



May 21, 2018

*Via Electronic Mail*

Comment Intake  
Consumer Financial Protection Bureau  
1700 G Street NW  
Washington DC 20552

Re: Submission in response to the Request for Information regarding the Bureau's Supervision Program (Docket No. CFPB-2018-0004)

Ladies and Gentlemen:

The Clearing House Association L.L.C.<sup>1</sup> appreciates the opportunity to comment on the Bureau of Consumer Financial Protection's (the "Bureau,") request for information on its Supervision Program. We applaud the Bureau for initiating this RFI to assess the overall efficiency and effectiveness of its supervision program and consider whether any changes to the program would be appropriate."<sup>2</sup> Periodic public assessments of agencies' functions, operations, rules, regulations, and programs are important in helping to maximize an agency's effectiveness in carrying out its mission, and as the Bureau is now in its seventh year of operation, both it and the institutions it supervises have gained substantial experience that can and should inform improvements to and refinements of the Bureau's supervision program. This reassessment also furthers the important goal of providing regulated institutions with transparency regarding the current standards to which they will be held by regulatory agencies, which in turn improves those institutions' ability to meet those standards.

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<sup>1</sup> 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.

<sup>2</sup> CFPB, Request for Information Regarding the Bureau's Supervision Program, 83 Fed. Reg. 7166 (Feb. 20, 2018).

This letter provides a range of recommendations in response to specific areas of the Bureau's Supervision Program for which the RFI seeks input; each of these recommendations is intended to support and further the Bureau's underlying mission to enforce 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,

**I. The Bureau Should Implement a More Cooperative Approach to Supervision.**

As the banking agencies have long emphasized and courts have consistently recognized, the supervisory relationship between an agency and the entities it supervises functions best when it is based on trust and open communication, which are fundamental pillars of effective bank supervision. As the D.C. Circuit has stated:

[b]ecause bank supervision is relatively informal and more or less continuous, so too must be the flow of communication between the bank and the regulatory agency. Bank management must be open and forthcoming in response to the inquiries of bank examiners, and the examiners must in turn be frank in expressing their concerns about the bank.<sup>3</sup>

Importantly, such open communication ensures that supervisory activities ultimately achieve their underlying purpose – in the Bureau's case, the protection of consumers. For this reason, we believe the effectiveness and efficiency of supervision would be greatly enhanced by implementing a more cooperative – and less adversarial – relationship between examiners and supervised entities. Such a relationship would allow issues to be identified, discussed, and resolved more quickly, allowing consumers to benefit in a more timely fashion, in contrast to a supervisory approach that is more punitive in nature and geared towards initiating enforcement actions, which can be more protracted. In this regard, we recommend that the Bureau adopt an approach to examinations that are “diagnostic and corrective” and based on the open communication emphasized by the federal banking agencies, rather than punitive in nature. In short, Bureau examinations should be, both in form and substance, a supervisory rather than enforcement exercise.

Indeed, the Bureau has recognized that open and frank communication throughout the supervisory process should enable most issues to be resolved without resorting to other, more formal mechanisms. In particular, the Bureau has stated that it “expects its supervisory staff, including examiners, field managers, and regional directors, to discuss with supervised entities their preliminary findings and any proposed ratings before an examination or supervisory review is completed” and “encourages supervised entities to fully engage in this dialogue and, when disagreements occur, to present all available information to support their

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<sup>3</sup> *In re Subpoena Served Upon Comptroller of Currency (In re Subpoena)*, 967 F.2d 630, 634, citing *Franklin Nat'l Bank*, 478 F. Supp. 577, 586; see also *United States v. Provident Nat'l Bank*, 41 F.R.D. 209, 210 (E.D. Pa. 1966); see also *Wolfe v. Dep't of Health and Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988) (“[T]he quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl”).

position. Through such communication, the CFPB anticipates that most disputes can be resolved before an examination is final.”<sup>4</sup>

Unfortunately, that policy has not been reflected in actual practice. In some cases, the experience of institutions subject to Bureau supervision has been that the supervisory relationship functions less as a collaborative effort between the Bureau and institutions to identify and remediate issues that could potentially harm consumers, but rather, as a fundamentally investigative process by which the Bureau seeks to identify potential violations of consumer law and take punitive actions against institutions, including by initiating enforcement actions. Consumers would be best served if the Bureau were to instead refocus its supervisory program on collaborating with institutions to identify and address practices or actions that could potentially harm consumers, consistent with the appropriate role of supervision in the larger regulatory framework.

## **II. MRAs Should be Used Only to Address Significant Violations of Federal Consumer Financial Law.**

As explained by the Bureau in the RFI, an MRA “is used to address violation(s) of Federal consumer financial law or compliance management weaknesses.” In its Winter 2013 Supervisory Highlights, the Bureau explained that it had created a single section in its Examination Reports of institutions that includes “all of the items that the Bureau expects an entity to address when the review identifies violations of law or weaknesses in compliance management.”<sup>5</sup> The entire section is referred to as “Matters Requiring Attention.” The Bureau further noted that the “entity receiving the report will be expected to furnish periodic progress reports to the CFPB about all Matters Requiring Attention. The frequency of reporting will be tailored to the specific Matters in a report.”<sup>6</sup>

The Bureau appears to have adopted the concept of an MRA from the federal banking agencies. A *Matter Requiring Attention*, or *MRA*, is the vernacular by which bank examiners communicate criticisms to a bank’s management or (increasingly) the board of directors. MRAs have no origin or even reference in law or regulation; rather, they originated as an informal convention in the examination process, and have since taken formal root.

Traditionally, MRAs were used by bank examiners to direct banks to remediate unsafe and unsound practices or significant violations of law identified during the examination; other, less important, criticisms were included in an examination report or

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<sup>4</sup> CFPB Appeals of Supervisory Matters (Oct. 28, 2015), at 3; available at: [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201508\\_cfbp\\_ApprovedSupervisoryAppealsProcess.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201508_cfbp_ApprovedSupervisoryAppealsProcess.pdf)

<sup>5</sup> CFPB Supervisory Highlights, Winter 2013, at 15. Available at: [http://business.cch.com/BANKD/201401\\_cfbp\\_supervision-highlights.pdf](http://business.cch.com/BANKD/201401_cfbp_supervision-highlights.pdf)

<sup>6</sup> *Id.*

supervisory letter, but not so labeled.<sup>7</sup> Post-crisis, however, both the Federal Reserve and the OCC have issued guidance that defines what constitutes an MRA.<sup>8</sup>

The legal basis of the banking agencies' supervisory powers is their statutory authority to prohibit unsafe and unsound practices or violations of law set forth in section 8 of the Federal Deposit Insurance Act. The Bureau has not explicitly articulated the source of its authority to issue MRAs, as it of course does not have authority under section 8 of the FDIA. Presumably, however, the Bureau's authority to issue MRAs with respect to entities subject to its oversight, including banks with more than \$10 billion in total assets, derives from its exclusive statutory authority to examine institutions for compliance with Federal consumer financial law.<sup>9</sup> However, like the banking agencies, the Bureau has not issued for notice and comment its interpretation of the meaning of a "Matter Requiring Attention," but simply included the very brief description above in a periodic public update on Bureau activity.<sup>10</sup> Because MRAs can lead to compliance rating downgrades and enforcement

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<sup>7</sup> The documentary origin of the MRA appears to have been the introduction of a "Matters Requiring Board Attention" page to the then-four Federal banking agencies common core Report of Examination. See Interagency Policy Statement of the Uniform Common Core Report of Examination (1993), available at [www.occ.gov/static/news-issuances/bulletins/pre-1994/examining-bulletins/eb-1993-7a.pdf](http://www.occ.gov/static/news-issuances/bulletins/pre-1994/examining-bulletins/eb-1993-7a.pdf).

