



May 14, 2018

Via Electronic Mail

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

Re: Request for Information Regarding Bureau Enforcement Processes (Docket No. CFPB-2018-0003)

Dear Ms. Jackson:

The Clearing House Association L.L.C.¹ (“TCH”) welcomes the opportunity to comment on the request by the Bureau of Consumer Financial Protection for information regarding the Bureau’s Enforcement processes and related issues.² TCH and its members support the Bureau’s mission of protecting consumers, and we appreciate the Bureau’s initiatives to review its policies and procedures and to receive public comment about its activities. By engaging all stakeholders in a public conversation about how the Bureau can function fairly and effectively, the Bureau has taken an important step in fulfilling its mission of protecting consumers and ensuring that markets for consumer financial products and services operate transparently, competitively, and efficiently. We believe that this important initiative will assist the Bureau in enhancing its enforcement processes to “best achieve meaningful burden reduction or other improvement to the processes . . . while continuing to achieve the Bureau’s statutory and regulatory objectives.”³

¹ The Clearing House is a banking association and payments company that is owned by the largest commercial banks and dates back to 1853. The Clearing House Association L.L.C. is a nonpartisan organization that engages in research, analysis, advocacy and litigation focused on financial regulation that supports a safe, sound and competitive banking system. Its affiliate, the Clearing House Payments Company L.L.C. owns and operates core payment system infrastructure in the United States and is currently working to modernize that infrastructure by launching a new, ubiquitous, real-time payment system. The Payments Company is the only private-sector ACH and wire operator in the United States, clearing and settling nearly \$2 trillion in U.S. dollar payments each day, representing half of all commercial ACH and wire volume.

² CFPB, Request for Information Regarding Bureau Enforcement Processes, 83 Fed. Reg. 5999 (Feb. 12, 2018).

³ *See id.* at 5999.

When used appropriately and predictably, the Bureau’s enforcement authority represents an important tool for addressing and deterring violations of federal consumer financial laws and for providing full and timely remediation of established consumer harm. We believe that financial firms—like all organizations—should be held to account for wrongdoing, and that full and timely remediation of established customer losses due to any such wrongdoing should be a high priority. It is important, however, that this authority be exercised consistent with applicable statutory safeguards and principles of due process. Unfortunately, the Bureau has not always exercised its enforcement discretion in this manner. Based on the experiences and observations of the industry, the Bureau has at times:

- engaged in “regulation by enforcement” by pursuing actions against institutions where no prior rule, guidance, or judicial decision provided fair notice that the conduct in question was unlawful in the view of the Bureau;
- implemented a Notice and Opportunity to Respond process that does not afford institutions a meaningful opportunity to understand and respond to the Bureau’s decision to pursue an enforcement action;
- sought to impose penalties and equitable remedies that are not proportional to the nature of the misconduct in question or its impact on consumers; and
- used tolling agreements and novel interpretations of statutes of limitations to expand its authority to punish long-past conduct.

In identifying these issues, we share the Bureau’s interest in efficiently identifying and addressing potential legal violations, particularly where they result in consumer harm. However, we believe that due process demands that the rules governing entities’ activities be made clear—in advance—and that remedies are proportional to the facts and circumstances of the conduct in question. To that end, this letter contains a range of specific recommended reforms to the rules and practices of the Bureau’s enforcement processes that are intended to further important policy aims, such as transparency and efficiency, without inhibiting the Bureau’s ability to punish and deter violations of consumer financial laws.⁴

Where possible, we believe the recommendations outlined below should be implemented by published rules or other formal regulatory processes, rather than merely by informal practice changes, as doing so will institutionalize those reforms, facilitate consistency in application, and provide greater transparency to the public and regulated entities. Formal policy changes and codifications will ensure more sustainable reform through future changes in Bureau personnel and will serve to inform stakeholders of the Bureau’s processes.

⁴ The proposals in this letter should be considered in conjunction with TCH’s response to the Bureau’s Request for Information regarding its CIDs and related processes. 83 Fed. Reg. 3686 (Jan. 26, 2018).

I. Executive Summary

- The Bureau should avoid “regulation by enforcement” by ensuring that enforcement actions are grounded in existing law and regulations. In particular:
 - The Bureau should make clear, either through a public enforcement policy or other public statement, that the remedial provisions in consent orders are uniquely negotiated for the specific institution and do not reflect any legal requirement or Bureau “guidance” for any other institution.
 - The Bureau should institute a formal process for the centralized review of actions that are based on its unfair, deceptive, and abusive acts or practices (“UDAAP”) authority, including authorization by a senior leadership committee.
 - The Bureau should refrain from imposing civil money penalties where there are not clearly announced standards governing the conduct, and when an action is necessary to prevent consumer harm it should only seek equitable remedies, such as through a cease and desist order.
 - The Bureau should revise and expand its no-action letter policy and similar procedures for providing clarity to the industry regarding the permissibility of products and activities, particularly to launch new or innovative products without fear of an enforcement action.
- The Bureau should ensure that the Notice and Opportunity to Respond and Advise process provides a meaningful opportunity to respond to the Bureau’s findings.
- The Bureau should refine its approach for determining the type and amount of enforcement remedies and for terminating consent orders. In particular:
 - The Bureau should introduce greater transparency and consistency to its approach to calculating civil monetary penalties, placing emphasis on (i) the harm caused by any misconduct, (ii) affirmative self-reporting of the issue by the institution, and (iii) voluntary remediation efforts the institution undertakes to address any misconduct.
 - Bureau demands for restitution should be more closely based on evidence of actual financial harm to consumers.
 - The Bureau generally should attempt to address less severe compliance issues through use of Supervisory remedies.
 - The Bureau should coordinate with other government authorities to prevent redundant enforcement efforts and to avoid duplicative penalties.
 - The Bureau should implement policies for terminating consent orders upon the satisfaction of reasonable and clearly defined conditions.
 - Bureau press releases announcing an enforcement action should adhere to the text of the consent order or complaint.

- The Bureau should implement a reasonable, clear, and consistent approach to determining applicable limitations periods and seeking tolling agreements.
- The Bureau should institute a policy to refrain from requesting or using attorney-client privileged materials in enforcement actions.

II. **The Bureau should avoid “regulation by enforcement” by ensuring that enforcement actions are grounded in existing law and regulations**

In the past, rather than engaging in notice-and-comment rulemaking or using advisory opinions or other general regulatory mechanisms to announce new rules, the Bureau often has used individual enforcement actions as a means of instituting *de facto* industry standards. According to former Director Cordray, requiring the government to articulate clear rules prior to initiating actions to punish that conduct “sets the bar too high” for regulators.⁵ Instead, Director Cordray explained, the Bureau’s Enforcement staff would work toward completing “a pattern of actions” in the hopes of conveying “an intelligible direction to the marketplace.”⁶ Under this approach, financial institutions were to glean insights from Bureau enforcement actions or prior cases brought by the Federal Trade Commission (“FTC”), and were supposed to treat the remedial provisions in consent orders as “detailed guidance” for “how to comply with the law and treat consumers fairly.”⁷

This process of “regulation by enforcement” presents several legal and practical concerns:

- In certain cases, the Bureau has brought enforcement actions even when, prior to the action, market participants and other regulators have understood a practice to be lawful. For example, the D.C. Circuit strongly criticized the Bureau’s use of an enforcement action against a single entity to reverse the government’s long-settled prior position regarding the legality of certain tying arrangements under the Real Estate Settlement Procedures Act, stating that the Bureau “violated due process” by failing to provide “fair notice of what conduct is prohibited.”⁸ Actions such as this contributed to the U.S. Treasury Department’s conclusion

⁵ Former Director Richard Cordray, Prepared Remarks at the Consumer Bankers Association (Mar. 9, 2016) (transcript available at <http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-consumerbankers-association/>) [hereinafter Cordray 2016 Remarks].

