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June 1, 2020

The Honorable Kathleen Kraninger
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

RE: Request for Information to Assist the Taskforce on Federal Consumer Financial Law -
[Docket No. CFPB-2020-0013]

Dear Director Kraninger:

The Independent Community Bankers of America (“ICBA”)¹ welcomes the creation of the Consumer Financial Protection Bureau’s (“CFPB” or “Bureau”) Task Force on Federal Consumer Financial Law (“Taskforce”). ICBA supports the Taskforce’s mission of examining the existing legal and regulatory environment facing consumers and financial services providers in order to develop recommendations on harmonizing, modernizing, and updating the Federal consumer financial laws, as well as identifying gaps in knowledge that should be addressed through research, ways to improve consumer understanding of markets and products, and potential conflicts or inconsistencies in existing regulations and guidance.

As the Taskforce produces new research and legal analysis of consumer financial laws, the CFPB has published a request for information (“RFI”) to assist, soliciting recommendations on ways to promote consumer welfare and seeking input to identify which areas of the consumer financial

¹ The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ nearly 750,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than \$5 trillion in assets, more than \$4 trillion in deposits, and more than \$3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers’ dreams in communities throughout America. For more information, visit ICBA’s website at www.icba.org.

services markets are functioning well, and which might benefit from regulatory changes. ICBA appreciates this opportunity to respond.

A fair and practical regulatory system can provide an environment that enables community banks to provide these responsible services and products to customers, and simultaneously curbs the practices of bad actors that offer predatory products. The creation of the Taskforce provides the CFPB with the opportunity to examine itself to determine how well the existing consumer financial protection regulatory environment is meeting its intended objectives, and if not, how the Bureau can reshape that environment.

An underlying fact reveals itself after reviewing every response made in this letter: Community banks are integral pillars of their communities. Because their success and good fortunes are intertwined with their communities, community banks strive to provide their customers with financial services and products that will positively affect their lives. Community banks spend considerable time and effort to build close relationships with their customers so that they can find the right product that can help them achieve their goals.

Many community banks offer digital account sign up, 24x7x365 debit card access, mobile check deposit, and direct deposit free of charge to their customers. This ensures that the customer has access to those funds as soon as possible, with lower overall fees to the consumer. Community banks make these products available because, by their nature, they are in the business of serving their customers. Additionally, community banks have a strong local presence with convenient locations and the opportunity to provide personalized service when needed.

ICBA urges the Bureau to promote that, as locally owned and operated institutions with strong ties to the customers and communities they serve, community banks are well-positioned to provide greater access to banking services, especially to those consumers with the greatest need.

Question 1: Millions of U.S. households lack a bank account. Should the Bureau promote greater access to banking services and, if so, how? Are alternatives to deposit accounts, such as prepaid cards and peer-to-peer (“p2p”) electronic payments, sufficient when compared to traditional banking products? What is the evidence regarding consumers’ understanding of, and experience and satisfaction with, these products?

The CFPB has promoted greater access to banking services by providing banks with models, such as the Start Small, Save Up initiative, as well as efforts to encourage banks to offer lower-risk deposit accounts that help consumers avoid overdrafting.² In addition to these efforts, ICBA recommends that the CFPB promote community banks as a model of providing greater access to banking services, given their rich history in serving their communities.

Promoting prepaid cards

Prepaid cards are vehicles that the CFPB can use to promote access to banking. CFPB research has found that prepaid products, in various forms, are among the fastest growing types of payment instruments in the United States. The CFPB cites a 2013 study by the Federal Reserve, which showed that compared with noncash payments, such as credit, debit, automated clearing house (“ACH”), and check, prepaid card payments increased at the fastest rate from 2009 to 2012.³

The CFPB surmises that the growth of prepaid cards appears to be motivated by the lack of access to checking accounts and other types of credit products.⁴ Similarly, a 2019 Federal Reserve study found that while the number of prepaid debit card payments slightly declined from 11.1 percent of all card payments in 2015 to 10.5 percent in 2018, the number of prepaid debit card payments increased to 13.8 billion with a value of \$0.35 trillion, an increase of 2.6 billion and \$0.06 trillion from 2015.⁵

Reloadable prepaid card programs are evolving increasingly into full-featured alternatives to traditional checking accounts and debit cards

Reloadable prepaid card programs allow account holders to:

- deposit funds at retail locations, using direct deposit, transfers from debit cards and linked checking and savings accounts, and checks by mail or through mobile deposit capture;
- write checks;
- withdraw cash from ATMs;
- send, receive, or request money from other cardholders; pay bills; pay for purchases at multiple, unaffiliated merchants; and
- establish sub-accounts for family and friends.

² “CFPB Takes Steps to Improve Checking Account Access,” Press Release, Feb. 3, 2016, *available at* <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-steps-to-improve-checking-account-access/>

³ Fed. Reserve Sys., “The 2013 Federal Reserve Payments Study, Recent and Long-Term Payment Trends in the United States; 2003-2012, Detailed Report and Updated Data Release” (2014).

⁴ The Pew Charitable Trusts, “Why American Use Prepaid Cards,” (finding that 58 percent of consumers that use prepaid products are currently without a checking account, but want to have a checking account in the future).

⁵ Fed. Reserve Sys., “The 2019 Federal Reserve Payments Study” (Dec. 2019), at 4.

Additionally, these programs are marketed as financial accounts as well as checking accounts and debit card alternatives. ICBA encourages the Bureau to continue to promote the usage of prepaid cards as a means to access financial services, so long as consumer protections are in place.

Question 2: One important reason for access to a bank account is to facilitate transactions. To what extent is it necessary to tie transaction services to the banking system? To what extent could transaction services and the banking system exist independently, and would independent existence raise new consumer protection risks that regulators should consider? Would reducing clearance times impact the demand for alternative products, such as check cashing, small-dollar loans, and overdraft protection? If so, to what extent?

A payment system with well-regulated and insured financial institutions as participants is vital to community banks, their customers, the communities they serve, and the United States economy. Traditionally, direct access to the banking system is limited to regulated, examined, and insured financial institutions. Non-bank payment processors and financial technology (“fintech”) companies play an important role as catalysts for innovation; however, they are required to partner with financial institutions to access banking and payments systems.

As required by regulatory agencies, banks warrant that fintechs, non-bank processors, and other third parties with which they have a business relationship, meet the same regulatory requirements as if they were performed by the bank itself. The Office of the Comptroller of the Currency (“OCC”) states,

“A bank’s third-party risk management should be commensurate with the level of risk and complexity of its third-party relationships; the higher the risk of the individual relationship, the more robust the third-party risk management should be for that relationship. It is up to bank management to determine the risks associated with each of the bank’s third-party relationships.”⁶

Transaction services independent of the banking system poses risk

In their role as gatekeepers, banks are charged with maintaining the integrity of the financial system through effective management of operational risk, regulatory compliance and consumer protections. ICBA believes that allowing entities that are not subject to the same oversight and regulatory scrutiny to directly access the banking and payments systems opens a veritable Pandora’s Box of risks, including exposing consumers’ funds to potential losses and unfair,

⁶ OCC Bulletin 2020-10, “Third-Party Relationships: Frequently Asked Questions to Supplement OCC Bulletin 2013-29,” Mar. 5, 2020 (hereinafter, “OCC FAQ guidance”), available at <https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-10.html>.

deceptive, or abusive acts or practices. ICBA urges the Bureau to subject these entities to the same level of oversight that community banks and other depository institutions undergo.

Decoupling payments from the banking system poses several risks. First, without a robust examination environment, which assures the safety and security of both data and dollars, the level of accountability is reduced, jeopardizing consumer security and privacy. Second, ensuring compliance with consumer protection laws such as Regulation E may be problematic, as there would be no regulatory agency tasked with supervisory oversight for compliance of non-banks. Lastly, consumer funds may not be protected without the oversight of regulated and federally insured depository financial institutions.

Increased use of real-time payments is an essential step toward payments modernization in the U.S.

The current COVID-19 pandemic has strengthened the justification for digital, real-time payments. Community banks envision opportunities to serve their customers through faster payments. Faster payments can help small businesses strained for cash make and receive just-in-time payments, improve cash flow, and transfer funds throughout their organization.