<sup>8</sup> The Federal Reserve has stated that "MRIs arising from an examination, inspection, or any other supervisory activity are matters of significant importance and urgency that the Federal Reserve requires banking organizations to address immediately and include: matters that have the potential to pose significant risk to the safety and soundness of the banking organization; matters that represent significant noncompliance with applicable laws or regulations; repeat criticisms that have escalated in importance due to insufficient attention or inaction by the banking organization; and in the case of consumer compliance examinations, matters that have the potential to cause significant consumer harm. ... MRAs constitute matters that are important and that the Federal Reserve is expecting a banking organization to address over a reasonable period of time, but when the timing need not be 'immediate.'" Definition (from [Supervisory Considerations for the Communication of Supervisory Findings](#), SR 13-13) (2013). An "MRIA," or "Matter Requiring Immediate Attention," is a variant of MRA unique the Federal Reserve, and is self-evidently an MRA that is considered to be more urgent. We note that the Federal Reserve has recently proposed to rescind and replace SR 13-13 in the context of its proposed guidance on supervisory expectations for boards of directors (82 Fed. Reg. 37219 (Aug. 9, 2017), but the relevant definitions remain effectively identical under that proposal. The OCC has stated that "Matters Requiring Attention (MRA) describe practices that: deviate from sound governance, internal control, and risk management principles, and have the potential to adversely affect the bank's condition, including its financial performance or risk profile, if not addressed; or result in substantive noncompliance with laws and regulations, enforcement actions, or conditions imposed in writing in connection with the approval of any application or other request by the bank OCC Definition (from [Bank Supervision Process, Comptroller's Handbook](#)) (Updated 2014).

<sup>9</sup> Section 1025 of the Dodd-Frank Act (12 U.S.C. § 5515) grants the CFPB "exclusive authority to require reports and conduct examinations on a periodic basis of an insured depository institution with total assets of more than \$10,000,000,000 and any affiliate thereof for purposes of—Assessing compliance with the requirements of "Federal consumer financial laws;" Obtaining information about the activities subject to such laws and the associated compliance systems or procedures of such persons; and Detecting and assessing associated risks to consumers and to markets for consumer financial products and services. "Federal consumer financial law" includes, among others, the Equal Credit Opportunity Act, the Fair Credit Reporting Act, the Home Ownership and Equity Protection Act of 1994, and the Fair Debt Collection Practices Act.

<sup>10</sup> 12 U.S.C. § 5515.

actions, the Bureau can and should review its MRA definition, subject that definition to public notice and comment, and establish a revised definition.<sup>11</sup> In the process of doing so, the Bureau should address at least two specific issues:

**A. Appropriately limit MRAs to significant violations of Federal Consumer Financial Law.**

The articulated standard for MRAs should mirror the legal authority by which they are issued – that is, any definition should make clear that MRAs must be limited to the remediation of (i) significant violations of Federal consumer financial law or (ii) actual consumer harm. This definition should also make equally clear that MRAs should *not* be used as a means to communicate (and demand conformance with) supervisory preferences or best practices, or to enforce non-binding guidance or “supervisory expectations.” As described further below in section V, the establishment of new requirements or policies that are treated as binding by the agency must be created through the proper notice and comment procedures as required by the Administrative Procedure Act and submitted to Congress as required by the Congressional Review Act.

That review and redefinition should also be used to introduce both materiality and prioritization to the MRA process. For example, a revised, uniform standard should make clear that MRAs ought to be focused on problems that are significant and would have meaningful consequences, and not on those that are minor, trivial, or theoretical. For example, it is not clear why the Bureau labels some issues as MRAs and others as “findings.” The Bureau should set clear standards for issuance of an MRA based on frequency of occurrences or actual impact on consumers. MRAs should not be issued for technical violations that had no actual consumer impact or minimal error ratios that do not amount to a substantial and systemic compliance failure.

Importantly, self-identified technical issues that an institution brings to the attention of the Bureau that the institution has made significant progress in remediating should not form the basis of an MRA. Institutions will be disincentivized from identifying and working to remediate minor technical issues if institutions are nevertheless “punished” for the existence of such issues, which ultimately will harm consumers, as issues would potentially not be identified and remediated as quickly (or potentially would not be identified at all).

Similarly, a revised standard should provide a better sense of *prioritization*, separating the most important MRAs from the less important ones, and ensuring there is clear alignment between supervisory views about the gravity of a problem and the relative time and attention that firm management should allocate to resolving it.

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<sup>11</sup> All of our recommendations regarding MRAs apply equally to the federal banking agencies, as we have previously articulated. The federal banking agencies and the Bureau could also consider proposing for comment joint guidance regarding the scope of MRAs. For more discussion of MRAs and suggestions for reforms thereto, *see* Greg Baer and Jeremy Newell “The MRA is the core of supervision, but common standards and practices are MIA,” available at: <https://www.theclearinghouse.org/advocacy/articles/2018/02/02-09-2018-mra-core-supervision>

Finally, the Bureau’s supervisory staff should clearly identify, when issuing an MRA, specific practices that must be revised or benchmarks that must be met in order for the institution to remediate the identified activity or practice to the Bureau’s satisfaction.

**B. Create alternative avenues for communicating examiner observations and preferences.**

None of the above is to suggest that examiners should limit their examinations and reviews only to those issues that rise to the level of harming consumers or significant violations of law. Examiners can, of course, add significant value in areas that do not meet those standards. Indeed, as noted previously, the Bureau has stated, in connection with its formal appeals process, that the agency “expects its supervisory staff, including examiners, field managers, and regional directors, to discuss with supervised entities their preliminary findings and any proposed ratings before an examination or supervisory review is completed” and “encourages supervised entities to fully engage in this dialogue and, when disagreements occur, to present all available information to support their position. Through such communication, the CFPB anticipates that most disputes can be resolved before an examination is final.”<sup>12</sup>

To further this objective, a lexicon is needed by which the Bureau can convey criticism, or raise ideas, without having to issue an MRA. For example, the Bureau should consider creating a new category – “Matters for Discussion,” or “MFDs” – that are designed to capture other examiner observations, criticisms, or concerns that don’t qualify as MRAs. This approach would provide the basis for a robust and candid dialogue between supervisors and banks on other issues.

