CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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May 14, 2018

Ms. 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 Enforcement Processes, Docket No. CFPB-2018-0003

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. Consumer protection is an integral part of an efficient capital market and the CCMC appreciates the opportunity to comment on the request for information regarding the enforcement activities of the Bureau of Consumer Financial Protection ("Bureau").

Fraud and predatory behavior have no place in the consumer financial services marketplace. Indeed, Congress granted the Bureau strong enforcement authority to achieve that goal. The Bureau must wield this tool both effectively and fairly. The Bureau has work to do to achieve this goal. We made similar recommendations to the Securities and Exchange Commission (SEC) in the 2015 report that we have attached as an appendix. The SEC moved forward on some of those recommendations including the discovery procedures and limited use of depositions. These recommendations can be informative to the Bureau as it considers this Request for Information (RFI).

The Bureau's prior leadership seemed to "push the envelope" on novel legal theories and pursue aggressive enforcement to achieve policy objectives. In doing so,

the Bureau caused unnecessary confusion and uncertainty in the marketplace discouraged businesses from engaging in legal activities, and caused enormous, unjustified, economic consequences for businesses and their employees. Consumers ultimately lost out because responsible, compliance-minded companies priced their products to account for the increased costs of compliance or hesitated to offer products and services when they were unsure of the potential legal ramifications.

The Bureau should exercise its authority both effectively and responsibly. It must respect the legal limits imposed by Congress and the Constitution and recognize that its measure of success should not be based on the penalty it imposes. To achieve these aims the Bureau should follow four key principles:

- **Avoid regulation by enforcement;**
- **Promote a fair marketplace by enforcing clearly established legal principles;**
- **Enforce the law within the limits of the Bureau's authority; and**
- **Avoid regulatory duplication in enforcement activities.**

These principles are discussed in greater detail below.

Discussion

I. Avoid Regulation By Enforcement.

The Bureau has previously used enforcement actions and consent orders to establish new policies in a wide-range of fields. The Bureau, for example, used enforcement actions in an apparent attempt to eliminate entire product categories such as credit-card add-on products, and define market practices in the case of dealer reserve in indirect auto-lending. Because the Bureau did not use its relevant rulemaking authorities, its approach led to unnecessary confusion and regulatory duplication and uncertainty, which in turn yielded increased costs and decreased choice for customers. Furthermore, the Bureau's prior leadership publicly embraced this approach. It even suggested that other companies should draw lessons from cryptic consent orders that companies often entered into because of the crippling financial and reputational harm the Bureau threatened to impose. In doing so, prior leadership failed to recognize the complexities of different business models and that not all practices can be compared between institutions.

We were pleased to see that Acting Director Mulvaney recently made clear that going forward the Bureau would undertake "more formal rule making and less regulation by enforcement."[1] We commend the Bureau's commitment to shift from the previous regulation-by-enforcement approach to a more thorough, collaborative, and sound policymaking approach that relies on the rulemaking authority that Congress granted to the Bureau. We consequently trust that it is unnecessary to reiterate all of our concerns about regulation by enforcement, which we have repeatedly detailed to the Bureau.[2] However, we do not think it is sufficient for the Bureau simply to announce a change of heart on this point. The sole director structure of the Bureau makes it critically important to codify these rules and policies. While Acting Director Mulvaney may not engage in rulemaking by enforcement, a new personality with divergent views could revert back to this practice. The unique structure of the Bureau makes it critical that the Bureau adopt appropriate internal policies to ensure that avoiding rulemaking by enforcement becomes a permanent feature of the Bureau's culture, not simply a phase that will change with the Bureau's leadership. Specifically, we would recommend that the Bureau adopt two reforms to give permanent significance to its change in course. These reforms should be codified in binding public policy documents so future leadership cannot ignore them to punish conduct that took place while the documents were in force.

a. Only Enforce Established Law

The Bureau should adopt procedures to make sure that it would be enforcing established law before bringing any enforcement action—not seeking to announce a new rule of general applicability. For example, the Bureau could require that any internal memorandum seeking authorization to bring an enforcement action must explain the alleged conduct that purportedly violated a specific legal standard. Such a memorandum should explain how the statutory language, governing regulations, and applicable interpretations issued by the Bureau or other federal agencies make clear that the conduct at issue was illegal. The memo should also point to the exact conduct that allegedly violated the articulated laws, instead of pointing to general practices such as "forbearance of student loans" or "add-on products." Implementing such procedures would ensure that enforcement actions are being used to enforce established law, rather than as a tool for imposing new policies or novel interpretations of the law.

