AMERICAN FINANCIAL SERVICES ASSOCIATION

February 3, 2025

The Honorable Scott Bessent
Secretary
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Dear Secretary Bessent:

On behalf of the American Financial Services Association (AFSA), I congratulate you on your appointment of acting director of the Consumer Financial Protection Bureau (CFPB). We look forward to working with you as you continue to champion economic policies that strengthen the consumer credit industry and ensure a brighter future for American workers and their families.

Founded in 1916, AFSA is the largest national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance. Members are uniquely situated to understand the impact of burdensome regulations on small businesses and the American consumer.

Attached are suggestions to reform the CFPB, by improving its transparency and accountability, and ensuring affordable credit products and services are available for American households. Additionally, we have included a list of the far-reaching regulations and guidance issued by the CFPB which we hope you reconsider. Such reconsideration will help empower consumers to make their own financial choices while supporting the U.S. economy.

We appreciate very much the agency-wide pause placed all rulemaking, communications, litigation, and other activities. We would encourage you to also extend compliance deadlines for all final rules to ensure that there is appropriate time to review the regulatory actions of the previous administration.

AFSA, and all our members, look forward to continuing to work with you in your capacity as acting director of the CFPB to do its part and help America's financial markets be the most robust in the world.

Sincerely,

Celia Winslow

Celia Winslow
President-elect
American Financial Services Association

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CLEAR RULES OF THE ROAD

Reviewing Guidance, Supervision, & Enforcement at the Consumer Financial Protection Bureau (CFPB)

Consumers need credit, not confusion. Credit terms should be easy to understand, and the CFPB's rules should be, too. Unfortunately, the CFPB's policies are so confusing and unclear that they risk hindering millions of consumers' access to credit in a time when most Americans face more than a $700 increase in their monthly bills for such basic goods and service as gas and groceries.

Every consumer deserves access to some form of credit; they shouldn't have to worry in times of need about not having access to credit to keep their financial lives on track. The CFPB can create reasonable regulations that protect consumers' access to credit, which is crucial to their financial stability and their economic mobility. Consumers deserve to be confident they are protected. Creditors deserve certainty and clarity so they can serve consumers and not be caught in a regulatory game of "gotcha."

The new CFPB director should:

(1) Stop rulemaking via guidance, adopt policies and procedures to ensure that rulemaking is done in compliance with the Administrative Procedures Act (APA), and create an Office of Economic Analysis;
(2) Pause current rulemakings for review, rescind or revise certain final rules, and examine areas in which new rulemaking might be necessary;
(3) Stop "risk-based" supervision, reassess Supervisory Highlights, supervise more efficiently, and make changes to the consumer complaint database; and
(4) Pause and review current enforcement actions and institute additional policies and procedures for enforcement actions and civil investigative demands (CIDs).

I. Guidance

The CFPB conducts rulemaking via guidance, with no opportunity for notice and comment, as opposed to following the legally-required Administrative Procedures Act (APA). AFSA asks that the new director: stop rulemaking via guidance, adopt policies and procedures to ensure that rulemaking is done in compliance with the administrative Procedures Act (APA), and create an Office of Economic Analysis.

A. Stop Rulemaking Via Guidance

1. In April 2023, the CFPB released its Policy Statement on Abusive Acts or Practices. AFSA and others have been asking for description of "abusive acts or practices" so that financial institutions could tailor their compliance management systems. Unfortunately, the statement is so vague and unwieldy, it is impossible to implement. For example, the CFPB says that the following could be abusive: fine print and complex language (much of which is required by law and by regulation imposed by the CFPB), pop-ups or drop-down boxes, an entity benefiting from cost savings, a product or service the customer complains about

(even if the complaint is unsubstantiated), a consumer having to pay money, and being a large company.

Recommendation: Because the Policy Statement on Abusive Acts or Practices is impossible to implement, the CFPB should rescind it. Decades of law, regulation, and jurisprudence already provide all the authority the Bureau and other regulators need to prevent abusive acts. Rescinding the policy statement will not leave a regulatory vacuum.

2. Rather than follow the APA, the CFPB posts policy changes in its blog. For example, in December 2022, the CFPB attempted to change the statutory requirements of the Servicemembers Civil Relief Act (SCRA).

   Recommendation: The CFPB should issue a policy statement that blog posts are not guidance and are not legally binding. Instead, covered entities should follow laws and regulations that have been issued under the APA.

3. In May 2022, the CFPB issued an interpretive rule (12 CFR 1042) seeking to clarify the state's ability to enforce federal consumer financial protection laws. The interpretive rule incorrectly stated that states can enforce the Consumer Financial Protection Act, including the provision making it unlawful for covered persons or service providers to violate any provision of federal consumer financial protection law.

