CONSUMER BANKERS ASSOCIATION

April 6, 2018

The Honorable Jeb Hensarling
Chairman
Committee on Financial Services
U.S. House of Representatives
2129 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Maxine Waters
Ranking Member
Committee on Financial Services
U.S. House of Representatives
4340 O'Neill House Office Building
Washington, D.C. 20151

Dear Chairman Hensarling and Ranking Member Waters:

The Consumer Bankers Association (CBA) appreciates the Financial Services Committee's continued oversight of the Consumer Financial Protection Bureau (CFPB or Bureau) and its activities. We would like to take this opportunity to submit the following comments on the Semi-Annual Report of the Bureau of Consumer Financial Protection. CBA is the voice of the retail banking industry whose products and services provide access to credit to millions of consumers and small businesses. Our members operate in all 50 states, serve more than 150 million Americans and collectively hold two-thirds of the country's total depository assets.

In 2010, Congress created the CFPB and granted it rulemaking authority over a $3 trillion consumer financial services industry. The CFPB has supervisory authority over more entities than all other Federal bank supervisors combined, totaling as many as 15,000 companies. In addition to supervisory authority over each depository institution with assets over $10 billion, the CFPB has supervisory authority over all those in the business of origination, brokerage, or servicing of consumer loans secured by real estate, and related mortgage loan modification or foreclosure relief services; private education loans; and short term liquidity products. Additionally, the agency has the ability to define, by rulemaking, its own scope of supervisory authority, which it has so far defined to include authority over larger consumer reporting agencies, debt collectors, nonbank student loan servicers, and international money transmitters. Overall, the Bureau's vast jurisdiction includes an entire sector of American finance from banks and credit unions, to innumerable financial services companies of all sizes, including larger participants in the American financial system, ultimately touching all Americans.

Despite its vast jurisdiction, the Bureau was structured in a way to limit congressional and presidential oversight. A sole director, who is only removable for cause, is responsible for the management of the Bureau, which has access to a dedicated funding stream from the Federal Reserve outside of Congress's direct oversight.

CBA supports Acting Director Mick Mulvaney's goal of bringing greater accountability to the agency. It is crucial that appropriate checks and balances are in place given the scope and importance of this agency. It is also important to insulate the Bureau from future political shifts that could reduce its ability to act impartially to ensure a fair and competitive marketplace. Our comments below will outline our views as to how the Bureau's structure and supervision, enforcement, and rulemaking activities, among others, can be improved to best serve consumers.

Bipartisan Commission at the Consumer Financial Protection Bureau

It is vital for a regulator to provide certainty to the industry it regulates, and ensure some constancy and predictability in leadership from one presidential administration to the next. At no agency is this more important than at the CFPB. The CFPB has such a wide reach, it impacts nearly every American consumer. That is why CBA strongly supports the Financial Product Safety Commission Act of 2018 (H.R. 5266) to transition the leadership structure at the CFPB from a sole director to a bipartisan, five-member commission. A bipartisan commission at the CFPB would help provide certainty, establish clear and consistent rules of the road, and best protect consumers for generations to come. We urge the committee to swiftly act on this bipartisan legislation to bring about this needed structural change.

A lack of certainty and long-term consistency in leadership at the Bureau adversely affects the banking industry, consumers, and our economy. As the past months have indicated, the CFPB's current governance structure is subject to dramatic political shifts with each change in presidential administration. This makes it incredibly difficult for the financial services industry to plan for the future. A bipartisan commission would bring more certainty to the highly regulated financial services space so that banks can properly plan for future investment in more technology, innovate new products, and better serve consumers.

A commission would also bring much-needed transparency to the CFPB as it would provide an open forum for dissenting voices and viewpoints from multiple stakeholders. From its inception, the CFPB has been the center of a political firestorm, which has only increased in strength in its nearly seven years of operation. A sole director can unilaterally make decisions, oftentimes behind closed doors and without public debate. Alternatively, a commission would allow debate on opposing ideas, viewpoints, and solutions, encouraging both sides to work together to come to moderated rulemakings that can better stand the test of time.

