American Bankers Association
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By electronic delivery to:
www.regulations.gov

The Honorable J. Michael Mulvaney
Acting Director
Bureau of Consumer Financial
Protection 1700 G Street, NW
Washington DC 20552

Re: Request for Information Regarding Bureau Enforcement Processes; Docket No. CFPB-2018-0003

Dear Acting Director Mulvaney:

The American Bankers Association (ABA)[1] appreciates your leadership in exposing the policies and procedures of the Bureau of Consumer Financial Protection to public comment through the Request for Information (RFI) process. This process provides a transparent, efficient, and timely opportunity for all of those affected by the Bureau's work to help the Bureau identify how it might improve the way it pursues its important mission.

Like all government agencies, the Bureau must strike a balance that allows it to pursue its objectives without undermining other important values, including fairness to those it regulates. As you have noted, the Bureau works for everyone: "those who use credit cards, and those who provide those cards; those who take loans, and those who make them."[2] Unfortunately, the Bureau's focus all too often has been on increasing the scope of its authority, rather than on instituting checks and balances to ensure that its authority is exercised wisely and fully for the benefit of consumers and consistent with law and due process. This pervasive problem helps explain why the Bureau has routinely turned to enforcement when other tools might achieve compliance and consumer redress with less cost and controversy, and why the Bureau's enforcement policies sometimes sacrifice fairness and efficiency in the name of expediency.

ABA's approach throughout the RFI process will be to provide constructive feedback on the Bureau's policies and procedures. Our intent is that the Bureau implement programs and policies that are transparent, fully consistent with the law, and focused on promoting the interests of financial consumers in a strong, vibrant, and innovative market that offers the variety of financial products and services that consumers want.

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[1] The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits, and extend nearly $10 trillion in loans.
[2] Mick Mulvaney, *The CFPB Has Pushed Its Last Envelope,* WALL ST. J. (Jan. 23, 2018), https://www.wsj.com/articles/the-cfpb-has-pushed-its-last-envelope-1516743561 (Mulvaney Op-ed).

Summary of Comment

A review of the Bureau's enforcement processes should start with the threshold issue of how and when the Bureau wields its enforcement authority. To date, the Bureau's focus on exercising its enforcement powers has caused it to miss opportunities to achieve compliance more efficiently and fairly using the other tools at its disposal. In particular, the Bureau's over-emphasis on enforcement has crowded out supervisory solutions that would be less costly, more certain to benefit consumers, and better for the financial services marketplace as a whole. Similarly, the Bureau has engaged in a misguided effort to provide compliance guidance through Consent Orders, while underutilizing its authority to provide guidance in a clear, comprehensive, and less adversarial manner. To address both issues, ABA proposes concrete ways for the Bureau to reorganize how it analyzes problems so that it chooses the right tool for each, rather than reflexively reaching for enforcement.

The Bureau needs not only to consider whether enforcement is the right tool, but to wield that tool thoughtfully and fairly when it is used. To this end, the Bureau should provide subjects of an enforcement investigation with the information, time, and attention necessary for them to understand and respond to the Bureau's concerns and conclusions. Such engagement should include detailed information regarding the Bureau's concerns, a genuine opportunity to engage with senior Bureau Staff on the relevant factual and legal issues, and a robust opportunity to respond in writing to the Bureau's case. Affording financial institutions such due process will strengthen the Bureau's enforcement program by subjecting it to careful, critical analysis before the Bureau imposes a settlement or goes to court. When cases do settle, the Bureau should rationalize and make transparent its approach to any appropriate Civil Money Penalties. In addition, the Bureau should better coordinate with federal and state agencies with relevant jurisdiction. It should also more carefully match its statements to the press with the language of the related Consent Order.

I. Enforcement and its Alternatives

One of the most momentous decisions made by any federal agency is whether and when to unleash the power of the government to pursue a person or entity for alleged violations of law. As Acting Director Mulvaney explained: [w]e have the power to do damage to people that could linger for years and cost them their jobs, their savings and their homes."[3] The decision to pursue an enforcement action is even weightier when the agency has the alternative option of ensuring compliance with the law *without* taking enforcement action.

