IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, et al., *Plaintiffs*, v. DAVID UEJIO, in his official capacity as Acting Director of the Consumer Financial Protection Bureau, et al., *Defendants*.	No. 1:20-cv-11141 (JCB)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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August 20, 2021

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TABLE OF CONTENTS

Table of Authorities ii

Introduction 1

Background 3

I. The Federal Advisory Committee Act 3

II. The Taskforce on Federal Consumer Financial Law 5

III. Plaintiffs and Procedural History 6

Legal Standard 7

Argument 8

I. Plaintiffs have standing to challenge the creation and operation of the Taskforce. 8

II. The Taskforce is subject to FACA 10

A. The Taskforce was established and utilized by the Bureau. 10

B. FACA's exemption for government employees does not apply. 11

1. None of the Taskforce members were full-time employees. 11

2. None of the Taskforce members were permanent part-time employees. 13

III. The Taskforce violated FACA. 16

A. Defendants have stipulated that the Taskforce violated FACA's pre-chartering and transparency requirements. 17

B. The Taskforce was not fairly balanced, as FACA requires. 17

IV. The Court should order complete relief. 21

Conclusion 25

TABLE OF AUTHORITIES

Page(s)

Cases

Alabama-Tombigbee Rivers Coal. v. Dep't of Interior,
26 F.3d 1103 (11th Cir. 1994) 22

Aluminum Co. of Am. v. FTC,
589 F. Supp. 169 (S.D.N.Y. 1984) 13

Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton ("AAPS"),
997 F.2d 898 (D.C. Cir. 1993) 3, 4, 12

Becker v. FEC,
112 F. Supp. 2d 172 (D. Mass. 2000) 8

Bryan v. Am. Airlines, Inc.,
988 F.3d 68 (1st Cir. 2021) 7

Cargill, Inc. v. United States,
173 F.3d 323 (5th Cir. 1999) 24

Cummock v. Gore,
180 F.3d 282 (D.C. Cir. 1999) 16, 24

Dantzler, Inc. v. Empresas Berrios Inventory & Operations, Inc.,
958 F.3d 38 (1st Cir. 2020) 10

Elec. Privacy Info. Ctr. v. Nat'l Sec. Comm'n on Artificial Intelligence ("EPIC"),
466 F. Supp. 3d 100 (D.D.C. 2020) 15, 16

Idaho Wool Growers Assoc. v. Schafer,
637 F. Supp. 2d 868 (D. Idaho 2009) 23

Minuteman Health, Inc. v. HHS,
291 F. Supp. 3d 174 (D. Mass. 2018) 7

NAACP Legal Def. & Educ. Fund, Inc. v. Barr,
2020 WL 6392777 (D.D.C. 2020) 23

NAACP Legal Def. & Educ. Fund, Inc. v. Barr,
496 F. Supp. 3d 116 (D.D.C. 2020) 24

NRDC v. Pena,
147 F.3d 1012 (D.C. Cir. 1998) 22, 23

PETA v. Barshefsky,
925 F. Supp. 844 (D.D.C. 1996) 3

Physicians for Social Resp. v. Wheeler,
956 F.3d 634 (D.C. Cir. 2020) 14

Public Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods,
886 F.2d 419 (D.C. Cir. 1989) (Friedman, J., concurring in judgment) 17

Union of Concerned Scientists v. Wheeler,
954 F.3d 11 (1st Cir. 2020) 13, 18

VoteVets Action Fund v. U.S. Dep't of Veterans Affairs,
992 F.3d 1097 (D.C. Cir. 2021) 10, 11

W. Org. of Res. Councils v. Bernhardt ("WORC I"),
362 F. Supp. 3d 900 (D. Mont. 2019) 9

W. Org. of Res. Councils v. Bernhardt ("WORC II"),
412 F.Supp.3d 1227 (D. Mont. 2019) 22, 23

Yanko v. United States,
869 F.3d 1328 (Fed. Cir. 2017) 11

Statutes, Rules, and Regulations

5 U.S.C. §§ 701-704 7

5 U.S.C. §§ 706(1) 7

5 U.S.C. §§ 706(2)(A) 7

5 U.S.C. §§ 706(2)(D) 7

5 U.S.C. § 3372 13

5 U.S.C. § 3401(2) 15

5 U.S.C. § 6101(2) 11

5 U.S.C. App. 2 § 3(2) 3, 10, 11

5 U.S.C. App. 2 § 5(b)(2), (c) 5, 17

5 U.S.C. App. 2 § 9(a)(2) 4, 8, 17

5 U.S.C. App. 2 § 10(a)(1), (2), (3) 4, 17

5 U.S.C. App. 2 § 10(b) 4, 17

18 U.S.C. § 202(a) 12, 13

5 C.F.R. § 340.401 12

5 C.F.R. § 610.111 ....11, 12

41 C.F.R. pt. 102-3, subpt. B, app. A at III....................5

41 C.F.R. § 102-3.30(a) 4, 8, 17

41 C.F.R. § 102-3.60....................4, 8

41 C.F.R. § 102-3.60(a), (b)(3) 17

41 C.F.R. § 102-3.65....................5

41 C.F.R. § 102-3.65(a) 4

41 C.F.R. § 102-3.140(a) 4, 17

41 C.F.R. § 102-3.140 (c), (d)....................17

Fed. R. Civ. P. 56(a) 7

Other Authorities

Comment by FTC Commissioner Rohit Chopra on DOT's Proposed Rule Defining Unfair or Deceptive Practices, www.regulations.gov under Docket No. DOT-OST-2019-0182-0225....................21

Committee Members, Meetings and Advisory Reports: Academic Research Council, GSA, https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzkMAAQ 14

Guidance – Appointment of Consultants to FACA, GSA, https://www.gsa.gov/policy-regulations/policy/federal-advisory-committee-management/advice-and-guidance/appointment-of-consultants-to-faca 12

H.R. Rep. No. 92-1017 (1972)....................3

Permanent, Merriam-Webster, https://www.merriam-webster.com /dictionary/permanent 13

S Rep. No. 92-1098 (1972)....................4

Webster's Third New International Dictionary (1981)....................11

INTRODUCTION

Congress established the Consumer Financial Protection Bureau to protect consumers from confusing, predatory financial products in the aftermath of the 2008 financial crisis. Twelve years later, the Bureau chartered a Taskforce on Federal Consumer Financial Law, purportedly to examine consumer finance laws and report its recommendations for how to improve them. The Federal Advisory Committee Act, or FACA, was designed to ensure that committees like the Taskforce serve the public interest. Yet the Bureau created the Taskforce without even attempting to comply with FACA's most basic requirements—the Bureau never showed any need for the Taskforce, the Taskforce largely conducted its operations in secret, and the Taskforce was composed of a biased slate of individuals with ties to the consumer finance industry that the Bureau was established to regulate.

To get around FACA's requirements, the Bureau claims to have designated the Taskforce's members as "full-time" or "permanent part-time" federal employees, purportedly rendering the Taskforce exempt from FACA's mandates. But that approach has no limiting principle: there is no reason why other agencies could not use a similar strategy to establish other advisory committees-in-all-but-name, rendering FACA a nullity.

The Bureau's approach is both legally and factually untenable. As a matter of both statutory text and common sense, the Taskforce's members were not full-time or permanent part-time federal employees. To the contrary, they were uniformly private citizens who provided short-term, intermittent help to the agency. They could not be full-time employees because each Taskforce member was precluded, by statute or agreement, from working a full-time schedule. Nor were they *permanent* part-time employees: the statutes governing their employment make clear that the members were working on a *temporary* basis. For example, the four non-chair members were designated "special government employees," a category of employee routinely

used by federal advisory committees and that, by statute, may only perform "temporary duties." The members' temporary status is further confirmed by their hiring forms, numerous Bureau communications, and the Taskforce Charter, which provided that the members would "work for a temporary period of time." In any event, none of the members qualified as *part-time*, which federal law defines to exclude employees, like the Taskforce members, who work intermittently.

The Taskforce was therefore subject to FACA, and Defendants violated that statute at every turn. Because they believed the statute to be inapplicable, Defendants have already stipulated that they made no effort to comply with its safeguards: that they did not make the requisite findings or engage in the requisite consultation before creating the Taskforce; that they did not provide contemporaneous access to all of the Taskforce's records and meetings; and that they never made a plan to ensure that the members of the Taskforce would be fairly balanced in terms of their views, rather than dominated by special interests. It is therefore no surprise that the Taskforce's membership was deeply unbalanced, composed solely of representatives of the financial services industry without a single proponent of robust consumer protections.

The need to monitor and respond to the Taskforce's biased and secretive work caused Plaintiffs—two consumer advocacy organizations and a consumer finance scholar—numerous personal, informational, and organizational injuries. And those injuries have been compounded by the issuance of the Taskforce's ultimate work product: a tainted Report that, unsurprisingly, parrots the preferred policies of the consumer finance industry. Unless the Court steps in, that Report will be used to advance those policies and inflict further harms on Plaintiffs, other proponents of consumer protections, and consumers writ large.

For these reasons, the Court should grant summary judgment to Plaintiffs and order all relief necessary to remedy Plaintiffs' harms and uphold FACA's purposes, including a use

injunction, a limited use injunction (in the form of a disclaimer on the Report's cover), the release of all remaining Taskforce records, and a declaratory judgment.

BACKGROUND[1]

I. The Federal Advisory Committee Act

The Federal Advisory Committee Act was enacted to "regulat[e] the growth and use of committees composed of outsiders called in to advise government officials." *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton ("AAPS")*, 997 F.2d 898, 903 (D.C. Cir. 1993). While Congress recognized that many committees provide "valuable expert advice," it "was also cognizant of the fact that many advisory committees were created without adequate justification." *PETA v. Barshefsky*, 925 F. Supp. 844, 847 (D.D.C. 1996). This failing permitted "special interest groups [to] use their membership on such bodies to promote their private concerns." H.R. Rep. No. 92-1017, at 6 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3491, 3496.

To safeguard against these dangers, FACA establishes requirements for the creation and operation of advisory committees. An advisory committee is "any committee, . . . task force, or other similar group . . . established or utilized by one or more agencies[] in the interest of obtaining advice or recommendations," unless the committee is "composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government." 5 U.S.C. App. 2 § 3(2). The Senate Report for a precursor bill to FACA explained that, "[a]fter analysis of the hearings and background material, it was felt that the main problems of proliferation, confusion and operational abuse lay with those advisory committees *whose membership in whole or in part*

[1] The facts in this background statement are laid out in Plaintiffs' Statement of Undisputed Material Facts (cited as "SUF ¶ #") and based on the parties' Joint Stipulation of Facts, the certified administrative record, the supplemental administrative record, and the declarations filed alongside this motion.

*comes from the public [*i.e.*, nongovernmental] sector*." S Rep. No. 92-1098 at 8 (1972) (emphasis added), *as reprinted in* Cong. Res. Serv., FACA Source Book: Legislative History, Texts and Other Documents 158 (1978); *see also AAPS*, 997 F.2d at 903 ("[S]ubjecting [wholly governmental committees] to FACA would fall outside Congress' purpose of regulating . . . committees composed of outsiders called in to advise government officials.").

To prevent the creation of biased and wasteful committees, FACA does not permit agencies to charter a committee until "after consultation with the [General Services Administration]." 5 U.S.C. App. 2 § 9(a)(2). As part of that consultation, agencies must explain to the GSA "why the advisory committee is essential to the conduct of agency business" and "why the advisory committee's functions cannot be performed by . . . other means"; the agency must also lay out its "plan to attain fairly balanced membership." 41 C.F.R. § 102-3.60. After consulting, agencies must "determine[] as a matter of formal record" in the Federal Register that the committee is "in the public interest in connection with the performance of duties imposed on that agency by law." 5 U.S.C. App. 2 § 9(a)(2); *see also* 41 C.F.R. § 102-3.65(a). As part of that determination, the agency must also find that the committee is "essential to . . . agency business" and that "the information to be obtained is not already available . . . within the Federal Government." 41 C.F.R. § 102-3.30(a).

Once established, committees must operate transparently. Each committee must hold its meetings open to the public, 5 U.S.C. App. 2 § 10(a)(1); provide timely notice of its meetings in the Federal Register, *id.* § 10(a)(2); allow interested persons to appear before and file statements with the committee, *id.* § 10(a)(3); ensure that meetings are held at a time and place that is reasonably accessible to the public, 41 C.F.R. § 102-3.140(a); and publish any records "made available to or prepared for or by" the committee, 5 U.S.C. App. 2 § 10(b).

FACA also requires every advisory committee to "be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. App. 2 § 5(b)(2), (c). "In introducing the Senate debate on the bill, a Senator explained that 'the most important provision here is the one which requires fair representation of different points of view upon any advisory commission.'" *NAACP Legal Def. & Educ. Fund, Inc. v. Barr*, 496 F. Supp. 3d 116, 143-44 (D.D.C. 2020) (quoting 118 Cong. Rec. 16,296 (1972)). The GSA has further outlined the factors for "achieving a 'balanced' . . . committee," which include "[t]he need to obtain divergent points of view." 41 C.F.R. pt. 102-3, subpt. B, app. A at III.

II. The Taskforce on Federal Consumer Financial Law

On January 8, 2020, the Bureau signed a charter "establish[ing] the Taskforce on Federal Consumer Financial Law." SUF ¶ 1. The Charter charged the Taskforce with "examin[ing] the existing legal and regulatory environment" and "report[ing] its recommendations for ways to improve and strengthen consumer financial laws and regulations." *Id.* ¶ 2.

Defendants have stipulated that they created and operated the Taskforce in a manner that did not comply FACA's requirements. *Id.* ¶ 17 (citing to stipulation). Specifically, Defendants agree that, prior to chartering the Taskforce, they did not meaningfully consult with the GSA and did not prepare a plan to attain fairly balanced membership. *Id*. ¶¶ 18-19. They also acknowledge their failure to make the requisite findings that the Taskforce was in the public interest, essential to agency business, and non-duplicative of work already being done within the government. *Id*. ¶ 20. Likewise, they concede that they did not comply with FACA's open meetings and record requirements. *Id.* ¶ 21.

To staff the Taskforce, Defendants assembled a group of lawyers, academics, and one retired economist, none of whom were currently serving in government. Those members exclusively represent deregulatory and industry views. For example, Todd Zywicki, who chaired

the Taskforce, believes that many consumer protections are paternalistic and has worked on behalf of several large financial institutions to influence the Bureau. The other Taskforce members hold similarly pro-industry views. *See infra* Part III.B.

Although Defendants received applications from 89 prospective members, including consumer finance experts and advocates for robust consumer protections, Defendants did not select any such applicants. SUF ¶¶ 29-35. Instead, Defendants employed a biased process to reject prominent scholars, including Plaintiff Professor Engel, who have devoted their careers to consumer protection and could have helped to balance the Taskforce. *Id*.

Two Senators voiced concerns with the Taskforce at the time that it was established. Specifically, they wrote to the Bureau to express doubts about the Taskforce's ability to "provide you with objective recommendations" given that it was "stacked . . . with representatives of payday lenders, Wall Street banks, and other industry interests." *Id.* ¶ 36. The Senators also worried that the Taskforce was "set up to evade [FACA]," and asked that the Bureau "immediately suspend the Taskforce." *Id*.

Defendants did not heed this advice. Instead, they continued to operate the Taskforce, which produced a final report on January 5, 2021. *Id.* ¶ 37. Confirming the Senators' fears, the 900-page Report includes recommendations that, if acted upon, would benefit the financial services industry at the expense of consumers. *Id.* ¶¶ 38, 51.

III. <u>Plaintiffs and Procedural History</u>

Plaintiffs in this case include two consumer advocacy organizations, the National Association of Consumer Advocates ("NACA") and the United States Public Interest Research Group ("U.S. PIRG"), as well as Professor Kathleen Engel, a nationally prominent consumer law and finance scholar devoted to improving protections for consumers. SUF ¶¶ 31-32, 39-42. Plaintiffs have a significant interest in the Taskforce's work and its compliance with FACA. *Id.*

¶ 43. These interests were harmed by the Defendants' across-the-board FACA violations, which caused Plaintiffs multiple personal, organizational, and informational injuries. *See infra* Part I.

Plaintiffs filed suit on June 16, 2020, alleging that the creation and operation of the Taskforce violated FACA. Complaint, ¶¶ 156-70, ECF No. 1. Defendants filed a motion to dismiss Plaintiffs' claims pertaining to the Taskforce's establishment and its lack of balance. ECF No. 19. This Court heard oral argument on January 6, 2021, and requested supplemental briefing to address whether the release of the Report rendered any of Plaintiffs' claims moot. On February 25, the Court denied Defendants' motion, finding that Plaintiffs had standing to assert the claims above and that the case was not moot. MTD Order at 2, ECF No. 43.

LEGAL STANDARD

Because FACA does not provide its own standard or a cause of action, FACA cases are generally brought under the standards set forth in the Administrative Procedure Act ("APA"). *See* 5 U.S.C. §§ 701-704. Under the APA, a reviewing court may "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1). The reviewing court may also "hold unlawful and set aside agency action" that is "not in accordance with law," *id.* § 706(2)(A), or that was adopted "without observance of procedure required by law." *id.* § 706(2)(D).

Summary judgment is appropriate where the record "presents no genuine issue as to any material fact and reflects the movant's entitlement to judgment as a matter of law." *Bryan v. Am. Airlines, Inc.*, 988 F.3d 68, 74 (1st Cir. 2021); *see also* Fed. R. Civ. P. 56(a). In APA cases, "summary judgment serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Minuteman Health, Inc. v. HHS*, 291 F. Supp. 3d 174, 189 (D. Mass. 2018).

ARGUMENT

I. Plaintiffs have standing to challenge the creation and operation of the Taskforce.

Plaintiffs have now shown, through prior filings and their attached declarations, that the unlawful creation and operation of the Taskforce caused them multiple personal, organizational, and informational injuries. That factual record corroborates the allegations that the Court found sufficient to establish standing on Plaintiffs' first and fourth claims in its previous decision. *See* MTD Order at 11-22. Defendants did not even contest Plaintiffs' standing to raise their second and third claims at the motion to dismiss stage, and for good reason—Plaintiffs' standing to assert those claims is obvious. Plaintiffs nonetheless address each of their claims in turn, explaining why each of the Bureau's legal violations caused them injury.

First Claim for Relief. To start, Plaintiffs have shown standing as to their first claim, which involves the Bureau's failure to make the requisite findings and take the requisite preliminary steps before chartering the Taskforce. Defendants have stipulated that they failed to meet those requirements, SUF ¶¶ 18-20, depriving Plaintiffs of what the Court has already held was "information to which they were entitled" as a matter of law. MTD Order at 16; *see* SUF ¶ 44; 5 U.S.C. App. 2 § 9(a)(2); 41 C.F.R. § 102-3.60; *id.* § 102-3.30(a); *id.* § 102-3.65. Plaintiffs have also shown, through the attached declarations, that Defendants' "failure to comply with FACA's requirements . . . 'perceptibly impaired' the Plaintiffs' activities and diverted at least some of the Plaintiffs' resources." MTD Order at 17-18; SUF ¶¶ 45-46. That is the sort of "concrete and demonstrable injury to the organization's activities—with a consequent drain on the organization's resources"—that is sufficient to establish standing. *Becker v. FEC*, 112 F. Supp.2d 172, 180 (D. Mass. 2000).

Second and Third Claims for Relief. Defendants have also stipulated that the Taskforce failed to provide Plaintiffs with access to its records and meetings while it was operating,

SUF ¶ 21—a classic form of informational injury. *See also id.* ¶ 47. The Taskforce's lack of transparency further resulted in personal and organizational injuries by preventing Plaintiffs from "participating in and following the Taskforce's work," MTD Order at 24, yielding a report that harms their interests. *See* SUF ¶¶ 48, 50-57.

Fourth Claim for Relief. Finally, Plaintiffs have shown that they have standing to assert their fourth claim, which pertains to the Taskforce's unlawful lack of balance. Specifically, Plaintiffs have shown that Professor Engel "applie[d] for membership and [was] denied access" pursuant to a "biased process," which the court already indicated would be sufficient to establish standing. MTD Order at 20-21; *see* SUF ¶¶ 19, 33-34, 49. Instead, the CFPB decided to appoint a slate of academics and lawyers uniformly opposed to consumer financial protections. *See* SUF ¶¶ 6, 22-26 (describing Taskforce members' experience); *id.* ¶ 36 (letter expressing Taskforce's lack of balance); *see infra* Part III.B. Plaintiffs have also corroborated their allegations that "the lack of representation [made] it harder for them to follow and influence the Taskforce's work." MTD Order at 20; *see* SUF ¶ 50. That is all that is required to show that the "one-sided" Taskforce is a "direct threat" to Plaintiffs' interests. *W. Org. of Res. Councils v. Bernhardt ("WORC I")*, 362 F. Supp. 3d 900, 909 (D. Mont. 2019).

The Taskforce Report has exacerbated these harms. As Plaintiffs have explained, many of the Report's recommendations run counter to Plaintiffs' expert views on how best to protect consumers. *See* SUF ¶¶ 38, 51. Yet those recommendations are likely to influence consumer financial policy at the state and federal levels and provide additional firepower to the financial services industry. *See id.* ¶ 52. Indeed, that prediction has already come to pass: the Report has repeatedly been cited by industry representatives and others to support anti-consumer positions. *See id.* ¶ 53. Plaintiffs will therefore be required to devote resources to exposing and rebutting

the Report—the product of an unlawful advisory committee from which they were shut out. *See id.* ¶ 54. The Taskforce's unlawful creation and operation caused, and is causing, each of these harms, satisfying the injury and causation elements of standing.

Finally, Plaintiffs have shown that the Court has the power to redress these injuries. "[T]he redressability element of standing requires that the plaintiff allege that a favorable resolution of [its] claim would likely redress the professed injury." *Dantzler, Inc. v. Empresas Berrios Inventory & Operations, Inc.*, 958 F.3d 38, 47 (1st Cir. 2020) (quotation omitted). As explained further below, Plaintiffs have sought multiple remedies—including a use injunction, a limited use injunction, the release of all Taskforce records, and a declaration—that, if granted, would redress these injuries. *See infra* Part IV; *cf.* MTD Order at 23-36 (holding that case was not moot because these remedies would provide relief). Plaintiffs therefore have standing.

II. The Taskforce is subject to FACA.

A Taskforce composed of private citizens and designed to provide recommendations to a federal agency is an advisory committee, plain and simple. Defendants nonetheless contend that, by attempting to hire the Taskforce members as employees, the Taskforce was able to circumvent FACA entirely. That assertion is baseless and would render FACA a nullity. Because the Taskforce was "established or utilized" by the Bureau in "the interest of obtaining advice or recommendations," it is subject to FACA. 5 U.S.C. App. 2 § 3(2). And, while FACA exempts committees "composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government," *id.*, that exception does not—indeed, it must not—apply here.

A. The Taskforce was established and utilized by the Bureau.

To begin, the Taskforce was unquestionably "established" and "utilized" by the Bureau for the purpose of obtaining recommendations. It was established within the meaning of FACA because the Bureau "select[ed] the committee's members." *VoteVets Action Fund v. U.S. Dep't*

of Veterans Affairs, 992 F.3d 1097, 1105 (D.C. Cir. 2021) (internal quotations omitted); SUF ¶ 3 (charter explaining that the "Bureau establishe[d] the Taskforce" to obtain "recommendations" and providing that "[t]he Director shall select the members"); *id.* (letter from then-Director Kraninger stating that she "chose [the] five members").

The Taskforce was also utilized by the Bureau because it was "subject to the [Bureau's] actual management or control." *VoteVets*, 992 F.3d at 1103. The Taskforce Charter provided that "[t]he Taskforce shall report to the Director of the . . . Bureau." SUF ¶ 4. It further specified that the Taskforce would be overseen by a Staff Director—"a full-time employee who shall ensure that the Taskforce operates in accordance with the terms of the charter[.]" *Id.* ¶ 5.

B. FACA's exemption for government employees does not apply.

Contrary to the Bureau's suggestion, the Taskforce does not fall within FACA's exemption for committees "composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government." 5 U.S.C. App. 2 § 3(2). For the exemption to apply, *every* Taskforce member would need to be either a full-time employee or a permanent part-time employee. *Id.* Here, none falls into either category.

1. None of the Taskforce members were full-time employees.

Although FACA does not define "full-time," that phrase typically means "employed for or working the amount of time considered customary or standard." Webster's Third New International Dictionary 919 (1981). For federal employees, the normal amount of time is 40 hours per week on a regular schedule. *See* 5 U.S.C. § 6101(2) (directing agencies to "establish a basic administrative workweek of 40 hours for each full-time employee"); 5 C.F.R. § 610.111 (requiring further that such workweek be on a "regular schedule"); *Yanko v. United States*, 869 F.3d 1328, 1332 (Fed. Cir. 2017) (federal full-time employees "work a 40-hour week").

Every member of the Taskforce fails that test. Chairman Todd Zywicki's Assignment

Agreement specified a year-long assignment as chair of the Taskforce, during which he would work "200 days at 8 hours each day, for a total of 1600 hours." SUF ¶¶ 7-8. The Agreement noted that this was "75% of a full-time schedule of 2080 working hours in a year." *Id.* ¶ 8. A percentage of a full-time schedule is obviously not a full-time schedule.

The remaining four members were designated special government employees ("SGE"), *id.* ¶ 10, a category of employee prohibited by statute from working more than 130 days in a year, 18 U.S.C. § 202(a). With a 130-day limit, these members were capped at working 1040 hours per year, or 20 hours per week on average, which is not a full-time schedule. *See AAPS*, 997 F.2d at 915 (expressing skepticism that "FACA's definition of 'full-time' extends to a person who works . . . less than 130 days out of a year.").

Moreover, the record confirms that none of the members worked full-time in any meaningful sense of the term. Rather, each of the members worked an intermittent schedule, SUF ¶ 16—*i.e.*, without the regular schedule required for full-time employees. *Compare* 5 C.F.R. § 610.111 (directing agencies to establish a "regular schedule" for full-time employees), *with* 5 C.F.R. § 340.401 (defining intermittent employment as "employment without a regularly scheduled tour of duty"). That lack of a regular schedule is why the GSA treats intermittent employees as distinct from full-time employees in its guidance on appointing experts to committees under FACA.[2] "FACA would be rather easy to avoid if an agency could simply appoint 10 private citizens as special government employees for two days, and then have the committee receive the section 3(2) exemption." *AAPS*, 997 F.2d at 915. Thus, none of the

[2] *See Guidance – Appointment of Consultants to FACA*, GSA https://www.gsa.gov/policy-regulations/policy/federal-advisory-committee-management/advice-and-guidance/appointment-of-consultants-to-faca (noting that experts will earn leave if they work full-time or part-time, but not if they work intermittently).

members was a full-time employee.

2. None of the Taskforce members were permanent part-time employees.

Nor did any of the Taskforce members work on a "permanent part-time" basis. To the contrary, both the statutes under which they were hired and the documents associated with their appointments reflect their *temporary* service. Even if the members were somehow deemed permanent employees, they also did not serve as *part-time* employees, as FACA requires.

a. The statutory hiring authority for the Taskforce's members rendered their service temporary. The Intergovernmental Personnel Act, the authority used for Todd Zywicki, SUF ¶ 9, prohibits assignments from "exceed[ing] two years," 5 U.S.C. § 3372. That is, by definition, not "permanent." *See Permanent*, Merriam-Webster, https://www.merriam-webster.com /dictionary/permanent ("continuing or enduring without fundamental or marked change").

As for the remaining members, the statute defining SGEs states that "'special government employee' shall mean an officer or employee . . . who is retained . . . for . . . *temporary duties*[.]" 18 U.S.C. § 202(a) (emphasis added). Congress created this category of employee because it "recognized the government's need to hire specialists for *short-term* projects." *Aluminum Co. of Am. v. FTC*, 589 F. Supp. 169, 175 (S.D.N.Y. 1984) (emphasis added). To "facilitate" this goal, Congress "reliev[ed] [SGEs] from restrictions inappropriate to their role and status, including . . . restrictions on outside employment," *id.* (citing 28 Fed. Reg. 985 (1963)), making the SGE category ideal for hiring outsiders to serve temporarily on advisory committees.

As the First Circuit has recognized, "advisory-committee members" under FACA often "are considered 'special government employees[.]'" *Union of Concerned Scientists v. Wheeler*, 954 F.3d 11, 14 (1st Cir. 2020). For example, the Bureau itself runs an advisory committee known as the Academic Research Council that is subject to FACA and is composed wholly of

SGEs.[3] *See also Physicians for Social Resp. v. Wheeler*, 956 F.3d 634, 640 (D.C. Cir. 2020) (noting that the FACA advisory committee members in that case were SGEs "who perform *temporary duties* for the federal government") (emphasis added). If the Bureau's arguments were correct, then many of the advisory committees in use today (including one of the Bureau's) would, unbeknownst to anyone, not constitute advisory committees, and agencies would be gifted an easy mechanism for avoiding FACA's requirements in the future.

b. The documents associated with the Taskforce members' appointments also reflect their temporary status. Each of their hiring forms describes their service as "temporary." *See* SUF ¶ 11 (Zywicki was assigned to "a time-limited temporary position"); *id.* (Box 24 of the non-chair members' Standard Form 50s indicates that they had no tenure and Box 45 describes their appointments as "temporary").

While the Bureau nominally changed the tenure of the four non-chair members to "permanent" on subsequent Standard Form 50s issued on February 2, 2020, after the Taskforce began operating, *id.* ¶ 12, this technical designation does not render the members permanent employees for the purpose of FACA. As noted just above, their appointments as SGEs were temporary by statute. Moreover, it is clear from every other part of the record that the members and the Bureau understood that the appointments were temporary, suggesting that the Bureau made these eleventh-hour form changes to avoid complying with FACA.

Indeed, the Taskforce Charter, which was not changed, specifies that the "members [will] work for a *temporary* period of time" and "shall serve for the duration of the Taskforce," which was "expected to operate from January 2020 until . . . no later than January 2021." *Id.* ¶ 13

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[3] *Committee Members, Meetings and Advisory Reports: Academic Research Council*, GSA, https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzkMAAQ (FACA database listing the Council and denoting the members as SGEs).

(emphasis added); *see also Elec. Privacy Info. Ctr. v. Nat'l Sec. Comm'n on Artificial Intelligence ("EPIC")*, 466 F. Supp. 3d 100, 121 (D.D.C. 2020) (holding that a committee fell outside of FACA's exemption where its members, "as employees 'appointed for the life' of a 'temporary' federal organization, [were] 'temporary' federal employees"). Further, the Bureau repeatedly communicated elsewhere that the Taskforce, and any appointments to it, were time-limited.[4] Tellingly, the Taskforce members no longer work for the Bureau. As planned, they all resigned following the release of the Taskforce's final report in January 2021. SUF ¶ 15. The Bureau's attempt to paper over its error cannot displace how the members' appointments were understood from the inception of the Taskforce all the way through its ultimate conclusion.

c. Although the lack of permanent employment is enough to conclude that this exception does not apply, the members were also not "part-time" employees. While FACA itself does not define "part-time," federal law defines "part-time career employment" as "employment of 16 to 32 hours a week . . . under a schedule consisting of an equal or varied number of hours per day, . . . but *does not include employment on [an] . . . intermittent basis*." 5 U.S.C. § 3401(2) (emphasis added); *see also EPIC*, 466 F. Supp. 3d at 121 (holding that a committee did not fall within FACA's exemption because its members were intermittent, and thus not part-time). Consistent with that definition, and as noted above, the GSA treats intermittent employees as distinct from part-time employees in its FACA-specific guidance. Here, every single member of

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[4] *See, e.g.*, SUF ¶ 14(a) (offer letter sent to Macleod explaining that he would be serving in a "temporary, excepted service position not to exceed 1 year as an SGE"); *id.* ¶ 14(b) (appointment letters describing the Taskforce as a "one-year effort" and noted that as SGEs, the members would be "employed to perform temporary duties"); *id.* ¶ 14(c) (orientation emails explaining that "the group will have one year from kickoff to produce its report"); *id.* ¶ 14(d) (MOU signed by Macleod stating that his "appointment is not to exceed 1/20/2021" and that this "temporary appointment carries no . . . commitment that [he would] be considered for . . . a permanent appointment").

the Taskforce was working an intermittent schedule. *See supra* page 12 & note 2.

* * *

Permitting agencies to hire private citizens and deem them government employees during their brief tenure on an advisory committee would frustrate the fundamental purpose of FACA. FACA was enacted to prevent the "proliferation of costly committees . . . dominated by representatives of industry and other special interests[.]" *Cummock v. Gore*, 180 F.3d 282, 284 (D.C. Cir. 1999). As representatives of the financial services industry hired temporarily by the Bureau solely to serve on the Taskforce, *see infra* Part III.B, the members of the Taskforce pose precisely the risk of agency capture about which Congress was concerned. Worse still, several of the Taskforce members maintained their private employment throughout. SUF ¶ 27 (describing various record documents explaining that Macleod and Noonan could continue practicing at their law firms because they were SGEs rather than regular government employees). FACA should not be interpreted to permit the very activity Congress sought to prohibit.

