

Comments of Financial Regulation and Consumer Protection Scholars and Former Regulators on
Docket No. CFPB-2018-0003

May 14, 2018

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

Dear Ms. Jackson:

Please see the submission below in response to the Consumer Financial Protection Bureau's ("the Consumer Bureau" or "the Bureau") Request for Information ("RFI") regarding Bureau Enforcement Processes (Docket No. CFPB-2018-0003; Document No: 2018-05784). We are academics who research and teach about consumer protection law, public enforcement of civil law, administrative law, financial regulation, and related topics.¹ Many of the below signatories have experience in public enforcement of consumer protection laws. We appreciate the opportunity to submit these comments for your consideration.

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I. THE CONSUMER BUREAU NEEDS A STRONG AND INDEPENDENT ENFORCEMENT PROGRAM TO PREVENT THE PROFOUND HARM UNLAWFUL FINANCIAL PRACTICES IMPOSE ON AMERICAN CONSUMERS

A. Unlawful Consumer Financial Services are Dangerous and Can Harm the Public

An enduring lesson of the financial crisis that caused the Great Recession is the simple recognition that consumer finance can be dangerous. While estimates vary, approximately 9.3 million American families lost their homes to foreclosure or short sales following the crisis.² In the aftermath of the financial collapse, nearly \$11 trillion in household wealth vanished.³ About eight million American jobs disappeared.⁴ The seasonally adjusted mean duration of unemployment nearly

² See Jonathan Horn, *Foreclosed? Maybe You Can Buy Again*, SAN DIEGO UNION-TRIB. (June 5, 2015, 9:41 AM), <http://www.sandiegouniontribune.com/news/2015/jun/05/foreclosure-shortsale-boomerang-buyers-real-estate/>; Laura Kusisto, *Many Who Lost Homes to Foreclosure in Last Decade Won't Return*—NAR, WALL STREET J. (Apr. 20, 2015, 12:50 PM), <http://www.wsj.com/articles/many-who-lost-homes-to-foreclosure-in-last-decade-wont-return-nar-1429548640>; see also Annamaria Andriotis et al., *After Foreclosures, Home Buyers Are Back*, WALL STREET J. (Apr. 8, 2015, 8:17 PM), <http://www.wsj.com/articles/after-foreclosures-home-buyers-are-back-1428538655> (providing alternative estimates); Tara Siegel Bernard, *Years After the Market Collapse, Sidelined Borrowers Return*, N.Y. TIMES (Oct. 22, 2014), <http://www.nytimes.com/2014/10/23/your-money/a-second-try-at-home-buying-after-the-market-collapse.html> (same).

³ U.S. FIN. CRISIS INQUIRY COMM'N, FINANCIAL CRISIS INQUIRY REPORT, at xv (2011).

⁴ Chris Isidore, *7.9 Million Jobs Lost—Many Forever*, CNN MONEY (July 2, 2010, 11:46 PM), http://money.cnn.com/2010/07/02/news/economy/jobs_gone_forever/.

doubled the peak duration in prior modern economic downturns.⁵ The combination of these larger macroeconomic trends and failed financial products exacerbated social problems and harmed millions of people. In the wake of the foreclosure crisis, the number of homeless families nationwide increased by 4% from 2008 to 2009.⁶ Neighborhoods stricken by foreclosures faced significant increases in crime.⁷ We have long known that families facing financial uncertainty and stress tend to have higher incidence of intra-family violence. This proved to be the case during the foreclosure crisis when sociologists found a significant increase (*sixfold* by one measure) in the likelihood that children would fall victim to physical abuse.⁸ And, the foreclosure crisis preceded a 35% increase in the number of households facing food insecurity.⁹

Consumer financial services can also be dangerous on a more personal level. Epidemiologist and public health scholars have found that the stress, forgone medical care, and even despair associated with financial distress are unhealthy.¹⁰ For example, scientific studies have demonstrated an association between home mortgage foreclosure and significant increases in illness, including heart attacks, strokes, respiratory failure, gastrointestinal hemorrhage, and kidney failure.¹¹ More recently, epidemiologists from the University of Washington found that use of fringe loan products, such as