The Bureau has a host of tools at its disposal. In his confirmation hearing, former Bureau Director Richard Cordray explained the critical difference between the role of the Bureau and his prior work as an Attorney General:

> At the Bureau, our bigger and more flexible toolbox includes research reports, rulemaking, market guidance, consumer education and empowerment, and the ability to supervise and examine both large banks and many nonbank institutions.[4]

[3] *Id.*

[4] Richard Cordray, *Testimony of Richard Cordray Before the Committee on Banking, Housing, and Urban Affairs* (Sept. 6, 2011), https://www.consumerfinance.gov/about-us/newsroom/testimony-of-richard-cordray-before-the-committee-on-banking-housing-and-urban-affairs/.

Not only did Director Cordray recognize that he had many tools at his disposal, but he recognized that enforcement was often the wrong tool to address a problem:

> I know from my own experience that lawsuits can be a very slow, wasteful, and needlessly acrimonious way to resolve a problem. The supervisory tool, in particular, offers the prospect of resolving compliance issues more quickly and effectively without resorting to litigation. We are continuing to build our capacity to make effective use of this entire range of tools.[5]

Unfortunately, the Bureau too frequently ignored this wisdom. As ABA explained in its comment letter on the RFI regarding Civil Investigative Demands (CIDs),[6] the Bureau has too quickly and too often resorted to enforcement to investigate and address compliance issues. This focus on enforcement has come at the expense of more appropriate solutions, including those that rely upon the Bureau's authority to supervise financial institutions and to issue regulations and guidance.

A. Supervision as an Alternative to Enforcement

Although the Bureau has a robust supervision program, it has consistently chosen enforcement over supervision to address alleged compliance issues. A July 2016 Bureau Fact Sheet on the agency's first five years claimed that the Bureau had recovered over $11.7 billion "from CFPB supervisory and enforcement work."[7] However, a closer analysis reveals that only about 3% of that amount was "as a result of supervisory activity."[8] Indeed, the Bureau collected more in Civil Money Penalties in enforcement matters than it obtained from all of its supervisory efforts.[9]

This imbalance does not serve the public interest. *First,* treating almost every problem as a matter for enforcement is an inefficient use of the resources of the Bureau and defendants alike. As Director Cordray explained, lawsuits are a "very slow, wasteful, and needlessly acrimonious way to resolve a problem."[10] The same is true of enforcement investigations, where thousands of hours and millions of dollars may be spent merely responding to Civil Investigative Demands.[11]

Second, consumers are not well served by the Bureau's over-reliance on enforcement. An enforcement action by the Bureau carries the risk that the Bureau will fail to secure in court the consumer redress and changes in practices that it could have obtained through a supervisory resolution. Moreover, enforcement actions can delay any ultimate customer remediation by the years it can take to litigate a case to completion, or cause the defendant to spend money on a defense that could have been used to bring new or lower cost products and services to market.

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[5] *Id.*
[6] *See* Virginia O'Neill, *ABA Response to Request for Information Regarding Civil Investigative Demands and Associated Processes; Docket No. CFPB-2018-0001*, https://www.aba.com/Advocacy/commentletters/Documents/cl-RFI-CID20180424.pdf.
[7] *Consumer Financial Protection Bureau: Enforcing federal consumer protection laws* (July 2016) (Fact Sheet), https://files.consumerfinance.gov/f/documents/07132016_cfpb_SEFL_anniversary_factsheet.pdf.
[8] *Id.* ($347 million was recovered through supervisory activity).
[9] *Id.* ($440 million was ordered to be paid in civil penalties).
[10] Cordray, *supra* note 4.
[11] *See* O'Neill, *supra* note 6.

Third, a bias towards enforcement is harmful to the financial services marketplace. One of the congressional mandates for the Bureau is to ensure that "markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation."[12] Public allegations of violations of law – even if never proven – leave a mark on the accused institution and on the financial system as a whole. Systematically undermining consumer confidence does not help the markets for financial products and services operate efficiently or well. In addition, defending against an enforcement action by the Bureau can cause a firm to pause with regard to developing and implementing new ways to serve customers.

For these and other persuasive reasons, Acting Director Mulvaney made clear that enforcement should be "the most final of last resorts" at the Bureau.[13] This should be particularly true when the Bureau has supervisory authority that would allow it to obtain appropriate customer redress and changes in practices from the relevant institution without enforcement. ABA recommends the following to help institutionalize that perspective.

