Statement of the U.S. Chamber of Commerce

ON: Hearing on “Fairness in Financial Services: Racism and Discrimination in Banking”

TO: U.S. Senate Committee on Banking, Housing, and Urban Affairs

BY: Bill Hulse, Vice President, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce

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Introduction

The mission of the Center for Capital Markets Competitiveness (CCMC) 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 so that businesses—from the local flower shop to a multinational manufacturer—are able to mitigate risks, manage liquidity, access credit, and raise capital.

The U.S. Chamber of Commerce commends the Committee for convening this hearing and its attention to concerns that have been raised about discrimination based on race or other impermissible factors. There should be no room for discrimination and racism in banking, in other parts of the financial services sector, in other industries, or anywhere in our society. The business community strongly supports effective anti-discrimination policies and adherence to the laws prescribed by Congress. We agree with the concept of fairness in our marketplace based on equal opportunity.

The U.S. Chamber of Commerce launched the Equality of Opportunity Initiative (EOI) to develop real, sustainable solutions to help close race-based opportunity gaps in six key areas: education, employment, entrepreneurship, criminal justice, health, and wealth. Driven by data and informed by conversations, the EOI agenda advances these solutions through private sector initiatives, and policy advocacy at the federal, state, and local levels. Through this work, we continue to develop research and data insights, convene key stakeholders to address EOI issues, advocate and drive action to advance policies and private sector solutions, and design programs, initiatives and partnerships that address systemic inequalities and promote the promise of equal opportunity for all Americans.[1]

The U.S. Chamber of Commerce is concerned that the Consumer Financial Protection Bureau (CFPB) is taking actions that will reduce opportunities for consumers to participate in the regulated market for financial products and services—which will force some consumers into unsafe, unregulated markets. The agency's structure, combined with the actions of its current leadership, have created significant concerns in a business community that is striving to serve underserved communities while continuing to meet its regulatory and legal obligations. The CFPB can play a critical role in protecting consumers and shaping the market for consumer financial products and services; however, the agency's credibility and its interest and ability to fulfill that mission is in doubt. The Bureau's structure and approach have been controversial since its inception, and we are at an inflection point in terms of the ability to preserve the agency's future.

The U.S. Chamber of Commerce has long advocated for reforms to promote increased transparency and accountability of the CFPB with the objective of putting the agency on a firm footing for the future, and promoting the policy certainty that industry and consumers expect. We have advocated for changes to bring the agency into compliance with the checks and balances required under the U.S. Constitution including a requirement that the funding mechanism be subject to the appropriations process. In 2018 CCMC released a report, *"Consumer Financial Protection Bureau: Working Towards Fundamental Reform"* with recommendations for the Bureau and Congress that remain more relevant than ever. We also have testified before this Committee and other congressional committees on the need for reform of the CFPB's structure and of the Bureau's regulatory approach. A more transparent and accountable structure will not only help protect the agency from justified legal challenges; it will drive the Bureau to produce better policy.

[1] https://www.uschamber.com/major-initiative/equality-of-opportunity-initiative

The CFPB is not a Competition Regulator

The CFPB is failing in its responsibility to protect consumers because it is instead pursuing a wholesale restructuring of the financial services market. In late May, the CFPB announced the creation of the "Office of Competition and Innovation" tasked with identifying "market-structure problems that create obstacles to innovation." This initiative seems more focused on market regulation than innovation. In July, the Director doubled down in a blog post explaining that a myriad of regulatory priorities were necessary to "promote competition."[2]

The broad authority granted to the CFPB by Congress has been a topic of debate since the agency's inception in 2011, but there cannot be serious debate that the agency's primary purpose was, and is, to enforce federal consumer financial protection laws. Certainly, Congress explicitly did *not* vest in the CFPB authority to act as an antitrust regulator or to manage competition across the financial services sector. The Dodd-Frank Act mentions the CFPB should ensure markets are competitive, but that general statement should not be conflated with the FTC and DOJ's clear authority to enforce the Federal Trade Commission Act, the Clayton Act, and the Sherman Act.

