



# CENTER FOR CAPITAL MARKETS

---

---

# COMPETITIVENESS

## STATEMENT OF THE U.S CHAMBER OF COMMERCE

---

**ON:** Improving Transparency and Accountability of the Bureau of  
Consumer Financial Protection

**TO:** The House Financial Services Committee  
Subcommittee on Financial Institutions and Consumer Credit

**BY:** Kate (Larson) Prochaska, Director at the  
U.S. Chamber of Commerce  
Center for Capital Markets Competitiveness

**DATE:** June 6, 2018

---

1615 H Street NW | Washington, DC | 20062

The Chamber's mission is to advance human progress through an economic,  
political and social system based on individual freedom

The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

**Testimony of Kate (Larson) Prochaska**  
**Director, Center for Capital Markets Competitiveness of the U.S.**  
**Chamber of Commerce**  
**Before the House Committee on Financial Services, Subcommittee on**  
**Financial Institutions and Consumer Credit**  
**June, 6, 2018**

Chairman Luetkemeyer, Ranking Member Lacy Clay, and members of the Subcommittee on Financial Institutions and Consumer Credit:

My name is Kate (Larson) Prochaska, director at the Center for Capital Markets Competitiveness (“CCMC”) at the U.S. Chamber of Commerce (“Chamber”) where I lead consumer finance issues. The Chamber is the world’s largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. I appreciate the opportunity to testify before the subcommittee today on behalf of the businesses and financial institutions that the Chamber represents.

Thank you for holding this important and timely hearing about “Improving Transparency and Accountability at the Bureau of Consumer Financial Protection” (“Bureau”). We at the Chamber have long been advocating for improvements to this influential agency and are grateful for the opportunity to share our views here today.

**Creation of the Bureau**

Consumers, small businesses, and the American economy rely on the availability of credit to meet their financial needs. Every day, financial institutions are working with their customers to try to get them the best loan that fits their goals – whether it is financing a dream home, finally starting a business, or financing their daughter’s education. Since each consumer’s needs are different, it is critical that there are a diverse set of credit products available and that consumers are able to build credit within the mainstream banking system. Diverse financial products and ample credit supply are heavily influenced by financial institutions’ ability to innovate, and the presence of a strong, competitive consumer marketplace.

Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) created the Bureau to consolidate the consumer protection functions of multiple regulators under one roof. We strongly believe in the Bureau’s statutory mission to “seek to implement and, where applicable, enforce Federal

consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.”<sup>1</sup> Consumer protection and a strong regulator to implement consumer finance laws are critical for a highly functioning and fair consumer marketplace. However, we believe the Bureau had growing pains and, as a result, lost sight of its mandate to foster “transparent” and “competitive” markets, and to ensure “that all consumers have access to markets.” The lack of accountability to Congress has exacerbated problems at the Bureau.

Within consumer financial services, the Bureau is instructed to ensure that:

- (1) Consumers are provided with timely and understandable information to make responsible decisions about financial transactions;
- (2) Consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination;
- (3) Outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens;
- (4) Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and
- (5) Markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.<sup>2</sup>

To be clear, rooting out unfair, deceptive, or abusive acts and practices and discrimination (“UDAAP”) is imperative to protect consumers and to foster a robust and fair consumer marketplace. However, the Bureau’s focus should not stop there. Under the past leadership, the last three prongs seemed to have lower priority, which is why we urge the new leadership to promote *all* aspects of the Bureau’s mandate and make recommendations on how to do so throughout this testimony.

---

<sup>1</sup> Dodd-Frank Act §1021(a).

<sup>2</sup> *Id.* at §1021(b).

## Chamber Advocacy for Changes to the Bureau throughout the Years

Years ago, the Chamber urged the Bureau to: promote access to credit, competitiveness, and choice for consumers and small businesses; reduce regulatory burden to spur economic growth; and produce policy in a data-driven and transparent manner. These important tenants help to create a financial marketplace that provides the diverse financial products and services consumers and small businesses need, while also protecting borrowers and guarding against unintended consequences. Unfortunately, the Bureau's past leadership often did not prioritize these goals to the detriment of the financial marketplace and ultimately consumers.