⁵ Henry S. Farber, *Job Loss in the Great Recession and Its Aftermath: U.S. Evidence from the Displaced Workers Survey* 3–4 (Nat'l Bureau of Econ. Research, Working Paper No. 21216, 2015), <http://www.nber.org/papers/w21216> (“A related concern is the unprecedentedly long average duration of unemployment spells. . . . The mean unemployment rate reached about 20 weeks in the three earlier recessions . . . but rose to 37 weeks in the Great Recession.”).

⁶ M. William Sermons & Peter Witte, *State of Homelessness in America*, NAT'L ALL. TO END HOMELESSNESS & HOMELESSNESS RESEARCH INST. 1 (Jan. 2011), http://www.endhomelessness.org/page/-/files/The_State_of_Homelessness_in_America_2011.pdf.

⁷ Lin Cui & Randall Walsh, *Foreclosure, Vacancy and Crime*, 87 J. URB. ECON. 72, 80 (2015); Ryan M. Goodstein & Yan Y. Lee, *Do Foreclosures Increase Crime?* 3 (FDIC Ctr. for Fin. Research, Working Paper No. 2010-05, 2010).

⁸ Jeanne Brooks-Gunn et al., *The Great Recession and the Risk for Child Maltreatment*, 37 CHILD ABUSE & NEGLECT 721, 725 (2013).

⁹ Patricia M. Anderson et al., *Food Insecurity and the Great Recession: The Role of Unemployment Duration, Credit and Housing Markets* 1 (June 2014) (unpublished manuscript) (on file with Texas A&M University); see also Deborah A. Frank et al., *Heat or Eat: The Low Income Home Energy Assistance Program and Nutritional and Health Risks Among Children Less than 3 Years of Age*, 118 PEDIATRICS e1293 (2006) (evaluating the “association between a family's participation or nonparticipation in the Low Income Home Energy Assistance Program and the anthropometric status and health of their young children”); T. Jelleyman & N. Spencer, *Residential Mobility in Childhood and Health Outcomes: A Systematic Review*, 62 J. EPIDEMIOLOGY COMMUNITY HEALTH 584 (2008) (describing the harmful effects of residential mobility on pediatric health); Margot B. Kushel et al., *Housing Instability and Food Insecurity as Barriers to Health Care Among Low-Income Americans*, 21 J. GEN. INTERNAL MED. 71 (2006) (showing the harmful effects of food insecurity on health).

¹⁰ E. Thomas Garman et al., *Financial Stress Among American Workers: Final Report: 30 Million Workers in America—One in Four—Are Seriously Financially Distressed and Dissatisfied Causing Negative Impacts on Individuals, Families, and Employers* 17 (2005), <http://www.personalfinancefoundation.org/features/feature3full.pdf>.

¹¹ Ana V. Diez Roux, Editorial, *The Foreclosure Crisis and Cardiovascular Disease*, 129 CIRCULATION 2248, 2248–49 (2014). See also Mariana Arcaya et al., *Effects of Proximate Foreclosed Properties on Individuals' Systolic Blood Pressure in Massachusetts, 1987 to 2008*, 129 CIRCULATION 2262, 2266 (2014) (“The presence of real estate—owned foreclosed properties near participants' homes predicted higher measured systolic blood pressure in a large cohort.”).

payday loans, “was associated with 38 percent higher prevalence of poor or fair health.”¹² Tragically, studies suggest that the foreclosure crisis was partially responsible for a 13% increase in the national suicide rate through between 2005 and 2010.¹³

