Statement of the U.S. Chamber of Commerce

ON: Assessing the Effects of Consumer Finance Regulations

TO: Senate Committee on Banking, Housing, and Urban Affairs

BY: David Hirschmann, President and CEO of the Center for Capital Markets Competitiveness

DATE: April 5, 2016

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The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Testimony of David Hirschmann
President and CEO, Center for Capital Markets Competitiveness of the U.S. Chamber of Commerce

Before the Senate Committee on Banking, Housing, and Urban Affairs

April 5, 2016

CHAIRMAN SHELBY, RANKING MEMBER BROWN, AND MEMBERS OF THE BANKING COMMITTEE:

The U.S. Chamber of Commerce (the "Chamber"), the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors and regions, as well as state and local chambers and industry associations, is dedicated to promoting, protecting and defending America's free enterprise system. The Chamber appreciates the opportunity to submit this testimony to the Committee as you examine the impact of recent consumer financial regulation.

The Chamber strongly supports sound consumer protection regulation that deters and punishes financial fraud and predation and ensures that consumers receive clear, concise, and accurate disclosures about financial products. Everyone—businesses as well as consumers—benefits from a marketplace free of fraud and other deceptive and exploitative practices. We have welcomed efforts by the Bureau that advance this important goal.

The Chamber also firmly believes, however, that consumers benefit from access to a broad range of competitive financial products and services. Choice empowers consumers, allowing them to find the product that will best allow them to go to college, participate in the digital economy, build equity in their homes, or deal with financial adversity. A regulator's responsibility is to ensure that competitive and transparent markets flourish within the bounds of clear and consistently enforced rules of the road. That allows consumers to make their own decisions, based on accurate, understandable information and free from government dictates.

Notably, Congress shared this belief when it established the Consumer Financial Protection Bureau (the "CFPB" or "Bureau") in passing the Dodd Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). It specifically tasked the Bureau with implementing and enforcing "Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and, that markets for consumer financial products and services are fair, transparent, and competitive."[1]

As we approach the five-year anniversary of the CFPB's regulatory record, the Chamber sees a distinctly mixed record on achieving this goal. In some areas, the Chamber has welcomed the opportunity to work together with the Bureau. Still, the Bureau can and must take a number of basic—but overdue—steps to fulfill its statutory mandates to implement and enforce Federal consumer financial laws "consistently," to ensure that consumers have access to a range of financial services from which they can choose the alternative they deem best, and to ensure that the markets for financial products and services remain "fair, transparent, and competitive."

Specifically, to ensure that consumer financial regulation achieves these ends, the Bureau should:

- Provide clear rules of the road for financial services companies so they can compete on a level playing field;
- Use enforcement actions to deter fraud and predation, not to announce new, broadly applicable regulatory policies;
- Strengthen the Bureau's own accountability by enhancing transparency and committing itself to fair administrative processes;
- Limit regulatory duplication and conflict by coordinating with other agencies; and
- Preserve companies' use of diverse tools, like arbitration agreements, to manage their relationships with the customers they serve.

While it is true that the CFPB's unique structure relieves it of the many checks and balances that apply to other federal regulators, that lack of democratic accountability heightens, rather than negates, the Bureau's obligation to develop a sound and broadly accepted regulatory system that will stand the test of time.

As it has throughout the past five years, the Chamber stands ready to work with the Bureau to identify concrete and practical steps toward achieving these goals. To that end, my testimony today provides recommendations for each of the five fundamental steps that the CFPB can and should take to improve its regulatory approach and better protect the long-term interests of American consumers.

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. 111-203, § 1021(a) (July 21, 2010) (codified at 12 U.S.C. § 5511(a)).

1. The CFPB Should Provide Clear Rules Of The Road For Financial Services Companies So That They Can Compete on a Level Playing Field.

In the Chamber's view, one of the fundamental principles of good government is that the rules and regulations that the government establishes should at a minimum be clearly knowable by those who have to live by those standards. That is especially important when the regulated entity is a business—especially a financial services business. Businesses want to compete on a level playing field under well-defined rules, but they cannot do so when they cannot figure out what the rules are. For that reason, the Chamber has repeatedly called upon the Bureau to provide clear rules of the road for financial services companies. Too often, the Bureau has rejected this approach, preferring instead to regulate through means that leave businesses guessing about whether they are complying with applicable law.

While the Chamber of course understands that no regulatory agency wants to bind itself to overly prescriptive rules that eliminate the flexibility needed to respond to changing circumstances, there are numerous steps that the Bureau can take to improve regulatory clarity without running any such risk. Here, I suggest two: adopting robust no-action and advisory opinion letter processes; and engaging stakeholders prior to announcing or enforcing any *de facto* regulatory requirements, "best practices," or policy expectations intended to apply broadly to one or more markets.

a) The Bureau Should Adopt A Robust No-Action Letter And Advisory Opinion Process.

The Chamber believes that one of the foundational principles of transparent and open government is the ability of a business or consumer to ask the government a question, inclusive of all relevant facts and circumstances, and get an answer as to whether the government will prohibit or permit a specific practice or activity. After all, the answer "no" is a much better answer, from a business perspective, than "I'm not going to tell you." That is why the Consumer Product Safety Commission ("CPSC"), the Justice Department, the Federal Trade Commission ("FTC"), the Securities and Exchange Commission[2] ("SEC"), and other federal regulatory agencies routinely issue written opinions that clarify governing legal requirements. These opinions typically take one of two forms: a "no-action" letter stating that staff would not recommend that an enforcement action be pursued under stipulated facts, and an advisory opinion that interprets a governing legal standard for an entire market, thus leveling the playing field for everyone in it. Unfortunately, the CFPB has no advisory

[2] The Chamber issued a report in 2009, Examining the Efficiency and Effectiveness of the U.S. Securities and Exchange Commission, that made specific recommendation on improving that agencies mo-action letter and approval processes.

opinion process; its no action letter policy is, by design, helpful in only the rarest of circumstances. The policy recently finalized by the Bureau permits the agency's staff to issue a no-action letter only if an applicant satisfies a series of burdensome and intrusive requirements.[3] No other federal agency imposes anything close to the Bureau's extremely restrictive criteria.

For example, to have a reasonable hope of demonstrating the "exceptional circumstances" that the Bureau requires for issuance of a no-action letter, a company must (among other things):

- Establish that the product is innovative and beneficial for consumers;
- Identify the substantial regulatory uncertainty that the company faces and the risks posed to consumers;
- Explain why the company cannot avoid regulatory uncertainty by modifying its product;
- Not ask about the meaning of the prohibition of unfair, deceptive, or abusive acts and practices; and
- Agree to provide data about the product on an ongoing basis.