For consumers, the value-added benefits of real-time payments can assist in navigating a complex payments world, allowing them to request payment and view payment status. Real-time payments will benefit consumers that live paycheck-to-paycheck and need immediate access to their money. Real-time networks that use a good funds, credit push model may facilitate decreased friction and cost of accessing funds by reducing overdrafts and reliance on check cashiers and payday lenders; thus, reducing demand for alternative products.

Increased use of real-time credit push transactions will provide a framework for financial innovation. Use cases such as on-demand access to earned wages, account-to-account transfers for investment purchases, and person-to-person payments will benefit from this essential step toward payments modernization in the U.S.

Question 3: What steps could be taken to promote greater competition among providers of services such as payments, financial advisory services, and savings accounts? How do third-party applications, sometimes referred to as “open banking,” affect the competition? To what extent do third-party applications raise new consumer protection risks that regulators should consider?

Today, there is already great competition among banks, community banks, credit unions and fintechs for traditional banking products such as savings accounts, checking accounts, loans, and non-traditional banking products such as p2p, financial advice, and account aggregation. However, ICBA advocates that an even playing field between banks, credit unions, and fintechs,

regarding regulations, would be the best way to promote innovation and protect consumers. Unregulated fintechs can create risk for consumers and the financial sector, often through the use of “open banking.”

“Open banking” has been interpreted in a myriad of ways, but generally is recognized as sharing information contained in a bank account. Digitization has made access to a wealth of data possible, and consumers have increasingly expressed a desire to leverage their bank account data to improve decision making and gain insight into their finances by using fintech solutions.⁷ Innovations fueled by open banking may be one path to achieving a goal as stated by the Treasury Department: to “[e]mpower Americans to make independent financial decisions and informed choices in the marketplace, save for retirement, and build individual wealth.”⁸

Fintech companies can serve as valued partners to community banks as they enhance banking platforms to offer their customers modern features. However, fintechs may also disintermediate community banks when they provide financial services directly to customers. Fintechs may place customer data at risk without appropriate processes, policies, and technology to protect customer data.

The banking regulatory agencies play a valuable role in defining and identifying the risks of existing and emerging technologies for both community banks and their service providers. ICBA recommends that regulation of fintech products and services should include consumer and data-security protections consistent with those that apply to the banking industry. These frameworks should also maintain harmonized due diligence requirements to reduce burdens for both the bank and fintechs. Additionally, the CFPB should craft guidance in a manner that does not hamper innovation.

In another scenario, consumers access features and capabilities from alternative financial management solutions outside of their banking relationship. In doing so, they may be unaware of the risks associated with sharing their account credentials. Application programming interfaces (“APIs”) are becoming the preferred industry standard for allowing customers to securely share their personal financial data with authorized third parties without forfeiting their bank account username and password. Access to bank account data through APIs enables consumers to enjoy enhanced customer experiences while limiting the scope of data that a permissioned third party can access.

ICBA cautions the Bureau that robust competition and allowing access to consumer data should not come at the cost of consumer privacy or security. Extending banking services to unregulated technology companies whose primary interest is mining consumer data to increase

⁷ “A Financial System That Creates Economic Opportunities Nonbank Financials, Fintech, and Innovation,” U.S. Department of the Treasury, Jul. 2018 (hereinafter, “Treasury Fintech Report”).

⁸ *Id.*

profits and generate revenue may result in a loss of consumer privacy and the protections afforded to consumers through their banking relationship. Fintech providers should be in partnerships with financial institutions, not in competition with them.

ICBA also advocates that some third-party applications raise new consumer protection risks that are difficult to identify and mitigate. For example, many community banks have no way of knowing who the smaller data aggregators are, nor do the apps or companies of concern must be traditional data aggregators. Banking credentials are shared by consumers with a host of different companies such as those with money management features, financial advice, investing, retirement trackers, tax preparation, p2p payments, and shopping, all of which offer opportunity for abuse. Worse, these are untraceable by the bank since the customer provides the banking credentials directly to the third-party app, without bank intervention or assistance. This is a growing concern for community banks, and ICBA asks the Bureau's Taskforce to consider options to curb the growth of this risk.

Question 4: There is consumer demand for short-term, small-dollar credit. What impediments exist for expanding access to short-term, small-dollar loans and ensuring that this market is fair, transparent, and competitive? What has been the impact of State and Federal efforts to regulate such credit? Is the annual percentage rate a meaningful measure for a very short-term loan? If not, what other measures might be more useful to help consumers in understanding and assessing the cost of short-term credit?

Community banks are responsible lenders that do not engage in abusive lending practices. Community banks are an important source of safe and sustainable small-dollar credit for the consumers who need it most. According to a Federal Reserve study, nearly half of American households — 46 percent — could not cover an unexpected \$400 expense, would find it challenging to handle, or would cover it by selling something or borrowing funds.⁹ Financially vulnerable adults with an emergency expense as small as \$400 could experience a financial hardship.¹⁰

As locally owned and operated institutions with strong ties to the customers and communities they serve, most community banks are well positioned to provide small-dollar loans to customers with the greatest need. By their nature, community banks are in the business of serving their customers. Generally, each community bank that makes small-dollar loans underwrite them in a way that works for them and their customers and where there is a financial history upon which to base a credit decision. These products are offered as a customer accommodation, are not typically advertised, and are rarely profitable for community banks.

⁹ Board of Governors of the Federal Reserve System, "Report on the Economic Well-Being of U.S. Households in 2018;" (May 2015) at 1 (hereinafter, "SHED Report").

¹⁰ *Id.* at 21.

Community banks pride themselves on having close relationships with their customers and being able to provide an affordable product that accommodates their customers' short-term financial needs. In response to the Bureau's finalization of the Payday, Vehicle Title, and Certain High-Cost Installment Loans rule ("payday loan rule") in 2017, ICBA expressed appreciation that community banks were recognized as responsible lenders that do not engage in abusive lending practices and work with their customers to establish favorable loan terms that reflect their customer's financial history and ability to repay.

The final payday loan rule exempts thousands of community banks from the onerous full-payment test or the principal-payoff option (consistent with ICBA's recommendation) so long as the bank does not originate more than 2,500 covered loans in a calendar year and does not derive more than 10 percent of its receipts from covered loans. This welcomed exemption acknowledges that community banks offer an invaluable and financially sound service to customers that should not be hindered or restrained and provides community banks the flexibility to continue providing safe and sustainable small-dollar loans to the customers who need it most.

Since community banks are not in business to roll over loans to generate fee income or steer consumers to unaffordable loan products, many have continued to provide this much needed service, particularly those that qualify for the exemption. However, the payday loan rule's restrictions on underwriting, annual percentage rates ("APR"), and innovation prevents many other community banks from offering the product, and thereby results in an impediment to access.

Lack of underwriting flexibility is an impediment to access

In 2019, the Bureau issued a notice of proposed rulemaking ("NPRM") to rescind "Mandatory Underwriting Provisions" of the 2017 payday loan rule. Specifically, the Bureau proposed to rescind the provisions that: (1) consider it an unfair and abusive practice for a lender to make a covered short-term or longer-term balloon-payment loan ("small-dollar loan"), including payday and vehicle title loans, without reasonably determining that the consumer has the ability to repay the loan according to its terms; (2) prescribe mandatory underwriting requirements for making the ability-to-repay ("ATR") determination; (3) exempt certain loans from the mandatory underwriting requirements; and (4) establish related definitions, reporting, and recordkeeping requirements. The NPRM was based on input received from stakeholders through its efforts to monitor and support industry implementation of the 2017 Final Rule, and notably, input received from the Call for Evidence series of Requests for Information issued in 2018.

Community banks do *not* prey upon or take advantage of a consumer’s potential lack of understanding of risks, costs, or conditions of small-dollar loans. While the Bureau notes research that underscores the inability of many consumers to withstand financial setbacks without the use of credit, access to credit, or other financial assistance, community banks have historically recognized this reality and have, therefore, offered fair and transparent small-dollar loans to these same consumers.

Small-dollar loans are not a profit center for community banks. In fact, community banks report that they often lose money making small-dollar loans because the fees and interest do not cover the costs of underwriting and processing them. However, even though these loans do not contribute to their profits, community banks make these loans to respond to the needs of their customers. In the rare event that community banks have experienced defaults, delinquencies, and reborrowing of small-dollar credit products, such adverse consequences were not and are not the results of abusive or unfair lending practices.

