May 14, 2018

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

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

Dear Ms. Jackson,

Better Markets Inc.[1] appreciates the opportunity to comment on the above-captioned Request for Information ("Release"), issued by the Consumer Financial Protection Bureau ("CFPB" or "Bureau").

The stated purpose of the Release is to gather information that will be used "to achieve meaningful burden reduction or other improvement to the processes used by the Bureau to enforce Federal consumer financial law."[2] Unfortunately, too often now, when agencies declare their intention to make their regulations less burdensome, their real agenda is to roll back or weaken rules that are necessary to protect consumers and investors, hold wrongdoers accountable, and maintain the stability of our financial system. This type of de-regulatory initiative is often in direct proportion to the effectiveness of the rules currently in place.

We fear that the Release illustrates the point and that the exercise is unnecessary and misguided. The CFPB's enforcement program has proven to be an extremely effective component of its oversight program, as it has focused appropriately on stopping patterns of fraud and abuse among many financial firms, holding those firms accountable, and returning over $12 billion in ill-gotten gains to consumers. Many in the financial services industry are ardently committed to curtailing the Bureau's enforcement power, precisely because it has been so effective. But there

[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans' jobs, savings, retirements, and more.

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

is clearly no need to embark on a re-assessment of the "overall efficiency and effectiveness of [the bureau's] processes," which is the driving force behind the request for information in the Release.

Any effort to weaken the CFPB's enforcement program, in the guise of merely reducing burdens or implementing other so-called "improvements" that actually cater to the wishes of the financial services industry, would be a serious mistake. Moreover, such an initiative runs directly counter to the agency's primary congressional mandate to protect consumers.[3] By focusing on regulatory burdens, the Release threatens to betray this mandate. Rather than attempting to achieve "burden reduction,"[4] the Bureau should instead be considering ways to strengthen its enforcement procedures and fulfill its statutory purpose even more effectively.

<u>INTRODUCTION AND BACKGROUND</u>

Congress established the CFPB following the worst economic crisis since the Great Depression. Congress understood that a more comprehensive and effective approach to consumer protection in financial services was appropriate and necessary for multiple reasons. It is above all an important component of the reforms needed to prevent another financial crisis, as fraud and abuse at the retail level is the early breeding ground for financial products that ultimately fuel a crisis. That was the case leading up to the 2008 crash. A major ingredient of the crisis were fraudulent and abusive practices by financial institutions aimed directly at consumers, particularly in the mortgage lending market. Those practices generated the raw material for the crisis—millions of subprime mortgages that were securitized and then disseminated throughout financial markets far and wide. But since the short-term profits generated at the expense of consumers did not immediately appear to affect financial firms' safety and soundness, prudential regulators failed to intervene.[5]

Once the financial crisis hit, it was everyday American consumers who suffered the most, while banks and other financial service providers received huge taxpayer bailouts. The 2008 financial crisis exacted enormous costs, with conservative estimates showing that it destroyed at least $20 trillion in gross domestic product.[6] Despite being caused by Wall Street recklessness, it was mainly consumers who paid the price.[7] The crisis threw millions of Americans into long-term unemployment or underemployment, cast over 15 million homes into foreclosure, and obliterated $19 trillion in wealth, including retirement savings.[8]

Thus, large-scale financial crises inflict harm on consumers in multiple ways: Consumers are victimized by the abusive practices that seed the crisis, they suffer massive economic damage

3 *See* 12 U.S.C. § 5511(a) (2012).
4 Release at 5999.
5 David Carpenter, The Dodd-Frank Wall Street Reform and Consumer Protection Act 3 (2010), *available at* http://www.llsdc.org/assets/DoddFrankdocs/crs-r41338.pdf..
6 Better Markets, The Cost of Crisis, $20 Trillion and counting (July, 2015), *available at* https://www.bettermarkets.com/sites/default/files/Better%20Markets%20-%20Cost%20of%20the%20Crisis.pdf.
7 *Id.*
8 *Id.*

when the crisis takes hold, and they are even forced to pay the tab for rescuing many of the financial institutions that caused the crisis.

