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United States Senate

COMMITTEE ON BANKING, HOUSING, AND
URBAN AFFAIRS

WASHINGTON, DC 20510-6075

LAURA SWANSON, STAFF DIRECTOR
BRAD GRANTZ, REPUBLICAN STAFF DIRECTOR

March 1, 2021

Mr. Dave Uejio
Acting Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Dear Acting Director Uejio:

I write today concerned that the Consumer Financial Protection Bureau (the Bureau) intends to take new regulatory and enforcement actions beyond the Bureau's statutory authorities, with little detail or legal justification, and with minimal to no regard for the potential costs to consumers. As detailed in a series of recent statements, the Bureau appears to believe that it can ignore jurisdictional limits and regulate without Congressional authorization, that the economy can easily bear additional regulatory pressures, and that consumers can tolerate the resulting costs. I request additional information about these announcements and urge you not to proceed until the Senate has acted to confirm a nominee to head the Bureau.

Supervision, Enforcement, and Fair Lending

On January 28, 2021, the Bureau announced potential changes to supervisory policies or practices that apply to institutions, with no indication of an intention to make these changes through a notice and comment process. The announcement stated that the Bureau's supervision and enforcement division "should determine the full scope of issues found in its exams, systemically remediate all those who are harmed, and change policies, procedures, and practices to address the root causes of harms."¹ It added that "penalties may be necessary."²

The announcement suggests that the changes may go beyond enforcing existing obligations and may impose new requirements, or retroactively impose new interpretations of existing requirements through changes to guidance. This is particularly troubling because enforcement based on changes to supervisory guidance contravenes the Bureau's own rules. The Bureau

¹ Blog post by Acting Director Dave Uejio, Jan 28, 2021, <https://www.consumerfinance.gov/about-us/blog/the-bureau-is-taking-much-needed-action-to-protect-consumers-particularly-the-most-economically-vulnerable/>.

² *Id.*

recently issued a final rule codifying the 2018 landmark interagency statement.³ That statement, which clarified the role of supervisory guidance issued by the Bureau and other financial regulators, reaffirmed foundational principles of administrative law, including that an agency's supervisory guidance does not create binding legal obligations and is not a basis for enforcement or penalty by the government. If the Bureau were to now hold financial institutions to new standards through changes to guidance or solely by posting the January 28 announcement on the Bureau's blog (in a return to the Bureau's "regulation by blog post" under the Obama Administration), it would violate the Bureau's rule and the important principles codified by such rule.

The Bureau also announced on January 28, 2021, that it would "look more broadly, beyond fair lending, to identify and root out unlawful conduct that disproportionately impacts communities of color and other vulnerable populations."⁴ Unlawful discrimination is unacceptable, and the Bureau should enforce the laws within its jurisdiction that prohibit discrimination in the provision of consumer financial services. However, this statement suggests that the Bureau intends to act outside the scope of its legal authorities. In addition, this statement appears to signal that the Bureau will resume efforts undertaken during the Obama administration to pursue disparate impact enforcement against lenders, despite 2015 Supreme Court precedent that casts serious doubt on the theory that the Equal Credit Opportunity Act prohibits disparate impact.⁵ The Obama administration's disparate impact enforcement in the indirect auto lending market resulted in Congress using the Congressional Review Act to overturn the Bureau's indirect auto lending guidance.⁶

On January 28, 2021, the Bureau also announced without further explanation that "it is the official policy of the CFPB to supervise lenders with regard to the Military Lending Act [MLA]."⁷ This announcement contravenes the Bureau's prior public statements that the law did not empower the Bureau to conduct examinations specifically directed at the MLA, which prompted the Bureau to ask Congress for clear authority to conduct such examinations.⁸ It is important that lenders follow the laws that confer heightened protections for service members.

³ CFPB Role of Supervisory Guidance Rule, 86 Fed. Reg. 9261 (to be codified at 12 C.F.R. pt. 1074) (2021), available at https://files.consumerfinance.gov/f/documents/cfpb_role-of-supervisory-guidance_final-rule_2021-01.pdf.

⁴ Blog post by Acting Director Dave Uejio, Jan 28, 2021, <https://www.consumerfinance.gov/about-us/blog/the-bureau-is-taking-much-needed-action-to-protect-consumers-particularly-the-most-economically-vulnerable/>.