⁶ *Id.*

⁷ *Id.* (explaining that “it would be ‘compliance malpractice’ for executives not to take careful bearings from the contents of these orders”).

⁸ *PHH Corp. v. CFPB*, 839 F.3d 1, 44-46 (D.C. Cir. 2016) (recognizing that the Bureau’s retroactive application of a new interpretation of a statute “violated due process” by failing to provide “fair notice of what conduct is prohibited”), *reh’g en banc granted, order vacated* (Feb. 16, 2017), *reinstated in relevant part on reh’g en banc*, 881 F.3d 75 (D.C. Cir. 2018).

that the Bureau’s “excessive reliance on enforcement actions, rather than rules or guidance, to regulate conduct . . . deprives regulated parties of fair notice concerning the rules to which they must conform their conduct.”⁹

- The process has not been subject to Administrative Procedure Act notice-and-comment procedures even though the orders are intended to serve a *de facto* rulemaking purpose. If the Bureau believes that any requirements contained in an enforcement order should apply broadly to all industry participants, the notice-and-comment rulemaking process represents the appropriate mechanism for imposing new rules.
- Bureau settlements with enforcement targets—who are often reluctant to litigate or prolong matters for practical reasons—do not involve the type of adversarial testing and principled impartial decision-making inherent to the judicial process. Accordingly, they do not have characteristics of a judicial precedent that could serve as a useful guide to others or as a “measuring stick.”
- Regulating through enforcement actions is inherently cumbersome and inefficient, providing “intelligible direction to the marketplace” only if and when the Bureau completes a consistent “a pattern of actions” that market participants can use to infer the Bureau’s legal position and enforcement priorities.¹⁰ Consent orders usually reflect the particular facts and circumstances that gave rise to the Bureau’s action, and the remedies they impose do not always relate directly to those facts.¹¹ It is therefore difficult for institutions to know what if any lessons to draw from particular orders.
- Uncertainty relating to “rules” and the prospect of being targeted for an unexpected action could potentially stifle innovation and discourage institutions from offering new products and services to consumers.

Fair notice concerns are particularly acute in cases where the Bureau pursues enforcement actions based on the Dodd-Frank Act’s UDAAP prohibitions. Although the law authorizes the Bureau to implement regulations under its UDAAP authority, including to establish standards defining “abusive” conduct, the Bureau has not done so. And while “unfairness” and “deceptiveness” both have precedents in the Federal Trade Commission Act, the Bureau has tended to push the envelope as to what constitutes a “deceptive” or “unfair”

⁹ U.S. Department of the Treasury, *A Financial System That Creates Economic Opportunities*, 82 (June 2017) (the “2017 Treasury Report”).

¹⁰ *See* Cordray 2016 Remarks.

¹¹ In its consent order with Dwolla, Inc., for example, the Bureau found that Dwolla had made misstatements about its data security standards, but required as a remedy that the company make *substantive* changes to those standards. *See In the Matter of Dwolla, Inc.*, File No. 2016-CFPB-0007 (Mar. 2, 2016).

practice, often by relying on assumptions about consumer understanding and behavior that are not supported by surveys or other evidence. The Bureau has even used its UDAAP authority to impose new requirements in areas already covered by existing and more specific regulations. For example, while consumer lenders have long offered deferred interest promotions in accordance with Regulation Z's robust disclosure requirements, the Bureau has more recently suggested that these promotions might be inherently unfair, urging creditors to take extra precautions not to "harm consumers" by "impeding their ability to manage their finances successfully."¹² If the Bureau believes that current disclosure requirements fail to promote consumer understanding of a product, the appropriate approach is not to declare the underlying product "unfair," but to amend or supplement the rules governing such disclosures. Using UDAAP to supplant existing regulatory regimes risks short-circuiting the rulemaking process and depriving institutions of fair notice of the standards governing their conduct.

In view of the foregoing, we believe the Bureau should implement policies to curb its historical practice of "regulation by enforcement." For example, the Bureau should make clear, either through a public enforcement policy or other public statement, that the remedial provisions in consent orders are uniquely negotiated for the specific institution and do not reflect any legal requirement or Bureau "guidance" for the industry in general. At most, consent orders should inform the conduct of other institutions only to the extent their policies or practices closely track the specific conduct the Bureau found illegal. If the Bureau believes that any requirement contained in such an order should apply broadly to all industry participants, it should implement that standard through a formal rulemaking or other general regulatory action. In the absence of such an action, the remedial provisions of an enforcement order should not be regarded as instructions on "how to comply with the law."

The Bureau should take added steps to curtail the risk that its UDAAP authority will be used to punish violations of previously unannounced standards. In its comment letter on the Bureau's CID processes, TCH proposed that the Bureau institute formal procedures through which a senior leadership committee (including the Bureau's Office of General Counsel) can review and modify, or entirely reject a CID that proposes to investigate a potentially abusive, unfair, or deceptive practice.¹³ Initiation of an enforcement action to address a potential UDAAP violation should also require review by this committee to ensure that the proposed action is consistent with Bureau policy and that entities have adequate notice that the conduct at issue would be considered a UDAAP violation.

While unique circumstances may in some cases require the Bureau to bring enforcement actions for violations of a previously unannounced standard, the Bureau should also implement

¹² See "Consumer Financial Protection Bureau Encourages Retail Credit Card Companies to Consider More Transparent Promotions" (June 8, 2017), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-encourages-retail-credit-card-companies-consider-more-transparent-promotions/>

¹³ See TCH Response to the Bureau's Request for Information regarding its CIDs and related processes, Part II.B (Apr. 26, 2018).

policies preventing the imposition of punitive sanctions for conduct not covered by existing rules. For example, where conduct targeted by an enforcement action has not been clearly addressed by a prior rule or judicial decision, the Bureau should generally refrain from seeking civil money penalties from the institution. Instead, any relief the Bureau pursues should be focused on requiring parties to cease and desist the offending conduct and, if necessary, provide tailored remediation to consumers. Such a policy will substantially alleviate the due process concerns that arise where entities lack fair notice that a practice is unlawful, without limiting the Bureau's ability to put a stop to the practice and to ensure that affected consumers are fairly compensated.¹⁴

Finally, the Bureau should enhance and make greater use of policies designed to resolve regulatory questions without punishing entities who fail to anticipate the Bureau's interpretation of the law. While the Bureau's no-action letter procedures were designed for this purpose,¹⁵ in practice the substantial burdens and unclear benefits of seeking a no-action letter have discouraged institutions from submitting requests.¹⁶ Requesting a letter requires institutions to provide information covering a range of topics not necessarily related to regulatory issues, including the benefits of a product or service relative to existing offerings and "suggested metrics for evaluating whether such benefits are realized."¹⁷ Upon receiving this information, the Bureau will issue a no-action letter only "rarely and on the basis of exceptional circumstances," and it provides no explanation for decisions not to issue a letter.¹⁸ Moreover, even where the Bureau does issue a no-action letter, the publication provides only that the Bureau has no "present intention" to pursue an enforcement action, and can revoke or modify its determination "at any time at the discretion of the staff for any reason."¹⁹

The Bureau should revise these policies to reduce burdens on institutions and ensure that no-action letters meaningfully settle the legality of the product or service in question. First, the

¹⁴ Such a policy would align with the approach proposed by a 2017 Treasury Report identifying potential regulatory reforms and legislative changes. *See* 2017 Treasury Report at 90. It would also be consistent with the Department of Justice's ("DOJ") recently announced policy prohibiting enforcement actions predicated upon guidance documents rather than formal rules. *See* DOJ, Office of the Associate Attorney General, Memorandum "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases" (Jan. 25, 2018).