- The Bureau's Action Review Committee (ARC) reviews issues raised in supervision to assess whether they should be referred to Enforcement.[14] However, the ARC rarely considers whether an enforcement matter should be handled by Supervision. Reforming the ARC process to identify and refer matters in both directions would be a step towards ensuring that the right tool is used to solve each problem. Enforcement should be considered when an institution is not cooperative or cannot be compelled to change its practices through a supervisory directive.

- The Bureau has assigned enforcement attorneys to supervisory examinations who can facilitate the transfer of supervision matters to enforcement. Providing Supervision with a similar line of sight into Enforcement investigations would help bring even-handedness to Bureau consideration of how to resolve particular issues. ABA members too often report that the Bureau's own supervisory staff was unaware that a matter was being transferred to enforcement. The Bureau's structure, which makes supervision and enforcement equal divisions within the Office of Supervision, Fair Lending and Enforcement (SEFL) should facilitate regular communication between Supervision and Enforcement about matters of concern and how they should be resolved.

- The Bureau's publication of regular *Supervisory Highlights* has provided helpful guidance to industry. However, the Bureau rarely uses that mechanism to explain *why* certain matters are resolved through Supervision rather than Enforcement. Providing an explanation of the Bureau's approach to this critical issue would help industry firms understand how they can work constructively with the Bureau to resolve matters before they require an enforcement action.

[12] 12 U.S.C. § 5511(b)(5) (2012).
[13] Mulvaney, supra note 2.
[14] Consumer Fin. Protection Bureau (The Bureau), *Supervisory Highlights*, 24 (Summer 2015), https://files.consumerfinance.gov/f/201506_cfpb_supervisory-highlights.pdf.

B. Regulation as an Alternative to Enforcement

The Bureau should rethink the relationship between enforcement and regulations and guidance. To date, the Bureau has often had it backwards, using enforcement actions to provide guidance on how to comply with the law. This has proven to be an inefficient and "cart-before-the-horse" way to provide such direction. Going forward, the Bureau should use regulations to establish legal requirements, and guidance to aid in the understanding of the regulations and how they are applied. Together, regulations and guidance provide a road map for compliance that financial providers can access and understand. The more effectively that these are applied, the more that they serve to reduce the need for enforcement.

Under Director Cordray, the Bureau pursued enforcement actions designed to send a message to the financial services industry.[15] Director Cordray lauded the Bureau's "thoughtful strategy" of "working toward a pattern of actions that conveys an intelligible direction to the marketplace."[16] He added that Bureau Consent Orders "provide detailed guidance for compliance officers," and are "intended as guides to all participants in the marketplace."[17] Indeed, the former Director asserted that "it would be 'compliance malpractice' for executives not to take careful bearings from [consent] orders about how to comply with the law."[18] Unsurprisingly, this approach has been properly labelled regulation by enforcement.

Regulation by enforcement suffers from several significant flaws that undermine the interest of consumers in a strong, vibrant and innovative market for financial products and services. This approach robs the public of the opportunity to participate in rulemaking, which is the very purpose of the Administrative Procedure Act.

First, regulation by enforcement is unfair to the defendant who is sued for violating a law before "detailed guidance"—in the form of their Consent Order—is available. Using one financial institution as an example from which others can learn is manifestly unfair to the institution singled out for punishment.

Second, Consent Orders do not actually provide "detailed guidance," but only a highly specific and highly negotiated account of how one party allegedly violated the law. Indeed, the Bureau has explained in other contexts that "while some guidance may be found in the Bureau's previous public actions, the outcome of one matter is not necessarily dispositive to the outcome of another."[19] In particular, negotiated injunctive relief may exceed regulatory requirements, or be drafted to work with the settling entity's unique policies and systems.

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[15] *See* Steven Antonakes, *Prepared Remarks of CFPB Deputy Director Steven Antonakes at The Exchequer Club* (Feb. 18, 2015), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-deputy-director-steven-antonakes-at-the-exchequer-club/ ("If we suspect a troubling practice is widespread, we may want to put the entire industry on notice through public enforcement actions.").

[16] Richard Cordray, *Prepared Remarks of CFPB Director Richard Cordray at the Consumer Bankers Association*, (Mar. 9, 2016), http://business.cch.com//BFLD/PreparedRemarksofCFPBDirectorRichardCordrayattheConsumerBankers-031016.pdf.

[17] *Id.*

[18] Id.