Again, "FACA 'would be rather easy to avoid' if the Government is right that private-citizen members of short-term advisory groups are always 'permanent part-time' employees of the Federal government." *EPIC*, 466 F. Supp. 3d at 122 (quoting *AAPS*, 997 F.2d at 915). That is precisely why the Bureau's attempt to circumvent FACA fails as both a matter of statutory language and intent.

III. <u>The Taskforce violated FACA.</u>

Simply put, if FACA applies, then the Bureau cannot prevail. With respect to the first three claims, Defendants acknowledge that they paid no heed to Section 9's pre-chartering requirements or Section 10's transparency requirements for meetings and records. As to the fourth claim, the facts show that Defendants assembled an imbalanced Taskforce in violation of Section 5(b)(2). Plaintiffs are therefore entitled to summary judgment on each of their claims.

A. Defendants have stipulated that the Taskforce violated FACA's pre-chartering and transparency requirements.

Defendants admit that they "created and operated the [Taskforce] in a manner that did not comply with requirements that apply to advisory committees under [FACA]." SUF ¶ 17 (citing Stip. ¶ 1). With respect to the pre-chartering requirements, Defendants concede that they did not consult with the GSA, prepare a fairly balanced membership plan, or make the necessary public interest findings. *Id.* ¶¶ 18-20 (stipulation cites 5 U.S.C. App. 2 § 9(a)(2); 41 C.F.R. § 102-3.60(a), (b)(3); 41 C.F.R. § 102-3.30(a)). As to FACA's transparency requirements, Defendants also agree that they did not hold Taskforce meetings open to the public, provide timely notice of meetings, ensure that meetings were held at a reasonable time and place, permit interested persons to file statements before the Taskforce, or make Taskforce records available to the public. *Id.* ¶ 21 (stipulation cites 5 U.S.C. App. 2 § 10(a)(1), (2), (3); *id.* § 10(b); 41 C.F.R. § 102-3.140(a), (c), (d)). Plaintiffs are therefore entitled to judgment on their first three claims.

B. The Taskforce was not fairly balanced, as FACA requires.

Although they do not expressly concede the point, the record demonstrates that Defendants also violated FACA's fairly balanced requirement. *See* 5 U.S.C. app. 2 § 5(b)(2), (c). "The appropriate inquiry in determining whether [a] Committee's membership satisfies" this standard "is whether the Committee's members 'represent a fair balance of viewpoints given the function to be performed.'" *Public Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419, 423 (D.C. Cir. 1989) (Friedman, J., concurring in judgment). To achieve this balance, agencies must "consider a cross-section of those directly affected, interested, and qualified," as well as "the need for divergent points of views on the issues before the advisory committee." *NAACP*, 496 F. Supp. 3d at 143-44.

With respect to the Taskforce, the Bureau was obligated to include "divergent points of

view," *NAACP*, 496 F. Supp. 3d at 144, on "ways to improve and strengthen consumer financial laws and regulations," SUF ¶ 2, including the views of both the financial services industry *and* consumer advocates. There is no reasonable dispute that both groups are "directly affected, interested, and qualified." *NAACP*, 496 F. Supp. 3d at 143. These groups have engaged in a longstanding debate over the CFPB's role in regulating the industry. On the one hand, industry and its allies have criticized the Bureau's very existence, arguing that regulation harms both consumers and industry. *See, e.g.*, *infra* page 19. On the other hand, consumer advocates like Plaintiffs believe that the Bureau should engage in robust regulation to prevent the proliferation of predatory financial products that harm consumers. SUF ¶ 28.

To include industry, while excluding consumer advocates, is "precisely the type of imbalance that FACA sought to prevent." *NAACP*, 496 F. Supp. 3d at 143 (committee on "improving American policing" was imbalanced where composed solely of "law enforcement" while excluding representatives of policed communities). As the First Circuit has explained, if an agency "announced that only persons paid by a regulated interested business could serve on a committee, we would expect that FACA's fair balance and inappropriate influence standards would supply a meaningful tool for review[] [.]" *Union of Concerned Scientists*, 954 F.3d at 19.

Given that Defendants have conceded that they never prepared a plan to ensure balance, as FACA requires, SUF ¶ 19, the only way the Taskforce could be fairly balanced is if it happened by accident. It did not. Each of the five Taskforce members they selected has held positions representing the financial services industry, and most have expressly endorsed pro-industry, deregulatory views. *See NAACP*, 496 F. Supp. 3d at 133 ("Congress accepted that a person's viewpoints c[an] be inferred from his or her background and employment status" and "one can presume that industry representatives will tend to represent industry interests").

1. **Todd Zywicki**, the Chair of the Taskforce and a Professor at the George Mason University Antonin Scalia School of Law, SUF ¶ 22, has spent his career advancing industry interests. In his time off-campus, Todd Zywicki has served as a director of "Global Economics Group, a consulting firm hired by Visa, Bank of America, and Citigroup to influence the Bureau and . . . was paid $500 an hour to help defend Morgan Drexen, a debt relief company, from a Bureau investigation." *Id*. Moreover, his public remarks and scholarship reveal that he opposes consumer finance regulation. For example, he opposed the Bureau's very creation, arguing that that Bureau would "increase the cost of . . . consumer and small-business credit, and [] increase the regulatory burden on financial institutions." *Id.* He further contended that regulating consumer financial products leads to "unintended consequences," such as "undermin[ing] the soundness of financial institutions." *Id.*

2. **Thomas Durkin**, a retired economist, *id.* ¶ 23, has also worked to promote the interests of the financial services industry. He spent the better part of a decade as the Chief Economist at the American Financial Services Association, "the primary trade association for the consumer credit industry." *Id.* Consistent with his work experience, Thomas Durkin has coauthored (with Todd Zywicki) books, articles, and op-eds that advocate deregulation of predatory financial products, such as payday loans, which he has referred to as "legal, high-cost" credit options. *Id.*[5]

3. **Howard Beales III** is a professor at George Washington University, where he has produced scholarship that cautions against certain regulation of credit markets. *Id.* ¶ 24.[6] He "has

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[5] *See also, e.g.*, *id.* ¶ 23(b) (noting an article in which Durkin dismisses as an "ancient and medieval view" the argument based on behavioral economics that "there are limitations on the economic rationality of consumer borrowers that must be guarded against with regulation").

[6] *See, e.g.*, *id.* ¶ 24(a) (noting an article in which Beales argues that behavioral economics should not be used to justify robust regulation in credit markets).

been described by the Wall Street Journal as 'an academic whose studies have been used by a tobacco company and consumer-goods makers to fight federal regulations.'" *Id*. Like Todd Zywicki, Howard Beales "works for a consulting firm where he sells his 'expertise' to industry." *Id.* (noting Beales' work for NERA Economic Consulting). In that capacity, he has "argu[ed] that payday loans with interest rates of up to 448 percent were 'beneficial to consumers.'" *Id*.

4. **William Macleod** represents industry as chair of the antitrust and competition practice group at the law firm Kelley Drye & Warren. *Id.* ¶ 25. His clients include "trade associations," "major household-name retailers, manufacturers and financial services companies." *Id*. In his capacity as a partner, he has used an "encyclopedic knowledge of antitrust and consumer protection law" and to "resolutely [fight] onerous regulations." *Id*.

5. **Linda Jean Noonan** also represents the financial services industry. *Id.* ¶ 26. As a partner at the law firm Hudson Cook, she "counsels financial institutions, national mortgage companies, consumer reporting agencies and others in complying with laws related to consumer credit, privacy, e-commerce and unfair trade practices." *Id*. As part of that work, she represents "clients in law enforcement proceedings before . . . the Federal Trade Commission, the Consumer Financial Protection Bureau, and the Department of Justice." *Id.* Noonan also serves as president of the American College of Consumer Financial Services Lawyers, a group whose executive board is composed entirely of lender-side financial services lawyers. *Id.*

Conversely, none of the Taskforce members represents the views of consumer advocates, even though Defendants received more than enough applications to fill that role.[7] In fact,

[7] While Beales, Noonan, and Macleod held positions at the Federal Trade Commission ("FTC") that involved enforcing consumer protection laws, SUF ¶¶ 24(d), 25(c), 26(d), that experience does not indicate that they represent the views of consumer advocates. First, all three *currently* represent industry and in that capacity have advanced pro-industry views. Second, Durkin and Noonan's years at the FTC were largely spent under the Reagan, Bush Sr., and Bush Jr.

Defendants rejected several dedicated consumer advocates. These included Plaintiff Professor Engel, a Research Professor at Suffolk University who has written extensively on how to improve consumer law to protect consumers and who has served in numerous public service positions concerning consumer finance, including at the Bureau. *Id.* ¶¶ 31-33. That she was rejected through a biased selection process is clear from Professor Engel's interview experience, during which Defendants questioned her "'in an inquisitorial manner' for the purpose of 'determin[ing] [her] stance on deregulation,'" without asking "about her qualifications and experience." *Id* ¶ 34. Defendants also declined to appoint Professor Prentiss Cox, a law professor who has devoted much of his career to consumer protection, including by drafting protective legislation and running a consumer protection clinic. *Id.* ¶ 35.

In sum, Defendants concededly never developed a plan to ensure that the Taskforce would be fairly balanced and, as a result, only selected members who are uniformly known for their pro-industry, anti-regulatory positions. They thus violated FACA in this respect as well.

IV. The Court should order complete relief.

The Bureau created and operated an advisory committee that is subject to FACA without even attempting to comply with the statute. Unsurprisingly, that committee produced a biased report—one which will be used to further the interests of the consumer financial services industry. The Court should therefore order all relief necessary to remedy Plaintiffs' harms and to

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administrations, *id.*, during which the agency was less aggressive in its enforcement. *See, e.g.*, Comment by FTC Commissioner Rohit Chopra on DOT's Proposed Rule Defining Unfair or Deceptive Practices ("Chopra Comment") at 1-2, *available* at www.regulations.gov under Docket No. DOT-OST-2019-0182-0225 (noting that the FTC's enforcement actions and rulemakings "plummeted" in the 1980s). For example, one of Durkin's achievements at the FTC was the Deception Policy Statement, SUF ¶ 24(d), which has been criticized by Rohit Chopra—a current FTC commissioner and President Biden's nominee for Director of the Bureau—as narrowing the FTC's ability to bring enforcement actions. Chopra Comment at 9.

vindicate FACA. Specifically, the Court should order (1) a use injunction, (2) a limited use injunction (a disclaimer on the Report whenever disseminated), (3) the release of all remaining Taskforce records, and (4) appropriate declaratory relief. SUF ¶¶ 55-57.[8]

1. Use injunction. To start, the Court should bar the Bureau from any future use of the Taskforce's Report or other work product. "FACA was designed by Congress to prevent the use of any advisory committee as part of the process of making important federal agency decisions unless that committee is properly constituted and produces its report in compliance with the procedural requirements of FACA." *Alabama-Tombigbee Rivers Coal. v. Dep't of Interior*, 26 F.3d 1103, 1106 (11th Cir. 1994). "[T]o allow the government to use the product of a tainted procedure would circumvent the very policy that serves as the foundation of [FACA]." *Id.* at 1107. A use injunction is therefore the "only vehicle that carries the sufficient remedial effect to ensure future compliance with FACA's clear requirements. Anything less would be tantamount to nothing." *Id*. This is particularly true where, as here, the agency did not even attempt to comply with significant FACA requirements.

Some courts have nonetheless held that a use injunction is proper only if necessary to avoid "render[ing] FACA a nullity" in light of "FACA's principal purposes—(1) avoidance of wasteful expenditures and (2) public accountability." *NRDC v. Pena*, 147 F.3d 1012, 1026 (D.C. Cir. 1998). "Because the FACA violation at issue here goes to the very creation and existence of the advisory committee, a use injunction is appropriate" under that standard as well. *W. Org. of Res. Councils v. Bernhardt ("WORC II")*, 412 F.Supp.3d 1227, 1242-43 (D. Mont. 2019). Like

[8] To the extent the requirements for permanent injunctive relief apply to Plaintiffs' requests, *cf. WORC II*, 412 F. Supp. 3d at 1243 n.7, those factors are also met: Plaintiffs' harms are irreparable, including by legal remedies like damages, and the flagrancy of the Taskforce's violations mean that both the equities and the public interest would be served by an injunction.

in *WORC II*, “the Committee’s very existence was tainted” by its failure to comply with FACA’s chartering and fairly balanced requirements. *Id.* at 1243. If anything, the Bureau’s violations in this case were far more severe than those in *WORC II* because the Taskforce’s secrecy further inhibited “public participation and accountability.” *Id.* at 1243; *see also Idaho Wool Growers Assoc. v. Schafer*, 637 F. Supp. 2d 868, 880 (D. Idaho 2009) (“Because Plaintiffs were denied their right to participate in the Committees’ processes, FACA’s purposes are advanced by limiting the future use of the Committees’ reports.”). If the Court were to decline to issue a use injunction here, it would send a powerful signal to agencies that they can flagrantly dispense with FACA’s most basic requirements without consequence.

Nor would a use injunction lead to “wasteful expenditures.” *NRDC*, 147 F.3d at 1026. For the reasons explained above, the Taskforce’s FACA violations contributed to an irredeemably tainted report. Whatever amount the Bureau expended on the Taskforce is outweighed by the need to ensure that the work of an unlawful advisory committee does not continue to harm Plaintiffs and that agencies comply with FACA moving forward. Besides, the Bureau cannot trumpet the importance of the Taskforce’s work when it expressly made no finding of the Taskforce’s utility in the first place, nor concluded that the information provided by the Taskforce could not be obtained through other parts of the federal government.

2. Limited use injunction (disclaimer). In addition, the Court should issue a limited use injunction requiring the Bureau to place a disclaimer on the Report whenever it is disseminated. “[I]nvoking advisory committee recommendations lends ‘political legitimacy’ to those decisions.” *NAACP Legal Def. & Educ. Fund, Inc. v. Barr*, 2020 WL 6392777, at *4 (D.D.C. 2020). Placing “[a] conspicuous disclaimer on the [Taskforce’s] report will qualify that legitimacy by ensuring that everyone who views the report learns it was produced unlawfully by

a non-representative body." *Id.* The frequency with which the Report has been cited by industry underscores the need for a disclaimer. *See* SUF ¶ 53.

A disclaimer does not preclude the need for a use injunction, however. A disclaimer would not prevent the Bureau from relying on the Taskforce's recommendations—particularly in secret, for actions that do not require notice and comment, or in spite of public opposition to the Report's usage. In other words, a use injunction prevents the Bureau from using the fruit of an unlawful advisory committee, while a disclaimer alerts the public to the committee's illegality.

3. Release of records. While the release of the Taskforce's records now cannot rectify how the Bureau unlawfully inhibited public participation while the Taskforce was in operation, the Bureau must release *all* remaining Taskforce records—not just the limited documents available online or otherwise. "[T]here is no question . . . that members of the public possess enforceable rights to obtain information under FACA," or that "FACA rights are enforceable even after an advisory committee has been disbanded." *Cummock*, 180 F.3d at 292. The Taskforce's obligation to produce its records therefore survived its dissolution and should be enforced by the Court.

4. Declaratory relief. Finally, because the Taskforce violated FACA, "the Plaintiffs have a basis for requesting a declaration that the Defendants' creation and administration of the Taskforce violated FACA and its implementing regulations." MTD Order at 18, 25-26; *see, e.g.*, *NAACP*, 496 F. Supp. 3d at 146 (declaring that the committee at issue was subject to and violated FACA). Such relief would supplement the other forms of relief requested above.

"If FACA has no teeth, the work product of spuriously formed advisory groups may obtain political legitimacy that it does not deserve." *Cargill, Inc. v. United States*, 173 F.3d 323, 341 (5th Cir. 1999). The Bureau cannot parade around a report produced by an unnecessary,

secretive, biased—and unlawful—advisory committee as the work of a neutral panel of experts. The Court should therefore order relief commensurate to the scale of the Taskforce's violations.

CONCLUSION

The Court should grant Plaintiffs' motion for summary judgment; enjoin CFPB to refrain from using the Taskforce's Report or other work product, to place a disclaimer on the Taskforce's Report, and to publish any unlawfully withheld Taskforce records; and declare that the CFPB Taskforce was unlawfully created and operated.

August 20, 2021

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, et al., *Plaintiffs*, v. DAVID UEJIO, in his official capacity as Acting Director of the Consumer Financial Protection Bureau, et al., *Defendants*.	No. 1:20-cv-11141 (JCB)

PLAINTIFFS' LOCAL RULE 5 .1 STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Plaintiffs hereby submit the following statement of material facts that are not in dispute under Local Rule 56.1 in support of their motion for summary judgment. The below facts are based on the parties' Joint Stipulation of Facts, ECF No. 54 (cited as "Stip. ¶ #"), the certified administrative record, the supplemental administrative record, and the declarations filed alongside this statement (cited as "[LAST NAME] Decl. ¶ # / Ex. #"). The certified and supplemental records were previously submitted at ECF No. 46-1 (pp. 1-14), ECF No. 46-2 (pp. 15-29), ECF No. 46-3 (pp. 30-49), ECF No. 46-4 (pp. 50-94), and ECF No. 55-1 (pp. 95-227) (collectively cited as "AR###").

1. On January 8, 2020, the Consumer Financial Protection Bureau signed a charter "establish[ing] the Taskforce on Federal Consumer Financial Law." AR1-3.

2. The Taskforce Charter charged the Taskforce with "examin[ing] the existing legal and regulatory environment" and "report[ing] its recommendations for ways to improve and strengthen consumer financial laws and regulations." AR1.

3. The Bureau selected the Taskforce's members. *See* AR1, 3 (charter explaining that the "Bureau establishe[d] the Taskforce" to obtain "recommendations" and providing that "[t]he Director shall select the members"); AR99 (letter from then-Director Kraninger stating that she "chose [the] five members").

4. The Taskforce Charter provided that "[t]he Taskforce shall report to the Director of the . . . Bureau." AR1.

5. It further specified that the Taskforce would be overseen by a Staff Director—"a full-time employee who shall ensure that the Taskforce operates in accordance with the terms of the charter[.]" *Id*.

6. The Bureau selected five private citizens to be the members of the Taskforce: Todd Zywicki, Thomas Durkin, Howard Beales III, William Macleod, and Linda Jean Noonan. AR210-11, 212.

7. Chairman Todd Zywicki's Assignment Agreement specified a year-long assignment as chair of the Taskforce. AR16 (see Boxes 20 and 21).

8. The Assignment Agreement also specified that he would work "200 days at 8 hours each day, for a total of 1600 hours." AR17. The Agreement noted that this was "75% of a full-time schedule of 2080 working hours in a year." *Id*. (see Box 26).

9. Todd Zywicki was hired under the Intergovernmental Personnel Act. AR15, 212.

10. The other four members were designated special government employees ("SGE"). AR103, AR111, 116, 121, 125, 128, 131, 141, 144, 176, 179, 182, 187, 195, 198, 201, 212.

11. Each of the members' hiring forms describes their service as "temporary." *See* AR16 (Zywicki was assigned to "a time-limited temporary position"); AR4 (Box 24 of Beales' Standard Form 50 indicates that he had no tenure and Box 45 describes his appointment as

"temporary"); AR6 (same for Durkin); AR9 (same for MacLeod); AR12 (same for Noonan).

12. On February 2, 2020, after the Taskforce began operating, the Bureau issued new Standard Form 50s for each of the non-chair Taskforce members. AR5, 8, 10, 14. On the February 2 forms, Box 24 lists the tenure of the four non-chair members as "permanent." *Id*.

13. The Taskforce charter, which was not changed after the new forms were issued, specifies that the "members [will] work for a temporary period of time" and "shall serve for the duration of the Taskforce," which was "expected to operate from January 2020 until . . . no later than January 2021." AR2-3.

14. The Bureau sent or received the following communications and documents:

a. The Bureau sent an offer letter to William MacLeod explaining that he would be serving in a "temporary, excepted service position not to exceed 1 year as an SGE." AR120.

b. Then-director Kraninger sent appointment letters to Beales, Durkin, and Noonan describing the Taskforce as a "one-year effort" and noting that as SGEs, the members would be "employed to perform temporary duties." AR125-26, 128-29, 131-32.

c. The Bureau sent orientation emails to Zywicki, Beales, Durkin, and Noonan noting that "the group will have one year from kickoff to produce its report." AR173, 176, 179, 182.

d. William Macleod sent the Bureau a signed memorandum of understanding stating that his "appointment is not to exceed 1/20/2021" and that this "temporary appointment carries no . . . commitment that [he would] be considered for . . . a permanent appointment." AR193-94.

15. The Taskforce members no longer work for the Bureau; they all resigned following the release of the Taskforce's final report in January 2021. ECF No. 40, at 2.

16. Each of the members worked an intermittent schedule. AR16-17 (see Boxes 19 and 26 of Zywicki's Assignment Agreement); AR4-5 (see Box 32 of Beales' Standard Form 50); AR6-8 (same for Durkin); AR9-10 (same for Macleod); AR13-14 (same for Noonan).

17. Defendants created and operated the Taskforce in a manner that did not comply with FACA's requirements. Stip. ¶¶ 1-4.

18. Defendants did not meaningfully consult with the GSA. *Id.* ¶ 2.

19. Defendants did not prepare a plan to attain fairly balanced membership. *Id*.

20. Defendants did not make findings that the Taskforce was in the public interest, essential to agency business, and non-duplicative of work already being done within the government. *Id*.

21. Defendants did not comply with FACA's open meetings and record requirements. *Id.* ¶¶ 3, 4.

22. Todd Zywicki, a Professor at the George Mason University Antonin Scalia School of Law, was selected as the Chair of the Taskforce. AR210.

a. Zywicki has served as a director of "Global Economics Group, a consulting firm hired by Visa, Bank of America, and Citigroup to influence the Bureau and . . . was paid $500 an hour to help defend Morgan Drexen, a debt relief company, from a Bureau investigation." AR95.

b. He opposed the Bureau's creation, arguing that that Bureau would "increase the cost of . . . consumer and small-business credit, and []

increase the regulatory burden on financial institutions." AR85 (listing Zywicki's testimony); *see also* Testimony before the House Committee on Oversight and Government Relations, Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs, *Who's Watching the Watchmen* (May 24, 2011), https://www.mercatus.org/publications/financial-markets/whos-watching-watchmen.

c. He further contended that regulating some consumer financial products leads to "unintended consequences," such as "undermin[ing] the soundness of financial institutions." AR95 (citing Zywicki's publications); *see also* Todd Zywicki, *Let's Treat Borrowers Like Adults*, Wall St. J. (July 8, 2009), https://www.wsj.com/articles/SB124701284222009065.

23. Thomas Durkin is a retired economist. AR39.

a. Durkin worked for six years as the Chief Economist at the American Financial Services Association ("AFSA"), *id.*, "the primary trade association for the consumer credit industry," *About AFSA*, Am. Fin. Servs. Ass'n, https://afsaonline.org/about-afsa/ (last visited Aug. 20, 2021).

b. Thomas Durkin has coauthored (with Todd Zywicki) books, articles, and op-eds that advocate deregulation of some financial products, such as payday loans, which he has referred to as "legal, high-cost" credit options. AR41 (listing coauthored book and article); AR96 (citing coauthored op-ed); *see also* Todd Zywicki et al., Consumer Credit and the American

Economy (Oxford University Press, 2014); *see also* Todd Zywicki & Thomas Durkin, *Why Everything Elizabeth Warren Ever Told You About Consumer Credit Is Wrong*, Forbes (Oct. 10, 2014), https://www.forbes.com/sites/realspin/2014/10/10/why-everything-elizabeth-warren-told-you-about-consumer-credit-is-wrong/?sh=850949b301f9 (summarizing arguments in book); Thomas Durkin et al., *Consumer Credit and the American Economy: An Overview*, 11 J. of L. Econ. & Pol. 279, 283 (2015) (dismissing as an "ancient and medieval view" the argument based on behavioral economics that "there are limitations on the economic rationality of consumer borrowers that must be guarded against with regulation").

24. Howard Beales III is a professor at George Washington University. AR21.

a. Beales has produced scholarship that cautions against certain regulation of credit markets. AR 24 (listing articles). *See, e.g.*, J. Howard Beales III, *Behavior Economics and Credit Regulation*, 11 J.L. Econ. & Pol'y 349 (2015) (arguing that behavioral economics should not be used to justify robust regulation in credit markets).

b. He "has been described by the Wall Street Journal as 'an academic whose studies have been used by a tobacco company and consumer-goods makers to fight federal regulations.'" AR96.

c. He "works for a consulting firm where he sells his 'expertise' to industry." *Id.* (noting Beales' work for NERA Economic Consulting). In that capacity, he has "argu[ed] that payday loans with interest rates of up to

448 percent were 'beneficial to consumers.'" *Id.*; *see also See Dr. . Howard Beales, III, Affiliated Academic*, NERA, https://www.nera.com/experts/dr-howard-beales.html (last visited Aug. 20, 2021).

d. Beales previously held positions at the Federal Trade Commission ("FTC") from 1977-1987 and 2001-2004. AR21-22. During that time, he "worked extensively on the development of the FTC's Deception Policy Statement." AR19.

25. William Macleod is chair of the antitrust and competition practice group at the law firm Kelley Drye & Warren. AR52.

a. Macleod's clients include "trade associations," "major household-name retailers, manufacturers and financial services companies." AR52-53.

b. In his capacity as a partner, he has used his "encyclopedic knowledge of antitrust and consumer protection law" to "resolutely [fight] onerous regulations." AR53.

c. Macleod previously held positions at the FTC. *Id*.

26. Linda Jean Noonan is a partner at the law firm Hudson Cook. AR65.

a. In that capacity, Noonan "counsels financial institutions, national mortgage companies, consumer reporting agencies and others in complying with laws related to consumer credit, privacy, e-commerce and unfair trade practices." *Id.*

b. As part of that work, she represents "clients in law enforcement proceedings before . . . the Federal Trade Commission, the Consumer Financial Protection Bureau, and the Department of Justice." *Id.*

c. Noonan also serves as president of the American College of Consumer Financial Services Lawyers, *id.*, a group whose executive board is composed of lender-side financial services lawyers. *See About the College*, Am. Coll. of Consumer Fin. Servs. Lawyers, http://www.accfsl.org/about-the-college/ (last visited Aug. 20, 2021).

d. Noonan previously held positions at the FTC from 1997-1991. AR66.

27. Macleod and Noonan maintained their private employment throughout the Taskforce's lifespan. *See, e.g.*, AR102, 141-47, 154-58, 186-87 (explaining that Macleod and Noonan could continue practicing at their law firms because they were SGEs rather than regular government employees).

28. There has long been debate over the CFPB's role in regulating the industry. On the one hand, as described above, industry and its allies have criticized the Bureau's very existence, arguing that regulation harms both consumers and industry. On the other hand, consumer advocates believe that the Bureau should engage in robust regulation to prevent the proliferation of predatory financial products that harm consumers. *See, e.g.*, Engel Decl. ¶ 7.

29. Defendants received applications from 89 prospective members for the Taskforce. AR 99, 214.

30. Among the applicants rejected by Defendants were multiple consumer finance law experts and advocates who endorse robust consumer protections. AR96-97.

31. In particular, Plaintiff Professor Kathleen Engel applied for membership. *See* AR226-27 (discussing Professor Engel's application).

32. Professor Engel is a Research Professor at Suffolk University and a known consumer advocate who has written extensively on how to improve consumer law to protect consumers and who has served in numerous public service positions concerning consumer finance, including at the Bureau. Engel Decl. ¶¶ 2-6.

33. Professor Engel was denied committee membership. Engel Decl. ¶¶ 9-13.

34. During her interview, Defendants questioned Professor Engel "'in an inquisitorial manner' for the purpose of 'determin[ing] [her] stance on deregulation,'" but only "spent minimal time asking about [my] qualifications and experience." AR226-27.

35. Defendants also declined to appoint Professor Prentiss Cox, a law professor who has devoted much of his career to consumer protection, including by drafting protective legislation and running a consumer protection clinic. *See* AR215-25 (Professor Cox's Taskforce application).

36. Two Senators voiced concerns with the Taskforce at the time that it was established. AR 95-98. Specifically, they wrote to the Bureau to express doubts about the Taskforce's ability to "provide you with objective recommendations" given that it was "stacked . . . with representatives of payday lenders, Wall Street banks, and other industry interests." AR95-96. The senators also worried that the Taskforce was "set up . . . to evade [FACA]," and asked that the Bureau "immediately suspend the Taskforce." AR97.

37. The Taskforce produced a final report on January 5, 2021. ECF No. 37.[1]

[1] The Taskforce's Report is available at https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureaus-taskforce-on-federal-consumer-financial-law-releases-its-report/.

38. The Report includes recommendations that, if acted upon, would benefit the financial services industry. *See, e.g.*, Mierzwinski Decl. ¶ 17; Rheingold Decl. ¶ 17. *See also* Engel Decl. ¶¶ 32-33.

39. Plaintiff the National Association of Consumer Advocates ("NACA") is a non-profit national association of legal services and private attorneys, law professors, law students, and other consumer advocates dedicated to promoting justice for consumers and to curbing abusive and predatory business practices. NACA's mission is to promote justice for all consumers by maintaining a forum for communication, networking, and information sharing among consumer advocates across the country and by serving as a voice for its members and consumers in the ongoing struggle to curb unfair and abusive business practices that adversely affect consumers. Rheingold Decl. ¶ 3.

40. To accomplish its mission, NACA engages in a variety of activities. First, NACA educates and shares information with both its membership and its members' consumer clients on topics including consumer rights, common issues faced by consumers in the financial services marketplace, and consumer advocacy best practices. Second, NACA promotes the interests of consumers by serving as a voice for consumers in the ongoing struggle to curb unfair and abusive practices by the financial services industry. Rheingold Decl. ¶¶ 4-7.

41. Plaintiff the U.S. Public Interest Research Group ("U.S. PIRG") is a non-profit consumer advocacy organization with tens of thousands of members across the United States. To create a safer and heathier world, U.S. PIRG draws on a strong network of researchers, advocates, organizers, and students to improve government transparency and to stand up to powerful special interests on behalf of the public on a variety of issues. Among other things, U.S. PIRG has a long history of working to improve and reform consumer financial laws and

regulations, including by defending the Bureau's core mission against efforts to unwind consumer protections. Mierzwinski Decl. ¶ 3.

42. U.S. PIRG accomplishes its objectives through several activities. First, U.S. PIRG offers free education and information to its members and to the general public regarding the Bureau's regulatory activities, as well as the ongoing need for improvements in consumer protections. Second, U.S. PIRG provides an independent voice for consumers, advocating for improved consumer finance laws and regulations in a number of ways. Mierzwinski Decl. ¶¶ 4-7.

43. Given their experience with consumer finance laws and regulations, Plaintiffs had a significant interest in monitoring, discussing, participating in, and reacting to the Taskforce's work. Engel Decl. ¶ 8; Mierzwinski Decl. ¶ 8; Rheingold Decl. ¶ 8.

44. Plaintiffs were deprived of information to which they were entitled because of the Bureau's failure to comply with FACA's chartering requirements when it established the Taskforce. Stip. ¶ 2; Engel Decl. ¶ 26; Mierzwinski Decl. ¶¶ 10, 12; Rheingold Decl. ¶¶ 10, 12.

45. Defendants' failure to comply with FACA's chartering requirements perceptibly impaired the Plaintiffs' activities and diverted at least some of the Plaintiffs' resources. Engel Decl. ¶¶ 26-28; Mierzwinski Decl. ¶ 10; Rheingold Decl. ¶ 10.

46. If the Bureau had complied with FACA when chartering the Taskforce, it might have elected not to establish the Taskforce at all, sparing Plaintiffs the need to follow the Taskforce's work. Engel Decl. ¶ 27; Mierzwinski Decl. ¶ 10; Rheingold Decl. ¶ 10.

47. Defendants' failure to provide the public with access to the Taskforce's records and meetings while it was operating deprived Plaintiffs of information to which they were entitled. Stip. ¶¶ 3-4; Engel Decl. ¶¶ 15-24, 25, 28; Mierzwinski Decl. ¶ 10; Rheingold Decl. ¶ 10.

48. The Taskforce's lack of transparency also resulted in personal and organizational injuries by preventing Plaintiffs from participating in and following the Taskforce's work. Engel Decl. ¶¶ 28-30; Mierzwinski Decl. ¶¶ 11-14; Rheingold Decl. ¶¶ 11-14.

49. Plaintiff Professor Engel was deprived of Taskforce membership pursuant to Defendants' biased process. Engel Decl. ¶¶ 9-12; Stip. ¶ 2(c).

50. The lack of representation for consumer advocates on the Taskforce made it harder for Plaintiffs to follow and influence the Taskforce's work. Engel Decl. ¶¶ 13, 15-24, 31; Mierzwinski Decl. ¶ 15; Rheingold Decl. ¶ 15.