The Bureau acknowledged that the NPRM would have minimal impact on accommodation loans.¹¹ That said, the Bureau, through the NPRM, suggested that eliminating the restrictions in the 2017 Final Rule would spur the development of small-dollar products that are not currently viable. This point was further underscored by the Bureau highlighting the OCC’s bulletin encouraging banks to develop additional small-dollar products¹² and FDIC’s recent request for information on ways it can encourage FDIC-supervised institutions to offer small-dollar products.¹³

ICBA continues to advocate for flexible underwriting standards. The nature of these loans renders the underwriting requirements in the 2017 Final Rule ineffective, cost prohibitive, potentially impossible, and counterproductive to meeting the short-term financial needs of their customers.

Community banks need the ability to work with consumers, including those with credit profiles outside of a bank’s documented underwriting policy, without the impediments of prescriptive underwriting requirements. While many community banks are exempt from the current ATR requirements that are the subject of the recent NPRM, it is crucial that the Bureau continue to provide community banks — proven responsible lenders — the flexibility to underwrite and structure small-dollar loans in a way that works for both the customer and the bank.

These customer-centric practices fulfill the consumer’s credit needs, provide the consumer with an achievable repayment plan and fulfill the bank’s commitment to its community. In our letter

¹¹ CFPB Notice of Proposed Rulemaking on Payday, Vehicle Title, and Certain High-Cost Installment Loans, RIN 3170-AA80; 84 Fed. Reg. 4252 (Feb. 14, 2019) at 4295.

¹² OCC Bulletin 2018-14, “Core Lending Principles for Short-Term, Small-Dollar Installment Lending,” May 23, 2018.

¹³ FDIC Request for Information on Small Dollar Lending, RIN 3064-ZA04; 83 Fed. Reg. 58566 (Nov. 20, 2018).

to the FDIC in response to its RFI seeking ways to encourage more community bank offerings of small-dollar credit products, ICBA recommended the FDIC provide banks the flexibility to develop and manage their own reasonable underwriting guidelines.¹⁴ The current rule prohibits community banks from offering, underwriting, and servicing small-dollar loans on terms that work for them and their customers and written in a way that is detrimental to the consumer experience.

The ability-to-repay analysis, debt verification requirements, and limits on payment transfer will make small-dollar lending uneconomical for community banks to offer, and therefore presents an impediment to access. Here again, ICBA urges the Bureau to assess ways in which it could allow for flexible underwriting while balancing the need for consumer protections in order to make these loans available to those in need.

The all-in APR of 36 percent is an impediment to consumers accessing small-dollar loans

Community banks have indicated that a 36 percent APR is easy to reach when lending small-dollar products for short durations. Community banks have also reported that many core processors do not calculate or track 36 percent total cost of credit, hence requiring excessive and costly system changes, staff education, and training.

Additionally, a 36 percent APR is easy to reach when providing small-dollar loan products when credit life and disability insurance is included. Optional credit life and disability insurance offers important and targeted financial protections to consumers and their families. When tragedies occur, credit life and disability insurance ensure that borrowers and their loved ones are not left without the means to cover their financial obligations.

A hard cap of 36 percent APR does not ensure economic viability for banks and does not adequately measure the cost of re-education, training, and system upgrades. Some community banks have indicated they would exit the small dollar lending market if loans exceed 36 percent total cost of credit, while others have decided to not enter the market at all, either of which is an impediment for consumers.

Question 5: Some creditors are supplementing or replacing traditional methods of underwriting (which often use income, debts, credit history, and stability factors) by employing "alternative data." Some types of alternative data clearly expand the sources of financial information, such as payment histories for rent, utilities, and other consumer obligations, and other types of alternative data appear to have little in common with traditional underwriting information. What role should the Bureau play in regulating the furnishing, reporting, and use of alternative data, and what should the Bureau consider

¹⁴ Thomas Whitley, Rhona, "ICBA comment letter to FDIC regarding: Request for Information on Small-Dollar Lending," Jan. 22, 2019, available at https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/19-01-22_smallollarcl.pdf?sfvrsn=bb614017_0.

in developing policy in this area? How should the Bureau consider alternative factors which creditors find helpful in predicting risk, but which may lack an obvious relationship with creditworthiness or have differential impacts on some consumers or groups of consumers?

Alternative data is generally understood as data that is not provided in traditional consumer credit reports. While traditional credit reports might not contain enough history for a bank to feel comfortable with the credit risk, alternative data provides additional context that could present a fuller picture of consumers.

Some banks already use alternative data and alternative underwriting models to approve a loan when an applicant has been denied using traditional data and techniques. Alternative underwriting techniques can also improve the speed and accuracy of credit decisions. Early examples of alternative data and techniques include analysis of a consumer's cash flow, utility and rent payment history, and even educational history.

Using alternative data to benefit un- and underbanked consumers

Perhaps the most beneficial use of alternative data is how it can help community banks provide financial services to un- or under-banked populations. Approximately 14 million Americans are unbanked, having no relationship with a bank. An additional 50 million are underbanked, meaning they have a basic relationship with a bank yet still rely on alternative financial service providers to meet their needs.

The lack of a relationship with banks can cost consumers up to \$40,000 over their lifetime in check-cashing fees and thousands more on high-interest loans from alternative providers. This means that the nearly 65 million unbanked and underbanked Americans stand to greatly benefit from a more formal relationship with a community bank.

Finally, while some consumers either do not have enough money to keep in an account or simply do not want a banking relationship, many others lack sufficient credit history to establish that relationship. Alternative data can solve for this.

Establishing a regulatory environment that nurtures use of alternative data

ICBA applauds the CFPB's efforts to adopt and support the use of alternative data. For example, the first no-action letter ("NAL") issued by the Bureau hinged on the use of alternative data, permitting the NAL recipient to use education and employment history to underwrite consumer loans. The Bureau also adopted an interagency statement on how banks can utilize alternative data.

While these efforts are certainly welcome, they fall short of creating an environment where community banks can use alternative data that will not incur undue legal liability. While ICBA commends the Bureau's intention for publishing the recent interagency statement on the use of alternative data, the statement is short on substance or novel information. Instead, the statement provides broad allusions to the potential benefits of alternative data, emphasizing that the use of alternative data may improve the speed and accuracy of credit decisions and may help firms evaluate the creditworthiness of consumers who currently may not obtain credit in the mainstream credit system.

Further, the statement provides only glancing reference on how to mitigate the potential downsides, stressing that banks must still maintain a well-designed compliance management program that provides for a thorough analysis of relevant consumer protection laws and regulations to ensure firms understand the opportunities, risks and compliance requirements before using alternative data. The Bureau should provide regulatory clarity for the use of alternative data consistent with applicable law for use in credit decisions

Clearly, it is welcome to see regulatory agencies collaborate and opine on novel technological developments, and ICBA supports the spirit behind the joint statement. Unfortunately, ICBA fears that the statement missed its desired outcome and has limited practical value. ICBA is not aware of any community banks relying on the statement as a spur to incorporate alternative data practices.

Question 6: Should the Bureau clarify its position on disparate impact theory under the Equal Credit Opportunity Act? If so, what should be the Bureau's position?

The Bureau, through Regulation B ("Reg B"), is responsible for implementing the Equal Credit Opportunity Act ("ECOA").¹⁵ The statute requires all lenders, including banks, to "make credit equally available to all creditworthy customers without regard to sex or marital status." Further, the statute makes it unlawful for "any creditor to discriminate against any applicant with respect to any aspect of a credit transaction (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant's income derives from any public assistance program; or (3) because the applicant has in good faith exercised any right under the Consumer Credit Protection Act."¹⁶

Under ECOA, a disparate impact case can be made when a creditor employs facially neutral policies or practices that have an adverse effect or impact on a member of a protected class

¹⁵ See 12 C.F.R. Part 1002.