¹⁵ *See* Bureau Policy on No-Action Letters, 81 Fed. Reg. 8686, 8687 (Feb. 22, 2016) ("No-Action Letter Policy") (explaining that the policy would "facilitate innovation and access, and otherwise substantially enhance consumer benefits," by addressing instances of "substantial uncertainty" regarding "how specific provisions of statutes implemented or regulations issued by the Bureau would be applied" to "innovative financial products or services").

¹⁶ *See also* the 2017 Treasury Report at 83 ("... the CFPB's no-action letter policy has been hampered by the stringent standards that must be met before the agency will even consider a regulated party's request").

¹⁷ No-Action Letter Policy at 8693.

¹⁸ *Id.* at 8694.

¹⁹ *Id.*

Bureau should require institutions to submit only the information necessary to determine the legality of a practice. For example, the FTC requires entities seeking advisory opinions to provide only “facts which the applicant believes to be material” to the question it seeks to have resolved.²⁰ In addition, the Bureau should respond to each request by issuing either a no-action letter or an explanation of why it will not provide such a letter. And once a letter is issued, the Bureau’s policies should provide that it represents the authoritative position of the Bureau absent a material change in circumstances. For example, when DOJ issues an Opinion Procedure Release regarding the legality of proposed conduct under the Foreign Corrupt Practices Act, it creates a “rebuttable presumption” that the conduct in question complies with the law.²¹ By providing that its no-action letters will be afforded similar weight, the Bureau can encourage companies considering new products and services to take advantage of the no-action letter process.

In addition to revising its no-action letter policy, the Bureau should consider other potential mechanisms for resolving regulatory uncertainty. Both the Securities and Exchange Commission (“SEC”) and the prudential banking regulators, for example, frequently issue interpretive letters to address compliance questions raised by industry participants. In addition, in situations where the SEC declines to take action against violations uncovered during an investigation—for example, because the violation would be based on a novel interpretation of the law—the commission will at times issue a “Report of Investigation” explaining its intention to take action against similar conduct going forward.²² Adopting a similar process would enable the Bureau to articulate new standards publicly without punishing entities who fail to divine how the Dodd-Frank Act’s broad standards will be applied to new facts and circumstances.

III. The Bureau should ensure that the Notice and Opportunity to Respond and Advise process provides a meaningful opportunity to respond to the Bureau’s findings

If the Bureau determines that an enforcement action may be warranted, it can issue a Notice and Opportunity to Respond and Advise (“NORA”) letter to the institution in question. When used effectively, the NORA process provides a valuable opportunity for the institution to understand the basis for the Bureau’s potential action and can allow for a meaningful exchange

²⁰ 16 C.F.R. § 1.2. Similarly, the SEC’s no-action letter policy only requires an applicant to “indicate why he thinks a problem exists, his own opinion in the matter and the basis for such opinion.” *See* SEC Release No. 33-5127 (January 25, 1971) [36 FR 26001].

²¹ 15 U.S.C. § 78dd-1(e) (requiring the Attorney General to “establish a procedure to provide responses to specific inquiries by issuers concerning conformance of their conduct with the Department of Justice’s present enforcement policy”).

²² *See* 15 U.S.C. § 78u(a)(1) (providing that the Commission may “publish information” regarding violations uncovered during its investigations. *See also* SEC Release No. 81297, “Report of Investigation Pursuant to 21(a) of the Securities Exchange Act of 1934: The DAO” (July 25, 2017) (explaining the need for users of “distributed ledger or blockchain-enabled means for capital raising” to comply with federal securities laws, but declining to take action against a particular entity’s use of these “emerging technologies”).

of views about the merits of the Bureau's case. Despite the potential utility of the NORA process, current Bureau policy gives Enforcement staff the discretion to forego the process entirely with the approval of the Enforcement Deputy.²³ In practice, this has meant that institutions may not receive a NORA letter prior to the initiation of an enforcement action, particularly where the Bureau previously has issued a Potential Action and Request for Response (PARR) letter after a supervisory exam.

Even where the Bureau decides to send a NORA letter to an institution under investigation, several aspects of the current NORA process undermine its effectiveness. Much like the statement of purpose in CIDs, the Bureau's NORA letters often include only boilerplate recitations of legal standards and fail to explain the factual basis for the proposed action, or how those facts satisfy the legal elements of alleged violations. In UDAAP cases, the Bureau's practice has been particularly opaque—the Bureau is rarely willing to give a detailed explanation of how the conduct at issue allegedly satisfies the statutory elements of an unfair, deceptive, or abusive practice. In addition, while the NORA process provides institutions with the opportunity to present reasons of law and policy why the Bureau should not pursue an enforcement action, under current rules these arguments must be prepared on an extremely short timeline (within 14 days unless an extension is granted). The current process also creates little opportunity for real dialogue. The Bureau does not provide any response to an institution's arguments prior to proceeding with its case and it does not afford institutions an opportunity to present arguments to senior Bureau leadership as a matter of course. These shortcomings in the current NORA process deprive institutions of a meaningful opportunity to contest and engage with the Bureau's factual findings and legal theories prior to the initiation of an enforcement action.

To ensure the NORA process promotes a meaningful exchange regarding the basis for (and potential shortcomings of) a contemplated enforcement action, the Bureau should introduce several changes to its current policies and practices. In particular:

First, except in exigent circumstances requiring an immediate enforcement action by the Bureau, institutions should have the opportunity to avail themselves of the NORA process. While entities often provide submissions and other materials during the course of an investigation, the NORA letter is unique in that it represents the Bureau's factual findings and conclusions relevant to a potential action. Both the Bureau and investigated institutions benefit from a meaningful exchange of views regarding those important conclusions.

Second, to provide the institution with a meaningful opportunity to engage with the Bureau's findings and to respond to the Bureau's initial legal positions, the NORA letter should include more than merely boilerplate language regarding the legal standards the Bureau believes to be at issue. The letter should set forth in detail the facts and law the Bureau views as supporting a decision to pursue an enforcement action. In contrast to the NORA process, similar

²³ CFPB Enforcement Policies and Procedures Manual, 94 (May 5, 2017).

procedures at other regulators often contain more detailed factual assertions and lead to a more productive dialogue. For example, 15-day letters used by the Office of the Comptroller of the Currency (“OCC”) or Notice of Violation letters issued by the Mortgagee Review Board at the U.S. Department of Housing and Urban Development (“HUD”) often incorporate underlying examination reports that include detailed descriptions of the facts constituting the alleged violation, allowing for a more meaningful exchange and dialogue on the relevant facts and whether they constitute violations. Similarly, the SEC’s “Wells Rule” provides a process through which the Commission’s staff can identify “the specific charges the staff has made a preliminary determination to recommend to the Commission,” as well as “specific evidence regarding the facts and circumstances that form the basis for the staff’s recommendation.”²⁴

Third, the Bureau should enhance the rules governing how and when institutions may respond to the findings set forth in a NORA letter. For example, in order to ensure an institution has an opportunity to develop a complete response to the Bureau’s allegations, the Bureau should as a matter of course grant extensions to the current 14-day response deadline. In the case of larger investigations, the 14-day timeline is almost always far too short to provide a meaningful response (particularly where Enforcement staff have had unlimited time to prepare their internal memorandum on the relevant issues). And in addition to a written response, entities should be provided with an opportunity to meet with senior Bureau Enforcement personnel to present their arguments directly to the individuals who will decide whether to pursue an action.