**III. The Bureau Should Take the Lead Role In Implementing and Enforcing Federal Consumer Financial Law Consistent With the Framework Established by The Dodd-Frank Act and Enhance its Coordination with the Federal Banking Agencies.**

Section 1025 of the Dodd-Frank Act grants the Bureau “exclusive authority” to require reports and conduct examinations on a periodic basis of insured depository institution with total assets of more than \$10,000,000,000 and any affiliate thereof for purposes of—

- Assessing compliance with the requirements of “Federal consumer financial laws;”
- Obtaining information about the activities subject to such laws and the associated compliance systems or procedures of such persons; and
- Detecting and assessing associated risks to consumers and to markets for consumer financial products and services.<sup>13</sup>

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<sup>12</sup> CFPB Appeals of Supervisory Matters (Oct. 28, 2015), at 3; available at: [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201508\\_cfpb\\_ApprovedSupervisoryAppealsProcess.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201508_cfpb_ApprovedSupervisoryAppealsProcess.pdf)

<sup>13</sup> 12 U.S.C. § 5515.

The federal banking agencies retain authority under section 8 of the FDIA to examine financial institutions for issues that could pose a threat to those institutions' safety and soundness. Those agencies also have authority to conduct examinations to assess consumer compliance by financial institutions with less than \$10 billion in total assets.

The Dodd-Frank Act contemplates coordination among the Bureau and the federal banking agencies. For example, sections 1025(b)(2) and 1024(b)(3)-(4) of the Dodd-Frank Act require the Bureau to coordinate its supervisory activities with the supervisory activities conducted by the Federal Banking Agencies, including consultation regarding their respective schedules for examining institutions and requirements regarding reports to be submitted by institutions. Section 1025(e)(1) of the Dodd-Frank Act requires that the Bureau and the Prudential Regulators:

- Coordinate the scheduling of examinations of Covered Institutions;
- Conduct simultaneous examinations of insured depository institutions with more than \$10 billion in assets and their insured depository institution affiliates, unless the institution requests separate examinations;
- Share draft reports of examinations of those institutions with the other agency and permit the receiving agency at least 30 days to comment on the draft report before it is made final; and
- Take into consideration any concerns raised by the other agency before issuing the final report of examination.

The Dodd-Frank Act does not define the type of examinations that must be coordinated, although presumably the intent was that the banking agencies coordinate the timing of their safety and soundness examinations with the timing of the Bureau's consumer compliance examinations for financial institutions' planning and other logistical purposes. In implementing the aforementioned sections of the Dodd-Frank Act, the banking agencies and the Bureau executed a Memorandum of Understanding ("MOU") intended to, among other things, establish which examination schedules must be coordinated, which examinations must be conducted simultaneously, and what it means to conduct an examination simultaneously.<sup>14</sup>

The MOU defines the "Covered Supervisory Activities" that must be coordinated as those that relate to compliance with the requirements of Federal consumer financial law, section 5 of the Federal Trade Commission Act, which prohibits unfair and deceptive acts and practices, and other consumer compliance supervisory activities with respect to institutions with more than \$10 billion in total assets. The MOU explicitly provides that "Generally, other safety and soundness supervisory activities such as examinations of asset quality of lending, liquidity, financial condition and performance, capital adequacy, deposit insurance, information technology, securitization and financial and capital market operations

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<sup>14</sup> See Memorandum of Understanding on Supervisory Coordination (May 2012), *available at*: [https://files.consumerfinance.gov/f/201206\\_CFPB\\_MOU\\_Supervisory\\_Coordination.pdf](https://files.consumerfinance.gov/f/201206_CFPB_MOU_Supervisory_Coordination.pdf)

that do not assess underwriting, sales, marketing, servicing, collections, or other activities related to consumer financial products or services are not Covered Supervisory Activities.”

The “Covered Examinations” subject to the MOU are those used in conducting “Covered Supervisory Activities” that yield a Covered Report of Examination – a report of a Covered Examination that concludes a supervisory cycle and yields a Compliance, CAMELS, or RFI rating. Thus, the banking regulators and the Bureau appear to contemplate that the prudential regulators have some authority to examine financial institutions with more than \$10 billion for consumer compliance and to reflect their findings in this regard in CAMELS or RFI ratings (or subsequently adopted ratings systems).

However, this ability of the banking agencies to conduct examinations for consumer compliance related matters is inconsistent with both the letter and spirit of the Dodd-Frank Act’s transfer of authority from the banking agencies to the Bureau to assess compliance with federal consumer financial law by institutions with more than \$10 billion in total assets.<sup>15</sup>

We encourage the Bureau to assert its “exclusive” authority to examine banks for consumer compliance consistent with Congressional intent that the Bureau be the lead consumer financial regulatory and enforcement agency. As part of this authority, the Bureau should revise the terms of the MOU with the federal banking agencies to clarify its primary role in examining and regulating the consumer compliance activities of large financial institutions. Of course, the Bureau should only assert its authority with respect to laws over which it has authority and not those over which it does not.

At a minimum, the Bureau and the federal banking agencies should clarify their respective jurisdictions with respect to examining institutions for compliance with all relevant federal consumer laws and increase coordination regarding the content and timing of examinations in order to minimize the overlap in supervision and examination that currently exists. In addition, the Bureau and the federal banking agencies should enhance the coordination of their respective supervisory and examination findings and required remediation actions, as appropriate. The Bureau also should coordinate data requests among the agencies so that institutions are not required to respond to identical or nearly identical data requests by different regulators. Enhanced coordination with regard to subject matter, information requests, and timing would greatly improve regulatory efficiency and thus help institutions to more quickly identify and remediate activities that could potentially harm consumers.

#### **IV. The Bureau should revise certain of its practices with respect to boards of directors.**

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<sup>15</sup> The federal banking agencies have asserted that they continue to have supervisory and enforcement authority regarding unfair and deceptive acts and practices (“UDAAP”) pursuant to section 5 of the FTC Act by referencing the agencies’ general authority to enforce any “violation of law” under section 8 of the FDIA. However, pursuant to section 1031 of the Dodd-Frank Act, the Bureau has exclusive statutory authority to issue and enforce UDAAP rules for banks.



**A. The Bureau should revise certain prescriptive supervisory expectations relating to the board of directors and better clarify the oversight role of the board relative to responsibilities of management.**

TCH appreciates the aim of the Bureau to emphasize the importance of compliance with consumer financial protection laws by expecting the board of directors to have a role relating to compliance with each such law. However, we believe that the Bureau should reconsider whether its current practices unnecessarily and inappropriately expand or blur the role of the board with that of senior management.

While boards of directors are responsible for providing effective oversight for the development and administration of the compliance management approach, supervised financial institutions should have appropriate discretion in determining how to structure this oversight, including the sources and formats of information, and level of involvement in approving policies.

As discussed in a 2016 TCH Report on the role of the Board and more recently in a comment letter to the Federal Reserve, board oversight of risk management and the internal control frameworks, including consumer financial protection regulations, is one of the core functions of a board of a large U.S. banking organization.<sup>16</sup> Foundationally, this involves the board of directors and/or board committee overseeing that the organization has established appropriate risk management and control programs and oversight of management's implementation of those programs. Reporting to the board of directors by senior leaders to aid in the board's consumer financial protection oversight should generally relate to material consumer financial protection-related risks, developments, policies, and/or other issues that are material in nature to the overall organization and providing effective and objective oversight of management's performance in carrying out its responsibilities.