¹⁶ 15 U.S.C. 1691.

unless it meets a legitimate business need that cannot reasonably be achieved by means that are less disparate in their impact.¹⁷

The CFPB lacks the statutory authority to infer disparate impact liability from the text of ECOA
In *Texas Department of Housing & Community Affairs v. The Inclusive Communities Project, Inc* (“Inclusive Communities”), which established a standard for proving disparate impact claims in the Fair Housing Act (“FHA”), the Court looked to the text of the FHA to determine that disparate impact claims were cognizable. It held,

“Title VII’s and the [Age Discrimination in Employment Act’s (“ADEA”)] ‘otherwise adversely affect’ language is equivalent in function and purpose to the FHA’s ‘otherwise make unavailable’ language. In these three statutes the operative text looks to results. The relevant statutory phrases, moreover, play an identical role in the structure common to all three statutes: Located at the end of lengthy sentences that begin with prohibitions on disparate treatment, they serve as catchall phrases looking to consequences, not intent. And all three statutes use the word ‘otherwise’ to introduce the results-oriented phrase.”¹⁸

ECOA, by contrast, does not include an equivalent catch-all phrase and is not a “results-oriented” statute. The prohibition in ECOA reads, “It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction ... on the basis of race, color, religion, national origin, sex or marital status, or age...”¹⁹ This language clearly prohibits overt discriminatory conduct (i.e. disparate treatment), but, in stark contrast to Title VII or the ADEA, it does not include an “otherwise adversely affect” clause that would trigger a disparate impact analysis.

In short, disparate impact liability is not expressly contemplated by Congress in the text of ECOA and the statute lacks the key triggering phrase that allows for results analysis in the context of Title VII, ADEA, and FHA claims. For this reason, it is beyond the scope of the CFPB’s statutory authority to extend disparate impact liability to ECOA.

The Bureau should conduct a cost-benefit analysis before determining that disparate impact liability is permissible under ECOA

Disparate impact liability, in the first instance, was not created by Congress. Instead, it was a tool developed by the Equal Opportunity Employment Commission in the 1970s to combat institutionalized discrimination. Most civil rights legislation prohibited overt acts of

¹⁷ CFPB, “Consumer Laws and Regulations: ECOA” (Jun. 2013) at 1, available at: https://files.consumerfinance.gov/f/201306_cfpb_laws-and-regulations_ecoa-combined-june-2013.pdf.

¹⁸ 135 S. Ct. 2507, 2519.

¹⁹ 12 U.S.C. 1619(a)

discrimination flowing from an evil state of mind, but there was still discrimination that stemmed from unconscious biases and the structure of institutions.

The application of disparate impact liability to lending is likely to have a chilling effect on creditors' willingness to lend in disadvantaged areas. This will negatively impact the borrowers that statutes like ECOA are trying to protect by reducing their access to credit or forcing them to borrow from less regulated sources. In other words, it is not costless to read disparate impact liability into the words of a statute where it is not expressly created.

Before the CFPB interprets ECOA to create disparate impact liability, it is appropriate to conduct a formal assessment of the prevalence of institutionalized discrimination in lending to determine if the benefits of imposing disparate impact liability exceed the costs. It may be the case that unconscious racial biases present at the institutional level could be corrected for with a less punitive tool than disparate impact liability.

If the CFPB interprets ECOA to include disparate impact liability, the Bureau's standard must be in line with the Supreme Court's decision in Inclusive Communities

In practice, a disparate impact framework functions as a burden-shifting regime. If the charging party establishes a prima facie case (for example, by providing statistical evidence of a disparate impact on a protected class), the burden of proof shifts to the defendant to prove that the challenged practice is necessary to achieve a legitimate business need. If the defendant satisfies this burden, the charging party may still establish liability by proving that the business need could reasonably be met by a practice that has a less discriminatory effect.

In *Inclusive Communities*, the Court imposed a robust causality requirement and held that a "disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity."²⁰ The Court also established a burden-shifting framework for courts and the government adjudicating disparate impact claims. Specifically, the Supreme Court required that a charging party or plaintiff bringing a disparate impact claim must first demonstrate a causal connection between the challenged practice or policy and the statistical disparity affecting a protected class.

This robust causality requirement was designed to prevent defendants from being held liable for racial disparities that their policies and practices did not create. Likewise, the Court

²⁰ *Texas Dept. of Housing & Community Affairs v. The Inclusive Communities Project, Inc.*, 135 S.Ct. 2507 at 2524, (2015).

reiterated that a plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact.

If the Bureau finds that ECOA does allow for disparate impact evaluations, then ICBA urges the CFPB to update its disparate impact standard in Reg B in order to ensure that it is consistent the *Inclusive Communities* decision by including a robust causality requirement and an affirmative defense for algorithmic lending.

Question 7: Both the Fair Credit Reporting Act (“FCRA”) and its implementing Regulation V and the Gramm-Leach-Bliley Act (“GLBA”) and its implementing Regulation P contain important protections of consumers’ personal information. Are these protections sufficient? Why or why not? If not sufficient, what further protections should the Bureau or Congress consider? Are there obligations in these regulations or statutes that impose a burden not justified by the corresponding consumer benefit?

ICBA supports the current consumer protections provided by both FCRA and its implementing Regulation V, as well as GLBA and its implementing Regulation P. The protections provided by these are sufficient to protect consumers’ data. The regulations provide a proactive federal approach that has successfully held financial institutions responsible for safeguarding consumers personal information.

Congress enacted the financial privacy requirements to provide an effective and successful balance between consumer protections and ensuring that consumer financial transactions take place in a safe and secure environment.

ICBA recommends that the Bureau hold all entities under its jurisdiction that process or store consumer financial data to the same standards that financial institutions are held to under GLBA. Under current federal law and regulation, other parties that procure this information are not subject to the same federal data security standards and oversight as financial institutions. Securing financial data at financial institutions is of limited value if it remains exposed at other points in a financial transaction.

Question 8: The FCRA requires consumer reporting agencies to “follow reasonable procedures to assure the maximum possible accuracy”; requires these agencies to disclose to a consumer the contents of the consumer’s file; contains procedures for consumers to dispute the accuracy of information in these agencies’ files; and requires notifications when information from these agencies’ files has contributed to a user’s adverse action. In addition, the FCRA’s implementing Regulation V requires that data furnishers implement and maintain reasonable written policies and procedures

concerning the accuracy of the data they furnish. Are these provisions designed to ensure accuracy sufficient? Why or why not? If not, what further protections should the Bureau or Congress consider? Are there obligations in these laws that impose a burden not justified by the commensurate consumer benefit?

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act” or “Dodd-Frank”) established the Bureau, consolidating many federal consumer financial protection powers from other federal agencies. Under the FCRA, consumers must be told when their information from a CRA has been used after an adverse action (generally a denial) has occurred, and disclosure of that information must be made free of charge.

FCRA requires that consumers be provided adverse action notices if they are denied credit or charged more as the result of their consumer report information. This requirement, among other factors, may represent challenges for market participants that are seeking to innovate by incorporating additional data sources into the credit underwriting process.

ICBA agrees with Treasury’s recommendation that CFPB should provide regulatory clarity for the use of new data and modeling approaches that are generally recognized as providing predictive value consistent with applicable law for use in credit decisions.²¹

ICBA also welcomes the Bureau’s recently published policy statement (“Policy Statement”) to highlight furnishers’ responsibilities under the CARES Act and inform furnishers of the Bureau’s flexible supervisory and enforcement approach during the COVID-19 pandemic regarding compliance with FCRA and Regulation V.²² The Policy Statement intends to consider the circumstances that entities face as a result of the COVID-19 pandemic and entities’ good faith efforts to comply with their statutory and regulatory obligations as soon as possible. ICBA believes that this flexibility will help furnishers to manage the challenges the current crisis poses.

Question 9: Most States have enacted laws that afford consumers certain protections in the event of a data breach. There is considerable variation among these laws, including the triggering events for coverage by the law and the requirements and remedies relating to a breach. Would Federal legislation, regulation, or guidance addressing data breaches be desirable? Why or why not? Would it be desirable to have a uniform national standard for data breach obligations? Why or why not?

²¹ Treasury Fintech Report, *supra* note 7, at 137.

²² Press Release, “CFPB Issues Credit Reporting Guidance During COVID-19,” Apr. 1, 2020, available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-credit-reporting-guidance-during-covid-19-pandemic/>

ICBA supports a federal standard, which pre-empts the patchwork of state laws to address data breaches. With respect to federal legislation, regulation, or guidance addressing data breaches, ICBA supports a national standard, which both acknowledges the already strict data security requirements placed on financial institutions by GLBA and its implementing regulations and requires a similar standard of data security across all industries. Any data breach or privacy legislation or regulations must recognize the existing requirements community banks undertake to protect consumer information and privacy, such as GLBA, and should include an entity-level exemption for community banks subject to the GLBA.