In recent months the CFPB has claimed, without supporting data, that a lack of market competition justifies a host of new regulatory actions interfering in the financial services market. But, recent research published by the U.S. Chamber in partnership with NERA Economic Consulting shows there has been a reduction in market concentration in commercial banking, consumer lending, and credit card issuing firms in recent years.[3]

A focus on competition nonetheless appears to be driving the CFPB's policy decisions. For example, the CFPB recently began a rulemaking process under Sec. 1033 of the Dodd-Frank Act. That provision states that covered persons are obligated, upon request by a consumer, to make information they control or possess concerning a consumer available in an electronic form – it makes no mention of "competition."[4]

The Chamber believes the Bureau has authority to promulgate a rule, and believes a well-reasoned rule could have the benefit of protecting consumers and clarifying obligations of financial institutions and their service providers, but is concerned that the Bureau will overreach under the auspices of its self-divined "competition" mandate. Indeed, the agency's announcement is replete with mentions of "competition," instead of squarely focusing on its authority to implement the Dodd-Frank Act.[5] Maybe this should not come as a surprise given the rulemaking is mentioned in President Biden's Executive Order on Promoting Competition in the American Economy.[6] But that Presidential directive cannot, and does not, change the purpose of Sec. 1033 or expand the CFPB's mandate.

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[2] https://www.consumerfinance.gov/about-us/blog/promoting-competition-in-our-financial-markets/

[3] https://www.uschamber.com/finance/antitrust/u-s-chamber-study-industrial-concentration-in-the-u-s-economy-is-declining-not-increasing

[4] SEC. 1033 CONSUMER RIGHTS TO ACCESS INFORMATION. IN GENERAL.—Subject to rules prescribed by the Bureau, a covered person shall make available to a consumer, upon request, information in the control or possession of the covered person concerning the consumer financial product or service that the consumer obtained from such covered person, including information relating to any transaction, series of transactions, or to the account including costs, charges and usage data. The information shall be made available in an electronic form usable by consumers.

[5] https://www.consumerfinance.gov/about-us/newsroom/cfpb-kicks-off-personal-financial-data-rights-rulemaking/

[6] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/

Mismanagement of the CFPB

The current CFPB Director is acting recklessly, and in some cases unlawfully, as he attempts to institute his preferred policies. The Director has concentrated his circle of advisors and decision-makers in a manner unprecedented at the CFPB, and as a result sidelined the knowledge and expert judgement of career staff.

Reckless Rhetoric

The current CFPB Director favors the use of inflammatory rhetoric, rather than deliberate notice-and-comment rulemaking, as the preferred method to change market practices. Earlier this year, he gave a speech in which he claimed he would seek historically unprecedented punishments for financial institutions as part of the agency's enforcement program for what he described as "corporate recidivism" and "repeat offenders." The Director described punishments ranging from caps on asset size, to banning certain types of business practices, banning certain product lines, and even revoking the federal insurance that protects the deposits of consumers and small businesses.[7] The agency also is depending on new forms of guidance and blog posts as a cudgel to enact change.

Fees

The CFPB has taken to labeling fees it does not like, including those that are legally permissible, as "junk." In January, Director Chopra stated in prepared remarks, "Service charges inflate ticket prices, resort fees hike our costs to stay in hotels, and our phone bills are often laden with mystery charges. These junk fees make it harder for us to choose the best product or service, since the true cost is hidden. . . Banking is no different."[8] The CFPB has since cited this theory in multiple policy initiatives, oftentimes without legal justification, in an attempt to ban or eliminate fees that it simply does not like. The CFPB fails to recognize that fees are a necessary part of enabling the myriad opportunities our robust and competitive financial system makes available to consumers.

Financial services companies use fees to ensure that the products they offer are competitive and commercially viable. Fees allow financial services companies to employ tailored pricing that reflects both the services used and financial needs of individual consumers. Along with other pricing components, product features, rewards and other product elements, fees play a role in each consumer's often complex and distinctive decision of what product is best for them. Indeed, a consumer is better empowered to choose the most suitable financial products and services when financial services companies can offer products and services with choices for various benefits and features with varying pricing structures. This consumer choice powers the robust competition and innovation seen in the consumer financial services market.

Congress has not imposed significant limitations or prohibitions upon fees charged for consumer financial products and services. For example, Congress clearly stated that no provision of the Consumer Financial Protection Act "shall be construed as conferring authority on the Bureau to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authorized by law."[9] Congress has focused on fee *disclosures* across the broad range of consumer finance products. As a result, fees charged by consumer financial services companies are

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[7] https://www.consumerfinance.gov/about-us/newsroom/reining-in-repeat-offenders-2022-distinguished-lecture-on-regulation-university-of-pennsylvania-law-school/

[8] https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-on-the-junk-fees-rfi-press-call/

[9] *See* 12 U.S.C. § 5517(o).

subject to strict disclosure requirements, including requirements related to when a financial institution must disclose the fees. These disclosure requirements, which are implemented through numerous regulatory frameworks, empower consumers to decide for themselves what is in their best interest based on the material product and financial elements of a particular consumer finance product or service and the consumer's own financial goals and needs.