There are instances where we believe Bureau supervisory expectations and policy are too prescriptive and unnecessary. Policies and guidance blur the critical distinction between board oversight responsibilities and managerial responsibilities. While supervisory policy and examination guidance are not generally intended to set definitive requirements, nonetheless, in our experience examiners often apply components of examination guidance as if they are definitive requirements, thereby exacerbating our concerns. For example, we are concerned that certain prescriptive expectations or guidance that does not clearly distinguish between the role of the board and that of management, such as the following, distract the board from its critical functions to oversee the compliance risk management

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<sup>16</sup> See The Clearing House, *The Role of the Board of Directors in Promoting Effective Governance and Safety and Soundness of Large U.S. Banking Organizations (May 2016) (the "TCH 2016 Directors Report")* available at <https://www.theclearinghouse.org/sitecore/content/tch/home/issues/articles/2016/05/20160505-tch-publishes-the-role-of-the-board-of-directors-report>; See also TCH's response to the Federal Reserve's August 2017 proposal relating to board effectiveness available at [https://www.theclearinghouse.org/-/media/tch/documents/tch-weekly/2018/20180215\\_tch\\_aabd\\_sifma-comment\\_letter\\_on\\_board\\_effectiveness-proposal.pdf](https://www.theclearinghouse.org/-/media/tch/documents/tch-weekly/2018/20180215_tch_aabd_sifma-comment_letter_on_board_effectiveness-proposal.pdf).

system and its other core board functions:

- An issue of the Bureau’s Supervisory Highlights addressing board and management oversight states that: (i) the board should approve a system of policies and procedures that address every consumer financial product or service offered by the entity, and (ii) the “management and the board” should develop a system of risk-based periodic monitoring reviews in order to ensure that transactions and other consumer contacts are handled in accordance with Federal consumer financial laws and with the entity’s own policies and procedures.<sup>17</sup>
- The Bureau’s Compliance Management Review Examination Procedures – part of its Supervisory and Examination Manual – states that the board of directors is ultimately responsible for “developing” and “administering” a compliance management system that ensures compliance with Federal consumer financial laws and addresses and minimizes associated risks of harm to consumers.<sup>18</sup> The Examination Procedures routinely use the standard terms “board and management” in situations where good governance practices would dictate that only management be responsible for the task in question (e.g., “engage . . . in managing identified risks”). The Procedures also direct examiners to “[d]etermine if the board members direct compliance personnel to design and implement [compliance management system] elements related to sales practices and performance goals that address both intended and unintended outcomes” where doing so in the normal course of carrying out oversight responsibilities would not necessarily be an attribute of an effective board but rather involve a clear management function.
- The Bureau’s statutory and regulatory-based examination procedures require that examiners determine whether (i) the “board and management” have “set” clear expectations about compliance for certain consumer financial regulatory requirements (e.g., Regulation E) that are appropriately the role of management; (ii) the board “established an independent review of policies and procedures” (e.g., HMDA/Reg C policies); (iii) the board and senior management receive training on technical topics that are operational in nature (e.g., fair lending training); and (iv) and the board be advised of activities that are properly the handled by management.

The foregoing and other similar statements in Bureau guidance and/or in examiner training-related materials should be revised in favor of terms that are unambiguously

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<sup>17</sup> See CFPB Supervisory Highlights, Summer 2013, at 8-10. Available at:

[https://files.consumerfinance.gov/f/201308\\_cfpb\\_supervisory-highlights\\_august.pdf](https://files.consumerfinance.gov/f/201308_cfpb_supervisory-highlights_august.pdf)

<sup>18</sup> See CFPB Supervision and Examination Manual, “Compliance Management Review” at pg. 40. Available at: [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_supervision-and-examination-manual.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf)

consistent with the board's oversight role (e.g., the board should "oversee," "review" or, where appropriate "approve," rather than "develop" or "administer" policies, systems, strategies, appetites, or plans). To further the appropriate delineation of the roles of the board and management, we recommend that the Bureau clarify and/or adopt the position that:

- Top-tier policies and plans that merit board review and/or approval will depend on the nature, size and complexity of the organization's activities; these policies and plans will generally include the overall compliance framework (i.e., rather than policies and plans relating to specific technical federal consumer financial requirements), and (ii) it is the role of management, not the board, to approve procedures.
- An expectation – whether memorialized in guidance or informal examiner expectation – that the board of directors remain deeply engaged in compliance efforts with the specific requirements of each federal consumer financial law (i.e., absent "red flags" or special circumstances such as formal actions) unnecessarily distracts boards from their broader functions. On the other hand, as reflected in the TCH 2016 Directors Report, we believe that it is appropriate to expect the board of directors to oversee the process in place, and monitor the progress of the remediation of material regulatory findings and actions.<sup>19</sup>
- Receipt of too much unfiltered information often can impair board effectiveness to the same extent as receiving too little pertinent information. It is essential that boards of financial institutions, like other corporate boards, be entitled to rely reasonably on the records of the organization and on the information provided to the board by management, board and management committees, employees, consultants, attorneys and advisors where there is no reasonable basis to believe that such reliance is unwarranted. Without this, the board would be consumed by minute details of the management and supervision of the organization, contrary to the goals of sound corporate governance.

The 2016 TCH Report suggests that there should be coordination and mutual recognition of board-related requirements imposed by the U.S. regulators ("as part of a [periodic review of board requirements], a U.S. banking agency should consider how best to take into account relevant regulations and/or guidance issued by other U.S. authorities (e.g., the SEC, the Bureau and other U.S. federal banking agencies) to promote a consistent understanding of expectations"). In this regard, we note that the Federal Reserve has recently initiated an effort to clarify the critical distinction between the role of the board and management and to facilitate this type of inter-agency coordination.<sup>20</sup> We recommend that the Bureau conduct periodic reviews of board requirements and standards that it promulgates

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<sup>19</sup> See generally TCH 2016 Directors Report at 11-12.

<sup>20</sup> See Federal Reserve System, *Proposed Guidance on Supervisory Expectations for Boards of Directors*, 82 Fed. Reg. 37219 (Aug. 9, 2017) ("Federal Reserve BE Proposal").

(including in examiner guidance) to emphasize areas of appropriate focus for boards and management in ways that provide the most effective governance, and to engage in the inter-agency dialogue on this important topic.

Finally, we recommend that the Bureau issue guidance regarding communication of supervisory findings, explaining that supervisory letters will generally be directed to appropriate management (and clarifying those limited circumstances where escalation of the entire letter/report to the board may be warranted) and that institutions have flexibility to provide a summary report to the board, or a responsible board committee, clearly highlighting material findings included in the letters. The practice of directing Bureau supervisory letters/reports – including voluminous technical information on Bureau methodologies and testing – to the board of directors unnecessarily risks distracting boards from their core oversight functions.<sup>21</sup> We would expect that senior management would establish a process to inform the board, or an appropriate committee, of material findings, which may include thematic summaries. This should alleviate any potential concerns with directing supervisory findings to senior management, rather than the board.

**B. The Bureau should establish a more efficient protocol for requesting board and board committee minutes and materials containing CSI.**

The issue of redacting confidential supervisory information (“CSI”) in board minutes in order to accommodate Bureau examiner requests for full disclosure of minutes is one that has come up increasingly over the past few years. In particular, concerns have been raised where the Bureau (or state authorities) examiners, has sought full access to board minutes including another agency’s CSI.