[19] The Bureau, *CFPB Compliance Bulletin 2015-05: RESPA Compliance and Marketing Service Agreements*, 2 (Oct. 8, 2015), http://files.consumerfinance.gov/f/201510_cfpb_compliance-bulletin-2015-05-respa-compliance-and-marketing-services-agreements1.pdf.

Third, to the extent that Consent Orders provide any guidance, they do so without the benefit of public input. Regulations and guidance alike are shaped by transparent processes that collect diverse perspectives and interests. Regulation through enforcement is denied the benefit of multiple perspectives, and so is less likely to be fair, comprehensive, and practical.

Fourth, consumers are better off when the Bureau guides financial institutions towards compliant conduct in the first place, rather than waiting for harm to occur, conducting an investigation, and then suing a financial institution to obtain consumer refunds.

Accordingly, the Bureau should not rely upon the process of bringing and settling enforcement actions as a means of providing guidance. Instead, the Bureau should provide the kind of advance guidance that can make enforcement actions rarer and fairer. As Acting Director Mulvaney put it, "the people we regulate should have the right to know what the rules are before being charged with breaking them. This means more formal rulemaking and less regulation by enforcement."[20] There are a number of ways to help institutionalize that perspective.

- The Bureau should reduce its reliance on the prohibition on unfair, deceptive, and abusive acts and practices (UDAAP) to bring enforcement actions. The Bureau's enforcement regime has relied upon this general prohibition more than it has relied on all eighteen of the enumerated statutes entrusted to the Bureau by Congress. Moreover, many of the Bureau's UDAAP cases have stretched "unfair" or "deceptive" beyond their known meaning, or deployed an "abusive" standard that neither the Bureau nor the Courts have adequately defined. The Bureau should avoid such aggressive use of UDAAP, particularly with regard to activities already regulated by specific statutes or rules.

- Before bringing an enforcement action, the Bureau should ask itself a simple question: How could the defendant have known that the relevant conduct was illegal? This simple question would have prevented the debacle of the Bureau's enforcement case against PHH, in which a panel of the D.C. Circuit Court of Appeals found that the Bureau's interpretation of law was inconsistent with the statutory text, industry practice, prior interpretations by the federal government, and the statute's purposes and legislative history.[21] The Bureau should see that opinion as a warning sign that its historic processes did not adequately pressure-test the Bureau's legal theories.

- Where the defendant was not clearly on notice that certain conduct was prohibited, the Bureau should consider whether supervisory corrective action may be appropriate. Should the Bureau believe that the practice of concern is more widespread, then it should initiate a rulemaking process instead of putting the defendant on notice through a lawsuit addressing conduct that had not previously been known to be illegal.[22]

[20] Mulvaney, supra note 2.
[21] See PHH Corp. v. CFPB, 839 F.3d 1, 41-43 (D.C. Cir. 2016), reh'g en banc granted, order vacated (2017), reinstated in relevant part on reh'g en banc, 881 F.3d 75 (2018).
[22] In addition to notice and comment rulemaking, the Bureau has a wide range of tools it barely uses: it issued exactly one No-Action Letter and one Compliance Bulletin in 2017.

In sum, any consideration of the Bureau's Enforcement Processes must begin by viewing the Bureau's enforcement tools in the context of the Bureau's full toolbox. Instead of reflexively reaching for enforcement, the Bureau should always seek to identify and use the tool that will work best. A Bureau committed to carefully considering alternative approaches will find that supervision and guidance often offer better ways to protect consumers and efficiently use Bureau resources than meting out punishment.

II. Enforcement Issues

The RFI asks a series of specific questions relating to aspects of the Bureau's enforcement processes, to which ABA responds below. Our comments are united by the principle that consumers, industry, and the Bureau have a shared interest in enforcement processes that are even-handed and credible.

A. Communications with Subjects of Investigations

By the time the Bureau has authorized an investigation, it should have a concrete sense of the conduct being investigated and what federal laws may have been violated. However, the Bureau's Enforcement Staff often refuses to share that information with the subject of an investigation. As noted in ABA's Comment to the RFI on CIDs, the Notice of Purpose on a CID routinely invokes all federal consumer financial protection laws rather than focusing on discrete provisions of laws and regulations that the Bureau believes may have been violated.[23] Enforcement Staff also often provide similarly broad responses to requests for additional information regarding the Bureau's concerns, and routinely refuse to meet and discuss substantive issues while the CID response is pending.