51. Plaintiffs object to many of the recommendations made in the Report. *See* Engel Decl. ¶¶ 32-33, 31; Mierzwinski Decl. ¶ 17; Rheingold Decl. ¶ 17.

52. The Report's recommendations will nonetheless likely influence consumer financial policy at the state and federal levels and provide additional support to the financial services industry. *See* Engel Decl. ¶¶ 35-36; Mierzwinski Decl. ¶ 18-19; Rheingold Decl. ¶ 19.

53. The Report has repeatedly been cited by industry representatives and others. *See* Pilant Decl. (listing sources).

54. Plaintiffs will therefore be required to devote additional resources to exposing and rebutting the Report. *See* Engel Decl. ¶¶ 34, 37-38; Mierzwinski Decl. ¶ 20; Rheingold Decl. ¶¶ 18, 20.

55. If the Court were to issue a use injunction prohibiting the Bureau from relying on the Taskforce's work product, it would alleviate Plaintiffs' need to expend resources addressing the Report. *See* Engel Decl. ¶¶ 35-36; Mierzwinski Decl. ¶¶ 18-19; Rheingold Decl. ¶¶ 18-19

56. If the Court were to issue a limited use injunction directing the Bureau to place a disclaimer on the report, or a declaration that the Taskforce's creation and operation was

unlawful, it would make it easier for Plaintiffs and others to rebut the Report. *See* Engel Decl. ¶¶ 35-36; Mierzwinski Decl. ¶¶ 18-19; Rheingold Decl. ¶¶ 18-19.

57. If the Court were to order the release of all remaining Taskforce records, it would make it easier for Plaintiffs to understand how the Taskforce reached its conclusions and to rebut the Taskforce's recommendations. *See* Engel Decl. ¶ 38; Mierzwinski Decl. ¶ 20; Rheingold Decl. ¶ 20.

August 20, 2021

Respectfully submitted,

/s/ Kristen P. Miller

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, et al., *Plaintiffs*,	
v.	No. 1:20-cv-11141 (JCB)
DAVID UEJIO, in his official capacity as Acting Director of the Consumer Financial Protection Bureau, et al., *Defendants*.	

DECLARATION OF KATHLEEN ENGEL

I, Kathleen Engel, declare under penalty of perjury as prescribed in 28 U.S.C. § 1746:

1. The facts contained in this declaration are known personally to me and, if called as a witness, I could and would testify competently thereto under oath. I submit this sworn declaration in support of Plaintiffs' motion for summary judgment in the above-referenced case.

I. <u>My Experience</u>

2. I am a nationally prominent scholar of consumer law and finance, having written extensively on the law and economics of mortgage markets and the subprime crisis. *See* Engel Application to Taskforce (attached as Ex. A). I currently hold a position as Research Professor of Law at Suffolk University. Prior to joining Suffolk University in 2009, I taught at Cleveland-Marshall College of Law for ten years.

3. Throughout my academic career, I have engaged in research on an array of consumer finance issues, ranging from the attributes and risks of specific financial products to the delivery of financial services, the laws that regulate consumer financial products, and the structure of financial markets. *Id.* My resulting expertise has been widely recognized in the form

of numerous awards for my publications. *Id.* For example, I coauthored a book on the 2008 financial crisis—*The Subprime Virus: Reckless Credit, Regulatory Failure, and Next Steps*—that won Best Book from the American College of Consumer Financial Services Lawyers.[1] My work has also informed critical legislation and regulations, including aspects of the Dodd-Frank Act. *Id.*

4. In addition to my academic experience, I have held numerous public service positions at the state and federal level, including at the Consumer Financial Protection Bureau "the Bureau"). *Id.* Specifically, I have served as a member of the Federal Reserve Board's Consumer Advisory Council, the Bureau's Consumer Advisory Board, the Community Affairs Research Board of the Federal Reserve Bank of Boston, and the Federal Reserve Bank of Cleveland's Academic Advisory Council on Subprime Lending. *Id.* In those positions, I reviewed and assessed existing and proposed regulations governing consumer financial products, as well as empirical and legal research related to consumer finance, for the purpose of improving consumer finance regulations. *Id.* In addition to serving on these committees, I have also advised state governments—including Ohio, Massachusetts, California, and Illinois—on a variety of issues related to consumer credit. *Id.*

II. My Interest in the Taskforce

5. My interest in the Bureau's Taskforce on Federal Consumer Financial Law (the "Taskforce") stems from my longstanding interest in the Bureau itself and its vital mission of ensuring that consumers are protected from predatory financial companies and products. The Bureau was created in the wake of the 2008 financial crisis as part of a major overhaul of

[1] *Writing Competition – 2011 Winners*, Am. Coll. Consumer Fin. Servs. Law., http://www.accfsl.org/writing-competition/2011-winners/ (last visited Aug. 16, 2020).

financial regulation that culminated in the Dodd-Frank Act. Specifically, the Bureau was established to "ensur[e] that all consumers have access to markets for consumer financial products and services . . . [that] are fair, transparent and competitive." 12 U.S.C. § 5511(a).

6. As part of my research, I have explained that the 2008 financial crisis could have been avoided if federal regulators had stepped in to protect consumers from abusive and predatory loans.[2] I have argued, among other things, that responsible consumer finance regulations should require that lenders ensure that borrowers can afford to repay their loans, prevent lenders from ambushing borrowers with nasty surprises (such as hybrid adjustable rate mortgages), and help ensure that consumers understand the available financial products in order to make informed decisions.[3]

7. However, there remains robust disagreement over the Bureau's role in regulating the financial services industry. On the one hand, consumer advocates and most consumer finance law experts, like myself, believe that the Bureau, with its broad rulemaking and enforcement authority over consumer financial products, should exercise its regulatory authority aggressively to prevent the proliferation of complex financial products that exploit consumer misunderstanding. On the other hand, the financial services industry and its allies have criticized the very existence of the Bureau as paternalistic and argued that the regulation of financial products harms both consumers (by limiting choices and the availability of credit) and the industry (by undermining competition and innovation).[4]

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[2] Kathleen C. Engel & Patricia A. McCoy, *The Subprime Virus: Reckless Credit, Regulatory Failure, and Next Steps* 149 (Oxford Univ. Press 2010).

[3] *Id.* at 228-31.

[4] Todd Zywicki, *Let's Treat Borrowers Like Adults*, Wall Street J. (July 8, 2009), https://www.wsj.com/articles/SB124701284222009065.

8. It is in this context that, on October 11, 2019, the Bureau announced that it would "establish" the Taskforce and that it would begin to accept applications for members to serve on the Taskforce.[5] Having devoted my career to studying and improving consumer protection law and finance, I had a significant interest in participating in the Taskforce's work, which would have enabled me to contribute my vast knowledge to the Bureau, and also to know and understand the assumptions and information the Task Force discussed and relied on when making recommendations. It would also allow me to know the nuances of the Task Force's analyses and how those analyses influenced its conclusions, including the rationales for any recommendations and the process for making its recommendations.

III. <u>My Application to Serve on the Taskforce</u>

9. Consistent with that interest, I applied to serve on the Taskforce, noting in my application that "[h]armonizing, modernizing, and updating consumer credit laws is long overdue" as the current laws and regulations frequently "do not take into account new realities of consumers' behavior" and could benefit from "consolidation and reorganiz[ation]." *Id.* I emphasized that the Taskforce was a "laudable and important project," and outlined several priorities that I would have focused on if selected to serve on the Taskforce. *Id.*

10. However, I appear to have been excluded from the Taskforce because of my opposition to deregulation and support for robust consumer protection. For example, before my application was declined, I was interviewed by Chris Muffirage, a political appointee,[6] who

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[5] Press Release, *CFPB Announces Taskforce on Federal Consumer Financial Law*, CFPB (Oct. 11, 2019), https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-taskforce-federal-consumer-financial-law/.

[6] *See* Nicholas Confessore & Stacy Cowley, *Trump Appointees Manipulated Agency's Payday Lending Research, Ex-Staffer Claims*, N.Y. Times (Apr. 29, 2020), https://www.nytimes.com/2020/04/29/business/cfpb-payday-loans-rules.html.

"posed questions in an inquisitorial manner" that I perceived as intended to "determine my stance on deregulation." AR226. Notably, I was not asked about my qualifications and experience. *Id.*

11. After my interview, I spoke with a colleague who was also interviewed for a position on the Task Force. She had been told that Chris Muffirage would be interviewing her. However, he was not present during her interview.

12. She informed me that she was asked what appeared to be scripted questions regarding her interest in serving on the Task Force and her qualifications. She described the interview as professional, impartial, and without any interrogation or politically-oriented questions.

13. My application to serve on the Taskforce was ultimately rejected, depriving me of an opportunity to provide information to the Taskforce, to understand and participate in the Taskforce's work, and to advocate for reasonable, consumer-friendly policies. Membership on the Taskforce also would have involved financial compensation and a valuable professional credential.[7]

14. I am aware that other academics who support protecting consumers from exploitation applied to join the Taskforce and were rejected, including Prentiss Cox, a professor at the University of Minnesota Law School. *See* AR215-25.

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[7] Evan Weinberger & Lydia Beyoud, *Financial Watchdog's Conflicted Task Force Earning Top Dollar*, BL (May 11, 2020), https://news.bloomberglaw.com/banking-law/financial-watchdogs-conflicted-task-force-earning-top-dollar (explaining that the Taskforce members' pro-rated salaries are near the top of the CFPB's payscale).

IV. My Exclusion from the Taskforce

15. Because my application to join the Taskforce was rejected via a biased selection process, and because the Taskforce operated in secret, I was prevented from fully participating in the Taskforce's work and monitoring the Taskforce's operations. Those injuries have made it more difficult to analyze and assess the Taskforce's recommendations, including the Taskforce's Report.

A. Exclusion from the Taskforce's meetings

16. To start, the Taskforce held several meetings limited to Taskforce members and/or select stakeholders, from which I was excluded.

17. For example, the Taskforce had a meeting on March 10, 2020 to seek input from stakeholders on "ways to harmonize and modernize federal consumer financial laws." *See* March 10, 2020 Meeting Announcement (attached as Ex. B). Prior to that meeting, the Bureau failed to provide public notice. Likewise, it did not hold the meeting in a manner accessible to the public or allow any members of the public to address the Taskforce.

18. Instead, the Bureau expressly restricted attendance to invited stakeholders, who were representatives from industry and certain consumer advocacy groups. *Id.* (noting that the meeting was "closed press, off the record, not for attribution in social media, and open to invitees only"). Director Kraninger recently testified that the March 10 meeting was attended only by those groups.[8]

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[8] *Consumer Financial Protection Bureau's Semi-Annual Report to Congress: Hearing Before the U.S. S. Comm. on Banking, Hous., & Urban Aff.*, 116th Cong. (2020), https://www.banking.senate.gov/hearings/02/21/2020/the-consumer-financial-protection-bureaus-semi-annual-report-to-congress.

19. I understand that the Taskforce met on other occasions in closed sessions to discuss matters related to the Taskforce's final Report and recommendations and to solicit input from other select stakeholders.[9] The Bureau did not provide notice of these meetings, nor did it allow the public to attend.

20. On June 4, 2020, I sent a letter to the Bureau, joined by the National Association for Consumer Advocates ("NACA"), requesting that the Taskforce provide notice of and hold open to the public all future meetings. Letter to Matt Cameron, Staff Dir., CFPB, from Kristen Miller & John Lewis (June 4, 2020) (attached as Ex. C). To date, the Bureau has not responded, although it held a single public hearing on July 16, 2020.

B. Lack of access to Taskforce records

21. The Bureau has not provided me or other members of the public access to the Taskforce's records. For example, the Bureau did not provide contemporaneous access to records associated with the March 10, 2020 meeting. Prior to that meeting, the Bureau circulated to invited attendees a list of questions that would be discussed at the meeting. *See* Ex. B. Defendants did not make this list public. The Taskforce also heard from various stakeholders at the meeting, but did not announce in advance who would be speaking or presenting. Nor has the CFPB made public copies of the stakeholders' remarks or the meeting minutes.

[9] *Id.* at 1:55 (indicating that the Taskforce's March 10, 2020 meeting was the "first" of such meetings, that the Taskforce would meet with other CFPB advisory committees later that week, and that both such meetings were part of "an ongoing process"); *Taskforce on Federal Consumer Financial Law, Charter*, CFPB ¶ 9 (2020), ("Taskforce Charter" or "Charter"), *available at* https://files.consumerfinance.gov/f/documents/cfpb_taskforce-charter.pdf (last visited Aug. 16, 2021) (directing the Taskforce to "meet as frequently as necessary to complete the [final] report" by January 2021).

22. As explained above, the Taskforce met on other occasions in closed sessions to discuss matters related to the Taskforce's final report and recommendations. The Bureau has not made the minutes, notes, and other records from these meetings publicly available.

23. The Bureau has not provided any of the other records made available to or prepared by the Taskforce. To date, the only records made publicly available with which I am familiar are the Taskforce Charter, various press releases announcing the establishment of the Taskforce and the selection of its members, a March 27 Request for Information, and the Taskforce's final Report.[10]

24. In the letter sent on June 4, NACA and I requested that the Taskforce's records be made available. *See* Ex. C. To date, the Bureau has not responded.

V. My Injuries from the Unlawful Creation and Operation of the Taskforce

25. The lack of notice of any of the Taskforce meetings, combined with the Bureau's failure to make available *any* records beyond those that established the existence of the Taskforce, made it impossible for the public, including myself, to follow along with the Taskforce's work. And, because of the opaque process through which the Taskforce was established, the secrecy with which it operated, and its lack of a balanced composition of members, I have been prevented from carrying out my academic work and from advocating for policies consistent with my research.

26. To start, the Taskforce was created without adequate consultation with the GSA as required by FACA, and without the requisite finding that the Taskforce was "in the public interest," 5 U.S.C. App. 2 § 9(a)(2), that it was "essential to the conduct of agency business," and

[10] *See generally Taskforce on Federal Consumer Financial Law*, CFPB, https://www.consumerfinance.gov/about-us/taskforce-federal-consumer-financial-law/ (last visited on June 15, 2020).

that the "information to be obtained was not already available through another advisory committee or source within the Federal government," 41 C.F.R. § 102-3.30(a). In addition, the Defendants did not prepare a "plan to attain fairly balanced membership" on the Taskforce as required by 41 C.F.R. § 102-3.60(a), (b)(3). Without that information, it is more difficult for me to understand and communicate the purpose of the Taskforce's work, how the Taskforce's work differs from the work of other components of the Bureau, where the Report fits in with other sources of information upon which the Bureau relies, and how the Bureau intends ultimately to utilize the Taskforce's work.

27. Had the Bureau attempted to meet FACA's requirements, it may have decided against creating the Taskforce at all, sparing me the need to analyze and report on the Taskforce's work. For example, if the Bureau had attempted to comply with FACA, it might have realized that the Taskforce was redundant or not in the public interest. Alternatively, the Bureau might have decided to staff the Taskforce with a different composition of members, providing representation for my views on the Taskforce.

28. As explained above, much of the Taskforce's work has been conducted outside the public eye. I have therefore been required to expend additional time and resources pursuing Taskforce records that should already be public, as reflected by the letter that I sent the Bureau. Moreover, I cannot study and write about records I cannot access. The Taskforce's lack of transparency therefore prevents me from doing my work as an academic, work that is both part of my career and deeply meaningful to me. The Taskforce Report does not fully reveal the discussions, evidence, and thoughts that went into the recommendations, which means that my analysis of the Report cannot address the ways in which political ideologies, biases, beliefs about consumer behavior, or political agendas may have influenced the Taskforce's recommendations,

all of which would inform my research and also the public's perception of the Report and the Bureau.

29. Moreover, had the Taskforce been operated transparently, it would have been easier for me to try to persuade the Taskforce to adopt recommendations for needed consumer protections. Instead, the lack of access to information about the Taskforce's work hampered my ability to advocate before the Taskforce and made it more likely that recommendations favorable to industry would come to fruition, which is exactly what happened.

30. For example, I submitted a comment in response to the Taskforce's March 27, 2020 Request for Information. Response to Request for Information (attached as Ex. D). But that request for information was so broad that it made it impossible to discern what proposals the Taskforce intended to consider and what sorts of information might be most useful. Instead, my comment focused on why, as a general matter, the Bureau should not rely on the Taskforce as a source of expertise. If I had access to information about the Taskforce's work, including its meeting minutes and other records, I would have been able to tailor my comments to address any issues under the Taskforce's consideration.

31. These harms are exacerbated because the Taskforce did not include a member who would adequately represent the interests of consumer advocates or academics, like myself or others who believe that regulating dangerous financial products is essential to protecting consumers and ensuring the stability of the economy. That view was not represented on the Taskforce because its members were allied with industry, increasing the likelihood that the Taskforce would recommend policies contrary to my research, as it ultimately did.

32. The Taskforce Report reflects that lack of balance. For example, the Taskforce lauds the values of competition and informed consumer choice, as do I; however, the authors

neglect to mention that in the name of competition and choice, lenders engage in obfuscation and hide costs, which actually inhibits competition and prevents *informed* choice. Similarly, the authors conclude that disclosures are the solution to the problem of unfair pay-day loans. They do not even nod to the extensive research studies that have found that disclosures do not help consumers avoid dangerous small-dollar loans. Repeatedly, they promote policy changes that would roll back regulations, such as those protecting college students from exploitation by credit card companies, without discussing the substantial evidence that led to the creation of those regulations.

33. The Report reflects the Taskforce's view that protecting consumers from abusive financial products is paternalistic and harmful while excluding the contrary view, held by most consumer finance experts, that consumer protections are beneficial to both consumers and the broader economy. The Taskforce's exclusion of evidence justifying the need for consumer protections stands in stark contrast to the history and purpose of the Bureau as set forth in the Dodd-Frank Act.

34. I have spent many hours analyzing the Taskforce's recommendations and their justifications so I could be ready to submit comments if the Bureau issued any proposed rules based on the Taskforce's findings. I have also had conversations with others opposed to the report to discuss the contents of its report, to identify particularly concerning recommendations, and to plan how to respond to the report.

35. Moreover, the Taskforce's Report will likely be used to influence CFPB policy by opponents of robust consumer financial protections or by future administrations. Despite its numerous flaws, Defendants framed the Taskforce as inspired by a prior commission established in 1968 whose recommendations "led to significant legislative and regulatory developments in

consumer finance."[11] Defendants also provided the Taskforce with the Bureau's imprimatur, invested substantial resources in the Taskforce,[12] and trumpeted the Taskforce's work. Thus, the Taskforce's recommendations will likely serve as ammunition for regulators who wish to unwind consumer protections, including a potential future administration or state consumer regulatory agencies.

36. Further, regulated industry and other third parties will likely seek to use the Taskforce's biased recommendations in their advocacy work. Specifically, the financial services industry might seek to use those recommendations in the course of notice and comment procedures on federal rules or for legislative advocacy and lobbying efforts. Parties in litigation may also cite the Taskforce's report in defense of their practices that harm consumers. As a report prepared with the imprimatur of the Bureau, the Report's impact is likely to be evergreen.

37. For these reasons, the Taskforce's biased recommendations are likely to be used to influence Bureau policy in a manner contrary to my academic work and my beliefs. They will therefore cause me to expend further time and resources to monitor, and if necessary, advocate against harmful policies. In various capacities—including serving on the Consumer Advisory Council of the Federal Reserve Board of Governors and the Consumer Advisory Board of the Bureau, and as an academic—I have consulted with legislators, responded to Notices of Proposed Rulemaking and Requests for Information, and submitted letters to agencies and politicians, all in support of consumer protection measures. If the Taskforce recommendations result in proposals for new regulations and laws that would harm consumers and the economy, I

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[11] *CFPB Announces Taskforce on Federal Consumer Financial Law*, *supra* note 5.
[12] *Financial Watchdog's Conflicted Task Force Earning Top Dollar*, *supra* note 7.

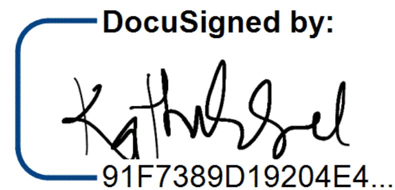
will make every effort to inform policymakers of the irrationality and lack of empirical support of the proposals.

38. This work will be made significantly more difficult by the Taskforce's lack of transparency, which has impaired my ability to participate and follow the work of the Taskforce. While the Taskforce members did describe theoretical and other justifications for their recommendations, because they met in secrecy and did not disclose their deliberations, it is impossible to know whether undisclosed theories, evidence, or political ideologies informed their conclusions. In particular, the Report's discussion of consumer behavior is based on principles not founded in evidence concerning how consumers behave, and is therefore inexplicable without more information about how the Taskforce conducted its business. Any challenge to the Report would be incomplete without knowing the members' motivations and the complete foundation for their recommendations.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: August 19, 2021

Jamaica Plain, MA



Kathleen Engel

EXHIBIT A

Office of Law Faculty

120 Tremont Street
Boston, MA 02108

617.573.8000

www.law.suffolk.edu

October 25, 2019

Director Kathleen Kraninger
Consumer Financial Protection Bureau
1700 G St NW
Washington, DC 20552

Dear Director Kraninger,

I am writing to apply for a position on the Taskforce on Federal Consumer Law.

Consumer law and finance has been the focus of my research and policy work for twenty years. I have written many articles related to consumer protection and a book on the law and economics of mortgage markets and the subprime crisis. In addition, I have held senior public positions and board positions related to consumer protection.

Senior public service

I have held numerous public service positions at the state and Federal level, including serving as a member of: (1) the Federal Reserve Board's Consumer Advisory Council (CAC) where I chaired the Consumer Credit Committee; (2) the CFPB's Consumer Advisory Board; (3) the Community Affairs Research Advisory Board of the Federal Reserve Bank of Boston; and (4) the Federal Reserve Bank of Cleveland's Academic Advisory Council on Subprime Lending.

In these positions, I reviewed and assessed extant and proposed regulations governing consumer financial products as well as empirical and legal research related to consumer finance. The positions have all involved working closely with people representing diverse constituencies, ranging from payday lenders to community development corporations.

While on the CAC, I organized a Data Subgroup with the mission of reducing the data reporting burden on banks by centralizing data collection and access. Our vision was to have a data warehouse that contained all the data that regulators require banks to produce; each regulator would then have access to the data that related to their authority using a single software platform.

I have trained Federal Trade Commission attorneys on mortgage regulations and twice been on consulting teams that were awarded contracts to assist the Department of Housing and Urban Development on fair lending compliance. In addition to my public service activities listed in my resume, I have advised state governments, including Ohio, Massachusetts, California and Illinois, on an array of issues related to consumer credit.

Research and teaching

I have engaged in research on all aspects of consumer finance, ranging from specific products and the delivery of services to the laws that regulate consumer financial products and the structure of financial markets. As a law professor, I have taught courses on consumer credit, including a survey course and an advanced seminar, and a class on the financial crisis, called Credit and Catastrophe. My knowledge of the laws and regulations governing consumer credit is based on both practical experience and deep academic study.

I am a highly respected scholar of consumer law. My publications have garnered numerous awards, including first place awards for a book and an article from the American College of Consumer Financial Services Lawyers-- an organization of lawyers that primarily represent financial institutions. Policy-makers have relied on my research in issuing regulations and passing legislation. A suitability standard that my co-author and I first proposed in 2001 informed pieces of the Dodd-Frank Act. Amendments to Reg. Z and AMPTA have cited my articles.

My research frequently incorporates economic principles and research. I have co-authored several articles with economists and have conducted my own empirical research on consumer protection laws.

Several years ago, I decided to stop teaching and dedicate my time to policy work and research. I continue to hold an appointment as a Research Professor at Suffolk University Law School and have maintained my academic connections such as serving on the Executive Committee of the American Association of Law Schools' Section on Commercial and Related Consumer Law.

I have also joined a number of Boards of Directors, including Consumer Reports, and am working on a new research project on student loan servicing. The flexibility in my schedule allows me to pursue opportunities like the Taskforce, which would not have been possible when I was teaching full-time.

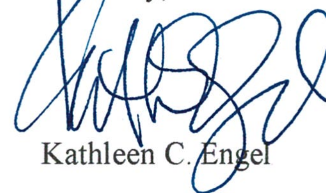
Taskforce goals

Harmonizing, modernizing, and updating consumer credit laws and regulations is long overdue. Examples abound of laws that do not take into account new realities of consumers' behavior. For example, the APR for closed end loans assumes a holding period of thirty years. Although the new TILA/ RESPA integrated disclosure attempts to address this distorting assumption, there are tools that could more accurately approximate borrowers' APRs and, thus, help them to comparison shop and make well-informed choices. Similarly, repeated revisions to TILA regulations have resulted in a complex scheme that is very difficult to navigate. There is significant room for consolidation and reorganizing the regs. The process likely requires returning to first principles and asking whether the regulations efficiently achieve those principles. Any new approaches would benefit from the CFPB's ability to conduct experiments.

Consumers have become accustomed to learning, evaluating products, and making decisions on-line. Digital innovations can be important tools for assisting consumers in the process of making choices among credit products. To the extent regulations can take this new reality into account, technology could improve transparency and consumer decision-making while also helping lenders increase their efficiency and decrease their costs. Of course, any modernization should take into account potential enforcement challenges for the CFPB and other regulators, operational hurdles for lenders, and the rich behavioral research on how consumers make decisions. Regulations not based on research run the risk of failing at their purpose.

The CFPB is embarking on a laudable and important project. I believe that I have the experience and interpersonal skills to make substantial contributions to the process and goals of the Taskforce.

Sincerely,



Kathleen C. Engel

EXHIBIT B

Fwd: INVITATION: March 10 Listening Session on Taskforce on Federal Consumer Financial Law

---------- Forwarded message ---------
From: **PublicEngagement** <PublicEngagement@cfpb.gov>
Date: Tue, Feb 25, 2020 at 4:05 PM
Subject: INVITATION: March 10 Listening Session on Taskforce on Federal Consumer Financial Law
To: PublicEngagement <PublicEngagement@cfpb.gov>

Dear Colleague:

In January 2020, Director Kraninger announced the appointment of five members to serve on the Consumer Financial Protection Bureau's (Bureau) Taskforce on Federal Consumer Financial Law (Taskforce). The Taskforce is charged with examining ways to harmonize and modernize federal consumer financial laws and must submit a report to the Director with recommendations within a one-year period.

The Taskforce will be hosting a listening session with Bureau stakeholders to seek input on their work ahead. Please note that this listening session is closed press, off the record, not for attribution in social media, and open to invitees only. Please do not forward this invitation outside of your organization.

Date: Tuesday, March 10, 2020

Time: 3:00 - 5:00 p.m. Eastern

Location: CFPB Headquarters (1700 G St NW; Washington, DC 20552), 6th Floor Lunchroom

RSVP Deadline: Please RSVP to PublicEngagement@cfpb.gov by end of day Wednesday, March 4, 2020

Note: Upon receipt of your RSVP, a discussion outline with some suggested questions will be shared in advance to help you prepare for the listening session. Please be sure to arrive 15 minutes early and bring a photo ID for security.

For more information about the Taskforce, please visit:

https://www.consumerfinance.gov/about-us/taskforce-federal-consumer-financial-law/

Case 1:20-cv-11141-JCB Document 59-3 Filed 08/20/21 Page 20 of 26

Sincerely,

Office of Public Engagement and Community Liaison

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03.10.20 - Listening Session - Discussion Outline (2).pdf
173K

Taskforce on Federal Consumer Financial Law

Listing Session

I. Summary:

The Taskforce on Federal Consumer Financial Law (Taskforce) will examine the existing legal and regulatory environment facing consumers and financial services providers and report to Director Kraninger its recommendations for ways to improve and strengthen consumer financial laws and regulations. The Taskforce will produce new research and legal analysis of consumer financial laws in the United States, focusing specifically on harmonizing, modernizing, and updating the enumerated consumer credit laws—and their implementing regulations—and 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.

During today's discussion, the Taskforce is interested hearing the ideas and perspectives from key Bureau stakeholders on innovation, inclusion, competition, and modernizing the financial regulatory framework.

II. Discussion Questions:

Below are a few questions to help facilitate the discussion but should not limit the discussion to these questions.

- **On Innovation**: What trends in financial technology or FinTech are you seeing today. How could these trends impact the marketplace ten to fifteen years from now? What might be the impact for consumers as the market evolves?

- **On Inclusion**: Do you believe there are regulatory issues that should be addressed at the federal level to promote greater access to consumer financial products or services to underserved individuals and/or communities?

- **On Competition**: Do you believe that promoting competition, innovation, and efficient markets can enhance consumer choice in the marketplace? Does the Bureau have a role in promoting competition while at the same time furthering its mission of consumer protection? Are there examples of state, Federal, or foreign regulators that have successfully balanced these goals?

- **On Regulatory Modernization**: Do you believe there are gaps or conflicts in financial regulations; redundancies in financial regulations; or areas of financial regulation where additional clarity is needed. If so, what are they? And where are there opportunities for improved coordination between federal and state regulators, specifically from the perspective of regulated entities and consumers?

- **On Research**: Are there new areas of research that the Bureau should consider undertaking or expanding on in the consumer financial marketplace?

EXHIBIT C

June 4, 2020

Matt Cameron
Staff Director
Taskforce on Federal Consumer Financial Law
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
matt.cameron@cfpb.gov

Dear Mr. Cameron,

As you are aware, on October 11, 2019, the Consumer Financial Protection Bureau ("Bureau") announced its intent to establish the Taskforce on Federal Consumer Financial Law ("Taskforce"). On January 8, 2020, Director Kraninger signed the Taskforce's Charter, which states that the Taskforce will provide the Bureau with "recommendations for ways to improve and strengthen consumer financial laws and regulations" in the form of a final report to be submitted in January 2021.[1] As a "taskforce . . . established [and] utilized by [the Bureau] in the interest of obtaining advice or recommendations," the Taskforce is subject to the Federal Advisory Committee Act ("FACA").[2]

The Taskforce has thus far held at least one meeting on March 10, 2020. During the Bureau's semi-annual report to Congress, which occurred on the same day, Director Kraninger testified that the March 10 meeting was the "first" of such meetings and that the Taskforce was scheduled to meet with the Bureau's other advisory committees that same week.[3]

Advisory committees, like the Taskforce, must meet certain obligations imposed by FACA. Among other things, advisory committees must provide "timely notice" of their meetings to the public and allow interested persons to "attend, appear before, or file statements with [the] committee, subject to such reasonable rules or regulations as the Administrator [of General Services] may prescribe."[4] Advisory committees must also provide the public with all "records,

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[1] CFPB, *Charter of the Bureau's Taskforce on Federal Consumer Financial Law* (Jan. 8, 2020), https://files.consumerfinance.gov/f/documents/cfpb_taskforce-charter.pdf.
[2] 5 U.S.C. App. 2 § 3(2)(c).
[3] Consumer Financial Protection Bureau's Semi-Annual Report to Congress: Hearing Before the U.S. S. Comm. on Banking, Hous., and Urban Aff. (Mar. 10, 2020), https://www.banking.senate.gov/hearings/02/21/2020/the-consumer-financial-protection-bureaus-semi-annual-report-to-congress.
[4] 5 U.S.C. App. 2 § 10(a)(2), (3).

reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda [and] other documents . . . made available to or prepared for or by" the advisory committee.[5]

To date, however, the Taskforce has not provided public notice of, or allowed for public participation in, any of its meetings. Nor has it has made publicly available *any* of its records.[6]

Thus, among other issues with its formation and operation, it does not appear that the Taskforce is in compliance with its obligations to hold its meetings open to the public and to make all material "made available to or prepared for or by" the Taskforce "available for public inspection and copying."

For the reasons set forth above, the National Association of Consumer Advocates and Professor Kathleen Engel respectfully request that the Bureau and Taskforce make available all documents thus far prepared for or by the Taskforce. They also request that the Bureau and Taskforce provide notice of future Taskforce meetings, hold those meetings open to the public, and make Taskforce records publicly available in a timely manner moving forward.

Sincerely,

/s/ Kristen P. Miller

Kristen Miller
John Lewis
Democracy Forward Foundation

On behalf of

National Association of Consumer Advocates
Kathleen Engel

CC:

Mary McLeod
General Counsel
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
mary.mcleod@cfpb.gov

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[5] *Id.* § 10(b).
[6] *See generally* CFPB, *Taskforce on Federal Consumer Financial Law* (last visited June 3, 2020), https://www.consumerfinance.gov/about-us/taskforce-federal-consumer-financial-law/.

EXHIBIT D

Office of Law Faculty

120 Tremont Street
Boston, MA 02108

617.573.8000

www.law.suffolk.edu

June 1, 2020

Consumer Financial Protection Bureau
Request For Information To Assist the
Taskforce on Federal Consumer Financial Law
Docket No. CFPB-2020-0013
May 29, 2020

Dear Director Kraninger:

I am responding to your Request for Information to Assist the Taskforce on Federal Consumer Financial Law.