The economic, social, and personal risks to the public from financial services related problems are not merely historical. Recent Federal Reserve data show deeply troubling trends in the student loan market. The student loan delinquency rate has been climbing since the Great Recession and now exceeds 10%.¹⁴ This figure understates the potential problem from what the Minneapolis Federal Reserve Bank called “a rising mountain of student debt” because a substantial portion of outstanding student loans are not in the repayment stage while borrowers are still in school or deferment.¹⁵ These delinquency rates are particularly puzzling given that federal student loan borrowers should be able to avail themselves of income-based repayment programs. America risks its future by leaving millions of young people to start their adult lives deeply mired in delinquent debts that are not normally dischargeable in bankruptcy. Transcending partisan politics, Republican Federal Reserve Chair Jerome Powell recently shared our concerns stating: “You do stand to see longer-term negative effects on people who can’t pay off their student loans It hurts their credit rating, it impacts the entire half of their economic life.”¹⁶

B. America Needs a Strong and Independent Civil Law Enforcement Program Providing Oversight in the Consumer Financial Services Market.

We recognize that current consumer finance trends as well as the consequences of the Great Recession are complicated. But as scholars of consumer financial services and related fields, we believe that enforcement of laws protecting consumers from illegal consumer financial services practices is critically important in tempering the potentially harmful effects of consume finance run amok. Americans need an effective and efficient consumer financial services law enforcement agency to stop those practices that Congress has prohibited under federal law. Of course, there are many honorable and well-meaning individuals and businesses that are providing beneficial consumer financial services to the public. And, we recognize that effective law enforcement is not sufficient by itself to address every consumer finance policy problem. Nevertheless, the consumer finance policy agenda created by Congress cannot succeed if the legal levers of that policy remain unenforced or are subject to manipulation by those who might to frustrate Congressional intent. From our perspective as scholars, we believe that America has an ongoing need for creative, efficient, and aggressive consumer financial law enforcement.

¹² Jerzy Eisenberg-Guyot, et al., *From Payday Loans to Pawnshops: Fringe Banking, the Unbanked, and Health*, 37 HEALTH AFFAIRS 429, 429 (2018).

¹³ Jason N. Houle & Michael T. Light, *The Home Foreclosure Crisis and Rising Suicide Rates, 2005 to 2010*, 104 AM. J. PUB. HEALTH 1073, 1073 (2014).

¹⁴ See Ashwini Sankar, *A rising mountain of student debt: Blame (maybe) tuition hikes, the Great Recession and lower college completion rates*, FEDGAZETTE (April 4, 2018) <https://www.minneapolisfed.org/publications/fedgazette/a-rising-mountain-of-student-debt>.

¹⁵ *Id.*

¹⁶ Jeff Cox, *Student Debt Could Hold Back Economic Growth, Should be Discharged in Bankruptcy, Fed Chief Says*, CNBC, March 1, 2018, <https://www.cnbc.com/2018/03/01/student-loan-problems-could-hold-back-economic-growth-fed-chief-says.html>.

Free-market competition does not work well when businesses can use deceptive or misleading practices to compete. Markets work best when each business or individual makes informed, self-interested decisions that collectively allocate scarce resources in the most efficient distribution we can reasonably expect. Adam Smith famously described the phenomenon of self-interested individual decisions creating collective welfare as “an invisible hand” guiding policy to an optimal outcome.¹⁷ We normally expect that each individual decision maker within a market economy will rationally compare the cost of any financial service with its next-best alternative. Our hope is that when individuals select products or services with the lowest opportunity cost, inefficient products and services are disciplined out of the marketplace. However, if one supplier can misrepresent the costs or benefits of its products without consequence, then consumers cannot engage in the rational comparison of alternatives that drives the market to efficient outcomes. When negative consequences for deception are muted, some businesses will rationally choose to innovate through developing newer, more difficult to detect strategies for misleading customers.¹⁸ When consumers cannot distinguish between misleading and accurate offers, the businesses that compete by truthfully offering the best product or service are left at a competitive disadvantage. And, if consumers themselves recognize that they cannot identify value, they may rationally satisfice to the first sub-optimal option to avoid the wasted transaction costs of comparing alternatives. Markets need a watchdog that raises the cost of deceit beyond its marginal expected utility.¹⁹