These substantial burdens and intrusive document production requirements ensure that companies are very unlikely to even request such a letter. Indeed, the Bureau itself estimates that it will receive no more than three actionable requests for no-action letters each year.[4]

The Bureau claims that its approach to issuing no action letters is designed to promote innovation. The Chamber questions, though, whether a company is likely to invest in innovation given existing regulatory risk in the market and such high barriers to obtain clarity. When the first step toward innovation is to hire a compliance department, it is more likely that a company will decide against creating innovative products—an unfortunate result that ultimately restricts consumer choice and opportunity. At a minimum, the Bureau appears not to have considered the costs and benefits of creating such a narrow no action letter process instead of one that offered clear rules of the road to a greater number of market participants, including those who provide already established financial products or services. The Bureau also appears not to have considered whether its policy will have the effect of disproportionately benefitting large companies that already have large regulatory budgets, which may find it easier to pass muster to obtain a no action letter than a smaller company that would have to hire new staff to prepare the required paperwork.

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[3] *See* Policy on No-Action Letters; Information Collection, 81 Fed. Reg. 8686 (Feb. 22, 2016).
[4] *Id.* at 8691.

The Bureau's other processes for answering questions from regulated entities do not compensate for the absence of meaningful no-action and advisory opinion processes. Those processes are robust; when published, they provide well-considered, prospective guidance to an entire market. In contrast, providing one-off advice to those who call the Bureau with questions or to entities during the supervision process do nothing to standardize industry behavior. Instead, the effect of those private conversations is the creation of regulatory arbitrage—some companies know the Bureau's expectations because they called on the phone and got some advice, while others do not. At a minimum, even if the Bureau did not want to broaden its no action letter policy or create an advisory opinion program (the Bureau has sometimes claimed it lacks the resources to do so), the Bureau could at a minimum simply write down and publish on its website the advice it provides in these closed-door settings.

The Bureau thus should meet the standard set by other agencies and provide meaningful regulatory clarity through no-action letters and advisory opinions. By doing so, it would allow responsible companies to understand and follow the rules of the road, and to compete on the same basis for consumers' business. Innovation and competition would flourish, and consumers would benefit from lower prices and broader product options. The Bureau's drastically-circumscribed policy offers none of these benefits and should be replaced by a policy that supports the meaningful use of no-action letters and advisory opinions to increase regulatory clarity in the consumer financial services market.

b) The Bureau Should Engage With Stakeholders Prior To Announcing Or Enforcing Any De Facto Regulatory Requirements, "Best Practices," Or Policy Expectations.

The Bureau has employed an array of informal missives and publications to convey its expectations for behavior in certain areas of consumer finance policy—all without soliciting notice and comment from stakeholders or engaging in the rulemaking process specified in law for imposing regulatory obligations. The Bureau may believe that its communications help businesses by providing the Bureau's views regarding a particular market, product, or practice; but in fact these informal issuances, which come as a surprise to the consumer financial services industry, create tremendous uncertainty and unfairness.

Letters from the Bureau to business executives "urging" them to take action not required by law and the Bureau's publication of "best practices," for example, raise questions about what will happen if they do not take the action requested or adhere to these "best" practices. Will the Bureau deem their inaction an "unfair, deceptive, or abusive act or practice" actionable under the CFPA? Similarly, financial institutions wonder what consequences they will face—including behind closed doors in the supervisory process—if they elect not to offer a product that their regulator has "urged" them to create. One wonders why, if these expectations do have practical force, the public been denied the notice and opportunity to comment contemplated by the Administrative Procedure Act. And because the Bureau has not been informed by public comment its issuances often fail to take account of practical realities, causing significant marketplace confusion for businesses and consumers alike. In short, the Bureau's activities in these regulatory gray areas are creating confusion and unlevel playing fields in the market, not bringing the clarity that the Bureau perhaps believes it is providing.

On February 3, 2016, for example, Director Cordray sent a letter to the CEOs of the nation's largest financial institutions concerning accounts that feature overdraft protection. He wrote, "This letter is not being sent in reference to any sort of regulatory requirement, but instead is simply a *suggestion* that I *urge* you to consider in serving your customers."[5] Even though framed as a mere "suggestion," a regulated entity cannot be certain of the consequences of failing to comply with a public statement of its regulator's preferences for whether and how it should offer overdraft products. Will it be asked to justify that decision as part of the supervision process? Will such a "failure" impact the conclusions in its examination? We also wonder what the basis is for the Director's "suggestions." Other than the Bureau's years-long interest in regulating the market for overdraft products, which to date remains unresolved, the Chamber is not aware of any public discussion of this idea; certainly there was no transparent notice and comment period. What if the adoption of the "suggestions" has adverse consequences for the availability of consumer credit?

The Bureau's March 23, 2016, *Advisory for Financial Institutions on Preventing and Responding to Elder Financial Exploitation* similarly "makes [ ] recommendations to banks and credit unions" to undertake a variety of efforts, such as the development of protocols for protecting account holders from elder financial exploitation and the training of staff and the use of technology to detect such exploitation.[6] The Bureau's press release accompanying the Advisory called these recommendations "an extensive set of voluntary best practices to help banks and credit unions fight" elder exploitation.[7] Here again, the Bureau uses hortatory language—these

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[5] *See* Form Letter from Dir. Richard Cordray to CEOs of Financial Institutions (Feb. 3, 2016)(emphasis added), http://files.consumerfinance.gov/f/201602_cfpb_letter-to-banks-on-lower-risk-accounts.pdf.

[6] CFPB, Advisory for Financial Institutions on Preventing and Responding to Elder Financial Exploitation (Mar. 23, 2016), http://files.consumerfinance.gov/f/201603_cfpb_advisory-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf.

[7] Press Release, CFPB, CFPB Issues Advisory and Report for Financial Institutions on Preventing Elder Financial Abuse (Mar. 23, 2016), http://www.consumerfinance.gov/newsroom/cfpb-issues-advisory-and-report-for-financial-institutions-on-preventing-elder-financial-abuse.

recommendations are "voluntary," not required—without any appreciation of how its recommendations will be received in the consumer financial marketplace. Financial institutions may well wonder whether, if they do not adhere to these "voluntary" best practices, a cause of action will lie against them—including under the vague "abusiveness" standard under the CFPA.

Here again, there was never any opportunity for transparent, meaningful public engagement in the development of these recommendations. The report that accompanied the Advisory described the Bureau's methodology in some detail, including, "in-depth, unstructured interviews with a broad spectrum of stakeholders."[8] Conspicuously missing from this methodology is input (or at least public notice of input) from those whom the Bureau did not select to interview, including academics, business associations, and consumer groups. If they were consulted, the transcript of those consultations remains hidden from the public view, as does any evidence of a cost-benefit analysis for the Bureau's suggestions.