   Recommendation: The CFPB should rescind the current interpretive rule. Allowing states to act beyond the express enforcement authority granted to them usurps the role of the CFPB and is a clear case of government overreach. The CFPB should issue a new interpretive rule, with an opportunity for notice and comment, describing the limitations that the Dodd-Frank Act put on states' ability to enforce the CFPA. Namely: (a) The plain language of the CFPA does not grant individual attorneys general from different states authority to bring a collective, multistate enforcement action for relief under the auspices of the CFPA; (b) the CFPA only authorizes a state to bring a civil action in that state to enforce the CFPA's UDAAP prohibition, not to enforce other Federal consumer financial laws; and (c) Congress granted the CFPB specific and extensive civil money penalties in12 U.S.C. § 5565(c), but it did not make the same grant of civil money penalties to the states.

4. The CFPB is not just conducting rulemaking via guidance, enforcement, blog post, and supervision, but is now engaging in rulemaking via amicus brief. For example, the Bureau has filed amicus briefs in a few Fair Credit Reporting Act cases urging the courts to find that lenders should investigate not only the factual accuracy of reported information, but also must assess and resolve legal disputes.

   Recommendation: Illustrating the agency's position by amicus brief results in confusion and is unworkable. Court cases often involve complicated and unique facts and an amicus brief supporting a party's position may not provide proper clarity for stakeholders. One example where the CFPB's rulemaking via amicus has resulted in a lack of clarity is in credit reporting. Contrary to the CFPB's urging in amicus briefs, the Fair Credit

Reporting Act addresses how lenders should address factual inaccuracies, but does not require lenders to resolve legal disputes. This position is supported by some courts who have considered the question. The CFPB should issue a procedural rule outlining the criteria that the CFPB will use to determine when it will file amicus briefs. In the meantime, the CFPB should issue a policy statement reiterating that the FCRA requires lenders to investigate only the factual accuracy of reported information, and not assess and resolve legal disputes.

B. Adopt policies and procedures to ensure that rulemaking is done in compliance with the APA.

Currently, the CFPB engages in regulation via guidance, blog posts, press releases, supervision, enforcement, and amicus briefs. The guidance is often unclear and difficult to interpret. Furthermore, it may contradict other laws or regulations. Such unclear guidance, issued without notice and comment, may harm financial institutions and the customers they serve.

Recommendation: The CFPB should promulgate a procedural rule specifying when the Bureau may issue guidance and when it must follow APA rulemaking. While guidance can be helpful, guidance cannot contradict state law or other regulations.

C. Create an Office of Economic Analysis.

The CFPB does not have a distinct team of economists responsible for reviewing the economic impact of the CFPB's actions. Such a team could ensure that the CFPB's actions have a positive, not negative, economic impact on the consumers the CFPB is charged with protecting.

Recommendation: The CFPB should create an Office of Economic Analysis that must review all proposed and existing guidance, orders, rules, and regulations. In the course of a rulemaking, the office must publish an assessment of all anticipated direct and indirect costs and benefits of the proposed regulation and of any reasonable alternatives. As part of the required analysis under the Regulatory Flexibility Act, the bureau must describe the impact on small businesses of proposed and final rules and a justification for the rejection of any alternatives.

II. Rulemaking

The incoming CFPB director should pause all open rulemakings and review them in light of the incoming administration's priorities. Regulations should: comply with current law, fit within the Bureau's statutory authority, not be duplicative, and be evaluated to ensure that they are solving a problem and would benefit consumers. The incoming CFPB director should also rescind or revise certain rules that have already been promulgated. Additionally, the new director should look at the consumer marketplace overall to determine if there may be areas in which new rulemaking is necessary.

A. Final Rules

1. *Payday, Vehicle Title, and Certain High-Cost Installment Loans*: This rule has gone through a myriad of changes over the last several years. Currently, the only portion of the rule set to go into effect is the payments provision. This provision: prohibits lenders from attempting to withdraw payment for a covered loan from a borrower's account after two consecutive attempts have failed due to lack of sufficient funds, unless the borrower specifically provides new authorization to do so; and requires lenders to give consumers certain notices, such as advance notice before attempting to withdraw a payment for the first time and notice of the consumer's rights when two consecutive payment attempts fail.

   Recommendation: As covered lenders have begun implementing this provision, it has become apparent that it would harm the very consumers the CFPB is trying to protect. Under this rule, consumers would lose flexibility and payment options. For example, lenders might not be able to allow consumers to pay with convenient methods, such as ACH. Furthermore, the rule was promulgated based on conclusions drawn data from fifteen years ago. During the last several years, lenders have changed their practices, making the need for the rule obsolete. For example, new rules for payments (from Nacha, which governs the ACH Network) prohibit lenders from attempting to pull from a customer's account numerous times. Therefore, the new director should rescind the payments provision.