Congress also understood that establishing better safeguards for consumers was a matter of fundamental fairness. Specifically, Congress recognized the need for an agency to help level the playing field between consumers and financial firms armed with scores of lobbyists and lawyers, reams of fine print contracts, and deep coffers. [9] So in addition to implementing reforms designed specifically to protect the stability of the financial markets, the Dodd-Frank Act also created the CFPB to protect consumers.[10]

Since its creation, the Bureau has been a fierce defender of the millions of Americans who depend on basic financial products and services, ranging from mortgages to credit cards. In particular, its Office of Enforcement has returned billions of dollars to consumers whom companies have fraudulently or erroneously charged.[11] It has also imposed civil penalties to deter financial companies from further abuses and it has handled over a million consumer complaints.[12] These actions have protected a range of consumers, from college students to veterans.[13] All this has been accomplished without impeding economic growth and while banks and other financial services firms have recorded ever-increasing profits.[14]

However, the new administration has turned its back on these accomplishments and the consumers who have benefited. Since the Bureau's new leadership assumed control, important rulemakings have been halted or delayed and enforcement actions have all but ground to a halt, with some cases being delayed or dropped altogether.[15] This change is part of a fundamental shift in philosophy that has been brought to the Bureau, which emphasizes protecting the financial industry rather than consumers.[16] As an apparent step in this process, the Bureau has now issued the Release, aimed at "assessing the overall efficiency and effectiveness of its processes"—an exercise that is hardly necessary given the agency's extraordinary enforcement track record. According to the Release, the Bureau hopes "to achieve meaningful burden reduction or other improvements to the processes used by the Bureau to enforce Federal consumer financial law."[17]

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[9] Carpenter, *supra* note 5 at 3.

[10] § 5511.

[11] Consumer Financial Protection Bureau, By the Numbers (2016) *available at* https://files.consumerfinance.gov/f/documents/201701_cfpb_CFPB-By-the-Numbers-Factsheet.pdf.

[12] *Id.*

[13] *Id.*

[14] Matt Egan, *Despite Record Profits, Banks Are Playing The Victim*, CNN (Mar. 15, 2018) http://money.cnn.com/2018/03/15/investing/bank-profits-senate-banking-bill/index.html.

[15] Emily Stewart, *The Government's Top Consumer Watchdog Hasn't Taken A Single Enforcement Action Since Trump's Pick Took Over*, Vox, (Apr. 10, 2018) https://www.vox.com/policy-and-politics/2018/4/10/17218774/mick-mulvaney-cfpb-consumer-wells-fargo-equifax; Francine McKenna, *Mulvaney's First Fine At CFPB Is Second-Largest In History Of Agency*, MarketWatch, (Apr. 21, 2018) https://www.marketwatch.com/story/mulvaneys-first-fine-at-cfpb-is-second-largest-in-history-of-agency-2018-04-20.

[16] Memorandum from Mick Mulvaney to the Consumer Financial Protection Bureau (Jan. 23, 2018) https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2018/01/Mulvaney-memo.pdf.

[17] Request for Information Regarding Bureau Enforcement Processes, 83 Fed. Reg. 5999 (Feb. 12, 2018).

Unfortunately, this is the now-classic code for de-regulation, and it signals an effort to weaken, not improve, the CFPB's enforcement program.

The changes seen at the Bureau are part of a larger effort to deregulate the financial industry and roll back the changes made to protect our economy from another crisis and to safeguard consumers and investors. A resurgence of fraud and abuse and a heightened risk of systemic collapse, with all the suffering that comes with it, is what we can expect if the de-regulatory agenda of the new administration takes hold at the Bureau and the other financial regulatory agencies.[18] The Bureau should resist this tide of deregulation and instead fulfill its duty to consumers by protecting and preserving its enforcement powers and strengthening them where possible under the law and consistent with its overriding mission.

COMMENTS

The release seeks comment on a broad range of issues relating to the Bureau's enforcement processes, including communications between subjects of investigations and the Bureau, the Bureau's Notice and Opportunity to Respond and Advise Process, the right to in-person presentations, the calculation of civil money penalties, and coordination with other agencies. Below, we offer comment on three topics: general principles that should guide the Bureau's review, issues relating to investigations, and issues relating to penalties and settlements.