The Chamber believes that the critical importance of open, public dialogue on key issues in the consumer financial services market is self-evident. Given the Bureau's stated commitment to transparency and public engagement, the Bureau should not continue to fail to engage with the public before issuing de facto regulatory standards. Going forward, it should undertake notice and comment before trying to move the market through informal guidance, "best practices," or other such means.

2. The CFPB Should Use Enforcement Actions To Deter Fraud and Predation, Not To Announce New, Broadly-Applicable Regulatory Policies.

As with any regulation through enforcement situation, the Chamber has had a longstanding concern with the Bureau's continued preference for regulating the consumer financial marketplace through enforcement actions and consent orders rather than through processes that give stakeholders notice and the opportunity to comment. Without increased transparency in the regulatory process, the market for consumer financial products will continue to be burdened by unnecessary confusion, regulatory duplication, and uncertainty, which, in turn, yields increased costs and decreased opportunities for customers. Recent developments, explained below, have heightened our concern, clarifying once again that regulation by enforcement imposes rules that are not only unclear, but that, to the extent that they are discernible, have weak factual and legal justifications. Nevertheless, we continue to stand ready to work with the Bureau to ensure that the Bureau's regulation of the consumer financial

[8] CFPB, Recommendations and Report for Financial Institutions on Preventing and Responding to Elder Financial Exploitation 7 (Mar. 2016), http://files.consumerfinance.gov/f/201603_cfpb_recommendations-and-report-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf.

market does not have the effect of denying consumers access to financial products that help them manage their personal finances.

a) The Bureau Should Ameliorate the Regulatory Uncertainty Caused By Its Enforcement Actions on Indirect Auto-Lending, Abusive Acts or Practices, and Service Provider Liability.

The Committee is very familiar with the confusion in the marketplace caused by the Bureau's enforcement actions on indirect auto lending, abusive acts or practices, and service provider liability. A retelling of the full history of that uncertainty is therefore not necessary here,[9] but a few highlights make clear that the Bureau has not changed its approach in any of these areas, ensuring that substantial regulatory uncertainty—and all of its attendant harmful consequences for businesses and consumers—continues to prevail.

Indirect Auto: The Chamber has joined numerous other industry stakeholders in expressing serious concerns about the Bureau's vigorous "indirect auto campaign" and our doubts about the legal validity of its claims (doubts which employees of the Bureau appear to share, based on a review of documents appended to a recent staff report of the House Financial Services Committee). The February 2, 2016 settlement among the Bureau, the Justice Department, and Toyota Motor Credit Corporation[10] begged the question, yet again, why the Bureau does not simply embark on a more formal process to try to satisfy its obvious desire to regulate the market. Its efforts to regulate the auto dealer market through enforcement actions against non-dealers have failed to date, and there is no reason to think that continuing on the same path will bring the Bureau a different result in the future. The answer is perhaps that the Bureau recognizes it does not have the authority to regulate the dealer market (section 1029 of Dodd-Frank prohibits it) and so is using its regulatory muscle to accomplish an end-run around express statutory language and congressional intent.

Abusiveness: The Chamber has repeatedly called upon the Bureau to issue formal guidance on the meaning of "abusive" acts or practices, as used in the Consumer Financial Protection Act, which would be consistent with the prior Federal Trade Commission policy statements addressing the meaning of "unfair" and "deceptive" practices.[11] The Bureau has continued to refuse to do so, however, preferring instead

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[9] We detailed our concerns on these issues in a letter to the Bureau over two years ago. *See* Letter from David Hirschmann, Pres., CCMC, to Richard Cordray, Dir., CFPB (Feb. 12, 2014),http://www.centerforcapitalmarkets.com/wp-content/uploads/2014/02/2014-2.12-CFPB-Letter.pdf.

[10] *See In the Matter of Toyota Motor Credit Corp.*, File No. 2016-CFPB-0002 (Feb. 2, 2016),http://files.consumerfinance.gov/f/201602_cfpb_consent-order-toyota-motor-credit-corporation.pdf.

[11] *See* FTC Policy Statement on Deception (Oct. 14, 1983), *appended to* Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984), http://www.ftc.gov/bcp/policystmt/ad-decept.htm; FTC Policy Statement on Unfairness (Dec. 17, 1980),

to recite the vague statutory standard when questioned on this subject and requiring financial services companies to try to decipher the term's meaning from a limited number of consent orders.[12] Given this approach, businesses are unsure whether to implement a compliance system based on the broadest possible interpretation of the term—even if that will have adverse consequences for credit availability—or implement a system based on a narrower view (such as requiring intentional wrongdoing) and risk the possibility that the Bureau will subsequently interpret the provision more broadly. The Bureau could very easily answer these broad questions—and assess whether its current approach will in fact have adverse consequences for consumers—by seeking notice and comment on the question and issuing at least some guidance, even if it does not now wish to adopt a definitive construction of the term "abusive." Instead, by leaving these critical questions unanswered, and by failing to inform itself of the consequences of the extremely broad approach it seems to be taking in uncontested consent orders, the Bureau risks causing real consumer harm through increased costs for consumers, reduced product offerings, and restricted credit availability.

Service Provider Liability: The Bureau also continues to maintain unnecessary ambiguity regarding the scope of a financial service company's liability for the actions of a service provider. The Bureau has authority to issue rules covering service providers, to supervise those providers, and to bring enforcement actions against them.[13] In contrast, the Dodd-Frank Act does not specify a basis for holding a company liable for the unlawful acts of its service provider. The absence of statutory guidance on this significant question argues strongly for the Bureau to at least issue clear guidance informed by public comment on the subject before imposing liability on a business for the unlawful acts of its service providers.[14]

Instead, the Bureau has preferred to pursue enforcement actions that create even more uncertainty for financial services companies. For example, a recent consent order imposed liability on a bank based on the fraudulent actions of third-

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appended to International Harvester Co., 104 F.T.C. 949, 1070 (1984), http://www.ftc.gov/bcp/policystmt/ad-unfair.htm.

[12] *See* 12 U.S.C. § 5531(d); *CFPB Supervision and Examination Manual*, Part II.C (Oct. 2012), http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf; CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts (July 10, 2013), http://files.consumerfinance.gov/f/201307-_cfpb_bulletin_unfair-deceptive -abusive-practices.pdf.

[13] *See* 12 U.S.C. §§ 5514(e), 5515(d) (providing supervisory authority over service providers); *id.* § 5531(a) (providing enforcement authority over service providers); *id.* § 5531(b) (providing authority to prescribe rules applicable to service providers regarding unfair, deceptive, or abusive acts or practices).