After the Bureau opened its doors in 2011, we tried to work with the new leadership and create a trustworthy dialogue between industry stakeholders and policymakers. Naturally, practitioners in this industry can explain how certain products work and how best to avoid unintended consequences in the real world when creating policy. These practitioners are on the front lines and understand how words in a guidance or rulemaking translate into the real world, which makes them valuable resources during the policymaking process. However, we were disappointed to find that our conversations, comment letters, and meetings seemed more perfunctory rather than seriously considered by the Bureau.

Here are some illustrations to describe our interactions further:

TILA/RESPA Integrated Disclosure (TRID): The Chamber advised the Bureau that the new mortgage systems would not be ready in time due to a small number of vendors equipped to implement the change. This was not for a lack of trying on the part of financial institutions – it was simply due to a backlog and complex system integration. The Bureau did not heed these concerns until immediately before the compliance date. The Bureau extended implementation because, as industry had stressed, not every institution was able to be compliant. While we were grateful the implementation date was finally extended, it was after years of stressing the issue to a regulator that seemingly did not trust our concerns. Much stress and confusion could have been avoided if there was an open and trusting dialogue.

Arbitration rulemaking: Throughout the arbitration rule-writing process, industry came to the table to propose solutions to address the Bureau's concerns surrounding arbitration, however it seemed that the Bureau had settled on its

preferred approach (banning class action waivers) before discussions even began. The Bureau's final arbitration rule was based on faulty data, and would have effectively banned the use of arbitration even though it is faster and cheaper for consumers. Unfortunately, due the high cost of attorney fees our legal system does not lend itself to consumers getting their "day in court" over small dollar amounts. While the attorneys profit, consumers are left with pennies on the dollar or coupons in the mail. Thankfully, Congress acted to overturn the Bureau's harmful rulemaking last fall so consumers will still have access to the arbitration system.

Complaint database: The complaint database can be a valuable tool for the Bureau when assessing markets; however, data that has not been verified or normalized should not be released to the public. Out of context data may lead consumers to think the companies that have the most individual complaints are the worst companies, when in reality they are the largest companies and could have a relatively low number of complaints compared to their number of customers. Previously, the Bureau would release monthly reports that included the "most complained about companies," even though that data had no value and would only serve to lead consumers to needlessly distrust those companies. After multiple meetings and discussions, the Bureau discontinued using this flawed practice.

With new leadership, there is the opportunity to make the Bureau a more mature, transparent, and accountable agency. Only with this approach will the Bureau adequately serve and protect consumers, while still promoting a competitive and transparent marketplace that fosters access to credit to all consumers.

### **Chamber Reform Agenda to Improve the Bureau**

The Chamber deeply supports strong consumer protections and a robust, transparent marketplace of consumer products and services. This is why, on March 28, 2018, we released a comprehensive agenda to reform the Bureau ("Chamber Reform Agenda"). The report includes numerous recommendations to promote consumer protection, create clear rules of the road for market participants, improve the management of the agency, and ensure that the Bureau is accountable to Congress.

In the report, we noted that any consumer protection agency, including the Bureau, has a three-part mission:

1. Ensure consumers have access to the marketplace and choice in products and services;
2. Promote the availability of information that consumers can use to make informed decisions; and
3. Provide protection against bad actors.

Further, we outlined six principle reforms comprised of 23 individual recommendations that constitute a series of concrete steps to ensure that the Bureau fulfills its statutory mandate to faithfully implement and enforce federal consumer financial laws, while putting in place the controls necessary to be a properly managed and effective agency. Each recommendation is discussed below.

## **1. Provide Clear Rules of the Road**

Recommendation 1: Promulgate regulations. Notice-and-comment rulemaking under the Administrative Procedures Act (“APA”)<sup>3</sup> is the best tool for setting regulatory policy because it gives stakeholders an opportunity to engage in the policy-making process. Companies can thrive when they have clear rules to follow. Uncertainty creates confusion in the marketplace and consumers ultimately lose out because responsible, compliance-minded companies hesitate to invest in new products and services when they are unsure of the potential legal ramifications.

