Congress of the United States
House of Representatives
Washington, DC 20515

March 21, 2023

The Honorable Rohit Chopra
Director, Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Dear Director Chopra:

We write to express grave concerns with the Consumer Financial Protection Bureau's recent efforts to impose industry-wide changes to longstanding practices in the auto finance industry through litigation against a single auto finance company.[1] The Bureau's actions pose severe risks to the availability of consumer credit for millions of hardworking Americans, and will certainly reduce or eliminate competition for subprime financing, if sources are even willing and able to provide it. As a result, fewer people will be able to purchase cars (needed to get to work, attend school, buy fresh groceries, and access health care), finance necessities, build credit, and ultimately, to achieve their American Dream.

The Bureau has pushed the bounds of its delegated authority, and members of Congress on both sides of the aisle are frustrated with the Bureau's circumvention of traditional policy-making channels. Without the benefit and accountability of the legislative and notice-and-comment rulemaking processes or sufficient data, the Bureau has attacked the auto finance market, the current market prices of used car vehicles, the availability of voluntary vehicle protection products, and lawful repossessions. This approach -- which risks eliminating access to credit to millions of Americans -- denies key stakeholders, including consumers, industry participants, and elected officials, the opportunity to contribute and comment on these significant changes, which will have significant unintended consequences for consumers in need and competitive markets in contravention of the Bureau's own statutory purpose: "ensuring that **all consumers** have access to markets for consumer financial products and services."[2]

The dangers of the Bureau's "legislation by lawsuit" approach to regulation in the auto finance space are manifest in the lawsuit it recently filed against Credit Acceptance Corporation with the New York Attorney General (NYAG). The Complaint in that case highlights where the failure to follow notice and comment rulemaking diminishes important market safeguards by disallowing contributions from important market participants:

- First, the Bureau has sought to disregard market transactions and compare vehicle sale prices with a hypothetical "cash price proxy" to reach the conclusion that a "hidden

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[1] *See* Compl., *CFPB v. Credit Acceptance Corp.*, 23 Civ. 0038, ECF No. 1 (S.D.N.Y. Jan. 4, 2023) (the "Complaint").
[2] 12 U.S.C. § 5511(a) (emphasis added).

finance charge" arises any time a dealer sells commercial paper to a finance company at a discount. Specifically, you argue in the Complaint that it is "abusive" and "deceptive" for the dealer to record the actual vehicle sales price negotiated between the dealer and the consumer as the "cash price" in a consumer's contract. It appears you believe that dealers across the country have been "incentivized" to inflate prices and that the "true cash price" that must be disclosed to consumers on the face of their contracts is whatever the finance company will pay to the dealer to later accept assignment of the contract, plus the customer's down payment and any trade-in value. You call this the "cash price proxy" and believe the difference between the "cash price proxy" and the selling price that the customer agreed to pay the dealership is a "hidden finance charge".

This approach fails to consider more than forty years of settled law and creates an untenable situation which will have a negative impact upon the necessary secondary markets for retail installment contracts. This position would also significantly curtail the lawful commercial sale and purchase of contracts in the secondary market, both within auto finance and likely beyond. Such a result would adversely impact consumers' access to credit, consumers choice for financing options, and competition in the marketplace overall. Moreover, it would dramatically limit the financing options available to consumers with poor or non-existent credit, potentially denying those consumers access to the credit markets at all, in contravention of the Bureau's statutory purpose and congressionally defined objectives.[3]

- Second, the Bureau's position is squarely at odds with the Truth in Lending Act (TILA), as implemented by Regulation Z, which the Bureau is charged with administering.[4] Among other things, the Bureau's position in the litigation fundamentally alters the definitions of "cash price" and "finance charge" in Regulation Z without amending those regulations through notice-and-comment rulemaking. Such important regulatory proclamations should not be repealed through litigation. Instead, any change to TILA's well-settled statutory limits on assignee liability for credit-disclosure-based claims or an attempt to hold lenders liable for disclosure violations not apparent on the face of the documents assigned must be undertaken by Congress. The litigation theory advanced by the Bureau without the benefit of a full consideration of the credit markets, and without contributions from the market's participants, injects into the secondary markets for retail installment contracts the very uncertainty that Congress sought to prevent with the TILA and undoubtedly will increase the cost of financing for millions of consumers.[5]

- Third, the Bureau suggests that an auto finance company must implement an "ability to repay" test that includes consideration of weekly food and childcare expenses when considering whether to extend credit.[6] No such requirement currently exists in the auto finance market. The Bureau's recent revocation, less than three years after their adoption, of mandatory underwriting guidelines in the context of payday, vehicle title,

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[3] *See* 12 U.S.C. § 5511.
[4] *See id.* §§ 5512(a), 5481(12)(O), 5582(a).
[5] *See* 15 U.S.C. § 1641(a).
[6] Compl. at ¶ 30.

and other high-cost installment loans[7] underscores why policy decisions concerning the appropriate balance of consumer protection and consumer access to credit are best left to the elected legislature or, at a minimum, the notice-and-comment rulemaking process.