I. The Bureau Should Adhere to Several Core Principles As It Assesses Its Enforcement Process.

As the Bureau goes through this process of evaluating its enforcement procedures, it should follow three general principles: (1) the Bureau's statutory mandate is to protect consumers; (2) a strong enforcement process is key to fulfilling that mission; and (3) a robust regulatory regime has benefited both consumers **and** the financial industry by keeping markets robust, fair, and transparent.

A. The CFPB Must Adhere to Its Duty to Protect Consumers.

The Bureau should review its enforcement process through the lens of what is best for consumers, as its statute requires. Congress's purpose in creating the CFPB was to protect consumers.[19] All of the objectives which Congress laid out for the Bureau must be filtered through this overarching purpose. A major reason for having a separate agency focused on financial consumer protection was the tendency of prudential regulators to pay too little heed to the needs of consumers.[20] For the CFPB, the guiding principle must be the interests of consumers.

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18 R. M. Schneiderman, Did Deregulation Cause the Credit Crisis?, New York Times, (Oct. 8, 2008) https://economix.blogs.nytimes.com/2008/10/08/did-deregulation-cause-the-credit-crisis/?mcubz=0.

19 *See* 12 U.S.C. § 5511(a) (2012).

20 Carpenter, *supra* note 5 at 3.

While the Bureau has the authority to reduce "unwarranted regulatory burdens,"[21] it may only exercise this power to help consumers gain access to fair, transparent, and competitive financial products and services. Therefore, any analysis of the Bureau's enforcement procedures must remain focused on promoting these attributes of our financial system. Put another way: if proposed changes do not help consumers gain access to products and services that are "fair, transparent, and competitive,"[22] then the change is not in keeping with the Bureau's statutory duty. Easing enforcement procedures may well increase consumer access to financial products which are unfair, opaque, and uncompetitive, to the benefit of some financial institutions, but the harm to the consumers is clear and inconsistent with the agency's paramount mission.

B. A Robust Enforcement Process Is an Essential Element of an Effective Regulatory System.

The Bureau should also remember that an enforcement process that holds financial companies accountable for violations of law is necessary to make any regulatory regime effective. No matter how well written rules may be, they cannot be effective unless vigorously enforced. Other tools, like supervision and examination, may encourage compliance and detect noncompliance, but ultimately an agency must impose penalties for non-compliance in order for such tools to work.[23] Strong enforcement actions put financial firms on notice that they face real consequences for non-compliance, including monetary sanctions, conduct remedies, and the transparency and public awareness that goes along with enforcement.[24] And in addition to these punitive and deterrent effects, enforcement is often an important mechanism for helping consumers recover their losses.

Agency enforcement in the financial sector is especially necessary since the complex and opaque nature of most financial agreements and transactions make it more difficult for consumers to protect themselves. And the pervasive use of binding arbitration agreements limits the extent to which consumers can seek and obtain meaningful relief once they have been victimized by fraudulent or abusive practices. The deck is stacked against them in many ways: If they cannot join in class actions, they are unlikely to seek relief at all; if they do file an arbitration claim, they are unlikely to win; if they win, they are unlikely to receive the full measure of their damages and attorneys' fees; if they win a significant judgment, they face hurdles in collecting; and if they lose and attempt to appeal, they have virtually no chance of success. And the arbitration process is so secretive that the deterrent effect of public exposure arising from arbitration is nil.[25]

The CFPB's enforcement role is thus indispensable, and it has proven to be effective. The CFPB's current enforcement regime has been successful at recovering money for consumers and

21 § 5511(b)(3).
22 *Id.*
23 *See* Jean Braucher & Angela Littwin, *Examination As A Method of Consumer Protection,* 58 Ariz. L. Rev. 33, 85-88 (2016).
24 *See id.*
25 *See id; see also* Consumer Financial Protection Bureau, Arbitration Study (Mar. 2018) *available at* https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

generating public awareness to put the industry on notice.[26] The deterrent effect has led to companies' investing in compliance.[27] For these reasons, the Bureau should avoid changing its enforcement processes in ways that make them less effective as deterrents and compensatory mechanisms.

C. A Strong Regulatory Framework Has Benefitted Both Consumers and Industry.

The current administration has instituted a policy of deregulation.[28] These efforts to deregulate the financial industry are predicated on the false notion that the financial industry is suffering under the burden of overregulation. However, the data show just the opposite. Financial regulation has created the conditions for a sustained period of economic growth and prosperity, just as the securities laws did following the crash of 1929. Many prominent policymakers and market watchers have recently highlighted the ever-increasing profits in the financial sector, the presence of healthy liquidity levels in our markets, and the overall strengths of our economy.