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[1] 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.

[2] *See generally* Letter from David T. Hirschmann to Director Richard Cordray (Mar. 31, 2016) (detailing concerns regarding regulation by enforcement), https://www.centerforcapitalmarkets.com/wp-content/uploads/2016/03/2016.3.31-CFPB-Letter-to-Dir.-Cordray-re-Regulation-by-Enforcement.pdf.

b. Rulemaking Should be the Only Vehicle to Establish New Policy

The Bureau should make statements in consent orders, or contemporaneously, that emphasize that a consent order does not attempt to establish any rule of general applicability. Reliance on consent orders to establish new policies is problematic for an array of reasons. Unlike rulemaking, consent orders are based on a unique factual scenario and do not benefit from public notice and comment about unintended consequences.[3] Moreover, consent orders represent only the Bureau's view of the law and have no judicial imprimatur. The fact that a company agreed to enter a consent order does not mean it would necessarily be found liable in a court. Instead, the company may think the cost benefit of settling is better for legal fees and the time and effort it takes to go to court. Further, companies are generally reluctant to litigate with their regulators and, thus, are inclined to acquiesce to their regulator that they must work with and be examined by to settle a matter. Due to the problems caused by using consent orders to establish general rules, the Bureau should make clear that consent orders do not establish generally applicable standards.

In the rare case where the Bureau finds it critical to articulate a general prospective principle relating to conduct at issue in a consent order, we urge the Bureau clarify its position in a subsequent bulletin, then to seek notice and comment on such a principle before adopting a final version of that bulletin and enforcing it in future actions. In so doing, the Bureau would ensure that companies can rely on the Bureau's rules and other governing legal interpretations when refining compliance programs—thereby minimizing the guesswork that increases costs and decreases consumer access to products.

II. Promote a Fair Marketplace by Establishing a Robust No-Action Letter Process and Advisory Opinion Process

To reduce the need to announce policy in enforcement actions, the Bureau should ensure that it has appropriate alternative tools to articulate its understanding of governing law. In particular the Bureau should adopt a robust no-action letter and advisory opinion process to provide clarity on the law when rulemaking is not appropriate. When the law is unclear, businesses are hesitant to innovate as they are afraid of being made an example of in an enforcement proceeding should an attorney at the Bureau disagree with their good faith legal interpretation. To combat this problem, a wide range of federal agencies – including the Consumer Product Safety Commission, Justice Department, Federal Trade Commission, and Securities and

[3] Unlike the Federal Trade Commission, the Bureau does not publish its proposed settlements for public comment and thus does not obtain even this minimal level of public input before finalizing a consent order.

Exchange Commission – routinely issue written opinions that clarify 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 give businesses valuable clarity about the government's view of the law before being subject to an enforcement action.

While the Bureau has a no-action letter policy, it is rarely utilized – it has only been used once[4] since the Bureau issued the final policy statement establishing the process. Companies do not seek "no-action letters" because there is no assurance the Bureau or other regulators or attorneys general will refrain from using their enforcement authority, either immediately based on information revealed in the application, or after granting and then revoking a no-action letter. The Bureau's limited informal processes for answering questions from regulated entities do not compensate for the absence of a meaningful no-action and advisory opinion process because they do not bind the Bureau or prevent it from taking enforcement actions contrary to any informal statements. Advisory opinions and no-action letters can provide well-considered, prospective guidance to an entire market. In contrast, providing one-off advice to companies who call the Bureau with questions or to entities during supervision fails to standardize industry behavior and does not provide the same legal protections as a no-action letter. To prevent the threat of enforcement from quashing innovation, the Bureau should implement these formal processes that allow companies to provide new products or product features without fear that a minor "foot-fault" or unknown violations would lead to an enforcement action.

