

Taskforce on Federal Consumer Financial Law Report

Volume II



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Introduction

In Volume II, the Taskforce has grouped recommendations in alphabetical topics for ease of navigation. Topics range from important concepts like maximizing financial inclusion, to ensuring the Bureau deploys its resources to provide strong consumer protections, to emerging issues with newer subjects such as alternative data, and to ensuring that consumer protection rules are modernized and sufficiently flexible to adapt to rapidly evolving consumer financial markets and services. It is important to note that, if implemented, many recommendations span across multiple topics.

Each topic has a short outline, or preamble, that sheds light on issues that the recommendations seek to address. These preambles reference principles discussed with greater detail in Volume I. The preambles are followed by a series of recommendations. Each recommendation includes the specific government audience believed to possess the authority to act on the recommendation and the suggested mechanism or action needed to implement the recommendation.

1. Alternative data

As consumer credit markets evolve, new technologies and methods such as artificial intelligence (AI), machine learning (ML), and the use of alternative data are rapidly evolving to better serve customers. In addition to reducing cost, increasing speed, and improving accuracy, these technologies allow better predictions of the risk of default and prepayment, which can enable credit on better terms for more consumers. Industry is increasingly turning to alternative data (i.e., data outside of the scope of traditional credit reporting data) to increase predictive accuracy of their models and to subsequently lower risk, lower prices, increase competition, and increase financial access and inclusion to traditionally underserved customers. For a more robust discussion of alternative data, see Chapter 9 in Volume I of this Report.

Alternative data can potentially increase predictive power of underwriting and pricing models used by financial institutions, allowing institutions to expand access to credit to individuals previously considered uncreditworthy under traditional models. For instance, underwriting using cash flow data from a consumer's bank account gives a more holistic and real-time view of a consumer's actual financial situation rather than relying on point-in-time markers like monthly revolving balances that would be found on a traditional credit report. This expansion of the range of consumers a lender is willing to work with via lowering previously non-negotiable credit score or payment history requirements, particularly to consumers on the margin of acceptance under traditional regimes, expands access to previously thin-file or no-file consumers who previously could not be considered for credit. It may also benefit consumers with limited credit usage or consumers trying to restore good credit by enabling them to qualify for credit that could improve the consumer's financial well-being.

In light of the benefits of use of alternative data, regulators should be cautious about unduly and prematurely restricting the use of new sources of data as consumer norms and expectations about privacy and data usage continue to evolve, especially among younger consumers who will benefit the most from use of alternative data. This allows for greater inclusion of racial and ethnic minority consumers who are disproportionately thin- and no-file consumers.¹

Often, alternative data are provided by data aggregators, companies that collect information and sell it to lenders for use in their models. Safety and security questions raised by screen scraping-based approaches to alternative data aggregation and the bilateral negotiation process necessary for application-programming-interface-based approaches have impeded adoption of alternative data, but industry is accelerating resolutions to these problems as the business case becomes

¹ The CFPB Office of Research, *Data Point: Credit Invisibles*, 16 (2015) (https://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf).

clear. For a more robust discussion of data aggregation, see Chapters 9 and 11 in Volume I of this Report.

Currently, the use of alternative data is allowed, but liability concerns over its use, methods of collection, and compliance with credit reporting laws have slowed its widespread adoption by industry. Some data aggregation firms have resisted being subject to the Fair Credit Reporting Act (FCRA) as it would require them to comply with, among other consumer safeguards, resource-intensive record accuracy dispute resolution processes in the law.

The FCRA states that a consumer reporting agency is a “person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information for the purpose of furnishing consumer reports to third parties.”² A consumer report includes a communication of any information, including alternative data, by a consumer reporting agency that bears on a consumer’s creditworthiness, character, personal characteristics, mode of living and similar traits, which is used, expected to be used, or collected in whole or in part for the purpose of establishing a consumer’s eligibility for consumer credit or insurance, employment, or other permissible purpose under Section 604.³ If a data aggregator assembles or evaluates consumer information, and furnishes it to a third party for use in making a credit eligibility decision, it would appear to meet the definition of “consumer reporting agency” and would be subject to the FCRA’s privacy, accuracy, and security requirements.

The Taskforce recommends that the Consumer Financial Protection Bureau (CFPB or Bureau) clarify the FCRA’s application to data aggregators and the use of alternative data. Alternative data will be a consumer report and regulated by the FCRA if it is used, expected to be used, or collected in whole or part for determining eligibility for consumer credit, insurance, employment, or any other FCRA permissible purpose.⁴ A data aggregator that assembles or evaluates consumer credit information or other information for the purpose of furnishing consumer reports to third parties is likely to be a consumer reporting agency (CRA).⁵ Thus, whether an aggregator is a CRA is likely to be a factual question.

There is additional concern over the applicability of privacy provisions in other statutes that may bar companies from furnishing this information to consumer reporting agencies. For example, telecommunications billing information is regulated as customer proprietary network

² FCRA sec. 603(f), 15 U.S.C. §1681a(f).

³ FCRA, sec. 603(d)(1), 15 U.S.C. §1681a(d)(1).

⁴ *Id.*

⁵ FCRA sec. 603(f), 15 U.S.C. §1681a(f).

information and may be subject to special privacy protections.⁶ The Taskforce’s understanding of this law causes it to doubt whether a legal provision was intended to restrict a telecommunications company or public utility from reporting payment information. Moreover, the benefit to consumers, especially those thin- or no-file consumers on the margins who may become scorable or prime for the first time, can outweigh the privacy and security concerns. Moreover, when the reports are limited to credit performance, the privacy concerns are no greater than with any other type of payment information. Even reporting negative information from alternative sources provides a net benefit to consumers, because it is likely a signal of the overall creditworthiness of these consumers, thereby making the market more efficient. Because of these consumer benefits, any entity with an account that requires regular payments by a consumer, other than healthcare payments, should be allowed to report this information to credit bureaus regardless of privacy provisions in other statutes.

Some stakeholders have expressed concern that specific kinds of alternative data such as educational or geographic data may serve as proxies for race, sex, age, or other protected classes and that disparities in lending will emerge if these data are used. These concerns are often tied up with larger questions about algorithmic bias, interpretability and explainability, and black boxes in Artificial Intelligence/Machine Learning models. As with traditional data, decisions based in part on alternative data remain subject to compliance with fair lending law. If there is a disparate impact on a protected class that is not the result of a legitimate business interest, or a less discriminatory alternative exists, these laws could be violated. Institutions who do not wish to be sanctioned under these regulations will strive to reduce discrimination and algorithmic bias while also investing in tools to explain their outcomes to regulators when they are examined for compliance with fair lending law. Moreover, as discussed in Chapter 10, by increasing competition and increasing choices for consumers, as well as by increasing reliance on data-based underwriting systems, entry to the market by FinTech firms tends to reduce pricing disparities among different groups of consumers; thus, the Bureau should be careful not to deter new entry unduly. The Bureau’s Office of Innovation policies, such as the Compliance Assistance Sandbox, allow institutions to proactively collaborate with the Bureau on issues of fair lending and innovation.

1.1 Recommendations

1. The Bureau, Congress, and other federal and state regulators should identify and eliminate unnecessary or undue restrictions on the ability of consumer reporting agencies to report payment and cash-flow data. One means is for the Bureau to clarify the FCRA’s application to

⁶ See, e.g., 18 U.S.C. § 2702.

data aggregators and the use of alternative data. All sources of alternative data should satisfy existing privacy, accuracy, and credit reporting laws.

2. The Bureau, Congress, and other federal and state regulators should exercise caution in restriction of the use of nonfinancial alternative data. These data can be very useful indicators of creditworthiness, and existing fair lending laws prohibit unlawful discrimination.

3. Payment data from any entity with an account that requires regular payments by consumers is valuable, particularly for consumers with thin or no credit report files. The Bureau, Congress, and other federal and state regulators should, whenever possible, construe other statutes to allow such entities other than health care providers, to report the performance of that account for purposes of credit reporting. In particular, Congress should add an express exception in 18 U.S.C. §. 2702 (b) that would allow providers of electronic communications services to the public to furnish account information to CRAs.

2. Bureau organization

There is no one “correct” approach to internal organization and structure for a complicated agency such as the CFPB. Any structure that is adopted invariably entails tradeoffs and a system for promoting coordination across the agency to promote consistent interpretations of legal standards, a coherent approach to pursuing policy objectives, and accountability to agency goals.

The CFPB presents challenging questions of internal organization and structure because of the large number of regulatory “tools” at its disposal, or what the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) refers to as “functions.” Since its inception, the CFPB’s internal structure has been largely organized around its regulatory “tools,” i.e., regulation, enforcement, supervision, research, and consumer education, in addition to its statutorily mandated offices. In the opinion of the Taskforce, this tools-based organizational structure is not optimized to promote regulatory effectiveness for maximizing consumer welfare in the financial sphere and has created coordination difficulties within the Bureau and its approach to external stakeholders. Regulatory effectiveness has been hampered because this structure has made it more difficult for the Bureau to use an integrated approach to efficiently identify and apply the most effective tool or mix of tools to address a specific legal or policy issue. Coordination between different divisions for determining the appropriate tool or tool mix to accomplish a specific regulatory objective has been largely *ad hoc* and unsystematic.

The CFPB’s tool-based organizational structure produced a concern in some instances that rather than fitting the best tool to provide a solution, there can be a tendency to retrofit outcomes to the chosen tool. Thus, for example, the CFPB has been criticized for pursuing what is called “regulation by enforcement,” using enforcement to make industry-wide policy changes that might have been more effectively addressed through a regulation. Notice and comment rulemaking also provides protections under the Administrative Procedure Act and rights to non-party stakeholders that enforcement actions do not.

In some instances, the choice of a regulatory tool seems to have produced highly prescriptive, highly detailed regulations that try to anticipate and resolve every possible scenario under the regulation, rather than promulgating a more principles-based regulation and then using enforcement, supervision, or other tools (such as guidance or education) to develop the details. By starting with a determination as to which agency tool will be used to address a particular issue and then fleshing out the substance later, it is more difficult for the agency to effectuate its policies efficiently. Policy coordination is also difficult under the current tool-based organizational structure. With respect to the Bureau’s rules defining “Larger Market Participants” for determining entities subject to supervision, for example, the Office of Regulations is responsible for establishing the definition as to which entities will be covered. Yet

once the threshold is defined and established, the Office of Supervision Examinations (OSE) actually conducts the examinations and the Office of Supervision Policy (OSP) sets examination policy and priorities. Fragmenting oversight of particular markets and industries across multiple divisions makes it difficult to coordinate effectively to ensure that all divisions are pursuing the same priorities in a coherent fashion; for example, by ensuring that the Bureau’s enforcement, supervision, and rulemaking offices are all applying the same legal definition of terms such as “abusive” to participants in a given market.

Given this, the Taskforce recommends that the CFPB reorganize its internal structure so that it is primarily organized around *markets* instead of *tools*. Thus, for example, the CFPB might have organizations dedicated to credit cards, mortgages, small-dollar loans, FinTech, and third-party service providers (such as debt collectors and mortgage servicers). Enforcement, rulemaking, and supervision responsibilities would reside primarily within those organizations. Other tools, such as research, consumer education, and consumer complaints, might remain Bureau-wide, but staff in each of these areas would be expected to develop expertise in working with each of the markets-based organizations.

In the view of the Taskforce, this approach would be an improvement over the current organizational arrangement by starting with a primary focus on particular markets and their challenges and then determining which tools would be most effective in addressing those problems. A market-based organizational structure also would make it easier to use a combination of several tools to effectively respond to a problem. The Taskforce recognizes that this approach would create some coordination problems of its own, leading to a concern about maintaining consistent legal interpretations and policy goals across different markets, rather than across different tool-based organizations. Although both types of consistency are undeniably important, consistent guidance to market participants from all of the Bureau’s operations (i.e., enforcement, supervision, and rulemaking) is more important to enable regulated entities to predict how the Bureau will apply the law than ensuring that, for example, all rules or all enforcement actions are consistent with one another.

The Taskforce is aware that, for some markets, the Bureau has created some specialization within the tool-based unit, such as examiners that focus on the highly specialized issues involving consumer credit reporting. This is helpful (and certainly necessary) but still inferior to, for instance, a dedicated consumer reporting unit that could identify problems in an ongoing way and determine which tool or combination of tools could best address them.

We also believe the Bureau would find a market-based organization far more efficient. Now, when the Bureau determines to undertake a new rulemaking, it must confer – often extensively – with the subject-matter experts housed throughout the Bureau in many different units. This not only involves coordinating priorities to ensure the necessary staff members are available to provide support, but also inevitably pulls the management teams of those subject-matter experts

into the project. It is easy to see how many senior managers in the Bureau can become involved in policy decisions in a rulemaking, in addition to handling their responsibilities in their own unit. It is usually far more efficient to have the experts in a market, whether examiners, rulemaking staff, or enforcement lawyers, reporting up through a single management chain.

A markets-based approach to oversight also reflects the way consumers shop for and use different products and how providers supply them. Effective regulation should focus on these interactions and competitive consequences. For example, prepaid cards and bank accounts are treated as substitutes by many consumers, and regulations on one could influence demand and usage for the other. Similarly, consequences for consumers of restrictions on small-dollar loans are impacted by regulations involving competing products, such as pawnbrokers, bank overdraft protection, deposit advance products, and earned wage access products. It is the opinion of the Taskforce that reorganizing the Bureau's internal organizational structure around markets will orient the Bureau toward a consumer choice-centered approach to oversight that will facilitate policies that align with the dynamics of consumer choice.

The Taskforce also recommends that the CFPB create a new unit with responsibility for (1) promoting coordination and consistency across the Bureau's operations, (2) identifying the Bureau's top priorities and engaging in strategic planning operations to accomplish them, (3) conducting assessment of the Bureau's effectiveness, including providing independent review of cost-benefit analysis initially conducted by Bureau organizations, (4) conducting retrospective review of regulations and major enforcement initiatives, and (5) drawing on the Bureau's research and policy expertise to conduct competition and consumer protection advocacy. This new unit would assume some of the responsibilities currently executed by the Office of Strategy and the Office of Research as well as new responsibilities.

2.1 Recommendations

4. The CFPB should reorganize its internal structure and operations to instantiate a “markets-based” organizational structure, as opposed to a “tools-based” operational structure.
5. The CFPB should establish an office with responsibility to coordinate operations across the Bureau, engage in strategic planning to achieve the Bureau's strategic objectives, and in collaboration with the divisions, conduct assessment of the effectiveness of the Bureau's operations, including independent cost-benefit review and retrospective review of regulations and major enforcement initiatives. The CFPB should also add a competition and consumer protection advocacy function based in this new office.

3. Competition

The Bureau’s tools include supervision, enforcement, consumer education, research, and rulemaking. The Taskforce believes that a guiding principle that should inform the use of each of these tools is fostering competition because of its benefits to consumers.

3.1 Bureau effects on competition

The purpose of the Bureau as defined in the Dodd-Frank Act is to “ensure[] that the Federal consumer financial laws are enforced consistently so that consumers may access markets for financial products, and so that these markets are fair, transparent, and competitive.” This mandate to ensure competition in markets is crucial to protecting consumers, as described in detail in Chapter 8 of Volume I of this Report. Regulation, supervision, enforcement, and education are all tools that the Bureau can use to foster robust competition in consumer financial markets and enhance consumer choice and access to credit. Application of those tools, however, can also have unintended effects on competition. Accordingly, the Bureau should carefully consider the market effects of interventions of all types.

Currently, the Bureau does not have any staff dedicated exclusively to considering the effects of Bureau actions on the competitive landscape of consumer markets, nor does it have particularly strong relationships focused on these issues with other regulators. The Bureau should increase its internal capacity to research competition, potentially by bringing experts into the Office of Research. Data to evaluate competition in various markets do exist but are sometimes difficult for one agency to collect on its own. Therefore, the Bureau should cooperate with other regulators and enforcement agencies to obtain the necessary research data the Bureau may lack.

The Bureau has statutory authority to supervise nonbank covered persons of all sizes in the residential mortgage, private education lending, and payday lending markets. In addition, the Bureau has the authority to supervise nonbank “larger participant[s]” in markets for other consumer financial products or services, as the Bureau defines by rule. To ensure larger participant rules do not have unintended anticompetitive effects, the Bureau should attempt to determine whether there are threshold effects, or distortions of firm behavior as they approach thresholds for larger participant rules. Additionally, the Bureau should continue to consider costs and adverse consequences in establishing thresholds. For example, the Bureau should determine whether the \$10 billion threshold in the Dodd-Frank Act artificially stunts the growth

of financial service providers.⁷ Should the Bureau determine such threshold effects are harming growth and competition, it should consider means to ameliorate the unnecessary costs associated with such thresholds.

3.2 Cost of credit

The Bureau’s supervision, enforcement, and rulemaking activities often drastically affect the way that markets work by compelling changes in the behavior of individual providers and of the market as a whole. These decisions are made after considering voluminous evidence and detailed analyses of the costs and benefits of regulatory action, but insufficient attention is paid to the structure of individual markets themselves. A key consideration of the competitive landscape of markets is the cost of doing business, and actions to protect consumers and enhance competition should be informed by those costs.

An accurate assessment of the costs of various types of credit, as well as an understanding of how those costs influence the structure and dynamics of markets, can inform public policy decisions. Tracking costs and provision of credit on an ongoing basis can also reveal how Bureau and other regulatory action affects the way companies do business and what products consumers can access.

3.3 Facilitating competition in bank accounts

Markets with low switching costs are usually competitive, as consumers can be enticed by better offers. However, not all markets make it easy for consumers to change financial service providers. Bank and credit union accounts are one example where the relative difficulty of switching banks to opening a new account may lead consumers to continue an account despite the availability of alternatives with more attractive terms. Switching checking accounts is especially difficult for a consumer with limited liquidity. Before closing their existing account, they must wait for all outstanding checks to clear to avoid expensive “returned check” charges and potential adverse information appearing on their credit report. To be able to continue receiving banking services during this wait, they must have the funds to make the minimum initial deposit required by the new bank, thus maintaining minimum deposits at two banks simultaneously and paying any account fees at two banks. These costs in time and money may

⁷ See the regulatory framework discussion in Chapter 13 for additional information about the Bureau’s \$10 billion threshold for supervision.

lead consumers to remain in a banking relationship that costs more than an alternative banking relationship because switching costs are too high.

While there are legitimate fraud and security reasons that may warrant a painstaking process for account changes, there should not be unnecessary friction caused by the process. High switching costs allow incumbents to thwart competition from rivals regardless of price or service because customers decide to forego switching rather than incur the cost of the process they must use to take advantage of a better offer at a competitor.

Once a primary bank account is opened, consumers tend to retain that bank account for an extended period. Switching one's primary bank account occurs with substantially less frequency than for similar products, such as credit cards or prepaid cards. This lack of mobility in bank accounts may reflect a higher degree of consumer satisfaction with their primary bank relationship than with other financial provider relationships. But it also seems clear that the switching costs for bank accounts are higher than for other financial relationships and that this could contribute to dampened competitive dynamics. The Taskforce is not aware of any rigorous empirical study that estimates the possible frictions that might dampen competition in bank accounts and reduce overall satisfaction with bank accounts.

The Taskforce believes that steps could be taken to facilitate greater competition and portability of bank accounts, much as regulatory reforms facilitated competition among cellphone providers in the past. Today, data aggregators and other providers of consumer financial services have arisen to help consumers more easily manage bank accounts and place their money where it will generate the highest yield. These solutions provide clear value to consumers. But there might be additional interventions that could be taken to reduce switching costs and promote competition.

Other nations, especially in the European Union (EU) and Australia, have promoted bank account portability and competition via regimes that have come to be known as "open banking." The EU open banking regime, as laid out in the revised Payment Services Directive (PSD2), allows for portable bank account numbers that customers can use to easily switch banks across the EU zone. Lowering the switching cost for consumers is expected to increase competition and spur innovation in the payments sector, leading to better economic and consumer protection outcomes. The Taskforce recommends that the Bureau study ways to promote competition in domestic depository accounts, including how to lower switching costs and the potential of account number portability, and work with other regulators and Congress, as necessary, to implement any recommendations.

3.4 State licensure

Currently, a patchwork of state licensing laws makes it difficult for many types of consumer financial service providers to expand their business across state lines. While safeguards are important, inconsistent standards and confusing requirements can prevent safe and efficient providers from entering a market. Inconsistent requirements artificially constrain expansion of popular services and insulate declining sectors from competition, leaving consumers worse off if they are unable to benefit from a truly competitive landscape. What should be paramount in consumer protection at the state level is not the legacy of yesterday's arrangements, but the steps states can take to maintain protection while lowering the cost and increasing the quality of financial options. States should research their regulations and those of other states to better understand what they can do to eliminate barriers to competition caused by these inconsistencies while still protecting consumers, with the end goal being both a high standard of consumer protection and a low cost of doing business.

Some states have taken important steps, for example by adopting consistent standards in the Uniform Consumer Credit Code (UCCC). The UCCC was drafted in 1968 by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and has been updated since. More updates are probably needed. Adoption of the UCCC gives consumers consistent protections against unconscionable transactions, unfair contracts, and usurious credit terms by merchants and non-bank creditors in those states. In turn, merchants and creditors receive consistent treatment under the law, can save costs on compliance regimes in multiple states, and can more readily expand to additional states. There are currently nine states who use this code as a basis for their state laws. Colorado, Idaho, Indiana, Iowa, Kansas, Maine, Oklahoma, Utah, and Wyoming are all adoptees, and several other states have adopted substantially similar laws.

While the Taskforce does not specifically endorse adopting the UCCC, we believe that states should consider modeling their consumer credit laws after these principles and do what they can to alleviate unnecessary burden on financial institutions who wish to serve more customers. As an additional step, states can consider eliminating or significantly streamlining license requirements; we note that many states either do not license creditors or have adopted a simple registration requirement that authorizes the creditor to engage in a wide range of consumer financial services. In contrast, licensure in some states can take up to a year before institutions can legally operate, leaving consumers unable to choose their services and receive the benefits from competition between entrants and existing providers. For its part, the Bureau can conduct a review of state creditor licensing laws to identify the practices that produce unnecessary burdens and require excessive amounts of time for licensing approval, thereby creating unwarranted barriers to entry. In addition, the Bureau through its new strategy and policy unit (as discussed in Section 2 above) can also identify best practices through review.

3.5 RESPA settlement service packaging

Mortgage acquisition is a difficult, time consuming, and costly process that could be made easier and less expensive for the consumer by using a packaging of settlement services approach.

Shopping for a mortgage can be a complicated process, with a wide array of options available. Loan and origination costs can involve various types of charges and different types of fees from different service providers, which use complicated terminology that is not standardized. The Real Estate Settlement Procedures Act (RESPA) requires a good faith estimate listing each individual settlement charge and fee. Upon application for a mortgage, a borrower receives a disclosure form that itemizes individual entries for items such as closing attorney, title search, and mortgage appraisal, to name but a few of the numerous services that are part of settlement.

Information provided on the good faith estimate includes the cost, the service, and sometimes even the name of a specific service provider. Some settlement services are preselected by the lender with both the service provider and cost forced on the borrower. With other settlement services, the borrower is permitted to search out its own provider and negotiate a price or select and accept the lender selected provider at the presented cost.