2. *Nonbank registry for enforcement orders (12 CFR 1092)*: This rule requires nonbank covered persons to register and submit to the proposed registry specific information about final, public orders issued by federal, state, or local agencies or courts. It also requires that a designated person at supervised nonbank covered persons attest to compliance with any such orders.

   Recommendation: This new registry is structured to "name and shame" rather than act as a useful tool to effectively monitor and reduce any potential risks to consumers. In addition, it is duplicative as any information published in the registry is already publicly available elsewhere. The CFPB should rescind the Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders.

3. *Small business lending (Section 1071)*: The rule requires commercial lenders to collect and report to the CFPB data on applications for credit for small businesses. Lenders will be required to ask for their business customers' personal information, such as their sexual orientation, and report it to the CFPB. Customers will have the option to decline to provide the information, meaning that the information that is collected will not be statistically useful. The rule is scheduled to go into effect on July 18, 2025 for large financial institutions.

   Recommendation: This data collection will be extremely burdensome and will yield little valuable information. The CFPB should delay the effective date for a year to review the rule. While part of the rule is statutorily mandated, the Bureau is proposing that creditors *collect and report information beyond what is required. The CFPB should revise the rule to only require creditors to collect and report on the data points outlined by Congress and/or require the CFPB to join in the injunction/stay order enjoining and tolling 1071 or at least file a motion of no objection in the Texas Bankers Association Case in the 5th Circuit; No. 24-40705.*

4. *Credit card late fee*: The CFPB's rule significantly restricts late fees that consumer credit card issuers may charge from \$30 or \$41, in most cases, to a mere \$8. While the rule is specific to cards, and the Bureau's authority to regulate credit card late fees comes from a specific provision in the CARD Act, the rule is concerning for the entire credit industry because it demonstrates the Bureau's misunderstanding of late fees. In addition, it is unclear if the CFPB will label late fees in other industries as "unfair" or "abusive."

   Recommendation: If not overturned by the court, it would have a major impact on the card issuers and customers. The CFPB should rescind the Credit Card Penalty Fees Rule.

B. *Open Rulemakings*

1. *Auto loan data collection*: The CFPB is proposing to collect a new set of data annually from auto finance businesses that acquire more than 20,000 auto loans in a calendar year. However, the CFPB has failed to justify why this overreaching data collection is necessary for market monitoring purposes.

   Recommendation: The Bureau should not finalize the proposed new information collection. The information the CFPB is seeking to collect will significantly burden businesses with more reporting requirements, risk Americans' right to privacy by allowing the CFPB to access sensitive customer and business information, and ignores Congressional intent set out in Section 1029 of the Dodd Frank Act relating to the "exclusion of auto dealers." In addition, the CFPB should issue any studies using the data already collected for comment before finalizing them.

2. *Nonbank registry for contracts with arbitration clauses*: The proposed rule would establish a registry for supervised nonbanks that include an arbitration clause in their contracts.

   Recommendation: The CFPB should not finalize the proposed rule because it is an unlawful attempt to issue a rule on arbitration following Congress' revocation of the CFPB's 2017 arbitration rule. It is also an attempt to regulate arbitration agreements, which is contrary to federal law, Supreme Court precedent, and policy, and would harm consumers, who benefit from arbitration.

3. *Fair Credit Reporting Act (FCRA)*: The CFPB is promulgating an extensive rule on credit reporting, which will have a substantial impact on both credit bureaus and credit furnishers. A proposed rule on medical debt has been released and a more general outline has been released.

Recommendation: Rescind the proposed rule and decline to proceed further with the rulemaking.

C. *New Rulemaking*

New rulemaking should be done in accordance with the APA. New rules should be promulgated only after a problem in the marketplace is identified, and if it is clear that the new rule will address the identified problem.

Recommendation: Two areas that the CFPB should consider studying are debt settlement and credit repair. Specifically, in debt settlement, the Bureau should find out if debt settlement companies are steering consumers to certain lenders and getting a kickback for those referrals. On credit repair, the CFPB should see if consumers' credit scores actually improve for longer than a few months and how much consumers pay for these services.

III. Supervision

The CFPB should stop "risk-based" supervision for state-licensed and state-regulated entities, reassess Supervisory Highlights, supervise more efficiently, and make changes to the consumer complaint database. Federal supervision of financial institutions has historically been focused on depository institutions because they hold consumer deposits. Nonbanks are supervised at the state level. Nonbanks do not pose the same risk as depository institutions because they risk their own (or their investors) money, not consumers' funds. Imposing a bank supervisory regulatory scheme on nonbanks is unnecessary.