IV. The Bureau should refine its approach for determining the type and amount of enforcement remedies and for terminating consent orders

The Dodd-Frank Act provides a variety of mechanisms for addressing violations of law. The Act authorizes “any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law,” including but not limited to civil money penalties (“CMPs”), injunctive relief, restitution to injured consumers, and disgorgement of profits earned as a result of the violation.²⁵ When used appropriately, these tools enable the Bureau to effectively address unlawful conduct and to deter future violations. In the past, however, the Bureau has sought remedies and penalties that were not proportional to the severity of the violation or the actual financial harm caused to consumers and that often did not reflect the institution’s role in identifying and addressing the misconduct.

The recommendations below propose potential policies and procedures to ensure that Bureau remedies reflect the nature of an institution’s wrongdoing and the institution’s cooperation in addressing misconduct.

²⁴ See SEC, Division of Enforcement, “Enforcement Manual” (Nov. 28, 2017).

²⁵ 12 U.S.C. § 5565.

A. *The Bureau should introduce greater transparency and consistency to its approach to calculating civil monetary penalties, placing emphasis on (i) the harm caused by any misconduct, (ii) affirmative self-reporting of the issue by the institution, and (iii) voluntary remediation efforts the institution undertakes to address any misconduct.*

The Bureau’s current guidelines for calculating CMPs afford Enforcement staff greater discretion than publicly available procedures employed by many other agencies. The Bureau’s publicly available Enforcement Manual states only that staff should calculate a CMP “within the parameters of the three-tiered framework” provided in the Dodd-Frank Act and “should always consider all of the mitigating factors as required by the statute.”²⁶ Within those broad parameters, the procedures provide little direction on how to weigh qualitative statutory factors such as “good faith,” “other matters as justice may require,” “the gravity of the violation,” or “the severity of the risks to or losses of the consumer” against Dodd-Frank’s baseline penalty amounts.²⁷ Moreover, the Bureau’s Enforcement Manual lacks clear policies governing how the Bureau will assess the number of “violations” or “days” used to calculate a penalty.²⁸ This lack of established standards has often made the penalty setting process unpredictable and seemingly arbitrary, undermining the principles of “transparency, uniformity, and proportionality” essential to balanced punishments.²⁹ It can also create obstacles to productive settlement negotiations, as institutions may often disagree with how the Bureau arrives at a proposed penalty.

Several other regulators, including the U.S. federal banking agencies, are guided by agency policies, guidelines, or penalty matrices in assessing CMPs. While matrices are not always consistently or predictably applied, they do provide the potential for a more rigorous and

²⁶ CFPB Enforcement Policies and Procedures Manual at 125. Under Dodd Frank, the three CMP tiers are: Tier 1: Any violation; Tier 2: Reckless violation; and Tier 3: Knowing violation. The five mitigating factors are (A) the size of financial resources and good faith of the person charged; (B) the gravity of the violation or failure to pay; (C) the severity of the risks to or losses of the consumer, which may take into account the number of products or services sold or provided; (D) the history of previous violations; and (E) such other matters as justice may require. 12 U.S.C. § 5565(c).

²⁷ The Dodd-Frank Act provides that penalties may be assessed per “violation,” and “for each day” during which such a violation occurs. 12 U.S.C. § 5565(c). But while the Bureau’s Enforcement Manual indicates that it considers “each violation of law affecting an individual consumer as a separate violation,” it does not include a framework for determining the number of consumers affected by a given violation. *See* CFPB Enforcement Policies and Procedures Manual at 125. Nor does it include any guidelines for when or how a penalty should instead be calculated based on “the number of days the violation lasted” or “the number of days the violative conduct lasted.” *Id.*

²⁸ *Id.*

²⁹ *See Dorsey v. United States*, 567 U.S. 260 (2012) (explaining Congress’s objectives in directing the creation of the Federal Sentencing Guidelines); *see also Collins v. SEC*, 736 F.3d 521, 526 (D.C. Cir. 2013) (“Review for whether an agency’s sanction is ‘arbitrary or capricious’ requires consideration of whether the sanction is out of line with the agency’s decisions in other cases.” (citing *Friedman v. Sebelius*, 686 F.3d 813, 827–28 (D.C. Cir. 2012))).

transparent approach to penalty setting.³⁰ The OCC, for example, has implemented a publicly available “CMP matrix” to provide guidance in determining appropriate penalty amounts.³¹ The OCC matrix expands four broad statutory factors under the statutory provision governing the assessment of CMPs by the OCC (and other U.S. federal banking regulators) to include thirteen more specific factors the agencies should consider in setting penalty sizes and designates a numerical weight for each factor. To determine the appropriate penalty in a particular case, the OCC assigns a numerical score to each factor based on the facts of the case, which together with the factor’s weight, produces a recommended CMP amount. To increase transparency and help promote effective settlement negotiations, the Bureau should introduce a matrix or other similar methodology (*e.g.*, penalty “guideposts”) for calculating penalties, including a particular focus on the extent of the harm caused, and where applicable, an enforcement target’s self-reporting and affirmative self-remediation of any misconduct. In addition to promoting more consistent penalty assessments for similar misconduct, such an approach should provide a framework for parties engaged in settlement discussions to productively negotiate an appropriate penalty.

Importantly, the Bureau should ensure that its policies appropriately acknowledge and incentivize self-reporting, remediation, and cooperation. As the Bureau itself has recognized, self-reporting and voluntary cooperation “can improve the Bureau’s ability to promptly detect violations of the federal consumer protection laws, increase the effectiveness and efficiency of enforcement investigations . . . and help more consumers in more matters promptly receive financial redress.”³² Affording credit for such conduct is a common practice at other agencies. For example, the OCC includes both “cooperation” and “restitution” among the factors to be scored when calculating CMPs. Similarly, the SEC’s “Seaboard Report,” issued in 2001, identified “self-policing, self-reporting, remediation and cooperation” as behavior the Commission would credit when considering whether and how to take enforcement action.³³

While the Bureau’s “Responsible Business Conduct Bulletin” was intended to be supportive of self-reporting, self-policing, cooperation, and remediation, it has not been as

³⁰ See Evan Weinberger, CFPB Enforcement Chief Defends Money Penalty Process, Law360 (Apr. 4, 2016) (quoting remarks by Former CFPB Assistant Director Anthony Alexis at Practising Law Institute, who stated that “I also understand you can jump off the matrix pretty quickly and get to discretion, and that’s where we are.”)

³¹ OCC Policies and Procedures Manual (PPM 5000-7) (Feb. 26, 2017). The OCC designed the matrix “to help ensure that CMPs are imposed consistently and equitably.” *Id.* In practice, however, the policy often fails to effectively cabin regulators’ discretion. For example, because statutory penalty maximums under applicable law (12 U.S.C. § 1818(i)) apply on a “per violation” basis, in practice, the U.S. federal banking agencies, including the OCC, still have significant discretion regarding how to count the number of violations that have occurred. These agencies have not disclosed policies about how they make such determinations.