Searching for all of these services can be time consuming and costly. Although some borrowers may do so, others may rely on referrals from their loan originator for many services. Originators, however, do not have strong incentives to send consumers to the lowest cost provider of services. Although savvy consumers may shop, others may not. Moreover, borrowers, likely most that infrequently enter into mortgage arrangements, can easily find the entire settlement process overwhelming or at least very effort intensive. For borrowers, whether purchasing or refinancing a home, attention is split between more pressing demands such as the need to search and select a home, work with real estate professionals, consider interest rates, come up with down payments, provide financial documentation, and an assortment of other distractions, often relegating the cost of settlement services to the back seat.

Consumer's inattention to the cost of closing charges results in limited pricing pressure for settlement services. At the same time, a lender has little concern for the cost of settlement services since it does not pay the costs. This, too, results in minimal pricing pressure. Without lender attention to cost, competitive price pressure on settlement service providers is replaced by competition among these providers for lender attention to gain the sought-after placement on a lender's settlement service provider referral list. To the extent that borrowers rely on referrals, and referrals do not depend mainly on price, inefficient service providers may persist, undermining market efficiency. The only limitation on this lack of incentive for the lender to

control third-party costs is the prohibition in RESPA Section 8 on “kickbacks,” which have been defined to include a service provider’s payment to the lender for referrals.⁸

The current RESPA-induced settlement process creates competitive economic inefficiencies that raise the cost of mortgage acquisition for consumers.

The most promising way to address these lingering non-productive economic costs in the typical mortgage transaction is to create a competitive market environment where lenders benefit from low closing costs and are incentivized to drive the costs lower. All-encompassing closing packages are likely to do so. Bundling settlement services into a package, however, inevitably raises questions about permissible payments to providers under Section 8 of RESPA. In 2002, the Department of Housing and Urban Development (HUD) proposed a “safe harbor” under Section 8 to facilitate such packaged settlement services with a guaranteed price.⁹

Packaged settlement would simplify and make the mortgage acquisition process less expensive for the consumer. Shoppers would save search costs by avoiding the need to individually find and select the various settlement services needed at closing. They would need only search for a single settlement price when otherwise preoccupied with lenders about mortgage interest rates, availability, and qualifications. Consumer focus on single settlement package prices would in turn inspire lenders to focus on cost. Lenders would demand the lowest possible price from settlement service providers. Settlement service providers would compete on cost. Quality of settlement services would not suffer as lenders would require competent settlement work to ensure proper income producing mortgage closings.

The packaged settlement process offers other efficiencies, too. Because settlement services are not bundled, the current RESPA system requires a specific breakout of each component of a closing cost. The effort to track and report these details involves burdens on lenders that create costs that ultimately fall on the consumer. Settlement packages would eliminate the need for this detailed tracking effort.

3.6 Recommendations

6. The Bureau should implement and enforce the law for the purpose of ensuring that markets for consumer financial products are competitive. Consider competition, effects on consumer

⁸ 12 C.F.R. § § 1024.14(b) and (f)

⁹ 67 Federal Register 49134 (July 29, 2002).

choice, and competitive effects of remedies in policy decision-making, including supervision, enforcement, and rulemaking.

- 7.** The Bureau should increase capabilities for researching competition issues, in line with the previous recommendation to include analysis of competition when taking action. The Bureau should cooperate or coordinate with prudential and other regulators to obtain necessary research data the Bureau may lack.
- 8.** The Bureau should determine threshold effects when establishing thresholds for Larger Participant rules. Should the Bureau identify serious threshold effects, it should determine why the phenomenon exists and address any anticompetitive effects.
- 9.** The Bureau should conduct a program of regular studies of the cost of lending in key product markets.
- 10.** The Bureau should conduct a general, ongoing study of the cost structure of different types of markets. The Bureau should look at total costs, not just cost of regulatory compliance.
- 11.** The Bureau should study ways to ease changing financial institutions and promoting competition, such as the feasibility of allowing consumers to port checking account numbers to a new bank.
- 12.** The Bureau should research the effect of state creditor licensure laws for covered entities and whether the burden and time for licensing approval create unwarranted barriers to entry.
- 13.** States should consider eliminating or streamlining licensing requirements for providers of financial services to avoid anticompetitive barriers to entry.
- 14.** The Bureau should remove regulatory barriers to allow guaranteed prices on packages of settlement services and mortgages to be made available to consumers. This exemption should be allowed for lenders and mortgage originators that offer loans without upfront fees:

A guaranteed-price package that includes the cost of all loan origination charges and other settlement services needed to close the loan;

A loan with an interest rate guarantee; and

A package price that remains the same throughout the mortgage application, approval, and settlement process, subject only to changes related to final underwriting conditions.

4. Consumer credit reporting

Congress enacted the FCRA in 1970,¹⁰ and the Dodd-Frank Act transferred exclusive rulemaking authority to the Bureau effective July 2011. The Bureau issued a consolidated restatement of the FCRA’s implementing regulation, Regulation V,¹¹ but otherwise it has not engaged in significant rulemaking related to consumer reporting. The Taskforce recommends that the Bureau amend Regulation V in various respects and research certain consumer reporting issues, and it recommends that Congress amend the FCRA to address civil liability for class actions.

4.1 Rulemaking and interpretive issues

Between 1970 and 2011, the Federal Trade Commission (FTC) issued many informal interpretations and guidance, including over 400 staff opinion letters and a staff compliance manual. The FTC initially consolidated many of these in its 1990 FCRA commentary,¹² on which the FTC sought public comment before publishing a final version in the Federal Register. FTC staff were revising the commentary for updates when Congress passed the Dodd-Frank Act. To assist the Bureau and the public, the FTC published a compendium of its FCRA interpretations, often referred to as the “40-Year Report,”¹³ that included updates to the 1990 commentary and other staff letters, informal opinions, and rulemakings.

The degree to which the public may rely on the FTC’s interpretations is uncertain. As with the prior 1990 commentary, the interpretations in the 40-Year Report have no binding legal effect, though courts have sometimes cited them as persuasive authority. The Bureau has stated generally that it gives “due consideration” to informal guidance that other agencies issued prior to the Dodd-Frank Act but that it determines whether to apply such guidance “in light of all

¹⁰ 15 U.S.C. §§ 1681–1681x. Congress has amended the FCRA numerous times.

¹¹ Bureau of Consumer Fin. Protect., *Fair Credit Reporting (Regulation V)*, 76 Fed. Reg. 79307 (Dec. 21, 2011); Bureau of Consumer Fin. Protect., *Correcting Amendments*, 77 Fed. Reg. 67744 (Nov. 14, 2012); Bureau of Consumer Fin. Protect., *Finalization of Interim Final Rules (Subject to Any Intervening Amendments) Under Consumer Financial Protection Laws*, 81 Fed. Reg. 25323 (Apr. 28, 2016).

¹² Fed. Trade Comm’n, Statement of General Policy or Interpretation; Commentary on the Fair Credit Reporting Act, 55 Fed. Reg. 18804 (May 4, 1990) (rescinded July 2011).

¹³ Fed. Trade Comm’n, *40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations*, 2011 WL 3020575 (July 2011), <https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrrreport.pdf>.

relevant factors,” such as the formality of the guidance and its persuasiveness.¹⁴ The public thus cannot predict reliably which aspects of the 40-Year Report the Bureau or a court may find persuasive. Consequently, consumers may be uncertain of their rights, while furnishers, CRAs, and users of consumer reports may be uncertain of their obligations.

The Taskforce recommends that the Bureau consider which of the FTC’s interpretations set forth in the 40-Year Report to adopt—specifically, that the Bureau identify the interpretations that it finds persuasive and to which it gives weight, updating them as necessary. Preferably, the Bureau would do so by codifying the interpretations as an expansion of Regulation V or as official commentary to Regulation V. Pending any rulemaking, the Bureau may wish to take an interim measure clarifying the aspects of the FTC’s interpretations on which the public may rely. Such an approach would give the public and courts greater certainty about how the Bureau interprets the FCRA.

When Congress enacted the Dodd-Frank Act, the FTC was also revising the content and model disclosures for the FCRA’s summary of consumer rights,¹⁵ notice to furnishers of information to CRAs,¹⁶ and notice to users of consumer reports.¹⁷ The FTC issued a proposed rule that would have, among other things, added information relating to the then-new Furnisher Direct Dispute Rule, improved the notices’ clarity, and deleted certain information that the FCRA does not require.¹⁸ However, the FTC did not finalize the rule because its authority transferred to the Bureau. In 2018, the Bureau issued an interim final rule amending the summary of consumer rights to incorporate new statutorily required language,¹⁹ but unlike the FTC’s proposal, it has not generally revised the notices.

The Taskforce recommends that the Bureau engage in rulemaking to update the summary of consumer rights, notice to furnishers, and notice to users. As the FTC observed, adding information about the Furnisher Direct Dispute Rule and revising the language on the notices could improve consumers’ understanding of their rights and furnishers’ and users’

¹⁴ Bureau of Consumer Fin. Protect., *Identification of Enforceable Rules and Orders*, 76 Fed. Reg. 43569, 43570 (July 21, 2011) (“The CFPB will give due consideration to the application of other written guidance, interpretations, and policy statements issued prior to July 21, 2011, by a transferor agency in light of all relevant factors, including: whether the agency had rulemaking authority for the law in question; the formality of the document in question and the weight afforded it by the issuing agency; the persuasiveness of the document; and whether the document conflicts with guidance or interpretations issued by another agency.”).

¹⁵ FCRA section 609(c), (15 U.S.C. § 1681g(c)).

¹⁶ FCRA section 607(d)(2), (15 U.S.C. § 1681e(d)(2)).

¹⁷ *Id.*

¹⁸ Fed. Trade Comm’n, Summary of Rights and Notices of Duties Under the Fair Credit Reporting Act, 75 Fed. Reg. 52655 (Aug. 27, 2010).

¹⁹ Bureau of Consumer Fin. Protect., *Summaries of Rights Under the Fair Credit Reporting Act (Regulation V)*, 83 Fed. Reg. 47027 (Sept. 18, 2018).

understandings of their duties. It also may be helpful to consider how the language that Congress added to the summary of consumer rights in 2018 interacts with other information on that form. To ensure the revised disclosures' efficacy, the Bureau should conduct consumer testing of at least the summary of consumer rights, if not all three notices.

The Bureau should also clarify the obligations of CRAs and furnishers when responding to consumer disputes. CRAs and furnishers report that they receive many repeated, frivolous disputes, with credit repair organizations submitting a large portion. But they express reluctance to use the FCRA's streamlined dispute-response procedures applicable to "frivolous or irrelevant" disputes because of uncertainty about when they have satisfied the requirement to "reasonably determine" that a dispute is in fact frivolous or irrelevant.²⁰ Investigating and responding to disputes thus reportedly imposes a greater burden on CRAs and furnishers than may be necessary to comply with the law and may lead to the removal of accurate information because the investigation is not completed in a timely manner. It also gives them an incentive to respond superficially to disputes—such as removing accurate negative information from a consumer's file to avoid additional disputes or rejecting a meritorious dispute without sufficient investigation. These outcomes are harmful generally to consumers and the market because they reduce the amount of accurate information available to creditors and other users of consumer reports.

The Bureau should clarify through rulemaking what constitutes a reasonable determination that a dispute is frivolous or irrelevant. In particular, it may be beneficial for the Bureau to identify examples of disputes that are (or are not) frivolous or irrelevant and the steps that CRAs or furnishers must or may take in various factual circumstances. The FTC has used this approach in some of its Guides, stating a general principle and then providing examples of its application.²¹ Relatedly, with respect to disputes that are not frivolous or irrelevant, the Bureau should consider clarifying the FCRA's requirement that a CRA or furnisher conduct a "reasonable [re]investigation" of disputed information.²² Again, the public may benefit from examples of disputes regarding various types of alleged furnishing errors and steps that would (or would not) constitute a reasonable investigation.

²⁰ FCRA section 611(a)(3) (15 U.S.C. § 1681i(a)(3)); 12 C.F.R. § 1022.43(f).

²¹ *See, e.g.*, Green Guides, 16 C.F.R. Part 260, and Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.

²² FCRA section 611(a)(1)(A) (15 U.S.C. § 1681i(a)(1)(A)); 12 C.F.R. § 1022.43(a).

4.2 Research issues

The Fair and Accurate Credit Transactions Act of 2003 required, among other things, the FTC to conduct a national study of the accuracy and completeness of consumer credit reports. As discussed in Chapter 11, the FTC’s 2012 report summarized findings from the first national study designed to engage all the primary groups that participate in the credit reporting and scoring process.²³ Stakeholders commonly cite to this report, including its finding that at least 24 percent of credit reports potentially contained errors.²⁴

The FTC and the Bureau continue to engage with stakeholders regarding the accuracy of consumer reports,²⁵ and the Bureau has indicated its intention to conduct a follow-up to the FTC’s influential 2012 report. As discussed in Chapter 11, the Taskforce wholeheartedly endorses these endeavors because they will add greatly to the Bureau’s and the public’s knowledge regarding the impact of recent changes in consumer reporting. The Taskforce recommends that the Bureau periodically study the accuracy and completeness of consumer credit reports, so that it can assess how the accuracy and completeness of consumer reports change over time, as well as monitor trends in the types of furnished information. In addition, while the FTC’s 2012 study addressed accuracy concerns that existed at the time, the Taskforce recommends that the Bureau also focus on how consistently various types of information are included in consumer reports, in light of the financial system’s increasing reliance on new technology and expanded datasets. These studies could provide valuable insight to the consumer reporting market, including to the accuracy and completeness of any non-traditional, or alternative, data that may be furnished.

The Bureau should specifically update its study of the tradeoff between accuracy and completeness implicit in the National Consumer Assistance Plan (NCAP) requirement for a minimum amount of identifying information before public record information is included in credit reports.²⁶ Because criminal records are not part of the NCAP, but are often part of

²³ Fed. Trade Comm’n, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003* (Dec. 2012), <https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf>.

²⁴ *Id.* at 63.

²⁵ For example, the FTC and the Bureau held a joint workshop in 2019 regarding accuracy in consumer reporting. See Fed. Trade Comm’n, *Accuracy in Consumer Reporting Workshop* (Dec. 10, 2019), <https://www.ftc.gov/news-events/events-calendar/accuracy-consumer-reporting-workshop>.

²⁶ The NCAP set new standards for the three national CRAs for reporting civil judgments and tax liens. Effective July 1, 2017, NCAP required the three national CRAs to remove public records from consumer credit reports if they could not match the information with the consumers’ name, address, and Social Security Number and/or date of birth and also update the information from courthouses at least every 90 days. See Consumer Data Industry Association, “New Public Record Credit Reporting Standards to Begin July 1, 2017; Civil Judgments and some Tax Liens to be

alternative data reports, the Taskforce recommends inquiry into whether criminal records meet the accuracy standards set by the NCAP and, if not, whether Bureau intervention through supervision or otherwise is appropriate. The Bureau should also study the problem of “file fragments” more generally.

As part of these studies, the Bureau should consider consumer reporting issues that arise in connection with a consumer’s bankruptcy. Commenters to the Taskforce Request for Information (RFI), as well as the recent American Bankruptcy Institute (ABI) Commission on Consumer Bankruptcy, noted that the interplay of the FCRA and the Bankruptcy Code can raise questions about how a creditor complies simultaneously with both laws.²⁷ The FCRA contains two discrete provisions regarding bankruptcy,²⁸ but the law does not state how a creditor must furnish accurate and complete information about debts owed by consumers who have filed bankruptcy or are co-liable with another person who has filed bankruptcy. The ABI Commission’s report identified several specific issues, including examples of potentially inaccurate furnishing or inconsistent reporting methods, though it noted that it had not yet explored whether these are widespread problems. The ABI Commission recommended further study.

The Taskforce echoes the ABI Commission and recommends that the Bureau research issues in consumer reporting related to bankruptcy. In particular, the Bureau should investigate the accuracy and completeness of information furnished regarding debts in bankruptcy and consider whether potential uniform reporting standards are necessary. Depending on the Bureau’s findings, it may wish to provide guidance to stakeholders or engage in rulemaking under the FCRA, or Congress may need to amend relevant statutes.

removed from many credit reports,” press release, June 28, 2017, at <http://s3.amazonaws.com/rdcms-cdia/files/production/public/PDFs/CDIA.NCAP.JulyChanges.6.28.pdf>. The Bureau reported that this change resulted in the removal of most civil judgments and half of all tax liens reported by the three national CRAs. See Claire Brennecke, Jasper Clarkberg, and Michelle Kambara, Public Records, Credit Scores, and Credit Performance, CFPB, Quarterly Consumer Credit Trends, December 2019, p. 2, at https://files.consumerfinance.gov/f/documents/cfpb_quarterly-consumer-credit-trends_public-records-credit-scores-performance_2019-12.pdf. The three national CRAs implemented the NCAP as part of a settlement with 31 state attorneys general. <https://www.experian.com/blogs/news/2015/05/20/consumer-assistance/>.

²⁷ Am. Bankruptcy Inst., *Final Report of the ABI Commission on Consumer Bankruptcy* § 5.05 (2019), <https://consumercommission.abi.org/commission-report>.

²⁸ FCRA section 605(a)(1) (providing that consumer reports generally must exclude information about bankruptcy cases that arouse more than ten years before the date of the report), (d)(1) (stating that any consumer report that contains information about a bankruptcy must include the specific chapter of bankruptcy and, if applicable, that the consumer withdrew the bankruptcy case before a final judgment). (15 U.S.C. § 1681c(a)(1), (d)(1).) The FTC’s 40-Year Report provides various guidance regarding bankruptcy (see Comments 605(a)(1)-1 through -3, 607(b)-6, and 611(a)-3), but they are limited in scope and, as discussed above, are not binding.

4.3 Security freezes

The Bureau should examine the success of consumers' request for security freezes. In 2018, Congress enacted the Economic Growth, Regulatory Relief, and Consumer Protection Act, which prohibited nationwide CRAs from charging a fee to place, remove, or temporarily lift a security freeze. The Taskforce notes that the CFPB Supervision and Examination Manual includes an assessment of compliance with requests for security freezes. However, the Bureau received feedback through its RFI that some consumers may nonetheless have difficulty placing or removing security freezes, and the volume of consumer complaints on this issue supports a degree of concern. Through its various tools, including supervisory and enforcement powers, The Taskforce urges the Bureau to look closely at this concern.

4.4 Legislation

The FCRA affords consumers a private right of action and the ability to seek damages for violations. Unlike other consumer protection statutes, however, it does not have any limitations on class action awards. For example, the Truth in Lending Act (TILA), the Equal Credit Opportunity Act (ECOA), the Fair Debt Collection Practices Act, and the Electronic Fund Transfer Act (EFTA) each limits class action awards to the lesser of \$500,000 or \$1,000,000 or 1 percent of the creditor's net worth.²⁹ To promote consistency among consumer protection laws, the Taskforce recommends that Congress amend the FCRA to impose appropriate limits on monetary awards in class actions.

Without appropriate caps, damage claims can create bet-the-company litigation over claims out of all proportion to consumer harm. The FCRA sets statutory damages for a willful violation of any provision of the Act in an amount not less than \$100 or more than \$1,000, in addition to unlimited punitive damages, plus court costs and attorney fees.³⁰

It is not clear to the Taskforce why Congress omitted a class action damage cap in the FCRA. Because the FCRA was among the first consumer financial protection laws Congress adopted, a clear precedent for capping class action damages had not yet been set. Perhaps it seemed less likely in 1970 than it has become now for FCRA allegations to lend themselves to class claims. Whatever the reason for the original absence of a cap on class awards, the Taskforce can see no

²⁹ TILA § 130(a)(2)(B), 15 U.S.C. § 1640(a)(2)(B); ECOA § 706(b), 15 U.S.C. § 1691e(b); FDCPA § 813(a)(2)(B), 15 U.S.C. § 1692k(a)(2)(B); EFTA § 916(a)(2)(ii), 15 U.S.C. § 1693m(a)(2)(B).

³⁰ FCRA § 616(a)(1)(A), 15 U.S.C. § 1681n(a)(1)(A).

reason to subject CRAs, users of consumer reports, employers, merchants, and other businesses to unlimited potential liability.

4.5 Recommendations

- 15.** The Bureau should engage in rulemaking to clarify the obligations of CRAs and furnishers with respect to disputes under the FCRA. In particular, the Bureau should provide guidance on when an entity has “reasonably determine[d]” that a dispute is frivolous or irrelevant, and it should consider clarifying what constitutes a “reasonable investigation” of disputed information. The Bureau should consider providing examples of conduct that does, and does not, satisfy these standards in various factual circumstances.
- 16.** The Bureau should engage in rulemaking to codify as appropriate the FTC’s interpretations of the FCRA, which are set forth in the FTC’s 40-Year Report. The Bureau should assess whether any of the interpretations requires updates or revisions.
- 17.** The Bureau should engage in rulemaking to update and revise the FCRA’s summary of consumer rights, notice to furnishers of information to CRAs, and notice to users of consumer reports. The Bureau should conduct consumer testing on the summary of consumer rights to ensure its efficacy, and it should consider testing the notices to furnishers and users.
- 18.** The Bureau should assess periodically the accuracy and completeness of consumer credit reports. The Bureau’s studies should include a focus on whether consumer reports include all the types of information that they should include.
- 19.** The Bureau should determine through its supervision, examination, and other tools whether consumers are able to obtain and remove security freezes appropriately.
- 20.** The Bureau should research consumer reporting issues that arise in connection with a consumer’s bankruptcy.
- 21.** Congress should adopt class action damages limitations for FCRA, to bring the FCRA civil liability provision in line with similar laws.

5. Consumer empowerment

Traditional approaches to consumer financial education appear to have had limited success in providing meaningful improvements in consumers' knowledge and financial well-being, although recent studies have started to provide some hope. Nevertheless, it is well-recognized that financial education can be an important tool for consumer empowerment by making markets more transparent and promoting market competition. Such foundational knowledge of consumer financial products and institutions is even more important today in light of the relentless and rapid speed of innovation and change, which necessitates a higher degree of foundational knowledge to understand new opportunities and risks.

On the other hand, consumer financial education is just one of the Bureau's five "tools," and it is important that the Bureau be mindful of both the potential of consumer financial education to promote financial well-being as well as its limits. Financial education is not a substitute for a robust and well-structured system of enforcement, supervision, regulation, and research. Financial literacy can provide a solid foundation for and complement to these other tools by enabling consumers to better protect themselves and facilitate more informed and efficient shopping behavior.

The disappointing effects of financial education may be attributed to a number of problems with the traditional approach. The goals are often poorly defined and frequently reflect the beliefs of those providing the information on what issues are important, rather than what consumers need. Information is not always provided at the most relevant time or in the most relevant period in a consumer's financial life cycle. For example, younger consumers may need more information on accessing a bank account and using credit, while middle-aged consumers may need more information with respect to retirement savings and investments. The Bureau's recent efforts to define the end-goal of consumer financial education with respect to promoting overall financial well-being and confidence is a valuable step toward providing more clear measures of assessment and allocation of resources, and the Taskforce encourages further development of financial education goals in line with those objectives.

In addition, much of consumer financial education is based on models that rely on statistical or mathematical rules for decisions under risk when probabilities are known. However, consumers make many decisions in which information is limited and the future is uncertain. Evidence suggests decisions made using heuristics and incomplete information may perform as well as rules based on extensive information and consideration of tradeoffs among alternatives.