The current environment of varying state data breach laws on top of the requirements found in the GLBA and its implementing regulations create unnecessary complexities, burdens, and costs for community banks and other financial institutions. A uniform national standard for data breach obligations modeled after the GLBA, including entity-level exemptions for community banks already complying with GLBA, would create a less complex, more secure environment to allow all entities to better secure data.

Question 10: Financial technology, or FinTech companies often use consumer data to provide new or enhanced financial products and services, but this can raise concerns about consumers' ability to protect privacy and control the use of their data. With respect to consumer data, how best can the Bureau or Congress balance between facilitating FinTech innovations that increase consumer choice and ensuring consumer protection? Do any existing technologies or practices, such as zero-knowledge proofs, raise fewer consumer protection concerns or have the potential to help regulators resolve the balance between consumer choice and consumer protection?

ICBA urges the Bureau to carefully balance innovation with consistent protections that ensure the security and privacy of consumers' data. Technological innovation and deployment, particularly digital innovation, continues to alter the way that consumers and businesses conduct banking and commerce and influences the products that community banks offer. Technology deployment may alter the risk profiles of both the consumer and their community bank. Specifically, community banks can be subject to a myriad of regulatory requirements and oversight based on the activity of their customers.

The banking regulatory agencies play a valuable role in defining and identifying the risks of existing and emerging technologies for both community banks and their service providers. However, guidance should be crafted in a manner that does not hamper innovation or impose undue burden upon community banks. The Bureau should refrain from mandating that banks share their customers' data. ICBA commends the Bureau for their leadership in releasing Consumer Protection Principles: Consumer-Authorized Financial Data Sharing and Aggregation

in October 2017 that reiterated consumers' right to share data,²³ recognizing that this right underpins innovation.

A March 2020 bulletin from the OCC established that relationships between financial institutions and data aggregators are different from traditional vendor relationships.²⁴ While the OCC does not consider screen-scraping a business relationship, it still expects that banks manage the associated risk, understand the ownership and business practices of the data aggregator, and monitor data-sharing activities.

In cases where there is a business relationship with the data aggregator, protecting and safeguarding the sensitive customer information should be the primary focus for third-party risk management. A security breach at the data aggregator could result in fraud or identity theft potentially causing reputational risk and financial liability for the bank.

ICBA is concerned about the OCC's assertion that financial institutions must conduct due diligence in cases where the bank does not receive a direct service from a data aggregator and does not have a business arrangement. Additional burdens are placed on community banks that want to honor the consumer's desire to share their data with a financial application. Many community banks have no way of knowing and identifying when their customers use data aggregators, especially smaller data aggregators. Consumers share their banking credentials with a host of different companies, such as those with money management features, financial advice, investing, retirement trackers, tax preparation, p2p payments, and shopping. All these applications, which offer opportunity for abuse, are difficult to identify by the bank since the customer provides the banking credentials directly to the third-party application, without bank intervention or assistance.

ICBA maintains that technology and standards should evolve in a manner that gives the consumer the ability to provide targeted permission to share specific data, rather than allow the customer-permissioned third-party provider unfettered access into their bank account. APIs are becoming the preferred industry standard for accomplishing this, allowing customers to securely share their personal financial data with authorized third parties without forfeiting their username and password.

ICBA supports the proliferation of any standard, so long as community banks can participate in the development and maintenance of such standard. However, we also recognize that these

²³ "Consumer Protection Principles: Consumer-Authorized Financial Data Sharing and Aggregation," (Oct. 18, 2017) available at https://files.consumerfinance.gov/f/documents/cfpb_consumer-protection-principles_data-aggregation.pdf.

²⁴ OCC FAQ Guidance, *supra* note 6, noting that the OCC defines two types of relationships: 1) where the bank has a formal data-access agreement and business relationship and 2) where consumers share their login information to an application, which uses a data aggregator to log in obtain, or "scrape" their account information.

standards are only in their initial adoption and most community banks' technology providers have yet to integrate these with the services they provide to community banks. Widespread adoption of APIs among community banks and their core processors is a necessary step toward banning of models that require the customer to share their login credentials with third parties, such as screen-scraping.

Lastly, a specific challenge for community banks as the industry moves from screen-scraping toward API access is establishing data sharing agreements with data aggregators. Most community banks do not currently have the ability or bandwidth to individually negotiate agreements with every data aggregator and will look toward adopting model agreements or multilateral agreements. The CFPB's acknowledgement of this in any potential rulemaking will help community banks facilitate fintech innovation that increases consumer choice.

Question 11: Are there gaps in consumer financial protections that should be filled by strengthening the Bureau's regulations? What type of protections are needed (e.g., additional disclosures, substantive requirements)? How should the costs and benefits of the proposed changes be evaluated?

To strengthen consumer protections, address gaps in regulations, and provide harmonization, ICBA believes the Bureau should improve its overall rulemaking process as it relates to the Small Business Review ("SBR") process, NPRM and final rules.

The Dodd-Frank Act authorizes the Bureau to administer, enforce, and implement federal consumer protection laws.²⁵ The Act further authorizes the Director to propose rules to enable the Bureau to carry out its purpose.²⁶ The Bureau has engaged in rulemakings mandated by Congress as well as discretionary rulemakings. The Bureau's rulemaking processes are subject to the statutory requirements below:

- Notice of Proposed Rulemaking – Pursuant to the Administrative Procedure Act ("APA"), the Bureau is required to publish a NPRM in the Federal Register each time it proposes, amends or repeals a rule.²⁷
- Small Business Review – The Bureau is subject to the Regulatory Flexibility Act of 1980 ("RFA"), which requires the Bureau to seek feedback from small businesses prior to proposing a rule. The Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA") amended the RFA to require some federal agencies to assemble a SBREFA panel prior to issuing a NPRM, if a proposed rule is likely to have a significant impact on

²⁵ 12 U.S.C. 5512(a).

²⁶ 12 U.S.C. 5512.

²⁷ 5 U.S.C. 533(b).

a substantial number of small entities. The Dodd-Frank Act subjected the Bureau to the SBREFA requirements.

- Impact Analysis – The Dodd-Frank Act requires the Bureau to evaluate the potential benefits and costs resulting from the proposed rule.²⁸ The Bureau also must consider the impact of proposed rules on depository institutions and credit unions with \$10 billion or less in assets, and on consumers in rural areas.²⁹
- Consultation with Federal Agencies – Pursuant to the Dodd-Frank Act, the Bureau must consult with prudential banking regulators or other federal agencies prior to proposing a rule and before issuing a final rule to help ensure consistency with prudential, market, or systemic objectives administered by such agencies.³⁰ Additionally, the Bureau and the Federal Trade Commission are parties to a memorandum of understanding, which requires them to consult each other before proposing or finalizing a rule concerning unfair, deceptive, or abusive acts or practices, to avoid duplication or conflict between the agencies.³¹

SBREFA panels

SBREFA panels (“Panels”) are comprised of representatives from the Bureau, the U.S. Small Business Administration (“SBA”) and the Office of Management and Budget (“OMB”). SBREFA requires the Panel to meet with a selected group of small entity representatives (“SERs” or “small businesses”) that are likely to be subject to the rules the Bureau may issue. SERs are paneled for rulemakings, and ICBA is pleased that community banks were chosen as SERs for several Panels. To date, the Bureau has held six SBREFA Panels.³² When SERs are selected, the Bureau sends background information and a draft of the proposed rule under consideration to each participant in preparation for the Panel outreach meeting.

ICBA is quite appreciative of the Bureau’s commitment to include community bank representatives on SBREFA Panels. Community banks appreciate that there is a statutory process that requires the Bureau to solicit, consider and incorporate their input during its rulemaking process; however, ICBA believes certain improvements are needed to ensure the Panel accomplishes its statutory objectives.

SERs have concerns about the Bureau’s management of the SBREFA process and believe that the proposed and final rules do not sufficiently reflect their input.³³ Before the Panel convenes, SERs are required to review the complex and comprehensive SBREFA materials from the

²⁸ 12 U.S.C. 5512(b)(2)(A)(i).

²⁹ 12 U.S.C. 5512(b)(2)(A)(ii).

³⁰ 12 U.S.C. 5512(b)(2)(B).

³¹ 12 U.S.C. 5581(b)(5)(D).