III. Enforce the Law Within the Limits of the Bureau's Authority

The Bureau should focus on basic principles such as adhering to the limits on its authority, respecting the right of respondents to have fair notice of what the law requires, and seeking only penalties that are appropriate given the conduct at issue. We describe below five reforms that the Bureau can implement to achieve those goals.

a. Adhere to Legal and Constitutional Bounds of the Bureau's Authority

The Bureau has enormous powers. But, those powers have limits – imposed by Congress and the Constitution – that must be respected. It is simply wrong for the

[4]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/

Bureau to use its huge authority to push a company or an individual into accepting a debatable settlement. As Acting Director Mulvaney wrote:

> It is not appropriate for any government entity to "push the envelope" when it comes into conflict with our citizens. We have the power to do damage to people that 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 we charged go to get their time, their money, and their good names back? If a company closes its doors under the weight of a multiyear Civil Investigative Demand, we still have jobs at CFPB. But what about the workers who are laid off as a result?[5]

The Bureau's history to date has reflected a regrettable willingness to use enforcement to "push the envelope," even when it explicitly lacked legal authority. 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 was unknown whether their approach would help or hurt consumers.[6] The Bureau should abandon this strategy, and instead, focus on strictly enforcing the rule of law.

The Bureau should learn from these mistakes and commit itself to carefully adhering 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 Bureau and reducing regulatory uncertainty for companies.

b. Abide by Statutes of Limitations

The Bureau also should abandon its practice of seeking to enforce consumer financial laws after the applicable statutes of limitation have run out. A case in point is the *PHH* action. The Bureau purported to impose liability under the Real Estate Settlement Procedures Act ("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. In *PHH* and other cases, the Bureau has claimed that it could bring enforcement actions years or even *decades* after the fact. This practice contravenes the purpose of the statutes of limitations and must be abandoned.

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[5] Mulvaney, *The CFPB Has Pushed Its Last Envelope*, *supra* n.1.
[6] *See* Rachel Witkowski, *The Inside Story of the CFPB's Battle Over Auto Lending*, AMERICAN BANKER (Sept. 24, 2015).

When going outside the statute of limitations, the Bureau claimed the statute of limitations does not apply to administrative actions. The D.C. Circuit rightly rejected that argument as "flatly wrong" and held that the statute of limitations applied equally to administrative proceedings.[7] 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."[8]

A statute of limitations reflects a "congressional concern for finality."[9] By enacting such a provision, Congress intends that after the limitations period has run out, 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 the Bureau could avoid the statutes of limitations altogether. Another concern of the statute of limitations is the difficulty of litigating older matters. Over the years, records get lost, computer systems change, and employees leave companies. All of these factors make it increasingly difficult to come to a resolution.

The Bureau should therefore commit to respecting an applicable statute of limitations in court actions, enforcement investigations, and administrative enforcement proceedings. Specifically, absent good cause approved by the Director, the Bureau should not pursue enforcement actions or other remedies for conduct occurring outside the five year statute of limitations provided by 28 USC § 2462, and it should codify this practice in public documents. Moreover, the Bureau should give meaning to this principle in its engagement with companies. For example, the Bureau should only ask investigatory targets to agree to toll the statute of limitations at the end of an investigation, not in its earliest stages. By doing so, the Bureau would better respect the purpose of a statute of limitations without losing its ability to take action against misconduct.

c. Provide 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 bringing enforcement actions based on new legal interpretations that are applied to prior conduct. As Acting Director Mulvaney

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[7] *PHH Corp. v. Consumer Fin. Protection Bureau,* 839 F.3d 1, 52 (D.C. Cir. 2016), *vacated* Feb. 16, 2017, *reinstated in part,* 881 F.3d 75 (D.C. Cir. 2018) (en banc).
[8] *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))).
[9] *Montana v. Clark*, 749 F.2d 740, 744 (D.C. Cir. 1984).

has stated, "it seems that the people we regulate should have the right to know what the rules are before being charged with breaking them."[10] Moreover, 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.[11] A regulator that "change[s] course" in its interpretation of the law must provide "constitutionally sufficient notice" of the change in interpretation prior to sanctioning companies.[12] It is thus not only good policy, but constitutionally required for the Bureau to provide regulated companies with fair notice of what federal consumer financial law requires before bringing enforcement proceedings against them.

Again, the *PHH* litigation is illustrative. There, the Bureau announced a new interpretation of RESPA in an enforcement proceeding and then unilaterally inflated an Administrative Law Judge's $6 million order of disgorgement to $109 million for conduct that had been legal under regulators' prior interpretation of the law. A D.C. Circuit 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."[13] The Bureau must avoid any similar mistakes in the future and should commit itself to fair enforcement of the law with adequate due process protections consistent with the Constitution.