[14] The Bureau clearly has the authority to consider a matter so "necessary or appropriate" to the administration of the Federal consumer financial laws. *See* 12 U.S.C. § 5512(b)(1).

party lawyers.[15] Without explaining why, the consent order treated these fraudulent actions of a service provider as the covered person's own actions. In this manner, the consent order seems to suggest that the Bureau believes that a company can be liable even if its service provider engaged in criminal conduct that violated the company's express instructions. If the Bureau were to subject this belief to public comment rather than using it, untested, to sustain a consent order, we would strongly caution the Bureau against holding such a sweeping theory of liability for actions that a company expressly prohibited.

b) The Bureau Should Abandon Efforts To Expand Regulation By Enforcement Into New Areas Of The Consumer Financial Services Market.

Our concerns about regulation by enforcement have been elevated by Director Cordray's March 9, 2016, speech to the Consumer Bankers Association, which seemingly redoubled the Bureau's commitment to that approach for the foreseeable future.[16] Indeed, the number of areas in which the Bureau is taking a regulation-by-enforcement approach appears only to be growing. As the example of debt sales enforcement actions demonstrates, this growth of regulation by enforcement has not even been slowed by the Bureau's ongoing rulemaking processes.

Bureau consent orders regarding debt sales appear to announce standards concerning the sale of charged-off debts to third-party debt buyers—a topic that apparently may be addressed in the delayed debt collection rulemaking discussed above. As stated (or at least implied) in the consent orders,[17] these requirements include:

- The provision of records concerning disputes between the creditor and the customer in the past year, even for those disputes that have been mutually resolved;
- A prohibition on selling debt within 150 days of the expiration of a statute of limitations; and

[15] *In the Matter of Citibank N.A.*, 2016-CFPB-0004 (Feb. 23, 2016),http://files.consumerfinance.gov/f/201602_cfpb_consent-order-citibank-na-department-stores-national-bank-and-citifinancial-servicing-llc.pdf.
[16] Dir. Richard Cordray, Prepared Remarks at the Consumer Bankers Association (Mar. 9, 2016),http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-consumer-bankers-association/.
[17] *See In the Matter of Chase Bank USA, N.A.*, 2015-CFPB-0013 (July 8, 2015),http://files.consumerfinance.gov/f/201507_cfpb_consent-order-chase-bank-usa-na-and-chase-bankcard-services-inc.pdf; *In the Matter of Citibank, N.A.*, 2016-CFPB-0003 (Feb. 23, 2016), http://files.consumerfinance.gov/f/201602_cfpb_consent-order-citibank-na.pdf.

- A requirement that a creditor include a term in a debt sale contract to prohibit the debt buyer from reselling the debt to a purchaser other than the creditor.

The specificity of these consent order terms and their repetition in multiple actions strongly suggest that they will be imposed routinely after alleged legal violations. But it is unclear whether these requirements are a form of penalty for allegedly illegal conduct or whether all market participants should (or must) meet them in order to comply with existing laws. After all, consent orders represent only the *Bureau's* views; they have no judicial imprimatur.

Take, for example, the blanket prohibition on reselling debt. This would be a radical change to the debt market if proposed as a rule. It is unclear whether the Bureau expects covered persons to make such a change based only on the relief imposed in a few consent orders. Nor is it clear that the Bureau has any record that supports the need for such a requirement, as opposed to less burdensome requirements (*e.g.*, the required inclusion of certain documentation with any resale of debt). These consent order terms leave these and many other questions unanswered, such as what liability (if any) a creditor has if the debt buyer violates the contractual prohibition on the resale of purchased debt, and on what basis such liability would rest—questions that could have been addressed if the Bureau had engaged in a rulemaking process that incorporated dialogue with the financial services community.

The Bureau's consent orders regarding debt sales and other topics, as well as Director Cordray's March 9, 2015 remarks, demonstrate the Bureau's continued commitment to regulation by enforcement. This is a mistake. The Bureau should write rules if it wishes to make rules. Regulation by enforcement is a shortcut that undermines public engagement—and public confidence—in the regulatory process, and consequently will undermine rather than support the long-term success of the Bureau.

3. The CFPB Should Strengthen Accountability By Enhancing Transparency And Committing To Fair Administrative Processes.

The CFPB's history to date has confirmed the Chamber's fears that the Bureau's unprecedented structure, with its lack of routine checks and balances, would produce agency action inconsistent with federal agency norms. The Chamber consequently has supported legislation that would incorporate the controls and oversight that apply to other federal regulatory agencies, which would in turn ensure far greater stability over the long-term for those who provide and rely on consumer credit. These include proposals that would:

- Increase the agency's transparency;

- Increase the CFPB's accountability to Congress;

- Strengthen checks and balances on the exercise of the CFPB's authority and, thereby, to the American people;

- Limit the CFPB's discretion to impose new requirements and burdens on financial institutions without first soliciting public input; and

- Clarify legal requirements imposed by the Dodd-Frank Act.

The Chamber believes that undertaking such structural reform is the most important step that Congress can take to put the Bureau on a sound long-term footing. Until such changes are made, we believe that Director Cordray and his leadership team have a special responsibility, if they expect to build a lasting foundation for the Bureau, to embrace transparency and accountability, rather than working to blurry the limits on its legal authority. It is regrettable that, to date, many of the Bureau's most significant mistakes have shared common threads of failure to engage with the public in a transparent process, adopting tactics that insulate the Bureau's decisions from judicial review (all while announcing broadly applicable principles), and refusing to engage with external experts even when they present the very data that a purportedly research-oriented agency should welcome.

Following are three examples of the Bureau's failure to meet the requirements of administrative law, failure to engage with the public in a meaningful dialogue, and to otherwise undermine the credibility of its regulatory processes. The Chamber stands ready to work with the Bureau in each area to help it bring its approach into line with the regulatory best practices developed at peer agencies.

a) The Bureau Should Take Seriously The Public Interest In Transparency And Proper Oversight Of Bureau Information Collection Activities.

Congress long ago recognized the public interest in preventing federal government agencies from undertaking unduly burdensome or intrusive collections of information from members of the public. It consequently enacted the Paperwork Reduction Act (PRA) to impose procedural safeguards—including public notice and comment—to help guard against unduly broad and burdensome data collections and to ensure that regulators use high-quality information in their decision-making.

The CFPB, however, has repeatedly made clear that it does not take seriously its obligations under the PRA, but regards that statute as an impediment to be circumvented or minimized at every opportunity. I would particularly highlight three ways that the Bureau has defeated the public policy objectives manifested in that statute:

- First, the Bureau has gathered enormous amounts of information about consumers' use of financial products and services through the supervisory process, prompting numerous questions about the need for these collections as well as whether their benefits outweigh both the costs to businesses and the risks they pose to consumer privacy.