Recommendation 2: Avoid rulemaking by enforcement. We applaud Acting Director Mulvaney for declaring that the “CFPB has pushed its last envelope”<sup>4</sup> and for committing to refrain from “regulation by enforcement.” Businesses work hard to understand and comply with the countless rules governing consumer financial services. It is unreasonable and inappropriate to expect companies to draw generally applicable legal principles from the limited facts included in a consent order, especially because every company and fact scenario is different.

Consumers agree. On the same day we issued the Chamber Reform Agenda, we also released a CCMC/ Morning Consult poll that found consumers overwhelmingly preferred the current administration’s approach to rulemaking. A resounding 66% of those surveyed across party lines indicated they prefer the current

---

<sup>3</sup> 5 U.S.C. §§ 500 to 596

<sup>4</sup> Acting Director Mick Mulvaney, Wall Street Journal “The CFPB Has Pushed Its Last Envelope” (Jan. 23, 2018) <https://www.wsj.com/articles/the-cfpb-has-pushed-its-last-envelope-1516743561>

approach of writing rules instead of governing by enforcement actions because it “creates rules that protect consumers and provides businesses with the certainty of clear guidelines.”<sup>5</sup>

Recommendation 3: Limit the use of informal guidance. Clarifications about existing rules, whether in guidance or exam manuals, can be helpful for institutions to better understand a policy that is already in place. However, these tools should not be used to create new policy since, unlike the APA process, they do not afford an opportunity public input.

Recommendation 4: Use sound economic analysis in the rulemaking process. Rulemaking must be based on sound economic analysis to anticipate unintended consequences that might arise in the real world. Only with a true cost benefit analysis, instead of subjective conclusions, can policymakers understand the practical ramifications of a new policy.

Recommendation 5: Eliminate areas of substantial legal uncertainty. We urge the Bureau to clear up areas of uncertainty, such as outlining the types of practices that are considered “abusive” under UDAAP. Also, we urge the Bureau to work with industry when areas of uncertainty arise to ensure institutions understand the rules of the road, and all companies are playing by the same standard.

Recommendation 6: Adopt a robust no-action letter and advisory opinion process. Companies need legal certainty to create new products and services. To promote this critical component of innovation, we urge the Bureau to create a robust “no-action” letter policy that gives companies legal certainty. To be clear, this does not just apply to “fintech” innovation, but all types of innovation in various areas of products and services from small dollar loan offerings to marketing and disclosures.

Further, we ask the Bureau to start issuing advisory opinions if there are repeated questions from industry on a particular policy. This is a practice that was successful at the Federal Reserve Board, and can serve as a method to clear up confusion.

---

<sup>5</sup> [https://www.centerforcapitalmarkets.com/wp-content/uploads/2018/04/CCMC\\_CFPB-Infographic\\_final.pdf](https://www.centerforcapitalmarkets.com/wp-content/uploads/2018/04/CCMC_CFPB-Infographic_final.pdf)

## 2. Enforce the Law Fairly

Recommendation 7: Respect the bounds of the Bureau's authority. Congress gave the Bureau clear boundaries on what offices to create and what to regulate.<sup>6</sup> We ask the Bureau to respect these boundaries in the types of activities and institutions they try to oversee.

Recommendation 8: Give companies fair notice of what the law requires. We urge the Bureau to adhere to clear regulations, instead of inconsistent interpretations in the enforcement and supervision functions. Only by adhering to concrete rulemaking will companies have the due process they are legally entitled to.

Recommendation 9: Respect statutes of limitations. Congress imposes statutes of limitations so companies are not potentially subject to lawsuits in perpetuity. In the past, the Bureau has taken the position that statutes of limitations do not apply to administrative actions. We urge the Bureau to clearly state that it has abandoned this position.

Recommendation 10: Reform the investigative process. We urge the Bureau to reform the investigative process to ensure that enforcement actions are only brought based on clearly articulated violations, instead of hunches or “fishing expeditions;” avoid regulation by enforcement; promote a fair marketplace by enforcing clearly established legal principles; enforce the law within the limits of the Bureau's authority; and avoid regulatory duplication in enforcement activities. We also ask that the timeframes and data to be collected are more reasonable.