³² See CFPB Bulletin 2013-06, “Responsible Business Conduct: Self-Policing, Self-Reporting, Remediation, and Cooperation” (June 25, 2013).

³³ SEC, “Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions” (Oct. 23, 2001).

effective as it should be, and we recommend that the Bureau reassess and clarify incentives to encourage cooperation and remediation. In particular:

- To properly incentivize cooperation in any enforcement-oriented framework, the nature of the credit provided must be made clear, concrete, and public. The Bureau rarely has made clear how an institution’s cooperation leads to a reduced penalty, and at times appears instead to have used the absence of cooperation to justify imposing an *increased* penalty on an institution. The Bulletin itself only states that if an institution engages in “responsible conduct,” the Bureau may favorably consider such conduct in connection with the resolution of a Bureau enforcement investigation. By explicitly incorporating an entity’s self-reporting, cooperation, and remedial efforts into its CMP calculations and being more transparent in terms of credit received, the Bureau can better ensure that institutions are consistently and appropriately recognized for providing important assistance.
- Where an institution self-reports an issue to either the Bureau (through either the Enforcement or Supervision staff) or another regulator, the Bureau should ensure that the institution receives appropriate credit for making that report in any subsequent penalty determinations. The Bulletin should also make clear that the self-reporting of issues to Supervision is considered equally to a report made to Enforcement when determining whether an institution is eligible for cooperation credit.³⁴
- In order to promote and accomplish the goal of protecting consumers, the Bulletin should provide clear credit not only to institutions that self-report potential misconduct, but also to those that proactively initiate efforts to remediate demonstrated consumer harm.

B. Bureau demands for restitution should be based on evidence of actual financial harm to consumers.

An important part of the Bureau’s mission of protecting consumers is to provide compensation to those consumers who are harmed by unlawful acts and practices. The Dodd-Frank Act thus permits the Bureau to seek “restitution” from institutions that violate the laws the Bureau enforces.³⁵ Because this remedy represents “the full amount lost by consumers” as a result of an institution’s wrongful conduct, obtaining restitution enables the Bureau to make consumers whole for losses suffered.³⁶

³⁴ In situations where an institution reports a violation to Supervision, providing appropriate credit may require that Supervision create and maintain a record appropriately evidencing the self-reporting to share with Enforcement.

³⁵ 12 U.S.C. § 5565(a)(2)(C).

³⁶ *CFPB v. Corinthian Colleges*, 2015 WL 10854380, at *6 (N.D. Ill. Oct. 27, 2015) (quoting *F.T.C. v. Febre*, 128 F.3d 530, 536 (7th Cir.1997)).

The Bureau has nevertheless often failed to meaningfully connect its demands for restitution to actual, quantifiable financial harm suffered by consumers and proximately caused by the conduct. In many instances, the Bureau will demand restitution for practices that merely inconvenience consumers, but do not cause any tangible monetary harm. Moreover, where a practice is shown to cause financial injury, the Bureau will often seek restitution for all consumers who, in theory, may have encountered the practice, without evidence regarding the number or percentage of consumers who were actually harmed. And even in cases where the Bureau purports to calculate the number of affected consumers, it has at times employed flawed methodologies that fail to withstand public scrutiny.³⁷

Two recent court decisions demonstrate this disconnect between the relief sought by the Bureau and actual consumer harm. In one action, the Bureau sought \$256 million in consumer restitution, an amount equivalent to the total interest and fees collected from borrowers to whom the defendant had made statements about certain aspects of its loans.³⁸ However, the Bureau failed to present any facts at trial showing that the defendant's statements caused these borrowers tangible financial harm.³⁹ According to the district court, absent evidence from actual consumers that "they were confused about the terms of the loans" or "did not receive the benefit of their bargain," no restitution—much less \$256 million—was warranted in the case.⁴⁰ Similarly, another recent Bureau action sought \$74 million in restitution for consumers whom the defendant company purportedly deceived about the amount and nature of its fees. The court rejected this demand, finding that a substantial number of the customers identified had not actually been subjected to the misrepresentations at issue. Because the Bureau did not provide "a basis for any restitution that might be limited in some way so as to make it a just result," the court declined to award any such relief.⁴¹

The issue is not limited to litigated cases—it has been the experience of members that the restitution demands made by the Bureau during settlement negotiations are often similarly untethered to actual evidence of consumer harm. These demands for restitution without a connection to actual and quantifiable consumer injury are problematic for several reasons:

- *First*, where the amount sought by the Bureau exceeds the actual harm caused to consumers, restitution represents a punitive sanction rather than an equitable

³⁷ For example, in attempting to prove disparate impact discrimination in the indirect auto-lending market, the Bureau appears to have overlooked or ignored evidence that its model was less accurate than other available methodologies. See Republican Staff of the House Committee on Financial Services, 114th Cong., *Unsafe at Any Bureaucracy: CFPB Junk Science and Indirect Auto Lending 15 et seq.* (2015).

³⁸ *CFPB v. CashCall, Inc.*, 2018 WL 485963, at *11 (C.D. Cal. Jan. 19, 2018).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *CFPB v. Nationwide Biweekly Administration*, No. 15-02106 (C.D. Ca. 2017).

remedy.⁴² The Dodd-Frank Act, however, specifies the maximum penalty amounts the Bureau may impose as punishment for violations committed with various mental states, and it prohibits the imposition of “exemplary or punitive damages” on top of those maximums.⁴³ The Bureau should avoid using sweeping demands for restitution as a means of circumventing these limitations and imposing *de facto* penalties not subject to the statutory and procedural requirements for assessing CMPs.

- *Second*, demanding large sums in consumer restitution without factual support impedes effective settlement negotiations. Even institutions that are prepared to settle will often be unwilling to pay restitution that outstrips any actual harm caused by their misconduct. In situations where an institution’s liability is unclear, the Bureau’s inflated demands can create the perception that it is attempting to strong-arm a settlement even where it lacks evidence to bring an action.
- *Third*, a lack of rigor in assessing consumer harm can prevent the Bureau from making an informed decision about whether to pursue an enforcement action or file a lawsuit to address that practice in the first place. Given limited resources, whether there is tangible consumer financial harm should be a key factor in the Bureau’s enforcement decisions. Even where a practice raises compliance questions, the absence of actual harm suggests that the Bureau should focus efforts elsewhere, or that an action is more appropriate for resolution in Supervision.

The Bureau’s Acting Director recently announced his intention to address these issues, explaining that in the future the Bureau “will be focusing on quantifiable and unavoidable harm to the consumer.”⁴⁴ In keeping with that focus, the Bureau should implement policies and practices that help to ensure that demands for restitution are supported by sufficient evidence that a challenged policy or practice resulted in tangible financial harm to consumers. For example, once a violation and resulting actual harm are established, the Bureau should not presume that all consumers who had dealings with an entity suffered a loss warranting restitution. Rather, the Bureau should work to develop facts to tailor restitution to the number of consumers actually harmed and the extent of such harm, such as by working with the institution to review relevant consumer complaints and identifying specific accounts likely impacted by a practice. Where identifying all impacted consumers is impracticable, the Bureau should take steps to ensure that its sampling methodologies meet appropriate accepted scientific standards. For example, the Bureau should publish any sampling or other statistical methodologies that it intends to use in enforcement matters so they are properly subject to public scrutiny and comment.