C. The Consumer Bureau Has a Strong Track Record of Deterring Deceptive Consumer Financial Practices—But, this Successful Program Now Appears to Be in Jeopardy

Early on the Consumer Bureau established an admirable track record of productively enforcing our nation’s consumer financial services laws—especially with respect to deceptive or misleading practices. The Bureau has focused on cases where businesses engaged in deceptive or misleading practices more than any other type of case. As illustrated in Table 1, through the end of 2015 nearly 60 percent of the Bureau’s cases included a count for engaging in an illegal deceptive act or practice. Moreover, these cases were not small matters. Cases that included a deception claim produced almost 10.5 billion dollars in consumer relief in the form of refunds or forgiven debts. This figure amounted to 93 percent of the total consumer relief awarded by the Bureau during this time period. These figures far outpaced the number of cases and amount of relief produced in matters alleging violations of enumerated statutes, such as the Truth in Lending Act or the Fair Credit Reporting Act. The upshot is that the Bureau appears to have kept sight of the legal theory around which a

¹⁷ Adam Smith, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 225-26 (Richard F. Teichgraber, III, ed., Random House, 1985).

¹⁸ Paul Heidhues, Botond Köszegi, & Takeshi Murooka, *Exploitative Innovation*, 8 *AM. ECON. J.: MICROECONOMICS* 1, 3 (2016) (setting out an economic model that explains, “why firms in many financial industries have been willing to make contract innovations with deceptive features that others could easily copy, and raise the general concern that resources are directed disproportionately toward these kinds of innovations.”).

¹⁹ Paul Heidhues, Botond Köszegi, & Takeshi Murooka, *Inferior Products and Profitable Deception*, 84 *REV. OF ECON. STUDIES* 323, 339-341 (2017) (providing an economic model of suboptimal deceptive equilibrium in credit card and mortgage markets).

national consensus presumably exists. Surely all Americans can agree that deceptive or misleading consumer financial services are illegal and should be the subject of legitimate civil law enforcement.

Table 1. CFPB Enforcement of Selected Consumer Financial Laws, 2012-2015.

Law	Cases enforcing		Cases against		Consumer relief ^a		CMPs ^a	
	<i>n</i>	%	<i>banks</i>	<i>nonbanks</i>	<i>\$ × 1000</i>	%	<i>\$ × 1000</i>	%
Truth in Lending Act	18	14.8	4	14	306,901.2	2.7	22,616.0	5.8
Fair Credit Reporting Act	14	11.5	4	10	375,130.2	3.3	65,835.0	17.0
Equal Credit Opportunity Act	8	6.6	6	2	493,250.0	4.4	30,900.0	8.0
Fair Debt Col. Practices Act	11	9.0	1	10	782,699.7	7.0	42,150.0	10.9
Electronic Funds Transfer Act	6	4.9	1	5	64,229.1	0.6	10,600.0	2.7
Real Estate Settlement Pro’s Act	21	17.2	4	17	101,764.5	0.9	70,467.0	18.2
<i>Deceptive Acts or Practices</i>	73	59.8	19	54	10,467,098.1	93.2	253,836.0	65.5