The CFPB's efforts in this area are stretching beyond the breaking point for the agency's authority to prohibit "unfair" acts and practices, given the absence of any express authority from Congress to limit fees. The standard for unfairness in the Dodd-Frank Act is that an act or practice is unfair when: 1) It causes or is likely to cause substantial injury to consumers; 2) The injury is not reasonably avoidable by consumers; and 3) The injury is not outweighed by the countervailing benefits to consumers or to competition.

The CFPB has recently introduced a temporal component that effectively stipulates disclosure of fees (and other terms) at the time of opening the account is an insufficient defense that the alleged injury cannot be "reasonable avoidable" by consumers." This novel interpretation of "unfair" appears in two recent policy statements announced on October 26, 2022. First, the CFPB announced a new Circular on "surprise" overdraft fees that are "unanticipated" for consumers even if they "closely monitor their account balances and carefully calibrate their spending"—asserting that "despite [financial institutions'] disclosures," "consumers face significant uncertainty."[10] The Bureau did not explain how or why consumers could face uncertainty given the financial institutions' disclosures about possible fees at the time of account opening. Second, the CFPB announced a new Compliance Bulletin on "surprise" deposit fees. The CFPB stated a person should not be subject to a fee if a check bounces because the consumer cannot know at the time of deposit if it will clear. But the financial institution accepting the check cannot know whether the check will bounce until it attempts to clear it—so there is no basis for categorizing the fee as 'unfair' given the costs imposed on institutions.

The agency's invocation of its "unfair" authority in this way may make for a good soundbite. But the statutory bounds of the Dodd-Frank Act and decades of precedent make clear that these policies are unlawful, especially because they were imposed via guidance rather than notice-and-comment rulemaking.

Disparate Treatment vs. Disparate Impact

The CFPB consistently conflates "disparate treatment" with "disparate impact" when suggesting activity is unlawfully discriminatory. Disparate treatment is intentional discrimination based on impermissible characteristics or criteria (e.g. race, religion, sex, age). Disparate impact occurs when treatment of a characteristic or criteria (e.g. employment status, income, assets, credit score) leads to different outcomes for different categories of individuals (e.g., when individuals are divided up by race, religion, sex, age). The two concepts should not be conflated.

The CFPB, nevertheless, is using inflammatory rhetoric to suggest racist decision-making and other unlawful discriminatory activity by financial institutions. For example, in the blog post published when the CFPB amended its examination procedures, CFPB staff stated: "When people of color suffer racist conduct in the financial marketplace, it can cause substantial monetary and non-monetary harms.

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[10] https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf

Depending on how the conduct occurs (face-to-face, digital, systematic, etc.), many individuals may be unaware they received disparate treatment or a discriminatory outcome."[11]

Guidance vs. Regulation

The CFPB Director made a speech in June in which he stated that "The CFPB is seeking to move away from highly complicated rules … and towards simpler and clearer rules … in addition, the CFPB is dramatically increasing the amount of guidance…" But in fact the CFPB now uses numerous different types of guidance documents in addition to regulations it is required to issue via notice and comment rulemaking. For example, the CFPB issues "compliance bulletins" as supervisory guidance to inform and advise regulated entities.[12] The CFPB issues "advisory opinions" to provide written guidance to assist regulated entities to better understand their legal and regulatory obligations. The CFPB also began a new program in May 2022 of issuing "circulars" advising parties with authority to enforce federal consumer financial law including state attorneys general, state regulators, and federal regulators. And finally, the CFPB issues interpretive and procedural rules as a another means of changing the rules of the road without adhering to notice and comment rulemaking. Guidance should be used to clarify aspects of the law, not create new policy.

This new web of guidance documents being spun by the CFPB is issued without notice and subject to change on the Director's whim, especially when new Directors are appointed. Guidance has the potential to be helpful, but not under this approach. These guidance documents are not being used to provide legal clarifications sought by regulated entities; they are being used to put forth new legal interpretations that regulated entities are expected to follow. Even more concerning, these guidance documents suggest that past actions will be scrutinized via the agency's new interpretation, not just future actions. This type of ex post facto change in the rules turns regulatory compliance into a guessing game.