³² The Bureau has held SBREFA panels on: Integrated Mortgage Disclosures under RESPA and TILA; Mortgage Servicing; Loan Originator Compensation Requirements; HMDA; and, the Payday Rule.

³³ Similar to comments expressed by Community Bank Advisory Council members. See, ICBA Response to the BCFP’s RFI on External Engagements, May 29, 2018.

Bureau. The process requires thoughtful and thorough analysis to determine how the proposal(s) could affect SERs. Further, SERs may seek legal counsel for additional analysis, participate on several conference calls and travel to Washington, D.C., at their own expense to execute their responsibilities. Because of the enormous sacrifice community bankers make, the Bureau should be more judicious in heeding the feedback they receive and ensuring that such feedback is reflected in proposed and final rules.

Another area ripe for improvement is the time allotted for the process. As stated above, the SBREFA process is a substantive exercise requiring significant time to review materials and prepare for the outreach meeting. The SBREFA process requires the Panel to complete its report within 60 days after the Panel is "convened,"³⁴ which is the date the Panel is formally established by the CFPB, SBA, and OMB.

SERs report receiving materials less than 10 days prior to the Panel outreach meeting, which makes it challenging to adequately prepare for the meeting. ICBA recommends the Bureau send materials at least 30 business days prior to convening a Panel or amend its definition of "convene" to mean the day the Panel meets in order to provide SERs sufficient time to undertake a comprehensive analysis of the complex materials, and allow the Bureau more time for completing the report within the required 60 days and provide a level of assurance that all scenarios and impacts are considered.

The additional time would also allow the Bureau's staff to reach out to the bankers to become more knowledgeable about the operational aspects of community banking so that Panel outreach meetings can focus on discussions and SER input regarding the proposed rule. As noted in a 2016 report issued by the Government Accountability Office ("GAO Report"), the Bureau's staff lacked practical knowledge of the banking process, which impacted the time available to discuss the rule itself because SERs had to educate them during the outreach meeting.³⁵

Finally, to ensure that SER-feedback is incorporated into rulemakings, ICBA recommends that the CFPB improve the process by including in the SBREFA report justifications for why feedback will not be considered or reflected in the proposed rule.

Notice of proposed rulemakings

Transparency, context, and historical foundation are vital when responding to a NPRM. Stakeholders who respond to NPRMs have varying levels of understanding, and the depth of the content must be comprehended by all audiences. But, oftentimes, commenters have limited time and resources to sift through several hundred pages of dense and complex

³⁴ The Bureau considers a panel to be convened on the date it is established and not the first meeting.

³⁵ GAO Report - Consumer Financial Protection Bureau – Observation from Small Business Review Panels (2016) P.16.

content. Because of these varying levels of understanding, those submitting comments need the flexibility to toggle throughout the document to reference information needed during the analysis and drafting processes. ICBA's recommendations for improving the NPRM process and making it easier for potential commenters to navigate through, digest and analyze the proposal include:

- streamlining the number of pages in the notice by providing a concise list of areas in which the Bureau seeks comments immediately after the summary section and avoiding redundancy in the supplementary information and background sections;
- adding a table of contents that includes links to all sections;
- establishing longer comment periods for proposed rules that do not have a statutory deadline; and
- responding in a timely manner to stakeholder requests to extend comment periods.

Final rules

Similar to NPRMs, final rules need to be streamlined. The Bureau's final rules are unreasonably long. The last five final rules released by the Bureau average 1,145 pages.³⁶ Those responsible for analyzing, determining applicability, implementing, and ensuring compliance need a user-friendly mechanism. ICBA's recommendations for modifying and reducing the content in final rules are:

- streamlining the number of pages in the final rule by limiting content to the summary, background, section-by-section analysis and legal authority;
- adding a table of contents that includes links to all applicable sections or documents;
- moving all supplementary content to a separate document; and
- including a separate document identifying specific changes from the proposed rule (i.e., "red-lined") to allow for the speedy identification of changes to existing regulations.

To further improve the final rule process and prepare entities for a smooth compliance and implementation experience, ICBA recommends that all guidance, compliance guides, toolkits, and other supporting materials be released simultaneously with the final rule. We also recommend the Bureau work in conjunction with the prudential regulators to release examination procedures six to nine months before a final rule becomes effective. Finally, we recommend that if after the release of all supplemental documents, stakeholders believe, based on their practical and operational assessment, additional time is needed to meet the compliance deadline, the Bureau should timely heed such request.

³⁶ TRID Rule, 560 pages; Arbitration Rule, 775 pages; Prepaid Rule, 1890 pages; Pay Day Rule, 1700 pages; HMDA Rule, 800 pages.

Question 12: Uncertainty can increase compliance costs and litigation risk without benefitting consumers. Are there areas of significant ambiguity or inconsistency in the regulations? Where would regulations benefit significantly from increased clarity or harmonization — both with respect to the Bureau’s regulations and with respect to overlap, duplication, or inconsistency with regulations issued by other Federal agencies? Please explain the lack of clarity and how the regulations should be clarified.

Opportunities to comment on guidance

Apart from the Bureau’s small entity compliance guides, which attempt to set forth plain language summaries of recently finalized rules, ICBA recommends the Bureau cease its practice of issuing stand-alone interpretive rule guidance without opportunities for public notice and comment under the Administrative Procedure Act requirements. Examiners reference this guidance when examining banks and expect compliance even though the guidance is not a formal rule or requirement. Further, the judiciary may rely on Bureau guidance when interpreting a bank’s liability under federal law. Both scenarios dictate that banks and other stakeholders should have the opportunity to provide feedback on guidance documents and provide ways that the Bureau can achieve its regulatory goals in the least burdensome way possible.

More timely production of webinars

ICBA encourages the Bureau to routinely produce webinars that clarify final rulemakings. ICBA recommends that the webinars be interactive and facilitated by subject matter experts who can answer practical, operational, and nuanced questions. Webinars should be structured to review regulatory requirements, compliance expectations, operational or real-time examples, and allow ample time for questions and answers. Additionally, webinars should be conducted within 30 days of a rule’s release, followed by additional opportunities for stakeholder participation, depending on the rule’s complexity and industry stakeholder needs. Questions and answers presented during the webinar should be posted under the relevant regulation, disseminated to participants, and, when appropriate, incorporated into to FAQs in accordance with ICBA’s recommendations.

Compliance guides

ICBA urges Bureau staff to make a concerted effort to draft compliance guides in plain language. Legalese and regulatory language should be housed in the rules, laws, and other governing documents. Stakeholders have varying levels of understanding and limited time to assess requirements and should not feel forced to hire counsel or consultants to help them understand and implement rules. Compliance guides consistent with these recommendations will benefit all audiences affected by the applicable rule. Guidance materials should also come with protections by the removal of disclaimers.

The Bureau uses disclaimers on non-rule guidance materials to essentially describe the purpose of the material, communicate that it is only intended to aid understanding and implementation, note legal limitations, and to emphasize that the rule and its Official Interpretations are the definitive sources on a rule's requirements in the event of a perceived conflict. By its own admission, the Bureau acknowledges stakeholder confusion over the usefulness, reliability, and credibility of the guidance "intended to aid understanding and implementation" when it is accompanied by these disclaimers. Many stakeholders believe written and oral disclaimers (attached to rule summaries, compliance guides, quick reference materials, webinars, industry calls and meetings, and other compliance aids) undermine the value of that guidance. Since compliance guidance is based on laws and implementing rules, it stands to reason that disclaimers are pointless. Guidance materials are intended to create additional opportunities for understanding and promoting awareness through various mechanisms and forums. The use of disclaimers furthers the notion that Bureau staff is not knowledgeable enough and/or do not trust their own understanding enough to stand behind the same rules they write and require compliance. Guidance documents and aids are direct byproducts of, and completely based on CFPB regulations. The Bureau should remove the regulatory uncertainty created by disclaimers.

All guidance and supporting materials issued by the CFPB are living documents that should be revisited and updated. ICBA recommends an annual review of all guidance documents, updates within 30 days of a regulatory change, and updates within 30 days of receiving common questions from stakeholders. We further recommend that this review be conducted by subject matter experts within the Bureau. These recommendations would ensure that stakeholders continually have the most recent information.