For example, the FDIC data from 2017 shows that the financial sector has seen record profits, the rate of loan growth for the industry has exceeded the growth rate of GDP, and loan balances for community banks have been up a robust 7.7 percent year-over-year.[29] The FDIC Chairman reviewed this data in testimony before the Senate Banking Committee and noted that "annual increases in industry net income have averaged 7.8 percent per year since 2011. FDIC-insured institutions reported a record $171.3 billion in net income in 2016, marking a net increase of 44 percent over the prior five years."[30] The American Banker, a trade publication, also reviewed the evidence and concluded:

> Republicans have repeatedly asserted that the 2010 financial reform law has increased the cost of consumer lending and cut off access to credit. . . . Yet the available data indicates otherwise. Consumer credit has roared back in the six years since Dodd-Frank, with a 46% jump in outstanding consumer credit to $3.8 trillion. . . . **[T]he fact remains that mortgage, auto and credit card lending have all gone up since 2010**. [Mortgage] lending standards are as loose as they've been since the downturn. . . . Auto lending has been on a tear since the financial crisis . .

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26 *See id.*

27 *See* CFPB compliance cost report.

28 *See, e.g.,* Core Principles for Regulating the United States Financial System, E.O. No. 13,772, 82 Fed. Reg. 9965 (Feb. 3, 2017); Enforcing the Regulatory Reform Agenda, E.O. No. 13,777, 82 Fed. Reg. 12285 (Mar. 1, 2017); Executive Office of the President, Presidential Memorandum for the Secretary of the Treasury on the Orderly Liquidation Authority (Apr. 21, 2017); Executive Office of the President, Presidential Memorandum for the Secretary of the Treasury on the Financial Stability Oversight Council (Apr. 21, 2017); Reducing Regulation and Controlling Regulatory Costs, Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

29 Federal Deposit Insurance Corporation, Quarterly Banking Profile: First Quarter 2017, https://www.fdic.gov/bank/analytical/qbp/2017mar/qbp.pdf.

30 Statement of Martin J. Gruenberg, Chairman, Federal Deposit Insurance Corporation, on Fostering Economic Growth: Regulator Perspective before the Committee on Banking, Housing, and Urban Affairs, United States Senate, June 22, 2017, https://www.fdic.gov/news/news/speeches/spjun2217.pdf.

> . . Credit card lending has returned to pre-crisis levels with total lending hitting an all-time high of $996 billion. . . .[31]

And Bloomberg reached a similar conclusion:

> Lending declined initially after 2008, when the entire banking industry was almost wiped out by the collapse of the U.S. housing market. But it's grown steadily since then, expanding by 6 percent a year since 2013, far faster than the economy. Banks now have a record $9.1 trillion of loans outstanding.[32]

All of these trends from 2017, showing a remarkably robust financial services industry, have continued into 2018, though due to one-time changes in the tax law, the industry did not set record profits again.[33]

Claims that financial regulation will harm consumers and investors have been proven false again and again. This pattern has been the hallmark of opposition to financial regulation for almost a century. It was played out with each new effort to strengthen financial regulation, including the federal securities laws, deposit insurance, the Glass-Steagall Act, mutual-fund reform, and others.[34] In each case, the imagined harm from regulation failed to materialize. Accordingly, the disingenuous arguments once again being advanced to repeal or fend off regulation must be discounted. Instead, the Bureau should keep in mind that a strong regulatory system benefits both industry and consumers. And it must not weaken an enforcement process that has been an integral part of this extraordinarily successful regulatory framework.

II. The Bureau Should Not Add Unnecessary Mandatory Pre-Litigation Processes.

In the Release, the Bureau "seeks feedback" on possible modifications to a number of pre-litigation phases. As a general matter, those investigative tools and protocols currently strike a fair balance between the rights of those under investigation and the need for the Bureau to have strong, effective, and efficient methods at its disposal. In particular, where the Bureau has discretion, that

31 Kate Berry, *Four Myths in the Battle over Dodd-Frank*, American Banker, March 10, 2017, https://www.americanbanker.com/news/four-myths-in-the-battle-over-dodd-frank (emphasis added).