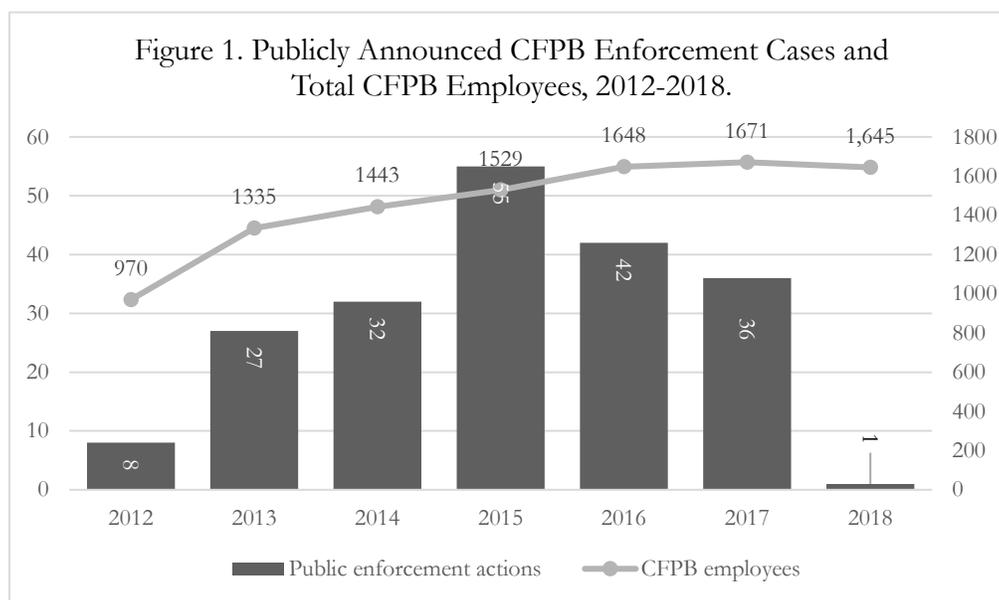
^aConsumer relief and civil money penalty figures reflect total awards generated in cases that included each type of statutory claim. These total awards may be attributable in part to other claims asserted in each case.

Source: Analysis of publicly announced CFPB enforcement actions, 2012-2015 in Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TULANE L. REV. 1057, 1094 (2016).

Nevertheless, in the past six months, the Bureau’s long-standing track record of bringing common-sense enforcement actions against businesses engaged in deceptive practices appears to be in jeopardy. From the Bureau’s inception through November of 2017 the Bureau announced 200 public enforcement actions. Beginning in July of 2012, the Consumer Bureau announced approximately 3.2 enforcement cases per month—almost one case per week. However, as illustrated in Figure 1, since the transition in leadership in November of 2017, the number of public law enforcement cases announced by the Bureau has plummeted to only one case in the past half-year.

By any customary metric for law enforcement productivity this decline in publicly announced cases would be a distressing sign. For example, “[p]olice department performance is typically measured through ‘clearance rates’ for criminal offenses, which usually require that at least one individual is arrested for the offense, charged, and turned over to the court for prosecution.”²⁰ In recent months, the Bureau’s clearance rate has crashed through the precinct floor—even though the number of employees available for law enforcement has held nearly steady. In our view, this raises fundamental questions about whether the Bureau’s leadership remains committed to deterring deception and other illegal activity in the financial services industry. Given this distressing trend, we encourage the Bureau to undertake immediate action to refocus and reinvigorate its law enforcement program.

²⁰ Anthony A. Braga and Desiree Dusseault, *Can Police Improve Homicide Clearance Rates?* HARVARD KENNEDY SCHOOL RAPPAPORT INSTITUTE FOR GREATER BOSTON POLICY BRIEFS 1 (November 2017), https://www.hks.harvard.edu/sites/default/files/centers/rappaport/files/braga_homicideclearance%20v7.pdf.



II. SPECIFIC STEPS IN FACILITATING AND EFFECTIVE BUREAU LAW ENFORCEMENT PROCESSES

A. Overview

In this section we respond to specific topics raised by the Bureau's RFI on Enforcement Processes. By way of overview, our responses draw on the four themes. To be effective the Consumer Bureau's enforcement processes should:

- Support career enforcement staff with the resources, flexibility, and decision-making authority they need to efficiently investigate, litigate, and settle cases;
- Minimize unnecessary meetings, communication, unproductive internal reports or memoranda, and other distractions that may be causing Bureau's recent decline in enforcement productivity;
- Promote remedial policies that both fully compensate consumers for all harm caused by illegal financial services practices and deter future illegal conduct with stiff civil money penalties; and,
- Shelter the Bureau's law enforcement fact-finding and decision-making from political pressure and corporate meddling.