A. *"Risk-based" Supervision (12 CFR 1091).*

The Dodd-Frank Act gives the CFPB the authority to supervise certain industries (like mortgage, student lending, and payday), depository institutions over $10 billion, larger participants in a market, and financial institutions that the CFPB has reasonable cause to determine pose risk to consumers. In 2012, the CFPB proposed a rule setting forth the procedures by which the CFPB may subject a nonbank to supervision using its "risk" authority, but didn't define "risk." In 2013, the CFPB issued a final rule, still declining to define the term "risks to consumers." In 2022, the CFPB issued a procedural rule specifying that the Bureau could make such risk determinations public, again neglecting to define "risk." At the same time, the Bureau noted it could call a nonbank risky, even if that nonbank did not violate any laws. In 2024, the CFPB announced publicly for the first time that it was using its risk-based authority to supervise an installment lender. In the announcement, the Bureau claimed that even though it was not accusing the lender of violating any laws, it had decided that the lender engaged in risky behavior.

Recommendation: The CFPB should close the examinations of financial institutions being supervised under the rule, Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination, without negative findings or any public statement. The CFPB should also withdraw public orders establishing supervisory authority under this rule. Lastly, the CFPB should issue a revised interim final rule that: (1) includes a clear, brightline, and *reasonable definition of "risk," (2) prohibits state-supervised entities from being designated as "risky," and (3) makes it clear that following a legal practice cannot be defined as "risky."*

B. Supervisory Highlights

The goal of Supervisory Highlights is to "help industry limit risks to consumers and comply with federal consumer financial law." However, often the Highlights do not provide sufficient detail for industry to adjust practices.

Recommendation: The CFPB should be clear that Supervisory Highlights are merely informative, not binding. Furthermore, the Highlights should be tailored and include sufficient detail (including using standard terms used by industry stakeholders) to allow for risk management.

C. Supervise More Efficiently

The CFPB has said that it has limited resources, and it should use its resources, particularly in the supervision division, more effectively and efficiently. For example, the CFPB has authority to supervise larger participants in designated markets, but "larger participants" is defined so broadly, that it covers even small businesses. The CFPB has also used its supervision authority to target industries outside its jurisdiction. For example, the CFPB has attempted to change auto dealer practices through supervision of auto finance companies, although auto dealers are exempt from CFPB oversight. In another example, the CFPB has tried to change optional insurance products through supervision of creditors, even though insurance is also expressly exempted from the CFPB's jurisdiction.

Recommendation: First, the CFPB should establish an independent internal agency appellate process for the review of supervisory determinations made at institutions supervised by the CFPB. Second, the CFPB should better prioritize who gets examined each year. When supervising businesses appropriately, the CFPB should avoid asking for materials/deliverables on federal holidays. A new Office of Economic Analysis should conduct a cost/benefit analysis of supervision and then the Bureau should review the larger participant rules. Third, CFPB exams should be targeted and limited to areas in the CFPB's jurisdiction.

D. Consumer Complaint Database

The CFPB's consumer complaint database could be an effective tool for consumers, but unfortunately, it is misused. Unverified stories are published and duplicative complaints submitted by unverified sources are not necessarily removed.

Recommendations: The "narrative" portion of the complaint database should be removed. Complaints should be removed after a certain period of time. And, only consumers themselves, not third parties, should be able to submit complaints to cut down on inaccurate, frivolous, and duplicative complaints.

IV. Enforcement Actions

Several of the CFPB's enforcement actions have gone beyond the Bureau's authority. Not only does the Bureau target entities outside its jurisdiction, but the CFPB attempts to create new compliance obligations, overrule state law, and change statutes by bringing enforcement actions. In the last year, the CFPB has attempted to change the following in enforcement actions it has brought against creditors: certain refund practices, cancellation agreements, credit reporting, debt collection practices, refinancing policies, fees charges, and ability to repay calculations.

A. Targeted Enforcement

Recommendations: While the CFPB may have the authority over these practices, it must make changes by following the APA, not by bringing enforcement actions. The Bureau should pause enforcement actions until they can be reviewed by the new director. Furthermore, the CFPB should institute a procedural rule describing when it can bring an enforcement action. Included in that rule should be a limitation that the Bureau can only enforce laws and regulations issued in accordance with the APA, not guidance. In addition, enforcement actions should only be brought where there is a clear violation of law. Lastly, the Bureau should not use is nebulous "abusive" authority to bring enforcement actions.

B. Explicit CIDs

The Bureau's expansive CID requests are fishing expeditions. They are not targeted at specific allegations of wrongdoing.

Recommendation: The CFPB should also implement a procedure rule that would give the CFPB 20 days to narrow or justify their CID. The CFPB should explicitly reference any alleged violations, as well as allow companies the ability to raise concerns such as vagueness or undue burden of CIDs. Additionally, financial firms would be able to bring CIDs to federal court for relief if the CFPB denies a reasonable petition to modify or set aside a demand. Finally, the CFPB should have 6-year statute of limitations on CIDs.

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The CFPB's overreaching regulations are harming – not helping – consumers. It's time for clear rules of the road to ensure accountability and transparency from the CFPB.