d. Enforcement Actions Should not be the Default Remedy

The Bureau should use its enforcement authority to target fraud, predatory behavior, and other clear wrongdoing. The Bureau should refrain from using enforcement as a default whenever a company suffers a compliance lapse that does not cause clearly identifiable consumer harm, or when the company has brought the issue to the Bureau's attention and is working towards remediating any loss suffered by its consumers. It is the unfortunate reality in doing business that mistakes will be made. This is why compliance-minded institutions have risk frameworks, compliance oversight, and audits to see if there are gaps in their system or risk trends. Despite best efforts, sometimes things fall through the cracks, and it is up to the financial services provider to remediate consumers. We respectfully ask the Bureau to place much greater emphasis on remediation and self-reporting when deciding whether to handle an action through supervisory or enforcement channels. If a company subject

[10] Mulvaney, *The CFPB Has Pushed Its Last Envelope*, *supra* n. 1.
[11] *FCC v. Fox Television Stations, Inc.,* 567 U.S. 239, 253 (2012).
[12] *Id.* at 254-258.
[13] *PHH Corp.,* 839 F.3d at 48.

to Bureau supervision self-reported and self-remediated, we think it would foster a culture of compliance and accountability if the incidents generally were handled through supervision rather than enforcement. If such a company is not subject to Bureau supervision, then the Bureau should create non-public enforcement action under which companies commit to refrain from the practices at issue and complete any remediation.[14]

We also ask the Bureau to be willing to engage reasonably with companies throughout the enforcement process – including before an action is filed – to have a candid conversation about what a company has done to remediate an issue, give redress to consumers, and make sure that the issue does not recur. After fully understanding the issue, the Bureau should reassess whether the issue is more appropriate for supervision. The Bureau should express a willingness to give cases to supervision if there is limited consumer impact, inadvertent errors, and strong cooperation from the institution. The Bureau should establish a clear process for referring matters to supervision, instead of maintaining them in enforcement even if they are better suited to be handled in supervision.

Likewise, the Bureau should be willing to engage with companies on the adequacy of the legal basis for an enforcement action, the accuracy of its understanding of the facts at issue, and whether and to what extent any consumers were harmed by the conduct at issue. By having these conversations, the Bureau and target companies will better understand the actions alleged, and it will be more likely that a more reasonable and fair outcome is achieved.

Specifically, we urge the Bureau to:

- Use the Notice and Opportunity to Respond and Advise ("NORA") process unless the Bureau, including on matters referred from supervision, has a compelling reason for not doing so, such as an exigent circumstance in which delay would jeopardize the case.

- Provide the potential subject of an enforcement action with a full presentation of the nature of the Bureau's proposed case and supporting evidence as part of the NORA process and allow adequate time to permit a meaningful response to the notice.

[14] OCC MOU processes, see PPM 5310-3.

- Establish a presumption in favor of granting access to the Bureau's investigation files to the subject of the investigation and require that a senior-level official review preliminary decisions to deny such access.

- Implement procedures to allow in-person presentations to Bureau personnel before initiating an enforcement action so Bureau staff can fully understand the problem they are trying to address.

- Adopt a policy that any party that has made a submission as part of the NORA process should be provided reasonable advance notice, such as three business days, that an enforcement action such as a lawsuit or administrative complaint is forthcoming.

- Also, if a consent order is reached, we ask the Bureau for a clear process for the timely review and closure of a consent order. This is critical to keep the action moving forward, and getting closer to a resolution faster.

As Acting Director Mulvaney wrote, "bringing the full weight of the federal government down on the necks of the people we serve should be something that we do only reluctantly, and only when all other attempts at resolution have failed."[15] Instead of rushing to enforcement as the solution to any perceived problem, the Bureau should communicate its concerns with the company and allow opportunities to halt and remediate the conduct at issue or otherwise respond. And, when the Bureau does bring an enforcement action, it should communicate its position to the defending company and prioritize meeting with the company to discuss disputed facts or alternative resolutions. Increased engagement with companies can help avoid the filing of unnecessary enforcement actions, narrow the range of disputes, and lead to broader agreement between target companies and the Bureau when settlements are reached. To be clear, there would be no downside for consumers. We take it as a given that the Bureau will require responsible companies to provide redress to affected consumers. In fact, using alternative avenues to enforcement ensure that issues are remediated faster, without consumers first waiting for a completed settlement negotiation. The only questions are whether that redress will be accompanied by a public enforcement action or whether the Bureau will listen to the target company before making that momentous decision.