5.1 General opportunities

The Taskforce has identified several specific research items in the next section that could be explored to further the goal of financial literacy, but there is much work to be done to understand what interventions actually work to help consumers. The literature has not found evidence that many financial literacy efforts are consistent or reliable at improving consumer financial well-being. The Bureau is well positioned to be a leader in financial education due to its unique Congressional mandate, expertise of the staff, and the relatively low opportunity costs for the Bureau to take up this work compared to other agencies. The Bureau should explore study methodologies that address when and how to intervene in consumer financial education, including incorporating credit and financial education issues in ongoing longitudinal panel studies such as the Panel Survey of Income Dynamics (PSID). The Bureau should also consider retrospective studies to test the efficacy of various consumer education interventions. To the Taskforce’s knowledge, neither the Bureau nor others to date have conducted serious research on this subject. Understanding what kinds of interventions work best is a prerequisite for many of the financial education proposals offered below.

5.2 Specific opportunities

The Bureau’s research and development of practical methods to measure consumer financial well-being³¹ are important steps forward in understanding the goals of consumer financial education and literacy. By focusing on both objective and subjective measurements of consumer well-being, the goals captured there provide a useful set of metrics to measure efforts to empower consumers throughout their lifecycle to be informed and responsible consumers.

The Taskforce urges the Bureau to continue to experiment and to conduct research on how to operationalize the normative goals of the Bureau’s financial well-being resources. We believe the Bureau should conduct research on how consumers actually make decisions, on how well their decision processes work, on how decision processes might be improved, and how best to provide financial education. The Bureau should focus on larger items in consumers’ budgets—mortgages, retirement savings, and auto purchases, for example. It should consider developing less cognitively-taxing tools like rules of thumb and heuristics rather than only optimizing decisions in particular choice contexts. In the research process, the Bureau should consider the extent to which “buyer behavior modeling” used in applied psychology studies and marketing would be useful in these contexts. The Bureau should conduct research on the extent to which the

³¹ Consumer Financial Protection Bureau, *Financial well-being resources* (2015). Accessed at <https://www.consumerfinance.gov/consumer-tools/educator-tools/financial-well-being-resources/>.

ballooning student debt crisis is affecting the financial well-being of consumers as well as their financial maturation broadly. As the Bureau is the only federal regulator with a statutory mandate to address and improve consumer financial education, the Bureau should invest the resources to become the leader in this research.

Specific research projects conducted by the Bureau or other research institutions can help advance knowledge of what works and what does not in the field of consumer education. Well-designed educational pilot programs will help individual consumers meet their financial goals and advance the Bureau's goals of increased consumer savings, the reduction of foreclosures, and the reduction of credit defaults among others. These pilot programs can have a variety of targets, varying by locality, participant demographics, length, and objective goals. The creation of many small, nimble pilot programs can create further areas of exploration and research to empower consumers.

Using Bureau infrastructure and expertise in innovation and project management, the Bureau could create a program analogous to the existing Tech Sprint program to field proposals for these pilot experiments, creating competition from inside and outside of the Bureau to identify the best proposals. This consumer literacy program would not be limited to these small educational pilot programs but could support a broader mission of encouraging private entities to partner with the Bureau to implement effective financial literacy programming.

Often, financial literacy education targeted at young people is designed entirely by financial professionals and ignores the large body of research on pedagogy broadly. While the Bureau should of course strive for a deep understanding of pedagogical research and reality, it is unlikely that the Bureau will be able to overcome this pitfall entirely in its design of educational programs. Thus, after identifying effective interventions that can be targeted toward young people, the Bureau should look to successful educational programs designed and administered by other government bodies as potential models to actually implement them. One such program is the Presidential Youth Fitness Program designed by the Department of Health and Human Services, which is heavily embedded into primary and secondary school physical education curriculums. A similar program for financial literacy fitness could be established at a national level, possibly including a partnership of government promotion (and existing resources) and private participation on a Board or Council. Such a program would be voluntary throughout the country but provide valuable education for kids, schools, and families, offering educators and families free access to courses and assessments for youth fitness at appropriate levels and motivational recognition to empower students to adopt and maintain financial well-being.

5.3 Recommendations

22. The Bureau should explore research methodologies that reveal more about when and how to intervene in consumer financial education, including incorporating credit and financial education issues in ongoing longitudinal panel studies such as the PSID. The Bureau should also consider retrospective studies to test the efficacy of various consumer education interventions.

23. The Bureau should continue to experiment and conduct research on how to operationalize the normative goals of its 2015 Report on financial well-being. The Bureau should conduct research to understand how consumers actually make decisions, assess how well their decision processes work, consider how decision processes might be improved, and determine how to disseminate the findings to consumers. The Bureau should first focus on larger items in consumers' budgets—mortgages, retirement savings, and auto purchases, for example. It should consider the extent to which consumer education should be focused on developing tools to engage in optimizing decisions in various contexts versus less cognitively taxing heuristics and rules of thumb. Finally, the Bureau should consider the extent to which the buyer behavior model used in marketing would be useful in this context.

24. The Bureau should establish an ongoing research program using educational pilot programs with specific, objective goals in mind, such as developing multiple pilots and approaches in differing localities, target demographics, objective goals, and length. If feasible, it should attempt the same pilot in multiple locations with similar target groups, goals, and lengths to control for variation and assess the efficacy of the program.

25. The Bureau should create a new program analogous to its Tech Sprint program around financial education at financial institutions and in the private sector generally. These tech sprints should provide as a benefit the opportunity for financial institutions to pilot these programs with supervision.

26. The Bureau should research the economic effects of student loans, especially on the financial well-being generally and financial maturation of younger consumers.

27. The Bureau should consider studying the efficacy of and subsequently experimenting with programs designed to educate and reward financial literacy for young consumers. One example could be a Presidential Youth Financial Fitness Program.

6. Cost-benefit and Bureau activities analysis

6.1 Regulatory cost-benefit analysis

To improve regulatory decision-making, transparency, accountability, and credibility, the Bureau should incorporate cost-benefit analysis into its regulatory program to a greater degree. In order to achieve these goals, the Bureau should adhere to established principles and best-practices of cost-benefit analysis (CBA) and include CBA analysts and economists in regulatory deliberations as early in the process as possible. To maximize the utility of CBA, the agency should consider costs and benefits in formulating its initial proposal and throughout the rulemaking process, culminating in the completed analysis. To enhance the objectivity of the Bureau's analyses, the Bureau should establish a system of independent review of its analyses.

An established policy of adhering to a set of principles and best practices of CBA standardizes important elements and provides a set of guidelines to hold agencies accountable to. The fundamental principles of CBA involve an analysis of the problem and relevant market failures; the identification of alternative solutions to the problem; an analysis of the costs and benefits of each alternative that is quantified and monetized to the maximum extent possible; and a recommendation to select the policy that maximizes net benefits. Other principles and best practices provide guidance on more technical matters, such as, among other things, establishing a baseline, discounting costs and benefits to present value, and the treatment of uncertainty. Still other principles and best practices of CBA are intended to advance the transparency of the rulemaking, such as providing clear presentation of the costs and benefits of regulations, clearly articulating analytical inputs to ensure reproducibility, and presentation of impacts using both pre- and post-statutory baselines. The principles and best practices of CBA are listed and discussed at length in Chapter 13.

Cost-benefit analysis must be able to accommodate qualitative information when quantitative and monetized values are unavailable. These qualitative benefits include distributional concerns, fairness, equity, and human dignity. Because of the importance of inclusion and credit availability to the Bureau's mission, the Bureau should evaluate any positive or negative effect on inclusion as part of its cost-benefit analyses as appropriate.

That said, CBA is most effective at achieving the goals stated above when all benefits and costs are quantified and monetized. Although many of the benefits associated with CFPB regulations are difficult to quantify and monetize due to a lack of quality research, the Bureau should

endeavor to conduct or sponsor the research necessary to develop reliable estimates of the benefits of avoided consumer harms.

In order to maximize the impact of regulatory CBA, it is important that the appropriate internal procedures be in place to ensure the lessons of the analysis are fully socialized in the agency and amongst decision-makers. To do this, economists and other analysts responsible for developing the CBA should be incorporated into regulatory deliberations as early as possible—and the decision-making process should allow for the analysis to be completed in time to inform, rather than justify, policy decisions.

Finally, to promote accountability the Bureau should subject its analyses to a review by an independent body. This review could be accomplished by existing regulatory authorities in the executive branch, such as the Office of Information and Regulatory Affairs (OIRA), which performs this task for Executive regulators. Alternatively, the Bureau could establish its own office that operates independent of the offices responsible for analytical development and regulatory decision-making. The Bureau should also consider codifying the principles of CBA in a rulemaking to further enhance the accountability of its analyses.

The Taskforce notes that many of its recommendations are consistent with recommendations made by the Administrative Conference of the United States (ACUS) in its report, “Benefit-Cost Analysis at Independent Agencies.” In its report, ACUS recommended that independent agencies consider adopting principles of cost-benefit analysis akin to Office of Management and Budget (OMB) Circular A-4, consultation with OIRA, and early incorporation of CBA into decision-making processes. ACUS also recommended that independent agencies should quantify and monetize benefits and costs whenever possible; produce transparent and reproducible estimates; and include clear summary information about the estimated costs, benefits, and transfer payments.³²

6.2 Evaluation of Bureau activities

As the Taskforce has emphasized throughout this Report, it is important that government policies and procedures are informed by the best available science and evidence. Maintaining a rigorous program for research and evaluation is essential to well-informed policy that deploys the Bureau’s resources efficiently to maximize its strategic and statutory goals. The Taskforce applauds the Bureau’s work to date in developing performance metrics under the Government

³² Admin. Conf. of the U.S., Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies*, 78 [Fed. Reg. 41,355](https://www.acus.gov/sites/default/files/documents/Copeland%20Final%20BCA%20Report%204-30-13.pdf) (July 10, 2013). Pg. 56. Report can be accessed at <https://www.acus.gov/sites/default/files/documents/Copeland%20Final%20BCA%20Report%204-30-13.pdf>.

Performance and Results Act (GPRA). Also, the Taskforce is aware of the Bureau's efforts to voluntarily comply with Title I of The Foundations for Evidence-Based Policy Act (2018), which emphasizes the importance of using evidence to address policy questions.

The Taskforce has reviewed the Bureau's performance metrics in its "Fiscal Year 2020: Annual Performance Plan and Report, and Budget Overview."³³ Generally, the Taskforce believes the strategic goals established by Bureau reasonably capture its statutory obligations and that the performance metrics identified are appropriate. However, the Taskforce believes that the performance metrics relate primarily to specific actions taken by the Bureau and that this work should be supplemented with additional metrics that track the general health of the markets they regulate using general welfare concepts in economics. These metrics could include tracking prices and quantities, competitiveness, and innovation.

Evaluation can be a useful tool to inform decisions about allocating scarce resources across the Bureau's activities. One area that is particularly ripe for additional research and evaluation is tool selection. If more information were available about the marginal benefits and costs of supervision and enforcement activities, the Bureau could allocate resources in manner to maximize compliance given resource constraints. The Bureau should evaluate the benefits and costs of enforcement and supervision to inform these decisions. It should also consider that enforcement and supervision may have economies (or diseconomies) of scale by firm size. Small banks may experience disproportionately higher costs than big banks due to supervision and enforcement, which may reduce competitiveness.

6.3 Retrospective examination of the Bureau's impact

The Bureau is required by statute to assess the effects of regulation on the marketplace before and after new rules are implemented. Undoubtedly major changes to the regulatory structure spurred by the passage of the Dodd-Frank Act and the creation of the CFPB have affected the makeup and structure of the consumer finance marketplace, and it is important to understand how and why those disruptions have shaped consumer experiences. The Bureau should, as appropriate, retrospectively analyze the effects of its rulemakings on aspects of the marketplace that affect consumer protection: competition, consumer understanding of financial products,

³³ Consumer Financial Protection Bureau (2020), *Fiscal Year 2020: Annual Performance Plan and Report, and Budget Overview*. Accessed at https://files.consumerfinance.gov/f/documents/cfpb_performance-plan-and-report_fy20.pdf.

the prevalence of bad actors, the overall regulatory compliance of firms, inclusion, and access to credit.

Enforcement is an important tool that the Bureau uses to ensure markets are “fair, transparent, and competitive,” and other areas of Bureau operation should consider the effects of their actions on the consumer protection landscape of a particular market, including competition, deterrence, and access to credit. As of now, little formal analysis is done on previous enforcement cases to understand how the principles applied in those past cases affect consumer protection today and in the future.

To better understand its effects on markets, the Bureau should conduct retrospective analyses of completed cases, with a specific eye toward identifying market impacts and assessing costs and benefits of those impacts, including their impact on access to credit and on competition. Learning from these analyses should be used as an input into the decision-making process before new cases are opened. The FTC conducted similar analyses in its work on hospital mergers and acquisitions, and market-specific retrospective studies of selected CFPB cases, preferably published publicly (with appropriate deference to protected non-public information) would go a long way to enhance both the Bureau and other market participants’ understanding of the effects of enforcement action on competition.

6.4 Recommendations

28. The Bureau should adopt principles like those identified in Chapter 13 in a public-facing statement to promote accountability and transparency. The Bureau could develop these principles and best practices on their own or voluntarily adopt OMB Circular A-4. The Bureau should consider implementing these principles via rulemaking.

29. The Bureau should establish independent review of its regulatory cost-benefit analyses by either staffing an office of cost-benefit analysis at the Bureau and establishing the appropriate internal controls to promote independent review, or by voluntarily submitting its analyses to OIRA for review.

30. The Bureau should conduct or sponsor high-quality empirical work to monetize the reduction in risk of consumer harms that comprise the benefits of its regulations.

31. The Bureau should involve staff responsible for conducting regulatory CBA in the development of the regulation at the earliest possible point in the process. The analysis should be completed in time to inform, rather than justify policy decisions.

- 32.** Because of the importance of inclusion and credit availability to the Bureau’s mission, the Bureau should evaluate any positive or negative effect on inclusion as part of its cost-benefit analyses as appropriate.
- 33.** The Bureau should supplement the performance metrics its developed for the GPRA with additional metrics that track the general health of the markets they regulate using general consumer welfare concepts in economics. These should include metrics intended to capture inclusion, competition, innovation, prices, and quantities. These metrics should be incorporated into the Bureau’s GPRA performance plan as soon as possible.
- 34.** The Bureau should research and evaluate the benefits and costs of supervision and enforcement activities and use that research to inform resource allocation decisions. The Bureau should analyze economies or diseconomies of scale by firm size in the benefits and costs of supervision and enforcement as part of this research.
- 35.** The Bureau should conduct selective case retrospectives to identify the market impacts of the Bureau's cases and assess the costs and benefits those impacts. The Bureau should evaluate selective cases grouped by market and look to FTC’s work on mergers and acquisitions as a model. It should seek to answer the question: how do the principles applied in past cases affect credit products today, and how will they affect such products in the future?
- 36.** The Bureau should conduct retrospective research on the effects of Bureau regulations on consolidation of financial institutions, institutions exiting markets, and effects on competition and consumer protection (as different cost structures have different impacts on consumer use).

7. Deposit accounts

As discussed in Chapter 10 of Volume I of this Report, a significant percentage of consumers are only marginally included in the financial system. They are unbanked or underbanked. Reasons for avoiding banks vary. Included among reported reasons are that consumers do not have enough money to justify the expense associated with maintaining a bank account, think bank fees are too high, do not need an account, and dislike or distrust banks. These consumers often live from paycheck to paycheck, and quick access to their money for a variety of regular or emergency needs can necessitate multiple transactions within a month. Additionally, delays in the payments clearing system can reduce the usefulness of a bank account for liquidity-constrained consumers, forcing them to rely on alternative financial services providers such as check cashers and others who can rapidly provide liquidity. Finally, unbanked and underbanked consumers may avoid traditional banks because they need flexibility in how they access and transact smaller quantities of money, which is difficult to do with traditional banks' barriers to starting and closing new bank accounts (detailed in the Competition section above).

Because of these various issues, unbanked and underbanked consumers use a variety of nonbank firms (check cashers, money order vendors, payday lenders, and pawnshops, for example) for their financial needs, which primarily involve payment services or short-term credit and are relatively expensive.

Increasingly, many consumers use prepaid cards for paying ongoing living expenses instead of a bank account. Depending on a consumer's financial circumstances, a prepaid card may be used to make payments at a lower cost than a checking account. Prepaid cards are often less costly than checking accounts and attractive for users who do not have sufficient balances to avoid some types of bank fees. Despite these differences, they function very similarly in the consumer's wallet. However, one key feature of each is different: the treatment of overdraft by consumers. Checking accounts are subject to overdraft protection rules under Regulation E, which allows consumers to opt-in to overdrafts if that is a benefit that they desire. Overdrafts on a prepaid card, however, are treated as extensions of credit under Regulation Z, the same regulation that governs credit cards, which contains substantially more required disclosures and an ability-to-repay analysis on the consumer. These requirements are costly, and subsequently many prepaid card issuers have ceased offering overdraft services at all, even though some consumers may benefit from them and desire them. The Taskforce takes the view that as prepaid cards and debit cards linked to a checking account serve effectively the same purposes for consumers, there should be no distinction in how overdrafts are treated between the two. Moreover, the termination of overdraft privileges has reduced consumer choice and may have unintentionally reduced consumer welfare. Overdrafts on the two products should be afforded

consistent regulatory treatment, and Regulation E's approach provides the more appropriate framework.

The Taskforce endorses measures aimed at increasing transparency, modernizing, and promoting competition for bank deposit and similar services. Measures include standardizing disclosures to facilitate comparisons among products (such as prepaid and debit cards), removing restrictions that inhibit competition on price or product features (such as price controls on debit card interchange income, which may cause banks to increase fee income), taking advantage of improvements in technology to add value to products (such as speeding up availability of deposited funds, which may lessen demand for payday loans), and eliminating seemingly obsolete regulatory restrictions (such as limits on the maximum number of permitted monthly savings account withdrawals).

7.1 Recommendations

37. The Bureau should expand access to the payment system by unbanked and underbanked consumers and ensure consistent treatment of consumers and similar financial products by applying the same Regulation E rules to consumers using prepaid cards and debit cards. Both types of card issuers should provide the same Regulation E opt-in and just-in-time fee disclosures and allow issuers to apply new funds first to overdraft fees and negative balances.

38. The Federal Reserve and the Bureau should take all reasonable measures to speed up the payments clearance system by updating Regulation CC on expedited funds availability as appropriate to reflect improvements in the technology for faster check clearing. Updates to Reg CC should result in:

To the extent reasonably possible and consistent with legitimate concerns about fraud, giving consumers the same prompt access to checks deposited by mobile devices as is required for ATM deposits, and

Treating deposits to prepaid accounts the same as deposits to checking accounts.

39. The Federal Reserve should maintain the recent interim final rule amending Regulation D to the six-transactions-per-statement cycle limit for savings accounts because, in addition to supporting the Federal Reserve's monetary policy goals, eliminating this limit provides consumers with needed flexibility in times of financial crisis.

8. Disclosures

8.1 Regulatory principles for disclosures

Conceptually, disclosure is a more attractive approach to consumer protection than is substantive regulation of financial products and services because it respects consumer preferences and allows for the different circumstances of different consumers. Substantive regulation must either limit all consumers to essentially the same product or establish criteria for determining who is eligible for which product. Even product features that may seem highly suspect in most circumstances, such as no- or low-documentation loans, have their place in serving consumer needs, as numerous consumers who are self-employed or gig workers have discovered. Such income is very difficult to document in a way that is both reliable and predictive of future income. Well-designed disclosure regulation can also facilitate shopping behavior by consumers, not only making it easier for them to find the products and services they desire but also making markets work more effectively overall.

Despite its key role, effective disclosures are hard to come by. To make informed financial decisions, consumers must be exposed to, pay attention to, comprehend, accept, and then retain information necessary to evaluate a transaction. With so many steps in the decision-making process, there is ample opportunity for intervention and failure, leading to less efficient outcomes for consumers. For an in-depth discussion of disclosures, please see Chapter 7 of Volume I of this Report.

In the view of the Taskforce, disclosures that provide additional information must seek to reduce the costs to consumers of locating the product or service they want. Disclosures should be focused on standardizing terms and facilitating comparability, because these approaches can potentially reduce the costs of obtaining information and shopping among products and providers. Disclosures should be tightly focused on information that is important to consumers and directly relevant to their purchasing decisions to avoid the problem of information overload. Disclosing all possible details and contingencies may appear to *provide* more information, but, as discussed above, consumers may actually *use* less information.

Other disclosures may serve primarily to document the details of a transaction. In a mortgage transaction, for example, consumers likely need a detailed listing of various charges to determine which fees are tax deductible, and ultimately to determine correctly their gain or loss when the property is sold. Similarly, the itemized list of transactions on a credit card statement serves to document where the money went for purposes of budgeting and to enable the consumer to identify incorrect or inappropriate charges. Neither type of disclosure is intended

to influence decisions about which provider to choose to purchase mortgages or credit cards, respectively.

The role of government in regulating financial disclosures is contentious because the potential for market interventions that harm rather than help consumers is high, usually because of a lack of understanding of what effective disclosures and related policies are. Simply adding another required disclosure to a stack of already monotonous and unreadable paperwork does not result in increased consumer protection. Disclosure regulations should not be based on untested assumptions, but rather what the research shows customers need, want, and can use. New research on disclosures, consumer attention, and the economics of information discussed in Chapter 7, as well as decades of experience with the current regime lead to the conclusion that the Bureau and other financial regulators should reconsider their overall approach to disclosures, especially when making new rules. Where possible, the Bureau should encourage principles-based rules rather than attempting to specify in detail exactly what a disclosure should contain and how it should appear. Mandatory disclosures should only contain the minimum information that is relevant and necessary for consumers to understand at the time that they make a decision, and additional important information should be readily available to consumers when they need it. Effective disclosure must call attention to the critical terms of the contract, rather than attempting to reproduce the contract in the form of a disclosure.

The Taskforce understands that both consumer advocates and industry often prefer rules that specify the exact wording of a compliant disclosure. The consumer financial services industry often seems to value clear rules of the road over flexibility, especially when rules are new. However, once the exact language of the disclosure is placed in the regulation, it can be difficult to change as the market evolves to make a somewhat different disclosure more effective. For this reason, offering an illustration of a compliant disclosure in the commentary or appendix to the rule is often a better approach. Regulation Z contains over 70 sample disclosures pertaining to closed-end loans in Appendix H alone.³⁴ These model disclosures provide valuable guidance to creditors on issues that are often complex, and their widespread use provides consistency that many consumers find helpful when comparing mortgage terms. At the same time, creditors have the flexibility to adapt the forms and disclosures if the changes meet the rule's requirements. This approach allows creditors to improve the forms, often making them more readable and, in addition, ensuring that the disclosure accurately describes the credit product they are offering.

Thus, while disclosures can provide great value to consumers in promoting competition and informed choice, information provision through disclosures should not be viewed as a solution for all possible market failures or as a uniform “good” to promote multiple different ends. Disclosure is not a substitute for vigorous enforcement of consumer protection laws against

³⁴ Appendix H to Part 1026 of Regulation Z, 12 C.F.R. Part 2026 Appendix H.

fraud and deception, nor should presenting consumers with a large stack of papers or website consent buttons be mistaken for disclosure and understanding by a consumer. Disclosure can be a useful complement to other regulatory tools by enabling consumers to protect themselves against fraudulent behavior and identifying high-quality providers of financial services.