To the extent examiners continue to seek full access to board minutes including another agency’s CSI, the Bureau should enter into, or expand the scope of existing, protocols with relevant federal banking regulators that either permits supervised institutions to share CSI with the Bureau or, alternatively, the Bureau should seek to receive CSI information directly from the relevant agency rather than from the financial institution itself.<sup>22</sup> Otherwise, the Bureau should institute a policy allowing supervised institutions to

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<sup>21</sup> See speech by Governor Daniel K. Tarullo at the Association of American Law Schools 2014 Midyear Meeting, Washington, D.C. (June 9, 2014) (“There are many important regulatory requirements applicable to large financial firms. Boards must of course be aware of those requirements and must help ensure that good corporate compliance systems are in place. But it has perhaps become a little too reflexive a reaction on the part of regulators to jump from the observation that a regulation is important to the conclusion that the board must certify compliance through its own processes. [Regulators] should probably be somewhat more selective in creating the regulatory checklist for board compliance and regular consideration . . . the failure to discriminate among [MRAs] is almost surely distracting from strategic and risk-related analyses and oversight by boards”); See also Federal Reserve BE Proposal (including proposed updated guidance on communication of supervisory findings explaining that MRAs and MRIs will generally be directed to management rather than the board).

<sup>22</sup> See Bureau Compliance Management Review examination procedures for Board and Management Oversight including “review board meeting minutes and supporting materials during the period under review for coverage of compliance matters.”

provide examiners certified extracts of minutes related to the particular exam topic at issue without being required to renegotiate the issue during each examination.

These requests place the financial institution either (i) in an awkward position of potentially seeming uncooperative because of restrictions on the ability to share the CSI of another agency, and/or (ii) spending an inordinate amount of time “negotiating” with the Bureau staff on issues such as whether the examiners would accept certified extracts of minutes related to a particular examination topic.

Especially to the extent that the Bureau obtains information directly from a prudential regulator, the Bureau should have adequate controls in place to ensure that the CSI does not become public. More generally, as noted above, we recommend enhanced supervisory coordination of examiner requests and time frames for required responses (e.g., in connection with topics such as sales practices where the Bureau and the federal banking agencies each conduct their own reviews). Where possible, more closely synchronized requests for information and materials on overlapping topics should reduce or eliminate unnecessary duplication of effort and, in some cases, facilitate an institution’s preparation of a more comprehensive response to regulatory requests.

**V. Any Bureau Releases that Establish New Requirements Must Be Promulgated in Compliance With The Administrative Procedure Act and the Congressional Review Act.**

We commend the Bureau for its ongoing commitment to transparency regarding its operations, processes, and procedures. For example, the Bureau publishes its Examination Manual on its website to allow institutions and the public to understand the manner in which Bureau examiners assess institutions for compliance with Federal consumer financial law and Bureau regulations. To the extent that the Examination Manual focuses on the processes and tactics employed by examiners in conducting examinations, the publication of the Manual provides institutions with useful guidance as to how to prepare for, and what to expect during, examinations. The Bureau also issues Supervisory Highlights, which summarize, on an anonymous basis, the approach taken and the Bureau’s findings in various exams. These Supervisory Highlights provide useful information to institutions about exam experiences and how companies have been asked to address issues identified by the Bureau, providing institutions with insight into the examination process and experience.

However, these, and other, publications by the Bureau should not establish new requirements, policies, or binding guidance, to the extent that they have not been promulgated appropriately under the Administrative Procedure Act (“APA”). Under section 553 of the APA, all rules must be promulgated through a public notice and comment process unless an exemption applies; one such exemption is for “interpretive rules” and “general statements of policy.”<sup>23</sup> As the Attorney General’s Manual on the APA describes, the key distinction is that only substantive rules that have gone through the notice and comment

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<sup>23</sup> 5 U.S.C. § 553.

rulemaking process “have the force and effect of law.”<sup>24</sup> In contrast, interpretive rules merely “advise the public of an agency’s construction of the statute and rules which it administers,” and general statements of policy merely “advise the public prospectively of the manner in which the agency proposed to exercise a discretionary power.”<sup>25</sup> Thus, any publications or other statements by the Bureau that it treats as having the force and effect of law must be publicly issued for comment. We also recommend that with respect to the Bureau’s publications, including the Examination Manual, legal staff in the Bureau’s General Counsel’s office regularly review and ensure that those publications comport with the requirements set forth in the Bureau’s regulations and other Bureau issuances that have been promulgated through the appropriate legal procedures under the APA.

In addition, the Congressional Review Act (“CRA”) requires an agency to submit a report on each new “rule” it issues – defined for this purpose (subject to certain exceptions) as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency” – to both Houses of Congress and to the Comptroller General before it can take effect.<sup>26</sup> The GAO has explained that a “rule” for CRA purposes is “broad” and includes both rules requiring notice and comment rulemaking, as described above, and those that do not, such as general statements of policy.<sup>27</sup> Thus, publications or issuances by the Bureau, including rules that must be promulgated via notice and comment rulemaking and general statements of policy, meeting the definition of “rule” under the CRA (and not qualifying for one of the relevant exceptions) are subject to its requirements.

## **VI. The Bureau Should Amend Certain Aspects of its Examination Processes to Best Serve the Goal of Minimizing Consumer Harm.**

### **A. The pre-examination process.**

As an initial matter, the Bureau should provide institutions with greater advanced notice of the Bureau’s examination schedule and topics to be covered during such examinations. Currently, the Bureau’s examination manual provides that “approximately” 60 days’ notice should be provided in advance of an examination, and that requests for materials

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<sup>24</sup> Attorney General’s Manual on the Administrative Procedure Act at 30 n. 3 (1947), reprinted in William F. Funk, Jeffrey S. Lubbers & Charles Pou, Jr., *Federal Administrative Sourcebook* (4<sup>th</sup> ed. 2008).

<sup>25</sup> *Id.*

<sup>26</sup> 12 U.S.C. § 805(a)(1).

<sup>27</sup> *See, e.g.*, United States Government Accountability Office decision B-329272, Letter to Senator Pat Toomey from Susan A. Poling, General Counsel, re: Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation--Applicability of the Congressional Review Act to Interagency Guidance on Leveraged Lending (Oct. 19, 2017), available at: <https://www.gao.gov/products/B-329272#mt=e-report>

should be sent soon thereafter.<sup>28</sup> However, providing institutions with additional advanced notice would enable institutions to better prepare and plan for an examination, which would foster a more efficient examination process.

Pre-examination information requests should be issued at least 90 days in advance of an examination, and materials should be required to be delivered at least 7 – 14 business days before an on-site review commences. These timing parameters will give firms sufficient time to prepare materials and give examiners time to review those materials fully prior to the commencement of an on-site examination. Having additional time to respond to data requests is particularly important, as developing and validating responses to data requests can take an extensive period of time and substantial resources.

Further, information requests should be more closely tailored to the subject of the examination. The Bureau should tailor its requests to the information necessary to examine the institution with respect to the specific subject of an examination. Overbroad requests make the examination process less efficient. Finally, examination request letters and requests for information to be supplied to a Compliance Tool Questionnaire as part of an exam, should not be used unless the information is relevant to, and will be used as part of, the examination process. The production of superfluous information or completing irrelevant questionnaires imposes compliance burdens on institutions without a commensurate benefit.