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[15] Mulvaney, *The CFPB Has Pushed Its Last Envelope*, *supra* n. 1

e. Tailor the Bureau's Response to the Conduct at Issue

Congress authorized the Bureau to seek a wide range of remedies in enforcement actions.[16] In particular, the Bureau may seek civil money penalties that are punitive in nature and go beyond the amounts paid by companies to make affected consumers whole. These penalties are paid into the Civil Penalty Fund that may be used to make payments to consumers affected by misconduct in other matters or to fund consumer education and financial literacy programs. As of six months ago, the Bureau had collected $566 million in these civil penalties.[17]

The Bureau should adopt a more principled, objective approach to deciding whether to seek a civil penalty in an enforcement action and how much to seek in any consent order. As an initial matter, the Bureau should abandon any thought that it should aim to secure as large a civil penalty as possible in any enforcement action. Likewise, the Bureau should not base civil penalties in one case on the Bureau's desire to provide remediation to consumers injured in *other* matters or to fund the Bureau's education and financial literacy programs. The Bureau instead should base the civil penalties it pursues on factors that reflect the need to seek punitive redress from the specific company at issue. Specifically, we recommend two ways the Bureau can better scale penalties to the severity of the specific misconduct at issue.

f. Civil Money Penalties Should Generally Only be for Knowing Violations:

The Bureau should reserve civil penalties for cases involving knowing violations. The Dodd-Frank Act clearly distinguishes between knowing, reckless, and non-knowing/non-reckless violations. When Congress gave the Bureau power to impose civil penalties, it was clear that the amounts it authorized were *ceilings*, not *floors*. It also outlined mitigating factors for the Bureau to consider when deciding what scale penalty to pursue.[18] The Bureau should carefully consider whether the misconduct warrants a civil penalty, and should not impose civil penalties for unintentional compliance gaps.

g. Self-Reporting and Remediation Should Receive Greater Credit

As mentioned above, the Bureau should give companies significant credit for self-reporting a violation to the Bureau as well as for undertaking affirmative internal

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[16] *See* 12 U.S.C. § 5565(a)(2).
[17] *See* BCFP, Civil Penalty Fund, https://www.consumerfinance.gov/about-us/payments-harmed-consumers/civil-penalty-fund/.
[18] 12 U.S.C. § 5565(c)(3).

remediation efforts. Responsible, compliance-minded companies expend substantial time and resources to comply with consumer financial laws and to fix any violation that occurs. If a company is working to remediate a violation and has self-reported it to the Bureau, there may be no need for the Bureau to impose additional punishment. Further punishing companies increases costs which are passed down to consumers and discourages other companies from coming forward. In contrast, accounting for remediation efforts will encourage companies to openly and efficiently address violations.

h. The Press Releases Describing an Issue should be Commensurate with the Consent Order

We would also urge the Bureau to refrain from misleading consumers by inaccurately and gratuitously criticizing companies in the harshest terms in its press releases, speeches, and other public statements. We simply ask the Bureau to mirror the public statements with the contents of the consent order to exhibit the true nature of the allegations and corrective actions. This change would be consistent with the practice executed by other regulators such as the Department of Justice and prudential banking regulators.

In the past, we have expressed our concern about the Bureau's practice of using press releases to describe consent orders – which almost always involve no admission of wrongdoing – in a hyperbolic manner that is likely to mislead customers. A poignant example is during the indirect auto settlements when the press releases spoke of "discrimination," instead of the true cause for the settlement – a statistical disparate impact of portfolios of auto lending contracts. "Discrimination" insinuates there was purposeful treatment discriminating against a certain person for a protected characteristic; however, in the auto lending cases, the lender never even sees the borrower so it would be quite difficult for discrimination to occur. However, someone reading the press release would have been under the impression that over discrimination had occurred.

Even the Bureau's own Ombudsman has noted such misrepresentations. For instance, the Ombudsman noted that some press releases did not reflect that a challenged company practice had ended. Likewise, it observed that some press releases could lead to reader confusion because "there were some words with legal meanings or interpretations in the press releases that were not in the consent orders."[19] And the Ombudsman pointed out that "there was some summarization in

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[19] CFPB Ombudsman, Annual Report to the Director 2015 at 23 (Nov. 15, 2016).

the press releases that resulted in certain factual elements seeming more important than they otherwise might, even if factually correct."[20]

The reputational risks to an institution going through an enforcement action cannot be overstated. If a wrongdoing has occurred, it should of course be reported. Similarly, if certain wrongdoing *did not* occur, the press release should not sensationalize to infer greater harm was done. We ask the Bureau to review the press release with the target institution when agreeing to the consent order and before making the press release public.