8.2 Credit advertising rules

Beyond disclosures at the time of purchase or contract signing, there are required disclosures in credit advertising. Several are principle-based rules, such as allowing a creditor to advertise credit terms that it actually offers and stating that required disclosures be made clearly and conspicuously.³⁵

The problem arises primarily with so-called “trigger-terms,” especially those applicable to closed-end credit.³⁶ If any of these trigger terms appears in an ad, a list of additional terms must also be disclosed. Television commercials, radio spots, and print ads often require disclosure in the unreadable fine print or by actors sped up to incomprehensible speeds.³⁷ This approach to advertising disclosure does virtually nothing to inform consumers and may discourage advertising that would in fact provide valuable information.

The Bureau should review advertising disclosure requirements, especially those involving advertising trigger terms, which should seek primarily to prevent advertising that is misleading about either the presented terms or their significance. Advertising is inherently incomplete and is not the place for disclosures that seek to provide information about all details of the transaction. For example, stating that a credit sale requires a 10 percent down payment may be useful to consumers shopping for a product they can buy on credit. But this statement triggers a host of other disclosures, including the annual percentage rate, which the creditor may not know until the consumer applies for credit. Similarly, the payment amount and number of payments will not be known until the consumer selects the product, and the creditor and consumer agree on the final price, and the consumer picks the length of the repayment term. The commentary to Regulation Z allows a creditor to use a unit-cost example, such as “48 monthly payments of \$27.83 per \$1,000 borrowed.”³⁸ But even if the consumer had the math skills to determine what

³⁵ Regulation Z Section 1026.24 (a) and (b), 12 C.F.R. § 1026.24(a)-(b).

³⁶ Regulation Z Section 1026.24 (d), 12 C.F.R. § 1026.24(d).

³⁷ The ads probably do not comply with Regulation Z’s requirement for “clear and conspicuous” disclosures, but enforcement is not common, probably because the Bureau and the FTC both recognize that many creditors find the trigger term rules unworkable.

³⁸ Regulation Z, Supp. I, cmt. 24(d)(2)-2.

the monthly payment would be on an item that cost, for instance, \$ 3,479.50,³⁹ the consumer would not have the information she needed if the annual percentage rate (APR) depended on her creditworthiness.

Rather than attempting to provide complete, if hypothetical, details of the transaction in each advertisement, regulators should adopt a principles-based approach designed to avoid unfair, deceptive, or abusive practices. Such an approach will streamline advertisements, allowing entities to advertise their products effectively and consumers to understand what is important to them in the moment. At the same time, the rule against unfair, deceptive, or abusive acts or practices (UDAAPs)⁴⁰ will constrain a creditor from offering misleading or deceptive terms, such as an unrealistically low monthly payment based on an unrealistically high down payment.

8.3 ECOA adverse action notices

The FCRA and ECOA both contain requirements for notices of adverse action in certain situations. Although the FCRA is the older law, its adverse action notice requirement was extensively amended over 25 years after the ECOA's adverse action notice requirements came into effect. This hop-scotch approach to developing adverse action rules for these two related laws has served neither consumers nor creditors particularly well.

Specifically, the FCRA's requirements overlap with similar requirements in the ECOA, as implemented by Regulation B, sometimes creating uncertainty. Regulation B requires an adverse action notice to include a statement of the specific reason for the action, and it identifies as insufficiently specific a statement that the consumer failed to achieve the qualifying score on the creditor's credit scoring system.⁴¹ When the Federal Reserve Board promulgated this rule in 1976, the provision helped ensure that consumers learned the reasons underlying their non-qualifying score.⁴² The prohibition against stating that the consumer "failed to achieve a qualifying score on the creditor's credit scoring system" has been widely understood similarly to prohibit a reason relating to not achieving a qualifying score on a credit bureau's scoring system.

But Congress has since amended the FCRA to require that, when a person takes adverse action based on information in a credit report, the person disclose to the consumer the key factors that

³⁹ $(\$3,479.5/\$1,000) \times \$27.83 = \96.80 monthly payment.

⁴⁰ The Dodd-Frank Act, Section 1031(a), 12 U.S.C. § 5531(a).

⁴¹ 12 C.F.R. § 1002.9(a)(2)(i), (b)(2).

⁴² Bd. of Governors of the Fed. Res. Sys., Amendments to Regulation B to Implement the 1976 Amendments to the Equal Credit Opportunity Act, 42 Fed. Reg. 1242, 1248-49 (Jan. 6, 1977).

adversely affected the consumer's credit score.⁴³ Consequently, the FCRA ensures that consumers learn the underlying reasons for their non-qualifying credit scores, and there is no need for Regulation B to require disclosure of the same information, duplicating the information in the FCRA portion of the combined notice. The Bureau should therefore amend Regulation B to permit a creditor to state, as a specific reason for denial, that the consumer failed to achieve a qualifying credit score when the notice also contains the key factors as part of its FCRA notice.

This change, which would apply only when the creditor gives the key factors for a low credit score, would provide to a consumer both the valuable information that a low credit score was a principal reason for adverse action and the key factors preventing the score from being higher. Without this change, creditors are left trying to figure out which ECOA reasons to list based on the credit score key factors and which to list based on non-credit score reasons for denial—all while staying within the maximum four reasons the Regulation B commentary states is sufficient. This change would simplify compliance for creditors and provide as much or more information to consumers who are denied credit.

Commenters to the Taskforce RFI raised a second compliance issue concerning whether and how a retail seller complies with the ECOA's adverse action notice requirements when the retail seller (who is also the original creditor) is unable to find a third party to approve and buy the contract. In such cases, the seller's sole reason for denial was that all indirect creditors refused to purchase the consumer's contract. For example, automobile dealerships may deny a consumer's credit application because all prospective indirect creditors that reviewed the application declined to purchase the proposed contract from the dealer. Dealerships question whether they must send an ECOA adverse action notice if the indirect creditors already provide one and, if so, what they should identify as the reason for denial.

Regulation B excuses a dealership or other retail seller from sending an adverse action notice if another party sends one on its behalf, but this provision is not often used. Most potential assignees will not agree to complicate their own adverse action notices by meeting the requirements for the dealer.⁴⁴ Although some dealerships do not send adverse action notices when they know that the banks and finance companies that denied the application will do so, many others see substantial compliance risks with this practice. Other retail sellers also struggle to provide the principal, specific reasons for denial because they do not know them. No law requires indirect creditors to share their reasons with the retail seller, and many finance sources

⁴³ FCRA sections 615(a), 609(f)(1) (15 U.S.C. §§ 1681(i)(a), 1681g).

⁴⁴ The commentary to 12 C.F.R. § 1002.9(g) requires a creditor giving an adverse action notice on behalf of another creditor (such as a retail seller) to give the name and address of each creditor and either: (a) disclose the applicant's right to a statement of reasons within 30 days, including the retail seller's phone number for making such a request and the right to have any reason given orally confirmed in writing; or to give the "primary reasons each creditor relied upon in taking the adverse action – clearly indicating which reasons relate to which creditor." 12 C.F.R. Part 1002, Supp. I, 9(g)-1.

decline to do so. Moreover, each creditor reviewing the consumer’s application will have its own underwriting criteria and its own reasons for adverse action. For example, one creditor may have a minimum credit score threshold the consumer does not meet, while another creditor will accept that score but will deny the application based on the consumer’s payment-to-income ratio or excessive mileage on a used car. The retail creditor is often at a loss to describe accurately another creditor’s reasons for denial. Its only accurate reason is that it was unable to find a finance source to buy the consumer’s contract on acceptable terms.

The commentary to Regulation B’s definition of “creditor” excuses from the adverse action requirement automobile dealers and others “who do not participate in credit decisions but who only accept applications and refer applicants to creditors, or select or offer to select creditors to whom credit requests can be made.”⁴⁵ Although this comment may have been intended to excuse retail sellers from adverse action notice requirements, it does not do so when the retail seller is also the original creditor (as the retail seller is when extending credit on a retail installment contract) and not merely referring applicants to creditors. Accordingly, Regulation B requires a retail creditor to provide a notice of adverse action unless another person does so on its behalf.

The Bureau should amend Regulation B to clarify that, if an indirect creditor provides an adverse action notice to the consumer in this situation, the retail seller does not also need to provide one. This approach eliminates inefficiency and even potential misinformation, without reducing the accurate and useful information available to consumers.

8.4 Disclosures in electronic transactions

Shopping around for any product or service is a great way to find the best option to suit a consumer’s needs, and one of the key contributions of consumer financial disclosure regulations is offering a standardized way to do so via measures like the APR. See Chapter 7 for a longer discussion of the benefits of shopping. Reducing the costs of shopping will increase competition among product providers, thereby lowering prices and resulting in consumer benefit.

Many of our rules and regulations around disclosures were written decades before the widespread adoption of digital technology. Today, some customers would rather take out a mortgage online at home or on their phone than in person at a bank, and the implications for how substantial disclosures should be disseminated and processed by the consumer are unclear. The Bureau should conduct research on electronic disclosures and how they can be delivered in ways that benefit consumers, particularly looking at the varieties of experience consumers can

⁴⁵ 12 C.F.R. Part 1002, Supp. I, 2(l)-2.

have with mobile technology and smart speakers. Disclosure rules that apply to communications before the consumer makes a product selection should be focused on enabling consumers to shop and make comparisons to find the product that best fits their needs.

8.5 Marketing to consumers with limited English proficiency

America's melting pot of people, cultures, and languages cannot thrive unless people are given the opportunity to advance. Inclusive consumer financial services are integral to this success. However, some creditors are reluctant to market to consumers with limited English proficiency (LEP) because they may lack the ability to provide all legally required documents in the consumer's preferred language. This is especially a concern for smaller companies and even for large one for languages that are not widely used.

Balancing the costs of providing in-language information about consumer financial services with the benefits of this information to LEP consumers and to the creditors that want to serve them can be a challenging task. Compounding this task is the legal uncertainty of how far a financial institution must go in providing information in the consumer's preferred language. Creditors that are eager to serve LEP consumers in their market area may be reluctant to do so if they believe they must provide translations of every communication not only at the time of consummation but also throughout the servicing relationship. Further, they may worry that promoting financial services in one non-English language may require doing the same in other languages. Bureau guidance could promote providing more financial services to LEP consumers.

For instance, some creditors who conducted limited advertising in other languages, such a sign in a bank that says in Spanish, "Ask us about our free checking accounts!" or "Great terms on a loan for your next car or truck!" take care to explain carefully any limits on their ability to provide information in the language used in the promotion. This approach allows the consumer to make an informed decision on whether the product is appropriate for their situation, such as if they have better-than-limited English proficiency or family members they regularly rely on for translations.

However, it is critical that the consumer not be misled in language expectations. Potential risk exists for consumers who desire a product or service but may be unable to understand critical documents, like billing statements, in English. In providing guidance to creditors, the Bureau should balance the value of making more financial services available to LEP consumers with the cost of ensuring reasonable consumer protections. For example, existing UDAAP authority would prevent a creditor from making promises in non-English advertising that it did not keep.

But it may also be useful to tell consumers in a non-English marketing piece whether the contract and other documents will be available only in English.

8.6 Research needed

The Bureau should conduct research on the availability of information, including timely or ongoing access to information and retainability, and conduct more testing on usability of consumer financial disclosures. The Bureau should also conduct research on electronic disclosures. As appropriate, based on research, if disclosures are statutorily mandated, the Bureau should make necessary recommendations to Congress concerning how to reform those disclosures. Similarly, based on research, if the Bureau has discretion in imposing disclosure requirements, the agency on its own should make appropriate modifications to those disclosures.

8.7 Recommendations

- 40.** Congress and the Bureau should focus shopping disclosures on reducing the cost to consumers of locating the product or service they want. Where relevant, other goals should be considered secondary in importance and considered only to the extent they do not materially interfere with the primary goal of promoting more informed shopping by consumers.
- 41.** To make disclosures more useful, the disclosures mandated by Congress and the Bureau should consist of only the minimum information consumers need to make an informed decision and to verify they received the product terms promised.
- 42.** The Bureau should only issue disclosure-related rules guided by research into what information is important to consumers and should use this research to re-think its overall approach to disclosures. As appropriate, based on research, the Bureau should make necessary recommendations to Congress for disclosure reform, as well as reform the disclosures the Bureau has the discretion to impose.
- 43.** The Bureau should revise credit advertising disclosure requirements in Regulation Z, especially eliminating or streamlining advertising trigger terms. The requirements should focus on less prescriptive rules, which often require tangentially relevant information that can be difficult to present clearly and understand and focus instead on avoiding misleading advertising in presented terms and requiring additional information when necessary to prevent deception.
- 44.** The Bureau should amend Regulation B or its commentary to clarify that a reason for adverse action relating to an insufficient credit score meets the standard for a “principal, specific

reason” when the creditor also provides the four or five “key factors” that kept the credit score from being higher, as required by the FCRA.

45. The Bureau should amend Regulation B to state that notification of adverse action is not required by a retail seller that does not make an underwriting decision and denies an application only because no third-party creditor agreed to purchase the contract, provided that each third-party creditor taking adverse action complies with the adverse action notification requirements, directly or through another third party.

46. The Bureau should develop a foreign language disclosure scheme that allows financial institutions to reach out into underbanked/unbanked consumer communities without forcing the financial institutions to maintain an underlying foreign language infrastructure.

47. The Bureau should conduct research on the availability of information, including timely or ongoing access to information and retainability. The Bureau should conduct more testing on usability of consumer financial disclosures. The Bureau should conduct research on electronic disclosures and how they can be delivered in ways that benefit consumers.

9. Electronic signature and document requirements

Congress enacted the Electronic Signatures in Global and National Commerce Act, or E-Sign Act, in 2000.⁴⁶ The E-Sign Act provides national rules regarding, among other things, provision of electronic disclosures to consumers. In general, when a federal or state law requires a person to provide a notice or other information “in writing,” the E-Sign Act permits the person to sign or send it electronically, subject to obtaining the consumer’s consent and making several statements about the consumer’s rights and the technology necessary to access the electronic notice.⁴⁷ The E-Sign Act applies to many federal and state laws, and numerous federal and state agencies have authority to interpret the Act as it applies to laws over which they have jurisdiction.⁴⁸ The Bureau is among these agencies, and it inherited the Board’s rules interpreting the E-Sign Act as it applies to Regulation B (ECOA), Regulation E (EFTA), Regulation M (Consumer Leasing Act), Regulation Z (TILA), and Regulation DD (Truth in Savings Act).

As Chapter 9 discusses in more detail, Congress enacted the E-Sign Act to promote innovation and electronic commerce, but some of its requirements now appear outdated and can impede timely provision of financial services. For example, the Act requires that, prior to obtaining consent, a person must provide a consumer with “a statement of the hardware and software requirements for access to and retention of the electronic record,” and, if the hardware or software requirements subsequently change, the person may have to re-obtain the consumer’s consent and provide a new statement of the hardware and software requirement. In addition, the Act requires that a consumer’s consent be “affirmative” and given or confirmed “in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent.”⁴⁹

The Bureau estimates that the required disclosures may be more than 1,000 words long,⁵⁰ which could take an average person two to eight minutes to read. Or, more likely, they simply add to the barrage of disclosures that consumers scroll past without reading as they attempt to

⁴⁶ 15 U.S.C. §§ 7001 *et seq.*

⁴⁷ E-Sign Act section 101(c)(1) (15 U.S.C. § 7001(c)(1)).

⁴⁸ E-Sign Act section 104 (15 U.S.C. § 7004).

⁴⁹ E-Sign Act section 101(c)(1) (15 U.S.C. § 7001(c)(1)).

⁵⁰ Bureau of Consumer Fin. Protect., *Debt Collection Practices (Regulation F)*, 84 FR 23274, 23361 (May 21, 2019).

complete a transaction.⁵¹ Requiring that the consumer consent “in a manner that reasonably demonstrates that the consumer can access information in the electronic form” imposes an additional procedural step and can create compliance questions about whether a consumer has made such a demonstration.⁵² The substance of the reasonable-demonstration requirement also may be antiquated, better suited to a time when software programs had very different capabilities and there was a genuine question whether a given consumer could open a particular type of electronic file. Today, formats such as PDF are widely available, free to download, and compatible with most operating systems, reducing concerns that consumers will consent to receiving notices that they cannot open.

For these reasons, the Taskforce recommends that Congress replace or revise substantially the E-Sign Act. At a minimum, Congress should eliminate the E-Sign Act’s antiquated requirements, including the required disclosures regarding necessary hardware and software and the requirement a consumer’s consent be in a manner that reasonably demonstrates that the consumer can access information in the electronic records. More generally, Congress should consider revising the consent process, including the requirement that a consumer’s consent be affirmative.

The Taskforce notes that the E-Sign Act contains an unusual “reverse preemption” provision.⁵³ This provision allows the general preemption of Section 101 of the E-Sign Act if a state enacts the Uniform Electronic Transactions Act (UETA) drafted and recommended by the National Conference of Commissioners on State Laws in 1999.⁵⁴ UETA, which has been adopted by all but two states, avoids many of the cumbersome procedures of E-Sign and provides a time-tested model for E-Sign modernization.⁵⁵ For example, UETA allows a consumer’s consent to conduct a transaction electronically either by a simple consent (“I agree”) or inferred from the circumstances.⁵⁶

⁵¹ See Chapter 7, Information.

⁵² Compliance questions could include, for example, whether a “reasonabl[e] demonstrat[e]ion” includes consumers’ affirmations that they can access a particular type software or obtaining a consumer’s consent on an HTML web page even though the disclosure will be in PDF. See, e.g., Thomas P. Quinn, Jr., *Time to Rethink E-SIGN “Consent Handshake” Standards?* (May 2014), <https://www.counselorlibrary.com/insights/article.cfm?articleID=810>.

⁵³ E-Sign Act section 102(a) (15 U.S.C. § 7002).

⁵⁴ *Id.*

⁵⁵ Only New York and Illinois have not adopted E-Sign, but they have laws that accomplish much of the same policies. See <https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034>.

⁵⁶ Comment 1 to UETA section 2, available at: <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=2c38eebd-69af-aafc-ddc3-b3d292bf805a&forceDialog=0>, at 6-7.

Pending Congressional action, the Taskforce recommends that the Bureau clarify or streamline certain of the E-Sign Act's requirements, recognizing that the Bureau's rulemaking authority is limited in some respects.

Clarifying what constitutes a reasonable demonstration could alleviate unnecessary burden and potentially speed the consent process. Commenters to the Taskforce RFI and the Bureau's Call for Evidence RFIs expressed frustration with the uncertainty about when a consumer has "reasonably demonstrated" the ability to access an electronic record. Clarifying what constitutes a reasonable demonstration could thus alleviate unnecessary burden and potentially speed the consent process. As a start, it would be very helpful for the Bureau to state that a presumption exists that the financial institution has met this standard when the consumer initiates the transaction on the consumer's device and consents to complete the transaction electronically.

In addition, the Bureau should streamline or create an exemption from the E-Sign Act's requirements for any rule for which it is responsible, especially the TILA/Regulation Z disclosures and ECOA/Regulation B adverse action notices. The Bureau has much greater flexibility regarding the regulations for which it is solely responsible. The "trigger" for a duty to comply with E-Sign is a law or regulation that requires a document be provided to a consumer "in writing."⁵⁷ Amending a regulation to allow a creditor to provide a disclosure "electronically or in writing" would obviate the need for E-Sign compliance.

When a consumer consents to an electronic transaction, the creditor should be able to provide required disclosures electronically and in a form the consumer can keep, without the need to read the extensive E-Sign consent disclosures and demonstration requirements. For instance, some laws, like the FCRA, have been amended to expressly allow electronic disclosures of adverse action, but the companion provisions in the ECOA's Regulation B have not, even though these notices are almost always provided at the same time in a single document. The Bureau could easily allow electronic notices for credit denials. A simple method would be to strike the Regulation B requirement for a "written" notification; the FCRA has never required its adverse action notices to be in writing, and it is this requirement of a writing that triggers the E-Sign requirements. In the alternative, the Bureau may prefer to allow creditors the option of providing adverse action notices either in writing or electronically, which would eliminate only oral disclosures. The Bureau could offer reasonable limitations on providing electronic notices, such as allowing them only when the consumer has initiated an online application or has supplied an email address for the purpose of receiving an electronic notice. The Taskforce

believes that, however the Bureau accomplishes this simplification, doing so would reduce the costs of offering credit with no reduction in consumer protections.

The Bureau could also enhance the delivery of Truth in Lending disclosures electronically. Increasingly credit sales are consummated electronically at the point of sale. Under the current rules, the consumer may complete an application electronically at the point of sale. Once the application is approved (typically by a third-party assignee), the seller must print a “review copy” of the Regulation Z disclosures and, if the consumer agrees to complete the transaction, print an identical set of disclosures that contain the consumer’s signature. The set of documents is then transmitted electronically to the assignee and usually maintained in electronic form for the life of the transaction. The “reasonable demonstration” requirements are difficult to meet when the transaction is conducted on the creditor’s devices, complicating compliance with the technical requirements of the E-Sign Act.

Finally, the Bureau should look for opportunities in other regulations to ease the use of electronic disclosures, both in existing regulations and in provisions it adopts in the future.

9.1 Recommendations

48. Congress should eliminate the E-Sign Act’s antiquated requirements, including the required disclosures regarding necessary hardware and software and the requirement a consumer’s consent be in a manner that reasonably demonstrates that the consumer can access information in the electronic records. More generally, Congress should consider revising the consent process, allowing consent by either a simple statement of agreement or consent to conduct the transaction electronically or an inference from the circumstances of the transaction.

49. Pending Congressional action, the Bureau should provide guidance as to what constitutes a “reasonabl[e] demonstrate[ion]” that a consumer can access information in the electronic records.

50. Pending Congressional action, the Bureau should enable electronic disclosures to consumers by reviewing its rules that require providing information “in writing,” and consider amending the rule, where possible under the enabling law, to allow electronic disclosures.

10. Emergency authority

Like most industries, financial services can be disrupted during times of emergency—particularly in times of natural disaster. In these acute periods, the Bureau should have the necessary flexibility to reduce barriers to recovery and access to financial services. The Bureau should also have the flexibility to shuffle its priorities in times of crises to meet acute needs, even if it means missing some statutory deadlines on projects unrelated to the emergency response. These barriers can arise from either federal or state law and can arise as a result of the operation of consumer protection law or prudential regulation.

During an emergency, it may become impracticable for creditors to comply with some the Bureau’s regulations, potentially disrupting the supply of credit when it may be in high demand. For example, many state and federal laws require elements of real estate closings, property appraisals, court filings, and other processes to be conducted in person or by requiring a notary to witness a signature or a “wet signature.” The underlying justification for many of these requirements is unclear, but they impose seemingly unnecessary costs under ordinary circumstances. During a period of viral pandemic, however, many of these requirements are not merely inconvenient or expensive but are potentially dangerous.

The Taskforce commends the Bureau and other state and federal regulators for their creativity and responsiveness in using the resources and flexibility available to them to enable the consumer financial system to continue to work during this period of unprecedented crisis. But it would be unrealistically optimistic to believe that a crisis comparable to the current pandemic will not occur in the future or that other major disruptions to the consumer financial system will not reoccur. The view of the Taskforce, therefore, is that the Bureau should be given the authority to act effectively and directly to protect consumers and to ensure that consumers have access to safe and effective credit in times of emergency and that to the greatest extent possible its acts should be consistent with the rule of law and regularized and transparent processes. To prepare itself to meet future crises and to provide stability and predictability to confront future crises, the Bureau should adopt a rule of general applicability that will authorize it, respecting rules it has adopted or laws it can interpret, to suspend or modify specific provisions during a time of declared emergency when it determines that the emergency has made compliance impracticable. When invoking this authority, the Bureau should publicly announce its action, the scope and duration of the suspension or modification, and the basis for its determination of impracticability.