#### **B. Efficiency and effectiveness of the examination process.**

Currently, the number of examiners and amount of time spent on each examination seems excessive in some cases. For example, in certain examinations, the Bureau assigns between eight and 12 examiners to examine a particular area at an institution, and the examination itself can take between eight and 12 weeks. In certain instances, there are more examiners reviewing a particular function at an institution than employees who actually perform that function. This large number of examiners and months-long examination can be disruptive to institutions in performing their ordinary course functions. We provide a number of suggestions to help mitigate this concern.

Examiners should fully review responses to pre-examination information requests prior to on-site arrival and should tailor their on-site activities appropriately based on those responses. Examiners need at least one week (exclusive of travel time) for orientation and training prior to on-site work.

Examination teams should be staffed with an appropriate proportion of experienced personnel in comparison to new examiners (both in terms of examinations in general and the specific firm). In some cases, a greater proportion of inexperienced examiners may result in an inordinately long examination. In this regard, we support the approach taken by the

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<sup>28</sup> See CFPB Supervision and Examination Manual, “Examinations” at pg. 4. Available at: [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_supervision-and-examination-manual.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf)

prudential regulators whereby examiners are assigned to particular institutions, which enables the examiners to understand the operations of the institution and helps to foster a productive, collaborative supervisory relationship between the examination team and the institution.

Where potential issues are identified, the examination staff should be focused on working with examined institutions to develop solutions, rather than initiating punitive actions, consistent with our recommendation in section I, above. Similarly, as discussed throughout this letter, examiners should engage in more frequent dialogue with institutions to discuss potential concerns and possible resolutions to such concerns, rather than communicating concerns solely in writing via the examination report.

Finally, while the Bureau has stated that it prioritizes examinations based on risk, the Bureau also has indicated that it examines larger institutions with greater frequency than those of smaller size. For example, former Deputy Director Steven Antonakes stated in the same remarks both that “Relatively higher risk Institutional Product Lines within relatively higher risk markets are our highest priority” and that the Bureau prioritizes “relatively larger players with a more dominant presence given their ability to impact more consumers than relatively small players.”<sup>29</sup> While we support the Bureau’s risk-based approach to prioritizing examinations, the Bureau should consider giving increased weight in this risk-based approach to institutions that have had prior compliance issues. This approach would help those institutions to remediate those and other potential issues and thereby ultimately inure to the benefit of consumers.

**C. The Bureau should establish greater procedural safeguards and provide increased transparency in the examination process.**

The Bureau’s conclusions set forth in examination reports must be based on an accurate understanding of the facts. Thus, the Bureau should establish a process under which firms are permitted to review the facts on which the Bureau’s examination report will be based and, if necessary, correct any inaccuracies prior to the issuance of the report.

Supervisory letters and examination reports should contain a clear description of the relevant statutes or regulations at issue, a description of the actions of the institution that the Bureau believes constitute a potential violation of those statutes or regulations, and a legal analysis as to why the Bureau believes that the institution’s actions constitute a violation.

In addition, examination reports should be customized for each examination and should not be based on template language. The latter approach results in vague and unhelpful letters at best, and often results in illogical letters with confusing language. Further, each examination report should be reviewed by a designated team of legal professionals in the General Counsel’s office to ensure consistency across examinations.

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<sup>29</sup> See Prepared Remarks of CFPB Deputy Director Steven Antonakes to the Consumer Bankers Association (March 25, 2015). Available at: <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-deputy-director-steven-antonakes-to-the-consumer-bankers-association/>.



Finally, post-examination exit meetings should be held after written results have been provided to an institution, so that the examiners can work with firms to develop solutions to any issues found (to the extent that this has not occurred during the normal supervisory/examination process) rather than resorting to enforcement actions as a matter of course.

**D. Examination reports should be issued in a timely manner.**

Examination reports are often issued long after an examination has been completed. One reason for the delay in the issuance of these reports may be that the Bureau's Supervision and Examination manual does not require examination reports to be issued within any particular timeframe. However, any insights that may be gained by the institution may be lost as a result of such delay, as the findings are often rendered "stale" as a result of the firm's remediation efforts in the interim. Thus, the value of the examination report is diminished substantially when it is delayed for a long period. Further, to the extent that an institution is only first made aware of an issue in the examination report (which practice would be contrary to our recommendation set forth in this letter that the Bureau and the institutions it supervises engage in increased real-time dialogue regarding potential issues and remediation efforts), the delay of a report will translate into a delay in the institution's being able to remediate the issue, which ultimately could have a greater negative impact on consumers. The Bureau should require that examination reports be issued within a reasonable timeframe after an examination has been completed.

Further, the significant delay between the end of an examination and the communication of results to an institution prevents firms from having an interval of operating normally between examinations during which any issues identified during an examination may be addressed and remediated.

The Bureau should not initiate an examination for at least six months after the prior examination report was issued to allow firms an opportunity to address any identified issues. Further, the Bureau should provide firms with more time (for example, between 12 and 18 months may be appropriate) to implement regulatory changes before the Bureau examines an institution for compliance with such regulation. New regulatory requirements often create new technology needs that must be met. Firms also frequently rely on third-party service providers to create and implement these changes, the timing of which is not directly under the control of the institution. In short, the Bureau should not underestimate the time it takes to identify, develop, test, and implement new technology.

**VII. The Bureau Should Incorporate More Robust Legal Analysis and Provide Greater Transparency into the PARR Letter Process.**

With respect to so-called "PARR Letters," the Bureau has explained that:

As part of the examination process, the Bureau may send a Potential Action and Request for Response (PARR) letter to a supervised entity. The PARR letter provides

the entity notice of preliminary findings of violation(s) of Federal consumer financial law, including fair lending laws, and the Military Lending Act (MLA). If there is a potential ECOA violation that could be referred to Department of Justice, the PARR letter provides the entity notice of the potential for a referral.

The PARR letter also notifies the entity that the Bureau is considering taking supervisory action, such as a non-public memorandum of understanding, or a public enforcement action, based on the potential violations identified and described in the letter. Supervision invites the entity to respond to a PARR letter within 14 days, and to set forth in the response any reasons of fact, law or policy as to why the Bureau should not take action against the entity. The entity is asked to provide documentation with its response. In certain instances, the Bureau requests additional documentation after reviewing the entity's response to the PARR letter. The information provided by the entity helps in determining whether it is appropriate to take supervisory or enforcement action against the entity.<sup>30</sup>

We make a number of recommendations for changes to the PARR letter process that would help the Bureau and institutions to work together more efficiently and effectively to resolve issues that could result in harm to consumers.

**A. PARR letters should include the Bureau's legal analysis and be subject to a more standardized review process.**

In general, the PARR letter process should be subject to greater legal rigor. For each potential violation, a PARR letter should: (i) identify the statute or regulation that is the source of the potential obligation in question, (ii) state the facts regarding the firm's conduct that may constitute a potential violation, and (iii) provide the Bureau's analysis of why the facts may constitute a violation of the statute or regulation at issue.