B. Topics Raised by the Bureau's RFI on Enforcement Processes.

- **Bureau Career Professional Staff Should Retain Substantial Flexibility and Discretion in their Communications with Investigation Subjects.** Consumer financial services investigations, litigation, settlement negotiations, and consent order monitoring all require

highly context dependent communication. For example, the appropriate frequency and timing of communication with an investigation subject may depend on the size and resources of the subject, the risk of revealing confidential investigatory information, and the nature of the investigation itself. A money-center bank under investigation in a matter involving hundreds of millions of dollars may require more detailed and frequent communication than a modest case with relatively simple enumerated statutory violations. The Bureau may need a different communication approach when investigating reputable companies that are cooperating with the investigation than when investigating fraudulent actors who are obstructing the investigation in bad faith. Moreover, some investigation subjects may seek to take advantage of communication with staff to waste time or lobby for special treatment and favors. It is imperative that the Bureau's law enforcement processes remain independent from influence campaigns by special interests. Of course, all investigation subjects should be entitled to professional and courteous treatment. But, not every investigation subject should be entitled to detailed information on the unfolding nature of a complex investigation at a time and manner of their choosing. Our review of the Bureau's Policies and Procedures leaves us confident that the Bureau is currently well positioned to communicate effectively with investigation subjects.²¹ We do not recommend changes to existing policies.

- **The Bureau Should Maintain Flexibility in the Overall Length of Investigations, but Should Not Tolerate Delay or Obstruction by Investigation Subjects.** On the one hand we believe that prompt investigations are desirable both for investigation subjects and victims of unlawful consumer financial practices. Defendants should not be allowed to engage in dilatory practices in responding to civil investigative demands, scheduling hearings in aid of investigation, or producing documents. On the other hand, the impulse to investigate quickly should not justify closing yet-to-be completed investigations that are necessary to address illegal activity. A one-size-fits-all approach to the length of Bureau enforcement investigations would not reflect the complex reality of gathering facts needed to effectively respond to consumer harm. The same timing considerations don't necessarily apply to different actors and different types of illegal behavior. Moreover, imposing an artificial deadline or timeframe on investigations could create a perverse incentive for investigation subjects to engaging in stonewalling. If investigations are time-limited in some way, then subjects will be tempted to slow-walk fact-finding in order to extend the investigation beyond the relevant timeframe. Within our view, the Bureau's investigations have generally proceeded at a reasonable pace and been reasonable in overall length. However, we are concerned that in the past six months the Bureau's failure to announce a reasonable number of law enforcement actions suggests that investigations may be breaking down under new leadership. Bureau managers should speed investigations by backing up career professional staff in settlement negotiations, encouraging staff to proceed

²¹ CONSUMER FIN. PROTECTION BUREAU, OFF. OF ENFORCEMENT, POLICIES AND PROCEDURES MANUAL VERSION 3.0 37 (2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-and-procedures-memo_version-3.0.pdf [hereinafter "POLICIES AND PROCEDURES MANUAL VERSION 3.0"].

expeditiously, and setting firm expectations with investigation subjects hoping for special treatment; but, not by closing matters where there is credible evidence of illegal activity.