The Bureau could provide additional flexibility during an emergency if it were able to provide temporary relief from state regulations. For example, the Bureau should have authority during a period of national pandemic to temporarily suspend the operation of state laws that require in-

person real estate closings or appraisals or notarized document requirements. The Bureau should explore the pre-emptive powers it has to identify temporary relief measures it could take in an emergency, such as to temporarily suspend the operation of state laws that require in-person real estate closings or appraisals or notarized document requirements. Congress should consider giving the Bureau additional preemption authority over state laws that hinder financial transactions in an emergency.

During an emergency, time is of the essence and administrative procedure can delay necessary services. Emergencies are often associated with periods of confusion and communication can be difficult. The Bureau should consider automatic policy responses (or automatic stabilizers) to the extent possible. Since such policies would be in place prior to an emergency, they can reduce uncertainty and reliance on emergency communications—and for these reasons, automatic policy responses are superior to ad hoc enforcement discretion. For example, whenever a state of emergency closes a courthouse, the time period requirement for information that can only be obtained from a courthouse (to verify, for example, information in a credit report) should be automatically extended until the courthouse reopens or a reasonable time thereafter.

Events like the pandemic have highlighted the need for flexibility in the regulatory system to deal with unanticipated shocks. Financial regulation traditionally has been highly prescriptive in its rule structure, an approach that creates certainty and predictability for consumers and providers but can stifle change and adaptability, especially in crises. But financial regulators' ability to react quickly and decisively in an emergency is contingent on legislation that affords them the discretion to do so when circumstances appropriate such a response. Going forward, Congress should consider enacting enabling legislation that provides the Bureau and other agencies with the ability to exercise discretion to stabilize the financial market and protect consumers in the event of emergencies.

10.1 Recommendations

51. The Bureau should adopt a rule of general applicability that will authorize it, respecting rules it has adopted or laws it can interpret, to suspend or modify specific provisions during a time of declared emergency when it determines that the emergency has made compliance impracticable. When invoking this authority, the Bureau should publicly announce its action, the scope and duration of the suspension or modification, and the basis for its determination of impracticability.

52. The Bureau should explore the preemptive powers it has over state regulations to identify ways it might provide additional relief from state laws hindering financial transactions in an emergency. Likewise, Congress should consider giving the Bureau additional preemption authority over such state laws.

53. The Bureau should implement automatic policy responses that trigger during Presidentially declared emergencies and end when the emergency ends.

11. Enforcement

11.1 Enforcement guidance

The Bureau's enforcement policy is opaque, and the passage of time and large number of settlements has done little to improve the public's understanding of when the Bureau will advance supervisory concerns to an enforcement matter or how it selects its remedies.

No company can expect to comply perfectly with every aspect of the myriad and often complex rules that govern consumer transactions. As such, the Taskforce does not believe that the Bureau expects flawless compliance, especially when violations are caused by an occasional human error. Yet the public would benefit from a better understanding of how the Bureau makes these important decisions.

The Taskforce believes that consumer harm, both frequency and severity, should be the lodestar of every enforcement decision. An excellent starting point would be creating a Bureau policy statement on the concept of consumer harm.

Once the Bureau has articulated the meaning of consumer harm, which the Taskforce assumes would include both out-of-pocket and reasonable intangible costs, in each enforcement matter, the staff should estimate the total consumer harm, and use it to set provide a rough estimated the cost of a settlement it recommends. This amount could be adjusted up or down, depending on aggravating factors (such as the need for deterrence or the willfulness of the violation) and mitigating factors, such as good faith or ability to pay.

The next step would be allocating the settlement amount between consumer redress and a civil penalty. All things considered, the allocation of the settlement amount should weigh in favor of consumer restitution, because returning money to consumers is always a priority. But the Taskforce recognizes that some violations do not easily lend themselves to consumer restitution, because the harm is intangible or in an amount too small for each affected consumer to make distributing redress reasonable. Such examples might include adverse action notice violations, privacy violations, and deceptive or abusive debt collection calls—to name just a few. In such settlements, the Bureau's foot might more fairly weigh on the pedal of allocating funds to civil money penalties to ensure that the total cost of the settlement represents a fair value of consumer harm, deterrence, ability to repay, and other relevant factors.

Another Taskforce concern is the disparity among enforcement agencies' sanctions for violations, especially the Bureau and the FTC. The Bureau and the FTC have the same enforcement jurisdiction over non-bank creditors that are larger participants, but they have

vastly different enforcement tools. The Taskforce can see no basis for this disparity, and we believe Congress ought to bring greater congruity to these remedies.

The Bureau should also offer more guidance regarding how it has implemented enforcement policy. The Taskforce believes the Bureau's recent adoption of a tool for researching CFPB enforcement actions⁵⁸ adds significantly to the public's understanding of past actions and potential future trends. An important potential adjunct to this guidance, however, is a description of possible enforcement actions the Bureau has considered but decided **not** to bring. The FTC realizes this objective, at least in part, by placing closing letters on the public record. At their best, these letters explain the FTC's concern with the named company's conduct and describe why the agency declined to pursue an enforcement action, including any corrective action the company took that weighed against an enforcement action. In contrast, some FTC closing letters do little more than announce the FTC's decision against taking formal action and offer little insight into why. Because these letters reveal the existence of a non-public investigation, if they do not shed light on the FTC's thinking, the Taskforce sees little rationale for them other than, perhaps, publicly shaming the investigatory target.

A better alternative, in the Taskforce's view, would be a periodic public document that explained why the Bureau determined not to proceed with an enforcement action under specified facts, without naming the company. The Taskforce thinks of this publication as a companion to the valuable "Supervisory Highlights."

The Bureau has often said that it will not engage in "regulation by enforcement," which the Taskforce understands to mean that it will not attempt to set new industry standards in the terms of settlements of enforcement actions. When unfairness underpins the Bureau's action, this is especially a concern. Such settlements are unwise because they circumvent the opportunity for notice-and-comment rulemaking in which the public can express views that may not have been paramount for the company that agreed to the settlement terms. Further, when the Bureau requires very specific terms for a company's future conduct, the public often cannot tell whether the Bureau considers these terms as what is needed to avoid an unfair, deceptive, or abusive practice or whether the specific remedy is merely in the vein of a "fencing in" provision for a single enforcement target and not intended as a standard for all industry actors. Regulation-by-enforcement is poor public policy and, despite the Bureau's occasional condemnation of it, the practice continues to occur.

⁵⁸ See CFPB, *Enforcement Database*. Available at <https://www.consumerfinance.gov/enforcement/payments-harmed-consumers/enforcement-database/>.

11.2 Civil penalty assessment standards

Congress has given the Bureau extraordinary powers to seek and impose civil penalties. A “knowing” violation can result in a fine of \$1 million per day (or per consumer affected). In the great majority of cases, the civil penalty agreed to in a settlement is less than the maximum allowed by law, and it is usually far below the maximum allowed. But the answer to how the Bureau determined the exact lesser amount is often hard to discern. This uncertainty has costs and, of particular concern, can deter innovation, inclusion, and competition.

The Dodd-Frank Act contains a short list of mitigating factors, but the general nature of these factors makes it hard to know how the Bureau applies them, much less whether they are applied consistently. Other financial regulatory agencies have taken three actions to improve the consistency and transparency of civil penalty demands, which the Bureau has declined to adopt.

In order to bring greater predictability to enforcement actions and to make clear the Bureau’s enforcement priorities, the Taskforce recommends that the Bureau adopt greater guidance on civil penalties and a “matrix” to indicate the factors to be considered, as other financial regulatory agencies have done.

The first action is adopting the Federal Financial Institutions Examination Council’s (FFIEC) Interagency Policy Regarding Assessment of Civil Money Penalties (1998 FFIEC Interagency Policy). The 1998 FFIEC Interagency Policy articulates 13 relevant factors that the agencies should consider in assessing civil penalties, which provide further guidance on the general statutory factors. The Bureau has declined, without explanation, to adopt the 1998 FFIEC Interagency Policy and states that considering these 13 factors is optional.

The second action is a matrix of how, in concrete terms, the agency should weigh the mitigating and aggravating factors listed in the Dodd-Frank Act and the 1998 FFIEC Interagency Policy. The prudential regulators have long used matrices as guidance. The matrix ensures that these 13 factors are considered in civil penalty decisions and enhance consistency of decisions. But the prudential regulators note the matrix is not substituting a mathematical formula for sound judgment. Using a matrix will never produce perfect justice, and each case will have its own unique factors to consider. Nevertheless, providing greater guidance and predictability will advance the goals of fairness, predictability, and the rule of law.

The Taskforce notes that using a civil penalty matrix could also assist Bureau managers in pursuing cases that will maximize their deterrent value and aid in case selection and resource allocation.

Although the Bureau and a company may disagree on the number of violations or on which cell of the matrix should be applied to specific allegations, the matrix almost certainly would

produce more consistent and transparent results. The Bureau has declined to adopt a matrix, again without explanation.

Third, the Federal Deposit Insurance Corporation (FDIC) and Office of the Comptroller of the Currency (OCC) have published statements on how they will apply each of the factors in the 1998 FFIEC Interagency Policy as part of the public Examination Manual (FDIC), general Policies and Procedures Manual (OCC), or Supervision and Regulation Letters (Federal Reserve Board). In contrast, the Bureau’s “Enforcement Policies and Procedure Manual,” which discusses its civil penalty policy and procedures, is a non-public document. Moreover, the Bureau’s Enforcement Manual offers scant guidance on how to develop a civil penalty recommendation. The Manual instructs the staff to include a recommended penalty or range in its memorandum seeking authority to settle or sue but does not ask the staff to explain why the recommended range is appropriate.

Even when the staff provides a basis in its non-public recommendation, it does not do so pursuant to public criteria, other than the Dodd-Frank Act’s general mitigating factors. Especially when the maximum penalty is very high (and it can easily reach tens or hundreds of billions of dollars for willful violations or reckless violations affecting many consumers), how are the downward adjustments made? The Taskforce assumes that the reduction is the result of mitigating factors, but how does the staff determine what these factors are worth? Cutting the maximum penalty by 20 percent? Cutting it by half? Cutting it by 99 percent? Some penalty amounts accepted by the Bureau are so far below the maximum statutory penalty that there is no discernable reason for the greatly reduced amount—apart from common sense that the case is simply “not worth” a higher amount. Fairness and transparency require more.⁵⁹

The Taskforce also notes that agencies have different civil penalty limits for violations of unfair, deceptive, or abusive acts or practices, which can give rise to real and perceived unfairness and uncertainty. The FTC lacks general authority to assess a civil penalty for an unfair or deceptive practice. The OCC and FDIC take similar approaches to each other regarding penalties. In contrast, the Bureau states that it might consider whether a proposed penalty would be comparable to a penalty assessed by other regulators, but staff should rely primarily on the statutory maximum.

⁵⁹ For example, the joint settlement with Equifax in 2019 for its security breach provided for payments of \$575 million. Of that amount, \$100 million took the form of a fine. The number of affected Americans was estimated at close to 150 million. Assuming the violation was considered to be Tier 2, the maximum civil penalty would have been up to \$4.3 *trillion*. The application of mitigating factors appears to have reduced the per-consumer penalty from \$28,906 (the maximum in 2019) to less than 68 cents. The all-in payment came to less than \$4 per consumer. The Taskforce cites this example not for the proposition that the settlement amount was necessarily too low. Rather, our point is the folly of applying a handful of very general mitigating factors, accompanied by virtually no public guidance, to reach the optimal penalty amount (or total settlement cost) in an enforcement settlement.

The Taskforce sees no public policy benefit from these differences in methods and authorities for setting civil penalties based solely on the happenstance of the agency that brings the action. Congress should reconcile the civil penalty authorities for the prudential regulators, the Bureau, and the FTC. The lack of structure in ensuring consistent approaches to civil penalties is reminiscent of the disparity in sentencing by federal courts. The CFPB is encouraged to follow the lead of the other financial regulators and adopt a similar matrix in coordination with those agencies to resolve the differences in setting civil penalties and more specific guidance in applying mitigating and aggravating factors.

The Taskforce observes that a great imbalance exists in the statutory remedies available to the FTC and the Bureau for the same violation, with the Bureau holding the power to impose higher sanctions with fewer procedural hurdles and delay than the FTC. This imbalance can lead to pressure on one agency to defer to another, not based on the expertise of the agency, but rather which agency has greater enforcement powers and the ability to impose heavier sanctions. Or the agencies may each bring coordinated actions, which the Taskforce does not favor because enforcement “double-teaming” a company squanders scarce enforcement resources at each agency.

Although the FTC can seek a civil penalty for unfair or deceptive acts and practices, it can do so only in the narrow circumstances established in Section 5(m)(1)(b) of the FTC Act.⁶⁰ This section requires the FTC to first determine in an adjudicated administrative action that a practice is unfair or deceptive and to then put a different company on actual notice of the FTC’s administrative determination before going to federal court to seek a civil penalty against the second company.⁶¹ Because this procedural requirement requires a specific finding that a particular practice is unfair or deceptive, and because many FTC decisions on enumerated laws often lack such findings, it is rarely used.

The process for obtaining consumer restitution under Section 19 of the FTC Act is also problematic. The FTC must first obtain a ruling in an administrative action and, after all judicial review is complete, litigate the violations a second time in federal district court, proving that the conduct was not only unfair or deceptive but also that a reasonable person would have known that the conduct was “dishonest or fraudulent.”

To avoid the difficulties of Section 19, the FTC has used its authority under Section 13(b) to seek permanent injunctions that not only seek to bar unfair or deceptive practices but also to impose various kinds of monetary equitable relief, such as restitution and rescission of contracts, to

⁶⁰ 15 U.S.C. § 45(m)(1)(b).

⁶¹ 15 U.S.C. § 57(b).

remedy past violations. But the legality of this practice is currently under consideration by the Supreme Court and, as a result, it is in jeopardy.

As a result of this imbalance in powers between the CFPB and FTC, the Taskforce recommends that Congress act to make the system of civil remedies more consistent and coherent among the prudential financial regulators, the FTC, and the CFPB. The Taskforce's recommendation is contingent on the Supreme Court, when considering the FTC's authority under Section 13(b) this term, holding that the FTC's powers are not consistent with our recommendation below.

The agencies should be able to order consumer redress for any violation of law, including an unfair, deceptive, or abusive act or practice, if the conduct is dishonest or fraudulent. The standard for a penalty should be higher. The FTC Act limits that agency, wisely, the Taskforce believes, to seeking a civil penalty in situations where the company knew or should have known its conduct was illegal, such as a violation of a rule or an order.⁶² Similarly, the FTC can obtain consumer redress only for acts that are dishonest or fraudulent. The Taskforce recommends that Congress, in reconciling the powers of the Bureau and the FTC, employ the dishonest-or-fraudulent standard for remedies amounting to a penalty, including the equitable relief of disgorgement.

11.3 Recommendations

- 54.** The Bureau should issue a policy statement on the concept of consumer harm.
- 55.** The Bureau should adopt public statement on how it will determine appropriate consumer restitution and civil penalties in matters. The allocation of total payments between restitution and penalties should reflect optimal consumer redress and deterrence. The Bureau's objectives should relate principally to the magnitude of consumer harm and be adjusted in appropriate matters as needed to further deterrence, subject to the statutory limits and mitigating factors.
- 56.** Congress should reconcile the civil penalty and consumer redress authorities of the prudential regulators, the Bureau, and the FTC, including giving the FTC statutory authority for obtaining consumer restitution for any unfair or deceptive act or practice that is dishonest or fraudulent and granting civil penalty authority to the Bureau and prudential regulators for unfair or deceptive acts and practices that are also dishonest or fraudulent or that violate another statute or regulation.

⁶² 45 U.S.C. § 45(m)(1).

57. The Bureau should issue “Enforcement Highlights,” analogous to “Supervisory Highlights,” to share Bureau concerns with the wider public and provide greater enforcement guidance on the factors it might consider in deciding not to take an enforcement action against a firm that may have engaged in wrongful conduct.

58. The Bureau should not set new standards for industry practices in settlements of enforcement actions, especially regarding practices deemed unfair or abusive. Instead, it should use its rulemaking authority to ensure that all affected parties have an opportunity to express views through notice-and-comment rulemaking and provide relevant data.

59. The Bureau should expressly adopt the 1998 FFIEC Interagency Policy Regarding Assessment of Civil Money Penalties.

60. The Bureau should adopt and publish a civil penalty matrix based on the factors in 1998 FFIEC Interagency Policy and consistent with the matrices of the prudential regulators, together with public guidance to enforcement staff on how to apply the factors in the matrix.

12. Equal access to credit

12.1 Discrimination based on disability

The economic history of the last century in the United States reflects a general growth of access to financial products for most Americans through innovation and competition. Some consumers, however, have not always had the opportunity to share equally in this abundance. In some instances, this was because of overtly discriminatory government policies, including discriminatory home mortgage lending rules and guidelines adopted by the federal government. In other instances, these limits resulted as a by-product of usury ceilings and regulatory barriers to competition that limited the ability of many consumers to gain access to products offered in competitive markets without artificial barriers to entry.

In the mid-1970s, Congress enacted and amended the ECOA⁶³ to outlaw discrimination on nine prohibited bases in access to credit and other aspects of a credit transaction. Per Regulation B, which implements the ECOA, they are “race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to contract); to the fact that all or part of the applicant's income derives from a public assistance program; or to the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act.”⁶⁴ The ECOA was a key victory in the push for civil rights in financial markets, along with the Fair Housing Act, the Community Reinvestment Act, and the Home Mortgage Disclosure Act.

Although civil rights legislation such as the ECOA have provided tools for addressing discrimination in advancing access to credit for many disadvantaged groups, not all vulnerable groups are explicitly protected. The ECOA does not include disability as a prohibited basis group, despite its inclusion in civil rights legislation regarding employment and in other credit granting such as the Fair Housing Act. The Americans with Disabilities Act (ADA) provides protections against unlawful discrimination on the basis of disability, and except for mortgage lending, there is no entity examining financial institutions for compliance with it in any systematic way like is done with other prohibited basis groups.

The Bureau should conduct research on the propriety of amending the ECOA to include disability as a prohibited basis group, and then potentially recommend its inclusion to Congress. Conducting this research first will allow the Bureau to understand the prevalence of

⁶³ 15 U.S.C. § 1691(a) (2018).

⁶⁴ 12 C.F.R. § 1002.1 (b)

discrimination, and follow-up research if disability status is included will allow the Bureau to measure the effect of the law, something that was not done at the inception of the ECOA for other prohibited basis groups. Analysis should include any potential unintended consequences of this step, including increases in costs. Including disability as a prohibited basis would bring the ECOA in line with the Fair Housing Act, providing uniform protections to protected classes across the credit sphere.

12.2 Modernization of Regulation B

The main antidiscrimination rules in Regulation B have remained largely unchanged since 1977, and what concerned Regulation B's drafters enough to be codified over 40 years ago may be no longer relevant and may have unintended consequences. Initially conceived as a law to protect women from sex and marital status discrimination, the ECOA, in conjunction with other legal and social movements toward equality, has been largely successful in significantly reducing disparities in credit access between men and women. The Federal Reserve Board found in a report published in 2007 that there is no real difference in average credit scores by sex, which strongly suggests that women and men have approximately the same access to credit.⁶⁵ It would be difficult for women to have the same average credit score as men if they experienced a meaningful difficulty in obtaining credit.

The ECOA's prohibitions on discrimination based on sex and marital status may be one of its greatest successes. That does not mean to suggest that discrimination against women on the bases of sex and marital status have entirely disappeared. But the advances are hard to deny.

As many of the specific prohibitions in Regulation B have forced radical changes in creditor practices during the last 46 years, some of them may have become unnecessary or even harmful to women. It is now time to look closely at them to see whether they continue to fulfill a useful purpose.

The Bureau should remove the requirement that creditor must consider the credit history of accounts in the name of a spouse for which the applicant is not contractually liable but is authorized to use. This was an important protection in 1977, when the credit history that married women helped build was typically listed only under their husband's name. This problem was compounded if the woman became widowed or divorced, because they often lost all access to the credit history at the very time they most needed it. For this reason, Regulation B generally

⁶⁵ The Federal Reserve Board, *Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit* (August 2007), <https://www.federalreserve.gov/boarddocs/rptcongress/creditscore/performance.htm>.

required a creditor to consider the credit history of an applicant's spouse that the applicant was permitted to use or for which both were contractually liable.⁶⁶ When married women had trouble in obtaining credit in their own names, this attribution of credit history to a spouse was usually beneficial to them. The Taskforce believes that, today, it is more likely to penalize a person (usually a woman) based on marital status.

As noted above, however, in the 46 years since the ECOA was enacted, many systemic obstacles to women in obtaining credit have been largely eliminated, and women on average have credit histories comparable to men. The need to attribute the credit history of an account for which the person has no legal liability but is allowed to use can have perverse effects.

Because consumer reporting agencies often do not know whether the accountholders of an account reported in two names—one who is contractually liable and the other who is not—are married to each other, they have adopted the practice of reporting the credit histories of all authorized users in both names, including authorized users who lack a marital relationship with the person contractually liable on the account. They reasonably believe that this action is necessary so that the creditor-users of their credit reports can avoid violating Regulation B.

As a result, some consumers will find negative information in their credit files on an account for which they have no legal liability. Indeed, a credit card holder can usually add authorized users without the users' consent or even their knowledge. In situations in which one spouse but not the other files for bankruptcy, it is not uncommon for the bankruptcy also to be attributed to the non-filing spouse who was only an authorized user on the discharged accounts. This can occur because the debt is reported as "discharged in bankruptcy" without denoting who was the filing party. Similarly, if the person contractually liable for a debt fails to pay it on time or at all, any authorized user will receive the bad credit history on the account. This practice penalizes a spouse whose partner failed to pay a debt or discharged a debt in bankruptcy for which the spouse had no legal liability.

The problem can work in reverse as well by attributing a good credit history to consumers who have done nothing to earn them. Private student lenders are often confronted with underwriting educational loans for 17- and 18-year-olds with excellent credit, because their parents listed them as authorized users on their accounts. The same dilemma applies to other creditors when young applicants have credit reports showing many years of good repayment. In fact, a fraudulent industry has developed by companies who incentivize (pay) people with good credit to list people with bad credit as authorized users on their accounts as a way of helping these

⁶⁶ Regulation B, 12 C.F.R. § 1002.6(b)(6) ("[I]n evaluating an applicant's creditworthiness a creditor shall consider: (i) The credit history, when available, of accounts designated as accounts that the applicant and the applicant's spouse are permitted to use or for which both are contractually liable").

poor risks quickly acquire a better history they have not earned.⁶⁷ The person who “loans out” their good history is paid a fee for each authorized user added, and the person who acquires the credit history (but not the actual right to use the account) pays a large fee. Creditors and their honest customers are the losers in this scheme.

The risk of harm to an applicant of being penalized by a spouse’s poor credit or bankruptcy not involving the applicant and the risk to creditors of attributing a good credit history to those who have not earned it, such as minor children and strangers, is likely outweighed by the benefits of attributing credit histories to authorized users because there is little evidence that married women now have difficulty in establishing credit in their own names.