It is deeply concerning that you have elected to issue an RFI when the country is in the middle of a serious pandemic that has killed over 100,000 and sickened almost two million. There are parents who cannot feed their children. Hard-working people who love this country are being evicted from their homes. Forty million have lost their jobs.

This is a time when American families need the CFPB to protect them from fraud and to help craft solutions to the financial crisis for which they bear no responsibility. It is not the time for your Task Force of questionable legality to embark on an effort to dismantle consumer protection.

I helped coordinate legal scholars' responses to the CFPB's 2018 RFIs related to the Bureau's consumer protection activities. In lieu of asking these scholars to write responses to the current RFI, which duplicates the 2018 RFIs, I have provided the URL for the twelve responses legal academics made in 2018: https://lawdigitalcommons.bc.edu/cfpb-comments/.

Sincerely,

Kathleen C. Engel,
Research Professor of Law
Suffolk University Law School

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, et al., *Plaintiffs*, v. DAVID UEJIO, in his official capacity as Acting Director of the Consumer Financial Protection Bureau, et al., *Defendants*.	No. 1:20-cv-11141 (JCB)

DECLARATION OF EDMUND MIERZWINSKI

I, Edmund Mierzwinski, declare under penalty of perjury as prescribed in 28 U.S.C. § 1746:

1. The facts contained in this declaration are known personally to me and, if called as a witness, I could and would testify competently thereto under oath. I submit this sworn declaration in support of Plaintiffs' motion for summary judgment.

2. I am currently senior director for federal consumer programs for United States Public Interest Group ("U.S. PIRG") and U.S. PIRG Education Fund. I have served as a consumer advocate for U.S. PIRG since 1989, advocating on improvements to a variety of consumer financial laws and regulations which became subject to the Consumer Financial Protection Bureau's jurisdiction on July 21, 2011. Before the Bureau was created, I testified on the need for its establishment before Congress several times. I was also a founding member and a leader of the Americans for Financial Reform coalition created to support Wall Street reform and creation of the Bureau. I continue to lead U.S. PIRG's efforts to protect and grow the Bureau. I also continue to be active in Americans for Financial Reform, and have chaired its CFPB issues

group and its weekly member calls since 2010. I am also chair of the board of the now-incorporated Americans for Financial Reform.

I. U.S. PIRG's Mission

3. U.S. PIRG is a non-profit consumer advocacy organization with tens of thousands of members across the United States. To create a safer and heathier world, U.S. PIRG draws on a strong network of researchers, advocates, organizers, and students to improve government transparency and to stand up to powerful special interests on behalf of the public on a variety of issues. Among other things, U.S. PIRG has a long history of working to improve and reform consumer financial laws and regulations, including by defending the Bureau's core mission against efforts to unwind consumer protections.

4. U.S. PIRG accomplishes its objectives through several activities. First, U.S. PIRG offers free education and information to its members and to the general public regarding the Bureau's regulatory activities, as well as the ongoing need for improvements in consumer protections.

5. For example, the U.S. PIRG Education Fund has published extensive reports on a wide variety of problems faced by consumers in the financial services marketplace. Most recently, these include a series of reports examining trends in consumer complaints received by the Bureau since its inception in 2011. Recent reports include a report that analyzed virtual wallets and payment apps, a report that tracked skyrocketing complaint levels—led by credit reporting complaints—during the pandemic, a study of debt-collection complaints to expose the worst debt-collection companies, and a report informing the public about the need for continued

public access to the Bureau's Consumer Complaint Database.[1] U.S. PIRG also educates the public through blog posts,[2] emails to its members, webinars, and social media.[3]

6. Second, U.S. PIRG provides an independent voice for consumers, advocating for improved consumer finance laws and regulations in a number of ways. Specifically, U.S. PIRG has regularly testified before Congress,[4] submitted comments in response to CFPB Requests for Information and on CFPB proposed rulemakings,[5] organized comment campaigns by its

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[1] *Reports: the CFPB Gets Results for Consumers*, U.S. PIRG, https://uspirg.org/page/usp/reports-cfpb-gets-results-consumers (last updated June 2021).

[2] The website posts are also often cross-posted to Medium and LinkedIn and posted to Twitter and Facebook.

[3] *See, e.g.*, Ed Mierzwinski, *Virtual Wallet, Payment App Complaints Skyrocket*, U.S. PIRG (June 22, 2021), https://uspirg.org/blogs/eds-blog/usp/virtual-wallet-payment-app-complaints-skyrocket; *Should We Fire The Big 3 Credit Bureaus?*, U.S. PIRG (December 11, 2020), https://uspirg.org/blogs/blog/map/should-we-fire-big-3-credit-bureaus; *I'm Reading the CFPB's Mail About the Pandemic's Effect of Family Finances*, U.S. PIRG (May 31, 2020), https://uspirg.org/blogs/eds-blog/usp/i%E2%80%99m-reading-cfpb%E2%80%99s-mail-about-pandemic%E2%80%99s-effect-family-finances (blog post highlighting the CFPB's failure to address the increasing numbers of credit reporting and debt collection complaints submitted by consumers since March 1, 2020).

[4] *See, e.g.*, *House Holds Hearing on Legislative Proposals Relating to the CFPB*, Consumer Fin. Monitor (May 28, 2014), https://www.consumerfinancemonitor.com/2014/05/28/house-holds-hearing-on-legislative-proposal-relating-to-the-cfpb/ (noting U.S. PIRG's testimony).

[5] *See, e.g.*, Ed Mierzwinski, *Mulvaney Lobs One Last Softball To Industry Opponents of CFPB*, U.S. PIRG (Dec. 31, 2018), https://uspirg.org/blogs/eds-blog/usp/mulvaney-lobs-one-last-softball-industry-opponents-cfpb (describing an extensive series of Requests for Information that U.S. PIRG responded to); U.S. PIRG, *Comment on CFPB Request for Information: Bureau Public Reporting Practices of Consumer Complaint Information* (June 20, 2018), https://www.regulations.gov/document?D=CFPB-2018-0006-0188.

members,[6] provided expert testimony at CFPB-hosted events,[7] and met with the Bureau and other financial regulators to educate them on consumer issues.

7. With respect to the Bureau's Taskforce on Federal Consumer Financial Law (the "Taskforce"), U.S. PIRG recently issued a January 2021 release titled "Illegitimate CFPB Task "Farce" Issues Final Report Promoting Businesses Over Consumers," explaining why the Taskforce's report would weaken consumer protections.[8]

II. U.S. PIRG's Injuries from the Unlawful Creation and Operation of the Taskforce

8. Consistent with this long track record of vigorous advocacy, U.S. PIRG has a significant interest in the Taskforce's activities. The Taskforce was created to offer recommendations concerning potential changes to consumer finance laws and regulations—a subject core to U.S. PIRG's mission, and one with which U.S. PIRG has decades of expertise.

9. If the Taskforce had been operated transparently and in compliance with FACA, it would have been easier for U.S. PIRG to monitor the Taskforce's activities, attend its public meetings, participate in those meetings to advance consumer interests to the extent possible, and educate its members and clients on the Taskforce's work. But because of the opaque process through which the Taskforce was established, the secrecy with which it operated, and its lack of

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[6] *See, e.g.*, *Tell Acting Director Mulvaney: Keep the Payday Lending Rule*, U.S. PIRG https://uspirg.webaction.org/p/dia/action4/common/public/?action_KEY=24569&uid=[[supporter_KEY]]&utm_source=salsa&utm_medium=email&tag=email_blast:[[email_blast_KEY]]&utm_campaign=USP4-FCON:FINREFORM-0518&utm_content=EM5:00C:0GH-AAP (last visited Aug. 16, 2021).

[7] *See, e.g.*, Ed Mierzwinski, *CFPB Report Confirms 2009 Credit Card Act Works to Protect Consumers*, U.S. PIRG (Oct. 2, 2013), https://uspirg.org/news/usp/cfpb-report-confirms-2009-credit-card-act-works-protect-consumers (excerpting testimony provided by U.S. PIRG at a CFPB field hearing in Chicago on the Credit CARD Act).

[8] Ed Mierzwinski, *Statement: Illegitimate CFPB Task 'Farce' Issues Final Report Promoting Businesses Over Consumers*, U.S. PIRG (Jan. 6, 2021), https://uspirg.org/news/usp/statement-illegitimate-cfpb-task-'farce'-issues-final-report-promoting-businesses-over.

a balanced composition of members, the Taskforce has impeded, and is impeding, U.S. PIRG's mission-driven educational activities, thereby forcing it to divert resources in response.

10. To start, the secrecy of the Taskforce—including its failures to publish the requisite findings, consult with the GSA, and provide transparency into its records and meetings—prevents U.S. PIRG from fully understanding how the Taskforce reached its conclusions, assessing the Taskforce's ultimate recommendations, and communicating the nature and significance of the Taskforce's work. Conversely, had the Bureau been forced to comply with FACA's requirements, it might not have decided to create the Taskforce at all, thereby sparing U.S. PIRG the need to monitor and react to the Taskforce's work.

11. U.S. PIRG has nonetheless done the best it can to follow the Taskforce's activities and understand the consequences of its work. For example, U.S. PIRG attended the March 10, 2020 meeting to express its concerns that the Taskforce was operating in violation of FACA and to request that the Taskforce hold its meetings open to the public. That meeting, however, hardly provided a robust opportunity for public input, considering that it was held in person at the beginning of the COVID-19 pandemic. Similarly, the summer hearing scheduled by the Taskforce provided very little advance information about the Taskforce's intentions, making it difficult for consumer advocates to participate fully.

12. U.S. PIRG is statutorily entitled to information about the Taskforce and would seek to use it as part of U.S. PIRG's work and advocacy efforts, if made available. Specifically, because U.S. PIRG has been denied access to the information necessary to assess the Taskforce's activities and to determine how the Taskforce reached its ultimate recommendations, U.S. PIRG has been unable to keep the public fully abreast of the Taskforce's efforts to reshape consumer financial laws and regulations. If U.S. PIRG had access to that information, it would seek to

publicize the Taskforce's operations and decisions to its membership and others, as it has in the past with respect to the Bureau. Indeed, U.S. PIRG routinely reads and responds to the Bureau's work product, including statements, reports, data, and other publications. This information is no less important now that the Taskforce has concluded its operations; it is necessary to give the public a full picture of how the Taskforce conducted its business while it was in operation, and to provide context to the Taskforce's ultimate report.

13. The Taskforce's secrecy also prevented U.S. PIRG from participating in its work. U.S. PIRG had very little visibility into the Taskforce's operations, and could not participate in the Taskforce's meetings. Were the Taskforce operated transparently, it would have been easier for U.S. PIRG to try to persuade the Taskforce to adopt recommendations for needed consumer protections. Instead, the lack of access to information about the Taskforce's work hampered U.S. PIRG's ability to advocate before the Taskforce and made it more likely that recommendations favorable to industry will come to fruition, as they ultimately did. That lack of access is a stark contrast to the level of access the Bureau has generally provided to consumer advocates since it was created, including under the tenure of Directors Mulvaney and Kraninger.

14. U.S. PIRG submitted a comment in response to the Taskforce's March 27, 2020 Request for Information. *See* Response to Request for Information (attached as Exhibit A). Without access to the Taskforce records and meeting minutes, however, U.S. PIRG was in the dark with respect to the recommendations the Taskforce may have been considering. If U.S. PIRG had access to such information, it would have been able to tailor its comments to address any issues under the Taskforce's consideration.

15. These harms are exacerbated because the Taskforce did not include a member who represents the interests of consumer advocates or academics who believe that regulating

dangerous financial products is essential to protect consumers and ensure the stability of the economy, like a representative from U.S. PIRG. That view was necessarily not represented on the Taskforce, increasing the likelihood that the Taskforce would recommend policies contrary to U.S. PIRG's interests, as it ultimately did. Moreover, if consumer advocates had been able to participate more fully in the Taskforce's work, they would have been able to provide helpful information and input to the Taskforce and improve the ultimate quality of the Taskforce's work.

III. U.S. PIRG's Injuries from the Taskforce's Report.

16. Now that the Taskforce has completed its Report, its work will further inflict concrete, imminent harms on U.S. PIRG. Indeed, it is notable that, after being blocked from fully engaging in the Taskforce's activities, U.S. PIRG and members of the public were never given the opportunity to review or comment on a draft version of the Report.

17. U.S. PIRG objects to many of the Taskforce's recommendations. For example:

a. The Taskforce recommended that states eliminate usury limits on predatory lending or that Congress allow fintech lenders to ignore them and make loans with triple-digit interest rates even in states that have more stringent interest rate limits.[9] U.S. PIRG has long supported usury limits, and has issued numerous reports and advocated against high-cost predatory lending. Specifically, U.S. PIRG supported the recent enactment of SJR 15, signed by President Biden on June 30, to repeal a rule of the Office of the Comptroller of the Currency that would have allowed fintechs to "rent-a-bank" and evade state usury limits. U.S. PIRG also

[9] *Taskforce on Federal Consumer Financial Law Report, Volume II*, CFPB 93-94 (Jan. 2021), https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-2_2021-01.pdf.

supports a national usury ceiling through enactment of the bipartisan Veterans and Consumers Fair Credit Act, which would expand the Military Lending Act to cover all consumers with a 36% APR ceiling.

b. The Taskforce also recommended that Congress repeal provisions of the highly successful 2009 Credit CARD Act.[10] But that law protects students and other young adults from credit cards that they cannot afford to repay and protects consumers with poor credit from predatory lenders' "fee harvester" cards, which offer tiny credit lines and relatively large recurring fees. U.S. PIRG has fought against predatory lenders for years, and will need to spend further time and resources to rebut the report's recommendations.

c. Finally, the Report recommends that Congress cap allowable penalties against credit bureaus and banks that violate the Fair Credit Reporting Act,[11] despite record numbers of consumer complaints to the Bureau about credit reporting errors affecting their credit scores.

18. These flawed recommendations, and others, are likely to be particularly influential because of the fanfare with which the Bureau celebrated the Report's release. The Bureau described the Report as the successor to the much-lauded report of the National Commission on Consumer Finance (NCCF) nearly fifty years ago.[12] However, the NCCF was a

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[10] *Id.* at 76-77.

[11] *Id.* at 25-26.

[12] *Consumer Financial Protection Bureau's Taskforce on Federal Consumer Financial Law Releases Its Report*, CFPB (Jan. 5, 2021), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureaus-taskforce-on-federal-consumer-financial-law-releases-its-report/.

truly independent commission that featured a diversity of membership and robust disagreement, unlike the Taskforce. The Bureau's effort to confer upon the Taskforce the legitimacy and the seriousness of the NCCF therefore makes it even more likely that the Taskforce's recommendations will be used to support policies that would harm consumers, as well as U.S. PIRG.

19. Because the Taskforce's work is likely to be used to influence CFPB policy in a manner harmful to U.S. PIRG's interests, U.S. PIRG must expend further resources to monitor, and if necessary, advocate against harmful agency actions. Even if the Taskforce's recommendations are rejected by the Bureau, however, the financial services industry will use the Report to make arguments against the sort of protections for which U.S. PIRG advocates, further requiring U.S. PIRG to rebut them. As detailed above, many of the Report's recommendations represent key priorities for the financial services industry. Legislators at the state and federal level are also likely themselves to seize on the report's recommendations to inform their proposals for legislation.

20. U.S. PIRG will be required to continue to divert resources to first understand how and why the Taskforce reached its final conclusions, what the impact of those will be, and second, to adapt their educational and advocacy work to this new reality. And this work will be made significantly more difficult by the Taskforce's lack of transparency, which has impaired U.S. PIRG's ability to participate and follow the work of the Taskforce. Consumer advocates are already on the back foot compared to the financial services industry, which is able to retain countless numbers of lawyers to further their goal of dismantling consumer protections nationwide. The Taskforce's biased Report adds yet another weapon to their arsenal.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: August 19, 2021

Cheverly, Maryland

Edmund Mierzwinski

EXHIBIT A

June 1, 2020

Submitted to eRulemaking Portal
Director Kathleen L. Kraninger
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Request for Information from Taskforce on Federal Consumer Financial Law, Docket No. CFPB-2020-0013

Dear Director Kraninger,

The 27 undersigned consumer, community, and civil rights groups write in response to the request for information from Taskforce on Federal Consumer Financial Law (Taskforce).[1]

We view this Taskforce as illegitimate, one-sided, and highly inappropriate during a pandemic. The Taskforce consists solely of five outside conservative academics and industry lawyers, including those who have represented payday lenders or others in CFPB enforcement actions and consumer litigation, and has no consumer representatives.[2] We are aware of several well-qualified academics who have a track record of working to advance consumer protections who were rejected, some after hostile interrogations. The absence of anyone to hold the Taskforce accountable makes it especially concerning that it was created in apparent evasion of the Federal Advisory Committee Act, even though Congress explicitly mandated that the CFPB follow FACA.[3]

At a time when the Bureau and all of our organizations should be focused on protecting consumers – and our own organizations and staff – from the impacts of the COVID-19 economic and health crisis, the Bureau has asked the public to comment on broad, far-reaching questions that go to fundamental questions about how to protect consumers. The Bureau has also provided a short 60-day comment window, even though the Bureau recently extended a separate, much narrower, comment request on time-barred debt disclosures because "the pandemic makes it difficult to respond to the [proposed rule]

[1] CFPB, Request for Information: Assist the Taskforce on Federal Consumer Financial Law, 85 Fed.Reg.18214 (Apr. 1, 2014), https://www.regulations.gov/document?D=CFPB-2020-0013-0001.

[2] Evan Weinberger, Bloomberg Law, Financial Watchdog's Conflicted Task Force Earning Top Dollar (May 11, 2020) ("E. Weinberger, Conflicted Task Force"), https://news.bloomberglaw.com/banking-law/financial-watchdogs-conflicted-task-force-earning-top-dollar (noting that the Taskforce has no consumer representation and "consists of five outside conservative academics and industry lawyers who have represented payday lenders in CFPB enforcement actions and consumer litigation, as well as banks and other companies in regulatory matters.").

[3] Congress passed 12 U.S.C. § 5493(h) specifically mandating that CFPB advisory committees be subject to the Federal Advisory Committee Act (FACA) after Republicans on the House Financial Services Committee criticized the CFPB for not holding public meetings. *See* Trey Garrison, Hensarling calls on CFPB to open closed meetings (March 17, 2014), https://www.housingwire.com/articles/29332-hensarling-calls-on-cfpb-to-open-closed-meetings/;Trey Garrison, Bill would force full transparency at CFPB (March 19, 2014), https://www.housingwire.com/articles/29366-bill-would-open-cfpb-regulators-advisors-to-full-transparency/. Yet the CFPB Taskforce is styled as an intra-governmental committee not subject to FACA "a CFPB spokesperson confirmed." E. Weinberger, Conflicted Task Force, *supra.*

thoroughly and to determine when stakeholders will be able to do so."[4] Yet even a time extension would not make this an appropriate endeavor. The CFPB should focus on preventing harm to consumers during the pandemic, rather than on an effort to rethink its mission and promote ideas to undo consumer protections.

Many of the questions the Taskforce poses hint at deeply disturbing ideological preconceptions that focus more on undoing consumer protections than enhancing them. Contrary to the subtext of the Bureau's questions, education, disclosures and competition are not enough to protect consumers. Enforcement must be more than a backstop that is limited to only the most abusive practices. The amount of industry profits or skewed industry cost estimates should not be used to block rules that provide important protection to consumers, even if the consumer benefits are not always quantifiable. Access to credit does not justify preserving predatory lending or destructive practices that leave consumers worse off. States are important backstops against inaction at the federal level. Indeed, Congress already made decisions about how to balance the competing interests on many of the questions the Bureau has posed, such as the important role of states in enforcing CFPB rules.

Moreover, the CFPB already consumed thousands of hours of our organizations' time by posing many of these same questions in the 12 requests for information that Acting CFPB Director Mick Mulvaney put out in 2018 on a wide range of aspects of the Bureau's operations and the laws and regulations it oversees:

- Civil investigative demands;[5]
- Administrative adjudications;[6]
- Enforcement processes;[7]
- Supervision program;[8]
- External engagements;[9]

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[4] CFPB, Supplemental notice of proposed rulemaking; extension of comment period, 85 Fed. Reg. 30890, 30891 (May 21, 2020).

[5] *See, e.g.,* Americans for Financial Reform et al., https://www.nclc.org/images/pdf/rulemaking/coalition-cid-rfi-2018.pdf (April 26, 2018) (coalition overview comments); Americans for Financial Reform et al., https://www.nclc.org/images/pdf/rulemaking/cfpb-crl-cfa-rfi-2018.pdf (April 26, 2018) (longer comments); Public Citizen, https://www.regulations.gov/document?D=CFPB-2018-0001-0074 (April 25, 2018); Legal Academics, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Legal-Academic-on-Civil-Investigatory-Demands.pdf (April 25, 2018); Appleseed Network, https://www.regulations.gov/document?D=CFPB-2018-0001-0081 (April 26, 2018); National Association of Consumer Advocates, https://www.regulations.gov/document?D=CFPB-2018-0001-0073 (April 26, 2018).

[6] *See, e.g.,* Center for Responsible Lending et al, https://www.regulations.gov/document?D=CFPB-2018-0002-0027 (May 7, 2018); Financial Services Scholars, https://www.regulations.gov/document?D=CFPB-2018-0002-0024 (May 7, 2018)

[7] *See, e.g.,* Allied Progress, et al., https://www.nclc.org/images/pdf/rulemaking/coalition-34-cfpb-enforcement.pdf (May 14, 2018) (coalition overview comments); Americans for Financial Reform, et al., https://www.nclc.org/images/pdf/rulemaking/cfpb-enforcement-rfi-group.pdf (May 14, 2018) (longer comments).

[8] *See, e.g.,* National Consumer Law Center, et al., https://www.nclc.org/images/pdf/legislation/43-group-comments-cfpb-superv.pdf (May 21, 2018) (coalition overview comments); Americans for Financial Reform, et al., https://www.nclc.org/images/pdf/legislation/natl-group-detailed-comments-cfpb-superv.pdf (longer comments).

[9] *See, e.g.,* Allied Progress, et al., https://www.nclc.org/images/pdf/rulemaking/group-comm-rfi-external-engagements.pdf (May 29, 2018). CAB: Consumer Lending Subcommittee, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/CAB-Comment-on-External-Engagement.pdf (April 18, 2018); Consumers Union, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Consumer-Union-Comment-on-External-Engagement.pdf (May 25, 2018); Legal Academics, https://ourfinancialsecurity.org/wp-

- Consumer complaint information;[10]
- Rulemaking process;[11]
- Adopted regulations;[12]
- Inherited regulations;[13]

content/uploads/2018/06/Legal-Academic-on-External-Engagements.pdf (May 29, 2018); Appleseed, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Appleseed-Comment-on-External-Engagements.pdf (May 29, 2018); Consumer Action, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Consumer-Action-Comment-on-External-Engagements.pdf (May 29, 2018); National Association of Consumer Advocates, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/NACA-Comment-on-External-Engagements.pdf (May 29, 2018).

[10] *See, e.g.,* Alaska Public Interest Research Group, et al., https://www.nclc.org/images/pdf/regulatory_reform/cfpb-complaint-db-rfi-sign-on-2018.pdf (June 4, 2018); Veterans and Military Service Leaders, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Veterans-and-Military-Leaders-comment-on-RFI.pdf (June 4, 2018); National Consumers League, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/National-Consumers-Leagues-comments-on-RFI-regarding-public-reporting-practices.pdf (June 4, 2018); AARP, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/AARP-Comment-on-RFI-regarding-public-reporting-practices-and-consumer-complaint-infromation.pdf (June 4, 2018); Legal Academics, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Legal-Academic-on-Complaint-Reporting.pdf (June 4, 2018), The Indiana Assets & Opportunity Network, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/The-Indiana-Assests-Opportunity-Network-.pdf (June 4, 2018).

[11] *See, e.g.,* Americans for Financial Reform et al., https://www.nclc.org/images/pdf/rulemaking/letter-group-cfpb-rfi-2018.pdf (June 7, 2018) (coalition overview comments); https://www.nclc.org/images/pdf/rulemaking/comment-afr-crl-nclc-cfpb-rulemaking-rfi.pdf (June 7, 2018) (longer comments); Appleseed, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Appleseed-Comment-on-Rulemaking-processes.pdf (June 7, 2018); Woodstock Institute, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Woostock-Comment-on-Rulemaking-Processes.pdf (June 7, 2018); Consumers Union, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Consumers-Union-Comment-on-Rulemaking-Processes.pdf (June 7, 2018); Public Citizen, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Public-Citizen-Comment-on-Rulemaking-Processes.pdf (June 7, 2018), Legal Academics, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Legal-Academic-on-Rulemaking-Processes.pdf (June 7, 2018).

[12] *See, e.g.,* Americans for Financial Reform et al., https://www.nclc.org/images/pdf/rulemaking/comments-adopted-regulations-coalition-rfi-cfpb.pdf (June 19, 2018) (overarching comments); National Consumer Law Center et al., https://www.nclc.org/images/pdf/regulatory_reform/comments-cfpb-rfi-housing-rulemaking.pdf (June 19, 2018) (mortgages); National Consumer Law Center et al., https://www.nclc.org/images/pdf/rulemaking/comm-cfpb-rfi-adopted-rules-prepaid-cards.pdf (June 19, 2018) (prepaid accounts); National Consumer Law Center et al., https://www.nclc.org/images/pdf/rulemaking/comm-cfpb-rfi-adopted-rules-remittances.pdf (June 19, 2018) (remittances and credit cards); National Consumer Law Center et al., https://www.nclc.org/images/pdf/rulemaking/comm-cfpb-rfi-adopted-rules-debt-coll.pdf (June 19, 2018) (upcoming debt collection regulations); Legal Academics, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Legal-Academic-on-Adopted-Regulations.pdf (June 19, 2018).

[13] *See, e.g.,* Americans for Financial Reform, et al. https://www.nclc.org/images/pdf/rulemaking/cfpb-inherited-regs-all-regs.pdf (June 25, 2018) (overarching comments); National Consumer Law Center et al., https://www.nclc.org/images/pdf/rulemaking/cfpb-inherited-regs-and-non-lending.pdf (June 25, 2018) (Regulation E, overdraft fees and bank account issues); Americans for Financial Reform, et al, https://www.nclc.org/images/pdf/rulemaking/cfpb-inherited-regs-disparate-impact.pdf (June 25, 2018) (fair lending); National Consumer Law Center, et al. https://www.nclc.org/images/pdf/rulemaking/cfpb-inherited-regs-electronic-communications.pdf (June 25, 2018) (electronic communications); National Consumer Law Center, et al., https://www.nclc.org/images/pdf/rulemaking/cfpb-inherited-regs-pace.pdf (June 25, 2018) (Property Assessed Clean Energy (PACE) loans); National Consumer Law Center, et al.,

- Guidance materials;[14]
- Financial education programs[15]
- Consumer complaints and inquiries.[16]

We have attached over 500 pages of comments that our groups and others submitted – on top of hundreds of additional pages of comments on other Bureau rulemakings and information requests – in response to those 2018 requests for information. Yet the Bureau appears to have largely ignored the lengthy and detailed responses that our organizations submitted. We urge you to review those comments and others by the multitude of other organizations, academics, and members of the public who provided suggestions on things that the CFPB can do, within its jurisdiction, to improve the protection of consumers.

We do not intend to spend more time rebutting the implications in the Taskforce's questions; in many cases, even a single question – such as whether we can count on disclosures and consumer "choice" to protect people – has been the subject of extensive research, commentary and debate over decades. Nor do we intend to embark on a project to justify the entire federal statutory consumer protection framework. Our organizations have thin resources that have already been severely strained by the need to respond to the coronavirus crisis. While some organizations and members of the public may submit brief responses to Taskforce questions, the Taskforce should not view those responses – or the absence of rebuttals to those who support weakening consumer protections – as legitimizing this enterprise.

The Taskforce claims to be inspired by the National Commission on Consumer Finance created in 1968. But the CFPB's Taskforce has only five members, all with a track record of pushing for de-regulation – and, in some cases, conflicts of interests in the clients they have represented and may represent in the future.[17] In contrast, the National Commission on Consumer Finance was specifically authorized and funded by Congress; its work was bipartisan; a majority of its 12 members, supported by dozens of staff and student researchers, were members of Congress accountable to the public; its work spanned four years and drew on multiple public hearings with hours of testimony from leading consumer advocates as well as individual consumers and lenders.[18] Whereas the National Commission concerned itself with problems in the consumer financial market, the Taskforce asks about the burdens of compliance with consumer protections.

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https://www.nclc.org/images/pdf/rulemaking/cfpb-inherited-regs-tila-respa-mortg.pdf (June 25, 2018) (Regulation Z (TILA) and Regulation X (RESPA); National Consumer Law Center, et al., https://www.nclc.org/images/pdf/rulemaking/cfpb-inherited-regs-tila-respa-mortg.pdf (June 25, 2018) (FTC mortgage rules); Legal Academics, https://ourfinancialsecurity.org/wp-content/uploads/2018/06/Legal-Academic-on-Inherited-Regulations.pdf (June 25, 2018).

[14] *See, e.g.,* Alabama Appleseed Center for Law & Justice, et al., https://www.nclc.org/images/pdf/rulemaking/coalition-comm-guidance-cfpb-rfi.pdf (July 2, 2018).

[15] *See, e.g.,* Allied Progress, et al., https://www.nclc.org/images/pdf/regulatory_reform/Comments-CFPB-on-Financial-Education-RFIs.pdf (July 9, 2018).

[16] *See, e.g.,* Allied Progress, et al., https://www.nclc.org/images/pdf/rulemaking/grp-comments-rfi-cfpb-cons-inquiry-process.pdf (July 16, 2018); California Reinvestment Coalition (July 13, 2018), https://californiareinvestmentcoalitio.app.box.com/s/i31q75dqg7o4k12ualcxqz504zbxexph.

[17] E. Weinberger, Conflicted Task Force, *supra* (noting that the Taskforce has no consumer representation and "consists of five outside conservative academics and industry lawyers who have represented payday lenders in CFPB enforcement actions and consumer litigation, as well as banks and other companies in regulatory matters.").

[18] *See* National Commission on Consumer Finance, Consumer Credit in the United States (December 1972), https://babel.hathitrust.org/cgi/pt?id=uc1.31822024338451&view=1up&seq=1.

Even responsible industry players will be harmed by this diversion. Banks and other companies are overwhelmed trying to assist their customers seeking help due to the COVID-19 crisis. That's where their attention needs to be, not on this academic exercise, opining on the theoretical virtues of principle-based versus prescriptive regulation or on regulation versus deregulation. And if the CFPB actually implements any recommendations of the Taskforce, companies will face the prospect of see-sawing regulatory frameworks that, in light of the illegitimacy of this Taskforce, may well be undone by the next change of leadership.

The CFPB has received record-setting numbers of complaints by consumers crying out for help in dealing with abusive companies and the impacts of the coronavirus economic crisis. The CFPB should listen to and respond to those cries, not spend time proposing harmful changes to the consumer protection framework that protects the American public.

Yours very truly,

Allied Progress
Americans for Financial Reform Education Fund
Arkansans Against Abusive Payday Lending
California Reinvestment Coalition
Center for Digital Democracy
Center for Economic Integrity
Center for Responsible Lending
Consumer Action
Consumer Federation of America
Interfaith Center on Corporate Responsibility
Jacksonville Area Legal Aid, Inc.
Kentucky Equal Justice Center
Maryland Consumer Rights Coalition
Mississippi Center for Justice
NAACP
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low income clients)
National Fair Housing Alliance
National Housing Law Project
North Dakota Economic Security and Prosperity Alliance
Public Citizen
Public Counsel
Reinvestment Partners
Texas Appleseed
U.S. PIRG
Virginia Citizens Consumer Council
Virginia Poverty Law Center

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, et al., *Plaintiffs*, v. KATHLEEN L. KRANINGER, in her official capacity as Director of the Consumer Financial Protection Bureau, et al., *Defendants*.	No. 1:20-cv-11141 (JCB)

DECLARATION OF IRA RHEINGOLD

I, Ira Rheingold, declare under penalty of perjury as prescribed in 28 U.S.C. § 1746:

1. The facts contained in this declaration are known personally to me and, if called as a witness, I could and would testify competently thereto under oath. I submit this sworn declaration in support of Plaintiffs' motion for summary judgment.

2. In 2001, I became the Executive Director and General Counsel of the National Association of Consumer Advocates (NACA). I remain in that position today. From 1986, when I became a practicing attorney, through 2001, I worked as an attorney representing low-income families in legal aid offices and community organizations in Maryland and Illinois. From 1996 through 2001, I also managed a legal services project in Chicago, Illinois that specialized in the representation of low-income and senior citizen consumers who were victims of fraudulent and unfair financial practices. Throughout my legal career, I have therefore focused on representing the interests of low-income consumers, including with respect to consumer finance matters.