- **The Bureau Should Not Revise its Notice and Opportunity to Respond and Advise (NORA) Procedures.** Largely based on the process followed by the SEC, the Bureau’s optional NORA process is appropriate to the Bureau’s mission and is not in need of revisions. Under the current Bureau Policies and Procedures enforcement staff are expected to use the NORA process in most cases but have discretion to forego the process with approval from management when there is a valid reason to do so.²² The NORA process should not be mandatory and the timeframe for NORA responses should not be extended in a way that will slow down enforcement cases. The Bureau should not hinder career enforcement staff by creating additional procedural or drafting hurdles in order to complete the NORA process. And, Bureau staff should retain considerable discretion in determining what details are provided in a NORA call. The Bureau’s existing ten-point check list on NORA disclosures already provides sufficient guidance to enforcement staff on how to handle this optional process.²³ We believe that current NORA procedures strike a reasonable balance between subjects’ pre-suit interest in case-related information and the Bureau’s interest in promoting prompt law enforcement and efficient use of resources.
- **The Bureau Should Not Establish a Right for Financial Services Companies to Make an In-Person Presentation to Bureau Personnel Prior to the Bureau Determining Whether it Should Initiate Legal Proceedings.** A meeting of this type is unnecessary because investigation subjects already have ample opportunity to engage in settlement negotiations. Moreover, this meeting would be a costly duplication of the forty-page NORA response memos that the vast majority of investigation subjects already file with the Bureau staff. Similar law enforcement offices at the state and federal level do not provide investigation subjects with the right to make an in-person presentation. Moreover, if the Bureau were to create such a right, it is critical that the Bureau not allow this presentation right to create scheduling bottlenecks or undermine the negotiating position of line staff by requiring the presence of the Bureau’s senior enforcement leadership. Also, if investigation subjects get a right to present, so too should consumers that were harmed by the subjects acts or practices in question. Overall, we believe a required meeting of this type would serve primarily to create delays, establish a perception of unfairness, undermine settlement negotiations, and duplicate the litigation process in federal court or administrative proceedings.
- **The Bureau Should Not Revise its Civil Money Penalty (CMP) Procedures to Create a Quasi-Mathematical CMP “Matrix.”** Adopting a CMP matrix similar to the matrix in use by the Office of the Comptroller of the Currency (“OCC”) is likely to undermine the bargaining position of Bureau enforcement staff. A matrix will extend and complicate settlement negotiations by emboldening defense counsel to debate scoring within the various

²² POLICIES AND PROCEDURES MANUAL VERSION 3.0 at 94.

²³ *Id.* at 96.

component inputs of the matrix. On balance, a penalty matrix will also tend to act as an anchor inhibiting the Bureau's deterrence of the most serious violations of the law. In business planning, some companies will project a worst-case scenario for CMP liability based on estimates drawn from the matrix and rationally engage in illegal activity when their expected profits exceed their liability estimates. The current statutory factors adopted by Congress enhance deterrence by leaving the predatory strategist second-guessing whether Bureau staff (subject to judicial oversight) will successfully identify the point at which breaking the law is no longer profitable. Creating and implementing the matrix will also divert Bureau staff away from actually bringing enforcement cases. Moreover, to the extent that a matrix is helpful, existing policies and procedures already allow Bureau staff to take the Federal Financial Institutions Examination Council matrices under advisement in settlement negotiations.²⁴ Finally, Congress could have chosen to follow the approach taken by the OCC but decided not to. We believe the Bureau should not weaken its law enforcement bargaining position *sua sponte*.

- **The Bureau Should Use the Standard Consent Order Terms and Conditions in Use Prior to 2018.** In our experience, the provisions included in Bureau consent orders prior to 2018 were substantially similar to provisions typically found in orders of other regulators, including the OCC and the FTC. Much of the Bureau's standard orders appears to be derived from FTC consent orders. These provisions are time-tested and relatively uncontroversial. We do not believe it is advisable to modify them at this time. However, the Bureau's one public enforcement action announced in the past six months, against Wells Fargo, appears to depart from past practices in at least one important way. This order provides that the bank is to develop its own restitution plan subject to non-objection by the Bureau; but, it sets no minimum amounts and allows Wells to identify who is eligible and the amount of payment based on its determination of consumer "economic or other cognizable harm."²⁵ We are concerned that the use of this phrase along with the failure to fully resolve the details of the restitution program and the discretion given to the bank to make initial determinations about the dollar amount of restitution could be used to limit the recovery harmed consumers are likely to receive. In litigation with state attorneys general and private plaintiffs, banks and other financial services companies often take the position that consumers cannot demonstrate they were individually harmed in resisting payment to consumers affected by violations. In the future, we encourage the Bureau to negotiate a minimum floor for consumer relief prior to announcing settlement agreements and exclude

²⁴ *Id.* at 130.