A second issue, which was useful in preventing discrimination against women, especially married women, in the 1970s pertains to the ban on considering whether an applicant has a telephone listing in her own name.⁶⁸ Initially the ban was necessary because of the prevalence of husband-registered telephone landlines in married households. For decades, however, telephone companies have listed landlines in both spouses’ names on request. Now mobile numbers are typically associated with an individual rather than a household. Since 2016, a majority of households have only cellphone service.⁶⁹ The ban may restrict a creditor’s ability to consider alternative data that would benefit the consumer, such as the use of automated records of wireless phone numbers and the owner’s name.

As the utility of alternative data as a vehicle for economic inclusion continues to grow, we must be cognizant of the stifling effects of overly-prescriptive regulations that have not been modernized to reflect the world we live in today or to minimize future risks with a principles-based approach to adapt to the world of tomorrow. The Taskforce recognizes that many consumers contract for wireless service under a “family plan.” We are aware of services that allow creditors and other subscribers to determine if a consumer has a wireless account, but we have been unable to determine if family-plan accounts reflect the names of each family member (or are capable of doing so) or only the name of a single person responsible for the charges on the account. In light of the growing importance of wireless service and alternative payment data, the Taskforce urges the Bureau to research the question of whether the ban on considering the existence of a consumer’s telephone listing in her own name is a material detriment to obtaining

⁶⁷ Federal Trade Commission, Credit Repair Company Settles FTC Charges It Deceived Consumers By Telling Them “Piggybacking” on Others’ Credit Could Boost Scores (March 2020).

⁶⁸ Regulation B, 12 C.F.R. § 1002.6(b)(4) (“A creditor shall not take into account whether there is a telephone listing in the name of an applicant for consumer credit but may take into account whether there is a telephone in the applicant’s residence”).

⁶⁹ National Center for Health Statistics, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July – December 2016* (May 2017), <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf>

credit, especially for consumers with no or limited credit histories. If not, this prohibition should be eliminated because it is likely to impede rather to advance the goal of inclusion.

Yet another provision in Regulation B that is likely outdated is the requirement in 12 C.F.R. § 1002.5(d)(2) to present a disclosure before asking about income from child support and similar sources. This rule causes unnecessary expense in processing applications for a protection that is no longer relevant for many women and parents. Choosing to provide income from child support does not necessarily reveal the applicant's marital status, because a child support payor and recipient may never have been married to each other, and the recipient, at the time of application, could have any marital status. These warnings, which take up valuable space on a credit application, especially an online application, have quite arguably outlived their usefulness. Just as Regulation B allows a creditor to ask if an applicant has an obligation to *pay* alimony or child support, a creditor should be able to ask the source of any information the applicant chooses to reveal without a cumbersome warning.

Additionally, the ban on questions related to childbearing or childrearing plans should have an exception for credit intended to finance fertility treatments or other services for which childbearing plans are directly relevant, a market that barely existed in 1977. Fifty years ago, it was common to consider a married woman's childrearing plans before counting her income. Today, the practice seems hard to imagine. The sole exception the Taskforce has discovered is the relatively new industry of financing fertility treatments. We do not think that half-century-old restrictions on childbearing plans should limit a woman's access to credit for financing fertility treatment.

Regulation B's rules regarding signature requirements for married people are sensible. They generally say that if a person (including a married person) is individually creditworthy, the person cannot be denied credit individual credit because their spouse does not become personally liable on the contract. Requiring the spouse's signature on a married person's debt, regardless of creditworthiness, was apparently a common practice 46 years ago and indefensible.

A troubling wrinkle presented itself, however, and Regulation B appropriately addressed it. If one spouse was applying for individual credit, but state law gave the other spouse a property interest in the collateral for the debt, the creditor could require the non-applicant's spouse on any document it reasonably believed to be necessary to perfect the creditor's security interest in the collateral. Generally, this meant the creditor could require the spouse's signature on the waiver of a security interest in the collateral but could not obtain the spouse's personal liability on the note. This was a subtle but important distinction, and the rule remains a good one today.

In 2003, the Federal Reserve Board identified a potentially troubling concern regarding the availability of business credit to married women. Unfortunately, in an effort to address this

concern, it adopted an overbroad rule. The Federal Reserve Board believed that business creditors were denying business credit to married applicants if the applicant's financial statement included joint assets. It addressed this concern in Regulation B's commentary, and more problematic, in the sample application forms in Appendix B.⁷⁰ The comment, which was not limited to business credit applicants, said that an intention to be a joint applicant must be documented at the time of application and must be distinct from the means used by individuals to affirm the accuracy of the information.⁷¹

Under this commentary, the two most common methods consumer creditors used to determine an intention to apply jointly—the completion of an optional section of the application for information about a joint applicant and a signature at the bottom of the application, which often contained a legend above it certifying, among other things, that the information presented was accurate—were no longer compliant.

Instead, the model application form (which provides a safe harbor) adds a new section at the top of the credit application, which requires checking one of three boxes the initials of each joint applicant and, if the box pertaining to a joint application is checked, providing the initials of both co-applicants. This disclosure takes up at least 11 lines on the application, but worse, it is often overlooked by applicants, who often jump to the first line requesting their name. In many credit arrangements, the entity that underwrites the credit is not the entity that first receives the application, such as a mortgage broker or retail seller. When the ultimate creditor receives the application and finds this section not completed, it must return the application to the person who provided it. That person must then contact the consumers so the person can arrange to obtain the initials of both co-applicants. In the worst cases, both applicants must return to the business location of the person who received the application from them or abandon the application due to the inconvenience.

12.3 Disparate impact

One of the cornerstones of the Bureau's fair lending supervision and enforcement mission has been the evaluation of lenders using the standard of disparate impact to identify illegal disparities in outcomes for different protected groups. In 2015, the Supreme Court issued a ruling in *Texas Department of Housing and Community Affairs vs. Inclusive Communities (Inclusive Communities)* on the validity of disparate impact under the Fair Housing Act. The Supreme Court held that it is cognizable, but that claims using disparate impact place the

⁷⁰ 12 C.R.F.R. Part 1002, Supp. I, para. 7(d)(1) cmt. 3.

⁷¹ *Id.*

burden on the plaintiff to establish that the defendant's policies cause the disparities in question.⁷² HUD has subsequently issued a final rule reinterpreting disparate impact significantly raising the bar for plaintiffs to bring a suit for housing discrimination, though this rule has been stayed by a federal district court.⁷³

HUD's rule and the Inclusive Communities ruling are specifically related to the Fair Housing Act but raise broader concerns about the use of disparate impact in other applications of fair lending including ECOA actions by the Bureau. Perhaps anticipating these concerns and potential future challenges, in July of 2020 the Bureau published an RFI on several aspects of Regulation B, including whether the Bureau should clarify its use of the disparate impact test for fair lending liability.⁷⁴ The Bureau should issue a rule on disparate impact that sets forth the standard it will apply to disparate impact (including if it is the same as the Inclusive Communities standard) and how the Bureau will apply that standard. Articulating a clear position on the cautionary language of the Supreme Court in elements of proof in a disparate impact case with will minimize the risk of concluding discrimination has occurred when the facts do not meet the applicable standard and of failing to pursue discrimination claims that do meet the standard due to a lack of certainty in how to apply it.

12.4 Enhanced antidiscrimination protections in auto finance

The CFPB has been concerned about potential credit discrimination in automobile finance almost since it opened its doors. By at least 2012, it had opened several investigations of banks and auto finance companies for discrimination based on “dealer markup,” the difference between the finance source's wholesale rate and the retail rate charge to the consumer. The Bureau's attention was focused on the almost industry-wide practice of paying dealers for the valuable services they provided to the ultimate creditor based on the spread between the wholesale and retail rate (the markup). Based on a simple comparison of average markups by racial/ethnic groups,⁷⁵ the Bureau was concerned that the auto finance source's practice of

⁷² Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc., No. 13-1371, 576 U.S. (2015).

⁷³ Mass. Fair Hous. Ctr. Inc. v. HUD (D. Mass., No. 1:20-cv-11765, preliminary injunction, Oct. 25, 2020).

⁷⁴ Bureau of Consumer Financial Protection, *Request for Information on the Equal Credit Opportunity Act and Regulation B*, CFPB, July 28, 2020, at 6, https://files.consumerfinance.gov/f/documents/cfpb_rfi_equal-credit-opportunity-act-regulation-b.pdf.

⁷⁵ Because Regulation B generally prohibits a creditor from collecting racial and ethnic information from the applicant, the Bureau estimated the applicants' race and ethnicity from name and address.

compensating the dealer based on the markup had the effect of causing minorities, usually African Americans and Hispanics, to pay higher markups than white non-Hispanics.

These investigations and their legal theory underpinnings were controversial throughout the six years of this enforcement activity. If discrimination was occurring—a point that dealers and their financing sources hotly contested—it was occurring at the dealership, the entity that set the retail price. But the Bureau focused its activity not on the dealers but the finance sources, because the Bureau’s jurisdiction over dealers is limited by Section 1029 of the Dodd-Frank Act.⁷⁶ This required the Bureau to employ, many believe, a novel and unsupported interpretation of the disparate impact theory, rather than disparate treatment, which under these facts would apply only to the dealerships making the pricing decisions.

In March 2013, the Bureau issued guidance that spelled out in detail the Bureau’s expectations of the actions a finance source should take in monitoring and remediating pricing disparities, according to its theoretical construct. In fairness, many in the auto finance industry welcomed the guidance, because they were eager to know the standards against which they would be held in developing a monitoring and remediation program, even though they may have believed strongly that the Bureau’s legal position subjected them to unfair and legally unsupportable liability under the ECOA.

Banks and finance companies protested that they had neither knowledge of nor control over dealers’ pricing decisions. They also argued that the Bureau’s identified key policy causing the disparate impact—allowing dealers limited discretion to set the retail interest rate—was not a policy at all but the *absence* of a policy, a point made by the Supreme Court in a 2011 employment discrimination case.⁷⁷

Of greater concern to finance sources was the staff’s opposition to using “controls” in their regression analyses to ensure that the comparisons were of consumers who were similarly situated, which the disparate impact theory requires, according to many cases. But the Bureau staff was not receptive to such arguments.

Auto creditors argued that appropriate controls would eliminate the disparities in pricing based on race and national origin. For instance, one or more of them presented evidence that no racial or ethnic differences existed if consumers within the same pricing tier, such as prime, near

⁷⁶ 12 U.S.C. § 5519.

⁷⁷ *Wal-Mart v. Dukes*, 564 U.S. 338 (2011). (In holding that the class certification failed on commonality grounds, the Court stated that “Wal-Mart’s ‘policy’ of *allowing discretion* by local supervisors over employment matters . . . is just the opposite of a uniform employment practice.” Emphasis in original.) Although this decision focused on class certification standards under Rule 23(a), its discussion of the commonality test casts grave doubt on whether the Court would find that third parties’ “discretion” in setting prices could ever amount to an assignee’s “facially neutral” policy that could support a disparate impact claim.

prime, subprime, or deep subprime, were compared against their peers in those tiers. Thus, they argued that the real cause of the markup disparities was the creditworthiness of the applicants. Creditors also argued to the staff, usually unsuccessfully, that the additional work required to qualify low-scoring applicants for credit and the limited credit sources available to buy such contracts from the dealerships warranted the higher markups (and greater compensation to the dealership). The result of these investigations was settlement with several very large banks and finance companies involving many millions of dollars in civil penalties and consumer redress.

This Bureau activity ended when the General Accountability Office ruled that the Bureau's 2013 guidance was a rule, subject to notice-and-comment rulemaking. At that point, the Bureau was required to submit the rule to Congress under the Congressional Review Act, and Congress rejected it.⁷⁸ That action precluded the Bureau from enacting a substantially similar rule in the future without express Congressional authorization.⁷⁹

The real concern with superficial disparities in markups by race and national origin, in the Taskforce's view, is whether they are fully explained by legitimate business considerations. The Department of Justice addressed this issue in two enforcement actions against dealers in 2007. The settlements with two Pennsylvania Ford dealerships helpfully articulated what the Department considered to be legitimate business considerations that would constitute a business justification defense under an ECOA disparate impact claim.

These settlements were the basis for a fair lending compliance program created in 2014 by three auto finance trade associations, the Fair Credit Compliance Policy and Program (Fair Credit Program).⁸⁰ The program contains rigorous requirements for dealers to document the specific reasons for accepting a financing price below their established markup amount. The acceptable reasons are those the Department of Justice has determined to be legitimate business justifications.

Faithful implementation of the Fair Credit Program ensures that a dealer does not illegally discriminate against an applicant on a prohibited basis in pricing decisions. This is a giant step forward in policing what have been largely discretionary decisions by dealers lacking a written (and reviewable) explanation. Under the standards of the Fair Credit Program, every downward departure from the assignee's markup limit must include a written justification that is made a part of the application file. It is noteworthy that in the FTC's settlement of discrimination

⁷⁸ S. J. Res. 57 and H. J. Res. 132 (2018).

⁷⁹ 5 U.S.C. § 801(b)(2).

⁸⁰ The National Automobile Dealers Association, the Association of Minority Automobile Dealer Associations, and the American International Automobile Dealer Associations Fair Credit Compliance Policy and Program, *available at*: <https://www.nada.org/WorkArea/DownloadAsset.aspx?id=21474838176>.

charges with an auto dealership in 2020, the dealership agreed to implement a program very similar to the Fair Credit Program.⁸¹

The Bureau's effort to address perceived discrimination in auto finance pricing through its enforcement actions from 2013 through 2016 imposed a tremendous compliance cost on the indirect auto finance industry with few tangible benefits for consumers. The Bureau clearly hoped to create an industry-wide change in how indirect creditors compensated dealers for the contracts that dealers originate and sell them. This effort was destined to fail due to the aggressive competition for consumer contracts by many potential assignees, both large and small. A dealership that found one finance source's payment too small, based perhaps on the terms of a Bureau consent agreement, had many other choices for where to sell its contracts.

Moreover, the Bureau's consent decrees were designed at best to *limit* dealer discretion based on impermissible considerations but not to end illegal discrimination. In light of its tools and jurisdictional constraints, limiting dealer discretion was perhaps the best outcome the Bureau could hope to achieve.

In contrast, the Fair Lending Program addresses any illegal discrimination directly and provides clear documentation for auditing by third parties, including enforcement agencies. At the same time, the program benefits competition by allowing dealers to set their own compensation limits, whether higher (where the market allows this) or lower (where price competition, often by credit unions) is more intense. The program ensures consistency in pricing practices by each dealer, allowing markdowns from the dealer's documented standard spread only for one of several legitimate reasons, which the Department of Justice has articulated. This is why the Fair Credit program ensures and documents a dealer's compliance with nondiscriminatory pricing rules.

Although each dealership sets a standard markup for its financing contracts, competition and dealers' autonomy is preserved because the dealership sets its standard markup based on its own business strategy.

The Taskforce understands that many auto dealerships have adopted this program on a voluntary basis. We anticipate, however, that adoption would be even more widespread if the Bureau acknowledged that compliance with the program would be one way of demonstrating compliance with the ECOA's rules against discrimination in pricing credit terms.

Although many would view the Fair Lending Program's rigorous requirements at the outer edge of compliance responsibilities under a disparate impact theory, it offers a valuable compliance

⁸¹ FTC. V. Liberty Chevrolet, Inc., Case No. 20-CV-3945 (S.D.N.Y.), Stipulated Order for Permanent Injunctive and Other Equitable Relief filed May 22, 2020.

option for dealerships, which would certainly benefit those dealers that are the most concerned with fair lending compliance. It would also provide assurance of nondiscrimination to both consumers and the finance sources that buy the consumers' financing contracts. Providing an express safe harbor against pricing discrimination claims for dealers would encourage even broader adoption of the Fair Credit Program and enable the finance sources that buy their contracts to control appropriately for nominal differences in markup rates. The commentary to Regulation B by both the Bureau and the Federal Reserve Board⁸² should be amended to provide that compliance with the standards of the Fair Credit Program constitutes compliance with the ECOA's requirements for nondiscriminatory pricing on a prohibited basis.

12.5 Recommendations

61. The Bureau should conduct research on the propriety of amending the ECOA to include disability as a prohibited basis group and, if warranted, potentially recommend its inclusion to Congress.

62. The Bureau should modernize Regulation B in the following specific ways:

Delete the required disclosure before asking about income from child support and similar sources in 12 C.F.R. § 1002.5(d)(2).

Eliminate the ban on questions about plans for childbearing in 12 C.F.R. § 1002.5(d)(3) or should provide for an exception for credit intended to finance fertility treatments or other services for which childbearing plans are directly relevant.

Eliminate the prohibition on considering whether an applicant has a telephone listing in the applicant's name.

Remove the requirement that creditor must consider the credit history of accounts in the name of a spouse for which the applicant is not contractually liable but is authorized to use.

Revise the Commentary to Paragraph 7(d)(1) to allow an intent to apply jointly to be determined by the totality of the circumstances, including the completion of information designated for a "joint applicant" on an application and a signature on a line for a "joint applicant."

⁸² The FRB's version of Regulation B applies to the dealers that are excluded from the Bureau's jurisdiction by section 1029 of the Dodd-Frank Act, 12 U.S.C. § 5519.

63. The Bureau should issue a rule that sets forth the standard it will apply to disparate impact (including whether it is the same as the Inclusive Communities standard) and how it will apply that standard.

64. The Bureau should address any future concerns about credit discrimination in pricing by auto dealers through its ECOA enforcement powers with auto dealerships under its jurisdiction, rather than through enforcement actions against the banks and other creditors that take assignment of these contracts.

65. In evaluating an auto dealership's compliance with the ECOA, the Bureau should take into account the many legitimate non-discriminatory reasons a dealer may vary the APR over the assignee's wholesale buy rate, such as a consumer's negotiation for a more competitive rate, the requirements of a manufacturer's promotional rate offering, the additional time and effort needed to find financing for some applicants, and similar non-discriminatory business reasons.

66. The Bureau and the Federal Reserve Board should amend the Commentary to Regulation B to provide that good faith implementation of the Fair Credit Compliance Program or comparable program constitutes one method of preventing discrimination in pricing credit offered by retail sellers.

13. Financial inclusion

The evolution of the consumer financial system over the last century has been a marvel by almost any measure, contributing to unprecedented prosperity, stability, and material comfort for millions of middle-class and working Americans. But challenges of inclusion and access remain stubborn for many, especially lower-income, young, minority, and immigrant consumers. The concept of “inclusion” is of great interest and importance and was often commented upon by individuals and organizations interacting with the Taskforce during its public outreach efforts that helped inform its work. Inclusion was one of the major themes of the Report of the NCCF in 1972. Volume I, Chapter 10 of this Report discusses this subject.

Inclusion is the ability of consumers to gain access to the products and services offered by the financial system. Full access to products and services like savings and checking accounts, credit cards, auto financing, student loans, and payment systems helps consumers lead engaged financial lives efficiently, at low cost, and to their overall benefit. Consumers without access, who are unable to use financial products, obtain credit, or are otherwise left out of the system, can suffer as a result. These consumers pay higher costs, are blocked from wealth creation tools such as mortgage loans used to obtain home ownership or credit used to purchase durable goods and can find even the purchase of necessities more difficult. Thus, financial exclusion can beget further exclusion and become chronic throughout one’s life.

The moral imperative to promote greater financial inclusion must be balanced against the equally compelling necessity of not burdening vulnerable individuals and families with unsustainable financial obligations or products that are inappropriate. Policymakers should be vigilant to eliminate discriminatory and artificial regulatory barriers that interfere with consumer access to products they believe will improve their financial well-being, while ensuring responsible underwriting. Laws, regulations, and the natural forces of competition play a role in opening the financial system to all consumers including the underserved, although without special care, even laws and regulations meant to enhance the consumer experience, can produce unintended negative effects on inclusion and access. Rules can also produce excessive compliance costs, change the ability to manage financial risk and the profit profile of products and services, lessen provider access to markets, and put limits on where a provider can operate or with whom it can do business.

Historically the most notorious obstacle to financial inclusion was usury ceilings, which made it uneconomical for providers to offer credit to many higher-risk and lower-income consumers. As a result, many marginal consumers were forced to rely on alternative providers of financial services, such as pawnbrokers and personal finance companies, or illegal lenders and even organized crime-controlled loan sharks.

Although less obvious and less disruptive than usury regulations, today there remain price controls, entry barriers, and other limits that interfere with the ability of lower-income and higher-risk consumers to gain access to quality financial products at competitive prices. For example, price controls in one aspect of a transaction have the predictable effect of forcing a bank to raise fees (or eliminate services) in another part of the business. Congress’s price controls on debit card transactions have caused banks to increase other fees, including those on basic checking accounts that have reduced access to bank accounts for many lower-income Americans. Restrictions on changing credit card terms that were widely used for risk management have reduced access to credit cards and eliminated one important way in which consumers transition from credit “invisibility” to establishing a credit record and score. Credit invisibility tends to continue over the lifecycle, thus cutting off access to certain products early in adult life can make it more difficult to gain access later on.

13.1 Expanding credit unions’ ability to serve under-served areas

Credit unions have important potential to serve unbanked consumers. Currently, only one credit union charter type, the multiple common bond charter, can serve underserved communities outside their common-bond membership.⁸³ The Taskforce recognizes that credit unions are subsidized entities through their tax status as not-for-profit cooperatives. But middle- and upper-class individuals have access to and use credit unions, and the Taskforce can see no reason why these benefits should be reserved largely to higher-income Americans.

Moreover, it is the view of the Taskforce that credit union charter type distinctions are somewhat arbitrary in terms of providing a principled demarcation among different classes of credit unions. As a result, the Taskforce is unable to discern a logical reason for excluding certain credit unions from serving underserved areas simply because of the terms of their common bonds. The Taskforce has heard that employment-based credit unions that operate in areas that include underserved communities would like the opportunity to expand their services to those communities, because they already possess the infrastructure to do so. The Taskforce can endorse this recommendation for the purposes of inclusion.

⁸³ 12 U.S.C. § 1759(c)(2)

13.2 Barriers

Barriers to inclusion take a variety of forms.

The purpose, objectives and functions spelled out in the Dodd-Frank Act assigns to the Bureau the job of ensuring that financial products and services markets operate transparently and efficiently to facilitate access and innovation. Without concentrated focus on this mandate, the Bureau can easily stray from this goal. The Bureau needs a formal system of best practices to routinely determine the effects of contemplated actions on inclusion and access to avoid the creation of unintended barriers that can flow from poorly designed regulations and practices.

Creditors front money and issue loans to consumers with the intent of being repaid. The most common tool for measuring risk and the likelihood of being repaid is the consumer credit report and associated credit score. Consumers with thin or non-existent credit records, known as “credit invisible” consumers, are more often than not unable to access the formal credit system because creditors cannot determine the level of risk when extending credit to such borrowers. One group of consumers that encounter this barrier to inclusion because they do not have easily observable credit histories are recent immigrants. The Bureau should work with other federal regulators, credit bureaus, and the private sector to try to develop processes that can expand access to financial products for immigrants by facilitating the translation of credit records and other indicia of financial risk from foreign jurisdictions to the United States.

Anti-money laundering and bank secrecy laws obviously serve an important and legitimate function within the U.S. financial and national security regulatory system to reduce the threat of terrorism and criminal activity. On the other hand, some concern has been expressed that Anti-Money Laundering (AML) and Bank Secrecy Act (BSA) requirements can impose excessive costs and risks of dealing with certain groups of consumers, which can unintentionally reduce financial access. Moreover, these laws can lead to paperwork and personal identification burdens that might be excessively costly in light of the risks presented by certain consumers. The Taskforce recommends that the Bureau, in collaboration with other domestic and international regulatory bodies, evaluate the existing AML-BSA regulatory framework with a particular focus on the potential cost of certain elements of that framework in terms of reduced financial access and inclusion in light of the benefits in terms of reduced criminal and terrorist activity.

