September 26, 2011

Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1801 L Street, NW
Washington, DC 20036

http://www.regulations.gov

Re: **Disclosure of Records and Information**
[Docket No. CFPB–2011–0003] RIN 3170–AA01

State Official Notification Rules
[Docket No.: CFPB -2011-0005] RIN 3170-AA02

Rules of Practice for Adjudication Proceedings
[Docket No. CFPB–2011–0006] RIN 3170–AA05

Rules Relating to Investigations
[Docket No.: CFPB-2011-0007] RIN 3170-AA03

Dear Ms. Jackson:

This letter is submitted by the American Financial Services Association ("AFSA") in response to the notices and requests for comment from the Bureau of Consumer Financial Protection (the "Bureau") entitled Disclosure of Records and Information (the "Disclosure Notice"); "State Official Notification Rules"; (the "State Officials Notice"); "Rules of Practice for Adjudication Proceedings" (the "Adjudication Notice"); and the Rules Relating to Investigations" (the "Investigations Notice").

Statement of Interest

Founded in 1916, AFSA is the national trade association for the consumer credit industry protecting access to credit and consumer choice. Our 350 members include consumer and commercial finance companies, auto finance and leasing companies, mortgage lenders, credit card issuers, industrial banks and industry suppliers. These companies are licensed and comprehensively regulated by state laws—many of which have been in place for nearly a century and predate the enactment of most federal banking laws. [1]

AFSA acknowledges that the Bureau has carefully examined the practices of existing federal agencies, including the Federal Trade Commission ("FTC"), the prudential regulators,

[1] In 1907, the Russell Sage Foundation surveyed the need for small consumer loans resulting in the passage of Uniform Small loan laws throughout the country. See: Gallery, David J., Hilborn, Walter S., May, David J. Small Loan Legislation, A History of the Regulation of the Business of Lending Small Sums (New York, Russell Sage Foundation, 1932).

and the Securities and Exchange Commission ("SEC") in its efforts to craft these interim final rules. We recognize that these rules represent an amalgamation of existing agency procedures, blended to enable the Bureau to perform its functions under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). AFSA welcomes the opportunity to share our views with respect to these interim final rules. Our members have a keen interest in the outcome of these deliberations and in the operation of the rules.

However, AFSA members remain concerned that these interim final rules do not sufficiently account for the adequacy and enforcement of existing state laws and regulations under which regulated entities operate before imposing new regulatory obligations. Furthermore, we are concerned that the Bureau's stated commitment to efficiency may inhibit appropriate due care being given to matters under its jurisdiction. Although this letter articulates concerns with several of the Bureau's interim final rules, AFSA would like to suggest some principles for the Bureau to consider as it receives public comment:

- The Bureau should adopt regulations that provide for the most protection of confidential information. Whenever the Bureau considers a process or regulation that governs the sharing of such information, the Bureau should keep in mind that protecting confidentiality enhances transparency between the Bureau and the entities it regulates because there is certainty that information is not routinely disclosed.

- The Bureau should clearly define when disclosures of confidential information are in the "public interest," so that regulated entities, again, can approach this new regulatory environment with certainty as to the standards and procedures that will be applicable to them.

- The Bureau should avoid using language that implies that regulated entities cannot exercise due care when responding to Bureau adjudication procedures or civil investigative demands. Such language detracts from the desire to create fully complete investigative and administrative records to the extent possible. Specifically, AFSA would recommend that the Bureau remove language that intimates that granting extensions of time, motions for postponement, etc. is "disfavored" from these interim final rules and any subsequent rulemakings.

- The Bureau should carefully consider the regulatory burdens that these interim final rules may impose on regulated entities. Although these rules draw significantly on existing agency rules and procedures, this reliance on regulatory precedent should not presume that there are no additional compliance obligations for regulated entities. The Bureau is a new agency, after all, and its rules and procedures must benefit from careful analysis.

- The Bureau should follow the procedures outlined in the Administrative Procedures Act ("APA") whenever applicable. The APA is a settled body of law that guides much of the area covered by the interim final rules.

Disclosure of Records and Information

Freedom of Information Act ("FOIA") Issues

AFSA is pleased that the Bureau examined the FOIA provisions used by other agencies, including those that deal with business information. However, we are concerned that this interim final rule does not follow the Federal Reserve Board's regulation dealing with frequently requested information.

While subject to some exemptions, as proposed, the Rule defines "frequently requested" as three or more requests for substantially the same records—less than other agencies that require at least five requests. [2] We believe that any hard and fast number is easy to manipulate--whatever the number, organized groups will simply file one more request than the number chosen. We suggest that rather than a set number, the definition should be changed to "frequently and regularly requested by a broad range of requestors."