⁵ See *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) (holding that the Fair Housing Act prohibits actions that have a disparate impact due to the "results-oriented" language of the statute); Equal Credit Opportunity Act § 701, 15 U.S.C. § 1691 ("It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction").

⁶ See Pub. L. 115-172 (2018) (overturning the rule submitted by Bureau of Consumer Financial Protection relating to "Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act.").

⁷ Blog post by Acting Director Dave Uejio, Jan 28, 2021, <https://www.consumerfinance.gov/about-us/blog/the-bureau-is-taking-much-needed-action-to-protect-consumers-particularly-the-most-economically-vulnerable/>.

⁸ See Colin Wilhelm, *CFPB asks Congress to give it the power over military lenders that Mulvaney said it didn't have*, Washington Examiner, Jan. 17, 2019, available at <https://www.washingtonexaminer.com/policy/economy/cfpb-asks-congress-to-give-it-the-power-over-military-lenders-that-mick-mulvaney-gave-up>.

However, the Bureau’s sudden and unexplained reversal gives rise to the concern that the Bureau has chosen to unilaterally expand its own jurisdiction rather than continue to seek any needed authority from Congress, and that it may continue to expand that jurisdiction to claim authority to launch examinations for other laws outside of those enumerated in section 1002(14) of the Dodd-Frank Act.

Research, Markets, and Regulations

On February 4, 2021, the Bureau announced that its regulatory and research division would begin to collect data and conduct regulation on various subjects, including some that are outside its jurisdiction. The Bureau’s jurisdiction is limited to specified “consumer financial product[s] and service[s]” and certain “enumerated consumer laws” set forth in the Dodd-Frank Act.⁹ Among other subjects, the Bureau announced its research office would analyze “landlord-tenant evictions.”¹⁰

Rental of real property, however, is not a financial service or product. Furthermore, the Dodd-Frank Act did not give the Bureau jurisdiction over landlord-tenant law or real property leasing, except in a very limited class of real property rentals that are the “functional equivalent of purchase finance arrangements.”¹¹ Landlord-tenant evictions have long been the province of the states, not the Bureau, and the CDC’s recent eviction moratorium did not intersect or purport to intersect with the Bureau’s authorities over consumer financial products and services.¹²

Additionally, the announcement said the Bureau would “[e]xplore options for preserving the status quo with respect to QM [qualified mortgage] and debt collection rules,” without further explanation.¹³ The Bureau subsequently issued a statement on February 23, 2021, that the Bureau expects to issue a proposed rule to delay the July 2021 mandatory compliance date for the QM Rule allowing creditors to use either the old or the new QM definition until the new mandatory compliance date, unless the GSE conservatorship ends during that time.¹⁴ It is not clear how the Bureau could ignore two final rules that are on the books. I am concerned that this announcement cause confusion for consumers and create uncertainty around debt collection practices and the mortgage market, particularly because the announcement gave no indication of how the Bureau would address the “GSE patch” if it ignored the final QM rule. Moreover, the presumption that

⁹ Blog post by Acting Director Dave Uejio, Feb. 4, 2021, <https://www.consumerfinance.gov/about-us/blog/the-bureau-is-working-hard-to-address-housing-insecurity-promote-racial-equity-and-protect-small-businesses-access-to-credit/>.

¹⁰ *Id.*

¹¹ Dodd-Frank Act 1002(15)(ii).

¹² See CDC Order, Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292, Dec. 31, 2020 (invoking public health authorities).

¹³ Blog post by Acting Director Dave Uejio, Feb. 4, 2021, <https://www.consumerfinance.gov/about-us/blog/the-bureau-is-working-hard-to-address-housing-insecurity-promote-racial-equity-and-protect-small-businesses-access-to-credit/>.

¹⁴ CFPB, “Statement on Mandatory Compliance Date of General QM Final Rule and Possible Reconsideration of General QM Final Rule and Seasoned QM Final Rule,” Feb. 23, 2021, https://files.consumerfinance.gov/f/documents/cfpb_qm-statement_2021-02.pdf.

government-sponsored enterprise (GSE) backed mortgages are qualified mortgages while the GSEs are in conservatorship has driven most of the mortgage market to utilize the patch and has all-but ensured that Fannie Mae and Freddie Mac would remain in conservatorship. The contemplated rule would extend the GSE patch and give rise to the concern that the Bureau has no serious intention of ending the patch. Prolonging the GSE patch is unsustainable in the long term.