13.3 Card Act reform

Another area of concern is the costs imposed by the Credit Card Accountability Responsibility and Disclosure Act (CARD Act).⁸⁴ The Taskforce believes the Bureau should analyze these effects, with special emphasis on costs that adversely affect risk management and its effect on inclusion. If analysis suggests that costs to inclusion may be greater than intended, Congress should consider amending it.

The primary focus of the CARD Act was to place limits on the terms and conditions of credit card agreements, including limits on the ability to adjust interest rates and other terms in light of changes in a consumer's risk profile. Empirical evidence has found that as a result of these regulations, interest rates have increased for all consumers and access to credit has been reduced, especially for higher-risk borrowers. Although some consumers have received benefits from the CARD Act as a result, the Taskforce believes that the adverse effect of the CARD Act on financial inclusion requires reconsideration of some of the statute's terms.

Two specific provisions of the CARD Act that were intended as consumer protections for specific groups of consumers should be reconsidered. As discussed in Chapter 12, the CARD Act includes restrictions on marketing and issuing credit cards directed toward particular groups of consumers.⁸⁵ These protections were intended to protect college students and other younger adults from incurring debts they could not repay, thus harming their credit histories early in their adult lives. However, an important effect of these limitations was reduced credit availability to young adults, impairing their ability to build a credit record necessary for access to credit in subsequent years. Moreover, the rule disproportionately reduces access for those from lower-income backgrounds whose parents are less able to co-sign for cards or otherwise guarantee a young person's obligations. Moreover, the benefits of the law are unclear, because delaying access to credit cards from age 18 to 21 may not reduce the risk of financial difficulties.

The second provision of the CARD Act is price controls on subprime credit card offers.⁸⁶ This provision limits the total of fees assessed during the first year a credit card account is open to 25 percent of the total credit line at opening.⁸⁷ Subprime cards with high fees and low credit limits do not provide the benefit of extending a substantial line of credit to consumers. But they can provide value to a consumer as a vehicle to establish or improve credit for those with impaired credit, who are credit invisible, or who are unable to provide collateral or a co-signer to obtain a

⁸⁴ The Credit Card Accountability Responsibility and Disclosure Act of 2009 (Card Act), Pub. L. 111-24, 111th Congress, 15 U.S.C. § 1601 note.

⁸⁵ CARD Act, §§ 301-303, 15 U.S.C.A. § 1637(c)(8); 1681b(c)(1)(B)(iv); § 1637(p).

⁸⁶ See discussion in Chapter 10.

⁸⁷ CARD Act, § 105, 15 U.S.C.A. § 1637(n).

credit card. Banks issuing these cards will often offer a traditional credit card after a consumer demonstrates good repayment with this card. Further, if the bank reports the credit history on the subprime cards, good payers can often find more choices in selecting an issuer of a traditional credit card. Rather than imposing price controls that can make these cards not viable in the market, Congress and the Bureau should consider disclosures that more clearly alert consumers to the benefits (establishing a credit history) and limitations (fees that may initially may consume much of the consumer's authorized credit limit), so consumers can make informed decisions regarding whether the card meets their needs.

The CARD Act's price controls reduce access to subprime cards. This can not only prevent consumers from accessing their preferred way of becoming credit visible but might also force them to rely on more costly alternatives such as payday loans or other alternative financial products that do not facilitate becoming credit visible. The key consideration is that consumers who are considering such a card understand its costs and potential value, so they can make an informed decision on whether the card can help them meet their financial goals – the same objective any other consumer has in evaluating a financial product. This objective can be accomplished by a disclosure-based regime, focusing on the terms of greatest interest to the users of these cards, combined with enforcement of prohibitions on unfair, deceptive, or abusive acts and practices.

13.4 Costs to provide financial services

The arrival of debit cards around the year 2000 ultimately led to the debit card becoming the most used non-cash payment used by consumers to complete transactions. Debit card issuers are generally banks, and these entities cover some of the cost of providing this service through the collection of interchange fees. These fees are paid mostly by merchants, cover the cost of the debit card product, and even help pay the costs of providing other bank services such as free checking accounts and access to ATMs. In contrast, consumers pay the costs of the system directly when they pay with checks, in the form of bank fees of various types. The debit card system with its overall effect on the cost structure for financial services created less expensive bank access for consumers that traditionally could not afford to participate in the financial system. The displacement of checks by debit cards also led to the widespread adoption of free checking models as the dominant form of bank accounts in the economy, a development that greatly expanded access to bank accounts for lower-income and younger consumers. The introduction of Section 1075 in the Dodd-Frank Act, however, with its limitation on interchange fees to those that are “reasonable and proportional to the cost incurred by the issuer with respect to the transaction,” the law has altered the cost structure of the debit card system and directly impacted the costs of bank services with real effects on inclusion for lower income consumers.

13.5 Competition to promote access

Competition between providers to attract consumers creates innovation in offerings and puts downward pressure on prices, drawing neglected members of the consumer class into the mainstream financial system. An effective way greatly to increase competition would be to expand access to the payments system to non-bank providers. The Taskforce believes that promoting innovation in consumer payments, as already found in other countries, could be powerful vehicle for increasing financial inclusion and competition.

13.6 Areas for further research

Financial inclusion is an area that has received a good deal of research and policy attention for years. During its proceedings the Taskforce became aware of two additional areas that call for further research to understand the problems of and solutions to particular groups with respect to financial inclusion, formerly incarcerated individuals and rural areas.

As discussed in Chapter 10, individuals emerging from extended periods of incarceration face daunting financial challenges. They face difficult job prospects and few assets. Moreover, if they have been imprisoned for an extended period of time, especially if longer than seven years, they may no longer have an active credit record. In addition, they may be victims of identity theft at unusually high rates and have difficulty monitoring their financial affairs while imprisoned. Research suggests that as a result of these challenges, formerly incarcerated people are less likely to have bank accounts and more likely to use alternative financial service providers than average. The Bureau should conduct research to investigate the particular challenges of the formerly incarcerated and work to develop policies to assist them in regaining (or gaining) credit visibility and access to quality financial products.

The financial challenges of rural populations are also an area that warrants future research. Bureau research has found that rural populations are the geographic group with the highest rate of credit invisibility.⁸⁸ The challenges of financial inclusion for rural populations has grown in recent years as many rural bank branches have been closed, leaving the next closest bank many miles away.⁸⁹ Moreover, many rural areas still have limited and expensive internet access and may lack reliable mobile phone service. With these considerations in mind, the Taskforce proposes 11 recommendations regarding financial inclusion.

⁸⁸ CFPB, Data Point: The Geography of Credit Invisibility (Sept. 2018).

⁸⁹ Federal Reserve Board, Perspectives from Main Street: Bank Branch Access in Rural Communities (Nov. 2019).

13.7 Recommendations

- 67.** The National Credit Union Administration should recommend that Congress allow all credit union charter types to serve underserved areas given the potential to increase inclusion.
- 68.** The Bureau should incorporate consideration of Dodd-Frank Act’s mandate to consider effects on inclusion, access, and choice in all its deliberations.
- 69.** The Bureau should study how to facilitate creditor access to credit report information about recent immigrants and to translate that information so that credit information from their financial lives prior to arrival in the United States can be used in credit decisions, such as by enabling immigrants to provide reliable information from a foreign jurisdiction that can enable a creditor to reconsider a decision on credit denial or pricing in the United States.
- 70.** The Bureau should analyze all costs related to the CARD Act with special emphasis on how the law impacts financial institution risk management and how the impacts ultimately affect inclusion. If analysis suggests that negative effects on inclusion, such as limited consumer access to credit cards, may be greater than intended, Congress should consider amending the law to reduce those adverse effects.
- 71.** Congress should consider repeal of the restrictions on marketing credit cards to consumers age 21 and under. The rule has clear costs to consumers, impacting inclusion and limiting access to credit. To help Congress understand the impact of the current ban, the Bureau should study its benefits and determine the extent to which becoming eligible for credit cards at age 21 instead of 18 has reduced the risk of financial difficulties in light of the costs of such policies.
- 72.** Congress should repeal the CARD Act’s restrictions on fees for unsecured subprime credit cards. The restrictions make these cards uneconomical for potential issuers, which diminishes their availability to consumers who seek to use the cards to build a positive credit history. Heightened scrutiny of these cards is warranted to ensure consumer protection. To avoid precluding consumer access to this credit improvement vehicle, policing of these subprime credit cards should be accomplished through principles-based UDAAP rules or a new disclosure regime tailored to the particular terms of these cards, rather than through legal restrictions that ultimately limit access.
- 73.** The Bureau should research Anti-Money-Laundering laws and Bank Secrecy Act effects on inclusion and access to credit, especially concerning remittances and other services used by immigrant populations. If necessary, the Bureau should conduct original research in this area.
- 74.** Congress should repeal the provision in Section 1075 of the Dodd-Frank Act that imposes price controls on debit card interchange fees due to its adverse impact on access to free or low-

fee banking accounts, which have impeded inclusion in the banking system. Repealing Section 1075 would not obviate the application of any other laws, such as antitrust laws, to these markets.

75. The Bureau should explore mechanisms, identify barriers, and make appropriate recommendations to Congress and other regulators for expanding access to the payments system by non-bank providers, while at the same time recognizing legitimate concerns about money laundering and financial solvency.

76. The Bureau should conduct research and develop policies tailored to the unique challenges of formerly incarcerated people, assess the risks of identity theft in this population, and work with appropriate state and federal authorities to develop robust mechanisms for protecting imprisoned individuals from identity theft.

77. The Bureau and other regulators should conduct further research and develop policies designed to address the growing problems of financial inclusion in rural communities. Consider joint research with the U.S. Department of Agriculture or other agencies as appropriate.

14. FinTech regulation

As detailed in Chapters 8, 9, and 10, innovation advances competition and in turn benefits consumers through greater choice, improved products, lower prices, and greater financial inclusion. Technology-enabled financial services, or FinTech, is at the center of innovation today. FinTech companies provide or support a wide array of consumer financial services, including payments, savings, peer-to-peer lending, and financial management. By using digital technology, FinTech companies can provide these services in new ways, allowing consumers to transfer funds through mobile devices, automate savings decisions, obtain loans without stepping foot inside a bank, and receive credit decisions and budgeting recommendations that consider a vast amount of data.

Regulatory uncertainty and unnecessary regulatory costs threaten to inhibit FinTech-based innovation, however. In particular, non-bank FinTech companies engaged in payments, remittances, or lending services are generally subject to state law and must register or acquire a license from each state in which they operate. A company with a nationwide footprint thus may need 50 separate licenses and adjust its practices to conform with each state's laws. As a result, a non-bank FinTech lender would be subject to different maximum-allowable interest rates depending on the state, whereas a federally chartered bank providing the same service could charge the interest rate that its home state allows, regardless of the consumer's location. These costs, and the competitive disadvantages from a segmented regulatory regime, are significant.

Federal policymakers should address these regulatory hurdles and promote competition and innovation by enabling FinTech companies to operate nationwide. Specifically, following on the National Commission on Consumer Finance's (NCCF) recommendation that Congress create a federal consumer financial protection agency that could issue federal charters to non-bank finance companies, the Taskforce recommends that Congress either authorize the Bureau to issue federal charters or licenses to non-bank FinTech companies engaged in payments, remittances, or lending services, or clarify the authority of the OCC. Charters or licenses should provide that these institutions are governed by the regulations of their home states, even when providing services to consumers located in other states, similar to the National Bank Act's treatment of federally chartered banks.

The Dodd-Frank Act created in the Bureau a unique agency well-situated to regulate entities engaged in interstate activities. By making the Bureau the licensing agency, Congress would assure that consumer protection concerns are at the forefront. The Bureau could supervise licensed entities to ensure compliance with applicable federal and state laws, just as it already does with respect to many other bank and non-bank institutions. Empowering the Bureau to issue charters for non-depository providers of financial services would also reduce the danger of

“capture” of federal regulators by banks and other depository institutions that could try to hamstring potential competitors through the imposition of unnecessary regulatory burdens, such as excessive capital requirements unjustified in light of the different risks posed by non-depository institutions.

Permitting non-bank FinTech companies to operate nationwide while subject to a single set of laws would ensure consistency, thus reducing unnecessary regulatory costs and promoting competition. It would also promote regulatory competition between states and ensure that states retain their role as laboratories of experimentation. Each state would have an incentive to establish workable consumer protection regulations to attract FinTech companies.

As an alternative to Bureau-issued licenses, Congress could clarify the OCC’s authority to issue federal charters to non-bank FinTech companies. The OCC, which has a long history of evaluating and granting charters, recently took steps to issue charters to such companies engaged in lending, and it has announced its intent to do the same with money transmitters. There is ample legal precedent for such a step, most notably the recognition of monoline credit card banks such as MBNA and others. These efforts are subject to legal uncertainty, however, because of questions about whether a non-depository can engage in “banking” under the National Bank Act. Especially if Congress elects not to authorize the Bureau to issue federal licenses, it should clarify that the OCC has that authority. This alternative option would ensure that FinTechs operating nationwide companies are subject to a single set of laws. Moreover, the OCC has significant expertise in FinTech generally and in these services specifically, and it may be well-positioned to supervise non-bank FinTech companies with multistate operations.

Regardless of which agency charters the FinTechs, the agency exercising that authority should pay careful attention to any capital requirements and other unnecessary or excessive regulatory burdens. Unlike banks that benefit from FDIC insurance of their deposits, FinTechs typically do not take deposits and do not have FDIC insurance on any deposits they take. Without the risk to consumers of holding their deposits, there appears to be no need for minimum capital requirements.

Apart from licensing, the Bureau should consider the costs and benefits to consumers of preempting state law in specific cases if the potential for conflict can impede provision of valuable products and services, such as regulation of FinTech companies engaged in money transmission. For example, state laws governing money transmitters vary greatly, and in some cases impose significant barriers to market entry. It may be that consumers would benefit from greater competition and choice if the Bureau preempted certain of those state requirements.

14.1 Recommendations

78. Congress should authorize the Bureau to issue licenses to non-depository institutions that provide lending, money transmission, payments services. Licenses should provide that these institutions are governed by the regulations of their home states, even when providing services to consumers located in other states, similar to the National Bank Act’s treatment of federally chartered banks. In the alternative, Congress should clarify that the OCC has the authority to issue charters to non-depository institutions engaged in lending, money transmissions, or payments services.

79. The Bureau should consider the benefits and costs of preempting state law in some specific cases in which the potential for conflict can impeded provisions of valuable products and services, such as the regulation of FinTech companies engaged in money transmission.

15. Privacy

Technology and the benefits and risks associated with it have pushed data privacy issues into the spotlight. The intense focus on these issues is likely to continue as our society innovates and deploys technology in ways to meet our needs. So too will the search for privacy solutions that balance the benefits derived from innovative uses of information with the need to prevent practices that may harm consumers.

Data privacy policies should aim at creating a positive-sum framework that benefits consumers, industry, and the economy as a whole. Consumers value safety and security and have a need to guard against the misuse of their information. But consumers also can gain great value from appropriate use of information to offer them products and services that better meet their needs at lower prices and with greater quality and convenience. Financial services providers have an interest in providing value-increasing products and services in a convenient way while maintaining the level of security consumers expect. They also require complete and accurate information to address information asymmetries and accurately assess risks and costs. The economy benefits overall when consumers have confidence that their information will be used securely and for their benefit and are thus more willing to adopt more efficient innovations. The pivotal role of the development of the credit reporting system in the United States in promoting competition, innovation, and inclusion, illustrates the potential value to consumers from enabling the use of consumer financial information by providers. Regulators should keep these considerations in mind when exercising their regulatory, supervisory, and enforcement authorities.

In the past, regulators have sought to address privacy concerns using approaches that are overly reliant on disclosure requirements. The result has been a regulatory regime that has been largely ineffectual, imposing substantial cost on providers with little more than a façade of protection to consumers. Even regulations that have succeeded in restricting the use of data have failed to address potential harms to consumers efficiently, instead relying on consumers to protect themselves. Regulators should shift their focus to protecting consumers rather than data, identifying the potential adverse consequences for consumers from particular data use or misuse. In this regard, the FCRA is an appropriate model, restricting use of credit reporting data to a specified set of uses, with provisions designed to avoid the adverse consequences that can result from inaccuracies in credit reporting data. Privacy regulation based on controlling adverse consequences is discussed in more detail in Chapter 11. Determining how to draft regulations that prevent harmful outcomes without restricting beneficial uses of data is worthy of regulators' study and consideration.

There is little evidence that the current, disclosure-based approach to privacy regulation has worked. Current policy is based on the unrealistic assumption that consumers will actually read and knowingly consent to long, detailed, complex privacy disclosures that govern the relationship between the consumer and the provider. Most people's experience with consenting to pop-up "Cookies" notices on websites or annual Gramm-Leach-Bliley Act (GLBA) privacy notices illustrate the chimerical nature of such consent. Indeed, privacy policies would seem to be the epitome of information overload, discussed in detail in Chapter 7.

Congress did not transfer the Safeguards Rules adopted by the FTC and the prudential regulators to the Bureau, and the Task Force believes the existing allocation of responsibility is appropriate. The FTC and the prudential regulators have developed substantive security expertise that the Bureau lacks, and there would be no real benefit in attempting to recreate it. The Taskforce notes, however, that a standard limiting notification of data breaches to only those when there are steps consumers can take to protect themselves will improve consumer recognition and responsiveness to privacy and security related notifications. Furthermore, as noted in Chapter 11, Section III, "[P]rivacy harms do not depend on the consumer's state of residence. They are the same, wherever the consumer lives." There is, therefore, little benefit in privacy requirements varying from state to state. There are, however, significant costs, particularly for online commerce and multistate firms, if companies must comply with a patchwork of inconsistent requirements, therefore such a standard should be set by Congress instead of leaving it to states.

15.1 Recommendations

80. When the Bureau confronts data privacy issues, it should seek regulatory solutions that control the possibility of harm to consumers rather than relying on disclosure. With respect to regulation, the Bureau should recognize and address, where possible, any potential anticompetitive effect of regulations as part of its rulemaking process. Disclosure is appropriate under the circumstances described in recommendation the following recommendation.

81. Congress should enact a law authorizing national preemptive standard for data breach notifications adopted by a relevant regulatory agency. The standards should consider what the objectives of such a notification would be when defining the scope of the law and the remedies.

82. The Bureau should study the effectiveness of GLBA privacy notices to ensure that information is relayed in a manner that is useful to consumers. Additionally, the Bureau should consider allowing financial services providers to post current privacy notices online only given consumer's growing dependence on the internet and the dynamic, fast-changing nature of technological advances.

16. Regulatory coordination

Financial institutions and other financial firms are regulated by many different federal and state regulators. For instance, depository institutions face consumer financial regulations from the Federal Reserve, the FDIC, the OCC, the NCUA, state-level banking regulators, and the CFPB.⁹⁰ Other non-depository entities that offer consumer financial products are regulated by state banking agencies, the FTC, and the CFPB.⁹¹ With such a high level of regulatory overlap, the Bureau must effectively coordinate with its regulatory partners to minimize duplication of effort and avoid unnecessary cumulative costs on the industry.

Regulators should continue to identify and focus on opportunities to coordinate regulatory efforts. To ensure that regulation does not stifle promising innovation, the Bureau should work with other agencies to create a unified regulatory regime for new and innovative technologies providing services similar to banks. In coordinating with other agencies to avoid duplication and burdensome supervision and examination of covered entities, federal regulators should evaluate whether revisions to Memoranda of Understanding (MOU) could improve and formalize the responsibilities of the various agencies. The Taskforce learned that all the prudential regulators currently duplicate the CFPB's examination of banks compliance management systems (CMS) and compliance with the federal ban on engaging in unfair or deceptive acts or practices (UDAP). These are perhaps the two most time-consuming aspects of a consumer compliance exam, which limits the resources of all these agencies to direct resources in more productive ways. Moreover, they create serious problems for banks that sometimes receive contradictory supervision guidance on the adequacy of the CMS or whether a practice is unfair or deceptive. Even when the positions of a prudential regulator and the Bureau do not directly conflict on issues involving CMS and UDAP, banks can never rely with confidence of the position of one regulator out of concern the other will instruct differently.

Opportunities exist for the Bureau to improve communication and coordination with state banking regulators. By improving outreach to states, it is likely duplication of efforts can be better avoided and identifying more opportunities to streamline regulation can be achieved.

The Bureau should also consider the most efficient way to coordinate with the FTC in enforcement actions regarding automobile dealerships. Auto dealers, like other retail sellers, typically offer financing to customers only if a third-party finance source agrees to purchase the

⁹⁰ For more information on the degree of regulatory overlap, see the Congressional Research Service's report "Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework" at <https://fas.org/sgp/crs/misc/R44918.pdf>.

⁹¹ *Id.*

contract after making a decision about the consumer's creditworthiness. For that reason, the third-party finance source is mostly or wholly responsible for the credit decision, even though the retail seller is the nominal creditor. When consumer concerns are focused on the retail seller, they typically relate to sales practices or product concerns rather than the financing. Because the FTC has jurisdiction over both unfair and deceptive sales practices and consumer credit extensions, oversight of retail sellers may be most efficiently handled by the FTC. The Taskforce believes there is no reason to treat auto dealers differently from other retail sellers, such as furniture or electronics sellers whose sales practices are regulated by the FTC. A distinction should be drawn between creditor and retailers who only handle the marketing and sales of a product, not the financing of the product. This parity in jurisdictional treatment could be accomplished by giving sole jurisdiction to the FTC for retail sellers. Alternatively, the Bureau and the FTC could continue to share jurisdiction over the financial aspect of the transaction, although this may lead to inefficiencies. Further, the line between where a sales transaction ends and the credit transaction begins is often not bright. The agencies should consider entering into an MOU to avoid duplicative enforcement.

16.1 Recommendations

- 83.** The Bureau should continue to identify and focus on opportunities to coordinate regulatory efforts. The Bureau and prudential regulators should eliminate overlapping examination subject areas and reconcile inconsistent examination standards that unnecessarily expend multiple resources and can cause confusion.
- 84.** The Bureau should continue to increase dialogue with state regulators to bridge knowledge gaps and streamline regulation.
- 85.** The Bureau should work with other agencies to create a unified regulatory regime for new and innovative technologies providing services similar to banks.
- 86.** The Bureau should work with the FTC to explore opportunities to streamline jurisdiction and enforcement of consumer financial protection regulation of third-party financing offered at automobile dealerships and other retail sellers. Because the FTC has jurisdiction over both unfair and deceptive sales practices and consumer credit extensions, oversight of retail sellers may be most efficiently handled by the FTC. The agencies should consider an MOU specifically focused on retail sellers to avoid duplicative effort.

17. Regulatory principles

Rapid and ongoing changes in technology, consumer preferences, and the economic environment has accelerated the pace of change in consumer finance. New opportunities and new threats have emerged with increasing speed. Growing complexity and global interconnectedness raise the potential for unanticipated sources of major and minor crises, whether economic, financial, or health related. These growing pressures have highlighted the need for greater flexibility and responsiveness in the regulatory system to be adaptive to these challenges. At the same time, this goal is in tension with the need for greater predictability in the regulatory framework to enable private actors to also plan and adjust to an increasingly unstable and unpredictable world.