AFSA is also concerned with the Rule's overarching exception to FOIA privacy norms wherein the Bureau "may, if not precluded by law, elect under the circumstances not to apply the exemption." [3]While waivers of this type are not unusual, this section, unlike the Federal Reserve Board's similar section, does not indicate who would make this decision, how they would make it and whether the covered person in question would have notice and opportunity to be heard before their data is released. We contend that the Bureau should fully articulate how this exception would be applied and under what circumstances.

Disclosure of Information to Other Regulators

AFSA believes that the Bureau's use of confidential information poses unique challenges, especially in the case of information shared with state attorneys general and other enforcement agencies.

We recommend, when confidential and proprietary information is transmitted to third parties such as state attorneys general, that those third parties agree and certify they will treat any such information as confidential. Of equal importance, the Bureau should ensure that these third parties are capable of protecting such shared data. This is no small concern as state governmental agencies have faced significant challenges with respect to data protection. [4]

We maintain that the standards to limit the sharing of supervisory and examination information for depository institutions should apply equally to all financial services providers. AFSA members also provide reports to state consumer credit regulators on a regular basis. The

[2] 65 Federal Register at 40,507
[3] §1071.11(b)
[4] For example, on March 31, 2011, Texas notified about 3.5 million people their personal information (including names, addresses and Social Security Numbers, and in some cases driver's license numbers and dates of birth) was publicly exposed for over a year because of data security lapses; on March 4, 2011, the University of South Carolina exposed the personal data of 31,000 students and alumni; and, similarly, on January 11, 2011, the University of Connecticut exposed 18,000 records.

Rule distinguishes between examination reports and other supervisory reportage. [5] We believe that the language governing the sharing of confidential supervisory information should include those reports provided by non-depository institutions to their state regulatory or licensing agencies.

State Official Notification Rules

AFSA believes the State Official Notification Rule lacks clarity in several areas. As drafted, state officials are required to follow a process in which they must give notice to the Bureau when they intend to enforce the Consumer Financial Protection Act (or the Bureau's regulations under that Act). Upon receiving this notice, the Bureau may elect to "otherwise participate in the action *as appropriate (emphasis added).*" [6] The Bureau does not provide any guidance as to when it would be "appropriate" for it to participate in an action taken by a state agency, and we believe that there should be clear standards as to when such participation would take place.

Who is the Public and What is their Interest?

The Rule also predicates several actions based on the undefined term "public interest." For example, emergency actions may be brought "in order to protect the public interest." [7] Additionally, the Bureau may disclose the substance or fact of a notice with other state or federal governmental entities, after consultation with state officials, "when necessary to protect the public interest." [8] The concerns raised above regarding the Disclosure of Information and Records Rule apply to this Rule as well.

We contend that the Bureau has to be cognizant that decisions to undertake actions pursuant to the Consumer Financial Protection Act are not isolated from political motivations or external pressures. After all, there is no statutory or regulatory constraint to prevent such influences from informing such decisions. Who determines when an action undertaken by a state or participated in by the Bureau is in the "public interest?" What criteria or standards will the Bureau apply when deciding that an action is in the "public interest?"

In light of these concerns, AFSA suggests that there should be specific criteria determining when an action is in the "public interest." Criteria could include a finding of immediate harm to consumers, the fact no other enforcement agency or regulator occupies the field, or that there is economic harm to consumers or the financial system. We would further recommend that the Bureau solicit public comment with respect to these criteria.

Finally, while this Rule primarily deals with state law enforcement agencies, AFSA recommends that other state regulatory officials be consulted and receive notice when an enforcement action is undertaken to ensure that state consumer credit commissioners and prudential bank regulators remain apprised of actions that touch or fall within their purview.

[5] §1022(c)(6)(C)
[6] §1082.1(d)
[7] §1082.1 (b)
[8] §1082.1(e)

Rules of Practice for Adjudication Proceedings

The Need for Pre-enforcement Process

AFSA appreciates that the Bureau evidently reviewed the existing rules of the prudential regulators, the Federal Trade Commission (FTC), and the Securities and Exchange Commission. Unlike depository institutions, the FTC has been the principal federal enforcement agency for most AFSA member companies, and as a result, AFSA members are familiar with that agency's practices and procedures. We agree that the Bureau's reliance on regulatory precedent "*should* further reduce the expense of administrative adjudication for covered persons" (emphasis added). However, the Bureau is a new regulatory entity, and therefore, the entire financial services industry needs to be assured that the Bureau endeavors to establish a transparent and fair pre-enforcement process.