I. NACA's Mission

3. NACA is a non-profit national association of legal services and private attorneys, law professors, law students, and other consumer advocates dedicated to promoting justice for consumers and to curbing abusive and predatory business practices. NACA's mission is to promote justice for all consumers by maintaining a forum for communication, networking, and information sharing among consumer advocates across the country and by serving as a voice for its members and consumers in the ongoing struggle to curb unfair and abusive business practices that adversely affect consumers.

4. To accomplish its mission, NACA engages in a variety of activities. First, NACA educates and shares information with both its membership and its members' consumer clients on topics including consumer rights, common issues faced by consumers in the financial services marketplace, and consumer advocacy best practices.

5. NACA's educational activities take on many forms, including blog posts, newsletters, webinars, and in-person trainings. For example, NACA has previously educated its members and consumers on various proposed rulemakings by the Consumer Financial Protection Bureau, such as a 2020 supplemental proposed rulemaking on time-barred debt,[1] a 2019 proposed rulemaking on debt collection practices,[2] and a 2017 final rule on arbitration.[3]

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[1] *CFPB Disclosures on Time-Barred Debt: Will They Help or Hurt?*, NACA (Mar. 11, 2020), https://www.consumeradvocates.org/resources/training-library/cfpb-disclosures-time-barred-debt-will-they-help-or-hurt%C2%A0%C2%A0.

[2] *The CFPB's Proposed Debt Collection Rule: Overview and Potential Impact on FDCPA and Debt Defense Practice*, NACA (June 6, 2019), https://www.consumeradvocates.org/resources/training-library/cfpbs-proposed-debt-collection-rule-overview-and-potential-impact-fdcpa.

[3] Isaac Hoenig, NACA, *CFPB Rule Will Restore Consumers' Access to Court—and Possibly to Their Free Annual Credit Reports*, Medium (July 17, 2017), https://medium.com/@NACAdvocate/cfpb-rule-will-restore-consumers-access-to-court-and-possibly-to-their-free-annual-credit-ebd72ef24906.

6. Second, NACA promotes the interests of consumers by serving as a voice for consumers in the ongoing struggle to curb unfair and abusive practices by the financial services industry. NACA does this in a variety of ways, including by submitting comments in response to CFPB Requests for Information and on proposed rulemakings,[4] by organizing comment campaigns on rulemakings,[5] by meeting with and educating financial services regulators on consumer issues,[6] and by interacting with regulators in more formal capacities.

7. For example, various NACA members have served on the Bureau's Consumer Advisory Board, which advises the CFPB on the impacts of emerging practices and trends in the consumer financial services industry. Similarly, NACA sends at least one of its staff members to the Consumer Advisory Board's meetings, which are held open to the public in compliance with the Federal Advisory Committee Act (FACA).

II. NACA's Injuries from the Unlawful Creation and Operation of the Taskforce

8. Consistent with this long track record of vigorous advocacy, NACA has a significant interest in the Taskforce's activities. The Taskforce was created to offer recommendations concerning potential changes to consumer finance laws and regulations—a subject core to NACA's mission, and one with which NACA has decades of expertise.

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[4] *See, e.g.*, Letter from NACA to Kathleen Kraninger, Director, CFPB, *Comments from NACA Regarding the Proposed Rule on Debt Collection Practices* (Sept. 18, 2019), https://www.consumeradvocates.org/sites/default/files/NACA.CFPBdebtcollection.comments_0.pdf.

[5] *See, e.g.*, *Submit Your Comment: Tell CFPB That Its Debt Collection Rule Must Put Consumers First*, NACA, https://contentsharing.net/actions/email_web_version.cfm?recipient_id=3879074274&message_id=17153571&user_id=NACA1&group_id=0&jobid=44830596 (last visited August 9, 2021).

[6] *See, e.g.*, Letter From State Chairs, NACA, to Kathleen Kraninger, Director, CFPB (Apr. 30, 2020), https://www.consumeradvocates.org/sites/default/files/NACA_statechairs_CFPB04302020.pdf.

9. If the Taskforce had been operated transparently and in compliance with FACA, it would have been easier for NACA to monitor the Taskforce's activities, attend its public meetings, participate in those meetings to advance consumer interests to the extent possible, and educate its members and clients on the Taskforce's work. But because of the opaque process through which the Taskforce was established, the secrecy with which it was operated, and its lack of a balanced composition of members, the Taskforce has impeded, and is impeding, NACA's mission-driven educational activities, thereby forcing it to divert resources in response.

10. To start, the secrecy of the Taskforce—including its failures to publish the requisite findings, consult with the General Services Administration (GSA), and provide transparency into its records and meetings—prevents NACA from fully understanding how the Taskforce reached its conclusions, assessing the Taskforce's ultimate recommendations, and communicating the nature and significance of the Taskforce's work. Conversely, had the Bureau been forced to comply with FACA's requirements, it might not have decided to create the Taskforce at all, thereby sparing NACA the need to monitor and react to the Taskforce's work.

11. NACA was therefore left to its own devices to try to keep abreast of the Taskforce's activities and the consequences of its work, and has been required to expend time and organizational resources pursuing Taskforce records that should already be public. For example, NACA, joined by Professor Kathleen Engel, sent a letter to the Bureau requesting that the Bureau release the Taskforce's records and hold its meetings open to the public. Similarly, NACA attended the March 10, 2020 meeting to express its concerns that the Taskforce was operating in violation of FACA and to request that the Taskforce hold its meetings open to the public.

12. NACA is statutorily entitled to information about the Taskforce and would seek to use it as part of NACA's work and advocacy efforts, if made available. Specifically, because NACA has been denied access to the information necessary to determine how the Taskforce's work will shape the Bureau's policies under consumer financial protection laws, NACA is unable to know how best to create educational and training programs that will advance consumer interests, or advise others on the same, given the potentially shifting landscape. If NACA had access to that information, it would seek to publicize the Taskforce's operations and decisions to its membership and others, as they have in the past with respect to the Bureau. This information is no less important now that the Taskforce has concluded its operations; it is necessary to give the public a full picture of how the Taskforce conducted its business while it was in operation, and to provide context to the Taskforce's ultimate report.

13. The Taskforce's secrecy also prevented NACA from participating in its work. NACA had very little visibility into the Taskforce's operations, and could not participate in the Taskforce's meetings. Were the Taskforce operated transparently, it would have been easier for NACA to try to persuade the Taskforce to adopt recommendations for needed consumer protections. Instead, the lack of access to information about the Taskforce's work hampered NACA's ability to advocate before the Taskforce and made it more likely that recommendations favorable to industry will come to fruition, as they ultimately did.

14. NACA submitted a comment in response to the Taskforce's March 27, 2020 Request for Information. *See* Response to Request for Information (attached as Ex. A). Without access to the Taskforce records and meeting minutes, however, NACA was in the dark with respect to the recommendations the Taskforce may have been considering. If NACA had access

to such information, it would have been able to tailor its comments to address any issues under the Taskforce's consideration.

15. These harms are exacerbated because the Taskforce did not include a member who represents the interests of consumer advocates or academics who believe that regulating dangerous financial products is essential to protect consumers and ensure the stability of the economy, like a representative from NACA. That view was necessarily not represented on the Taskforce, increasing the likelihood that the Taskforce would recommend policies contrary to NACA's interests, as it ultimately did.

III. NACA's Injuries from the Taskforce's Report

16. Now that the Taskforce has completed its final Report, its work will further inflict concrete, imminent harms on NACA.

17. NACA objects to many of the Taskforce's recommendations. For example:

a. NACA is deeply concerned about the Report's recommendation to cap class action damages in certain federal consumer protection statutes, an idea we have long fought against as it would make it much harder for consumers to receive appropriate redress and to hold corporate wrongdoers appropriately accountable.[7]

b. Further, the Report's recommendation that the Bureau be authorized to "issue licenses to non-depository institutions that provide lending, money transmission, [and] payments services"[8] is an extremely controversial

[7] CFPB, *Taskforce on Federal Consumer Financial Law Report, Volume II* 25-26 (Jan. 2021), https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-2_2021-01.pdf.

[8] *Id.* at 83.

suggestion that could significantly alter the effectiveness and mission of the agency and require NACA to expend a serious amount and time and effort to effectively respond to this idea.

c. Finally, the Report's recommendation to "[e]stablish independent review of [the Bureau's] regulatory cost-benefit analyses by either staffing an office of cost-benefit analysis at the Bureau… or by voluntarily submitting its analyses to OIRA for review"[9] may sound neutral, but is a terrible idea that NACA and other consumer advocates have fought against time and again in other contexts. Such a process is simply a tool to keep government from creating regulations that meet the economic and non-economic needs of consumers and their communities.

18. The issuance of the report required NACA's staff to spend several days reading, reviewing, and analyzing the Report to determine its potential negative impact on consumers and on our consumer advocacy work.

19. Because the Taskforce's work is likely to influence Bureau policy in a manner harmful to NACA's interests, NACA must expend further resources to monitor, and if necessary, advocate against harmful agency actions. Even if the Taskforce's recommendations are rejected, NACA very much expects that the Report will be used by the financial services industry and their state and federal legislative allies to justify weakening consumer protections. If and when this happens, NACA will need to educate our state chapter leaders about the report's provenance, the nature of the Taskforce, and the illegitimacy of its findings. NACA will also need to provide our leaders with an analysis and appropriate talking points to rebut the Report.

[9] *Id.* at 34.

20. NACA will be required to continue to divert resources to first understand how and why the Taskforce reached its final conclusions, what the impact of those will be, and second, to adapt their educational and advocacy work to this new reality. This work will be made significantly more difficult by the Taskforce's lack of transparency, which has impaired NACA's ability to participate and follow the work of the Taskforce. Further, because of the secret nature of the Taskforce, NACA has no concrete understanding of how or why it made specific recommendations, including on class action caps, licensing of non-bank institutions and increased "cost-benefit analysis," making it that much more difficult for NACA to prepare rebuttals.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: August 19, 2021

Potomac, MD

Ira Rheingold

EXHIBIT A

June 1, 2020

Hon. Kathleen L. Kraninger
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Docket No. CFPB-2020-0013, Request for Information: Taskforce on Federal Consumer Financial Law

Dear Director Kraninger:

The National Association of Consumer Advocates (NACA), a nonprofit organization actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means, submits its response to the Consumer Financial Protection Bureau's (bureau or CFPB) Request for Information (RFI) related to "the Taskforce on Federal Consumer Financial Law (taskforce)," established to examine "the legal and regulatory environment facing consumers and providers of consumer financial products and services."[1]

NACA is a long time and ardent supporter of the CFPB's creation, its mission, and its efforts to make the financial marketplace fair for consumers and to ensure that financial products and services work better for ordinary people. Moreover, NACA's community, chiefly made up of advocates who represent consumers with financial disputes, including advocates who provide free, civil legal assistance to low-income people, regularly interacts with the bureau on behalf of and for the benefit of their consumer-clients.[2]

These comments will not respond directly to the substantive inquiries in the RFI. Instead, it sets forth the following reasons to support NACA's request for suspension of the activities of the CFPB's newly formed taskforce:

1) The taskforce's announcement, its creation, and subsequent activities have occurred at a rapid pace. The bureau first announced creation of the taskforce on October 11, 2019, and subsequently launched an application process for taskforce members. Three months later, in January 2020, the bureau published its selection of the taskforce's five members. On March 27, 2020, the taskforce posted its Request for Information to the public, two weeks after the country entered and remains in a virtual shut down and Americans were ordered to quarantine at home to combat the spread of the coronavirus. The RFI, which contemplates broad and wide-ranging issues related to consumer protection law and regulation, and invites responses to sweeping questions about possibly

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[1] Bureau of Consumer Financial Protection, *Request For Information To Assist the Taskforce on Federal Consumer Financial Law, Notice and request for information*, 85 Fed. Reg. 18214, April 1, 2020.
[2] Nat'l Assoc. of Consumer Advocates, *CFPB in Our Communities, Advocates Reflect on the Consumer Bureau's Role in Achieving Justice for Consumers*: *An Online Survey,* Feb. 2018, https://www.consumeradvocates.org/media/news/naca-survey-cfpb-fully-immersed-key-resource-and-partner-for-distressed-consumers.

comprehensive changes to the law, afforded a mere two-month period – until June 1 – in which interested stakeholders could respond to the taskforce's request.

2) Meanwhile, the extraordinary circumstances of the COVID-19 pandemic forced stakeholders to urgently re-prioritize their activities to respond to the crisis' impact on consumers and the consumer finance market, leaving little time to respond to the RFI. The bureau itself has received record numbers of COVID-19 related complaints and is charged with assisting tens of millions of Americans devastated by the financial impact of the crisis and overseeing regulated entities' responses to the unprecedented event.[3] Stakeholders submitted requests to the bureau urging it to extend the deadline and provide a more reasonable time period in which the public can respond to the taskforce inquiries. The bureau denied multiple requests from stakeholders and members of Congress[4] to extend the time period for public comments.

3) None of the members of the five-person taskforce has a history of supporting consumer protection. Instead, their past comments and associations all indicate affinity to financial industry priorities, including deregulation and restrictions on consumers' access to justice.

The members of this taskforce have described regulations in the financial services context, using terms, such as "paternalistic" and "onerous." Taskforce members who have spoken of regulation relating to consumer credit have called such regulations "restrictive." Taskforce members have decried additional regulations to protect consumers who were victims of subprime mortgages during the financial crisis. Taskforce members have opposed expansion of federal agency authority to include consumer redress in certain contexts when tackling fraud, and have opposed monetary penalties against wrongdoers in other contexts. When they have contemplated privacy of unfair and deceptive advertising, taskforce members have minimized the importance of safeguards for consumers and advocated for limited enforcement. And most notably, publications have often quoted taskforce members' unrelenting criticism of the CFPB and the Dodd-Frank Wall Street Reform and Consumer Protection Act, the 2010 financial reform law that created the agency.[5]

4) The bureau is already equipped to carry out the responsibilities granted to a taskforce. The bureau asserts that the taskforce is inspired by the National Commission on Consumer Finance a commission established in 1968 by the Consumer Credit Protection Act (CCPA), but the two are distinct. The CFPB's five-member taskforce was not created or authorized by Congress, but by the director. The 12-member 1968 commission was bipartisan with members representing different interests, while the CFPB's taskforce members hold similar views, including a clear lack of support for stronger consumer protection laws and regulation.

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[3] Sylvan Lane, *Coronavirus drives record number of complaints to consumer bureau,* THE HILL, May 1, 2020, https://thehill.com/policy/finance/495705-coronavirus-drives-record-number-of-complains-to-consumer-bureau

[4] Brown Urges CFPB Director Kraninger to Extend Taskforce Deadline, May 28, 2020, https://www.brown.senate.gov/newsroom/press/release/brown-cfpb-kraninger-extend-taskforce-deadline

[5] Rob Seal, *Subprime Mortgages: A Good Thing*?, UNIVERSITY OF VIRGINIA SCHOOL OF LAW NEWS AND MEDIA, April 3, 2008, https://www.law.virginia.edu/news/2008_spr/zywicki.htm; Todd Zywicki, *The Consumer Financial Protection Bureau and the Return of Paternalistic Command-and-Control Regulation*, THE FEDERALIST SOCIETY, Sept. 8, 2015; Todd J. Zywicki and Thomas A. Durkin, *Why Everything Elizabeth Warren Told You About Consumer Credit Is Wrong,* FORBES, Oct. 10, 2014, https://www.forbes.com/sites/realspin/2014/10/10/why-everything-elizabeth-warren-told-you-about-consumer-credit-is-wrong/#45b08fed301f; Bob Sullivan, *Five years after financial reform, new consumer agency still hasn't won over critics*, BOBSULLIVAN.NET, RED TAPE CHRONICLES, July 23, 2015, https://bobsullivan.net/gotchas/five-years-after-financial- reform-new-consumer-agency-still-hasnt-won-over-critics/; Testimony of J. Howard Beales III, Before the Subcomm. on Commerce, Manufacturing, and Trade Comm. on Energy and Commerce, House of Representatives on *The FTC at 100: Views from the Academic Experts*, Feb. 28, 2014, https://docs.house.gov/meetings/IF/IF17/20140228/101812/HHRG-113-IF17-Wstate-BealesH-20140228.pdf; L. Jean Noonan, *Love Triangle or Bermuda Triangle?,* HUDSON COOK INSIGHTS, February 2012; Kelley Drye, https://www.kelleydrye.com/Our-People/William-C-MacLeod ("In his work with trade associations and their members, he has resolutely fought onerous regulations…").

The establishment of the 1968 commission has more in common with the CFPB, than it does with the taskforce. The commission and the CFPB were both authorized by acts of Congress and granted clear mandates. The commission was created "to study and make recommendations to the Congress and to the President on the functions and structure of the consumer finance industry, as well as consumer credit transactions generally." The CFPB, established by the Dodd-Frank Act, is charged with overseeing and enforcing federal financial laws that specifically protect consumers.

5) The taskforce could benefit from the CFPB's legitimate and authoritative position, potentially using it to push harmful, deregulatory principles on the financial marketplace. As previously mentioned, the taskforce membership is entirely composed of individuals whose policy positions are in sync with the traditional positions of the financial industry. According to the RFI, the taskforce is "charged with (1) examining the existing legal and regulatory environment facing consumers and providers of consumer financial products and services; and (2) reporting its recommendations for ways to improve and strengthen Federal consumer financial laws, including recommendations for resolving conflicting requirements or inconsistencies, reducing unwarranted regulatory burdens in light of market or technological developments, improving consumer understanding of markets and products and services, and identifying gaps in knowledge that the Bureau should address through future research." Any report from this taskforce no matter how dangerous or risky its recommendations could retain an air of legitimacy, which will potentially harm the honest development of consumer law and regulation.

It is always a useful activity to examine existing law and inquire about unexplored ways to achieve the purpose that Congress has set up as CFPB goals in its oversight of the financial marketplace. Legal and regulatory examination can and has been pursued within the CFPB's current structure, through its ongoing research, rulemaking, and rule reviews. However, it is risky and inappropriate for CFPB leadership to deploy agency resources to hire outside parties who have a clear one-sided idealogy to achieve ends that may be contrary to the agency's mission and the statutory mandates of Title X of the Dodd-Frank Act.

The sudden creation of the CFPB taskforce, its predisposed policy positions, and its ill-timed and limited call for public comments during a national health and economic crisis, raises red flags about its legitimacy and purpose. Whether the taskforce was created in an effort to topple well-established consumer protection laws and regulation or not, the evidence so far in these early stages shows that the taskforce is not needed for the bureau to fulfill its statutory mandate. Accordingly, the bureau should suspend any further taskforce actions, and redirect its attention to critical work that it is already authorized to exercise in protection of American consumers and the safeguarding of the financial marketplace.

Sincerely,

Christine Hines
Legislative Director

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, et al., *Plaintiffs*, v. DAVID UEJIO, in his official capacity as Acting Director of the Consumer Financial Protection Bureau, et al., *Defendants*.	No. 1:20-cv-11141 (JCB)

DECLARATION OF JORDAN PILANT

I, Jordan Pilant, declare under penalty of perjury as prescribed in 28 U.S.C. § 1746:

1. The facts contained in this declaration are known personally to me and, if called as a witness, I could and would testify competently thereto under oath. I submit this sworn declaration in support of Plaintiffs' motion for summary judgment.

2. I am a Legal Assistant at Democracy Forward Foundation, which serves as counsel to Plaintiffs in the above captioned matter.

3. Attached as Exhibit A-1 is a true and correct copy of Dan Bucherer, *Durkin & Winslow Breakdown CFPB Taskforce Report*, Am. Fin. Servs. Ass'n (Jan. 29, 2021), https://afsaonline.org/2021/01/29/durkin-winslow-breakdown-cfpb-taskforce-report/.

4. Attached as Exhibit A-2 is a true and correct copy of Dan Bucherer, *AFSA Statement on CFPB Taskforce Report*, Am. Fin. Servs. Ass'n (Jan. 5, 2021), https://afsaonline.org/2021/01/05/afsa-statement-on-cfpb-taskforce-report/.

5. Attached as Exhibit A-3 is a true and correct copy of Paul Metrey, *CFPB Taskforce Promotes NADA Fair Credit Program*, Nat'l Auto. Dealers Ass'n (Jan. 6, 2021), https://blog.nada.org/2021/01/06/cfpb-promotes-adoption-of-nada-fair-credit-program/.

6. Attached as Exhibit A-4 is a true and correct copy of Eric J. Mogilnicki & Lucy Bartholomew, *Panel Spotlight: The CFPB's Taskforce on Federal Consumer Financial Law Report: How 100 Recommendations Could Change Consumer Financial Services*, Am. Bar Ass'n (April 14, 2021), https://www.americanbar.org/groups/business_law/publications/committee_newsletters/consumer/2021/202104/cfpb/.

7. Attached as Exhibit A-5 is a true and correct copy of *CFPB Taskforce on Federal Consumer Financial Law Report*, Cal. Fin. Serv. Providers Ass'n, https://www.cfsponline.com/cfpb-taskforce-on-federal-consumer-financial-law-report.html (last visited Aug. 13, 2021).

8. Attached as Exhibit A-6 is a true and correct copy of Steven T. Snyder, *Is it Time for the Resign of the E-Sign "Reasonable Demonstration?*," Bradley Arant Boult Cummings LLP (Apr. 8, 2021), https://www.bradley.com/insights/publications/2021/04/is-it-time-for-the-resign-of-the-esign-reasonable-demonstration.

9. Attached as Exhibit A-7 is a true and correct copy of Richard Gottlieb et al., *CFPB Taskforce Issues Report Setting High-Level Agenda and Priorities*, Fin. Servs. Blog of Manatt, Phelps & Phillips LLP (Jan. 13, 2021), https://www.manatt.com/insights/newsletters/financial-services-law/cfpb-taskforce-issues-report-setting-tentative-hig.

10. Attached as Exhibit A-8 is a true and correct copy of Troy Jenkins & Donald Readlinger, *CFPB Task Force Recommends Congress Authorize the CFPB to Issue Licenses to Non-Depository Institutions*, Troutman Pepper (Jan. 22, 2021), https://www.jdsupra.com/legalnews/cfpb-task-force-recommends-congress-8438315/.

11. Attached as Exhibit A-9 is a true and correct copy of Ben Bevilacqua et al., *New Illinois Predatory Loan Prevention Act Leaves Lenders and Borrowers with Uncertain Future*, Troutman Pepper (April 20, 2021), https://www.consumerfinancialserviceslawmonitor.com /2021/04/new-illinois-predatory-loan-prevention-act-leaves-lenders-and-borrowers-with-uncertain-future/.

12. Attached as Exhibit A-10 is a true and correct copy of an announcement of a webinar with Todd Zywicki, titled *The Consumer Financial Protection Bureau Taskforce Report*, Cato Institute (Feb. 4, 2021), https://www.cato.org/events/consumer-financial-protection-bureau-taskforce-report.

13. Attached as Exhibit A-11 is a true and correct copy of an announcement of a webinar with Jean Noonan, titled *CFPB Taskforce on Federal Consumer Financial Law Report - What Does it Mean for You?*, Hudson Cook, LLP (Jan. 28, 2021), https://www.hudsoncook.com /events/cfpb-taskforce-on-federal-consumer-financial-law-report/.

14. Attached as Exhibit A-12 is a true and correct copy of Dan Bucherer, *Knowledge & Networking On The Gold Coast*, Am. Fin. Servs. Ass’n (May 27, 2021), https://afsaonline.org/ 2021/05/27/knowledge-networking-on-the-gold-coast/.

15. Attached as Exhibit A-13 is a true and correct copy of *CFPB, The Roadmap Forward - Part Two*, Hudson Cook, LLP (Apr. 5, 2021), https://www.jdsupra.com/legalnews /cfpb-the-roadmap-forward-part-two-5467798/.

16. Attached as Exhibit A-14 is a true and correct copy of page *8 of Brief of Professional Background Screening Association as Amicus Curiae in Support of Petitioner, *Transunion LLC v. Ramirez*, No. 20-297, 2021 WL 533218 (S. Ct. Feb. 8, 2021).

17. Attached as Exhibit A-15 is a true and correct copy of pages *15-16 of Brief of Consumer Data Industry Association as Amicus Curiae in Support of Petitioner, *Transunion LLC v. Ramirez*, No. 20-297, 2021 WL 533213 (S. Ct. Feb. 8, 2021).

18. Attached as Exhibit A-16 is a true and correct copy of Thomas Miller Jr., *Written Testimony for Hearing Before the United States Senate Committee on Banking, Housing, and Urban Affairs* (July 29, 2021), https://www.banking.senate.gov/imo/media/doc/Miller%20Testimony%207-29-21.pdf.

19. Attached as Exhibit A-17 is a true and correct copy of William M. Himpler, *Written Testimony for Hearing Before the United States Senate Committee on Banking, Housing, and Urban Affairs* (July 29, 2021), https://www.banking.senate.gov/imo/media/doc/Himpler%20Testimony%207-29-21.pdf.

20. Attached as Exhibit A-18 is a true and correct copy of *Kraninger to Deliver Address on NS3 Closing Day*, RESPA News (Aug. 12, 2021), https://www.respanews.com/RN/ArticlesRN/Kraninger-to-deliver-address-on-NS3-closing-day-82983.aspx.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: August 20, 2021

Washington, D.C.

/s/ Jordan Pilant
Jordan Pilant

EXHIBIT A-1

DURKIN & WINSLOW BREAKDOWN CFPB TASKFORCE REPORT

In early January the Consumer Financial Protection Bureau released its Taskforce on Federal Consumer Financial Law Report. As AFSA noted, it's the first time the federal government has done a thorough report on the consumer financial services industry since the 1970s. The report is long; it's two volumes add up to about 900 pages and it's full of important research and information. We'll highlight sections of the report in this newsletter over the next few months. Also, stay tuned for an AFSA podcast with Tom Durkin, one of the taskforce members.

In this issue, we'll highlight what the report says about APR. In Chapter 4, the taskforce writes, "… the APR is a complete guide to the least expensive loan when the amount of the loan and its maturity are constant, but is only a partial guide otherwise. On small-dollar loans where size, rate, and maturity can all easily double or triple in size, more evaluation is necessary than just looking at the APR."

The report provides four examples illustrating this point.

With a $4,000 loan with an APR of 27% and a term of 36 months, the payment would be $163. 30 and the finance charge $1,878.83.

With a $2,000 loan with an APR of 27% and a term of 24 months, the payment would be $108.76 and the finance charge $610.25.

With a $1,000 loan with an APR of 72% and a term of 12 months, the payment would be $119.28 and the finance charge $431.32.

With a $500 loan with an APR of 95% and a term of 6 months, the payment would be 107.88 and the finance charge $147.31.

The taskforce concluded, "As the examples here show, sometimes the highest APR can even produce the least-cost loan in dollars. In these situations regulating by the unit price [which is a term the taskforce uses to describe APR] eliminates the lower cost alternative in dollars."

The taskforce also notes, "Not very surprisingly, users of small-dollar credit appear to find the dollar amount of the finance charge to be an important for understanding a loan's cost."

January 29th, 2021 by **Dan Bucherer**

EXHIBIT A-2

AFSA STATEMENT ON CFPB TASKFORCE REPORT

Earlier today (January 5, 2020), the Consumer Financial Protection Bureau's Taskforce on Federal Consumer Financial Law released a report with recommendations on how to improve consumer protection in the financial marketplace. You can access the volumes of the report ***here*** *and* ***here****.*

> The American Financial Services Association is pleased that the Consumer Financial Protection Bureau Taskforce on Federal Consumer Financial Law has issued its report. The members of the taskforce have spent the bulk of their careers studying consumer finance and we encourage policymakers to closely review their important work in this report.
>
> The prime focus of this Taskforce report is the effect of regulation on consumers and their access to credit. The last time such a comprehensive review was undertaken by the federal government was the 1970s. Clearly, much has changed – both for consumers as well as the diverse and evolving consumer credit industry – and our hope is that this report serves as a crucial resource for policymakers and our industry moving forward in shaping pro-consumer policies that expand consumer access to credit.
>
> AFSA thanks Director Kraninger for initiating and supporting the work of the Taskforce, as well as the members of the Taskforce for their dedicated service. AFSA looks forward to both reviewing the report in detail and highlighting key elements that affect our member companies, as well as the millions of consumers they serve.

January 5th, 2021 by **Dan Bucherer**

EXHIBIT A-3

By Paul Metrey, NADA Vice President of Regulatory Affairs

In January, 2020 Consumer Financial Protection Bureau (CFPB) Director Kathy Kraninger appointed a taskforce on Federal Consumer Financial Law to explore and make recommendations on ways to improve consumer protection in the marketplace.

After extensive deliberations, the taskforce yesterday unanimously issued a comprehensive report that sets forth a sweeping set of recommendations to protect consumers.

Key to the report are several recommendations that NADA and the National Association of Minority Automobile Dealers (NAMAD) jointly submitted to the taskforce last June. Most notably, the recommendations urge the CFPB and the Federal Reserve Board to establish that "good faith implementation of the [NADA/NAMAD/AIADA] Fair Credit Compliance Program or comparable program constitutes one method of preventing discrimination in pricing offered by retail sellers."

This recommendation, coupled with the American Bar Association's similar recommendation last August, represents the latest in a growing number of calls from diverse groups for government to recognize a dealer's faithful adoption of the optional NADA/NAMAD/AIADA Fair Credit Compliance Program as a safe harbor against pricing discrimination claims.

The NADA fair credit compliance framework, available to all dealers on a voluntary basis, enhances the ability of participating dealers to comply with our nation's fair credit laws while retaining the flexibility needed to meet the borrowing needs of the nation's car buyers. NADA encourages every franchised dealer and dealership group to discuss with their attorney the adoption and implementation of this Program.

EXHIBIT A-4

April 14, 2021

Panel Spotlight: The CFPB's Taskforce on Federal Consumer Financial Law Report: How 100 Recommendations Could Change Consumer Financial Services

Eric J. Mogilnicki and Lucy Bartholomew

Share:

The arrival of the Consumer Financial Protection Bureau's ("CFPB's" or "Bureau's") *Taskforce on Federal Consumer Financial Law Report* (the "Report") in January 2021[2] was muffled by the pandemic and the anticipated departure of CFPB Director Kathy Kraninger. However, the Report raised some important issues that should stay on the agenda even as the Bureau moves forward with new leadership.

At the outset, congratulations are due to the Taskforce members,[3] who engaged in a serious study of the increasingly complex web of laws and regulations that make up consumer financial services law. While practitioners are required to focus on the investigation or regulation before them, the Taskforce was able to look towards the horizon. The result was an eclectic set of recommendations that should not gather dust merely because the administration has changed hands.

The Taskforce also ably handled the additional burden of criticism focusing on the makeup of the Taskforce. To be sure, it would have been far better if the Taskforce had included a lawyer or academic who is routinely identified as a consumer advocate. However, the work and meetings of the American Bar Association's Consumer Financial Services Committee routinely demonstrate that lawyers who represent financial institutions can and do articulate and advance the interests of consumers on issues ranging from equal access, to the fairness of disclosures, to redress for consumer harm. The ideas in the Report should be judged by their merits, not their parentage.

The Report consists of two volumes: one providing a historical and economic overview of consumer finance, and the other providing recommendations to improve and strengthen the application of financial laws and regulations. Key recommendations include:

- Authorizing the Bureau to issue licenses to non-depository institutions that provide lending, money transmission, and payment services;[4]
- Expanding access to the payment system by unbanked and underbanked consumers, ensuring consistent treatment by applying the same rules to similar financial products;[5]
- Considering the benefits and costs of preempting state law where conflicts can impede the provision of valuable products and services, such as the regulation of FinTech companies engaged in money transmission;[6]
- Establishing independent review of the Bureau's regulatory cost-benefit analyses by staffing an office of cost-benefit analysis at the Bureau and or by submitting its analyses to the Office of Information and Regulatory Affairs for review;[7]
- Exercising caution (a recommendation for the Bureau, Congress, and other federal and state regulators) in restricting the use of nonfinancial alternative data;[8]
- Creating a unified regulatory regime for new and innovative technologies providing services similar to bank services;[9]
- Evaluating potential effects on inclusion as part of the Bureau's cost-benefit analyses;[10] and

- Facilitating creditor access to immigrants' credit information prior to their arrival in the United States in order to use that information in credit decisions.[11]

There are more than a hundred recommendations. This article will highlight three of the critical issues raised.

First, the Report reflects and advances the critical need to think further about how disclosures can best assist consumers in making decisions. Following in the footsteps of the seminal work, *More than You Wanted To Know: The Failure of Mandated Disclosure*, by Omri Ben-Shahar and Carl E. Schneider,[12] the Taskforce notes that more disclosure is not always better disclosure.[13] Instead, regulators and financial institutions alike sometimes add disclosures to already complicated documents without recognizing that the resulting proliferation of information can mean that consumers fail to read, much less absorb, critical information. In response, the Taskforce proposes a principles-based approach to provide more financial institutions with greater flexibility in what and how information is provided.[14] While that is one of several potential solutions that warrant further discussion, the Taskforce deserves credit for shining a spotlight on an issue that will only grow in importance as our mobile devices shrink the space available for disclosures.