Consumer Education and External Engagement

On February 10, 2021, the Bureau issued a statement that its consumer education division would apply a disparate impact standard to company responses to the unverified consumer complaints in the Bureau's consumer complaint database. The stated reason is that "consumer advocates have found [racial] disparities in some companies' responses."¹⁵

It is not clear how these unnamed consumer advocates could find racial disparities since the Bureau does not publish the race—or even names—of those who submit consumer complaints.¹⁶ Nor does the Bureau verify the information that consumers submit, rendering any analysis based on that data unreliable. As importantly, it is not clear what actions the Bureau intends to take or on what authority. There is nothing in the Dodd-Frank Act governing disparities in complaint responses, and the vast majority of financial institutions are not required to provide any response to consumer complaints.¹⁷

Questions

To provide more information about the Bureau's troubling and vague statements, please provide answers to the following questions by March 15, 2021.

1. Is the Bureau changing or planning to change the standards that apply to institutions, using sub-regulatory changes to its supervisory policies or practices?

Please provide a detailed explanation of all new requirements, standards, policies, and supervisory practices the Bureau is purporting to impose on supervised financial institutions, and the legal basis for making these changes, with particular attention to the Bureau's rule on the role of supervisory guidance.

What actions are the Bureau taking or planning to take to "look more broadly, beyond fair lending" to address action that "disproportionately impacts" certain groups?

¹⁵ Blog post by Acting Director Dave Uejio, Feb. 410, 2021, <https://www.consumerfinance.gov/about-us/blog/consumers-and-their-experiences-to-be-at-the-foundation-of-cfpb-policy-making/>.

¹⁶ CFPB, "How we use complaint data," <https://www.consumerfinance.gov/complaint/data-use/>.

¹⁷ The Dodd-Frank Act only requires responses to consumer complaints from insured depository institutions and insured credit unions whose assets exceed \$10 billion. *See* Dodd-Frank Act §§ 1034(b), 1025.

Please provide a detailed explanation, including which authorities the Bureau is relying on to conduct these actions; the laws that the Bureau intends to enforce under a disparate impact theory; the markets to which it will apply this theory; and the data or statistical analysis the Bureau will use, with particular attention to how the Bureau will account for the dearth of reliable data regarding the race, sex, and other protected characteristics of non-mortgage credit applicants.

2. What is the Bureau's basis for conducting MLA examinations, contrary to its prior statements that it lacks authority to do so?

Please provide a detailed explanation, addressing whether under the Bureau's legal theory the Bureau also has the authority to conduct examinations for violations of state laws and other laws outside of those enumerated in section 1002(12) of the Dodd-Frank Act.

3. What "public statements" does the Bureau intend to rescind pursuant to its January 28, 2021 statement on enforcement?

Please ensure that the response addresses whether this statement covers the Bureau's statements affirming its adherence to principles of regulatory transparency, clarity, and accountability, and ensure the response provides a detailed explanation of any related changes to the Bureau's supervision and enforcement as a result, including the legal basis for any supervisory or enforcement changes.

4. What is the Bureau's basis for focusing attention on landlord-tenant evictions?

Please provide a detailed explanation, including which Bureau division and office will implement these changes and the legal support for doing so, with particular attention to the jurisdictional limits outlined in the Dodd-Frank Act.

5. What is the Bureau's basis to "[e]xplore options for preserving the status quo with respect to QM [qualified mortgage] and debt collection rules"?

Please provide a detailed explanation, addressing what would permit the Bureau to ignore duly promulgated final rules, and how the Bureau would address the "GSE patch" if it ignored the final QM rule.

6. What is the basis for "consumer advocates" conclusion that there are racial disparities in companies' responses to consumer complaints, and what is the basis for the Bureau to take action regarding any such disparities?

Please provide a detailed list of which consumer advocates have come to this conclusion, what data they accessed in forming their allegations, what the Bureau is doing to verify these

allegations before acting upon them, what actions the Bureau is planning to take, and the Bureau's authority to do so.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in blue ink that reads "Pat Toomey". The signature is written in a cursive style with a large, looping initial "P" and a long horizontal stroke extending from the "y".

Pat Toomey
Ranking Member