The CFPB claims these documents are "just guidance" but it is, at best, sending mixed signals about the efforts that regulated companies must undertake to comply. Examples abound, but two are highlighted below. First, the CFPB issued guidance on October 26, 2022 as a "compliance bulletin" saying that certain overdraft practices are *likely* "unfair and unlawful" under existing law. However, President Biden undermined the value of this guidance the same day through conflicting remarks "making clear" that such practices are "unfair" and "illegal."[13] Second, the CFPB issued an "interpretive rule" on June 28, 2022, that attempts to call into question the federal preemption of the Fair Credit Reporting Act by finding "it preempts only narrow categories of state laws."[14] The CFPB issued this interpretive rule in an attempt to influence the outcome of ongoing litigation, seeking to tip the scales in favor of undermining the express preemption provisions of the FCRA. This type of effort to influence litigation against participants in the credit reporting system exceeds any sort of reasonable "guidance." Much of the agency's use of guidance is unhelp and reckless, some of it is unlawful.

Unlawful

On June 28, 2022, the U.S. Chamber of Commerce sent two letters to the CFPB requesting explanations for unlawful and legally dubious activity. The first letter takes issue with the March 16, 2022

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[11] https://www.consumerfinance.gov/about-us/blog/cracking-down-on-discrimination-in-the-financial-sector/#:~:text=When%20people%20of%20color%20suffer,treatment%20or%20a%20discriminatory%20outcome.

[12] https://www.consumerfinance.gov/compliance/supervisory-guidance/

[13] https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/10/26/remarks-by-president-biden-on-protecting-american-consumers-from-junk-fees/

[14] https://www.consumerfinance.gov/about-us/newsroom/cfpb-affirms-ability-for-states-to-police-credit-reporting-markets/

amendment to the CFPB's Supervision and Examination Manual adopting the novel position that the agency can examine financial institutions for alleged discriminatory conduct under its "unfair, deceptive, and abusive acts or practices" (UDAAP) authority.[15] The second letter expresses concerns with 1) The CFPB's Policy Fellowship program; 2) The revisions to Rules of Practice for Adjudication Proceedings; 3) Effective repeal of the 2013 decision not to publish a final decision or establishing supervisory authority; and, 4) The interpretive rule claiming that state attorneys general have the authority to enforce the Consumer Financial Protection Act.

The first letter explains that the Bureau exceeded its authority by extending fair-lending laws beyond the bounds carefully set by Congress. Specifically, the Bureau's mistaken notion that "[**d]iscrimination … can trigger liability under [the] ban on unfair acts or practices**" ignores the text, structure, and history of the Dodd-Frank Act, as well as similar legislation addressing agency authority to regulate unfairness. What's more, the Bureau's contemplation of disparate-impact liability—a specific form of liability that not even most antidiscrimination laws create—flouts congressional intent and Supreme Court precedent. This March 16, 2022 amendment to the CFPB's Supervision and Examination Manual is the subject of a lawsuit by the U.S. Chamber of Commerce and other industry associations.

The second letter details various other concerns regarding the agency's direction under its current leadership. The **CFPB's Policy Fellow program** circumvents the competitive service requirements.[16] Hiring for competitive-service positions must follow a strict process governed by statutes and regulations.[17] Yet, the Bureau hired over 20 "policy fellows" outside of this process to serve as project directors for the Director, with salaries, in some cases in excess of $200,000, that indicate significant responsibility. This sort of backdoor favoritism is precisely what the civil-service laws are designed to prevent. Regardless of the legalities, Members of the House Committee on Financial Services detailed why this program is misguided—opening the door to all manner of favoritism and ideologically driven personnel selection and mismanagement, as well as conflicts of interest. Indeed, the program could hardly have been designed better to achieve those ends. The terms of the program reportedly permit fellows to engage in outside employment with written approval from Bureau management.[18] The Bureau does not publicly disclose the roster of fellows. Fellows also appear to be exempt from filing financial disclosures required of other federal employees with similar responsibilities.[19] These and other features create self-evident risks for conflicts of interest and make the program ripe for unchecked favoritism in selection.