Second, the Report offers a host of useful recommendations that relate to the fairness and transparency of the CFPB. For example, the Report endorses the use of a Civil Money Penalty ("CMP") matrix at the Bureau,[15] similar to the approach taken by the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency.[16] Such a matrix, which would describe the factors and weighting of those factors in the Bureau's CMP decisions, would give consumers, Congress, and regulated entities some visibility into how important enforcement decisions are made.[17] Likewise, the Taskforce proposes reforms to the Bureau's Supervisory Appeal process.[18] In both cases, the Report appropriately seeks to ensure that the Bureau is more accountable and transparent.

Third, and most importantly, the Report contributes to our national discussion of what the Taskforce calls "the moral imperative to promote greater financial inclusion."[19] To be sure, the Report could and should have done more to document the facts and implications of our noxious national history of discrimination in consumer financial services. Instead, the Report curiously claims that "[h]istorically the most notorious obstacle to financial inclusion was usury ceilings."[20] However, the Report does offer important and welcome recommendations on expanding the availability of consumer financial services. In particular, the Reports calls for the Bureau to devote new attention:

- to whether the Equal Credit Opportunity Act should be amended to include disability as a prohibited basis for discrimination;[21]
- to rural populations, which have the highest rate of credit invisibility;[22]
- to furthering access to financial services by recent immigrants by making their credit histories outside the U.S. more accessible;[23]
- to addressing the unique challenges, such as identity theft, faced by the incarcerated and formerly incarcerated. [24]

In proposing additional focus on these underserved populations, the Taskforce most clearly fulfills its mission of helping the CFPB, the financial services industry, and all who work on consumer financial issues, to look more deeply into the question of what needs to be done to improve the quality and availability of financial services to consumers.

1 Eric J. Mogilnicki is a partner at Covington & Burling LLP, and Lucy Bartholomew is an associate at Covington & Burling LLP.

2 *See* Consumer Fin. Protection Bur., *Taskforce on Federal Consumer Financial Law Report* (Volume II) (January 2021), *available* at https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-1_2021-01.pdf [hereinafter Taskforce Report Volume I]; Consumer Fin. Protection Bur., *Taskforce on Federal Consumer Financial Law Report*

(Volume II) (January 2021), *available* at https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-2_2021-01.pdf [hereafter Taskforce Report Volume II].

3 The report was prepared by Todd J. Zywicki, J. Howard Beales, Thomas A. Durkin, William C. MacLeod, and L. Jean Noonan.

4 *See* Taskforce Report Volume II, at 81–83.

5 *See* Taskforce Report Volume II, at 36–37.

6 *See* Taskforce Report Volume II, at 51–52.

7 *See* Taskforce Report Volume II, at 10–12.

8 *See* Taskforce Report Volume II, at 6–9.

9 *See* Taskforce Report Volume II, at 86–87.

10 *See* Taskforce Report Volume II, at 31–32, 34–35.

11 *See* Taskforce Report Volume II, at 75, 79.

12 Omri Ben-Shahar & Carl E. Schneider, *More Than You Wanted To Know: The Failure of Mandated Disclosure* (April 26, 2016).

13 *See* Taskforce Report Volume II, at 38–46.

14 *See* Taskforce Report Volume II, at 56–60.

15 *See id.*

16 See Office of the Comptroller of the Currency, Policies and Procedures Manual, PPM-5000-7 (REV), *Civil Money Penalties* (Feb. 26, 2016), *available* at https://www.occ.gov/news-issuances/bulletins/2016/bulletin-2016-5a.pdf; Federal Deposit Insurance Corporation, *Formal and Informal Enforcement Actions Manual: Restitution and Civil Money Penalties* (October 2020), *available* at https://www.fdic.gov/regulations/examinations/enforcement-actions/ch-09.pdf.

17 *See* Eric Mogilnicki, *CFPB Has Too Much Flexibility in Assessing Fines*, American Banker (April 16, 2019), available at *https://www.americanbanker.com/opinion/cfpb-has-too-much-flexibility-in-assessing-fines.*

18 *See* Taskforce Report Volume II, at 98, 99.

19 Taskforce Report Volume II, at 73.

20 *Id.*

21 *Id.* at 81-82.

22 *Id.* at 78.

23 *Id.* at 79.

24 *Id.* at 80.

Authors

EXHIBIT A-5

CFPB Taskforce on Federal Consumer Financial Law Report

The Consumer Financial Protection Bureau (CFPB) Taskforce on Federal Consumer Financial Law released its two-volume, 900+ page report in January 2021, including approximately 100 recommendations for the CFPB, Congress, and state and federal regulators on how to improve consumer protection in the financial marketplace.

Volume One of the report offers a historical and economic overview of consumer finance in the U.S.; summarizes the core elements of consumer financial protection and regulations – including those related to consumer protection, competition, innovation, and inclusion – and explores the modernization of the regulatory framework to empower consumers, drawing on empirical data and analyses. This includes a substantive and thoughtful examination of small-dollar lending. Volume Two is devoted to the taskforce's recommendations.

Overarching Principles The CFPB created the taskforce in October 2019 to examine ways to harmonize and modernize federal consumer financial laws. Below are the three overarching principles that inspired the drafting of the report (Volume 1, pg. 12):

– **Principle One**: "Consumer protection policy should be particularly attentive to the consequences for inclusion and access by previously under-served communities. Toward that end, facilitation of competition, innovation, and consumer choice in the marketplace should be an essential element of consumer protection policy."

– **Principle Two**: "Consumer financial protection policy should be focused on avoiding harms to consumers rather than attempting to specify how providers should design and market their products."

– **Principle Three**: "The existing regulatory framework needs modernization to enable it to adapt more nimbly to changes in technology and consumer preferences, respond to new opportunities and threats to consumers, and address future crises, such as the 2008 financial crisis that spawned calls for the Bureau's creation and the 2020 Coronavirus pandemic."

Importance of Access to Credit

"For millions of individuals, especially younger ones, their demand for additional credit is highest at the stage of their lives when their available supply of credit likely is lowest….As a result, many consumers are unable to meet all of their credit demand through mainstream financial providers, yet the demand remains." (Volume 1, pg. 177)

"Without credit, [low or moderate income borrowers] would have to make large sacrifices in current consumption to pay for large or unexpected current expenses, making the purchases personally very costly." (Volume 1, pg. 183)

"Availability of short term credit when needed can reduce consumers' vulnerability to unexpected expenses or short-term fluctuations in income when they already have debts involving the financing of household investment." (Volume 1, pg. 186)

Consequences of Interest Rate Caps

"On small-dollar loans where size, rate, and maturity can all easily double or triple in size, more evaluation is necessary

than just looking at the APR. As the examples here show, sometimes the highest APR can even produce the least-cost loan in dollars." (Volume 1, pg. 175)

"Consequently, attempts to change and subvert the basic economics of lending through price ceilings have existed throughout history. These attempts have enhanced the reality of credit rationing, the situation where credit supply falls short of demand at the market price." (Volume 1, pg. 180)

"Available empirical evidence indicates that although the price charged for small-dollar loans is high in APR terms, those prices appear to be the result of high operating costs including high loss rates per loan dollar on small-dollar lending." (Volume 1, pg. 194)

Key Recommendations

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

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

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

– The Bureau should continue to identify and focus on opportunities to coordinate regulatory efforts. The Bureau and prudential regulators should eliminate overlapping examination subject areas and reconcile inconsistent examination standards that unnecessarily expend multiple resources and can cause confusion.

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

– States should exercise caution when setting interest rate caps when implementing regulations on small dollar credit loans. States should carefully consider the negative impact on credit availability when considering further regulations. Preferably, interest rate caps should be eliminated entirely.

– States should reconsider, update, or eliminate usury laws as appropriate, recognizing the high costs they impose by denying valuable services to consumers who need them.

– The Bureau should conduct recently announced research on payday loan disclosures with an eye toward making sure

consumers understand what they are signing up for, rather than prescribing normative disclosures designed to influence consumer behavior

EXHIBIT A-6

Bradley
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Is it Time for the Resign of the E-Sign "Reasonable Demonstration?"

Banking Exchange

Authored Article
Published Date - 4/8/2021

The E-Sign Act was signed into law over two decades ago. To put that into context, smart phones as we know them did not exist—the most popular mobile phone in 2000 was a flip phone, the Nokia 3310, and the first iPhone would not debut for another seven years. The most popular website was AOL because many people were still using AOL as their internet service provider. Google was a fledgling company with its search engine just starting out among the mainstays like Excite and Lycos. Google's G-mail would not be released for another four years.

Needless to say, a tremendous amount has changed in those twenty years. Of most importance to this article is the use of electronic delivery for notices. At the time the E-Sign act was passed, the concept of receipt of notices in electronic form was a relatively novel concept. Personal business was not routinely conducted online by most people. Staples of today like online banking and online loan applications were almost unheard of at that time, with less than 1% of U.S. households banking online at the start of 2000.

While the benefits to moving to electronic notices were obvious and the E-Sign Act enabled progress on that front, it presented challenges in view of the lack of uniformity in how year-2000 consumers accessed electronic information. At that time there were a number of potential issues including the hardware and software the individual was using and—as hard as it is to believe now—issues with bandwidth and storage.

Unlike today, there was no guarantee that a consumer's device would be able to view and store notices regardless of the form used to deliver them. This meant that it was possible that a consumer could agree to receive electronic notices and then have no readily available way to view them. The E-Sign act addressed this problem in two ways.

The E-Sign Act explicitly requires that in obtaining consent to receive electronic notices that a consumer *"(i)prior to consenting, is provided with a statement of the hardware and software requirements for access to and retention of the electronic records. . . ."* 15 U.S.C. § 7001(c)(1)(C)(ii). Whether these disclosures are ever read notwithstanding, they are routinely made as required. While the burden here is relatively low, one must question whether this requirement has outlived its usefulness when it is unheard of for hardware or software to be limiting factors in viewing any standard notice document.

The more burdensome requirement and focus of this article is that the E-Sign Act requires consent to be given *"in a manner that* ***reasonably demonstrates that the consumer can access information in the electronic form that will be used*** *to*

provide the information that is the subject of the consent. . . ." 15 U.S.C. § 7001(c)(1)(C)(ii) (*emphasis added*).

Historically, the specifics of this *"reasonable demonstration"* were not set out explicitly but most interpreted it to require some affirmative action by the consumer to prove they had the capability to receive the information. An example of a common demonstration was to send the consumer a code using the same format that would be used to send notices and then have the consumer send back the code to confirm their ability to view it. While a demonstration like this adequately establishes the ability of the consumer to view the notices, it is a separate set of compliance actions that introduce complexity into a process while reducing efficiency.

At a minimum it can create delay and require handling the exceptions such as when someone requests electronic notices but fails to provide the code. The extra steps can also be burdensome to consumers particularly when there is no concern on their part of the ability to view standard notices.

The use of separate actions undertaken by the consumer to provide a reasonable demonstration has decreased substantially over time for several reasons. One is that the prevalence of more than capable hardware and standard software has made it highly unlikely a consumer will be unable to receive and view disclosures made in standard forms. This means the requirement is increasingly viewed as a potentially significant operational impediment with very limited, if any, consumer protection benefit. To the contrary, as noted above it could be seen as an unnecessary impediment to routine convenience of electronic notices.

A second reason for the reduction in the use of separate confirming actions is an increased employment of *"self-demonstrating consent."* This can be done when the same technology that will be used to provide notices is necessarily used in the process of obtaining consent for electronic notice. For example, if the E-Sign Act consent is obtained through an online sign-up for a product or service and the format used to present the application will also be used to provide the notices electronically, then the ability to provide the consent equates with a demonstration of being able to receive and view the notices to be sent subsequently.

It is now standard practice for financial institutions to direct consumers to authenticate to a site to review notices and disclosures due to information security and privacy concerns, making it more feasible to use this self-demonstrating form of consent of presenting notices in the same form as the original consent.

All of the factors discussed herein have reduced the focus on the reasonable demonstration element and greatly lessened the risk of enforcement around this specific element if an institution is using standard practices. For example, the OCC recently rescinded Advisory Letter 2004-11 *"Electronic Consumer Disclosures and Notices,"* which discussed the reasonable demonstration element and explicitly noted that the banks subject to the guidance should design an appropriate method to obtain consent in a manner that reasonably demonstrates the ability of the customer to receive the electronic notice and disclosures. Even more recently, the CFPB performed a comprehensive review of financial consumer law requirements, publishing its results in a report last month:

> *The substance of the **reasonable-demonstration requirement also may be antiquated**, better suited to a time when software programs had widely different capabilities and when there was a genuine question as to whether a given consumer could open a particular type of electronic file. Today, formats such as PDF are widely available, free to download, and compatible with most operating systems, reducing concerns that consumers will consent to receiving notices that they cannot open.*

Taskforce on Federal Consumer Financial Law Report, Vol. I, pg. 474 (January 2021) (*emphasis added).* In the second volume of the same report, the CFPB explicitly recommends removing these "antiquated" requirements;

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

Taskforce on Federal Consumer Financial Law Report, Vol. II, ¶ 48 (January 2021).

While not dispositive, the sum of these actions and logic behind it track the overall trend of a de-emphasis on the *"reasonable demonstration"* element. While businesses cannot ignore the explicit wording of the statute until it is formally amended, it is useful to consider the historical reasoning for these requirements and balance the pros and cons of requiring confirmation tasks that can be seen as impediments to efficient process. Until it is formally addressed, the use of *"self-demonstrating"* consent can be a good option where feasible.

Republished with permission. This article, "Is it Time for the Resign of the E-Sign 'Reasonable Demonstration?'," was originally published by *Banking Executive* on April 8, 2021.

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EXHIBIT A-7

CFPB Taskforce Issues Report Setting High-Level Agenda and Priorities

Financial Services Law

January 11, 2021

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The Consumer Financial Protection Bureau (CFPB) released its long-awaited two-volume Taskforce Report on Consumer Financial Law (the Report) as expected last week, following a yearlong effort. While advisory in nature, it is written with an intent to influence consumer finance law for decades to come. And while the Taskforce was criticized for lacking any consumer advocates among its members, the Report more often than not generally expands in detail on themes that could have fit just as well in Obama-era reports or views we expect to see expressed in a CFPB led by a Biden administration appointee. We explain in detail below.

What Happened

Although the Kathy Kraninger-led CFPB officially commissioned the effort in October 2019, the Report is inspired by a similar 1972 taskforce report and recommendation (the 1972 Report) following the 1968 enactment of the original federal Consumer Credit Protection Act. The 1972 Report was influential in guiding the enactment and/or material enhancement of many of the core consumer financial statutes still in robust use today (e.g., TILA, RESPA, FDCPA). The right to cure after acceleration, the prohibition on confessions of judgment, exemptions from garnishment and levy, the right to cancel within 72 hours after certain transactions, and the general regulatory apparatus for disclosures and complaint resolution all have roots in recommendations contained in the 1972 Report.

There was certainly controversy when the Taskforce was established in 2019. The 1972 taskforce was large, and included members from interest groups across the political spectrum. This time around, Kraninger appointed a far smaller group led by a libertarian, Professor Todd Zywicki of George Mason University, as Taskforce chair. Other Taskforce members were George Washington University professor

Howard Beales, retired Federal Reserve Board economist Thomas Durkin, William MacLeod, partner at the Kelley Drye law firm (and former Federal Trade Commission (FTC) bureau chief), and Hudson Cook partner Jean Noonan (who formerly headed the Farm Credit Administration). MacLeod joined after the initial formation. Notably absent? Representatives from consumer advocacy groups. In June 2020, consumer advocacy groups sued the CFPB on the grounds the Taskforce was illegally constituted.

Notwithstanding these legitimate criticisms, what the Taskforce generated appears to be a far more balanced set of recommendations than consumer advocates feared.

The new Report spans almost 900 pages across two volumes and offers dozens of recommendations for statutory and regulatory changes to existing law, including grand high-level thoughts and commentary regarding the next few decades of consumer financial law.

While Volume I provides useful background, and mini-treatises on various aspects of consumer financial law (including practical and interesting empirical analyses), time can be saved by skipping to the more digestible 100-page Volume II, which summarizes policy recommendations in organization of the CFPB, supervision, regulatory coordination, privacy, fintech, equal access to credit, electronic documents and other important areas of consumer financial services.

The Report presents the recommendations in alphabetical order without signaling priority.

Alternative Data—This topic concerns the use of algorithms, artificial intelligence, predictive coding and social media to estimate a consumer's creditworthiness as distinct from more traditional factors such as on-time payment history. The Report recommends that the CFPB implement regulatory changes under its rulemaking authority pursuant to the Fair Credit Reporting Act (FCRA) to bring such nontraditional credit evaluations under the same regulatory umbrella as furnishing traditional credit reports is today. The Report recommends maximum aggressiveness in deployment of these new technologies to modernize evaluation of creditworthiness tempered by traditional fair lending analyses to ensure that nontraditional factors are not used as proxies to discriminate against protected classes.

CFPB Organization—The Report criticizes past CFPB policy as inconsistent across the rulemaking, examination and enforcement divisions. Under current CFPB structure, each power of the CFPB (the Report calls them "tools") functions as its own department, thus creating institutional biases as to the tool—distracting, in the Report's view, from substance. The 2021 Report therefore recommends reorganizing the CFPB by market segment or industry so that, for example, all mortgage policy—whether it be look-forward rulemaking, everyday examination or enforcement—can be crafted with the

mortgage market as a whole in mind. The Report recommends a similar financial product-based structure to the bureaucracy as a reform to the current tool-based approach as to all other major products, such as auto finance, payments and small dollar lending.

Competition—At a high level, the Report calls generally for a greater research interest in evaluating the competitiveness of the consumer financial services marketplace and for enhanced monitoring and analytics on the impact the exercise of its powers has on the cost of credit. Those broad principles feed into more concrete recommendations, including study of "open banking" concepts prominent in the European Union and elsewhere internationally, streamlining state licensing regimes, and enabling the sale of all-inclusive mortgage closing packages under RESPA.

Credit Reporting—As the FTC's interpretations of the FCRA have not been formally adopted by the CFPB, the Taskforce calls upon the CFPB to review such interpretations and formally reissue rules it agrees with or at least provide informal guidance as to what FTC interpretations are viewed favorably by the CFPB. The Report also recommends that Congress revisit FCRA to make it more consistent with newer consumer financial statutes such as ECOA and the FDCPA by, among other things, adding a $500,000 or $1 million damages cap for class action suits.

Consumer Empowerment—This topic addresses consumer education and financial literacy. The Report recommends study of past educational outreach programs for efficacy, funding of more regional or local pilot programs with expansion only of those that demonstrably succeed, and a Presidential Youth Financial Fitness Program modeled on the Presidential Physical Fitness regime.

Cost-Benefit Culture—The Taskforce calls for an independent cost-benefit function within or outside of CFPB, retroactive cost-benefit analyses of prior rulemaking, comparison of historic results with expectations from cost-benefit analyses performed when the rule was enacted, and involving the cost-benefit personnel and mindset early in the rulemaking process rather than merely performing a post hoc analysis.

Deposit Accounts—The Taskforce calls for applying Regulation E (governing electronic funds transfers) to prepaid and debit cards, which sounds like an additional regulatory burden but is in fact intended to reduce the existing regulatory burden, which regulates such cards in a similar manner to credit cards even though no credit is generally extended in their use. The Report also calls for studying ways, potentially by amendment of Regulation CC, to bring parity to the time from deposit to fund availability as between mobile and traditional physical check deposits, and for elimination of the six-transactions-per-month limit on savings accounts.

Disclosures—The Taskforce notes that disclosures are "a more attractive approach to consumer protection than is substantive regulation" because they allow for broader consumer responsibility and choice. "On the other hand, information provision through disclosures should not be viewed as a solution for all possible market failures or as a uniform 'good' to promote multiple different ends." Based on these overarching considerations, the recommendations include a focus on reducing the cost of credit, keeping the disclosures pared down to the essentials the consumer needs to make an informed decision, and marshaling the CFPB's data-gathering and analytics to make reports to Congress on legislative changes that may be appropriate for disclosures. The Taskforce also suggests revising Regulation B to clarify that a "specific reason" for denial of credit is effectively given if the creditor provides the handful of "key factors" that guided the credit determination, and to provide that notification of adverse action is not required when a retail seller makes no underwriting decision and denies credit solely because no third party would purchase the debt (but placing the duty to send the notification on the third-party potential lender rather than the retailer).

Electronic Signatures—While the regulatory changes facilitating electronic signatures since the late 1990s have in many ways been a regulatory success story, the Taskforce nonetheless calls for Congress to "replace or revise substantially" the E-Sign Act. Though E-Sign is only 20 years old, passed in 2000, the Taskforce notes the rapid pace of technological change in recent years and argues that parts of E-Sign are already obsolete. The consumer's consent, for example, must be given again if the hardware or software used to facilitate the signature changes in even minor ways, a relic of a time when there were competing document formats and consumers did not have universal access to, for example, the PDF format. The Report still considers some disclosure to be an important component of a valid electronic signature, but finds that the majority of electronic signature disclosures are far too long to be read and appreciated by consumers and would disclose more if they were shorter and limited to essentials. The Report also calls for other modernizations and technical revisions to ensure that statutes and regulations consistently facilitate electronic signatures even where they refer to, for example, the need for a writing.

Emergency Authority—Especially in light of lessons learned from the COVID-19 pandemic, the Taskforce urges a wholesale review and revision of the CFPB's emergency plans, scope of its emergency authority, and method of keeping the public fully apprised of the same. More controversially, the Taskforce also calls for the CFPB to have the emergency power to pre-empt state regulations during an emergency; this seems unlikely to take hold. Some changes due to COVID-19 lessons learned are inevitable, however, and we expect to see CFPB movement on that topic in 2021.

Enforcement—"No company can expect to comply perfectly with every aspect of the myriad and often complex rules that govern consumer transactions," the Report notes. "[C]onsumer harm, both frequency and severity, should be the lodestar of every enforcement decision." Accordingly, the Taskforce calls for the CFPB to issue a public statement as to the meaning of consumer harm and how such harm translates into civil penalties and restitution formulas, harmonize and reconcile the disparate enforcement powers of the CFPB and FTC, issue an "Enforcement Highlights" modeled on the popular "Supervisory Highlights" publication, avoid rulemaking by settlement terms, and publicly disclose metrics on how it calculates penalty and restitution amounts in relation to consumer harm.

Equal Access to Credit—The Taskforce opines that the regulatory framework introduced in the 1960s and 1970s was designed in part to prohibit the then-common practice of discrimination against women and minorities in credit. Since then, while the Report acknowledges discrimination has not "entirely disappeared," it argues that "the advances are hard to deny." It therefore calls for revision of various equal protection laws under a fresh look based on present market conditions. Without elaborating on what an appropriate policy would be, the Report nonetheless asks for some statement of CFPB's view of disparate impact "and how it will apply that standard" in the future. Finally, the Report suggests participation in voluntary government fair lending programs should provide some form of limited safe harbor from fair lending violations.

Financial Inclusion—The Report expresses myriad high-level calls urging financial inclusion for consumers presently excluded from financial markets. The Report suggests the CFPB consider, for example, lowering the age of permissible consumers for credit card marketing from 21 to 18 to allow young people to build credit, and removing subprime interest rate caps for persons without a credit history.

Fintech Regulation—The reasons are complex, but the ultimate action item called for is simple: The CFPB should assist Congress in creating a CFPB licensing framework for nonbank fintechs to provide lending, money transmission and payment services, or grant the OCC the power to supervise such fintechs like banks. This Recommendation finds broad support across the political spectrum, but the devil will be in the details, which still appear to be murky and will undoubtedly be informed by a variety of stakeholders in or likely to be impacted by this emerging industry.

Privacy—The Taskforce calls for prioritizing avoidance of consumer harm, arguing that "[t]here is little evidence that the current, disclosure-based approach to privacy regulation has worked." It also calls for national privacy standards, citing the significant costs and, it argues, few benefits of inconsistent state regulation in this area.

Regulatory Coordination—The Taskforce urges further dialogue between the CFPB, other federal regulators and their state counterparts to reduce inconsistencies and inefficiencies where appropriate.

Regulatory Principles—Citing general concepts of good regulatory hygiene, the Taskforce solicits "plain language," elimination of obsolete regulations, reserving major guidance to notice-and-comment rulemaking, and further expansion of the No-Action Letter and Sandbox programs.

Small Dollar Credit—Here the Taskforce uncontroversially calls for greater speed in mobile and other electronic payments, especially where small dollar amounts are involved, but also more controversially suggests fewer interest rate caps to facilitate a wider availability of financial products. We do not see the latter as likely to become conventional wisdom, but we do expect to see CFPB efforts to bring regulatory parity to mobile platforms with a particular emphasis on the small transaction space.

Supervision—According to the Taskforce, an institution's exam rating "should be based not on the quality of its [Compliance Management System, or CMS] but on the outcome of its CMS." Relatedly, it says, appeal rights should be expanded and should involve representatives from each regional office.

Why It Matters

Consumer advocacy groups will doubtless attack the Report because of the makeup of the Taskforce itself. But whether or not the Taskforce Report achieves anything like its lofty intentions, this is a significant report for industry and consumers alike. Readers should not assume that because the Report was released during the last days of the Trump administration it will be entirely discarded as a political document per se. The CFPB is an independent agency, and much of the Report reads as though it was written by career regulators, albeit with some exceptions as discussed above. Its influence will certainly extend into the Biden years, especially in those areas consistent with pre-Trump CFPB priorities.

While none of the above is binding or an enactment of a new rule or statute, if past experience is any indication of future results, the Taskforce Report is likely to be at least influential in forming the CFPB's upcoming agenda and areas of focus. The more technical or mundane the recommendation, the more likely it will be strongly considered in years to come. And the more controversial items are likely to be championed as hobbyhorses of political lobbies on both sides for years to come, thus perhaps not forecasting the future regulatory structure but giving definition to the Overton Window and foreshadowing discussions likely to occur in the years ahead.

EXHIBIT A-8

January 22, 2021

CFPB Task Force Recommends Congress Authorize the CFPB to Issue Licenses to Non-Depository Institutions

Troy Jenkins, Donald Readlinger

Troutman Pepper

Contact

Earlier this month, a task force created by the Consumer Financial Protection Bureau (CFPB) Director Kathy Kraninger sent Congress a report with over 100 recommendations to strengthen consumer finance law, including fintech regulations. One recommendation is to authorize the CFPB to "issue licenses to non-depository institutions that provide lending, money transmission, or payments services," or, alternatively, for Congress to clarify that the Office of the Comptroller of Currency has the authority to issue charters to those same non-depository institutions.

By centralizing the power to issue licenses to non-depository institutions, fintech companies will benefit from the removal of state regulatory hurdles and burdens, while consumers will benefit from increased competition. As the report noted, "innovation advances competition and in turn benefits consumers through greater choice, improved products, lower prices, and greater financial inclusion."

Even though these task force recommendations are not binding, it will be interesting to see how the Biden administration reacts to these recommendat[illegible] Rohit Chopra to lead the CFPB.

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EXHIBIT A-9

Consumer Financial Services **LAW MONITOR**

Monitoring the financial services industry to help companies navigate through regulatory compliance, enforcement, and litigation issues

New Illinois Predatory Loan Prevention Act Leaves Lenders and Borrowers with Uncertain Future

By **Ben Bevilacqua**, **James Stevens** & **Rick Eckman** on April 20, 2021

Illinois Governor J.B. Pritzker signed the Illinois Predatory Loan Prevention Act (Act) into immediate effect on March 23. The Act imposes sweeping changes and contains broad language, leaving the state's lenders and borrowers with an uncertain future.

To understand this new law, one must recognize that Illinois based the Act on the federal government's Military Lending Act (MLA), which instituted an annual percentage cap for loans to service members by stating that "lenders could not charge active duty, guard, or reserve service members or their dependents an interest

rate higher than 36%."[1] The MLA contains an inclusive definition for calculating the APR, typically referred as the MAPR. In addition to the interest rate, the MAPR includes fees, and charges imposed for credit insurance, debt cancellation and suspension, and other credit-related ancillary products sold in connection with the transaction. If voluntary, these are excluded from the calculation of the normal APR.

These measures intended to provide extra protection from lending practices that "could pose risks for service members and their families," while also promoting military readiness and service member retention.[2] In other words, Congress attempted to set the MAPR to meet the needs of a particular group. With respect to loan products under the MLA, lenders cannot charge interest and fees that, when added together, would exceed a 36% MAPR.[3]

The Act applies the MLA's lending rules to all Illinois consumers and drastically increases the scope beyond that of the MLA. The Act reads, "[t]he purpose of this Act is to protect consumers from predatory loans consistent with federal law and the Military Lending Act which protects active duty members of the military. This Act shall be construed as a consumer protection law for all purposes. This Act shall be liberally construed to effectuate its purpose."[4] Far from limiting the application to a group with specific gaps in its coverage, the Illinois law grants the MARP to all consumers and applies the Act to all transaction types. In doing so, the Act has left lenders scrambling to create agreements that not only benefit their borrowers, but also keep the transactions profitable.

The Act also applies to all parties that offer or make loans in the state of Illinois, and it attempts to make banks and other regulated financial service providers involved in partnership arrangements with nonbanks the true lender under Illinois law.[5] While "[b]anks, savings banks, saving and loan associations, credit unions, and insurance companies … are exempt from the provisions of this Act,"[6] the Act is drafted to make it very difficult for nonbank lenders to partner with these institutions by including "true lender" concepts to these arrangements, including the nebulous predominant economic interest theory. The Act does this by stating that it applies to nonbank partners or regulations institution if "(1) the person or entity holds, acquires, or maintains, directly or indirectly, the predominant economic interest in the loan; or (2) the person or entity markets, brokers, arranges, or facilitates the loan and holds the

right, requirement, or first right of refusal to purchase loans, receivables, or interests in the loans; or (3) the totality of the circumstances indicate that the person or entity is the lender and the transaction is structured to evade the requirements of this Act. Circumstances that weigh in favor of a person or entity being a lender include, without limitation, where the person or entity: (i) indemnifies, insures, or protects an exempt person or entity for any costs or risks related to the loan; (ii) predominantly designs, controls, or operates the loan program; or (iii) purports to act as an agent, service provider, or in another capacity for an exempt entity while acting directly as a lender in other states."

Unable to justify the risks related to a loan or navigate the limitless true lender language, many lenders will refuse to make loans to Illinois consumers because of the Act, either directly or through a bank partnership model since it is not possible for them to make profitable loans at the restricted rate. Future studies will no doubt document how the Act negatively affects Illinois consumers.**[7]**

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[1] 10 U.S.C.A. § 987 (West).

[2] FDIC Consumer Compliance Examination Manual – September 2016.

[3] FDIC Consumer Compliance Examination Manual – September 2016, page 1. "For covered transactions, the MILA and the implementing regulation limit the amount a creditor may charge, including interest, fees, and charges imposed for credit insurance, debt cancellation and suspension, and other credit-related ancillary products sold in connection with the transaction. The total charge, as expressed through an annualized rate referred to as the Military Annual Percentage Rate may not exceed 36%. The MAPR includes charges that are not included in the finance charge or the annual percentage rate disclosed under the Truth in Lending Act."

[4] Igla, Amendment to Senate Bill 1792, page 54.

[5] Igla, Amendment to Senate Bill 1792, page 55.

[6] "…organized, chartered, or holding a certificate of authority to do business under the laws of this State or any other state or under the laws of the United States…" *Id.*

[7] Lisa Chen and Gregory Elliehausen (2020). "The Cost Structure of Consumer Finance Companies and Its Implications for Interest Rates: Evidence from the Federal Reserve Board's 2015 Survey of Finance Companies," FEDS Notes. Taskforce on Federal Consumer Financial Law Report, Volume II, page 94. Online Lenders Alliance letter of disapproval to Governor Pritzker.

Consumer Financial Services **LAW MONITOR**

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EXHIBIT A-10

Case 1:20-cv-11141-JCB Document 59-6 Filed 08/20/21 Page 38 of 85

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The Consumer Financial Protection Bureau Taskforce Report

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FEATURING

Featuring **Todd Zywicki** (@ToddZywicki), Senior Fellow, Cato Institute; **George Selgin**(@GeorgeSelgin), Director, Center for Monetary and Financial Alternatives, Cato Institute.

The long-awaited report of the Consumer Financial Protection Bureau (CFPB) taskforce is now out. Come hear Todd Zywicki, who chaired the taskforce, discuss its findings and recommendations and give his perspective on how CFPB policies are likely to change under the Biden administration with George Selgin, director of the Center for Monetary and Financial Alternatives.

EXHIBIT A-11

Events

January 28, 2021

CFPB Taskforce on Federal Consumer Financial Law Report - What Does it Mean for You?