Recommendation 11: Ensure the adjudication process is fair. We hope the Bureau will develop internal policies limiting the use of administrative adjudication to ministerial cases that can be resolved expeditiously; allow a respondent company to have a limited right of removal to move more complex cases to federal district court; and institute safeguards to avoid abuse in any matter that proceeds an administrative adjudication.

---

<sup>6</sup> Dodd-Frank Act § 1022.

Recommendation 12: Reform supervision. We ask the Bureau to refrain from treating supervision as a pipeline to enforcement; reform supervisory processes to promote consumer protection and reduce unnecessary burdens; and implement supervisory authorities clearly, consistently, and fairly across companies.

### **3. Educate Consumers with Accurate, Data-Driven Information**

Recommendation 13: Emphasize consumer financial education. Consumers can better protect themselves from bad actors if they have access to valuable financial resources and education. We ask the Bureau to treat financial education as a top priority, and work in public/ private partnerships and across governmental bodies to ensure consumers receive meaningful and pertinent information.

Recommendation 14: Reform the complaint database. The complaint database can be a helpful resource for the Bureau to monitor markets, but individual complaints should not be shared publicly. A federal government agency has the responsibility to ensure the data they are making public does not mislead the public or violate privacy protections. Until the Bureau can ensure these two critical pillars are met, the complaint database should be kept private.

Moreover, the vast majority of regulators keep complaint data private because the issues are not verified and there are privacy concerns with releasing the data. We ask the Bureau to follow the lead of other regulators by refraining to publish the data, at least until these concerns can be resolved.

### **4. Commit to Transparency**

Recommendation 15: Facilitate appropriate congressional oversight. We hope the Bureau's new leadership can foster a relationship of trust with Congress. An open dialogue will hopefully create a more collaborative environment and foster better policy for Americans.

Recommendation 16: Facilitate meaningful public dialogue. We urge the Bureau to use its megaphone to facilitate meaningful, constructive public dialogue with stakeholders. Previously, the Bureau took an adversarial tone with midnight embargoes and hyperbolic press releases. Consumers deserve accurate, not one-sided, information and we hope the Bureau will provide that going forward.

Recommendation 17: Reorganize the Consumer Advisory Board. Congress tasked the Bureau with creating a Consumer Advisory Board (“CAB”) to “advise and consult with the Bureau in the exercise of its functions” and to “provide information on emerging practices in the consumer financial products or services industry.”<sup>7</sup> Unfortunately, the Bureau seemed to use the CAB for publicity and policy releases, instead of substantive dialogue. We hope the CAB will be more balanced going forward with an increased amount of stakeholders who have experience in the financial services industry and can articulate how policies will affect consumers in the real world.

Recommendation 18: Rescind the proposed gag order. In August 2016, the Bureau proposed a rule that would prevent businesses from disclosing civil investigative demands (“CIDs”). The Chamber and other stakeholders view this as a violation of businesses’ free speech rights, and we ask the Bureau to formally rescind this proposal.

## **5. Avoid Regulatory Duplication and Burden**

Recommendation 19: Coordinate regulatory activities with other agencies. The patchwork of federal regulators is complex and unwieldy. But don’t take our word for it – the Government Accountability Office (“GAO”) said in a 2016 report: “The U.S. financial regulatory structure is complex, with responsibilities fragmented among multiple agencies that have overlapping authorities.”<sup>8</sup> We hope the Bureau will work to minimize duplication and promote efficiencies when working with its federal and state counterparts.

Recommendation 20: Defer to regulators with primary authority. In an effort to minimize duplication, we hope the Bureau will defer to regulators that have clear authority or who have been leading an enforcement action or rulemaking instead of duplicating the work. Designating a lead agency will also help to coordinate efforts.

Recommendation 21: Avoid unnecessarily burdensome information requests. In the supervisory, enforcement, and rulemaking process, immense data is requested of companies to better understand issues. There is often need for this information, however, requests can also be outside the scope of the pertinent questions, require

---

<sup>7</sup> Dodd-Frank Act § 1014(a).

<sup>8</sup> Gov’t Accountability Office, Financial Regulation: Complex and Fragmented Structure Could Be Streamlined to Improve Effectiveness (Feb. 2016), <https://www.gao.gov/assets/680/675400.pdf>

lengthy responses in a short timeframe, and require pulling together information from legacy systems that do not function together. We ask that information requests be thoughtful and limited to only truly necessary matters.