The Bureau's **revised Rules of Practice for Adjudication Proceedings** represent a dramatic departure from agency practice, with little regard for due-process and separation-of-powers concerns. Traditionally, the Bureau has favored adjudication in federal court of alleged violations of federal consumer-finance laws, but the revised rules shift to greater reliance on administrative adjudication while eliminating procedural safeguards that apply to such adjudications. The revised rules made critical changes to the administrative adjudication process by expanding the Director's power and reducing protection for defendant companies that lack due process. The Director is a political appointee who serves at the will of the current President. The Director is not an impartial judge.

Specifically, on February 22, 2022, the Bureau issued revised rules that provide new powers to the Director to review cases, to decide dispositive motions, and to refer such motions to an administrative law judge. It is telling that the Bureau rushed this policy change without any advance opportunity for

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[15] https://www.uschamber.com/assets/documents/20220628-Letter-Manual_2022-06-28-160834_onwj.pdf
[16] 5 U.S.C. §2102.
[17] *Id.*; see also 5 C.F.R. §§332, 337.
[18] House Cmte. Ltr. at 1, https://republicans-financialservices.house.gov/uploadedfiles/2022-05-12_letter_to_chopra_on_fellows_program_final.pdf
[19] *Id.*

public comment and without any effort to amplify its perfunctory request for post-hoc public participation. In fact, the Bureau only briefly noted in an announcement in the Federal Register that it welcomed comments on the rules, which went into effect immediately. This quiet revision and shift to a great reliance on in-house administrative adjudication takes the Bureau in the wrong direction at a time when courts are expressing deep skepticism about the fairness and even the constitutionality of administrative adjudication.

The Bureau violated the Administrative Procedure Act when it repealed its 2013 rule providing that the Bureau would not make public a **final decision or order establishing supervisory authority** over a covered person. Under that 2013 standard, "all documents, records or other items submitted by a respondent to the Bureau, all documents prepared by, or on behalf of, or for the use of the Bureau, and any communications between the Bureau and a person, shall be deemed confidential supervisory information."[20] The standard went through the notice-and-comment process to guarantee confidentiality for businesses in certain proceedings, and "[a]fter consideration of the comments regarding confidentiality," the Bureau expressly "agree[d] that all aspects of a proceeding under the final rule relate to the Bureau's supervisory process and should be deemed confidential supervisory information." Recently, the Bureau has effectively rescinded that rule, and given the Director discretion to remove confidentiality protections from final decisions and orders. The Bureau wrongly decided that "this rule is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act" as a rule of agency organization, procedure, or practice.

Finally, the Bureau's **interpretative rule stating that state attorneys general have the authority to enforce the Consumer Financial Protection Act** (part of the Dodd-Frank Act) is incorrect in several respects. The interpretative rule claims that States can bring claims under Section 1042 of Dodd-Frank for violations of other enumerated consumer [financial protection] laws."[21] That claim is unambiguously wrong. The Consumer Financial Protection Act does not authorize States broadly to enforce all provisions of the Act under Section 1042.[22]

U.S. Chamber of Commerce v. CFPB

On September 28, 2022, the U.S. Chamber of Commerce and co-plaintiffs sued the CFPB to hold it accountable to the rule of law as it pursues its important mission.[23] The U.S. Chamber and co-plaintiffs challenge the CFPB's recent update to the Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) section of its examination manual to include discrimination and in particular disparate impact. The violations of law by the CFPB targeted in the lawsuit are emblematic of the structural issues with the agency and its current management. Plaintiffs explain that the agency acted in excess of its statutory authority under the Dodd-Frank Act; violated procedural requirements under the Administrative Procedure Act; and that the agency's funding is not properly appropriated in accordance with the law given the Appropriations Clause requires legislative applications prior to executive expenditures.

Importing disparate impact into UDAAP will likely result in the disappearance of products consumers currently enjoy and benefit from. For example, no-fee checking accounts are more often offered to customers with higher balances, which often are individuals further into their careers as opposed to those who are just beginning to work. A disparate impact analysis could find that no-fee

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[20] 12 C.F.R. §1091.115 (emphasis added).
[21] Authority of States To Enforce the Consumer Financial Protection Act of 2010, 87 Fed. Reg. 31940, 31941 (May 26, 2022).
[22] *See* 12 U.S.C. §5552.
[23] https://www.uschamber.com/finance/u-s-chamber-sues-to-hold-consumer-financial-protection-bureau-accountable-to-the-rule-of-law-and-consumers

policies for customers with larger balances constitute age discrimination against younger customers, and therefore banks may no longer be willing to offer such products to consumers for fear that they will be declared unlawful.