To that end, AFSA recommends that the Bureau adopt a process wherein a prospective defendant is given the opportunity to respond before an action is filed, similar to the Wells Notice process adopted by the SEC. In 1972, then SEC Chairman William J. Casey appointed a committee (known as the "Wells Committee" after its chairman John Wells) which recommended the following:

> "Except where the nature of the case precludes, a prospective defendant or respondent should be notified of the substance of the staff's charges and probable recommendations in advance of the submission of the staff memorandum to the Commission recommending the commencement of an enforcement action and be accorded an opportunity to submit a written statement to the staff to be forwarded to the Commission together with the staff memorandum."

The SEC adopted this process in its Rules on Informal and Other Procedures and has been successfully used—often in fairly complex cases. [9]

The Wells Notice also benefits the SEC as it allows that agency's leadership to be "... not only to be informed of the findings made by its staff but also, where practicable and appropriate, to have before it the position of persons under investigation at the time it is asked to consider enforcement action." [10]

Other agencies, including the Federal Reserve, the Office of Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and many state agencies, have a process that, like the Wells process, provides for the advance notice of potential charges, along with the opportunity to respond. We believe the Bureau should implement the same procedures.

Rules Governing Special Proceedings

[9] See SEC Rule 5(c) , 17 C.F.R. § 202.5(c)
[10] SEC Office of Chief Counsel, Enforcement Manual (August 11, 2011) at Page 23

While the Rules do not reference the issuance of temporary cease-and-desist proceedings, pursuant to Section 1053(c) of the Dodd-Frank Act, the Bureau has invited comments as to whether special rules governing such proceedings are necessary and, if so, what they should provide.

AFSA believes that such proceedings should be based on findings made on specific criteria. For example, the FDIC issues temporary cease–and-desist orders when it determines that "the violation, or the unsafe or unsound practice, as specified in the notice, or the continuation thereof, is likely to cause insolvency or significant dissipation of assets or earnings of the bank, or is likely to weaken the condition of the bank…". [11]

We believe this subject is too important to be a mere aside in a rulemaking—especially since the underlying statute may need revision—and we recommend that the Bureau undertake a new rulemaking inviting comment on this topic.

Rules Relating to Investigations

As noted in our comments on the Adjudication Rules, AFSA members are familiar with FTC practices and process, including those governing investigations in non-adjudicative settings. Like the FTC, the Bureau will rely heavily on the Civil Investigative Demands (CID) process.

While the Rules, appropriately, require that the Bureau must inform a person subject to a CID of the "nature of the conduct constituting the alleged violation that is under investigation and the provisions of law applicable to such violation", they are open-ended as to the deadlines for compliance. Disturbingly, the Rule states that requests for extensions of time are "disfavored." [12]

The assumption that extensions of time are somehow dilatory is incredibly discouraging, given the fact that the Bureau itself has no history of precedents upon which defendants and their counsel may rely. The Rule unfortunately does not seem to recognize that there may be business demands or lack of resources to respond--particularly in the case of smaller companies facing a CID.

Next, the Rules provide no independent review if a covered person believes the CID is without merit. We believe that this should be corrected.

The Bureau may conduct hearings in support of a CID, but unlike FTC practice, covered persons may not object to a question on the grounds that the question is outside the scope of the investigation thereby leading to organized fishing expeditions at high cost to companies.

AFSA recommends that covered persons be allowed the ability to seek repayment of attorneys fees and costs incurred in defending against an investigation if it is shown to be wholly without merit. Again, reliance on regulatory precedent is not enough; other agencies have

[11] FDIC Regulations, § 308.131
[12] 76 Federal Register at 45172

struggled and continue to struggle to ensure transparency and fairness in these processes and procedures. Cost recovery is a means to accomplish this objective.

Additionally, the Bureau may allow representatives of agencies with which it is conducting a joint investigation to be present if the covered person being examined consents. While the latter seems benign, we suggest that a lack of such consent should not be used to presume guilt in the underlying matter.

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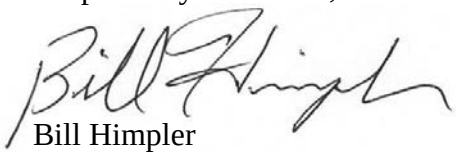
AFSA welcomes the opportunity to discuss any of the issues raised in this letter. If you have any questions or if we can provide any additional information, please feel free to contact me at 202-296-5544, ext. 616 or bhimpler@afsamail.org.

Respectfully submitted,



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