²⁵ *Compare In re Wells Fargo Bank, NA*, File No. 2018-BCFP-0001, at ¶ 51 (April 20, 2018), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_wells-fargo-bank-na_consent-order_2018-04.pdf (failing to specify a minimum redress dollar amount and authorizing the bank to limit its own remediation plan to those customers it determines to have "an economic or other cognizable harm") *with In re Wells Fargo Bank, NA*, File No. 2016-CFPB-0013, at ¶ 73 (August 22, 2016), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/2016-CFPB-0013Wells_Fargo_Bank_N.A.--_Consent_Order.pdf (providing a minimum amount of redress to affected consumers of "no less than \$410,000" and nowhere authorizing the bank to limit relief based on "economic and cognizable harm").

the controversial concept of “economic or other cognizable” harm from its template agreement.

- **The Bureau Should Actively Coordinate with Enforcement Partners in Order to Maximize Consumer Relief and Deter Illegal Activity.** In general, the Bureau has actively and successfully collaborated with other federal and state law enforcement partners. Prior to 2016 the Bureau cited some form of collaborative enforcement in 33.6 percent of its publicly announced enforcement actions.²⁶ These cases produced about \$10.6 billion in consumer redress—which constituted about 95 percent of all redress awarded by the Bureau at that time.²⁷ The Bureau’s law enforcement partners have included United States Department of Education, the Department of Justice, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the OCC, HUD, the FTC, 49 state governments, the District of Columbia, and the Navajo Nation Department of Justice. In many of the largest, national cases, Bureau leadership should continue to anticipate that coordination with other law enforcement partners will likely be necessary. On the other hand, sometimes partnership enforcement actions can require additional time and resources with a relatively modest marginal increase in restitution and fines. In certain contexts, the CFPB has unique legal tools compared to state partners with respect to penalties, nationwide jurisdiction, and investigative authorities. Coordination is important, but the solution is not to simply say that if the states are bringing enforcement cases against a defendant (or a type of defendant), then the CFPB can abdicate its law enforcement responsibilities. We believe that the Bureau should take a flexible approach to inter-agency coordination that balances the benefits and drawbacks of collaboration with an eye toward deploying the most cost-effective deterrent of illegal activity possible.

III. CONCLUSION

In response to the worst financial crisis since the Great Depression, the United States Congress established the Consumer Bureau and charged it with primary law enforcement responsibility for our nation’s consumer financial services laws. By law, Congress gave the Bureau the fiscal resources necessary to create and deploy a formidable law enforcement team. We believe the Bureau has succeeded in creating a strong and effective Enforcement Office with sound policies and procedures. For several years the Bureau has used these resources, staff, and processes to successfully enforce the law. We recognize that financial institutions, their trade associations, and lawyers are likely to lobby for additional procedural hoops and barriers to law enforcement. In our view these comments should be taken with a healthy dose of skepticism. In 201 enforcement actions, the Consumer Bureau has amassed an overwhelmingly successful track record while its litigation setbacks can be counted on one hand. In every single Bureau enforcement action, the defendants had the right to make their case before a United States District Court Judge or federal administrative law judge—something millions of consumers are not entitled to because of binding

²⁶ Peterson, *supra* note X, at 1083.

²⁷ *Id.*

arbitration clauses and class action waivers included within their boilerplate financial services contracts.

Despite this critical role for public law enforcement, in the past six months, Bureau leadership has frozen hiring of law enforcement staff (even when needed to replace departures or retirements), requested \$0 additional funds transfers from the Federal Reserve to fund the Bureau, attempted to eliminate the Office of Fair Lending and Equal Opportunity, and announced only one public enforcement case with no specified minimum amount of consumer restitution. We believe and agree that elections have consequences. However, the public expects, the laws of the United States demand, and the constitutional oaths of Bureau's staff require the Bureau to continue vigorously enforcing consumer protection law.