Question 13: Where have regulations failed to keep up with rapid changes in consumer financial services markets? Are regulatory changes needed to address new products and services and the way consumers obtain them? Are there regulations that have outlived their usefulness? Are there new regulations that might be needed? Are there regulatory areas or specific regulations now sufficiently so overlapping as to be redundant?

Policies that allow for new market products and services is the optimal way to account for rapid changes in the consumer financial services marketplace. Thankfully, the Bureau has started to adopt and incorporate several policies that can integrate these novel products and services. The Bureau has already finalized its no-action letter, trial disclosure program, and consumer compliance assistance sandbox. The Bureau is currently considering comments in response to a proposed tech sprint program, as well. Collectively, these policies position the Bureau to adequately respond to new products and services and the way consumers obtain them.

The innovation policies adopted, and currently being considered, by the Bureau tend to strengthen its open collaboration with stakeholders in order to work together in developing solutions to shared problems. The policies allow for technology to potentially reshape compliance, speed effective interaction between regulators and financial institutions, and decrease cost and administrative burden.

ICBA firmly believes that these policies will: (1) reduce or modify the need for regulated entities to transfer data to the Bureau, (2) provide more cost-effective oversight of supervised entities, (3) facilitate that secure data access or exchange between regulated entities and the Bureau, and (4) reduce unwarranted regulatory compliance burdens.

In addition to policies that focus on regulating innovations made at banks and other market participants, ICBA strongly encourages the Bureau to invest in programs that help its staff implement technologies that improve their supervision, examination, and rulemaking responsibilities, typically classified as supervisory technology (“suptech”) and regulatory technology (“regtech”).

In particular, regtech and suptech would be beneficial for use with regulations that require data collection and reporting. This would include the development of technology that harnesses automated reporting, real-time monitoring, and data management and validation. The technologies would be useful for any data-intensive regulation, such as regulations implementing the Home Mortgage Disclosure Act (“HMDA”), the Bank Secrecy Act (“BSA”), the Community Reinvestment Act (“CRA”), and section 1071 of the Dodd-Frank Act.

Question 14: Some stakeholders favor regulations with specific requirements, which draw bright lines for a company’s compliance obligations but can apply a one-size-fit-all approach. Others favor “principle-based” regulations, which can provide a company with flexibility but can create compliance uncertainty. Federal regulations currently employ both approaches (e.g., Regulation Z’s highly specific disclosure rules, and Regulation V’s requirement that data furnishers implement and maintain reasonable written policies and procedures concerning the accuracy of the data they furnish). Which approach is preferable, and does this depend on the industry, the statute, or other considerations? Please explain.

Under Section 1022(b)(3) of Title X of the Dodd-Frank Act, the Bureau has authority to exempt any class of covered persons, service providers or category of consumer financial products or services from any provision of Title X or any Bureau rule. While ICBA applauds the Bureau for using its exemption authority in a meaningful way in its final rule on Payday, Vehicle Title, and

Certain High-Cost Installment Loans,³⁷ by and large, the Bureau was hesitant to use this authority.

ICBA strongly urges the Bureau to use this authority to tailor regulations to exempt community banks from any final rule that hampers community banks' ability to provide financial services and products to their customers. Feedback obtained from SERs, NPRMs, and through other external engagement mechanisms should not only be used to evaluate the potential content of a rule but should be used to determine community bank exemption potential. ICBA is hopeful that the Bureau will expand consideration of exemptions as an element in its overall rulemaking process.

Question 15: With respect to institutions and laws currently within the Bureau's jurisdiction, the Bureau's supervision or enforcement authority may be exclusive or shared with other regulators, depending on the institution or law in question. Have the agencies been cooperating appropriately in areas of shared jurisdiction, and are there ways in which their cooperation could be improved? Is more clarity needed about how the agencies are cooperating in areas of shared jurisdiction? Do the Bureau and other agencies act jointly in appropriate circumstances?

Federal and state agencies are consistently encouraged to coordinate regulatory and enforcement activity in areas in which there is overlap. In its 2017 report,³⁸ the U.S. Department of the Treasury consulted with the member agencies of the Financial Stability Oversight Council ("FSOC") and concluded the FSOC should "be reformed to further facilitate information sharing and coordination among the member agencies regarding financial services policy, rulemaking, examinations, reporting, and enforcement." The report went further:

"As banking regulators are approaching the full implementation of Dodd-Frank, nearly seven years after its passage, regulation has proven to be insufficiently tailored to depository institutions based on the size and complexity of their business models. Requirements in Dodd-Frank are overseen by multiple regulatory agencies with shared or joint rule-making responsibilities and overlapping mandates. This complicated oversight structure has raised the cost of compliance for the depository sector, particularly for midsized and community financial institutions. Moreover, the regulatory agencies often do not engage in sufficient coordination, so financial institutions often face duplication of efforts."³⁹

³⁷ Any lender that makes 2,500 or fewer covered short-term or balloon-payment small-dollar loans per year and derives no more than 10 percent of its revenue from such loans is exempt from the rule's full-payment test and the principal-payoff option.

³⁸ "A Financial System That Creates Economic Opportunities: Banks and Credit Unions," June 2017 (Treasury Report), <https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf>

³⁹ *Id* at 6.

ICBA recommends that the Bureau heed the report's findings and coordinate enforcement activity accordingly. Doing so would not only reduce duplicative efforts, streamline processes, reduce cost and manpower needed to review and assess enforcement activity and documentation, but would also help the Bureau accomplish its Strategic Plan goal of filing or settling a matter within two years of opening an investigation.

Question 20: What types of disclosures regarding consumer financial products or services are effective and what types are not? Could the content, timing, or other aspects of disclosures be improved and, if so, how?

ICBA has long encouraged the CFPB's efforts to clarify and streamline the implementation and regulation of disclosures related to consumer financial products. It is crucial that the Bureau continue to make regulations less complicated, thereby easing the compliance burden on community banks, as well as provide consumers easy-to-read, clear, and meaningful set of disclosures that help them better understand the costs of any financial transaction. This includes thoughtful consideration of how to strike a balance between providing consumers with clear, timely, and reliable information regarding their financial services without creating a convoluted regulatory framework that is inflexible, laden with rules that increases costs, extends processing times, and creates delays which result in consumer dissatisfaction.

One type of disclosure that continues to be an overly prescriptive and costly pain point for consumers and community banks is the Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act ("Regulation X") and the Truth in Lending Act ("Regulation Z"), collectively called the TILA-RESPA Integrated Disclosures Rule and commonly known as TRID. Comprised of six elements, the TRID Rule: (1) integrated certain aspects of TILA and RESPA; (2) redesigned/standardized the disclosure forms; (3) reallocated legal responsibility and liability to creditors to provide disclosures; (4) defined what qualified as a mortgage loan application; (5) changed the timing requirements of when consumers receive information; and (6) constricted the tolerance rules, expanding the "zero tolerances" categories for variances between the amounts of costs and fees disclosed during the application process and those charged at closing. ICBA asks that the CFPB revisit timing concerns regarding the costs and benefits of the three-day closing disclosure requirement, and timing challenges in general.

ICBA appreciates that the CFPB recently took steps to make it easier for consumers with urgent financial needs to obtain access to mortgage credit more quickly with an interpretive rule clarifying that consumers can exercise their rights to modify or waive certain required waiting

periods under the TRID rescission rules.⁴⁰ Requiring customers to wait three business days to close after receiving their Closing Disclosure is likely correlated with more consumer complaints and higher costs, even during stressed times resulting from a pandemic. We ask that the CFPB make this interpretive rule permanent.

We also recommend the Bureau conduct a study to reassess the positive and negative effects of removing the 10 percent tolerance for certain required settlement services that the borrower cannot shop for or where the bank selects the service provider. The Bureau's goal is to make sure that the cost estimates provided by lenders are more meaningful and meet the "good faith" standard, but it is likely that the consequence may lead to increased prices as banks overestimate their charged fees to compensate for low or non-existent TRID tolerances.

To encourage consumer choices, we recommend removing the property address as a required item for purchase transactions. To issue a Loan Estimate, the lender must have the address of the property to be financed. In order to issue a Loan Estimate to a borrower who wishes to "go shopping" for a home and home loan, the lender must issue a preapplication estimate, and would then issue the Loan Estimate once a property is selected. This creates further confusion.

We also recommend exempting commercial or small business loans from TRID where the borrower's residential property is used as additional collateral for the loan.