- Second, as detailed in a September 22, 2014 report, the Government Accountability Office concluded that the OCC and the CFPB agreed to each collect credit card data from nine financial institutions (one less than the threshold for triggering the PRA) and then to share that information with each other. (The OCC could not even manage to limit itself to this cynical attempt to sidestep the PRA, but blatantly violated it by collecting credit card data from sixteen financial institutions, not nine.) [18]

- Third, the Bureau has relied heavily on "generic" collection proposals that seek approval for an entire means of information collection. For example, the Bureau has sought and received approval "to gather primary data from purposive samples through controlled trials in field and economic laboratory settings."[19] What sort of actual information would be collected under this proposal is anyone's guess, meaning that the purpose of the PRA—to allow the public to understand and comment on the need for particular information collections—is entirely defeated.

We recognize that compliance with the PRA requires significant time and energy. But that is true of all of the legal requirements that make up the regulatory process and that maintain its credibility through accountability to the public. The Bureau should not shirk its responsibilities under the PRA or take shortcuts just because it views the statute as an impediment to the goals it wants to achieve. Instead, the Bureau should embrace the transparency provided by the PRA and other

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[18] *See* Gov't Accountability Office, Consumer Financial Protection Bureau: Some Privacy and Security Procedures for Data Collections Should Continue Being Enhanced 47 (Sept. 2014), http://www.gao.gov/assets/670/666000.pdf.

[19] Agency Information Collection Activities: Comment Request, Docket No. CFPB-2014-0018; OMB Control No. 3170-XXXX, 79 Fed. Reg. 53,422 (Sep. 9, 2014),

regulatory processes as the very basis of its credibility and, thus, its long-term success as a regulatory agency.

b) The Bureau Should Welcome Meaningful Discussions with the Public, Not Just Host Well-Scripted Field Hearings.

The risk of lost credibility also is on full display at the CFPB's field hearings, which are largely public relations exercises devoid of any meaningful debate about the subject of the hearing. While the Bureau purports to use these hearing to listen to all interested stakeholders, it is plain to any even slightly disinterested observer that they are part and parcel of the Bureau's press strategy to promote its initiatives Thus, while industry representatives nominally are allowed to participate, they are permitted only to make a short statement and then answer two or three general questions posed by Bureau staff. Never is there any actual engagement between the Bureau and panelists: the Bureau does not answer any of the tough questions raised by panelists and there is no meaningful dialogue among the panelists themselves.

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

- In 2011, the FTC, to which the Dodd-Frank Act granted exclusive rulemaking authority over auto dealers that engage in indirect financing, conducted three roundtables to learn about automobile financing. It began this process with a notice in the Federal Register, solicited public comments (100 were received and docketed), and invited thirty-one speakers representing consumers, industry, and other government agencies (including the Bureau) to participate in even-handed discussions at each of the three events.[20]

- In 2014, the SEC hosted a cybersecurity roundtable that featured 29 panelists, permitted notice and comment (14 comments were received), and published the resulting transcript.[21]

In the Chamber's view, the Bureau has not adequately explained why it cannot apply these practices in its own deliberative process. After all, the Bureau does not

[20] *See generally* Fed. Trade Comm'n, The Road Ahead: Selling, Financing & Leasing Motor Vehicles, http://www.ftc.gov/news-events/events-calendar/2011/08/road-ahead-selling-financing-leasing-motor-vehicles.
[21] *See generally* Secs. & Exch. Comm'n, SEC Announces Agenda, Panelists for Cybersecurity Roundtable (Mar. 24, 2014), https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541253749#.UzCB2ijip9U.

hold a monopoly on wisdom on consumer financial services policy. Our democratic system is based on the assumption that public debate makes policies stronger, not weaker. The Bureau consequently should seek meaningful public engagement rather than further jeopardize the integrity of its actions by continuing to hold events that qualify primarily as political theater.

c) The Bureau Should Ensure Due Process in Its Internal Administrative Adjudication Process.

The Dodd-Frank Act authorizes the Bureau to preside over administrative hearings to adjudicate enforcement actions not brought in federal court.[22] As we have seen in other agencies, this authority is susceptible to misuse and consequently should be exercised with particular care. The Bureau should recognize the need to protect the due process right of those who appear before its internal tribunal, ultimately presided over by the director of the Bureau,[23] especially to offset any suspicion about the Bureau's impartiality. Unfortunately, because of the Director's remarkable intervention in the *PHH Corporation* matter, the administrative adjudication process so far appears more like an extension of the Bureau's enforcement function than an independent decision-making body.

As the Chamber explained in its amicus brief to the U.S. Court of Appeals for the D.C. Circuit, the *PHH Corporation* matter involved a disputed interpretation of the Real Estate Settlement Procedures Act. While we disagree with the Bureau on its interpretation of that statute, what is more remarkable, for present purposes, is that the Bureau announced its interpretation for the first time in an enforcement action and imposed substantial retroactive liability on the basis of that interpretation. Then, apparently dissatisfied with the Bureau's apparent victory over the company, the Director increased the money judgment imposed on the company by a factor of eighteen from the amount recommended by the presiding independent administrative law judge. As the Chamber's brief explains:

> First, [the Bureau] violates the most basic requirement of due process—fair notice of what the law requires—by overturning a settled interpretation of law and then imposing a sanction of $109 million for conduct that was lawful under the longstanding prior interpretation.
>
> Second, it claims the authority to ignore clear statutes of limitations applicable to enforcement actions brought in court

[22] *See* 12 U.S.C. § 5563.
[23] *See* 12 C.F.R. § 1081.405.

> whenever it exercises its unreviewable discretion to institute an administrative enforcement action.
>
> The combination of these two rulings means that the Bureau has arrogated to itself the ability to change a settled legal interpretation, impose enormous penalties for conduct that complies with that interpretation, and to do so without regard to the limitations periods specified by Congress. That breathtaking assertion of raw administrative power, if permitted to stand, would open the door to similarly unfair and unauthorized sanctions by the Bureau, under its broad enforcement authority, and by other agencies as well.[24]

The *PHH Corporation* case is still pending before the D.C. Circuit Court of Appeals. Regardless of the outcome in that case, expecting a Court of Appeals to round off the rough edges of a flawed administrative adjudication process is hardly a strategy for successful regulatory policymaking.

4. The CFPB Should Limit Regulatory Duplication And Conflict By Cooperating And Coordinating With Other Agencies.

The Bureau holds an expansive range of authorities and responsibilities that explicitly overlap with the authorities and responsibilities of other federal agencies. Effective coordination is essential, as Congress itself recognized.[25] To date, while the Bureau has announced various formal tools for cooperation, such as memoranda of understanding, the actual level of coordination between the Bureau and other agencies appears to have been low. For example, this Committee is surely familiar with the overlapping and mixed messages sent to banks by their prudential regulators and the CFPB on deposit advance products. Such confusion benefits no one. Going forward, the Bureau should commit itself to enhancing coordination, both by avoiding duplication and by thinking proactively about how to ensure that the regulatory response to a single issue makes sense when considered as a whole.

a) The CFPB Should Focus Its Resources On Areas Where It Has Clear Jurisdiction And That Are Not Already Crowded With Other Regulators.