Although detailed and prescriptive legislation and regulation are often intended to provide stability and predictability, where they are excessively rigid, they can actually undermine those goals by becoming obsolete and contrary to both common sense and the parties' expectation. For example, mandated paper-based disclosures or in-person processes can prove burdensome, wasteful, and contrary to consumer needs and expectations when technology enables faster, simpler, and more effective means of protecting consumers and achieving regulatory goals.

To maximize the utility and flexibility of the Bureau's regulations and to respond to the increasingly rapid pace of change in technology and consumer preferences, to the greatest extent possible the Bureau should rely on flexible principles-based regulations that protect consumers from harm while promoting access, inclusion, innovation, and competition, rather than detailed and specific regulations that can become quickly outdated, impose more costs than necessary, and foreclose innovative new approaches to protecting consumers. Regulations should be clear and easy to understand, and the Bureau should be sure to issue regulatory guidance to clarify confusing language. The Bureau should be sure to use clear and consistent language, concepts, and terms and apply them consistently across the Bureau's functions. To maintain a modern regulatory program that is simple and imposes no more burdens than necessary, the Bureau should build on its process of ongoing review of existing rules to identify regulations that can be simplified, streamlined, updated, or otherwise improved.

Highly detailed and specific regulations often can be inferior to more flexible principles-based standards for several reasons. Most regulated industries have some heterogeneity in business models, operating procedures, costs, and products, so one-size-fits-all standards are unlikely to maximize benefits net of costs. More flexible standards provide firms with the ability to develop more innovative solutions to problems that are more adaptable to changes in the industry. This may reduce the probability that a regulator has to rewrite the regulations when consumer preferences change, or innovative new products develop.

Well-articulated and stable general principles, combined with appropriate use of the Bureau’s multiple regulatory tools, can help to navigate this course between excessive uncertainty on one hand and excessive rigidity on the other. In deciding which of its regulatory tools to use to address a given consumer protection challenge—particularly when establishing the optimal mix of regulation, enforcement, and supervision—the Bureau should be conscious of this trade-off between stability and flexibility. Regulation is most usefully constructed to provide a principles-based regulatory framework, while enforcement and supervision can be useful in developing those principles within that broader framework. Excessively detailed and prescriptive regulations on one hand, or the making of “regulation by enforcement” on the other, can both threaten this balance by enforcing excessive rigidity in one case and insufficient predictability in the latter.

In recent years the Bureau has taken several important and valuable steps consistent with the goal of increasing flexibility in the operation of the regulatory framework while preserving overall stability. For example, the Bureau’s rollout of an active No-Action Letter program can provide a valuable source of predictability without sacrificing flexibility. Its Compliance Assistance and Trial Disclosure Sandbox programs are role models of experiments in regulatory innovation using modern technology and regulatory collaboration. Other regulatory agencies should emulate the underlying design and goals of these programs. Continued Bureau support and evaluation of these programs is crucial. The Bureau should also conduct ongoing evaluation of these programs to ensure their ongoing effectiveness, relevance, and efficiency of these programs so that parties have adequate incentives to use these programs to their maximum efficiency. The Bureau’s regulations should be in plain language and easy to understand. The Bureau should be sure to use clear and consistent language, concepts, and terms, as well as apply them consistently across the Bureau’s functions. Policy guidance should be aligned and applied equally by regulations, supervision, and enforcement teams when conducting Bureau business. The Bureau should issue regulatory guidance to clarify the regulations, as necessary. In doing so, the Bureau should be careful that guidance documents do not create new law or policy and should subject significant guidance documents to notice and comment in the Federal Register. To determine which guidance documents require notice and comment, the Bureau should consider adopting the definition of significant guidance document found in OMB’s *Final Bulletin for Agency Good Guidance Practices*.⁹² Review of the stock of regulations is an important element in any regulatory program. In 2011, President Obama issued Executive Order 13563 “Improving Regulation and Regulatory Review,” requiring executive agencies to conduct retrospective analyses of existing regulations to identify rules that may be outdated or

⁹² OMB, *Final Bulletin for Agency Good Guidance Practices*, 72 FR 3432 (January 25, 2007).

excessively burdensome.⁹³ Further, the 1994 Riegle Community Development and Regulatory Improvement Act required the banking agencies to conduct a systematic review of their regulations to “improve efficiency, reduce unnecessary costs, eliminate inconsistencies, eliminated outmoded and duplicative requirements, promote uniformity among the regulations and policies of the agencies, and reduce regulatory burden.”⁹⁴ Section 1022(d) of the Dodd-Frank Act requires the Bureau to publish an assessment of its each of its significant regulatory actions within five years of finalization. Also, the Regulatory Flexibility Act requires the Bureau to review rules within 10 years of publication to assess whether it had a “significant economic impact upon a substantial number of small entities.”⁹⁵

When it began operations, the Bureau rightly prioritized its mandatory rulemakings and several high-priority discretionary rulemakings. Now, the Bureau should redouble its efforts to review existing regulations for opportunities to streamline and reduce costs. In addition to its existing practices for reviewing the existing stock of regulations, the Bureau should consider adopting some process to prompt review of existing regulations as questions arise. The Bureau should consider whether additional assessments of major regulations should be instituted at intervals beyond the five-year requirement in the Dodd-Frank Act. The Bureau should consider processes to review regulations that the Bureau inherited and have not been recently amended. The Bureau should evaluate and streamline, as appropriate, the process by which questions that come through the Office of Supervision Examinations, the Office of Regulations, the Office of Innovation, and other policy-interpretation areas of the Bureau are shared with other parts of the Bureau so that guidance can be consistent and shared publicly.

Beyond the challenges of adapting and updating the existing regulatory framework to deal with the ongoing and increasingly rapid pace of technological and economic change, the global financial crisis of 2008 and the Coronavirus pandemic of 2020 illustrate the additional need for a coherent and predictable framework for dealing with large-scale crises. Those recommendations are addressed in Section 10, “Emergency authority.”

⁹³ Exec. Order 13563, 3 CFR 13563, *Improving Regulation and Regulatory Review* (2011), available at <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>

⁹⁴ Board of Governors of the Federal Reserve System, *83rd Annual Report* (1996), available at <https://www.federalreserve.gov/boarddocs/rptcongress/Annual96/regsim.pdf>

⁹⁵ See CFPB, *Fiscal Year 2020: Annual Performance Plan and Report, and Budget Overview* (2020), available at https://files.consumerfinance.gov/f/documents/cfpb_performance-plan-and-report_fy20.pdf.

17.1 Recommendations

87. The Bureau should apply a principles-based regulation wherever possible, with sufficient flexibility for crises and change. Rules should be updatable, adaptable to developing threats, and periodically reviewed. The Bureau should be conscious of its regulatory tool usage and in deciding which tool to use for a given challenge it should consider, among other factors, the balance between predictability and flexibility.

88. Regulations should use plain language and be easy to understand. The Bureau should apply concepts, terms, and guidance consistently across Bureau functions and activities.

89. When beneficial, the Bureau should clarify regulations with appropriate guidance. The Bureau should ensure that interpretive guidance documents do not create new policy and that significant guidance documents are published for notice and comment in the Federal Register. To determine which guidance documents require notice and comment, the Bureau should consider adopting the definition of significant guidance document found in OMB's *Final Bulletin for Agency Good Guidance Practices*.⁹⁶

90. The Bureau should build upon its process of ongoing review of existing rules to identify regulations that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. The Bureau should consider adopting a process to prompt review of existing regulations as questions from stakeholders arise. The Bureau should consider whether additional assessments of major regulations should be instituted at intervals beyond the five-year requirement in the Dodd-Frank Act. The Bureau should consider processes to review regulations that the Bureau inherited and have not been recently amended.

91. The Bureau should evaluate and streamline, as appropriate, the process by which questions that come through the Office of Supervision Examinations, the Office of Regulations, the Office of Innovation, and other policy-interpretation areas of the Bureau are shared with other parts of the Bureau so that guidance can be consistent and shared publicly.

92. The Bureau should continue to support and encourage the development of its No-Action Letter, Compliance Assistance Sandbox, and Trial Disclosure Sandbox programs.

⁹⁶ OMB (2007), *supra* note 84.

18. Small dollar credit

One of the most contentious yet important issues in consumer financial protection is the provision of small dollar credit to consumers. For consumers on the economic margins, small dollar credit can be a lifeline to get through turmoil caused by unplanned expenses, loss of income, or other liquidity shock. With this aid comes a heightened risk for lenders of default and larger operating costs per loan dollar, leading to higher interest rates and fees than mainstream credit products like personal loans or credit cards. Advocates champion small dollar credit as a necessary lifeline to keep many consumers above water and point out that small dollar lenders are the only ones willing to give credit to marginal borrowers on any terms. The terms and pricing of small-dollar loans are simple and highly transparent and those who use them value many of the features of these products. Critics say the interest rates are usurious, that consumers in dire straits do not understand or fully consider the consequences of a small dollar loan, and the business model for small dollar lenders, which in their view relies on rolled over debt to make a profit, “traps” consumers in a cycle of debt and poverty. Undoubtedly some benefits and some harms can occur with these products, and the potential for great benefit and great harm exists. The research literature on the costs and benefits of small dollar loans is mixed. Chapter 5 of Volume I this Report explores background and research findings on small dollar credit at greater length.

Many of the reasons cited by customers for using small-dollar loan products are intractable or will not change based on anything the Taskforce can recommend here. Small-dollar loans are disproportionately relied on by lower-income and younger households who face financial and liquidity challenges and are rationed from gaining access to sufficient levels of mainstream credit to meet their needs. These needs are especially acute early in the financial lifecycle, as many consumers exhibit a high demand for credit at the same time mainstream lenders are reluctant to extend credit to them. As a result, much use of small-dollar credit is lifecycle based and many consumers “age out” of small-dollar loan usage as they become more financially established and their need for credit becomes less urgent. Other consumers, however, use small-dollar loans chronically, and usage persists throughout the lifecycle. Regardless, for many consumers, use of small-dollar credit is a symptom of underlying temporary or chronic financial and economic challenges, not a primary cause.

In other instances, usage of small-dollar loans can be addressed through regulatory reforms that remove some of the need for such products. Consumers sometimes employ payday loans because they are expecting shortly to have the money to cover their expense when their next paycheck or some other source of income is deposited in their account. Some portion of delays between when consumers know funds are coming in and when funds are deposited and available can be attributed to delays in the payment processing system, which is currently undergoing a

transformation as advancements in financial technology focus on speeding up the payments system. Financial technology firms, traditional banks, and the Federal Reserve are now focused on increasing the speed of payments processing, with a myriad of potential positive effects for consumer welfare. The Bureau should conduct research on the degree to which delays in the processing system are causing the use of small dollar credit products and associated consumer harms. Some of the need for small-dollar credit can be alleviated by technical solutions, such as faster payments and speedier posting of deposits. Other changes will not reduce demand for small dollar loans but hold potential to reduce costs and increase choice and competition.

As shown in Chapter 4 of Volume I of this Report, costs per loan dollar of lending small amounts are important, with costs of smaller loans higher per loan dollar on small loans. Consequently, when states set interest-rate ceilings, the effect is to eliminate the smaller loan sizes. It is the Taskforce's view that any ceiling will inevitably eliminate some potential borrowers from the market. For this reason, it urges states to exercise caution when setting interest rate caps and to consider the impact on credit availability.

In this vein, states should reconsider, review, and update or eliminate usury laws that are antiquated and outdated; recognizing the high costs they impose by denying valuable services to consumers who need them. The NCCF conducted a comprehensive analysis of effective usury regulations and concluded in 1972 that a better way was to encourage financial inclusion through policies that encouraged competition, free entry to markets, and consumer information. The passage of time has not changed the importance of the NCCF's conclusions and so we again recommend that states revisit and reconsider existing usury regulations with inclusion in mind and revise, update, or eliminate them as appropriate.

As noted in Volume I, hundreds of years of study and experience have shown that usury laws interfere with credit availability and inclusion of marginalized borrowers. Usury ceilings promote convoluted circumvention practices such as term repricing that make product pricing and features less transparent and dampen competition. Usury ceilings often deprive consumers of preferred financial products and force them to turn to alternative providers and products that are more expensive and less desirable. Today, prominent Truth in Lending disclosures reveal finance charges, and evidence suggests that most customers know what they are getting and how much it will cost them.

For the Taskforce, an important policy question is whether society believes availability of credit for everyone is a good idea or not. Ultimately, to ask whether there should be government intervention in small dollar credit markets is a debate about societal ideals more than it is about economics. As with almost all aspects of the consumer credit ecosystem, decisions about small dollar credit involve trade-offs that implicate value judgments. The Taskforce has attempted to make clear what these trade-offs and value judgments are to assist decision makers at the Bureau and elsewhere. In the past, however, legislative and regulatory decisions to deprive

marginal consumers of access to small-dollar loans was grounded in paternalistic, crude, and unsubstantiated stereotypes about the supposed capabilities of broad categories of Americans to exercise responsibility over their lives and make decisions that benefit themselves and their families. Recent research indicates that today’s “experts” continue to underestimate the knowledge and capability of lower-income and marginal consumers. The Taskforce urges that any legislative or regulatory steps taken to deprive marginal consumers of access to small-dollar loan products be grounded in sound economic theory and empirical evidence and not in unfounded and condescending stereotypes of the consumers who use these products.

18.1 Recommendations

- 93.** The Bureau should research how much small dollar credit use and potential associated consumer harms are caused by delays in payment processing and to support regulatory efforts to adopt a faster payments system.
- 94.** States should exercise caution when setting interest rate caps when implementing regulations on small dollar credit loans. States should carefully consider the negative impact on credit availability when considering further regulations. Preferably, interest rate caps should be eliminated entirely.
- 95.** States should reconsider, update, or eliminate usury laws as appropriate, recognizing the high costs they impose by denying valuable services to consumers who need them.
- 96.** The Bureau should conduct recently announced research on payday loan disclosures with an eye toward making sure consumers understand what they are signing up for, rather than prescribing normative disclosures designed to influence consumer behavior.

19. Supervision

The Bureau dedicates a considerable portion of its staff resources to the supervisory process. Nearly a third of its employees are involved in supervision related activity. As noted in Volume I Chapter 6 of this Report, government inspections are a common tool of consumer protection enforcement but the Bureau’s authority to engage in ongoing supervision through the examination process to the extent it does is unusual. As such, how the Bureau carries out its supervision process warrants serious consideration.

19.1 Defining a “larger participant”

Thousands of financial institutions fall under the Bureau’s supervision authority. One way the Bureau obtains jurisdiction over nonbank institutions in individual markets is via the larger participant rules promulgated by the Bureau under the Dodd-Frank Act. The criteria in these rules for what constitute a larger participant lack consistency across markets and seemingly create an uneven playing field; some product and service providers face the costs of compliance supervision, while others escape such oversight with their compliance failures going undetected. As a result, institutions are incentivized to work actively to avoid Bureau supervisory oversight. This has the potential to negatively impact consumers as market participants avoid growth and the provision of products to an expanded clientele.

Moreover, the rulemakings appear to select the criteria for being a larger participant more by feel than principles. Should a “larger” participant be one in the top decile of the ranked participants? Should the larger participants, collectively, cover a certain percentage of the transactions in the industry? Or should they have the number of transactions annually that, on average, a bank under the Bureau’s jurisdiction has? Are thresholds that exist now appropriate in the future as markets change in substance and size over time? For 10 years, the Bureau has been feeling its way on this topic. The Taskforce believes it is time to articulate some clear standards for this important decision.

19.2 Leveraging technology in examinations

The Bureau’s supervision role for all institutions under its jurisdiction is executed through examinations that take extensive amounts of time and effort. Despite the significant commitment of resources to the supervision function, Bureau resources are limited. It can only examine a small number of institutions in any given time period.

To expand the reach of its exam efforts to cover more financial institutions and enhance consumer protection, the Bureau should develop new exam capabilities. In the spring of 2020, the Bureau proved capable of taking new approaches to its exam process when it rolled out a new “prioritized assessment” process to deal with the conditions created by the Coronavirus pandemic. The Bureau should apply this same ingenuity to create automated processes to expand its supervision capabilities.

19.3 The role of Compliance Management System review

As noted above, the supervision function is accomplished through the examination process. Examinations generally involve two distinct avenues of review, transaction testing and assessment of an institution’s Compliance Management System or “CMS.”

Transaction testing is conducted to determine if an institution has followed the law. It involves the review of records, such as consumer mortgage files, to determine compliance with the law and evidence of consumer harm. Consistent with the Taskforce’s principles based, outcomes-oriented approach to consumer protection, this sort of review by a government regulator seems appropriate and directly determinative of compliance with the law.

Though only a few consumer compliance statutes require or refer to CMS, the Bureau’s supervisory exam process considers CMS as the linchpin for consumer protection efforts and concentrates most of its efforts on the CMS of financial institutions. The working theory seems to be that if an institution possesses a self-governing consumer CMS, the institution will be more likely to comply with the federal protection laws. So it seems fair to ask, “After 10 years of repeated Bureau CMS reviews at the biggest depository institutions in the country, reviews designed to instill effective self-governing compliance systems at these banks, have Bureau efforts resulted in the banks developing CMS systems that receive the very best Bureau ratings (“STRONG”), and have these same banks achieved complete compliance with the federal consumer protection laws and regulations?”

The CMS review is an in-depth analysis of the management system used by a financial institution to comply with the law. Examiners look at how well the institution’s systems detect, prevent, and correct practices that present significant risk of violating law and causing consumer harm. The review is a deep and intrusive probe into the institution’s business operations. A CMS review, after considerable back and forth with the institution’s management, culminates with a rating for how well the institution’s systems foster compliance with the law and a description of how the management system falls short of the Bureau’s ideal management form. The findings, produced at the end of an exam and presented in a supervisory letter or exam report, end up

essentially as a process by which the Bureau substitutes the institution's management judgment with the Bureau's management ideals. This sort of review by a government regulator does not seem appropriate.⁹⁷

The value of the Bureau's practice of assessing a financial institution's CMS during the examination process is not clear. This is not to say that the CMS is not valuable to the financial institution; it almost certainly is. Maintaining good compliance with the vast and sometimes complex laws and rules that govern consumer financial transactions is challenging, and the financial institution's CMS is important to achieving this goal. But, to a large extent, the proof is in the pudding. If an institution's CMS is poorly documented or otherwise appears weak by examiner expectations, but the institution consistently meets its compliance obligations, the Taskforce believes its compliance should be judged by its results, not its CMS documentation.

The entire CMS review process is vulnerable to subjective assessments by examiners and is ripe for inefficiency. Exam hours can easily mount up in debates by examiners over issues such as whether or not the particular number of loan files reviewed (3, 5, or 7, etc.) by the compliance review team at a bank is enough to qualify the action as meeting the monitoring requirement of a sufficient CMS, or by deliberations on the proper number and type of complaints that should be captured and recorded in an institution's complaint system. If the answers to these CMS-related questions are debatable within an exam team, how can an examined institution understand what it needs to do to live up to the Bureau's expectations? The process seems filled with imprecision. With the possibility of legitimate disagreement within the Bureau over CMS findings, as well as the final exam institution ratings, the entire process creates the appearance of uncertain and unpredictable action by the government.

The review of a CMS is time consuming and labor intensive for all parties. Determining whether an institution complies with a law/regulation requires much less effort. Less time spent performing CMS reviews would benefit both supervised institutions and consumers by making better use of examination hours. The Taskforce believes these savings would be considerable. They could result in shortening exams, expanding the scope or depth of transaction testing, and permitting examinations of more institutions. The Taskforce understands that the Bureau does not have adequate supervisory resources to examine all larger participants and, as the Bureau completes more larger participant rulemakings, this pressure on resources will only intensify. Reallocating resources from grading institutions' CMSs in this way will multiply the power and presence of the Bureau in the marketplace. The Bureau should also consider whether redirecting

⁹⁷ We recognize that review of a bank's CMS has a different role for prudential regulators, who are charged with ensuring the bank's safety and soundness and protecting the insurance fund from losses.

some supervision resources to enforcement activity would provide better protection for consumers.

19.4 Appeals of exam findings and ratings

The Bureau recognizes the possibility that examined institutions may develop legitimate concerns about examiner conclusions in a final exam report, so it has an appeal system to deal with these situations. The current appeal process took effect in October 2015. The process, however, seems insufficient.

The process lacks transparency in that examined entities are not explicitly provided notice of the appeal process in the initial or on-going communications during a supervision examination.

The Bureau appeal process lacks independence, the cornerstone of American due process. Appeals take place entirely within the Bureau's supervision organization and its immediate chain of command where the original decision being appealed was made. Appeals are heard by a committee appointed by the Associate Director of the Supervision Enforcement and Fair Lending division, known as SEFL, and includes a staff person from this Associate Director's staff, one or more representatives from Bureau headquarters supervision management, and one or more representatives from one of the four relatively autonomous Bureau supervision regional offices. Without input from each region, appeal decisions can easily lack nationwide consistency. Furthermore, with appeals cloistered inside the supervision operation, views of other Bureau offices and the Bureau's top leadership have no formal role, possibly impacting consistency of decisions across the entire Bureau and compliance with the Director's policy positions.

19.5 Examining for Military Lending Act compliance

The Dodd-Frank Act does not give the Bureau supervisory authority over the Military Lending Act (MLA). As a result, the Bureau does not examine lending institutions for compliance with the MLA.

Congress passed the MLA in 2006 to protect military personnel from unscrupulous lenders. In 2013, Congress amended the MLA to give the Bureau explicit enforcement authority over the MLA but is silent as to the Bureau's supervision authority. As a result, the Bureau does not conduct supervision reviews that address MLA compliance.

In order to protect service members as consumers, the MLA should be amended to unambiguously allow the Bureau, whose primary mission is to promote federal financial consumer protection, to conduct preemptive supervisory examinations as needed to prevent activity that violates protections afforded service members by the MLA.

With these considerations in mind, the Taskforce proposes six recommendations.

19.6 Recommendations

97. The Bureau, whenever possible, should consider conducting automated or data-based examinations. Taskforce conversations with private and public stakeholders indicate that the Bureau is behind the prudential regulators, and many financial institutions, where automated review processes are already used to help with compliance operations.

98. The Bureau should focus its supervision activity on financial institution compliance with the consumer protection laws. The institution's exam rating should be based not on the quality of its CMS but on the outcome of its CMS—that is, its compliance and compliance failures. Unless otherwise necessitated by laws that require the presence of a CMS, the Bureau should limit CMS considerations to risk assessments in setting exam scope and focus.

99. The Bureau should maximize its supervisory impact by redirecting resources from grading a CMS to expanding the scope, depth, and frequency of examinations, especially for covered institutions that may not currently be on an examination schedule. The Bureau should consider whether reallocating some supervisory resources to enforcement would increase consumers' financial protection.

100. The Bureau should change its current supervision appeal process to increase fairness and consistency. The Bureau's Deputy Director should serve as judge in an adversarial process where the appealing entity and the supervision organization present their cases. The supervision team should include a member from each of the four regional offices and a Bureau lawyer. The Bureau should provide notice of appeal rights to examined institutions via written notice contained in letters issued when a financial institution is notified of the Bureau's intent to conduct an exam and once again later in the supervisory letter or exam report issued at the conclusion of the exam.

101. The Bureau should revisit its larger participant rules to assess the cost and benefits of the rules in conducting effective supervision and promoting consumer protection.

102. Congress should grant the Bureau explicit authority to conduct examinations specifically intended to review compliance with the MLA. The requested authority would complement the work the Bureau currently does to enforce the MLA.