⁴² *C.f. Kokesh v. SEC*, 137 S.Ct. 1635, 1642 (2017) (holding that disgorgement sought by SEC functioned as a penalty rather than as an equitable remedy because it was sought not for the purpose of “compensating a victim for his loss,” but instead “for the purpose of punishment, and to deter others from offending in like manner”).

⁴³ 12 U.S.C. § 5565(a)(3).

⁴⁴ E-mail from Acting Director Mick Mulvaney to CFPB Staff (Jan. 23, 2018).

C. The Bureau should generally attempt to address less severe compliance issues through use of Supervisory remedies.

The Bureau conducts regular examinations of institutions for compliance, and both examined institutions and the Bureau dedicate substantial resources to these examinations. Supervision should be the Bureau's primary tool for addressing compliance issues and the Bureau should be more proactive in identifying matters that can be better resolved in Supervision throughout the entire course of a matter. In the experience of the industry, however, the Bureau has sometimes been overly inclined to transfer matters to Enforcement, and the movement of matters between the Bureau's supervisory and enforcement functions appears to flow only towards Enforcement. Once a matter is referred to the Bureau's Enforcement staff, the matter remains with Enforcement through its conclusion, and matters are rarely transferred back to Supervision, regardless of the course the investigation takes and of the time and resources required to pursue the enforcement process.

The Bureau's Supervision Program includes a number of informal mechanisms through which the Bureau can require institutions to change problematic policies or practices, such as a memorandum of understanding ("MOU") or matters requiring attention ("MRAs"). Because MOUs and other supervisory tools allow the Bureau to quickly address compliance issues without adversarial proceedings, they reduce the burdens imposed on regulated institutions and are a more efficient use of limited Bureau resources. In particular, where an institution self-reports an issue and cooperates fully with the Bureau, the Bureau should presumptively rely upon supervisory remedies for resolving the issue. Additionally, when deciding whether to pursue a matter in enforcement—and whether a pending matter should remain with Enforcement—the Bureau should ensure that sufficient consideration is given to whether the institution has already corrected the issue and has provided remediation to affected consumers. In cases where the remediation has been provided, the use of supervisory remedies to review changes to business practices and the remediation provided will often be more efficient for both the Bureau and the institution than initiating a new enforcement action. Similarly, where preliminary findings by Enforcement indicate that a practice is unlikely to result in significant harm to consumers, the Bureau should consider returning the matter to Supervision for resolution.

By placing a greater emphasis on supervisory remedies in the first instance, and by being more proactive in returning less significant issues to Supervision, the Bureau will be able to better ensure that Enforcement resources are dedicated to cases where there has been unremediated consumer harm or there is some other pressing need for an enforcement action.

D. The Bureau should coordinate with other government authorities to prevent redundant enforcement efforts and to avoid duplicative penalties

The Bureau should also seek to work more closely with other government authorities to reduce redundant enforcement efforts and avoid the duplicative penalty assessments that often result from overlapping investigations and enforcement jurisdictions. U.S. financial institutions frequently fall under the enforcement jurisdiction of multiple government entities. This is

particularly true for large banking institutions, which in addition to the Bureau's authority are also subject to the authority of the federal prudential banking regulators, state attorneys general, and other federal agencies such as the Commodities Futures Trading Commission (CFTC), DOJ, Financial Crimes Enforcement Network (FinCEN), Office of Foreign Assets Control (OFAC), and SEC, among other regulators.

The overlapping jurisdiction of these regulators often leads to multiple agencies seeking to address the same conduct, often without sufficiently coordinating their investigations or the remedies they seek.⁴⁵ In its response to the Bureau's request for information regarding CIDs and related processes, TCH highlighted that duplicative investigations by multiple regulators can result in an inefficient use of government resources and lead to unnecessary burdens on institutions, and it encouraged the Bureau to consider the efforts of other regulators when deciding whether to initiate an investigation.⁴⁶ Determining the appropriate remedy to address a legal violation involves similar considerations. A lack of coordination among agencies can lead to multiple regulators assessing unfairly duplicative penalties. It can also present obstacles to settlement negotiations, as institutions are unwilling to settle claims with one regulator without resolving potential claims of other regulators.

We applaud early steps that the Bureau's new leadership has taken to address this issue, including by working more closely with the OCC and by, in one instance, remitting Bureau penalties in recognition of amounts paid to another regulator for the same conduct. But more remains to be done. The Bureau should build upon these steps by implementing a formal policy

⁴⁵ See, e.g., Remarks by Rod Rosenstein, Deputy Attorney General, delivered at the Clearing House's 2017 Annual Conference (Nov. 8, 2017) ("[R]epeated punishment for the same conduct has the potential to undermine the spirit of fair play and the rule of law. Multiple punishments can also deprive a company, as well as its employees, customers, and investors, of the benefits of certainty and finality ordinarily available through a full and final settlement."); Remarks by Keith Noreika, Acting Comptroller, OCC (Nov. 2017) ("And I can see a memorandum of understanding being entered into among the agencies so there is less regulatory duplication, and less so-called piling on. I think we have a little bit of a problem now."); Remarks by David W. Ogden, former Deputy Attorney General, delivered at the U.S. Chamber of Commerce Institute for Legal Reform and National Association of Criminal Defense Lawyers Symposium on "The Enforcement Maze: Over-Criminalizing American Enterprise" (May 26, 2016) ("Unfortunately . . . we often see investigations where agencies are not sharing information and are not coordinating their efforts. This wastes the resources of both the government and the target of the investigation. And because each agency seeks its own penalty, its own headlines, even if each agency is trying for a proportionate result (which, I fear many are not) there is obvious potential for enormous total penalties that far exceed the seriousness of the violation. . . . I believe that this shift damages the reputation of law enforcement, drives a wedge between good businesses and the government, and sets back the cause of justice.").

⁴⁶ See TCH Response to the Bureau's Request for Information regarding its CIDs and related processes, Part II.A (Apr. 26, 2018).

requiring that all penalty calculations consider payments to other regulators.⁴⁷ In addition, Bureau policies should require prompt communication to other relevant investigating agencies of the Bureau's intention to assess a penalty and any other form of redress to be sought. And after determining an appropriate penalty for a given violation, the Bureau also should include in its resolution document how it considered and credited (or chose not to credit) penalties imposed by other agencies in setting the amount of its assessment.

In addition, the Bureau should work with other regulators to facilitate consultation and coordination regarding the appropriate total amount of penalties for conduct falling within the jurisdiction of multiple agencies. One potential mechanism for promoting such coordination would be through an update to existing Federal Financial Institutions Examination Council ("FFIEC") policy statements. The FFIEC is a useful mechanism for implementing uniform standards governing the supervision of financial institutions, and the council previously has adopted policy statements to promote consistency in enforcement actions and penalty assessments.⁴⁸ However, the relevant policy statements have not been updated for over twenty years, and they do not specifically address inter-agency coordination of penalty determinations. Potential revisions could call for greater coordination among agencies regarding proposed penalties and require agencies to consider penalties imposed by other agencies when determining their own penalty assessments.

Alternatively, the Bureau could consider entering into MOUs with other agencies to adopt a coordinated approach to penalty determinations. This approach could be particularly useful in promoting coordination with regulators that are not FFIEC members, including state attorneys general. The Bureau may wish to use as models the existing MOUs with various

⁴⁷ For example, DOJ recently instituted changes to the U.S. Attorneys' Manual requiring consideration of "the totality of fines, penalties, and/or forfeiture imposed by all [DOJ] components as well as other law enforcement agencies and other regulators" when determining Corporate Resolution Penalties. *See* Memorandum from Deputy Attorney General Rod J. Rosenstein to DOJ Heads of Department Components and United States Attorneys, "Policy on Coordination of Corporate Resolution Penalties" (May 9, 2018).