IV. Avoid Regulatory Duplication

We welcome the Bureau's interest in exploring how it should coordinate its enforcement activity with other Federal and State agencies with overlapping jurisdiction. Coordination is key to ensuring that companies are not subject to duplicative and unnecessary regulatory burdens that drive up costs for businesses and prices for consumers.

As the Government Accountability Office has explained: "The U.S. financial regulatory structure is complex, with responsibilities fragmented among multiple agencies that have overlapping authorities."[21] This inherently convoluted structure makes it critical that regulators overseeing the same institutions carefully coordinate their efforts. We recommend that the Bureau commit itself to enhancing coordination in four ways.

First, the Bureau and other federal agencies should work together to ensure that their standards are not at cross purposes and that their actions do not point to inconsistent policy outcomes. Presently, there are divergent standards on numerous issues. For example, the Bureau and other regulators sent mixed messages to banks on deposit advance products/small dollar loan regulation. There are also differing work streams on fintech and limited English proficiency standards – just to name a couple of topics. Such confusion benefits no one. The Bureau may be an independent agency, but it should not work in isolation. Taking steps to address these divergent standards is critical to reducing regulatory burdens imposed on companies. Specifically to address duplicative federal enforcement actions, we recommend that the Bureau:

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[20] *Id.*

[21] 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.

- Continue to use and follow the Bureau's memorandums of understanding ("MOU") with other enforcement authorities.[22]

- Seek to proceed jointly with other enforcement authorities at the early stages of an investigation.[23]

- Before commencing an enforcement action, contact other agencies to try to file a single action reflecting the common interest of multiple regulators.

- Consider standing down where effective action already has been taken (or commenced) by another enforcement authority, or where another enforcement or regulatory authority has conducted an investigation and elected not to bring an action.

Second, the Bureau should work closely with state regulatory agencies that are considering bringing enforcement actions against entities within the Bureau's authority. In particular, the Bureau engages with state regulators regarding actions brought by those officials under the Consumer Financial Protection Act, and may intervene in such an action as appropriate.[24] The Bureau should use those authorities to guide state-level regulators towards effective, non-duplicative enforcement activities.

Third, the Bureau – like any other federal regulator – is limited to its congressionally-assigned role and should not interfere with the regulatory efforts of another agency to which Congress expressly has granted authority. In the past, 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 subject to the authority of the Federal Trade Commission and the Justice Department.

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[22] *See, e.g.,* Memorandum of Understanding (between CPFB and Prudential Regulators) (May 16, 2012), https://files.consumerfinance.gov/f/201206_CFPB_MOU_Supervisory_Coordination.pdf .
[23] The SEC, for example, has done this frequently on an *ad hoc* basis during its history. *See, e.g.*, *SEC Announces Latest Charges in Joint Law Enforcement Effort Uncovering Penny Stock Schemes*, SEC Press Rel. No. 2014-105 (May 22, 2014), https://www.sec.gov/news/press-release/2014-105#.VOZkTHZkreQ.
[24] *See* 12 U.S.C. § 5552(b).

- 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 multiple enforcement actions for alleged "cramming" on mobile phone bills, even though both the Federal Communications Commission and the Federal Trade Commission previously had brought such actions.

We think the Bureau should refrain from going outside their jurisdiction and into fields that are already occupied by other federal regulators. The Bureau should focus on the many tasks within its statutorily articulated arena and allow other regulators to fulfill their responsibilities free from Bureau interference.

Even within the Bureau, we believe there has been duplication and urge the Bureau to create clearly delineated lines of responsibility. There is still confusion about the relationship between supervision and enforcement, especially about when a matter escalates from a supervisory to enforcement matter. We ask the Bureau to issue a clarification about the internal processes. Moreover, the relationship between Research Markets and Regulations (RMR) and enforcement has generated confusion in the industry. It would be helpful to know if RMR is conducting research on regulating a certain area. If so, we assert enforcement should refrain from bringing actions in this space until RMR has acted. This would give the industry more clarity and consistency throughout the marketplace, which in turn help businesses innovate products for consumers.

We thank you for the opportunity to submit these comments. We believe that our recommendations will help the Bureau to enforce the law and ensure that consumers are protected and benefit from a robust marketplace. We also strongly believe that the Bureau, as *all* agencies, should follow the strictures of the law and Constitution, and have a fair due process. These goals are compatible with each other and must be followed for this important system to work properly.

We stand ready to discuss these issues further.

Sincerely,

Tom Quaadman