Unfairness and Discrimination – Distinct Statutory Concepts

Congress has enacted a series of civil rights laws to protect consumers from invidious discrimination on the basis of specific characteristics and in specific contexts, including Title VII of the Civil Rights Act of 1964 (employment), the Fair Housing Act of 1968 (housing), the Equal Credit Opportunity Act of 1974 (credit), and the Americans with Disabilities Act of 1990 (disability).

Separately, when it created the CFPB in 2010, Congress gave the Bureau authority nearly identical to that of the FTC to prohibit "unfair" acts or practices by covered persons or service providers offering or providing consumer financial products and services. Congress also separately authorized the CFPB to implement two specific antidiscrimination laws, the Equal Credit Opportunity Act (ECOA) and the Home Mortgage Disclosure Act (HMDA).[24]

On March 16, 2022, the CFPB erroneously conflated the concepts of "unfairness" and "discrimination" by announcing that it would begin examining financial institutions for alleged discriminatory conduct that it deemed to be "unfair" under its "unfair, deceptive, and abusive acts or practices" (UDAAP) authority. The CFPB also revised its examination manual to reflect its new view that its "unfairness" authority can be used to investigate and sanction allegedly discriminatory practices.

Congress has never indicated that these two statutory concepts, "unfairness" on the one hand, and "discrimination" on the other, are interchangeable or overlapping. Rather, they are distinct, and each has a well-established meaning and scope of application. Thus, the Dodd-Frank Act discusses "unfairness" and "discrimination" as two separate concepts, and defines "unfairness" without mentioning discrimination. The Act's legislative history refers to the Bureau's antidiscrimination authority in the context of ECOA and HMDA, while referring to the Bureau's UDAAP authority separately.[25]

Violation of the Administrative Procedure Act

By failing to go through proper notice-and-comment procedures when amending its manual, the CFPB violated the Administrative Procedure Act's procedural requirements. Under the Administrative Procedure Act, the agency cannot take arbitrary or capricious actions and must submit legislative rules to the notice and comment process. Through its recent examination manual update, the CFPB has, with the stroke of a pen, arrogated an open-ended and novel power to police regulated entities for discrimination—including for mere disparate impacts. And while its "update" imposes substantial new obligations on regulated entities, the CFPB entirely bypassed the notice-and-comment process required by the APA. This is not just unlawful; it is bad policymaking.

Regulated entities are all but left to guess how to comply with the Bureau's "update" to its examination manual. Significantly, the CFPB has not identified protected classes or characteristics, or delineated what legal test it will use to determine whether discrimination actually took place. Are race and ethnicity the only protected classes, or does the Bureau intend to enforce the update to prohibit discrimination, including disparate impact, based on other classes or characteristics? What legal test will the Bureau follow? What steps can financial institutions take to demonstrate compliance? These

[24] https://www.aba.com/advocacy/policy-analysis/unfairness-and-discrimination
[25] https://www.aba.com/advocacy/policy-analysis/unfairness-and-discrimination

questions, and others (i.e. the agency's statutory authority), would typically be addressed via notice and comment rulemaking.

The CFPB's Structure is Unconstitutional

The CFPB has been structurally flawed since the beginning. The Dodd-Frank Act, the legislation authorizing the creation of the CFPB, created an agency with extremely broad authority and less accountability and transparency than other financial regulators. While the Supreme Court has invalidated one element of the Bureau's structure—the limits on the President's authority to remove the Director—the Bureau's continued unconstitutional structure allows the Director to make significant decisions that affect the financial wellbeing of millions of Americans without being subject to appropriate checks and balances.

Seila Law v. CFPB

The U.S. Supreme Court addressed the agency's structure in 2020, holding invalid the provision of Dodd-Frank providing that the President could remove the Director only "for cause." In our amicus curiae brief in *Seila Law v. CFPB*, the Chamber argued all of this governmental power is concentrated in a single individual—the Bureau's Director—who serves a five-year term and (at that time) could be removed from office only for cause. Which is to say that Congress entrenched these significant powers in an officer unaccountable to the President, the elected official who is solely vested with "the executive Power," U.S. Const. Art. II, § 1, Cl. 1, and the duty to "take Care that the Laws be faithfully executed," id. Art. II, § 2, Cl. 2.[26] The Supreme Court held that the CFPB's leadership by a single Director removable only for inefficiency, neglect, or malfeasance violated the separation of powers, but concluded that the removal restriction could be severed from the rest of the Dodd-Frank Act.