Furthermore, the concept of a commission has historically shared bipartisan support. Under President Obama, the Department of Treasury issued a report stating, "The CFPA [Consumer Financial Protection Agency] should be structured to promote its independence and accountability. The CFPA will have a Director and a Board. The Board should represent a diverse set of viewpoints and experiences."[1] Under the Trump Administration, Treasury Secretary Steve Mnuchin testified he does "support the concept of a board to oversee [the CFPB]" in a recent House Appropriations Subcommittee hearing.[2] In Congress, bipartisan legislation establishing a CFPB commission has passed the House Financial Services Committee six times and passed the House of Representatives four times, with Democrats and Republicans voting in favor. When Dodd-Frank passed the House in 2009, under the leadership of then-House Financial Services Committee Chairman Barney Frank (D-MA), it included a provision that would establish a five-member commission at the Bureau. And just last Congress, the

[1] Department of Treasury, *Financial Regulatory Reform, A New Foundation: Rebuilding Financial Supervision and Regulation*, p. 58.
[2] House Appropriations Subcommittee Hearing, FY19 Budget Hearing, Department of Treasury, March 6, 2018.

House Financial Services Committee passed on a bipartisan basis, legislation that would establish a bipartisan, five-member commission at the CFPB.

Importantly, the American people and industry are supportive of a bipartisan commission at the CFPB. A recent Morning Consult poll shows that by a margin of three to one, registered voters support a bipartisan commission over a sole director, with only 14 percent of those polled stating they prefer to keep the Bureau's current leadership structure.[3] Industry is also in lock step with two-dozen trade associations representing thousands of banks, credit unions, financial institutions, and businesses of all sizes supporting this needed change.

Both political parties must put aside the short-term gains and politicization of the CFPB in favor of the long-term best interest of America's consumers, businesses, and economy. Both Democrats and Republicans, at different times, have claimed it is to their benefit politically to keep the agency as a sole director, arguing it is better to have an autonomous director for a five year term to undo or redo the rules the previous director imposed or revised. However, this approach is short-sighted. Not only does it fail to truly take into consideration the best interest of consumers, but it provides a flawed form of regulatory leadership for a multi-trillion dollar industry.

A bipartisan commission would bring certainty, transparency, and clarity to an overly political agency. We urge the committee to continue its recent bipartisan effort to improve our financial regulatory system by passing legislation to improve the CFPB's governance.

Renewing the Focus of the CFPB

Rethinking the "Push the Envelope" Mentality

In February, the CFPB released a revised Strategic Plan that outlines its mission, strategic goals, and objectives. This plan revises the draft strategic plan former Director Richard Cordray released in October of 2017. Stated within the plan are the Bureau's long-term strategic goals, which include 1) ensure that all consumers have access to markets for consumer financial products and services; 2) implement and enforce the law consistently to ensure that markets for consumer financial products and services are fair, transparent, and competitive; and 3) foster operational excellence through efficient and effective processes, governance, and security of resources and information. In the opening statement, Acting Director Mick Mulvaney stated, "If there is one way to summarize the strategic changes occurring at the Bureau, it is this: we have committed to fulfill the Bureau's statutory responsibilities, but go no further." CBA strongly agrees with this reformed plan and believes the previous administration's practice of "pushing the envelope" was a gross misuse of its statutory authority that failed to properly serve the financial needs of the U.S. consumer.

Requests for Information

As part of its effort to evaluate the agency's prior actions and polices, the CFPB has initiated several requests for information (RFIs) on the Bureau's functions and past actions. CBA appreciates this opportunity for stakeholders to comment, and we will submit responses on the RFIs, sharing our members' perspectives as banks regulated and supervised by the CFPB. It is

[3] Morning Consult Poll, May 3, 2017.

rare for a regulatory agency to take the time to assess its entire operations in a thorough fashion by reaching out to stakeholders. The CFPB is first and foremost a consumer protection agency, so it is important it answer to the consumers themselves. It is also a financial regulator for banks and nonbanks in the consumer financial services space, and we believe it is extremely valuable for the Bureau to learn how its actions affect the ability of these companies to serve consumers. CBA commends the CFPB for this effort and will be providing input to the RFIs.

Some of the comments we will be sharing with the Bureau during this comment period include the following:

Enforcement and Supervision
The CFPB has historically used the enforcement process as a regulatory tool. Former Director Richard Cordray stated on numerous occasions that companies should draw their understanding of the compliance and legal requirements of federal law by studying consent orders and other enforcement actions by the CFPB. The result is not in the best interest of either industry or consumers. This policy, which is often called "rulemaking by enforcement," appealed to the CFPB because it was swifter and did not require as much substantiation. The rulemaking process, as mandated by the Administrative Procedures Act and the Dodd-Frank Act, is time consuming for a reason: it demands the CFPB to adhere to a strict process that invites those who are affected by a proposal to have a say in the creation of the rule. Enforcement actions do not; and if they are negotiated consent orders, they may not even be a very fair representation of the regulator's compliance expectations of others. In order to attempt to know what the law is and how to comply, one has to hire a team of expensive lawyers to decipher the tea leaves. We believe this is simply bad public policy and leads to nothing more than excess legal cost and a lack of clear guidance.

