. This issue is particularly salient when implementing technological changes in response to new regulations because there are limited technological vendors that can make the changes. The issue about the lack of vendors was incredibly apparent during implementation of the TILA RESPA Integrated Disclosure rule. Despite best efforts, there were limited technological vendors in the marketplace that could conduct such an overhaul so the rule had to be delayed.

e. Coordinate with other regulators to avoid duplication.

As a 2016 Government Accountability Office report said: "the U.S. financial regulatory structure is complex, with responsibilities fragmented among multiple agencies that have overlapping authorities."[15] This complex structure makes it critical that regulators overseeing the same institutions consciously and deliberately coordinate their efforts. Consequently, Congress mandated that "the Bureau shall coordinate its supervisory activities with the supervisory activities conducted by prudential regulators, the State bank regulatory authorities, and the State agencies . . . "[16] It is important to note the language is "shall," not "may," which clearly shows how important coordination is to Congress. 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 leaves much to be desired.

Going forward, the Bureau should implement policies to ensure that its supervisory work does not duplicate or conflict with the examinations performed by other regulators. Duplicative document and information requests unnecessarily impose costs on companies and waste agency resources. Overlapping examination schedules pose similar problems. To combat these issues, the Bureau should refine its memorandums of understanding with the prudential regulators to better establish protocols and policies that facilitate coordination.[17] Collaborating with other agencies

[15] 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 .
[16] 12 U.S.C. § 5514(b)(3).
[17] *See* CFPB, Memorandum of Understanding on Supervisory Coordination (May 16, 2012).

to create coordinated annual exam calendars or joint examinations would further reduce the duplication of efforts and burden imposed on companies. In addition, to help avoid unnecessary repetition of information requests, the Bureau should develop an agreement under which a triaging agency, such as the Treasury Department's Office of Financial Research or the Financial Stability Oversight Council, serves as a custodian of information of common interest to the Bureau and other regulators. Lastly, when violations are found, the Bureau should coordinate with other regulators to resolve the issues in concert or establish a lead regulator, rather than subjecting companies to multiple, uncoordinated supervisory or enforcement actions.

(3) Implement Supervisory Authorities Clearly, Consistently, And Fairly Across Companies.

a. Clarify how and when the Bureau will use its various supervisory tools.

As discussed above, the Bureau has a series of tools for communicating concerns to companies under examination, including PARR letters, supervisory letters, examination reports, and exit meetings. The Bureau, however, has not provided any guidance on when and why the Bureau will choose to use which tool. This lack of information allows the Bureau's process to appear arbitrary to supervised entities. To remedy this problem, the Bureau should publish additional guidance on when and how it will use each supervisory tool.

First, with respect to MRAs, the Bureau should clarify the circumstances in which the Bureau will issue an MRA as opposed to a "finding" or other conclusion. Currently, there is no definition of what an MRA is, which creates great confusion for institutions. To the extent possible, it would be helpful to provide clarity using quantitative standards (e.g. relating to the number of instances of compliance gaps or the amount of consumer harm) to determine, or at least guide, whether an examiner should issue an MRA. The Bureau should also clarify when, if ever, an MRA would be issued for an instance other than a compliance failure, such as for a compliance management process issue.

Second, the Bureau should provide more transparency on the use of PARR letters. At this time, supervised companies lack insight into the PARR letter process or its effectiveness. Since PARR letters are of great significance, we believe they should not be issued for an individualized issue, but instead, only for systemic compliance problems. Further, providing anonymized data identifying issues addressed via PARR letters and results of PARR letters would increase transparency

into the process. The Bureau should also provide clarity on how the Bureau will respond to and consider legal arguments set forth in responses to PARR letters. Providing that information to companies will allow them to more effectively address the Bureau's concerns.

b. Apply rules consistently across regulated entities.

Consistent application of the rules is a key element of any fair regulatory system. The Bureau has struggled with consistency when operating its vast, nation-wide supervision program because examiners in the field may have different interpretations from one another. To be clear, this is not a problem unique to the Bureau. This lack of consistency creates uncertainty and confusion in the marketplace, which discourages businesses from engaging in legal activities and may cause companies to raise prices to offset the increased costs of compliance. We recommend three ways the Bureau could act to address this issue.

First, the Bureau should take steps to ensure its examiners have appropriate training. As the 2017 inspector general report explained, the Bureau has previously failed to adequately train and set out expectations for its examiners.[18] Examiners must properly understand the Bureau's supervisory processes and legal standards to apply rules consistently and appropriately across regulated entities. Without improved training, examiners will continue to lack the requisite understanding necessary to operate a fair and consistent supervision program.

Second, the Bureau should not use the supervisory process to announce new requirements for entities that are subject to examination. As we have previously discussed in comment letters to the Bureau, the best mechanism for establishing new standards is notice and comment rulemaking, with additional forms of guidance offered where appropriate. Applying new rules or principles—or the mere personal preferences of an examiner—to companies subject to examinations creates inconsistent results. If the Bureau becomes convinced through its supervisory work that a new policy should be adopted, the Bureau should use the appropriate public means to do so.

Third, the Bureau should coordinate with other regulatory agencies to confirm that its supervisory approach to matters of shared jurisdiction is workable. As described above, many financial services companies are subject to regulation from multiple federal and state agencies. This regulatory structure has resulted in divergent standards. For example, the Bureau and other regulators have sent mixed messages to

[18] *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).

banks on deposit advance products and small-dollar loan regulation. The Bureau should work with other agencies to compare their supervisory programs and devise a coordinated substantive approach to avoid more contradictory standards.

c. Use Supervisory Highlights and the Supervision and Examination Manual in an appropriate manner

The Bureau's *Supervisory Highlights* and Supervision and Examination Manual (Exam Manual) provide valuable information to supervised businesses. We encourage the Bureau to expand its use of these publications to provide more helpful information. However, as described below, the Bureau simultaneously should be sure that these publications provide appropriate types of information to the marketplace, specifically:

- *Supervisory Highlights* provide companies with insights into how the Bureau applies the law during the supervision program. This information can help companies improve compliance programs. To further increase the value of *Supervisory Highlights*, the Bureau should present detailed, anonymous information on past cases, including legal analysis outlining violations element by element, especially in less defined areas of the law like unfair, deceptive, and abusive acts and practices (UDAAP).

- The Exam Manual should serve as a tool to present helpful guidance on how companies can demonstrate compliance and prepare for examinations. For example, it should clearly lay out the standards to be applied, including by emphasizing to examiners that the Bureau bears the burden of proof to show a violation, not the companies to prove they did not violate regulations. Moreover, the Bureau should use the Exam Manual to provide more relevant detail to supervised entities and regularly review it to ensure that it remains up to date. For example, the Bureau should expand the Exam Manual's coverage of:

    - The Bureau's existing interpretation of the regulatory requirements, as developed through prior rulemakings or other appropriate processes;

    - The analysis behind these interpretations; and

    - The metrics the Bureau will use to assess compliance with these requirements.

While *Supervisory Highlights* and the Exam Manual can increase transparency and information sharing, the Bureau should be conscious that these publications are not

the appropriate forum to set out new interpretations of rules or regulatory obligations. Such interpretations or rules generally should be addressed through notice and comment rulemaking where stakeholders may provide feedback on the Bureau's proposal. *Supervisory Highlights* and the Exam Manual should be confined to laying out the application of established rules. Nonetheless, we believe that the Bureau can and should substantially increase the value of these documents to supervised entities.

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We thank you for the opportunity to submit these comments and would be happy to discuss these issues further.

Sincerely,

Thomas Quaadman