In addition, legal staff in the Bureau's General Counsel's office should be more involved in the PARR letter process in order to standardize the process of more rigorous legal review of PARR letters and ensure greater consistency. Attorneys in the General Counsel's office should verify that the Bureau's analysis comports with the relevant statutes, the Bureau's regulations, official interpretations, and relevant case law. Those attorneys also should be available to review and discuss the PARR letter's analysis when regulated entities have legal concerns with the examiners' interpretation of the underlying law or how it applies to the facts. In addition, those attorneys should respond to the legal arguments set forth in PARR responses. If the Bureau rejects a firm's arguments, the Bureau should explain the legal basis for that rejection.

**B. The Bureau should provide institutions with greater transparency into the PARR letter process.**

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<sup>30</sup> CFPB Supervisory Highlights, Summer 2015, at 27. Available at: [https://files.consumerfinance.gov/f/201506\\_cfpb\\_supervisory-highlights.pdf](https://files.consumerfinance.gov/f/201506_cfpb_supervisory-highlights.pdf)

Currently, regulated entities have no insight into the PARR process or its effectiveness. The Bureau should provide anonymized data on the PARR process that identifies those issues being addressed via PARR letters and the ultimate disposition of those issues – whether the institution remediates the issue satisfactorily (and how such remediation is achieved) or whether an enforcement action is pursued and why the institution was unable to satisfactorily remediate the issue in the normal course.

The Bureau also should provide greater transparency regarding the Action Review Committee (“ARC”) process – the process by which the Bureau determines whether a matter should be referred to the enforcement division. Currently, institutions have very little insight into the reasons why particular issues are referred to and/or pursued by the enforcement division.<sup>31</sup>

**C. The Bureau should provide institutions with a longer period of time in which to respond to PARR letters.**

Given the amount of data regularly requested via PARR letters, firms need at least 60 days to respond, especially if data has to be run and reviewed or loan-level reviews are required. While extensions of this time period are potentially available, the current 14-day timeline makes an extension necessary in practically every case. Requiring institutions to request an extension presents an additional administrative step for institutions and the Bureau that could be eliminated if a longer response period were provided in the first instance.

**VIII. The Bureau Should Amend its Process for Appealing Supervisory Findings to Provide Institutions with a More Independent Review and a More Robust Standard Under which Appeals are Considered.**

The Bureau has implemented a process for appealing adverse supervisory findings.<sup>32</sup> We commend the Bureau for recognizing the importance of allowing institutions the opportunity to contest adverse supervisory findings. Under the current appeals process, an entity may appeal final Bureau compliance ratings that are less than satisfactory (a 3, 4, or 5) or any underlying adverse finding, or adverse findings conveyed to an entity in a supervisory letter. The Bureau defines “adverse findings” as those that result in a Matter Requiring Attention by the board of directors or principal(s) of the entity.”

As an initial matter, consistent with recommendations we have made throughout this letter, we highlight the importance of firms’ having meaningful opportunities to engage with Bureau staff—both on-site examiners and Bureau subject-matter experts—on a regular basis throughout the supervisory cycle. We suggest that the Bureau institute a process to provide

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<sup>31</sup> We discuss when issues are more appropriately handled by supervision rather than enforcement in the comment letters we filed in response to the Bureau’s RFI on the Civil Investigative Demand process and the Bureau’s RFI on Enforcement processes on April 26<sup>th</sup> and May 14<sup>th</sup>, respectively.

<sup>32</sup> CFPB Appeals of Supervisory Matters (Oct. 28, 2015), at 3; available at: [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201508\\_cfpb\\_ApprovedSupervisoryAppealsProcess.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201508_cfpb_ApprovedSupervisoryAppealsProcess.pdf)

institutions with regular interim updates by on-site examiners and Bureau subject-matter experts during the course of examinations. Such updates would allow firms to clarify factual misunderstandings and remediate issues in real time, as opposed to deferring all findings to the end of the examination cycle. For example, one possible approach may be for the Bureau to require that the examination team for each firm provide a draft of the ratings determination to the firm a reasonable period of time before the ratings letter is formally issued (for example, four weeks). The draft would be provided with the understanding that the firm would be permitted to correct any factual misstatements, to respond to any proposed adverse findings, and to request that the examination team reconsider any specific component ratings before the letter and ratings are formally issued.

We also recommend that the Bureau provide additional procedural safeguards prior to a rating downgrade. Under such a review process, the firm should be given notice and an explanation of the reasons for the potential downgrade, and the firm should have an opportunity to correct any factual misstatements and respond to any proposed adverse findings. As part of this review process, firms should have the opportunity to meet with senior Bureau staff. Only after such a review is completed and the Bureau senior staff has determined that a ratings downgrade is warranted should the downgrade be finalized.

With respect to the Bureau's formal appeals process, the Bureau's procedures provide that appeals must be addressed to the Associate Director for Supervision, Enforcement and Fair Lending, who will appoint a committee composed of individuals who were not involved in the supervisory matter being appealed. The committee's membership will include:

- One member of the Associate Director's staff,
- One or more representatives from CFPB Headquarters Supervision management, and
- One or more representatives from CFPB regional management.

The committee's findings are then summarized in a written decision and submitted to the Associate Director, who will review the decision and make any modifications as he or she deems appropriate. The decision of the Associate Director is final. The Bureau does not accept any further attempts to appeal the Associate Director's Decision.

#### **A. Independent and Consistent Reviews**

While we appreciate the Bureau's recognition of the importance of the availability of an independent review, certain changes to the appeals process are warranted to further this goal.<sup>33</sup> First, once examiners issue a less than satisfactory consumer compliance rating,

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<sup>33</sup> All of our recommendations regarding the Bureau's appeals process apply equally to the federal banking agencies, whose appeals processes also are in need of reform, as detailed by law professor Julie Andersen Hill. See "When Bank Examiners Get It Wrong: Financial Institution Appeals of Material Supervisory Determinations," by Julie Andersen Hill, Associate Professor of Law, University of Alabama School of Law (2014) at 14, available at [www.stlouisfed.org/~media/Files/PDFs/Banking/CBRC-2014/SESSION2\\_AndersonHill.pdf](http://www.stlouisfed.org/~media/Files/PDFs/Banking/CBRC-2014/SESSION2_AndersonHill.pdf). Professor Hill concluded that the appeals process at each agency is "a dysfunctional and seldom used system." However, we applaud the Federal Reserve Board for recently

financial institutions should have *direct* access to a dedicated appellate authority outside of the supervisory and examination function, such as the Bureau’s Ombudsman or some other independent authority that, if composed of multiple individuals, remains generally consistent and does not change with each appeal. Fairness and due process would best be served by a truly independent adjudicator. The Associate Director for Supervision, Enforcement, and Fair Lending oversees the Supervisory functions of the Bureau and thus would not have the requisite independence from the examination process resulting in the contested rating.

Further, a more independent appellate authority may increase bank confidence in the appeals process. In addition, the efficacy of the internal appeals process will be limited so long as the Bureau has discretion to respond to objections by enhancing the damages it will seek. The Bureau should establish a binding value on damages for the violations identified in an examination prior to a firm’s appeal decision.

In addition, a consistent appellate authority is more likely to issue consistent decisions than an authority, such as the committee contemplated in the Bureau’s current policy, whose membership changes with each appeal.

At a minimum, if the Bureau does not amend its current appeals framework and require the initial adjudicator to be independent from the supervisory function, there should be an avenue to appeal the Associate Director’s decision to an independent authority such as the Ombudsman.