Another concern we intend to raise in our response to the RFIs is the absence of good coordination by the regulatory agencies. CBA member banks are often supervised by multiple federal regulators (not to mention the state regulatory bodies that supervise state chartered banks). A single financial services company can be examined by the Federal Reserve, the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and the CFPB. In some cases, more than one agency is examining a bank for similar or related issues, each with a slightly different set of lenses. The same documents can be requested or variations can be sought, and similar inquiries can be made to the same people. Better coordination is needed to minimize the cost and burden to the financial institutions, permitting them to better serve their customers. In a similar vein, enforcement can be a multiple agency process, with each agency taking on the same issue, and imposing its own penalties for related violations. At times this appears to be driven by a desire to demonstrate its regulatory authority and not defer to any other regulatory body, but it is unnecessary to have redundancy, and it is a cost that ultimately reduces the effectiveness of the entire enforcement process. The Treasury Department, in its 2017 report on financial services, recommended a single entity act as a kind of traffic cop or coordinator. CBA would support this approach to increased regulatory coordination.

Rulemaking

The CFPB's record regarding discretionary rulemaking has been concerning. The arbitration rule is a prime example of this latter form of regulation. During this rule's multi-year journey, the CFPB had multiple opportunities to gather data and work with industry to ensure arbitration agreements received a fair and balanced review of their merits and shortcomings. Indeed, CBA and other stakeholders reached out to the Bureau on many occasions (often without invitation) to provide substantive input on the CFPB's arbitration study. However, these entreaties were rebuffed, and an incomplete study served as the basis for a flawed regulation. Were it not for Congress's swift action in repealing this regulation under the Congressional Review Act, consumers would have lost an important dispute resolution tool, while the banking industry would have faced heightened litigation risk from frivolous lawsuits.

We would also point to the CFPB's small-dollar rule. Here, the CFPB produced an overly restrictive, broadly-applied rule based on little data. Despite industry efforts to develop a workable solution to meet consumers' small-dollar needs, the Bureau instead implemented a rule that will make small-dollar lending impractical and near impossible. This drastic approach and implementation of preconceived policy positions will only leave consumers with fewer options. They will now be forced into unregulated and unsupervised markets that offer few, if any, protections or will simply have their needs unmet. Consequences of this type of pre-determined rulemaking could be drastic for consumers, leaving them unable to pay rent, buy gas or groceries or meet an unexpected medical expense.

CBA is strongly supportive of clear and rational regulations that promote the industry's ability to comply and provides consumers with access to credit. We believe these twin objectives would be best served by a robust public comment process, a firm adherence to the formal rulemaking process, and a flexible implementation process following the issuance of a final rule. Under this framework, we would stress the need to avoid policy-based rulemaking and to base new regulations on real-world data and rigorous economic cost-benefit analysis.

Consumer Complaint Database

CBA member companies have strong incentives to maintain deep, well-informed, mutually satisfactory relationships with customers. This is why our members have robust complaint management procedures outside of the CFPB's Consumer Complaint Database to ensure they are resolving disputes as quickly as possible.

The CFPB has gone far beyond its statutory authority of establishing the Database, by publishing the data, adding unverified narratives, and now proposing a subjective consumer survey on resolution satisfaction that has no proven benefit. In addition to an annual report required by Congress, the CFPB releases "Monthly Complaint Reports" including complaint data on company performance, complaint volume, state and local information, and product trends. The CFPB has never taken any steps to determine if consumers use these published reports or benefit from them in any way. Instead, these reports seem intended to tarnish banks and other financial institutions' reputation, without verification and regardless of actual legal wrongdoing. Such action puts into question the objectivity of the data and thus its usefulness to consumers and regulators.

With the CFPB's database exceeding 1 million complaints, the inclusion of potentially personally identifiable narrative information, and reports of insufficient data security protocols at the CFPB, CBA is strongly concerned about the potential for compromising consumer privacy. In addition, the database erodes consumer privacy by impairing the confidential nature of the exchange between customer and banker.

To ensure consumer privacy and prevent the dissemination of misleading information, the CFPB should refrain from publically releasing filed complaints, stop the monthly reports on "most complaints," and eliminate the new survey from the portal.

Rulemaking

Small-Dollar Bank Loans

Millions of Americans live paycheck-to-paycheck, and need help making ends meet. Yet, regulators in Washington have chipped away at products and services that provide short-term, small-dollar credit, leaving consumers with very few and more expensive alternatives.