The Bureau's Funding Mechanism

The CFPB's funding is not subject to Congressional oversight via the appropriations process—instead the Bureau obtains its funds from the Federal Reserve. The Dodd-Frank Act requires the Federal Reserve Board to transfer to the CFPB the "amount determined by the Director to be reasonably necessary," subject to a cap equal to 12 percent of the Federal Reserve System's total 2009 operating expenses, adjusted annually based on the percentage increase in the employment cost index by the Federal Government for total compensation for state and local government. According to the CFPB, the FY 2021 transfer cap is $717.5 million.

The U.S. Court of Appeals for the Fifth Circuit recently held, in *Community Financial Services Association of America, Limited v. CFPB*, that the Bureau's funding structure is unconstitutional, because it circumvents Article I, Section 9, Clause 7 of the U.S. Constitution, which provides: "No Money shall be drawn from the Treasury in Consequence of Appropriations made by Law…" The court stated that "Congress's decision to abdicate its appropriations power under the Constitution, i.e., to cede its power of the purse to the Bureau, violates the Constitution's structural separation of powers." It found "Congress did not merely cede *direct* control over the Bureau's budget by insulating it from annual or other time limited appropriations. It also ceded *indirect control* by providing that the Bureau's self-determined funding be drawn from a source [the Federal Reserve] that is itself outside the appropriations process—a

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https://www.chamberlitigation.com/sites/default/files/cases/files/19191919/U.S.%20Chamber%20Amicus%20Brief%20%28merits%29%20--%20Seila%20Law%20LLC%20v.%20CFPB%20%28U.S.%20Supreme%20Court%29.pdf

double insulation from Congress's purse strings that is 'unprecedented' across the government." And the court stated, "The Bureau's perpetual insulation from Congress's appropriations power, including the express exemption from congressional review of its funding, renders the Bureau no longer dependent and, as a result, no longer accountable' to Congress and, ultimately, to the people."[27]

The CFPB and Department of Justice recently petitioned the Supreme Court for a writ of certiorari to review the Fifth Circuit's ruling.[28] They argued that review by the Supreme Court "is warranted because the court of appeals' decision declared an Act of Congress unconstitutional, because it squarely conflicts with a decision of the D.C. Circuit, and because it threatens to inflict immense legal and practical harms on the CFPB, consumers, and the Nation's financial sector." It seems likely the Supreme Court will grant review and hear arguments on the CFPB's funding structure in Spring 2023. We believe the Court should conclude that the CFPB must be funded through an appropriation enacted by Congress.

If the Court reaches that conclusion, Congress should appropriate funds to keep the CFPB operating. The agency should not be left without funding. Despite our frustrations with the agency's current leadership, the CFPB has an important role in protecting consumers from predatory actors that seek to operate outside the reach of the law. The need for congressional action should not be used to undermine the agency's important mission of consumer protection – it should be used as an opportunity to institute guardrails for how this mission is fulfilled. We anticipate Congress will use this opportunity to debate other reforms to the CFPB, which we believe would be wise, but we would be unsympathetic to efforts intended to undermine the agency's mission. Any structural reforms or funding riders considered as part of an appropriation bill to fund the agency should be targeted in nature. We will actively build a bipartisan coalition in Congress to provide funding and targeted reforms to the CFPB if the Supreme Court finds its funding structure unconstitutional.

Legislative Reforms

We believe it is now more important than ever for Congress to enact legislation preventing the Bureau's regulatory abuses and to conduct oversight of the CFPB's actions. We support the measures described below and believe they should be prioritized in any discussions by Congress.

Require Funding to Come from Congressional Appropriations.

Fiscal reform requiring the Bureau to be funded through an appropriation enacted by Congress would strengthen congressional oversight. The CFPB would be required to justify its spending and policies to Congress, not just make empty promises. This is a reform that both Democrats and Republicans should be able to get behind – both parties have expressed frustration about how the Director of the opposing political party has managed the agency. That is the precise reason why the framers of the U.S. Constitution adopted a system of checks and balances on political power in our government.