In sum, the Bureau's proposed attempt to create new rules through litigation denies our citizens their rights to participate in our historic democracy. This type of policymaking should only be done by the People's elected representatives in Congress or through the congressionally enacted administrative rulemaking process.

Moreover, the Bureau's actions come when there is significant risk of recession from the efforts to cool inflation. In such event, it is to be expected that more consumers will have to depend on subprime credit, which will be increasingly scarce if it becomes unlawful for finance companies to buy commercial paper at a discount. What's more, the stance that credit should not be extended if there is a risk of default could cause credit markets to freeze entirely just as inflationary pressure forces consumers—especially subprime consumers—to make hard choices to prioritize their expenses and debt obligations.

These concerns merit consideration by the House Financial Services Committee. Accordingly, we request your answers in writing to the following questions not later than April 7, 2023.

1. Has the Bureau considered, or is the Bureau considering, engaging in rulemaking to set new underwriting standards, including, but not limited to, requirements to evaluate a consumer's ability to repay auto finance obligations? If yes, the Bureau previously withdrew its underwriting standards for payday, vehicle title, and certain other high-cost installment loans, citing insufficient evidence that such standards are necessary to prevent unlawful or abusive acts or practices. What factual basis does the Bureau have to support adopting such standards in the auto finance context at this time? If no, upon what authority does the Bureau base its decision to circumvent the notice-and-comment rulemaking process and seek to implement such a significant policy determination through litigation?

2. In the Complaint, the Bureau criticizes an auto finance company for having a specific default rate. Could you please explain if the Bureau is proposing a new standard that requires a lender to only make a loan that it is 100% sure will be repaid? In other words, is the only acceptable default rate a 0% rate? If not, what default rate is acceptable to the Bureau, and what basis does it have for setting that default ceiling? Has that default rate ever been communicated to lenders? Does the Bureau believe it is possible for lenders to identify which consumers will default at the time of contracting (particularly when most defaults are caused by unpredictable future events, such as divorce, loss of income, and medical issues) and how can that knowledge be imposed upon participants in the secondary market? What is the Bureau's basis for believing that imposing such a default rate (even if less than 0%) will diminish access to credit for broad swathes of Americans?

3. In the Complaint, the Bureau suggests that creditors should inquire about specific costs individual consumers may be incurring, such as grocery bills and childcare. What

[7] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 85 Fed. Reg. 44,382 (July 22, 2020).

specific law, rule or regulation requires creditors to make such inquiry? What guidance exists to identify what information needs to be considered and how it should be used? What research has been performed to determine such costs at the time of origination are determinative of a customer's ability to repay? How did this research account for a customer's ability to increase their income after gaining access to a car, to lower their grocery bills by accessing multiple stores and comparison shopping, to increase their earning capacity through additional education accessible only by car, and to stay in better health by increased access to health care?

Do consumers need to provide monthly cash flow reports before they apply for a loan? Who would be responsible for auditing those reports? What happens to the contract if a mistake is later identified? How much income as compared to expenses is needed for a contract to be lawful?

4. What basis does the Bureau have to suggest that consumers who default on their obligations do so because they never could afford even their first car payment as opposed to having a later financial stress occur during the life of their contract that impacted their ability to repay (*e.g.*, job loss)? What basis does the Bureau have to support its position that creditors can predict which future financial stresses will befall specific consumers?

5. Has the Bureau conducted any analysis of whether consumers are unable to understand the material risks, costs or conditions of financing a vehicle purchase, or adjust expenses to accommodate such a purchase, under the current disclosure requirements?

6. Has the Bureau conducted any type of cost-benefit or regulatory impact analysis on how these new "rules" will affect consumers and consumer choice in financial services? If yes, please provide documentation of that analysis.

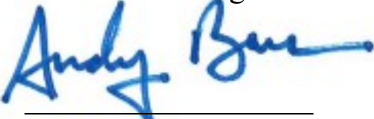
Additionally, we request that the Bureau provide written responses and any related documentation referenced in the questions above to be submitted with your responses in an unredacted form.

Thank you for your prompt attention to this matter. We look forward to your response.

Sincerely,

Michael V. Lawler
Member of Congress

Andrew R. Garbarino
Member of Congress



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