Historically, federal banking regulators have encouraged banks to help finance these small-dollar consumer loans. This is a preferable scenario: customers receive the services they want – and need – but remain in the well-regulated and supervised banking system. In response, some banks, working closely with regulators, developed a way to meet short-term lending needs with a tool known as deposit advance products. These loans were carefully designed to ensure strong safeguards, like an ability to repay analysis that took into account a customer's cash flow patterns and direct deposit history. Additionally, deposit advance products are cheaper than payday loans, offer greater transparency, require substantial disclosures and compliance with federal law, receive positive feedback from borrowers, and have low default rates.

Before the rule was proposed, CBA and many of our member banks worked in good faith with the Bureau to provide insight and counsel on how a rule could be crafted that would allow for banks to serve the small-dollar loan market, providing a well-regulated bank product to compete with payday loans. Unfortunately, the CFPB's final rule on small-dollar lending will only act as a disincentive for banks to enter this important market. Under the CFPB's rule, lenders will be required, among other things, to determine whether consumers have the ability to repay by applying overly complicated underwriting requirements similar to those for a home mortgage, which will make the product costly to consumers and unviable for depositories to offer. While the CFPB did provide for some very specific exceptions that would allow for lenders to make loans that are not subject to the rule, these exceptions offer little in the way of practical application and are so minimal they will fail to meet the incredible demand that exists for small dollar loans, forcing consumers to look to more expensive, less regulated options to fulfill their short term credit needs.

We are encouraged by the CFPB's announcement earlier this year that it will review the small-dollar rule for possible amendment. CBA urges the Bureau to revoke the rule; implement a structure that will not be overly prescriptive such that it will leave consumers with few, if any, short-term liquidity options; and allow depository institutions to enter the small dollar lending market.

Home Mortgage Disclosure Act
Our members are dedicated to responsibly and fairly serving the housing needs of their communities and are committed to the purposes of the Home Mortgage Disclosure Act (HMDA). While the Dodd-Frank Act mandated the expansion of information collected under HMDA, the CFPB's final HMDA rule almost tripled the number of data fields and greatly increased the complexity of reporting. As a result, CBA member banks invested in new systems to collect the expanded dataset at the beginning of this year.

CBA has long been concerned about the sensitive HMDA data that the CFPB intends to collect, store, and publish. Consumers buying a home are forced to relinquish their most sensitive information, often without understanding this information is being handed over to a governmental agency. The new data fields are even more sensitive than many of those previously collected, with the addition of credit score, debt to income ratio, and property address, among other new fields. Attaching a borrower's name and property address to HMDA data can be achieved in over 80 percent of all cases. The addition of the new data fields raises the probability to virtually 100 percent.

Given the sensitive nature of the expanded HMDA data and the risk of re-identification, CBA strongly believes the new data fields should not be made public unless in aggregate form. In that same vein, CBA appreciates Acting Director Mulvaney's commitment to reconsider elements of the rule and pursue a non-punitive approach to the new collection efforts in the meantime.

Debt Collection
CBA fully recognizes the important role the collection of debt plays in the proper functioning of the consumer credit markets, as it reduces creditors' losses from non-repayment and promotes the availability and affordability of consumer credit. We support the CFPB's goals of updating the Fair Debt Collection Practices Act (FDCPA), modernizing its communication standards, and generally enhancing consumer protections.

As the Bureau has acknowledged, the FDCPA is limited to third-party debt collectors and does not provide a valid legal basis for regulating creditors enforcing their loan agreements with borrowers. Congress clearly enacted the FDCPA to establish ethical guidelines for the collection of consumer debt by third-party debt collectors, and it never intended nor designed the Act to cover the collection practices of creditors. In that same vein, CBA strongly opposes placing FDCPA-like restrictions and requirements on creditors. They are unwarranted and incongruent with the lender-borrower relationship, which is usually a long standing one motivated by strong business incentives on the part of creditors to help borrowers successfully repay their debt obligations.

CBA is also concerned by the overly restrictive communication standards set out in the Bureau's Outline of Proposals issued ahead of its small business panel hearing for third-party debt collections. We believe setting communication barriers too high between collectors and borrowers has the potential to significantly harm consumers. Based on our members' experience, consumers facing financial hardship are best served if they are able to freely communicate with collectors and their creditors. Doing so helps consumers avoid late fees, minimize negative impacts to their credit report, avoid account closures, and allows them to take advantage of loss mitigation or other workout programs. As a result, we firmly believe it is essential that any new rules promote, not inhibit, consumer engagement with collectors and creditors.

As the CFPB has indicated it is moving forward with releasing a proposed rule under the FDCPA, we urge the CFPB to work with industry and Congress to establish debt collection regulations for third-party debt collectors that strike the right balance between consumer protection and consumer engagement.