The Bureau's reticence is counterproductive. A financial institution that understands the Bureau's concerns is in a better position to provide documents, testimony, and other information that meets the Bureau's needs. In many cases, candid dialogue can significantly reduce the burden of the investigation on all parties, as broad CIDs and investigational hearings are replaced by targeted inquiries and responses. Such communication also can foster early settlement discussions, which conserve Bureau resources and speed any appropriate consumer redress. In particular, the Enforcement Staff should disclose any ongoing customer harm as soon as it is identified. Such prompt disclosure would give the party under investigation the opportunity to end and remediate such harm even before the investigation is complete. All of these steps are better for consumers and the Bureau than a belated enforcement action.

B. The Notice and Opportunity to Respond (NORA) Process

The NORA process is a credit to the Bureau, and an example of how an agency voluntarily can create processes that provide due process to entities facing enforcement actions. The NORA process implicitly recognizes that the filing of public charges imposes financial and reputational costs to the defendant. Accordingly, it is appropriate to provide putative defendants with an opportunity, before such charges are filed, to persuade the Bureau not to go forward with an enforcement action. The NORA process also recognizes that the Bureau benefits from a robust testing of its facts and legal theories before they are made public.

[23] *See* O'Neill, *supra* note 6.

However, there are a number of ways that the NORA process could be improved. *First*, there should be a formal presumption in favor of providing a Notice and Opportunity to Respond. In particular, the NORA process should be followed even when a matter is referred from Supervision to Enforcement after the institution responded to a Potential Action and Request for Response (PARR) letter. Enforcement's concerns and legal theories often are different from those in Supervision, and the referral to Enforcement suggests that the PARR response was insufficient to address the Bureau's concerns.

Second, the Bureau's Notice should provide a detailed account of the factual and legal claims that the Staff expects to allege. At present, Bureau Staff vary widely in their willingness to provide information and answer questions about the potential enforcement action. Such caginess is short-sighted, as the NORA process is less fair and less useful if it does not focus on the precise facts and legal theories on which the Bureau plans to rely. A Bureau that is prepared to make formal charges should be prepared to subject those charges to scrutiny before they are made public.

Three reforms would make the NORA process more robust:

- The Bureau Staff will sometimes provide details of the Bureau's case orally, but resort to conclusory language in the formal NORA letter.[24] It is difficult to see a legitimate rationale for this approach, which makes miscommunication more likely. Accordingly, the Bureau should consider adopting a policy or internal guideline that, absent special circumstances, its final complaint will contain only the factual allegations and legal theories presented during in writing during the NORA process. Such a requirement would ensure that the NORA is comprehensive, and it is similar to the occasional Bureau practice of sharing a draft complaint with a putative defendant.

- There should be a presumption that the NORA process includes making the investigative file available to the putative defendant. The NORA process cannot serve its purpose if the factual basis for the Bureau's allegations is hidden from view. Moreover the defendant would have the right to these materials if the Bureau initiated administrative proceedings.[25] Making the file available prior to such proceedings will facilitate settlement discussions by ensuring a common understanding of the facts. The Securities and Exchange Commission (SEC) allows for such sharing of the investigative file, noting that this can "be a productive way for both the staff and the recipient of the . . . notice to assess the strength of the evidence that forms the basis for the staff's proposed recommendations."[26]

- The default NORA response time of 14 days[27] is too short. Bureau Staff routinely spends months, if not years, assembling its case. The person or entity under

[24] The form letter that the Bureau uses for NORA letters suggests that the case against a financial institution can be summarized in a sentence or two; considerably more space is dedicated to the Bureau's rules limiting the paper size, font size and number of pages for the response. *See* Sample NORA Letter, http://www.consumerfinance.gov/wp-content/uploads/2012/01/NORA-Letter1.pdf.
[25] 12 C.F.R. § 1081.206 (2012).
[26] SEC Div. of Enf't, *Enforcement Manual*, 22 (Nov. 28, 2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.
[27] The Bureau, *CFPB Bulletin 2011-04 (Enforcement): Notice and Opportunity to Respond and Advise* (Nov. 7, 2011), https://files.consumerfinance.gov/f/2012/01/Bulletin10.pdf.

investigation should not have its time to respond unnecessarily compressed. To the extent that the Bureau believes it is important that an investigation be expedited, it can and should expedite its own internal processes rather than impose the cost of a shortened schedule on the party receiving a NORA.