The CFPB has clear authority across wide portions of the consumer financial services market. That authority has limits, however, because Congress specifically deprived the Bureau of authority in a number of areas. To date, the Bureau has

[24] Br. of Am. Cur. U.S. Chamber of Commerce, *PHH Corp. v. CFPB*, No. 15–1177 (D.C. Cir. Oct. 5, 2015).
[25] *See* 12 U.S.C. § 5581(b)(5)(D) (requiring coordination between the FTC and the CFPB).

appeared to seek out opportunities to test—and, in our view, breach—the limits of its authority, including by crossing into territory already regulated by other agencies. The Bureau should reconsider this approach; at a minimum, it should commit itself not to create standards that conflict with those already applicable to entities within its jurisdiction.

The Bureau's entry into the data security field in March 2016 provides a good example of a Bureau decision to press its jurisdiction in a manner that raises a substantial threat of conflicting regulatory standards. To our knowledge, the Bureau's enforcement action against and consent order with Dwolla, Inc., represented its first public assertion of jurisdiction over a company's data security. As an initial matter, we were puzzled by the apparent asymmetry between the allegations recited in the order and the agreed-to remedies: Dwolla's alleged violation was that its statements about its data security were inflated; the remedy, however, was not limited to improving the accuracy of those *statements* but included substantive requirements that Dwolla actually change its data security *practices*.[26]

But our greater concern was with the Bureau's expectation that the data security standards found in the Dwolla consent order will be exported to the consumer financial marketplace writ large. Needless to say, those standards were not the product of a rulemaking pursuant to the Administrative Procedure Act, so there was no public input on important questions surrounding them, such as whether they are flexible enough to adapt to rapidly changing cybersecurity threats or consistent with President Obama's ongoing efforts to develop a Cybersecurity National Action Plan.[27] Instead, they were the product of a one-off consent order, fashioned pursuant to the Bureau's belief in its seemingly boundless authority to root out "unfair, deceptive, or abusive act[s] or practice[s]."[28]

Moreover, the Chamber, which has worked constructively with other federal regulators on data security issues for years, is concerned that the Dwolla consent order represented the sudden addition of yet another regulator to the already crowded consumer data security landscape. Indeed, the Bureau's abrupt entry onto the data security scene was unexpected given Congress's specific decision to prohibit the Bureau from enforcing the so-called "safeguards rule" under the Gramm-Leach-Bliley Act.[29] Countless federal and state regulators, including the Federal Trade Commission,

[26] *Compare In the Matter of Dwolla, Inc.* ¶¶ 15-27, 2016-CFPB-0007 (Mar. 2, 2016) (describing alleged misstatements about data security) *with id.* ¶¶ 52-62 (ordering substantive changes to Dwolla's data security),http://files.consumerfinance.gov/f/201603_cfpb_consent-order-dwolla-inc.pdf.
[27] *See* The White House, *Fact Sheet: Cybersecurity National Action Plan* (Feb. 9, 2016), https://www.whitehouse.gov/the-press-office/2016/02/09/fact-sheet-cybersecurity-national-action-plan.
[28] Dodd-Frank Act §§ 1031, 1036 (codified at 12 U.S.C. §§ 5531, 5536).
[29] Dodd-Frank Act § 1093 (codified at 15 U.S.C. § 6805(a)(8)).

already regulate data security; it is unclear what deficiency the Bureau is trying to fill in this overcrowded field. There also is no evidence that the Bureau evaluated the likelihood of regulatory duplication (or worse, dissonance) with other regulators or considered whether its regulation, whether duplicative or not, would impose unnecessary costs on businesses subject to its authority. We consequently have strongly urged the Bureau to coordinate any future data security actions with other banking regulators to ensure compatibility between the respective agencies' views on data security and to leverage existing expertise in the field.

Unfortunately, this is not the only instance in which the Bureau has ventured into an area falling into the core expertise of another federal regulator. Another example is a pair of enforcement actions against mobile phone companies for billing errors caused by third parties—even though such actions are firmly within the jurisdiction of the Federal Communications Commission and FTC.[30]

These actions smack of attempts to test, and expand, the boundaries of jurisdiction and to compete with other agencies in claiming authority over activities that are "in the news." The Bureau has more than enough to do in its core areas of responsibility. It should focus on those obligations, and eschew exercises in regulatory adventurism designed to plant its flag in areas well within the authority of other federal agencies.

b) The CFPB Should Build Deep And Sustained Working Relationships With Other Regulators.

The Bureau's commitment to coordination should not be limited to merely avoiding obvious intrusions into areas in which the Bureau has limited authority and that already are the subject of sustained attention by other regulators. In addition, the Bureau should work proactively with other regulators to ensure that the overall regulatory response to an issue is coherent and prudent. While the CFPB is an independent agency, that does not justify its working in isolation. Rather, the Bureau and other agencies should work together to ensure that their supervisory guidance is not at cross purposes and that their enforcement actions do not point to different policy outcomes.

For example, the Bureau should work with other regulators to understand and manage any consequences of a Bureau enforcement action, such as its effect on a financial services company's rating under the Community Reinvestment Act or upon

[30] *See* CFPB, CFPB Takes Action to Obtain $120 Million in Redress from Sprint and Verizon for Illegal Mobile Cramming (May 12, 2015), http://www.consumerfinance.gov/newsroom/cfpb-takes-action-to-obtain-120-million-in-redress-from-sprint-and-verizon-for-illegal-mobile-cramming/ (describing proposed consent orders).

measures of safety and soundness. In addition, the Bureau should understand how its future policymaking will interact with that of other federal agencies, again to avoid unnecessary and unproductive conflict and to ensure that those policies interact in a coherent manner. To do so, the Bureau must build deep and sustained working relationships with other regulators. It is our impression that further work remains to be done on that score, and we hope that the Bureau will embrace it as an opportunity going forward.

5. The CFPB Should Preserve Companies' Use of Diverse Tools, Including Arbitration Agreements, To Manage Their Relationships with the Customers They Serve.

Financial services companies know that customers are their most important asset and consequently work very hard to satisfy customers' expectations and to address any concerns that arise. Indeed, customer service is the foundation of the most successful companies. The Bureau should facilitate and encourage customer service efforts, rather than push consumers toward adversary relationships and litigation.

a) The CFPB Should Support Effective Customer Service Rather Than Harm Consumers' Confidence In Their Financial Services Companies.