32 Zeke Faux, Yalman Onaran, and Jennifer Surane, *Trump Cites Friends to Say Banks Aren't Making Loans. They Are*, Bloomberg, Feb. 4, 2017, https://www.bloomberg.com/news/articles/2017-02-04/trump-cites-friends-to-say-banks-aren-t-making-loans-they-are (emphasis added).

33 *See* Federal Deposit Insurance Corporation, Quarterly Banking Profile: First Quarter 2018, https://www.fdic.gov/bank/analytical/quarterly/2018-vol12-1/fdic-v12n1-4q2017.pdf.

34 *See, e.g.*, Marcus Baram, *The Bankers Who Cried Wolf: Wall Street's History of Hyperbole About Regulation*, The Huffington Post, June 21, 2011, 6:56 PM, http://www.huffingtonpost.com/2011/06/21/wall-street-history-hyperbole-regulation_n_881775.html; Paul G. Mahoney, *The Origins of the Blue-Sky Laws: A Test of Competing Hypotheses*, 46 J.L. & Econ. 229, 249 (2003) ("In the 5 years following adoption of [the most stringent type of blue sky law statute], bank profits increased on average by nearly 5 percentage points . . . ."); *see also* John Heltman, *Mortgage Rules Not Chilling Market as Feared, Data Shows*, American Banker, Sept. 24, 2015, http://www.americanbanker.com/news/law-regulation/mortgage-rules-not-chilling-market-as-feared-data-shows-1076899-1.html (belying claims that new mortgage underwriting standards would "cripple credit availability" and spur banks to "quit the business entirely"); Comment of Fin. Planning Coal., July 5, 2013 (application of fiduciary standard to fee-based accounts did not cause predicted "parade of horribles"), https://www.sec.gov/comments/4-606/4606-3126.pdf.

discretion should be preserved. Enforcement attorneys familiar with cases are in the best position to determine when to bring in the subject of an investigation for an in-person meeting or when to invoke the "Notice and Opportunity to Respond and Advise" ("NORA") process. Adding required steps to the pre-litigation process could lead to the Bureau's wasting resources on unnecessary box-checking or to an unwarranted slowdown in the enforcement process.

A. Civil Investigative Demands ("CIDs") Must Be Maintained as an Effective Tool for Enforcement.

The CFPB's current process for issuing CID's correctly balances the interests of those being investigated with the enforcement needs of the Bureau. The CID processes that the Bureau uses have a lengthy record of ensuring agencies can gather critical facts while protecting the rights of those under investigation. The current CID processes are taken almost directly from the Federal Trade Commission Act (FCTA).[35] The FTC's processes are in turn based on the Department of Justice's own processes. These steps have a long and proven history of properly balancing the needs of an investigating agency and the investigated.[36]

The regulations that the CFPB has promulgated go further to help ensure a quick and fair process. The Bureau must notify CID recipients of the conduct that gave rise to the possible violation under investigation and the laws which govern such a violation.[37] The Bureau must also afford CID recipients the opportunity to meet and confer with the Bureau, enabling early clarification of any issues arising from the CID.[38] And CID recipients have the opportunity to challenge the CID both before the CFPB and in Federal Court.[39] These processes ensure that the Bureau can expeditiously and fairly conclude its investigations.

If the Bureau scales back its CID authority in the name of alleviating the "burdens" of an investigation on companies, or adds additional unnecessary layers of process, it will frustrate the Bureau's ability to get to the truth and it will prolong and delay the investigative phase. This will make the entire process more lengthy to the detriment of consumers who remain vulnerable to any violations that are ongoing.[40] The faster an agency can get to the facts, the faster it can act to halt wrongdoing and determine whether enforcement should follow.

Another factor that supports the need for a robust CID mechanism is the Bureau's statute of limitations. The CFPB has a 3-year statute of limitations.[41] This short time period puts exceptional pressure on enforcement attorneys to initiate actions relating to complex financial misconduct in a comparatively short period of time. If the Bureau makes CIDs more difficult and

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35 *Compare* 12 U.S.C. § 5562 with 15 U.S.C. § 57b-1.

36 *See, e.g., United States v. Markwood*, 48 F.3d 969 (6th Cir. 1995); *CFPB v. Source for Public Data, LP*, No. 17-16, 2017 WL 2443135 (N.D.T.X. June 6, 2017).