⁴⁸ *See* Revised Interagency Policy on Coordination of Formal Corrective Action by the Federal Bank Regulatory Agencies, 62 Fed. Reg. 7782 (Feb. 20, 1997) ("Interagency Coordination Policy Statement") (calling for agencies to notify each other and state supervisory authorities in writing, prior to or when initiating enforcement actions against depository institutions); Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institution Regulatory Agencies, 63 Fed. Reg. 30227 (June 3, 1998) ("Interagency Policy Regarding the Assessment of CMPs") (providing guidance on the criteria used by the FFIEC agencies in determining CMP amounts in accordance with 12 U.S.C. § 1818(i)(2)(G)).

agencies for the coordination of supervisory and enforcement efforts in areas of overlapping authority.⁴⁹

E. *The Bureau should implement policies for terminating consent orders upon the satisfaction of reasonable and clearly defined conditions.*

In its comment letter concerning the Bureau's CID-related processes, TCH highlighted the potentially harmful effects of allowing investigations to linger without conclusion, particularly where an institution must publicly report the status of an inquiry.⁵⁰ The Bureau's consent orders, which are often open-ended and lack a clear termination process, raise similar concerns.⁵¹ Operating under an ongoing consent order not only can impact an entity's reputation, but it also risks unduly limiting the entity's activities as it seeks to avoid potential follow-on actions. Until they are lifted, these orders also impose substantial costs on institutions. Resources are required to manage compliance, and entities often must retain outside counsel and maintain substantial document discovery databases related to the Bureau's action. Moreover, for some institutions, the presence of a consent order can have significant collateral legal consequences for its dealings with other regulators including when seeking regulatory approval for a proposed transaction.⁵²

To address this issue, the Bureau should include in each consent order a clear explanation of the conditions and timeframe for lifting the order. For example, where a consent order requires an institution to execute a remediation or compliance plan, it should also specify a reasonable period in which the Bureau, following notification of completion by the institution, must verify compliance with the order's requirements. The order should also include a reasonable period (*e.g.*, sixty days) after which the Bureau must report the results of its

⁴⁹ See, *e.g.*, Memorandum of Understanding Between the Consumer Financial Protection Bureau and the FTC (Jan. 20, 2012) (providing that the agencies "shall endeavor to coordinate law enforcement activities, including conducting joint investigations where appropriate, to minimize duplication of efforts"); "Memorandum of Understanding" between the CFPB and DOJ with respect to fair lending coordination (Dec. 6, 2012) (requiring the agencies to "coordinate their enforcement actions and make every effort to avoid unnecessarily duplicative actions"); "Memorandum of Understanding" among the CFPB, the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, and the OCC with respect to the coordination of supervisory activities (May 16, 2012).

⁵⁰ See TCH Response to the Bureau's Request for Information regarding its CIDs and related processes, Part III.D (Apr. 26, 2018).

⁵¹ In some cases, the Bureau's orders simply state that they will terminate on a particular date (often five years in the future) regardless of whether the institution fully remediates the issues sooner. Other orders state that they will remain in effect until terminated by the Bureau.

⁵² For example, the Federal Reserve Board has provided that institutions "operating under a formal enforcement action are expected to resolve the issues that led to . . . the enforcement action prior to seeking approval from the Federal Reserve to engage in any expansionary activities, including mergers, acquisitions, asset purchases, investments, new activities, and branching." See Federal Reserve Board, SR14-2/CA14-1: Enhancing Transparency in the Federal Reserve's Applications Process" (Feb. 24, 2014).

examination and either lift the consent order or provide an explanation of why the order's conditions have not been satisfied. By including clear terms for termination of an order, the Bureau can increase regulatory certainty for institutions and encourage prompt completion of remedial measures. Additionally, removing uncertainty on when, or if, a consent order will terminate will make institutions more likely to reach a consensual settlement and to agree to remedial measures favored by the Bureau.

F. *Bureau press releases announcing an enforcement action should adhere to the text of the consent order or complaint*

The reputational price paid by institutions subject to government enforcement actions can be as significant as any monetary remedies imposed. But while risk to an entity's reputation can serve as an effective deterrent to potential rulebreakers, treating regulated institutions fairly requires that the Bureau communicate the facts underlying its enforcement actions to the public in a fair and accurate manner.

In the past, the Bureau's practice in announcing settlements has been to issue a highly charged press release that describes the alleged conduct in unbalanced terms. In conjunction with these announcements, the Bureau often conducts press-only conference calls in which it relays its views to the media without permitting an institution to hear first-hand the accusations levied against it. A common perception among institutions is that these press releases and press calls have at times mischaracterized the nature or prevalence of the conduct and the settlement reached. This is particularly troublesome in circumstances where the institution has not admitted or denied the Bureau's allegations or where the action is based on novel or previously unannounced legal standards. The Bureau's press release practices stand in contrast to the practices of other regulators, including DOJ and the prudential bank regulators, which typically issue straightforward press releases that reflect the text of the action.

Moreover, the Bureau has generally been unwilling to discuss the post-settlement press release as part of settlement negotiations. This poses an obstacle to negotiations, as a key factor in such settlements is mitigating the reputational harm that results from the action. To address this issue, Bureau leadership should implement a process requiring that press releases adhere to the actual language of the consent order and avoid highly charged language and unbalanced descriptions. The Bureau should also end the practice of barring institutions from press calls announcing a settlement or lawsuit. Finally, the Bureau should consider making the content of its press releases an element of settlement negotiations.

V. **The Bureau should implement a reasonable, clear, and consistent approach to determining applicable limitations periods and for seeking tolling agreements**

As Courts have broadly recognized, statutes of limitations play a vital role in "promot[ing] justice" by "preventing surprises" and precluding litigation of long-past claims for

which “evidence has been lost, memories have faded, and witnesses have disappeared.”⁵³ The Bureau’s policies and practices have at times undermined these important goals, as the Bureau has generally taken aggressive positions regarding statute of limitations issues and has often sought tolling agreements early in investigations, even before it has any facts. The Bureau should take steps to limit these practices and subject the scope of its enforcement powers to reasonable time limitations.

A. *The Bureau should accept reasonable time limitations on its enforcement authority*

In pursuing Enforcement actions, the Bureau often has staked out aggressive positions regarding its authority to punish long-past conduct, despite multiple court decisions rejecting its positions. These positions are problematic not only because they seek the revival of stale claims, but also because the Bureau has used expansive and strained interpretations of the relevant statutes of limitations to create pressure for larger settlements and broader investigations.