L. Jean Noonan and Lucy E. Morris

Request a replay of this webinar

The Consumer Financial Protection Bureau (CFPB) Taskforce on Federal Consumer Financial Law released its highly anticipated Report on January 5, 2021. The Taskforce's year-long effort resulted in two volumes encompassing nearly 100 recommendations on how to improve consumer protection in the financial marketplace.

Hudson Cook Partner Lucy Morris, chair of the Firm's Government Investigations, Examinations and Enforcement practice group and former CFPB deputy enforcement director, discuss the Report with Hudson Cook colleague Jean Noonan, one of the five members of the Taskforce. Jean shares her insider's perspective on interpreting the Report to help you focus on the recommendations that could have the most impact on your business in 2021 and beyond. In addition, Lucy and Jean provide insights into how the arrival of the new Biden administration could affect the Report's impact and the future of consumer protection.

Registration required. All fields with an asterisk (*) are required. Registration is offered and available primarily to clients of Hudson Cook, LLP. Please register using a company email address. Attempted registrations using personal email (Gmail, Yahoo, etc.) or academic email addresses (.edu) will not be accepted or will be canceled prior to the date of the webinar, as will registrations from lawyers at law firms, government employees or reporters. After registering and being approved, registrants will receive a confirmation email containing instructions on how to log in to the webinar.

EXHIBIT A-12

KNOWLEDGE & NETWORKING ON THE GOLD COAST

AFSA was pleased to welcome members and friends back for the 2021 Independents Conference & Expo. Virtual attendees were also able to tune in to the conference session via the AFSA LIVE(stream) sponsored by REPAY.

A variety of boards, committees and working groups met in-person for the first time in over a year to discuss key issues and help shape the future of the consumer credit industry.

Attendees enjoyed receptions and dinners with their friends and colleagues.

Bill Himpler, Tom Hudgins & R.E. Everette spoke about current issues facing the industry (ABS).

Charlie Gasparino addressed his view on the current economic and political environment (PayNearMe).

Danielle Fagre Arlowe & Celia Winslow with AFSA discussed the current state of play in Washington and around the nation (Wells Fargo Preferred Capital).

RSM discussed it's annual financial performance survey, including current trends for growth, leverage and profitability (RSM).

George Shand with FICO shared his expertise on what to expect from the new consumer (StateNational).

Steve Rochlin, CEO with Impact ROI spoke about the importance of ESG in our economy and Carissa Robb with Constant.ai and Frank Veneziano with Roberston, Anshutz, et. al., addressed recent debt collection rules (Experian).

Experts addressed Coping with Rapid Changes (Bradley) and Building the New Normal (Experian) as we emerge from the Pandmic.

L. Jean Noonan discussed the recent Consumer Financial Protection Bureau Consumer Finance Taskforce Report (DOt818).

Anthony Robles inspired attendees with his story about being an NCAA wrestling champion and ESPN Jimmy V Award winner (GoldPoint).

Did you miss out on the conference this time around? Stay tuned to the **AFSA blog** and AFSA events page for more information on the association's upcoming conferences.

May 27th, 2021 by **Dan Bucherer**

EXHIBIT A-13

April 5, 2021

CFPB, The Roadmap Forward - Part Two

L. Jean Noonan

Hudson Cook, LLP

+ Follow Contact

Part Two: Consumer & Dealer Relationship

This article was originally published in the April 2021 issue of *Texas Dealer* magazine, pages 12-15.

This article is the second of an exclusive three-part series interview with Jean Noonan, member of the CFPB Taskforce on Federal Consumer Law. Part One can be found in the March issue of Texas Dealer.

We resume our conversation where we left off on Part One with a question citing the Taskforce report with recommendations for improved financial protection program.

***Texas Dealer*:** The report states:

"DOOR-TO-DOOR SALES In any contract for the sale of goods entered into outside the creditor's place of business and payable in more than four installments, the debtor should be able to cancel the transaction at any time prior to midnight of the third business day following the sale."

As you are aware, door-to-door sales statutes were originally designed to combat shady door-to-door salesmen and car dealers were excluded from the federal door-to-door rescission law. Today consumers are reaching out over the internet to car dealers from numerous states with various state statutes modeled after the federal law and some of those laws are less clear as to applicability. Would you care to share your view on the
internet sales?

Jean Noonan: This rule is a good example of a legal p
uncertainty in an area it was never intended to regulate re
created long before internet sales existed. If I order fro
three-day cooling-off period, and it is hard to imagine l
Similarly, if I am buying a car completely online, the do
simply because I do not walk into a dealership. Orderin an
increasingly popular way to buy a car. We should not h

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Case 1:20-cv-11141-JCB Document 59-6 Filed 08/20/21 Page 46 of 85

ability to buy a car in a way they may prefer and find convenient, especially because our consumer protection laws have not kept up with the times.

***Texas Dealer*:** The report says, "credit that they [consumers] can afford but cannot obtain is harmful to consumers." I think a great example of this is how many of our members have stepped in to fill a void left by traditional lenders by offering a Buy Here Pay Here option for vehicle financing. However, some claim consumers are harmed by the high rates required to overcome the risk involved with financing these consumers. Should our dealers be worried about how this balance will be struck under the new administration?

Jean Noonan: Yes. I think they should be worried; I am concerned that the new administration will not appreciate the importance of making credit available for vehicle purchases to consumers who do not qualify for prime credit. As a consumer advocate, I know there is a definite role for BHPH auto finance. I understand some of the concerns that regulators have with the BHPH industry. Rates are high and sometimes the price of the car is high because the cost of doing business is high. Defaults are higher than we would all like, but even if there is a 25 percent default rate, that means 75 percent pay for the car and have transportation for their family. Consumers know the cost of the auto and the financing, and they are in the best position to decide if the cost of ownership is worth it. Do they live in a place where they can get to work by walking or is there a bus? Can their children get to school? Those are very personal decisions, and many people lack a good alternative to car ownership. Many people live in areas that lack good public transportation. I hate to see anyone lose a good job because no one will finance a car for them. If they are shopping at a BHPH dealer, it is because they know they do not qualify for traditional financing. I would like to see every BHPH dealership report to the credit agencies so customers can get the benefit of their good payment history and can graduate to more affordable credit.

***Texas Dealer*:** Will you elaborate on BHPH dealers reporting to the credit agency?

Jean Noonan: Reportingpayment history has pros and cons for both consumers and BHPH dealers. On balance, I believe that credit reporting is a
opportunity to build a good repayment record, and dea
assessing credit risk. The main caution I offer BHPH d
reporting must be accurate. There is not a private right
for errors in furnishing information to credit agencies
regulators can enforce the FCRA's accuracy provisions,
system is very important.

***Texas Dealer*:** Some of our members only offer one i
concern that regulators will accuse them of discriminat

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consumers by making these lower rate loans unavailable to them. Do you think this is a valid concern?

Jean Noonan: I think offering multiple rates can be done with very little legal risk if done correctly. I have some subprime clients who have one rate, and it is usually the state cap. If they wanted to offer a risk-based rate with several levels, there are ways to do it quite safely. For example, dealers can set very objective criteria for pricing at each risk level, so consumers at highest risk pay highest rate. A problem can arise if the consumer's interest rate is not set objectively. If customers who appear to be of equal risk are paying different rates, this can create an inference of illegal discrimination. Unless the dealer can explain that pricing difference convincingly, the dealer is at risk. But there are legitimate business reasons customers of equal risk may pay different rates. A dealer must be able to explain these differences in each case. Perhaps the customer who received a lower rate walked in with a credit rate quote from another dealer or creditor. Maybe the dealer was especially motivated to sell particular cars and decided to offer a lower rate to get those cars off the lot. Those would be legitimate nondiscriminatory reasons. Unless the dealer makes a note of that, however, it will be hard to defend those decisions.

Our Taskforce recommended that Regulation B be amended to provide a safe harbor if a dealer uses the NADA/NAMAD/AIADA fair credit compliance program. I have advised many of my dealers to use that program, because, even without a safe harbor, a dealer is able to defend its pricing decision, if challenged. The NADA Fair Credit compliance program sets up a strong and defensible way to explain discretionary differences. Many independent dealers do not want to offer just one rate because it prices them out of the market for the best qualified customers. A lot of us believe a used car is one of the best bargains out there, so I think that every independent dealer should strongly consider risk-based pricing.

***Texas Dealer*:** One of the recommendations made was "the CFPB reorganize its internal structure and operations to instantiate a 'markets-based' organizational structure, as opposed to a 'tools-based' operational structure." In such an appro y the same group as other used car dealers?

Jean Noonan: Probably so. A benefit of a markets-ba Bureau staff the opportunity to understand the auto fir h BHPH dealers differ from other independent dealers. I me at the FTC you cannot be a good regulator unless yo CFPB staff members want to be good at understanding t promotes that knowledge much more than specializing rulemaking. Certainly, in private practice you cannot b the business.

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From the perspective of good policy, we want to eliminate laws that interfere with a valuable business practice without a significant benefit to consumers. That is a law that is actually hurting consumers, so there is no upside with this law in this context. That's what I think we really need to look at. More laws do not necessarily mean better consumer protection. We need smarter laws. A smart law is one that focuses on preventing consumer harm, while still supporting financial inclusion and innovation.

***Texas Dealer*:** A portion of the report focuses on the need for financial education. Do you worry that the attorneys, government workers, and people providing input about that education will not understand the needs of our customers?

Jean Noonan: That is an excellent question and, yes, I do worry about this. Trade associations like TIADA have a very important role in making sure regulators understand the informational needs of consumers. Often education and disclosure rules are designed by people who are not using those services and are shaped by what they want consumers to know rather than by what those consumers themselves want to know. For example, if I am a government lawyer writing a disclosure pertaining to a product or service I don't like, I might emphasize everything I can to discourage a consumer from choosing it, even if that product might be a reasonable choice for a particular consumer. Consumers need objective facts so they can make an informed choice. A BHPH purchase can be a very rational decision for consumers. Reducing the risk or cost of default by using a starter interrupter or GPS can also benefit consumers by making credit more available or at a better price. We should focus our education on helping consumers shop intelligently and not have disclosures meant to discourage.

I do believe that we should have disclosures and education that meet consumers where they are and tell consumers what they really want to know. I do think the Truth in Lending Act does a pretty good job of that. Whether a consumer is shopping for a used BMW at a high end independent or buying whatever she can afford at a BHPH dealer, there are some basic things she needs to know, such as the cost of credit, both in dollars and interest rate, what the monthly payment is, and the number and frequency of the paym ll me is whether I could have gotten a better deal elsewhe ut consumers must decide for themselves whether to inve

***Texas Dealer*:** The report states "Currently, the use o s is allowed, but liability concerns over its use, methods reporting laws have slowed its widespread adoption by nt the use of alternative data, what would be some of your

Editor's Note: Next month read part three of this series more.

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EXHIBIT A-14

No. 20- 297

IN THE
Supreme Court of the United States

TRANSUNION LLC,

Petitioner,

v.

SERGIO L. RAMIREZ,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PROFESSIONAL BACKGROUND SCREENING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether either Article III or Federal Rule of Civil Procedure 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS. ii

TABLE OF CITED AUTHORITIES iv

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT. 3

ARGUMENT. 4

I. The Ninth Circuit's Decision Has The Potential To Further Open The Floodgates To A Multitude Of New "No Injury" Class Actions . . . 4

A. The FCRA's Statutory Framework Demonstrates The Importance Of Rigorous Enforcement of Article III's "Concrete Harm" Requirement 6

B. The Ninth Circuit's Decision Likely Will Result In A Marked Increase In FCRA Class Actions Where Plaintiffs and Class Members Suffered No Concrete Harm. 10

Page

1. Section 1681b(b)(1) of the FCRA, Which Requires A Certification or Promise By an Employer to a Consumer Reporting Agency........11

2. Section 1681e(b) of the FCRA, Which Requires a CRA to Have Reasonable Procedures to Assure Maximum Possible Accuracy 14

II. The Ninth Circuit's Decision Exacerbates Ongoing And Unjustified Harm For Businesses and Consumers 18

CONCLUSION 23

always understand they were consenting to a background check, and in most cases were hired by the defendant following the background check. Their "informational" harm is a mere fiction that has resulted in millions of settlement and litigation dollars being spent by employers. As discussed *infra* Part I.B.1-2, this is just one of the many no-injury claims under the FCRA.

Second, the FCRA imposes potentially staggering damages where liability is found. Where a willful violation is established, the FCRA mandates an award of statutory damages between $100 and $1,000 per consumer. 15 U.S.C. § 1681n(a)(1)(A). The FCRA also mandates an award of attorney's fees and costs to a prevailing plaintiff's counsel. 15 U.S.C. § 1681n(a)(3). In addition, uncapped punitive damages also are available, and as this appeal illustrates, can be awarded even to class members who did not suffer an actual injury. 15 U.S.C. § 1681n(a)(2). Moreover, unlike other consumer protection statutes, the FCRA does not impose any limits on monetary awards in class actions.[2] Tellingly, just last month, the Consumer Financial Protection Bureau (CFPB) Taskforce recommended that "Congress should adopt class action damages limitations for FCRA, to bring the FCRA civil liability provision in line with similar laws." *Taskforce on Federal Consumer Financial Law Report, Volume II* at 26 (Jan. 2021).[3]

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2. In contrast, the Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(B), the Equal Credit Opportunity Act, 15 U.S.C. § 1691e(b), the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(2)(B) and other similar statutes limit class action awards to the lesser of $500,000 or $1 million, or 1 percent of the defendant's net worth.

3. Available at https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-2_2021-01.pdf (all websites last accessed February 5, 2021).

EXHIBIT A-15

No. 20-297

In the Supreme Court of the United States

TRANSUNION LLC, PETITIONER,
v.
SERGIO L. RAMIREZ, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF CONSUMER DATA INDUSTRY ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether either Article III or Federal Rule Of Civil Procedure 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered.

2. Whether a punitive damages award that is multiple times greater than an already substantial class-wide award of statutory damages, and is orders of magnitude larger than any actual proven injury, violates due process.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
INTEREST OF *AMICUS CURIAE* 1
INTRODUCTION AND SUMMARY OF ARGUMENT 3
ARGUMENT 5
I. This Court Should Review Whether Article III And Rule 23 Permit A Plaintiff To Be Part Of An FCRA Class When No Creditor Requested Or Saw The Claimed Error In The Plaintiff's Credit File.................5
A. The Ninth Circuit's Decision Creates Conflicts With Other Courts Of Appeals ...6
B. Congress Recognized The Harm That Consumer Reporting Agencies Impose By *Disseminating* Inaccurate Information To Creditors, Not From Having A Line Of Inaccurate Information Merely Sitting In A Consumer File..9
C. The Ninth Circuit's Holding Needlessly Harms Consumer Reporting Agencies, And Thus Consumers And The Economy As A Whole 13
II. The Ninth Circuit's Punitive Damages Holding Magnifies The Threat That Its Article III And Rule 23 Holdings Pose To Consumer Reporting Agencies.......................18
CONCLUSION..21

Congress Under Section 319 Of The Fair And Accurate Credit Transactions Act Of 2003 at 5 (Dec. 2012) (hereinafter "*FTC 2012 Report*")[8]; Staten & Cate, *supra*, at 11–12. This tailoring reduces the lender's bad-debt costs, which, in turn, allows the lender to extend more credit to more credit-worthy consumers and generate more income. Staten & Cate, *supra*, at 12.

Consumers "across the age and income spectrum" benefit from a robust consumer reporting industry. *Id.* at ii–iii; World Bank Group, *General Principles For Credit Reporting* at 1 (Sept. 2011).[9] Consumer reports lower the cost of borrowing, since the lenders who reduce costs of bad debt by relying on these reports can lend to consumers at lower interest rates. *See* Staten & Cate, *supra*, at ii–iii, vii; World Bank Group, *supra*, at 1. Consumer reports facilitate faster credit decisions, allowing consumers to quickly receive necessary financing, even for "very significant decisions" like "a college education," "a new home," or an "automobile." Staten & Cate, *supra*, at vi; *FTC 2015 Report* at 1–2; World Bank Group, *supra*, at 1. This all means that "[c]redit reporting . . . increas[es] the number of Americans who qualify for credit,"

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[8] Available at https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf.

[9] Available at http://documents.worldbank.org/curated/en/662161468147557554/General-principles-for-credit-reporting.

Staten & Cate, *supra*, at iv—most prominently, "borrowers that have traditionally faced systemic bias" from mainstream credit institutions, Turner, *supra*, at 9; Staten & Cate, *supra*, at 8–9.

These crucial benefits of the consumer reporting industry depend in a large degree on keeping the costs of this "elaborate" consumer reporting "mechanism" reasonable. § 1681(a)(2); *see* Staten & Cate, *supra*, at vii; World Bank Group, *supra*, at 4, 20, 30. Yet, that important goal is difficult, since "most aspects" of this system "are vulnerable to the high costs of . . . regulation." Staten & Cate, *supra*, at vii; *see id.* at 28.

2. Consumer reporting agencies hold a substantial volume of information about consumers. Even just the three largest consumer reporting agencies maintain detailed credit files for "approximately *200 million consumers*." *FTC 2015 Report* at 1–2 (emphasis added). Those files contain information from over 1.3 billion "trade lines," or individual credit accounts owned by consumers. *CFPB 2012 Report* at 3. Consumer reporting agencies receive this consumer information from roughly 10,000 data furnishers. *Id.* These furnishers themselves are often creditors, including "[m]ost large banks and finance companies," *FTC 2012 Report* at 3, as well as "collections agencies" and other institutions, *FTC 2015 Report* at 1–2. These entities all voluntarily provide this information to the consumer reporting agencies "because they benefit from the credit

EXHIBIT A-16

Hearing Before the United States Senate Committee on Banking, Housing, and Urban Affairs

July 29, 2021

Thomas (Tom) Miller, Jr.
Professor of Finance and *Jack R. Lee Chair*
in Financial Institutions and Consumer Finance
Mississippi State University
Senior Research Fellow, Consumer's Research

Chairman Brown, Ranking Member Toomey, and members of the committee—thank you for the opportunity to appear before you today. The matter you are considering remains tremendously important for consumers, especially low-income consumers with poor credit.

The focus of my testimony is on the effects of a binding interest rate cap. An interest rate cap is binding when loan revenue is less than the cost of loan production. Thus, a binding interest rate cap reduces the supply of loans because lenders will not make unprofitable loans.

An interest rate cap does not make loans less expensive; it makes loans less available.

Because banks do not make small-dollar loans to borrowers with damaged credit, the marketplace has responded with an array of nonbank supplied loan products. Americans who rely on nonbank supplied small dollar loans are not wealthy, and many live from uncertain paycheck to uncertain paycheck. Today, few Americans have a rainy-day fund big enough to cover unexpected bills, paycheck shortfalls, or unplanned work absences.[1]

Imposing a 36 percent interest rate cap eliminates the supply of much needed nonbank supplied small-dollar credit products. The demand for credit, however, will remain. If there is still demand for loans to cover some basic living expenses, but no available loans, what will low-income consumers do? How are they better off with fewer credit options? Imposing an interest rate cap is disastrous for the very people it allegedly protects.

Consider the tough, life-impacting decisions affected consumers must make if they do not have access to credit. Perhaps people will delay going to the doctor, or the dentist, or a taking a pet to the veterinarian. Perhaps they will not buy needed school supplies for their children. Perhaps they will defer necessary maintenance or repairs to their home or vehicle, or they might bounce a check to pay a utility bill. They might even seek the much-needed credit from illegal loan sharks. Proponents for interest rate caps deny these stark realities.

Small-dollar nonbank lenders not only provide consumers with much needed loans, but access to small-dollar nonbank supplied loan products also helps consumers build their credit rating. In

[1] *See* Annamaria Lusardi, Daniel Schneider and Peter Tufano. Financially fragile households: Evidence and Implications, Brookings Papers on Economic Activity, Spring 2011.

this way, small-dollar credit products help sub-prime consumers build access to credit from banks. Every ladder has a lowest rung. If the lowest rung is missing, how can consumers climb the credit-building ladder?

Access to credit is a fundamental freedom for all Americans. Consumers are smart—they know their own financial situation better than others know it. Americans should be able to make their own decisions about credit matters.

The decision to take out a small-dollar loan does not involve a lot of money. The average payday loan, for example, is for about $375.[2] Consumers routinely make decisions involving much higher dollar amounts. Consumers rent or buy a house. They buy vehicles. They take out student loans. We trust consumers to make these decisions.

It is incumbent on anyone legislating, regulating, advocating, or studying any small dollar credit product to understand and know the differences among these products. Small-dollar nonbank supplied credit products differ significantly in terms of loan size, length of loan, costs, repayment method, and their underwriting processes. As a result, they are not perfect substitutes for one another. I present an overview of four of these products in my freely available 2019 Primer, "How Do Small- Dollar, Nonbank Loans Work?"[3]

The CFPB's 2021 Report of the Taskforce on Federal Consumer Financial Law contains detailed discussions of the demand for consumer credit (Chapter 3), the supply of consumer credit (Chapter 4), and the "perennial problem of small-dollar lending (Chapter 5).[4]

My testimony contains three main points:

1. Interest rate caps reduce the supply of credit—resulting in consumer harm.
2. A high interest rate does not mean high dollar costs to the consumer.
3. Lawmakers should search for ways to expand access to credit for all Americans.

---

[2] Bolen, J.B., G. Elliehausen, and T. W. Miller, Jr. 2020. "Do Consumers Need More Protection from Small-Dollar Lenders? Historical Evidence and a Roadmap for Future Research, Economic Inquiry 58, pp. 1577-1613.

[3] https://www.mercatus.org/publications/financial-markets/how-do-small-dollar-nonbank-loans-work. Also see the effects of a 36 percent interest rate cap in Miller and Zywicki,(2020). https://www.cato.org/commentary/wrong-kicks-route-36

[4] https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-1_2021-01.pdf

1. Interest rate caps reduce the supply of credit—resulting in consumer harm.

Economic theory predicts that binding price ceilings create shortages, limit gains from trade, and impose costs on consumers.

Nobel prize winner Milton Friedman once said: "We economists don't know much, but we do know how to create a shortage. If you want to create a shortage of tomatoes, for example, just pass a law that retailers can't sell tomatoes for more than two cents per pound. Instantly you'll have a tomato shortage."[5]

In Professor Friedman's example, the tomato shortage is created because revenue from selling tomatoes for two cents per pound does not cover the costs of producing tomatoes. Setting the price of tomatoes at two cents a pound does not make tomatoes less expensive; it makes tomatoes less available.

Loan Revenue Must Exceed the Cost of Producing the Loan.

A commonly proposed interest rate cap is 36 Annual Percentage Rate (APR). How does a 36 APR render loans unprofitable? The same logic Professor Friedman used for tomatoes also applies to loans. Setting the rate lenders can charge for loans does not make loans less expensive; it makes loans less available. If the revenue received from a loan is less than the cost of producing the loan, lenders will not produce the loans.

The attached Figure 1 illustrates the problem of a binding rate cap.

The Progressives of the early 20th century teamed up with capitalists to create the Uniform Small Loan Law of 1916. This model legislation allowed licensed lenders to make loans at an APR of 36 percent. At the time, lenders could profit from making loans of $100 at a 36% APR—loan revenue exceeded the costs of production.

The horizontal line in Figure 1 shows that the revenue from a $100 loan made at 36 percent APR is the same today as it was in 1916. Costs of production have increased since 1916. I proxy these costs with the Consumer Price Index (CPI), which has increased by a factor of about 26 from 1916 to 2021. What do these two lines tell us? In 1916, revenue exceeded costs for a $100 loan made at an APR of 36 percent. In 2021, the costs of making a $100 loan far exceed the revenue.

Chen and Elliehausen (2020) show that a breakeven loan size at 36 percent APR is about $2,500.[6] But suppose a consumer only needs to borrow $500? Access to $500 loans is lost

[5] https://blog.acton.org/archives/80641-6-quotes-milton-friedman-on-freedom-and-economics.html
[6] https://www.federalreserve.gov/econres/notes/feds-notes/the-cost-structure-of-consumer-finance-companies-and-its-implications-for-interest-rates-20200812.htm

under a 36 percent interest rate cap. In Chapter 4 of the CFPB's Taskforce report, a range of breakeven interest rates by loan size are presented.

Installment loans less than $2,500 must have a higher APR than 36 percent. Revenue from the loan must cover production costs and generate a normal, competitive return for the lender. If rates cannot rise higher than 36 percent, access to credit levels less than $2,500 is lost.

Extending the 36 percent interest rate cap to all consumers will be a disaster for millions of Americans with subprime credit histories. Why? Instead of lowering the cost of small-dollar loans, a 36 percent cap destroys small-dollar credit supply.

A Specific Example of how the MLA interest rate cap eliminates supply.

In a payday loan, the amount of interest paid equals the amount loaned, times the annual interest rate, times the amount of time the loan is held. So, under a 36 percent interest rate cap, if you borrow $100 for two weeks, the interest you would pay is $1.38 ($100 × .36 × 2/52).

So, the revenue to the lender from this $100 payday loan would be only $1.38. A 2009 study by Ernst & Young, however, showed the cost of making a $100 payday loan was $13.89. The cost exceeds the loan revenue by $12.51 – probably more, since over a decade has passed since the E&Y study. Logically, lenders will not make unprofitable loans. Under a 36 percent APR cap, consumer demand will continue to exist, but the legal supply will dry up.

While the MLA interest rate cap does not explicitly outlaw payday loans, it has the effect of eliminating this legal supply of credit.

2. A high interest rate does not mean high dollar costs to the consumer.

Suppose a consumer has an emergency that costs $300 now. Suppose the consumer does not have $300 in cash or on a credit card or available from family or friends. This situation calls for a loan.

Consider two loans.

The first one is for $300, paid back in three equal monthly installments of $106. This loan costs $18 in interest.

The second loan is also for $300 and is paid back in three equal monthly installments of $120. This loan costs the consumer $60 in interest.

Of course, consumers would rather pay $18 instead of $60. But here is the catch: The first loan is unprofitable, so lenders will not make this loan. This loan does not exist: It is a Unicorn.

The interest paid on the preferred, but unavailable, Unicorn loan is calculated at a 36% APR. The second loan that would be available from lenders, costs consumers $14 more per month.

The APR on the second loan is 118%. The APR on this loan sounds "high" and "shocking," but a cost of only $14 more per month does not sound high, shocking, or unaffordable.[7]

It is important to remember that consumers spend dollars, they do not spend "percents."

If the consumer needs a loan to cover an emergency, the consumer could very well be willing to pay $60 interest over three months to get the needed money today.

3. Lawmakers should expand access to credit for all Americans.

Helping Consumers

Small-dollar credit products serve millions of people. According to a banking regulator, nearly 33 million families have no or limited access to bank credit. A recent study by the Federal Reserve Bank of New York suggests millions more may be "credit insecure." That is, they tend to max out their credit limit, have a low credit score, and a history of late payments. Also, 45 million primarily young, low-income, and minority Americans have poor or thin credit histories. They are ineligible for prime credit cards and bank loans.

Many consumers use small-dollar loans because they lack access to cheaper bank credit – they are "underbanked," in the policy jargon. According to the FDIC, 18.7 percent of all U.S. households were classified as underbanked in 2017. For one in five households in America, small-dollar nonbank loans are vital.

More than a third of households making under $50,000 experience month-to-month spikes and dips in their income. For these Americans, credit cards and consumer loans from banks are not a reliable option. Instead, small-dollar credit products help them deal with volatile incomes and unforeseen expenses. The choice for these consumers is between using small-dollar credit products, or simply going without needed goods and services.

So, what will consumers do if a binding interest rate cap causes lenders to stop making small-dollar loans? To my knowledge, there is no easy answer. I do know that if consumers face a need for money, they will meet it somehow. They will: bounce checks and incur an NSF fee; forego paying bills; avoid needed purchases; or turn to illegal lenders.

A Summary of Arguments used by Interest Rate Cap Advocates

For a variety of reasons, since the beginning of recorded history, lawmakers have looked upon the ownership of money, and the charges for its use, differently from the ownership of other assets and the charges for their use. Consequently, setting interest rap caps on loans has long been a focus of religious leaders and governments and their agents. A belief in the effectiveness

[7] For more details, see https://x2u.731.myftpupload.com/state-laws-can-give-consumers-more-loan-choices/

of interest rate caps endures despite many empirical studies showing that not only are interest rate caps ineffective, but they actually harm their intended beneficiaries.

Fundamentally, because interest rate caps are a market-distorting action, imposing an interest rate cap or banning loan products reduces the well-being of parties who would have otherwise engaged in trade. Nonetheless, advocates continue to argue for interest rate caps.

Professor Harold Black and I summarize a large body of rigorous, peer-reviewed academic research. We sort their arguments into four general categories. [8]

1. Borrowers are naïve and simply do not understand the loan terms.

2. Groups thought to be most vulnerable to exploitation by lenders—namely minorities, women, and the poor—need even more protection from "predatory" lenders.

3. Even if consumers are willing to borrow at high interest rates, society should protect these consumers from themselves because they are making themselves worse off.

4. Lenders, especially small dollar lenders, make abnormally high profits from lending at high interest rates because they have considerable market power.

In our work, we find no published empirical evidence that supports any of these four arguments.

Supporters of interest rate caps say that interest-rate restrictions protect naïve borrowers from so-called "predatory" lenders. Academic research shows, however, that small-dollar borrowers are not naïve.[9]

Supporters of interest rate caps often claim that interest rate caps do not reduce the supply of credit. These claims are not supported by any predictions from economic theory or demonstrations of how loans made under a binding interest rate cap are still profitable.

Supporters of interest rate caps claim that lenders, especially small-dollar lenders, make enormous profits because desperate consumers will pay whatever interest rate lenders want to charge. This argument ignores the fact that competition from other lenders drives prices to a level where lenders make a risk-adjusted profit, and no more.

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[8]Black, Harold and Thomas W. Miller, Jr. 2016. Examining Arguments Made by Interest Rate Cap Advocates. Hester Peirce and Benjamin Klutsey, eds., Reframing Financial Regulation: Enhancing Stability and Protecting Consumers. Chapter 13. Arlington, VA: Mercatus Center at George Mason University. https://www.mercatus.org/system/files/peirce_reframing_ch13.pdf

[9]See, for example, Elliehausen, G., and E. Lawrence, 2008. A Comparative Analysis of Payday Loan Customers, Contemporary Economic Policy 28, pp. 299-316 and Allcott, H., J. Kim, D. Taubinsky, and J. Zinman, 2021. Are High-Interest Loans Predatory? Theory and Evidence from Payday Lending, Review of Economic Studies, *forthcoming.*

Questions about the MLA's Performance

Extending the MLA's 36 percent interest rate cap to all Americans kicks many consumers to the curb. Their option to use small-dollar credit products will not be outlawed, but there will be no legal supply of loans for amounts less than $2,500.

Evidence has accumulated that the MLA has provided no benefit. In 2015, Carter and Skimmyhorn found that access to payday loans did not increase bad outcomes, like poor job performance, documented by previous Carrell and Zinman (2008). "Our analysis," they conclude, "suggests no significant benefits to servicemembers from the MLA." A 2016 study by Mary Zaki showed access to payday loans made it easier for military personnel to buy food and other goods before their biweekly paycheck.

Why extend the MLA? What evidence exists that the MLA has helped military personnel and their immediate family members? Is there evidence that it has harmed members? Why extend it now? Why not wait for a significant amount of research to inform such a crucial decision?

In science, the gap between beliefs and current research results drives further research. Before instituting a law with wretched outcomes for many borrowers, Congress should call for government and independent researchers to build a mosaic of transparent and replicable research results on the effects of interest rate caps on consumers.

Concluding Thoughts

In my scholarly work on consumer credit, I study how small dollar loan markets work and how best to help lawmakers restructure laws to improve the welfare of borrowers.

Every day, consumers make choices based on the price of money—just as they respond to prices of other goods and services. Despite the age-old teeth gnashing and hand wringing by philosophers, advocates, reformers, legislators, and others, the market for loanable funds is not "special" or "different." Simply stated, the market for credit obeys the laws of supply and demand. As in any market that obeys the laws of supply and demand, letting the competitive market determine prices and quantities will greatly benefit the participants in the small dollar loan market.

Conversations about consumer credit often reflect utopian visions of the world. Many people simply imagine that a few tweaks to regulations would ensure that everyone had the money needed to feed, clothe, and shelter the family.

We can all afford low prices for any good. But will the good be supplied at a low price?

No matter how hard we all try, a well-crafted regulatory framework cannot bring us a credit utopia. Deliberate, empirically informed regulators, however, can do much to preserve and expand consumers' options along the nonbank supplied small-dollar loan landscape.

I urge Congress to read more about interest rate caps before making any decision on them. A particularly good place to begin is the 2021 Report of the CFPB's Taskforce on Federal Consumer Financial Law.