## **6. Structure the Bureau for Long-Term Success**

Recommendation 22: Adopt a commission structure. For years, we have advocated a five-person bipartisan commission instead of a sole director oversee the Bureau. A commission structure would mitigate the pendulum swing from one director to the next, and create more certainty for industry and better outcomes for consumers. Acting Director Mulvaney has repeatedly stated he has too much power – Congress must finally remedy this by passing legislation instituting a bipartisan commission structure for the Bureau.

Recommendation 23: Institute congressional control over the Bureau’s budget. The Constitution gives Congress the power of the purse, which provides the opportunity for continual and meaningful oversight.<sup>9</sup> Only with this check and balance will the Bureau be subject to real oversight. Again, the CCMC/Morning Consult poll found that consumers agreed – 66% of people polled supported government agencies with checks and balances.<sup>10</sup>

### **The Bureau’s Call to Evidence**

In addition to the Chamber Reform Agenda, we have been providing feedback to the Bureau on how to improve the agency through recent comment letters. We thank the Bureau for releasing their “Call to Evidence,” which is the compilation of 12 separate requests for information (“RFIs”) to conduct an audit of the agency. As we know, this is the very first time the Bureau has transitioned power, which makes it incredibly important to conduct such thoughtful analysis to hopefully create a more mature, transparent, and accountable agency.

In preparing our responses to the RFIs, we have spent countless hours receiving feedback from businesses on how to best improve the Bureau, and identifying concrete principles that can guide the agency for the long run. To date, we have filed six comment letters addressing CIDs, adjudication proceedings, the enforcement process, the supervision process, external engagements, and the

---

<sup>9</sup> U.S. Constitution, Article I.

<sup>10</sup> [https://www.centerforcapitalmarkets.com/wp-content/uploads/2018/04/CCMC\\_CFPB-Infographic\\_final.pdf](https://www.centerforcapitalmarkets.com/wp-content/uploads/2018/04/CCMC_CFPB-Infographic_final.pdf)

complaint database. We look forward to filing our rulemaking comment tomorrow, and subsequent comments due through July 16<sup>th</sup>. In the interest of time, I will not address each letter individually, but will provide them for the record.

### **Bureau's Semi-Annual Report and Congressional Recommendations**

This brings me to the Bureau's thirteenth Semi-Annual Report that was issued on April 2, 2018. In his opening letter, Acting Director Mulvaney suggested four suggested statutory changes, which I will address individually.

1. **Fund the Bureau through appropriations:** We have long supported putting the Bureau under true congressional oversight, which is the practice at the majority of federal agencies. As discussed above, the Chamber Reform Agenda also recommended that the Bureau come under the regular order of appropriations and be accountable to Congress. The CCMC/ Morning Consult poll found that the public agreed: 66% of those surveyed recognized the importance of appropriations to provide checks and balances over governmental agencies.<sup>11</sup>
2. **Require legislative approval of major Bureau rules:** While we do not take a position on whether legislative approval should be required for all regulations, we do believe regulations should be based upon clear statutory authority and subject to rigorous oversight.
3. **Ensure that the Director answers to the President in the exercise of executive authority:** The Chamber believes that all agencies should be held accountable and the Bureau is no different. As I noted earlier, we support moving to a bipartisan commission structure to manage the agency. So long as a single director heads the Bureau, it is critical that the limitation permitting the director's firing only "for cause" be repealed as it completely insulates the Director from the President's authority and accountability.
4. **Create an independent Inspector General ("IG") for the Bureau:** Just based on sheer bandwidth, it seems logical that the IG would be more effective

---

<sup>11</sup> Id.

if it had only one agency to oversee instead of having to oversee the Federal Reserve as well. We agree with this recommendation.

### **Conclusion**

I look forward to working with the Committee and this Subcommittee on legislative proposals that make the Bureau more mature, accountable, and transparent. Thank you again to the Chairman, Ranking Member, and Committee for holding this hearing and for the opportunity to testify. I am happy to take any questions.