We share the Bureau's goal of ensuring that consumers are satisfied with the financial products and services they use. American financial institutions and providers dedicate enormous resources to their customer service processes and carefully listen to customer concerns. We, accordingly, would welcome any effort by the Bureau to strengthen financial services companies' relationships with their customers and to support effective customer service processes. Unfortunately, the Bureau has taken another approach, encouraging and publicizing consumer complaints that are full of misleading information about financial institutions, and that consequently create confusion in the marketplace while disrupting existing customer service relationships.

A financial institution that published "factually inaccurate" information knowing that "some consumers may draw (or be led to) erroneous conclusions"—phrases the Bureau uses to describe the information about financial services providers it publishes on its website—would be subject to a Bureau enforcement action for deceptive conduct. The Bureau should not hold itself to a lower standard. It should cease its publication of misleading information through its complaint database and related reports.

The Chamber and many other stakeholders have exhaustively detailed the many flaws in the consumer complaint database. For present purposes, consider the following four:

- The complaint database is subject to manipulation, such as by a potential litigant seeking to inflate apparent complaints against a prospective defendant. The Bureau has acknowledged this risk,[31] but makes only limited efforts to confirm a commercial relationship between the complainant and the subject company. Those limited steps cannot prevent publication of complaints based on intentional misrepresentations or omissions.

- As the Bureau has put it, complaints may be based on "factually incorrect information as a result of, for example, a complainant's misunderstanding or misrecollection of what happened."[32]

- Most of the "complaints" in the database are not really complaints at all. Two-thirds of submissions to the database are closed with an explanation, not relief, from the company.[33] The bulk of these "complaints," in other words, involve no wrongdoing by the financial institution (or even other circumstances that prompt a financial institution to offer monetary relief).[34]

- The complaint data is not representative and has not been normalized. As a result, a consumer reviewing the contents of the database will be left with the misleading impression that companies with the largest customer bases are the subject of a disproportionate number of complaints.

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[31] CFPB, *Disclosure of Certain Credit Card Data*, No. CFPB-2011-0040 ("2012 Complaint Policy Statement"), 77 Fed. Reg. 37,558, 37,562 (June 22, 2012).

[32] *See* CFPB, Disclosure of Consumer Complaint Narrative Data, No. CFPB-2014-0016 ("2014 Complaint Proposal"), 79 Fed. Reg. 42,765, 42,767 (July 23, 2014).

[33] CFPB, *Consumer Response Annual Report: January 1-December 31, 2014*, at 41 (Mar. 2015) (indicating that 70% of complaints are closed with explanation), http://files.consumerfinance.gov/f/201503_cfpb_consumer-response-annual-report-2014.pdf.

[34] For example, the Bureau has reported that various consumers have not realized that they generally must dispute a charge on a credit card statement within 60 days or that a credit card issuer may not override a merchant's "no-return policy." *See* CFPB, *Consumer Response: A Snapshot of Complaints Received* 20 (July 2014), http://files.consumerfinance.gov/f/201407_cfpb_report_consumer-complaint-snapshot.pdf.

The Bureau is well aware of all these fundamental flaws, but, rather than fix them, it has worked aggressively to expand and publicize the complaint database,[35] providing what it has described as a government "megaphone" for misleading data.[36]

Its justifications for doing so make no sense. Most notably, the Bureau has justified its publication of misleading information with the claim that a "marketplace of ideas" will determine what the complaint data shows.[37] But a "marketplace of ideas," cannot exist without the ability to transparently study the data and correct the flaws. The Bureau's policy in this area is directly juxtaposed to Justice Brandeis' famous axiom that sunlight is the best disinfectant.

And there is no evidence that such a "marketplace of ideas" has emerged. Indeed, the Bureau appears to have tried to make up for this absence, publishing very unfair reports on the Top-Ten "Most Complained-About Companies." These reports appear to have gained very little traction in the press (which we assume was the Bureau's primary goal), which is unsurprising because an unbiased observer can immediately see these reports for what they are: lists of the ten financial services companies that interface with the most customers in the United States (i.e. the credit reporting agencies and the largest banks and mortgage companies).

The inadequacy of the consumer complaint database has very unfortunate consequences for consumers and businesses. Specifically, the complaint database:

- Misleads consumers, distorting the very consumer financial services marketplace that the Bureau is charged with protecting by causing consumers to make *less* informed decisions;

- Disrupts existing customer care relationships by (a) encouraging consumers to tell their stories to the Bureau first, rather than to their financial services provider; (b) prompting companies to settle even unreasonable claims that are the subject of a complaint, thus

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[35] Congress tasked the Bureau with establishing a process for receiving and handling complaints against financial services companies; Congress said nothing about publication of complaints. But in retrospect, it is possible to see that the Bureau had publication in mind at the beginning of the process for establishing the complaint database. *See* Disclosure of Certain Credit Card Complaint Data, 76 Fed. Reg. 76,628, 76,632 (Dec. 8, 2011) (indicating that the Bureau would not publish complaint narrative data at that time because of privacy concerns, but noting the view (which ultimately was adopted by the Bureau) that "Publishing narratives only if a consumer affirmatively opts in to—or fails to opt out of—publication might alleviate this problem.").

[36] *See* Prepared Remarks of CFPB Director Richard Cordray at the Consumer Response Field Hearing (July 16, 2014) ("We have many tools at hand to ensure fairness and dignity for consumers, but we also can offer people a megaphone to empower them to tell their own stories in their own words."), http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-consumer-response-field-hearing/.

[37] *See* 2012 Complaint Policy Statement, 77 Fed. Reg. at 37,561.

disadvantaging customers who do not submit their complaint to the Bureau; and (c) generating suspicion of and hostility towards financial services providers;

- Imposes undue reputational harm on responsible financial services companies, as well as significant direct costs as they process and address complaints; and

- Exposes consumers to invasions of privacy through the reidentification of consumers who submit complaints to the complaint database.[38] The harm caused by this reidentification will be even greater if complaint narratives are published, as consumers then will face the additional risk of intimate details of their financial experiences being reassociated with their name and address.

The Bureau is right to insist that companies respond to consumer complaints: we agree that resolving consumer concerns is a basic element of good business. But the Bureau's goal should be to encourage consumers to use effective customer service systems. While a complaint system can provide an early warning system, the CFPB's system should not displace existing customer service relationships. More broadly, the Bureau should focus on building consumers' confidence in their financial services companies, not tearing it down through ceaseless publication of exaggerated, inaccurate complaint data. Informed consumers necessarily have some degree of caution, but the Bureau should not be in the business of casting doubt over the whole marketplace and fostering dissension and litigation, rather than strong, trust-based customer relationships.

b) The CFPB Should Prioritize Protecting Consumers Over Protecting Trial Lawyers.