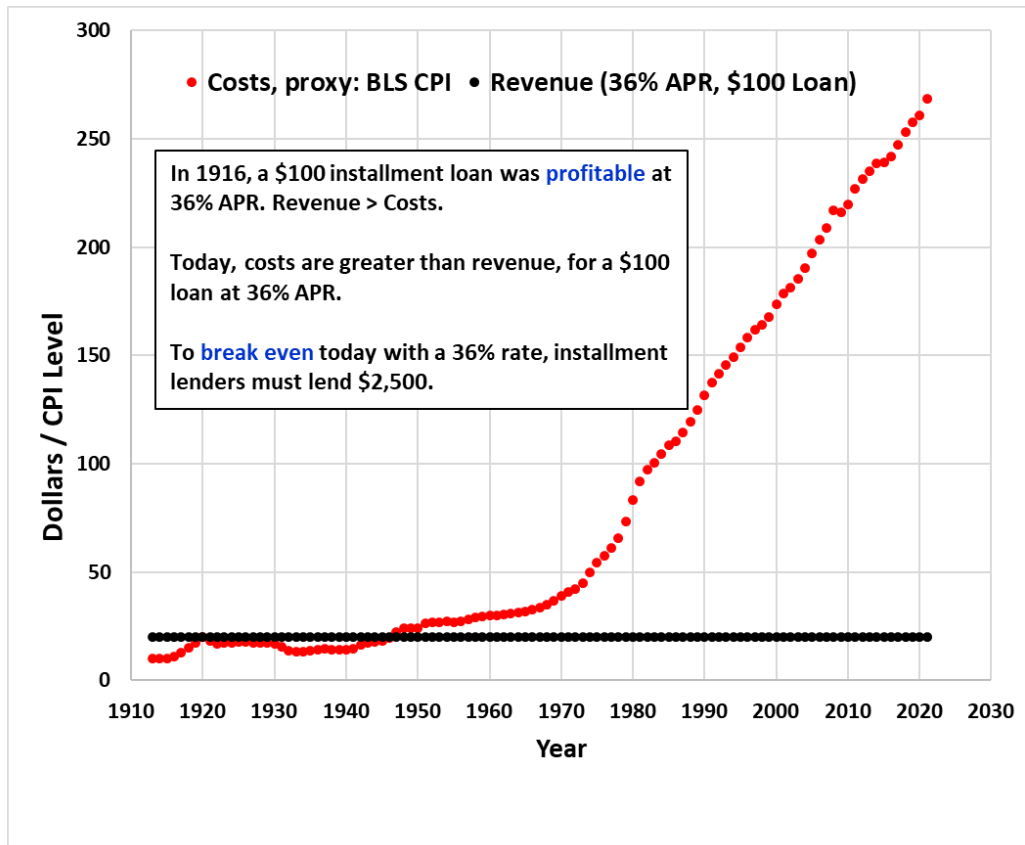
I also urge Congress to follow the scientific evidence on the impact of interest rate caps.

Finally, I urge Congress to heed the 1972 National Commission on Consumer Finance which concluded: "…competition is the best regulator of consumer credit markets." Competition breeds innovation. Innovation provides more choices. Consumers benefit with more choices. Rather than setting arbitrary caps on important financial products, law makers should increase competition by raising, or removing, interest rate caps.

Thank you. I stand ready to answer any questions.

Figure 1.

Then and now. Profits and losses from a 36% interest rate cap.



The revenue from a $100 loan with a 36% interest rate cap is the same today as it was in 1916 (black line). Costs have increased (red line).[10]

1. **At 36% rate, a profitable loan size is at least $2,500.[11] But suppose a borrower only needs $500 and has poor credit? Access to credit is lost.**

2. **Installment loans less than $2,500 must have a higher interest rate attached, to generate a profitable level of income to the lender. Lenders will not make unprofitable loans. Access to credit is lost.**

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[10] Think about wages, for example.

[11] Chen and Elliehausen (2020). https://www.federalreserve.gov//econres/notes/feds-notes/the-cost-structure-of-consumer-finance-companies-and-its-implications-for-interest-rates-20200812.htm

Appendix: A (Brief) History of the 36% Interest Rate Cap

- In the early 20th century, the Progressive Movement focused on major social reforms (i.e., Vote for Women, Temperance, Child Labor, Food Processing, and the Illegal Loan Shark Problem).

- In 1909, Reformers, spearheaded by Mr. Arthur Ham of the Russell Sage Foundation, sought ways to spread access to credit to workers. Reformers at the time recognized that lenders AND borrowers had to be satisfied for a sustainable market-based alternative to the illegal "loan shark problem."

- After research and collaboration with Capitalists, these Reformers set out to pass state laws allowing specially licensed lenders to make small-dollar consumer loans at rates **six times above** usury rates at the time, 6% APR.

- Their collective efforts resulted in the Uniform Small Loan Law (USLL) of 1916. By 1940, all but nine states had adopted some version of it. When they wrote the model law, through rigorous study, it was determined that the costs and risks merited: 3.50% per month (for loans up to $100), and 2.50% per month on amounts over $100. The average is 36% APR.

- The Reformers noted: "…The rate is designed to attract aggressive competition by licensed lenders [when the law is enacted] to drive unlicensed lenders out of business…This rate should be reconsidered after ***a reasonable period of experience with it***…."

EXHIBIT A-17

Testimony of

WILLIAM M. HIMPLER,

President and Chief Executive Officer,

American Financial Services Association,

before the

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,

UNITED STATES SENATE

on

Thursday, July 29, 2021,

Regarding

the hearing entitled, "Protecting Americans from Debt by Extending the Military's 36% Interest Rate Cap to Everyone"

TESTIMONY OF WILLIAM M. HIMPLER, PRESIDENT AND CHIEF EXECUTIVE OFFICER, AMERICAN FINANCIAL SERVICES ASSOCIATION

Mr. Chairman, Ranking Member Toomey, and members of the Committee, my name is Bill Himpler, and I am the President and CEO of the American Financial Services Association (AFSA). AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. I thank you for allowing me to appear today to discuss the important role that traditional installment lenders serve in the lives of millions of American consumers.

My testimony emphasizes three points. *First*, American consumers need access to responsible and affordable small-dollar credit to meet their financial needs and protect them from harmful financial disruption. *Second*, legislation imposing the Military Lending Act's (MLA) 36% Military Annual Percentage Rate (MAPR) cap on all consumers would remove important credit options. *Third*, the Committee should ensure that traditional installment lenders can continue to meet the credit needs of their customers, as they have for over a century.

First and foremost, American consumers need access to credit. The economic and employment disruption that ensued from the pandemic over the past eighteen months highlighted, in the starkest possible ways, the need for consumers to have access to responsible and affordable small-dollar credit.

In its 2019 report on the economic well-being of U.S. households, the Federal Reserve found that many adults, particularly people of color and those who have had limited opportunities for education, are inadequately prepared to withstand even small financial disruptions.[1] The Federal Reserve's survey highlighted that nearly 40% of adults shared that they would have difficulty covering an unexpected $400 expense. This is akin to the results of a survey performed by the Financial Health Network, which found that 43% of Americans turn to credit to make ends meet.[2]

Safe and responsible credit products, such as traditional installment loans, continue to provide a much-needed way for Americans, particularly those millions of consumers with non-prime credit scores, to cover these unexpected expenses. Just this week, *The Wall Street Journal* reported that some 53 million U.S. adults lack traditional credit scores because they have thin or nonexistent borrowing histories.[3]

Throughout the pandemic—indeed for more than one hundred years—traditional installment lenders have served customers with safe and affordable loans for those unexpected needs. In fact,

[1] Federal Reserve Board of Governors, Division of Consumer and Community Affairs. (2019, May) *Report on the Economic Well-Being of U.S. Households in 2018*. Retrieved from https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm.
[2] Garon, Dunn, Golvala, Wilson (2018). *U.S. Financial Health Pulse*. Financial Health Network. Retrieved from https://s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2019/05/07151007/FHN-Pulse_Baseline_SurveyResults-web.pdf.
[3] Andriotis, A. (2021, July 24). FICO Score's Hold on the Credit Market Is Slipping. *Wall Street Journal.* Retrieved from https://www.wsj.com/articles/fico-scores-hold-on-the-credit-market-is-slipping-11627119003.

919 18th Street NW, Washington, DC, 20006 ▲ 202.296.5544 ▲ www.afsaonline.org ▲ @AFSA_DC

consumer finance companies make more than three times as many personal loans to non-prime borrowers than credit unions, which are often cited as a small-dollar credit solution.

My second point is this—access to small-dollar credit would be dramatically hindered under a 36% MAPR cap on covered consumer loans. Experian recently estimated that nearly one in three Americans do not have a prime or excellent credit score, so the people most adversely affected would be those who need a financial lifeline on occasion.[4] When reputable small-dollar lenders are unable to serve underbanked consumers or those with less than perfect credit, such consumers are left with few options other than unregulated or illegal predatory lenders.

The Federal Reserve, a Consumer Financial Protection Bureau (CFPB) taskforce, banks, non-bank lenders, and credit unions all say the same thing: Interest rate caps at 36% or below are unworkable for reputable lending institutions and harm the people these caps are intended to protect.

- The National Commission on Consumer Finance study confirmed it;[5]
- The CFPB's Taskforce on Federal Consumer Financial Law report confirmed it;[6] and
- A Federal Reserve study on interest rate caps confirmed that few, if any, reputable lenders can afford to offer small-dollar loans capped at 36% Annual Percentage Rate (APR).[7]

More recently, the National Foundation for Credit Counseling's *2020 Military Financial Readiness Survey* of servicemembers found that active duty servicemembers were more than twice as likely to take out a cash advance or payday loan this year than in 2019, and that they used payday loans because there were few other options available to them.[8]

Even financial institutions such as credit unions, which the CFPB asserts[9] might offer such small dollar loans when other lenders can no longer do so, say rate caps are harmful to consumers and limit access to credit. "[T]he establishment of a national all-in rate cap applicable to all creditors is an unproven one-size-fits-all policy, the consequences of which will likely include reduced

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[4] Stolba, Stefan. (2021, June 7*). Fewer Subprime Consumers Across U.S. in 2021*. Experian. Retrieved from https://www.experian.com/blogs/ask-experian/research/subprime-study/.
[5] National Commission on Consumer Finance. *Consumer Credit in the United States*. Washington, DC: US Government Printing Office, 1972.
[6] Consumer Financial Protection Bureau, Taskforce on Federal Consumer Financial Law [hereinafter CFPB Taskforce]. (2021, January). *Taskforce on Federal Consumer Financial Law Report*. Retrieved from https://www.consumerfinance.gov/documents/9449/cfpb_taskforce-federal-consumer-financial-law_report-volume-1_2021-01.pdf.
[7] Chen, L., Elliehausen, G. Board of Governors of the Federal Reserve System (2020, August). *The Cost Structure of Consumer Finance Companies and Its Implications for Interest Rates: Evidence from the Federal Reserve Board's 2015 Survey of Finance Companies.* Retrieved from https://www.federalreserve.gov/econres/notes/feds-notes/the-cost-structure-of-consumer-finance-companies-and-its-implications-for-interest-rates-20200812.htm.
[8] National Foundation for Credit Counseling (2021, May). *2020 Military Financial Readiness Survey*. Retrieved from https://www.nfcc.org/resources/client-impact-and-research/2020-military-financial-readiness-survey/.
[9] Consumer Financial Protection Bureau. (2020, March 26). *Federal Agencies Encourage Banks, Savings Associations, and Credit Unions to Offer Responsible Small-Dollar Loans to Consumers and Small Businesses Affected by COVID-19* [Press Release]. Retrieved from https://www.consumerfinance.gov/about-us/newsroom/federal-agencies-encourage-banks-savings-associations-credit-unions-to-offer-responsible-small-dollar-loans-consumers-small-businesses-affected-covid-19/.

access to credit from reputable lenders," said Credit Union National Association President and CEO Jim Nussle.[10]

Moreover, in states where aggressive APR limits have been imposed on small-dollar loans, the consequences are unequivocal: A rapid reduction in the availability of safe and affordable credit for people who rely on it, and an increased reliance on unsafe or illegal forms of credit, with a devastating effect on poverty levels, well-being, and financial mobility.

In most, if not all, states where policies hindered responsible lenders from offering small-dollar loans, such policies have acted as an effective ban on small-dollar consumer lending, with disastrous consequences for those affected. For example, after the imposition of APR caps in Georgia and North Carolina effectively banned small-dollar loans, a Federal Reserve Bank of New York study reported that people "bounced more checks, complained more about lenders and debt collectors and have filed for Chapter 7 ('no asset') bankruptcy at a higher rate."[11] Moreover, the North Carolina Commissioner of Banks Consumer Finance Annual Report in 2018 reported that access to loans less than $1,000 continued to decline because consumer finance lenders were withdrawing from the market.[12]

Because of concerns related to the availability of credit, veterans' groups wrote to Congress in 2019 expressing hesitation with expanding the MLA. They wrote, "While anecdotal evidence sheds some light on the potential barriers to credit for the veteran community, systematic data collection has been limited. We see this as a major problem and believe that policymakers should first undertake an in-depth examination of the barriers that veterans face when looking to secure a loan before hastily taking action in a way that would lead to severe unintended consequences." See the attached appendix for the letters.

The solution is not, as one consumer advocate said, "Borrow from people you care about, ask for more hours, take on a second job, sell your plasma…"[13] Americans deserve choices for their consumer credit needs, and many of them turn to traditional installment loans, which are safe, smart options.

This brings me to my third point—traditional installment loans have, for more than a century, helped consumers of different races, backgrounds, and occupations cover necessities in a personal financial crunch, or unexpected expenses to purchase a new refrigerator or make emergency car

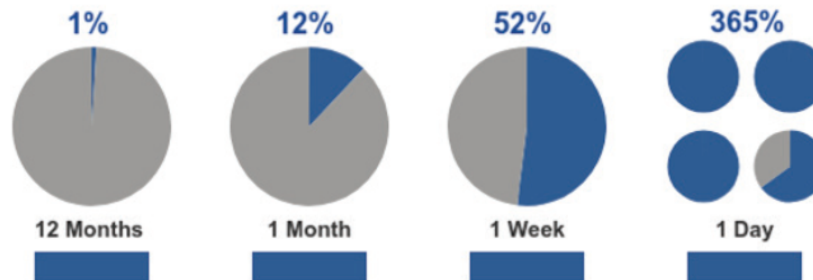
[10] Credit Union National Association. (2021, July 15). *Proposed 'all-in' rate cap would reduce access to credit.* Retrieved from https://news.cuna.org/articles/119673-proposed-all-in-rate-cap-would-reduce-access-to-credit.
[11] Morgan, D., Strain, M. Federal Reserve Bank of New York (2007, November). *Payday Holiday: How Households Fare after Payday Credit Bans* (Report No. 309). Retrieved from https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr309.pdf.
[12] North Carolina Office of the Commissioner of Banks (2018). *Consumer Finance Annual Report*. Retrieved from https://www.nccob.gov/Public/docs/News/Pub%20And%20Research/2018_Annual_Report_Final.pdf.
[13] Millerbernd, A. (2021, July 7). Are state interest-rate caps an automatic win for borrowers? *Star Tribune.* Retrieved from https://www.startribune.com/are-state-interest-rate-caps-an-automatic-win-for-borrowers/600075690/.

repairs. These lenders meet the small-dollar credit needs of American consumers in a responsible and affordable manner.

AFSA's traditional installment lenders offer fixed-rate, fully-amortizing, small-dollar loans repaid in equal monthly payments. The average loan amount is $2,000, with no balloon payments or hidden costs. These loans have been some of the safest and most affordable forms of consumer credit in the United States for over a century. Lenders determine a borrower's ability to repay, and repayment history is reported to credit bureaus, which gives consumers the opportunity to build or strengthen their credit history. AFSA's traditional installment lenders adhere to the Consumer Bill of Rights, which is available on caseforcredit.com.[14]

The CFPB, under the leadership of Director Richard Cordray, recognized that traditional installment lenders assess their customers' ability to repay, and so their loans were exempt from the final Payday, Vehicle Title, and Certain High-Cost Installment Loans Rule.

For such small-dollar loans, the quality, affordability, and soundness of the loan is best judged by its length and monthly amount owed, not its interest rate. APRs are a function of time, rather than a measure of the cost of a loan. For example, say you borrow one hundred dollars today and are charged one dollar in interest. If you repay the loan in one year, the APR is 1%. Repay it in a month, the rate is 12%. If you repay the loan tomorrow, the APR is 365%. Same dollar in interest, vastly different APRs, as you can see in the chart below.



While the cost of credit remains exactly the same ($1.00), the APR varies dramatically based on the duration (or term) of the loan. Thus, APR cannot be relied upon as an indicator of loan affordability.

A 36% interest rate cap will harm consumers by restricting access to traditional installment loans. As referenced above, analysis based on a Federal Reserve study demonstrates that with a 36% rate cap, consumers would not be able to obtain a loan of less than $3,000.[15] Consumers will be forced to borrow higher amounts than they need or want, with higher costs and longer repayment periods, despite having a lower APR. That is, even if they qualify for the larger loan. The graph below

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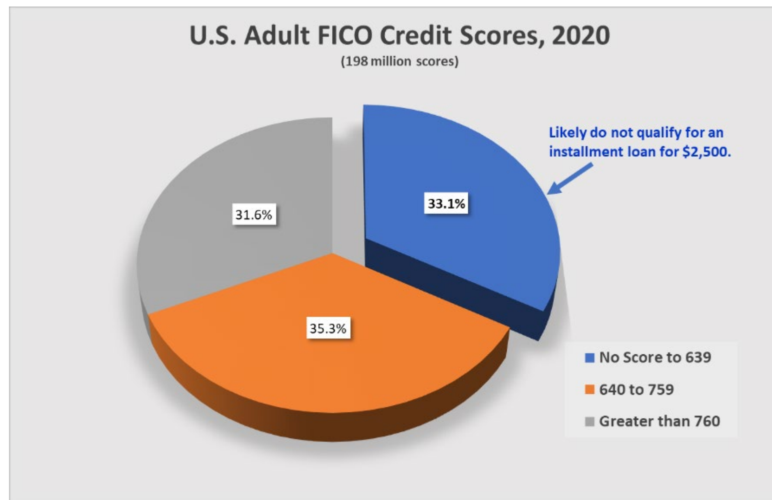
[14] American Financial Services Association. (n.d.). *AFSA Traditional Installment Lenders' Consumer Bill of Rights* Retrieved from https://caseforcredit.com/wp-content/uploads/2021/07/21Memo-Consumer-Bill-of-Rights-72621.pdf.
[15] Chen, Elliehausen, *Cost Structure, Consumer Finance Companies*.

highlights how many Americans would be left out of the credit system with a 36% rate cap in place.



A study by Federal Reserve economists, which was included in the CFPB's Taskforce on Federal Consumer Financial Law Report, demonstrated that consumers took out larger loans in states with rate caps than they did in states without caps:

> "Durkin, Elliehausen, and Hwang provided examples. They found that in Pennsylvania, which has a low maximum permissible rate, there were few installment loans — just 1.5 per 1,000 population. Moreover, there are almost no loans for less than $500 and only 1 percent of loans for under $1000. Fifty-seven percent of loans had maturity lengths greater than two years. As a result of these larger loan amounts, 55 percent of loans had monthly payments in excess of $150 per month.
>
> "The authors compared experience in Pennsylvania to Texas, which allows higher APRs on small installment loans. In Texas, there are many more loans — 23.9 per 1,000 population. Forty-two percent of loans were for under $500 and 70 percent were under $1000. Finally, 99 percent of loans had maturity periods shorter than two years. Because of the smaller loan sizes, only 16 percent of borrowers had payment obligations of greater than $150 per month. And smaller loans for shorter intervals reduce finance charges."[16]

In conclusion, access to reliable, transparent financial services is a cornerstone of the American way of life; for many consumers such access enables opportunities that might otherwise be out of reach. Credit access should not be a privilege reserved for the elite. When someone who is underbanked or has less than perfect credit is turned down or does not have access to a needed loan, it is not a consumer-protection victory. It is a civil rights loss. *All* consumers deserve access

[16] CFPB Taskforce, *Fed. Consumer. Fin. Law Report*, (201-202).

to safe and reliable credit, and AFSA and its members stand ready to work with you to ensure that economic opportunity is accessible for all.

Thank you for the opportunity to appear before you today on this important issue, and I look forward to your questions.

APPENDIX

SERVING WITH PRIDE

AMVETS

NATIONAL HEADQUARTERS
4647 Forbes Boulevard
Lanham, Maryland
20706-4380
TELEPHONE: 301-459-9600
FAX: 301-459-7924
E-MAIL: amvets@amvets.org

November 13, 2019

The Honorable Maxine Waters
Chairwoman
U.S. House Committee on Financial Services
2129 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Patrick McHenry
Ranking Member
U.S. House Committee of Financial Services
2004 Rayburn House Office Building
Washington, D.C. 20515

Re: Major Concerns Regarding the Veterans and Consumers Fair Credit Act

Dear Chairman Waters and Ranking Member McHenry:

Thank you for your continued efforts to meet the unique needs of military personnel, veterans, and their families relative to financial tools and credit. However, we do wish to express our concern with the current draft of the "Veterans and Consumers Fair Credit Act," as written. While we appreciate the Committee wishing to explore the unique requirements of veterans' access to fair credit, we do not see anything in this draft legislation which, in fact, addresses those unique needs of veterans.

Instead, it appears to address fair credit access from a national perspective and simply references veterans as part of that national population. Veterans are a segment of broader society and would therefore reap the same benefits, in terms of access to lower interest loans, as non-veterans under this bill. It is precisely for that reason that titling the bill in a manner that suggests veterans would benefit because of their status is specious, at best.

Adding insult to injury is the fact the bill, as written, is completely silent on actual loan issues that many veterans face. Veterans are more likely to suffer financing shortfalls for small businesses and disapprovals for loans, in part, because of perceived credit risks associated with a history of frequent changes of address, including overseas assignments. Absent an actual fix that specifically benefits veterans, the bill as presented is a missed opportunity to correct what amounts to a penalty for having served in the military.

We would be happy to work with you to develop programs which will improve veterans access to credit, and hope we can meet with you to discuss next steps. But in the interim, we request you delay consideration of this bill until we have a better understanding of veterans' unique credit requirements.

Sincerely,

Sherman Gillums Jr.
Chief Advocacy Officer

ENLISTED ASSOCIATION OF THE NATIONAL GUARD OF THE UNITED STATES

1 Massachusetts Avenue NW, Suite 880 • Washington, D.C. 20001-1401 • 800-234-EANG (3264) • Fax (703) 519-3849

November 15, 2019

Dear Chairman Waters and Representative McHenry:

Thank you for continuing to consider the unique interests of military personnel, military families, Veterans, and Veteran families in access to financial tools and credit. The Enlisted Association of the National Guard of the United States (EANGUS) looks forward to working with you and the Committee in properly addressing the unique adversities Veterans, Servicemembers and their families face with solutions unique to their circumstances.

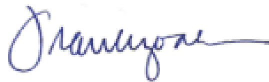
However, we wish to express our concern with the possible consideration of HR 5050, the *"Veterans and Consumers Fair Credit Act."* While we appreciate the Sponsors wishing to explore the unique requirements of Veterans' access to fair credit, we believe that without further study Veterans might be placed in the same situation as many military members and families as they access non-prime financial solutions.

Furthermore, it appears that this legislation invokes the name of Veterans into a bill introduced in proximity to Veterans Day without substantial language to address or relieve the unique economic burdens military and Veteran families bear. We believe this borders on being gratuitous to Veterans and without any real substance to help Veterans.

While anecdotal evidence sheds some light on the potential barriers to credit access for the Veteran community, systematic data collection has been limited. We recognize this to be a serious problem, and believe that policymakers should first undertake an in-depth examination of the barriers that Veterans face when looking to secure a loan before taking action in a way that could lead to severe, unintended consequences. Considering this legislation without an accompanying study would seek to apply a one-size-fits-all approach that might result in Veterans losing capital access.

Of particular concern, our constituency is primarily National Guardsmen and women. Unfortunately, a good portion of these members who faithfully served our country are still not considered "Veterans" under Title 38 of United States Code. This legislation would have no effect on that demographic who are near and dear to us.

We request you delay consideration of this bill until further study provides better understanding of Veterans' unique credit requirements.



Frank Yoakum
Sergeant Major
U.S. Army (Retired)
Executive Director
EANGUS

November 15, 2019

The Honorable Maxine Waters	The Honorable Patrick McHenry
U.S. House Committee on Financial Services	U.S. House Committee of Financial Services
2129 Rayburn House Office Building	2004 Rayburn House Office Building
Washington, D.C. 20515	Washington, D.C. 20515

Dear Chairwoman Waters and Representative McHenry:

Thank you for continuing to consider the unique interests of military personnel, military families, veterans, and veteran families in access to financial tools and credit. We look forward to working with you and the Committee in properly addressing the unique requirements of these populations with unique solutions, where appropriately tailored.

However, we do wish to express our concern with the possible consideration of the bill HR 5050 the *"Veterans and Consumers Fair Credit Act"*, introduced earlier this week. While we appreciate the sponsors' wish to explore the unique requirements of veterans' access to fair credit, we do not see anything in this draft legislation which, in fact, addresses any unique needs of veterans. Instead, it appears to address fair credit access from a national perspective, and simply references veterans as part of that national population.

As you likely know, veterans may have more difficulty accessing capital than nonveteran consumers. While many consumers struggle to find a loan, especially when dealing with a sudden emergency, veterans as a community experience these hardships at higher rates. But this legislation does not appear to address the unique needs of veteran consumers.

Instead, it appears that this legislation simply invokes the name of veterans into the bill since its Congressional introduction and Committee consideration are happening around Veterans Day. Such involvement of veterans in what is not a veteran specific bill, to leverage the national attention on Veterans Day, borders on the exploitative and is not something we can support.

While anecdotal evidence sheds some light on the potential barriers to credit access for the veteran community, systematic data collection has been limited. We see this as a major problem and believe that policymakers should first undertake an in-depth examination of the barriers that veterans face when looking to secure a loan before hastily taking action in a way that would lead to severe unintended consequences. Considering this legislation without that comprehensive and thoughtful process would seek to apply a one size fits all approach that studies have shown results in a loss of capital access for the veterans community.

We would be happy to work with you to develop, collect, and analyze that systematic data collection on veterans access to consumer credit, and hope we can meet with you to discuss next steps. But in the interim, we request you delay consideration of this bill until we have a better understanding of veterans' unique credit requirements.

Sincerely,

Military Order of the Purple Heart	National Defense Committee	Valor Medical Service Dogs

EXHIBIT A-18

Conference Coverage

Kraninger to deliver address on NS3 closing day

Conference Coverage
Thursday, August 12, 2021

Former Consumer Financial Protection Bureau (CFPB) Director Kathy Kraninger will speak during the third day of the 17th annual National Settlement Services Summit (NS3). The in-person event will be held Aug. 31-Sept. 2 in Naples, Fla.

Kraninger, now vice president of regulatory affairs for Solidus Labs, will outline enduring principles in consumer protection and highlight areas for modernization, particularly as recommended in the CFPB's Taskforce on Federal Consumer Financial Law Report. She also will share effective approaches for regulated entities managing the pivots in the regulatory landscape and consumer expectations.

Her address will be followed by the "iBuyer Buy in" session. As the country reopens, the number of professionals participating in iBuyer transactions is increasing. Veronica Figueroa, CEO, The Figueroa Team, brokered by eXp Realty; Leah Sakas, Zillow Offers' vice president of central operations, and Tony Chahal, HomeLight's head of strategic relationships, will address how to be prepared in this industry niche.

"iBuying appears to be back in the wake of the COVID-19 pandemic – worrying many agents that they'll be replaced or cut out of the real estate transaction process entirely," Chahal said. "During this panel, attendees will hear from HomeLight and top real estate experts on how new technology building the future of iBuying empowers – not replaces – top real estate agents, keeping them firmly at the center of the transaction."

In addition, conference goers will learn how HomeLight and Zillow empower top agents with the technology to help their customers make all-cash offers on their dream homes – and help agents accelerate their commission and deliver an exceptional experience to their clients, Chahal added.

Next up will be Ask the Experts, a chance for attendees to pick the brains of industry leaders in an intimate one-on-one round table setting. Discussions will focus on compliance, business and operations topics, including RESPA, fair lending, cybersecurity, mergers and acquisitions and artificial intelligence.

At the next session, "Signed, Sealed and Claim Free," Noemi Dedoah, Alliant National Title's chief claims counsel and vice president; Chris McChesney, Doma's chief claims counsel, and Shelley Stewart, president/CEO of Southern Title, will give advice on avoiding the common mistakes leading to title insurance claims. "Regardless of how careful you are, claims will happen – both under policies of title insurance and those matters that aren't a traditional `title claim,' "McChesney said. "The biggest driver of the costliest claims is fraud, be it external, transactional, or internal. However, there are steps agents and the parties to a transaction can take to prevent some claims and lessen the impact of those that are unavoidable."

For more information on NS3 2021, including the agenda and a list of speakers for all three days, click **here**. You can register for NS3 online or click **here** to get information on how to register via mail, fax or phone.

Today's other top stories

CFPB updates mortgage servicing compliance guide

NS3 Preview: Innovation and compliance a top focus

CFPB: Some mortgage servicers struggling to help borrowers

DOJ settles California Fair Housing Act suit

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, et al., *Plaintiffs*, v. DAVID UEJIO, in his official capacity as Acting Director of the Consumer Financial Protection Bureau, et al., *Defendants*.	No. 1:20-cv-11141 (JCB)

PROPOSED ORDER GRANTING
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Upon consideration of Plaintiffs' motion for summary judgment, it is hereby **ORDERED** that the motion is **GRANTED**. The Court hereby **DECLARES** that Defendants violated the Federal Advisory Committee Act ("FACA") and its implementing regulations by creating and operating the Taskforce on Federal Consumer Financial Law (the "Taskforce") without complying with FACA's requirements.

Defendants are hereby **ENJOINED** to:

1. Refrain from using any advice or recommendations from the Taskforce at any time in the future, including the Taskforce on Federal Consumer Financial Law Report, *available at* https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureaus-taskforce-on-federal-consumer-financial-law-releases-its-report/ (the "Report"). If Defendants have already proposed action that relies on such advice, Defendants must withdraw that proposal.

2. Amend the Taskforce's Report to include a disclaimer indicating that the report was produced in violation of FACA. Specifically:

a. On the cover pages of both Volumes I and II, Defendants will include a warning label that reads in bold red font: "This report was produced in violation of the Federal Advisory Committee Act as explained on page 1 of this volume."

b. In both Volumes I and II, Defendants will insert a new page 1 entitled "Disclaimer Federal Advisory Committee Act Violations." The body of that page will read:

This report was produced in violation of the Federal Advisory Committee Act ("FACA"). As a task force established and utilized by the Bureau "in the interest of obtaining advice or recommendations," the Taskforce on Federal Financial Consumer Law was an advisory committee subject to FACA. 5 U.S.C. App. 2 § 3(2). Accordingly, the Bureau was required to comply with FACA.

Among other things, FACA required the Bureau to:

a. Consult with the General Services Administration ("GSA") prior to chartering the Taskforce regarding why the Taskforce was essential to the conduct of the Bureau's business and why the Taskforce's functions could not be performed by other means, 5 U.S.C. App. 2 § 9(a)(2); 41 C.F.R. § 102-3.60;
b. Describe to the GSA the Bureau's plan to attain a Taskforce membership that was fairly balanced in terms of the points of view represented and the functions to be performed by the Taskforce, *id.*;
c. Determine as a matter of formal record—after consultation with the GSA and before chartering the Taskforce—that the Taskforce was in the public interest in connection with the performance of the Bureau's duties, 5 U.S.C. App. 2 § 9(a);
d. Ensure that the Taskforce membership was fairly balanced in the manner described above, *id.* 2 § 5(b)(2), (c);
e. Hold the Taskforce's meetings open to the public, *id.* § 10(a)(1); and
f. Make the Taskforce's records available for public inspection, *id.* § 10(a)(3)(b).

Because none of these requirements were met, a federal court has concluded that the Taskforce was created and operated in violation of FACA. For the same reasons, this report was produced in violation of FACA. The Bureau has therefore been enjoined from using any of the advice or recommendations contained herein.

3. Within thirty days of the date of this order, Defendants must release all Taskforce records to Plaintiffs and make those records publicly available on the Taskforce's webpage, consistent with the CFPB's practice for other advisory committees.

a. Taskforce records include all "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee." 5 U.S.C. App. 2 § 10(a)(3)(b). This includes any communications among the members, as well as personal notes and other preparatory material of Taskforce members that were shared with other members for the Taskforce's consideration.

b. Defendants will provide a *Vaughn* index for any documents that have been fully withheld from production or redacted in part under exemptions provided by the Freedom of Information Act.

4. Within thirty days of the date of this order, the parties will submit a joint status report concerning Defendants' compliance with this order.

It is so **ORDERED**.

Dated:

The Honorable Judge Jennifer C. Boal
United States Magistrate Judge