Section 1071 of Dodd-Frank Wall Street Reform and Consumer Protection Act
Section 1071 of the Dodd-Frank Act amends the Equal Credit Opportunity Act to require data collection on business loan applications to help monitor compliance with fair lending laws. In brief, every financial institution must inquire of any business applying for credit whether the business is a small business, or a women-or minority-owned business, maintain a record of the information separate from the application, and report the information along with related information about the application (location of business, action taken, amount of credit provided, etc.), to the Bureau. The information must be made public on request in a manner to be established by regulation and will be made public annually by the Bureau.

Businesses both small and large can be complex entities with multiple owners and a wide variety of capital needs which only magnifies the difficulties in collecting the data needed to identify potential discrimination. The potential for overly burdensome data collection requirements could stifle small business lending, greatly increase compliance costs for small business lenders, open the door to costly litigation, and raises immense consumer privacy concerns. Lenders will also see increased compliance costs as they revamp lending systems and processes in order to collect the required data. The net result will limit the resources banks have to make loans and add greatly to compliance burdens and risks, a negative for small business lending.

CBA members anticipate a chilling of small business lending and compliance complications due to the complex new data collection requirements under Section 1071 of the Dodd-Frank Act. In order to prevent a reduction in small business lending and an increase in costly litigation that could occur from the misuse of the information collected, CBA recommends the repeal of Section 1071.

Student Lending
Through both its Student Loan Ombudsman and the Office of Students and Young Americans, the Bureau has paid considerable attention to the various repayment issues confronting student loan borrowers in America. Today, student loan debt stands at nearly $1.5 trillion – second only to mortgage debt. Nearly 93 percent of this mountain of debt is federal loans, mostly held by the U.S. Department of Education. A recent report from the Federal Reserve Bank of New York estimates more than 20 percent of borrowers in repayment are more than 90 days delinquent or

have defaulted on their loans.[4] At the same time, 98 percent of private student borrowers are repaying their loans.

The CFPB's oversight of private student lending should reflect the market's strong performance. For example, the CFPB's proposal initiated last spring to require the reporting and collection of private student loan servicing data is unnecessary given market performance and duplicative of the considerable data that is already made publicly available on a regular basis. Furthermore, the CFPB's complaint reports should recognize there are stark differences between federal and private student loans and, therefore, should clearly delineate between them.

Separation of Ombudsman and Office of Students Role

For the past several years, the Student Loan Ombudsman has also led the Office of Students. These are incompatible roles as they create a conflict of interest. An ombudsman should be impartial and serve in a confidential capacity, while a division head at the agency is a policy maker, enacting rules or recommending enforcement by the agency. CBA strongly recommends the Bureau separate the positions.

Know-Before-You-Owe for Federal Student Loans

The CFPB should focus its resources on preventing federal loan repayment issues before they start by empowering student loan borrowers to make educated financial decisions and avoid too much debt. CBA supports a "know-before-you-owe" initiative – similar to the CFPB's work on mortgage disclosures – for federal student loans.

Access to information about the true cost of a loan is critical to making an informed decision about how much debt to take out. Unfortunately, federal borrowers must weed through more than a dozen pages of disclosures and squint to read fine print to unearth some of the key loan terms. Current disbursement disclosures fail to provide terms specific to individual borrowers, instead offering broad categories of interest rates and fees and ranges of estimated monthly payments, and lack information on the total expected cost of the loans.

Private lenders are required by the Truth in Lending Act to provide customers with clear and conspicuous disclosures of loan costs and terms before loans are disbursed. The interest rate, loan fees, annual percentage rate (APR), monthly payment amount, and total cost of the loan, among other important terms specific to the individual borrower are boldly displayed. This information allows borrowers to make informed decisions about the loans that are appropriate for their higher education needs. The CFPB should work with the Department of Education to provide federal student loan borrowers the same kind of concise, meaningful information about their future obligations before they owe as do private lenders.

Conclusion

The retail banking industry is best able to serve its customers when there is a stable and even-handed regulatory framework that produces clear and reasonable rules of the road. We encourage the CFPB to take a thoughtful approach to supervision, enforcement, and rulemaking

[4] https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2017Q4.pdf

and include industry input into their decision making process to prevent unintended effects on financial consumers. CBA stands ready to provide industry expertise to lawmakers and the Bureau in the pursuit of reasonable regulatory rules and guidance to improve the marketplace for financial products and services. On behalf of the members of CBA, we appreciate the opportunity to submit this statement for the record.

Sincerely,

Richard Hunt
President and CEO
Consumer Bankers Association