37 12 U.S.C. § 5562(c)(2); 12 C.F.R. § 1080.5.

38 12 C.F.R. § 1080.6(c).

39 12 U.S.C. § 5562(f)(l).

40 The Release flags "the length of Bureau investigations" as one area of review. 83 Fed. Reg. at 5999. To the extent this is a concern for industry subjects of investigation, changes in the CID protocol could well aggravate rather than alleviate this concern.

41 12 U.S.C. § 5564(g).

time-consuming to pursue, this would only intensify that pressure and increase the likelihood of serious violations of law escaping appropriate enforcement action.

B. The Notice and Opportunity to Respond ("NORA") Should Remain Discretionary.

The CFPB's NORA process, when deemed appropriate, provides targets of an investigation with notice of the subject's potential legal violations and an opportunity for the subject to submit a written statement to the CFPB explaining why no enforcement action is warranted for legal, factual, or policy reasons. Modeled on the U.S. Security and Exchange Commission's Wells notice process,[42] the NORA process begins before the Office of Enforcement recommends that the director of the CFPB institute enforcement proceedings. It is meant "to ensure that potential subjects of enforcement actions have the opportunity to present their positions to the bureau before an enforcement action is recommended or commenced."[43] The NORA response is included with the Office of Enforcement's recommendation to the director, who then decides whether to bring an enforcement action.

The CFPB should continue to model its process on the SEC's Wells process. The SEC model has a long history and balances the needs of an investigating agency with the rights of the prospective defendants. The Release asks whether the NORA process should be mandatory,[44] and the answer is no. Making the process mandatory would hamstring the Bureau when, for example, exigent circumstances may make immediate action necessary. The NORA process is only the first step in the enforcement process, and even if it is never initiated, the subjects of investigation still have ample due process and the ability to respond to and defend against any formal allegations of wrongdoing. The SEC's rules also make its process discretionary.[45] The SEC did so purposefully because "[i]t cannot place itself in a position where, as a result of the establishment of formal procedural requirements, it would lose its ability to respond to violative activities in a timely fashion."[46] The CFPB should adhere to the same practice.

C. In-Person Presentations Should Be at the Discretion of the Enforcement Attorney.

Similarly, the Bureau should not be required to afford subjects of potential enforcement the right to make in-person presentations to Bureau personnel before the agency decides to initiate formal proceedings. While it certainly is within the discretion of the enforcement bureau to speak with the subject of an investigation, it should not be mandatory. Enforcement attorneys are best positioned to determine when an in-person meeting is necessary and appropriate to help the Bureau pursue enforcement matters quickly and fairly. Additionally, adding a mandatory in-person meeting might slow down the enforcement process in exigent circumstances where time is of the essence.

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42 *See* 17 C.F.R. § 202.5(c); SEC Enforcement Manual § 2.4.

43 *See* CFPB Bulletin 2011-04 (Enforcement)("NORA Bulletin"), Nov. 7, 2011, *available at* http://www.consumerfinance.gov/wp-content/uploads/2012/01/Bulletin10.pdf.

44 *See* Release at 5999.

45 17 C.F.R. § 202.5(c).

46 *See id.*

III. Any Civil Money Penalty Matrix Must Include Elements that Ensure Strong Punishment and Deterrence.[47]

If the Bureau decides to implement a civil money penalty matrix, it should include a broad range of factors that encourage compliance, deter recidivism, and set an example for other members of the industry. The matrix should impose meaningful costs of non-compliance while being flexible enough to allow the Bureau to penalize companies appropriately in rare instances where the matrix does not include an unusual aggravating factor. Examining the CFPB's statute and the matrices of other agencies highlight some features that any matrix should include. Key guiding principles are that any Bureau matrix should weight the factors included in the statute more heavily; it should serve as a non-binding guide; and it should be the starting point for determining a penalty, not an endpoint.

The CFPB's statute makes plain a few features that must be included in any matrix. First, the statute explicitly includes intent, the size of the institution, evidence of good faith, gravity of violation, risk or loss suffered by consumers, and any history of previous violations as among the factors the Bureau must consider when formulating a civil penalty.[48] The statute also divides penalties into tiers, measured by the level of intent.[49] Intent should therefore be given more weight relative to other factors.[50] Given the CFPB's unique statutory mandate, it should also give special weight to the degree of harm that the violations inflicted on consumers.