C. The Right to Make a Presentation

In addition to the NORA process, the Bureau should afford subjects of potential enforcement actions the right to make an in-person presentation to Bureau personnel prior to the Bureau determining whether it should initiate legal proceedings. This meeting should not be merely a formality, but include active discussion of the proposed enforcement matter and the institution's factual and legal defenses. To that end, the Bureau should adopt policies to ensure that relevant Staff – including at least the relevant Deputy Assistant Director for Enforcement – attend and participate fully. A productive meeting not only would provide subjects with the opportunity to plead their case in person but also ensure that that both the Staff and the subject understand the other's arguments and evidence. Such a shared understanding is essential to facilitate resolution.

D. Civil Money Penalty (CMP) Matrix

The Bureau is charged with protecting consumers, and so its focus should be on obtaining penalties that are sufficiently high to punish and deter conduct – not higher. Therefore, Enforcement staff should not, as a negotiating tactic, seek penalties that are higher than those required for justice. In particular, the Bureau should repeal language in the Bureau Enforcement Manual instructing Enforcement Staff to "consider seeking the statutory daily maximum based on the three-tiered framework."[28] This approach, which assumes the worst, is a poor use of agency discretion, and inconsistent with the approach of other banking agencies subject to similar statutory maximums.

The goals of the Bureau and the rights of the regulated would both be better served if the Bureau was more rigorous and transparent about how it arrives at proposed CMPs. The CMPs available to the Bureau are governed by broad standards[29] and a set of mitigating factors.[30] However, the Bureau has not adopted standards for applying those criteria to particular cases, nor explained its reasoning when it imposes CMPs in individual Consent Orders.

The available data suggests that CMPs are creatures of negotiation rather than calculation. For example, the House Financial Services Committee published an internal Bureau Decision Memorandum through which Enforcement staffers sought the Director's authorization to seek a settlement with or commence litigation against three auto lenders.[31] The memorandum includes a section in which the staff sought to rationalize penalties for similar misconduct—but then obtained authorization to seek CMPs anywhere from $0 and

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[28] The Bureau, *Policies and Procedures Manual*, 125 (May 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-and-procedures-memo_version-3.0.pdf.

[29] 12 U.S.C. § 5565(c)(2) (2012) (establishing three tiers of penalties, ranging from up to $5000 per day to $25,000 for recklessly engaging in a violation to up to $1 million a day for a knowingly engaging in a violation).

[30] 12 U.S.C. § 5565 (2012).

[31] The Bureau, *Decision Memorandum for the Director* (Nov. 19, 2015), https://financialservices.house.gov/uploadedfiles/november_19_2014_decision_memorandum_authorization_to_seek_a_settlement_or_commence_litigation.pdf.

$30 million for two different lenders. Likewise, the Bureau's settlements in a series of cases involving relatively similar issues relating to credit card add-on products included CMPs that ranged widely without any explanation of how the statutory criteria justified the differences.

The Bureau's silence on how it calculates CMPs is inexplicable. If there is some internal logic to the way the Bureau treats different entities, the Bureau should be transparent enough to disclose it. If there is no such internal logic, the Bureau is failing in its fundamental duty to be impartial when it metes out penalties.

Fortunately, a solution to this lack of transparency is close at hand. The Office of the Comptroller of the Currency uses a CMP matrix "to help ensure that CMPs are imposed consistently and equitably."[32] The FDIC[33] and the Federal Reserve Board[34] do the same. The Bureau should follow this best practice and adopt a CMP matrix that is anchored to the applicable statutory criteria. Such a matrix would demonstrate that the Bureau is willing to have neutral principles – and not the Bureau leadership's preferences and interests – set the penalties to be applied for violations of law. Such a reform would also eliminate one source of concern regarding the unbounded discretion afforded the Bureau's single Director.

E. Standard Provisions

The Bureau's Consent Orders typically include boilerplate provisions that the Bureau refuses to consider changing. This one-size-fits-all approach should be replaced by a willingness to consider tailoring these provisions to meet the needs of a particular settlement.