As this Committee knows, Congress tasked the Bureau with studying the use of arbitration agreements in the Dodd-Frank Act, and authorized it to take regulatory steps consistent with that study and the public interest.[39] As I describe herethe

[38] *See* 2014 Complaint Proposal at 42,768 ("[T]he Bureau will take reasonable steps to remove personal information from the complaint to minimize (but not eliminate) the risk of re-identification.").

[39] Section 1028 of the Dodd-Frank Act (12 U.S.C. § 5518) directed the Bureau to study and report to Congress on "the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services." Such agreements are often referred to as "pre-dispute arbitration agreements" because they represent the mutual, voluntary agreement between parties to present future disputes between them in an arbitration forum rather than in court. Section 1028 goes on to permit, but not require, the Bureau to issue a rule to impose conditions or limitations on the use of pre-dispute arbitration agreements if such restrictions would be "in the public interest" and "for the protection of consumers." Any rule must also be "consistent with the study" the Bureau conducts.

Bureau has exercised this authority in a non-transparent, unfair manner, appears likely to lead to proposal of a rule that will not benefit consumers, and will only benefit trial lawyers.

The Bureau conducted its study from 2012 to 2015 (the "Study") and reported its results to Congress in March 2015. Many members of Congress and business associations—other than those representing the interests of plaintiffs' lawyers who stand to benefit from increases in litigation—heavily criticized the Bureau for its staunch refusal to consider factors and data relevant (if not entirely central) to its inquiry, its contorted attempt to present data and analysis that put class action litigation in a good light, and, consequently, the resulting flawed conclusions of the study. Undeterred, the Bureau published materials last fall that foreshadow a Bureau rulemaking that, as a practical matter, will likely eliminate arbitration altogether and force consumers to pursue their legal claims—even those for as little as $20—through expensive litigation in America's already overcrowded courts.

Given the clear benefits of arbitration, it is disappointing that the Bureau is about to propose a rule that is likely to have the practical effect of eliminating consumer arbitration in the financial services industry.[40] Of course, the Bureau's proposal will not say that; it will be framed as a requirement that class procedures be permitted either in arbitration or in court. And it will do so, the Bureau will say, in order to "preserve" class actions—even though class actions provide little benefit to consumers, and focus their massive financial rewards on lawyers.

The bottom line is that if arbitration is regulated out of existence, consumers will lose the ability to vindicate most of the small injuries they suffer in any forum whatsoever because the claims are not classable and they are too expensive to pursue individually.

Pursuant to section 1028 of the Dodd-Frank Act, the Bureau will purport to base its proposed rule on the Study. But the Study is the result of a closed process that solicited public comment once at the outset in 2012 and never again for the three years that followed. The Bureau never informed the public of the topics it had decided to study and never sought public comment on them—even though a number of commenters suggested that the Bureau utilize that procedure. The Bureau never

[40] Arbitration imposes significant additional transaction costs on companies—paying consumers' filing fees and other costs of arbitration, for example. Thus, as one group of businesses has explained, "when there is no assurance that all claims will be arbitrated in lieu of litigation, and a [company] must shoulder the additional costs of class action litigation, subsidizing the costs of individual arbitration is no longer a rational business option"; the only logical decision is to "disengage from arbitration altogether." Br. of Am. Cur. CTIA—the Wireless Association at 21, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

convened public roundtable discussions on key issues, as many other agencies routinely do. And the Bureau never sought public input on its tentative findings.[41]

More than 80 members of the House and Senate sent a letter to the Bureau stating that:

> The process that led to the Bureau's Arbitration Study has not been fair, transparent, or comprehensive. The Bureau ignored requests from senior Members of Congress for basic information about the study preparation process. The Bureau also ignored requests to disclose the topics that would be covered by the study, and failed to provide the general public with any meaningful opportunities to provide input on the topics. Because the materials were kept behind closed doors, the final Arbitration Study included entire sections that were not included in the preliminary report that was provided to the public.
>
> As a result, the flawed process produced a fatally-flawed study. Rather than focusing on the critical question—whether regulating or prohibiting arbitration will benefit consumers—and devising a plan to address the issues relevant to resolving that question, the Bureau failed to provide even the most basic of comparisons needed to evaluate the use of arbitration agreements.[42]

It is particularly remarkable that the Bureau's proposal apparently will be justified by the asserted benefits of class actions, when the plain reality is that consumer class actions deliver little to anyone other than lawyers. Thus, eliminating arbitration in order to preserve class actions sells out the interests of consumers in order to benefit plaintiffs' lawyers.

Indeed, plaintiffs' lawyers are the chief proponents—and the principal beneficiaries—of restrictions on arbitration. Because arbitration is quicker and more efficient than litigation, it is less expensive, which means that plaintiffs' lawyers cannot extract large settlements and attorneys' fees for meritless claims in arbitration as easily as they could in class actions in court. As Professor Martin Redish has noted, this confirms that "[t]he real parties in interest in… [many] class actions are… the plaintiffs' lawyers."[43] The Bureau's own study found that plaintiffs' lawyers average

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[41] The Bureau staff would meet with interested parties and accept written submissions. But the staff refused to provide any information regarding the topics that the Bureau was studying or the timeline for its study process, and those one-way conversations therefore were not conducive to meaningful input.

42 http://www.cfpbmonitor.com/files/2015/06/McHenry-Scott-to-Cordray-Letter-re-arbitration.pdf.

[43] Testimony of Martin H. Redish at 7, *Class Actions Seven Years After the Class Action Fairness Act* (June 1, 2012), available at http://judiciary.house.gov/hearings/Hearings%202012/-Redish%2006012012.pdf.

class action fee is $1 million per case, while the average recovery by consumers in class actions is just $32.35. This alone should have dissuaded the Bureau from its misguided plan to ban arbitration by rule.

The Bureau's work on arbitration has been infected by many of the process problems I have highlighted in this testimony. Unsurprisingly, a bad process is poised to lead to a bad result—and one that will benefit plaintiff's lawyers, not consumers.

* * * * *

Thank you again for the opportunity to testify to the Committee on the effect of regulation on the consumer financial services marketplace. Continued innovation and competition continue to propel the marketplace forward, creating ever more choices and benefits for consumers. Prudent regulation can play an important role in preserving competition and advancing customer choice. Unfortunately, however, the Bureau too frequently has taken another path, overstepping its bounds; preferring regulatory uncertainty to clear rules of the road; and disrupting, rather than encouraging, effective and amicable relationships between financial services companies and their customers.

An improved regulatory approach could ensure a bright future for the consumer financial services market. Consumers want, need, and benefit from safe consumer financial services; countless responsible and innovative companies want to provide these products. With clear rules of the road developed through sound and open processes, the market will thrive and consumers will benefit. We hope that the Bureau will join with all stakeholders in pursuing these goals.