Most notably, the Bureau has argued that “under Dodd-Frank, there is no statute of limitations for any CFPB administrative actions,” and that this “overrides the statutes of limitations in all of the underlying statutes enforced by the CFPB to enforce any consumer protection law.”⁵⁴ The Bureau’s administrative action against PHH thus sought disgorgement of profits and other remedies going back nearly six years before the Bureau initiated the proceeding—far beyond the limitations periods in Dodd-Frank and the underlying consumer financial law at issue (the Real Estate Settlement Procedures Act).⁵⁵ The D.C. Circuit rejected the Bureau’s position and its troubling implications, describing the Bureau’s argument as “absurd,” “nonsensical,” and not “remotely plausible.”⁵⁶

With respect to claims brought in court, the Bureau has also advanced positions that undermine the certainty provided by clearly defined limitations periods. For example, the Bureau’s enforcement manual explains that “[m]ost of the enumerated consumer laws do not contain an explicit time period for bringing a Bureau enforcement action,” such that “there is no limitations period” when the Bureau seeks only equitable relief (including equitable monetary relief), and only the five-year limitations period in 28 U.S.C. § 2462 applies to actions “seeking a fine, penalty, or forfeiture.”⁵⁷ The Bureau has also argued in some cases that the explicit limitations periods in underlying consumer financial laws, such as the one-year limitations period in the Fair Debt Collection Practices Act (“FDCPA”), do not apply to the Bureau at all,

⁵³ *Gabelli v. SEC*, 133 S.Ct. 1216, 1221 (2013).

⁵⁴ *PHH*, 839 F.3d at 50.

⁵⁵ *Id.* at 46.

⁵⁶ *Id.* at 54.

⁵⁷ CFPB Enforcement Policies and Procedures Manual, 104 (May 5, 2017).

such that it is constrained by no limitations period, even in actions brought in court.⁵⁸ The Bureau's positions are based on strained readings of the relevant statutes that courts have largely declined to adopt. For example, multiple courts have rejected the argument that neither the one-year statute of limitations found in the FDCPA nor the discovery-based three-year period in 12 U.S.C. § 5564 applies to the Bureau's FDCPA suits.⁵⁹ Similarly, at least one court has rejected the Bureau's position that the Truth in Lending Act's one-year limitations period does not apply to cases brought under that statute.⁶⁰

Finally, the Bureau has taken aggressive and novel views on how (and whether) the statutory three-year discovery rule in 12 U.S.C. § 5564 limits its powers. For example, in one case, the Bureau reportedly argued that violations were not "discovered" until Enforcement has closed an inquiry and submitted a recommendation to Director Cordray.⁶¹ In another enforcement proceeding, the Bureau argued that that discovery may be deferred until the Bureau receives the last production of documents from an entity under investigation, the entity certifies production is complete, or the entity provides a response to a NORA.⁶² The Supreme Court, however, has recognized that the limitations periods for enforcement actions should not "hinge on speculation about what the Government knew, when it knew it, and when it should have known it," particularly given the "many legal tools" government agencies have to "root out" legal violations.⁶³ The Supreme Court's reasoning runs squarely against the Bureau's interpretation of Section 5564.

Despite adverse court decisions, the Bureau has continued to advance expansive interpretations of its authority in subsequent enforcement actions. This practice produces unnecessary uncertainty for the institutions the Bureau regulates, and it fails to respect the important role that statutes of limitations play in promoting justice by preventing the litigation of stale claims. The Bureau should instead announce clear and reasonable policies regarding the limitations on its ability to punish long-past conduct.

B. The Bureau should implement policies restricting Enforcement from seeking tolling agreements early in investigations.

The Bureau has also sought to avoid potential limitations issues by coercing institutions to sign tolling agreements early in investigations. Where an investigation has resulted in

⁵⁸ See *CFPB v. Frederick J. Hanna*, 114 F. Supp. 3d 1342, 1376 (N.D. Ga. 2015).

⁵⁹ See *CFPB v. Weltman, Weinberg & Reis Co., L.P.A.*, No. 17-817 (N.D. Ohio Sept. 28, 2017); *Hanna*, 114 F. Supp. 3d at 1378.

⁶⁰ *CFPB v. ITT Educ. Svcs.*, 2015 WL 1013508, at *33 (S.D. Ind. 2015)

⁶¹ *CFPB v. Intercept Corp.*, No. 16-cv-144, Dkt. 19 at 11 (D. N.D. Aug. 8, 2016).

⁶² *In re Integrity Advance LLC*, CFPB No. 2015-0029, Bureau's Opp. to Motion to Dismiss at 12 n.10 (Jan. 15, 2016).

⁶³ *Gabelli*, 133 S. Ct. at 1224.

findings of misconduct, tolling agreements ensure that the Bureau can complete its inquiry and, if necessary, pursue an action before the relevant statute of limitations expires. The Bureau’s current procedures, however, advise Enforcement staff to consider requesting a tolling agreement “[i]f at *any point* during the investigation Staff believes there might be a statute of limitations issue.”⁶⁴ And while the Bureau’s Enforcement Manual explains that it is “common for subjects to resist entering into a tolling agreement prior to the commencement of settlement negotiations or the filing of an enforcement action,” it contains no guidance for dealing with or avoiding such conflicts.

The Bureau has accordingly often sought tolling agreements early in investigations, often before an institution has provided any information suggesting a legal violation; in some cases a tolling agreement has been demanded immediately after the initial CID. This practice is especially troubling because past Bureau CIDs have often given parties only very limited notice of the conduct at issue, and thus institutions may have not understood what potential claims they might be tolling by agreeing to the Bureau’s demands. Nevertheless, in our experience, the Bureau has at times pressured parties to sign tolling agreements, including by threatening to file an affirmative action in court before an investigation is completed or, alternatively, suggesting more favorable treatment during an investigation if the party agrees to toll limitations periods. Overreliance on tolling agreements also reduces the Bureau’s incentive to conduct its investigation in an expeditious manner, contributing to the problem of open-ended and unfocused investigations. The DOJ, by contrast, directs United States Attorneys to make “every effort” to resolve matters “within the statutorily allotted time,” and to employ tolling agreements only where “unavoidable.”⁶⁵

The Bureau should therefore amend its policies to provide that, absent a compelling reason, Enforcement should not seek a tolling agreement until an investigation has matured to the point where the Bureau has identified a set of facts that it believes constitute a violation of law (*i.e.*, when a NORA is issued or could be issued) and is at risk of allowing the limitations period to expire on a known and concrete set of claims.

VI. The Bureau should refrain from using attorney-client privileged materials in enforcement actions

As described in greater detail in TCH’s comment letter on the Bureau’s CID processes, the attorney-client privilege represents an essential right to which the Bureau’s current procedures afford insufficient consideration.⁶⁶ To address this issue, the letter recommends that the Bureau adopt a formal rule or policy statement that it will not seek production of privileged

⁶⁴ CFPB Enforcement Policies and Procedures Manual, 104 (May 5, 2017) (emphasis added).

⁶⁵ See DOJ, United States Attorneys’ Manual § 9-28.210 (updated Nov. 2015).

⁶⁶ See TCH Response to the CFPB’s Request for Information regarding its CIDs and related processes, Part V (Apr. 26, 2018).

materials pursuant to CIDs. However, we recognize that a policy preventing requests for privileged materials may in some circumstances be insufficient to ensure that an institution's attorney-client privilege is respected, particularly where Enforcement staff has the ability to obtain such materials from Supervision rather than directly from the institution itself. In order to ensure adequate space for regulated entities to seek candid legal advice, the Bureau should refrain not only from seeking privileged materials during its investigations, but also from using any such materials—including privileged materials obtained from Supervision—when pursuing an enforcement action against an institution unless an institution has provided the privileged materials to Enforcement voluntarily.

* * *

The Clearing House appreciates the opportunity to comment on the proposal. If you have any questions, please contact the undersigned by phone at 212-612-9220 or by email at gregg.rozansky@theclearinghouse.org.

Respectfully submitted,

A rectangular box with a thin black border, used to redact the signature of Gregg Rozansky. The text "The Clearing House" is faintly visible in the top left corner of the box.

Gregg Rozansky
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