F. Coordination with Other Federal and/or State Agencies

The Bureau should better coordinate its investigations with those of other federal and state agencies. In general, such coordination should lead to a single agency conducting the investigation and resolving the matter. The Bureau was designed to centralize consumer protection enforcement, and duplicative efforts are inefficient for both the agencies and the entity under investigation. Such duplicative efforts also often result in duplicative penalties.

The case against such duplication was eloquently made by Deputy Attorney General Rod Rosenstein in a recent speech to the New York City Bar White Collar Crime Institute.[35] In announcing a new Department of Justice Policy encouraging coordination among Department components and other enforcement agencies, the Deputy Attorney General explained that regulatory "'piling on' can deprive a company of the benefits of certainty and finality ordinarily available through a full and final settlement."[36] In addition, "repeated

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[32] OCC, *Policies and Procedures Manual*, 4 (Feb. 26, 2016), https://www.occ.gov/news-issuances/bulletins/2016/bulletin-2016-5a.pdf.
[33] FDIC, DSC Risk Management Manual of Examination Policies, Civil Money Penalties, §14.1-3, https://www.fdic.gov/regulations/safety/manual/section14-1.pdf.
[34] Board of Governors of the Fed. Res. Sys., *Civil Money Penalties and the Use of the Civil Money Penalty Assessment Matrix* (June 3, 1991), https://www.federalreserve.gov/boarddocs/srletters/1991/SR9113.HTM.
[35] Dep't of Justice, *Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute* (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.
[36] *Id.* at 3.

punishments . . . may exceed what is necessary to rectify the harm and deter future violations."[37] ABA urges the Bureau to endorse the letter and spirit of this new Department of Justice policy.

In the course of such cooperation, the Bureau should not share confidential supervisory information with any federal or state agency that could not itself require production of that information. Nor should the Bureau stand idly by if a state Attorney General or regulator seeks to enforce the Consumer Financial Protection Act in a way that is inimical to federal policy. The Dodd-Frank Act provides the Bureau with the authority to intervene in such proceedings,[38] and the Bureau should exercise that authority to the extent necessary to ensure that federal law is interpreted consistently nationwide.

G. Enforcement Press Releases

The Bureau should be more scrupulous in drafting press releases to describe resolved enforcement actions. In the past, Bureau press releases have too often sensationalized Consent Orders, including mischaracterizations of the contents of the Order. For example, the Bureau often requires redress to *all* customers (whether or not injury is found for all customers) in order to ensure that all *impacted* customers are made whole. This occurs when, for example, it is unclear which customers viewed allegedly deceptive marketing language. However following such an agreement, the Bureau press release will often use the number of customers receiving redress as if that number represented the number of *injured* customers. Such overstatements are unfair to the settling party, misleading to the public, and a disincentive to settlement.

There are at least two ways the Bureau could solve this persistent issue. *First*, the Bureau could provide defendants with an opportunity to comment on the draft press release a day or two prior to the Bureau announcement. This would provide the Bureau with the opportunity to hear any concerns about its press release, and to respond with changes if appropriate. *Second*, the Bureau could make an effort to have its press releases closely track the documents that comprise the settlement. The OCC, FDIC, SEC and FTC all do a better job than the Bureau in summarizing, rather than characterizing, the official documents used in litigation and settlement. The Bureau should follow that best practice. An agency charged with enforcing a prohibition of deceptive conduct should have high standards for the accuracy of its own statements.

Conclusion

ABA recognizes that enforcement is an important and powerful tool for protecting customers. However, it is not the Bureau's only tool, and it is often not the most effective tool. To date, the Bureau has been so sharply focused on enforcement that it has missed opportunities to use other tools, including supervision and guidance that can more efficiently and expeditiously protect financial consumers from harm. Moreover, the Bureau also has missed opportunities to strengthen its enforcement program by subjecting its initial factual findings and legal conclusions to robust review. Providing additional information, time, and attention to the subjects of an investigation will provide a helpful check on Bureau decisions before an enforcement action is filed. Such reforms, and the others discussed above, will strengthen the Bureau for the long term by reducing well-founded criticisms and establishing an enforcement program that is both effective and even-handed in its pursuit of

[37] *Id.*
[38] 12 U.S.C. § 5552(b) (2012).

consumer protection. If you have any questions about these comments or would like to discuss anything further, please contact Virginia O'Neill at 202-663-5073 or voneill@aba.com.

Sincerely,

Virginia O'Neill
Senior Vice President, Center for Regulatory Compliance