## **B. Standard of Review**

The Bureau has stated that when considering appeals, the appeals committee “will review the supervisory letter or examination report for consistency with the policies, practices, and mission of the CFPB and the overall reasonableness of the examiners’ determinations, and support offered for, the supervisory findings.” We appreciate the Bureau’s attempt to communicate the standard of review that the appeals committee will use when considering appeals. However, the articulated standard lacks clarity. Further, a more robust standard of review should be adopted by the Bureau. First, the Bureau should consider the issue being appealed *de novo*.<sup>34</sup> Further, the Bureau should uphold a determination – such as a less than satisfactory rating -- only when it determines that the action at issue (such as the assignment of a particular rating (i.e., 3, 4 or 5)) was warranted

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proposing amendments to its internal appeals process for material supervisory determinations and its Ombudsman policy. See Board of Governors of the Federal Reserve System, Proposed policy statement; request for comments, *Internal Appeals for Material Supervisory Determinations and Policy Statement Regarding the Ombudsman for the Federal Reserve System*, 83 Fed. Reg. 39, 8391-96 (Feb. 27, 2018). We submitted a comment letter in response to the Federal Reserve’s request for comments.

<sup>34</sup> This is the standard that the Board appears to be proposing to apply to initial appeals of material supervisory decisions under its revised supervisory appeals process. Board of Governors of the Federal Reserve System, Proposed policy statement; request for comments, *Internal Appeals for Material Supervisory Determinations and Policy Statement Regarding the Ombudsman for the Federal Reserve System*, 83 Fed. Reg. 39, 8391-96 (Feb. 27, 2018).

when assessed against clearly articulated and measurable factors and standards and based on evidence – in other words, that the assignment of the rating was not arbitrary and capricious.

**C. Increased Transparency**

Finally, summaries or redacted appellate decisions should be published to provide greater transparency about the appeals process and the standards used by the Bureau in assigning ratings. In publishing such decisions, it is imperative that *any* information that could potentially reveal the identity of the appealing institution would be redacted from the published decision. This practice would be consistent with the protections afforded by the Freedom of Information Act, under which information “contained in or related to examination, operating, or condition reports” prepared by an agency are exempt from disclosure.<sup>35</sup>

**IX. Institutions should be permitted, but not required, to use third party consultants to conduct assessments specified in MRAs or to assess the sufficiency of completion of an MRA.**

In certain cases, institutions may wish to retain third party consultants or other experts to conduct assessments specified in an MRA. Institutions should be permitted to use such third parties. However, the Bureau should not mandate that institutions use such a third party to conduct such assessment. Institutions should be permitted to leverage their internal risk management frameworks and expertise to assess a particular matter specified in an MRA or the sufficiency of completion of an action required by an MRA without expending the resources – which in some cases could be significant – required to contract with a third party. In addition, to the extent that institutions use third parties to conduct such assessments, the conclusions of the third party should be treated as though they were reached by the bank itself.

**X. The Bureau should establish clear standards for designating “larger” non-depository institution participants in consumer financial product markets pursuant to section 1024 of the Dodd-Frank Act.**

Pursuant to section 1024 of the Dodd-Frank Act, the Bureau has supervisory authority over all nonbank covered persons<sup>36</sup> offering or providing three enumerated types of consumer financial products or services: (1) origination, brokerage, or servicing of consumer loans secured by real estate, and related mortgage loan modification or foreclosure relief services; (2) private education loans; and (3) payday loans.<sup>37</sup> The Bureau also has

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<sup>35</sup> 5 U.S.C. § 552(b)(8).

<sup>36</sup> The provisions of 12 U.S.C. § 5514 apply to certain categories of covered persons, described in subsection (a)(1), and expressly exclude from coverage persons described in 12 U.S.C. § 5515(a) or 5516(a). “Covered persons” include “(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described [in (A)] if such affiliate acts as a service provider to such person.” 12 U.S.C. § 5481(6).

supervisory authority over “larger participant[s] of a market for other consumer financial products or services,” as the Bureau defines by rule.<sup>38</sup>

One of the Congressional purposes in establishing the Bureau was to create a level playing field between banks and non-banks. Indeed, the Bureau is authorized under the Dodd-Frank Act to ensure that “Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition.”<sup>39</sup>

While the Bureau has issued five rules defining larger participants in the following markets: consumer reporting (effective September 2012), consumer debt collection (effective January 2013), student loan servicing (effective March 2014), international money transfers (effective December 2014) and automobile financing (effective August 2015), the Bureau’s supervision and examination efforts to date have been largely focused on depositories, contrary to the Congressional purpose to establish a level playing field. As discussed in section VI(B), the Bureau has established a risk-based approach to examination frequency. With respect to those markets over which it has established rules, the Bureau should consider whether, in setting its examination schedule, it has appropriately considered the risks presented by the large players in those markets or whether it has unduly focused on depositories in this regard and rebalance its examination focus accordingly.

Further, there are a host of consumer financial services and product markets over which the Bureau could, but has not, identified larger participants over which it could, and should, assert supervisory authority in order to minimize consumer harm. For example, the Bureau has not asserted its authority over marketplace lenders, which are not subject to a robust regulatory framework. Consumers may be more susceptible to harm as a result of this lack of regulation in that and other markets. The Bureau should provide greater transparency into the process by which it identifies those markets in which it will exercise its authority to identify larger participants to be subject to the Bureau’s supervisory authority and solicit input on this process for making such determinations. For those markets in which it does not assert such authority, the Bureau should explain why it does not believe that consumers would be harmed by the lack of the Bureau’s oversight of that market.

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<sup>37</sup> 12 U.S.C. § 5514(a)(1)(A), (D), (E). The Bureau also has the authority to supervise any nonbank covered person that it “has reasonable cause to determine, by order, after notice to the covered person and a reasonable opportunity . . . to respond . . . is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.” 12 U.S.C. § 5514(a)(1)(C); *see also* 12 CFR part 1091 (prescribing procedures for making determinations under 12 U.S.C. § 5514(a)(1)(C)). In addition, the Bureau has supervisory authority over very large depository institutions and credit unions and their affiliates. 12 U.S.C. § 5515(a). Furthermore, the Bureau has certain authorities relating to the supervision of other depository institutions and credit unions. 12 U.S.C. § 5516(c)(1), (e). One of the Bureau’s mandates under the Dodd-Frank Act is to ensure that “Federal consumer financial law is enforced consistently without regard to the status of a person as a depository institution, in order to promote fair competition.” 12 U.S.C. § 5511(b)(4).

<sup>38</sup> 12 U.S.C. § 5514(a)(1)(B), (a)(2); *see also* 12 U.S.C. § 5481(5) (defining “consumer financial product or service”).

<sup>39</sup> 12 U.S.C. § 5511(b)(5).

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The Clearing House appreciates the opportunity to provide input on the RFI. If you have any questions, please contact the undersigned by phone at (202) 649-4619 or by email at [paige.pidano@theclearinghouse.org](mailto:paige.pidano@theclearinghouse.org).

Respectfully submitted,

A handwritten signature in black ink that reads "Paige E. Pidano". The signature is written in a cursive, flowing style.

Paige E. Pidano  
Managing Director and  
Senior Associate General Counsel  
*The Clearing House Association L.L.C.*