QM rulemaking request

Last year, ICBA responded to the CFPB's requested feedback on allowing the expiration of a specific category of Qualified Mortgage ("QM") loans that are eligible for purchase or guarantee by the government sponsored enterprises ("GSE") Fannie Mae and Freddie Mac, a category also known as Temporary GSE QM loans or the "GSE Patch."⁴¹ This policy is scheduled to expire in January 2021. It provides QM status to loans purchased or guaranteed by the GSEs even if they exceed the rule's 43 percent debt-to-income limit. At least 25 percent of the GSEs' loan purchases currently are covered by the patch.

The CFPB has recently indicated that it is planning to release a rulemaking addressing the Patch's expiration. Releasing the NPRM now or allowing the GSE Patch to expire during this national emergency would further destabilize the housing market and the financial markets more broadly. Moreover, any rulemaking or change in the QM definition will have a substantial impact on consumer protections and housing affordability. Housing industry stakeholders must have adequate time to submit detailed and data-driven comments to the Bureau before it finalizes a new, post-GSE Patch QM definition. Given the stresses and uncertainty brought on by

⁴⁰ 85 FR 26319 (May 4, 2020).

⁴¹ Haynie, Ron, "ICBA response to ATR/QM ANPR; Docket CFPB-2019-0039; (Sept. 16, 2019) *available at* https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/icba-qm-anpr-cfpb-2019-0039.pdf?sfvrsn=6dc05317_0

the COVID-19 crisis, ICBA asks the CFPB to delay the QM rulemaking and extend the Patch for an additional year to January 2022. This would allow community banks and the financial services industry to allocate time to focus on the present economic and health emergencies.

Question 21: How should the Bureau determine an appropriate remedy for a law violation, considering the need to correct and deter violations without creating adverse effects on competition and other unintended consequences?

In determining appropriate remedies for violations of laws, ICBA supports the Bureau's recent approach to unfair, deceptive, or abusive acts or practices ("UDAAP") violations. This approach balances unintentional violations of law with the need to deter and punish intentional and harmful violations. Specifically, the UDAAP policy (1) focuses on citing or challenging conduct as abusive in supervision and enforcement matters only when the harm to consumers outweighs the benefit; (2) avoids "dual pleading" of abusiveness and unfairness or deception violations arising from all or nearly all the same facts, and alleging "stand alone" abusiveness violations that demonstrate clearly the nexus between cited facts and the Bureau's legal analysis; and (3) seeks monetary relief for abusiveness only when there has been a lack of a good-faith effort to comply with the law.

These underlying principles should be considered when the Bureau evaluates all potential violations of the law, and not just when a UDAAP violation is alleged. Otherwise, the Bureau would be ignoring the intent behind the alleged violation. Consumer financial protection laws are complex, and nuanced. They should not be matters that are judged under a theory of strict liability.

Question 22: What is the optimal mix of regulation, enforcement, supervision, and consumer financial education for achieving the Bureau's consumer protection goals?

Of the Bureau's statutory mandates, financial education should be prioritized among the others. The Bureau is statutorily mandated to provide consumers with timely and understandable information to make responsible decisions about financial transactions, and to develop and implement initiatives intended to educate and empower consumers to make better informed financial decisions. The Bureau achieves these statutory mandates in several ways. The Bureau creates educational content and publishes it on its website for consumption by consumers. The content includes a wide range of financial topics, including lending and savings products. The Bureau has created guides, webinars, a financial health framework, and other educational resources that consumers can access. Finally, the Bureau partners with community organizations and outlets, such as community banks and other financial institutions, libraries, and social services agencies to aid in the dissemination of this material.

Financial education is a means to achieving financial health

According to a recent survey conducted by the Board of Governors of the Federal Reserve System,⁴² consumer financial health and well-being have generally improved since the financial crisis. Tracking with overall improvements in the economy, respondents to the survey indicate improvements in their own assessment of finances and more can handle a small, unexpected expense, as compared to previous years' surveys.

Drilling into why individuals are un- or under-banked reveals that negative perceptions persist. One in nine adults put off at least one credit application because they thought that their credit application would be denied.⁴³ Financial education would help eliminate this widely held misconception. Finally, the survey also found that many adults believe they are behind in their savings for retirement and that people commonly lack financial knowledge and are uncomfortable making investment decisions. On average, respondents answered fewer than three out of five basic financial literacy questions correctly, with lower scores among those who are less comfortable managing their retirement savings.⁴⁴ Given that most families, even those approaching retirement age, have little or no retirement savings, ICBA recommends that the CFPB increase efforts to educate consumers on this particular issue.

Financial education is essential to consumer protection

Although community banks offer and provide their customers with responsible financial services, there are many un- and under-regulated entities that offer usurious and predatory products that can cause significant financial harm for consumers. There are also many products that are not predatory, per se, but are designed for certain segments of the population and are not suitable for all. Financial education can help consumers avoid these products, or at the very least, help consumers with remediation.

Understanding that preventing harm is more fruitful than a cure, ICBA supports the Bureau's and community banks' efforts to direct financial education resources to young consumers before they enter the financial mainstream and have yet to engage with financial products.

In the unfortunate situations where a consumer has originated an inappropriate loan or has engaged with predatory lenders, financial education after the fact can still be helpful in mitigating any potential harm. Without information, a consumer might think that they are simply "stuck" with the product or lender and forced to make sacrifices. However, consumers that work with community banks can learn about alternative options that would greatly improve the quality of their lives, such as auto refinancing or small dollar loans. Without financial education, the consumer would be unaware of such better options.

⁴² SHED Report, *supra* note 9, at 2.

⁴³ *Id*

⁴⁴ *Id* at 49.

Question 23: How can we best assess the efficacy of the Federal consumer financial protections in achieving their goals?

Under administrative rules, such as the APA, RFA, and Paperwork Reduction Act (“PRA”), the CFPB already possess the tools needed to determine the efficacy of consumer financial protections in achieving their goals. However, ICBA contends that the Bureau can leverage these tools to an even greater extent than it does currently.

In Section 610 of the RFA, Congress specified that agencies, including the Bureau, review certain rules within 10 years of their publication, and consider the rules’ effect on small businesses, such as community banks. The purpose of the review is to minimize any significant economic impact of the rules upon a substantial number of small entities, consistent with the stated objectives of applicable statutes. At the conclusion of each review, the Bureau will determine whether the rule should be continued without change or should be amended or rescinded.

The Bureau is required to solicit and consider stakeholder feedback on a number of efficacy-related issues, such as (1) the continued need for the rule, (2) the complexity of the rule, (3) the extent to which the rule overlaps, duplicates, or conflicts with federal, state, or other rules, and (4) the time since the rule was evaluated or the degree to which technology, economic conditions, or other factors have changed the relevant market.

As the Bureau collects comments during a RFA review to determine whether a follow-up rulemaking or deregulatory action is needed, ICBA suggests that the Bureau attempt to collect, collate and convey all information received, regardless of whether a rule is ultimately revised or rescinded. The report published under the Economic Growth and Regulatory Paperwork Reduction Act (“EGRPRA”) is a good model for the Bureau to emulate.

Under EGRPRA, federal banking agencies are mandated to conduct a review of regulations in order to identify outdated or otherwise unnecessary regulatory requirements imposed on insured depository institutions. Unlike RFA reviews, EGRPRA reports require the agencies to summarize, and respond to, all comments received in response to the review.

ICBA encourages the Bureau to similarly publish and respond to all comments received in response to an RFA review, possibly publishing such reports on an annual basis. Related to the EGRPRA review process, ICBA recommends that the Bureau voluntarily participate in the decennial review. Although RFA reviews are certainly welcome, they only occur once, 10 years after being finalized. In contrast, rules reviewed under EGRPRA provide stakeholders with repeated opportunities for review and comment, thereby establishing a longitudinal record of information.

Conclusion

Again, ICBA appreciates this opportunity to respond to the Taskforce's RFI, and we believe that this effort will facilitate an open dialogue and exploration on ways to improve the Bureau's effectiveness and redouble its focus on what it was created to accomplish: facilitating greater consumer choice and efficient markets, while still vigorously enforcing consumer financial law in a way that guarantees due process. If you would like to discuss these comments further, please do not hesitate to contact me at Lilly.Thomas@icba.org or at 202-821-4409.

Sincerely,

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