Other agencies with statutory schemes similar to the CFPB's[51] have also created matrices that can provide helpful guidance for the Bureau. The first feature of most agency matrices is their non-binding and discretionary nature.[52] This allows enforcement attorneys to use the matrix as an initial guide for determining a penalty without usurping their discretion or bargaining ability. A matrix should be a tool to help ensure equitable and consistent treatment and should not "reduce the [civil money penalty] process to a mathematical equation."[53] Leaving the Bureau with discretion recognizes that matrices "are not a substitute for sound supervisory judgment" and that at times "it may be appropriate to depart from the matrices to reach a fair and equitable result that

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47 The Release also seeks comment on the standard provisions in Bureau consent orders. On this issue, we simply urge the Bureau to ensure that its settlement agreements or consent orders include, at a minimum, the following provisions: (1) strong monetary penalties to punish and deter wrongdoers effectively, without any tax deductability or credits that reduce the actual penalty; (2) sanctions against individuals responsible for the illegal conduct, not just the firms; (3) comprehensive narratives with sufficient detail to show what individuals violated what laws and rules, the amount of financial damage done to victims, and the amount of benefit the firm received from the illegal conduct; (4) conduct remedies to insure that practices are reformed at the institution; (5) restitutionary remedies to make victims whole; (6) admissions of wrongdoing; and (7) collateral consequences, such as regulatory disqualifications and bars.

48 *See* 12 U.S.C. § 5565 (2018).

49 *See id.*

50 Examining other agency matrices show that intent is typically weighted more than other factors. *See* OCC Matrix.

51 *Compare* 12 U.S.C. § 5565 (2018) with 12 U.S.C. § 1813(i) (2018).

52 *See, e.g.*, Office of the Comptroller of the Currency, Policies and Procedures Manual: Civil Money Penalties (Feb. 26, 2016) ("OCC Matrix") *available at* https://www.occ.gov/news-issuances/bulletins/2016/bulletin-2016-5a.pdf; Federal Deposit Insurance Company, Examination Manual: Civil Money Penalties *available at* https://www.fdic.gov/regulations/safety/manual/section14-1.pdf.

53 *See* OCC Matrix at 4.

achieves the agency's supervisory objectives."[54] Other agencies also typically include factors such as the extent the institution benefitted as a result of a violation, how long the violation continued (both before and after notification), a firm's history of violations, and whether the company attempted to conceal the violation.[55] As for mitigating factors, agencies typically look to the extent of restitution, cooperation, and good faith shown by the violator.[56]

This list of factors, along with the statutorily listed considerations, is a strong starting point for a matrix, but the Bureau should also clarify how it applies these factors or include additional factors to encourage compliance and prevent future violations. For example, the statute (and most matrices) takes into account the size of the institution and the institution's ability to pay. While this should be a factor to consider, the Bureau should continue its policy of focusing more on a firm's ability to become compliant with the law and CFPB regulations and less on its ability to pay a fine.[57] At some point, if a company is unable to comply with the law, then it should no longer have the privilege of being in business. The Bureau should continue to pursue appropriate fines—large enough to reflect the gravity of the offense and to deter misconduct--against entities both large and small.

Finally, assessing the degree of cooperation should include the firm's willingness to acknowledge details of the violation. This includes the role of individuals and firm management in the illegal conduct. This is necessary in part because, without acknowledging how exactly a company committed the violation, it is difficult for the company to change personnel and practices so that future violations do not occur.

Should the CFPB decide to promulgate a civil money penalty matrix, it can ensure that the matrix combines useful guidance with necessary flexibility by incorporating the factors and considerations set forth above.

CONCLUSION

We hope these comments are helpful in your consideration of the enforcement process.

Sincerely,

Dennis M. Kelleher
President & CEO

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[54] *Id.*
[55] *See, e.g., id.*
[56] *Id.*
[57] *See* Evan Weinberger, *CFPB Enforcement Chief Defends Money Penalty Process,* Law360 (Apr. 4 2016) https://www.law360.com/articles/779896/cfpb-enforcement-chief-defends-money-penalty-process.

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