Subjecting the Bureau to funding oversight would align it with similar agencies. The Federal Trade Commission (FTC) has a similar consumer protection mandate via its authority to prohibit Unfair and Deceptive Acts and Practices. In fact, it is narrower given it does not have authority to prohibit "abusive" acts and practices and its rulemaking authority is subject to additional rigor under the Magnuson-Moss Process. Yet, it is subject to funding oversight from Congress. The Consumer Product

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[27] https://www.ca5.uscourts.gov/opinions/pub/21/21-50826-CV0.pdf
[28] https://www.supremecourt.gov/DocketPDF/22/22-448/246429/20221114155607407_No.%20CFPB%20et%20al.%20v.%20CFSA%20et%20al.pdf

Safety Commission (CPSC), which Senator Warren has described as the model for the CFPB, is also subject to funding oversight from Congress.[29]

Replace the Director with a Multi-Member Bipartisan Commission

In 2008 in the *Journal of Consumer Affairs*, now Senator Elizabeth Warren (D-MA) authored an article titled *"Product Safety Regulation as a Model for Financial Services Regulation"* that states that "A Financial Product Safety *Commission* [emphasis added] would provide coherent regulation of financial products, eliminating their most dangerous features."[30] We agree that replacing the single Director with a multi-member commission would make the Bureau's regulatory actions more coherent more fair. The article concludes by finding, "Personal responsibility will always play a critical role in dealing with financial services products, just as personal responsibility remains a central feature in the safe use of any other product, but a Financial Product Safety *Commission* would be the consumers' ally." Again, we agree, and we believe a five-member commission representing multiple perspectives and positions will serve as a stronger ally to consumers than a single Director.

Congress originally expressed support with the concept of a Commission. The original draft of the Dodd-Frank Act that passed the U.S. House of Representatives on December 11, 2009 "creates a Commission to succeed to all the authorities of the Agency …" The legislation was sponsored by former Representative Barney Frank (D-MA) and received the votes of 223 Democrats.[31] The Senate instead adopted a provision providing for a single Director, without explanation in the Congressional Record.

Due to the single-director structure, Presidential transitions can usher uncertainty in the financial services industry by constant turnover. Finally, each Presidential administration brings different philosophies and approaches to lending services that can negatively affect consumers and small businesses. A commission structure, by contrast, would provide more stability in the rulemaking process and the interpretation and enforcement of consumer protection laws across administrations.

Provide for Right of Removal to Federal Court from CFPB's Administrative Adjudication Forum

Administrative adjudication can play an essential and valuable role in an effective regulatory system by providing an efficient—and equally fair—alternative to civil litigation. Properly structured administrative adjudication can be a preferred forum for all participants—particularly for routine matters involving limited legal or factual disputes. The Bureau's new Revised Rules, discussed above, unfairly favor the CFPB. Congress could address the constitutional and policy issues created by the Revised Rules by adopting legislation that provides defendants a right of removal to federal court.

By granting unprecedented authority to the Director (who authorized the enforcement action) at all stages of the adjudication process, the Revised Rules undermine, not advance the goal of legal uncertainty espoused by the CFPB. The decisions of the Director in any administrative adjudication will not be viewed as permanent statements of the law, or as impartial applications of settled legal principles to the facts, but as the individual views of a single official that only reflect the policy judgments of the

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[29] "Just as the Consumer Product Safety Commission (CPSC) protects buyers of goods and supports a competitive market, a new regulatory agency—a Financial Product Safety Commission (FPSC)—would protect consumers who use financial products." https://onlinelibrary.wiley.com/doi/full/10.1111/j.1745-6606.2008.00122.x

[30] https://onlinelibrary.wiley.com/doi/full/10.1111/j.1745-6606.2008.00122.x

[31] https://clerk.house.gov/Votes/2009968

present administration. Rather than creating legal stability and certainty, the Revised Rules' concentration of adjudicative authority in the CFPB Director will lead to the imposition of legal interpretations that swing, often substantially, under the appointees of one administration to the next. This concentration of authority also will further confuse and mix the distinct functions of investigator, prosecutor, and adjudicator, exacerbating due process risks and undermining the legitimacy and defensibility of the Bureau's adjudications.

Conclusion

The CFPB's current leadership is acting without transparency or accountability. The Director seeks to reshape financial markets under the guise of promoting "competition," is avoiding rulemaking under the APA in favor of guidance and is acting unlawfully to implement a political agenda that will reduce access to the regulated financial system for consumers.

The CFPB's credibility must be restored if it is to fulfill the important mission of consumer protection prescribed by Congress. The agency runs the risk of being plagued by political agendas and mismanagement unless Congress institutes the checks and balances that have been considered, oftentimes with bipartisan support, since the agency's inception. One person should not have such significant influence over the competitive market that makes financial products and services available to consumers.