CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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The Honorable Richard Cordray
Director
The Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Dear Director Cordray:

In our letter to you seven months ago, dated July 2, we suggested a dozen steps that the Consumer Financial Protection Bureau ("Bureau") could take to improve its supervision and regulatory processes. The Bureau has provided additional information about its organizational structure and regulatory agenda. But no action has been taken on most of the suggestions, including all of those that would significantly eliminate the uncertainty and lack of clarity that continues to cloud the Bureau's activity and therefore imposes significant costs on the huge number of businesses subject to the Bureau's jurisdiction.

The effect of this continued uncertainty and inefficiency is not simply to impose excessive, unjustified costs on legitimate businesses seeking to comply with the law—it directly constrains the lending, especially lending to small businesses that our economy desperately needs in order to grow and create jobs for the millions of Americans who remain unemployed.

This letter suggests several additional steps that the Bureau could take to eliminate inefficiency and unjustified burdens in connection with its supervision and investigatory processes. The suggestions are based upon the actual experiences of numerous individual businesses.*

* As you know, the recent decision in *Noel Canning v. NLRB*, No. 12-1115 (D.C. Cir. Jan. 25, 2013), raises important issues regarding the validity of the Bureau's past and future actions. By sending this letter we are not taking a position regarding the Bureau's authority to conduct examinations.

Supervision

The Bureau has frequently pointed out that the examination and supervision process is one of its "key tools" for enforcing compliance with consumer protection laws; that process has now been underway for more than a year for some companies, for slightly less than a year for others. While several companies have reported good experiences with individual examiners or examination teams, the majority have reported that the examination process is confusing, unnecessarily duplicative, inconsistent, and open-ended; in fact the "process" is difficult to discern. This significant experience with supervision has revealed a number of areas in which improvement is greatly needed.

1. The Bureau Should Improve the Training of Supervision Staff.

A number of companies report both frequent turnover in supervision staff and insufficient training, resulting in dramatically different competency levels among members of supervision teams and between teams. Staff hired from other regulatory agencies' examination programs have generally exhibited an understanding of the nature of the examination process, while those without such experience appear to have been provided with little effective training regarding the nature of the process, let alone with respect to their particular responsibilities.

Perhaps because of the uneven quality of examination teams, businesses consistently report that that the Bureau's examination teams have little authority to make decisions—the Bureau's examiners must obtain permission from "Washington" before making even the most minor decisions. That lengthens examinations considerably and eliminates the situation-specific approach that has traditionally characterized, and is one of the key benefits of, the examination process.

The Bureau needs a much greater focus on training and recruiting experienced personnel in order to address these issues. (Unfortunately, we understand from several businesses that far from recruiting additional personnel, the Bureau has lost a number of individuals experienced in the examination process because those individuals were frustrated by their lack of authority in the field.)

2. The Bureau Should Apply Consistent Approaches to Examinations.

It is troubling that even though examination teams indicate that they are on a "short leash" in terms of their need to obtain authorization from Washington regarding their communications with businesses under examination, the examination process is dramatically inconsistent from company to company:

- Examiners appear to have no organized process for conducting the various categories of examinations, with initial and follow-up requests seemingly random (and of significantly different scope depending on the examination team);

- Some companies receive a multi-year schedule of examination plans (subject to change), while others have had their requests for such a schedule rejected;

- Some companies receive quarterly "closing letters" containing comments that, if circumstances do not change, will provide the basis for the year-end closing letter, but others do not receive such letters;

- Some companies are provided with the equivalent of an "organization chart" for their examination team enabling the company to understand the team members' responsibilities, but other companies have been denied that information; and

- Some companies find that the Bureau team has coordinated its exam with other supervisory regulators, but more often, companies have multiple agencies on site, making duplicative requests, and even competing with one another for access.

The examination process should not be opaque—if companies are provided with basic information such as that just described they will be able to be more responsive to the examiners, and to plan effectively to manage the company' participation in the examination process. The Bureau's examination manuals should be updated to include a checklist of information that will be provided to all companies under examination.

3. Examinations Should Have an End Point and The Bureau Should Institute a Sensible, Uniform Closing Letter Process.

Examinations are intended to be a repetitive process, not a one-time occurrence. The end of an examination is the time that the company receives information from the Bureau, to help the company better comply with consumer protection laws. Indeed, the Bureau's Examination Manual specifies that an examination concludes with a closing meeting and contains template forms for the Examination Report and accompanying cover letter. Unfortunately, the reality in the field does not match the Manual's requirements: many of the Bureau's examinations do not seem to end. A large number of businesses have been subject to examinations that are still "open" after a year or more. In many cases, there are no outstanding requests for information—but the company is told that the examination is not yet closed.

This practice creates tremendous uncertainty for companies, and it also defeats the purpose of the examination process, which also is reflected in the problems with the closing letter process.

The federal bank regulators all use a similar process for the finalizing of closing letters. The entity being examined is given an opportunity to review the letter and identify any purely factual errors; to the extent the examination team concludes that there was a factual mistake (which can often occur in comprehensive multi-month examinations of complex institutions), the error is corrected before the letter is sent to the examiners' supervisors for approval.

The Bureau's examiners do not provide an opportunity for the examined entity to identify factual errors before a draft closing letter is sent to Washington for approval. And once the letter is approved, the examination team refuses to correct even clear factual mistakes—requiring companies to invoke the complex examination review system in order to correct even the most obvious of errors (presumably because a correction would mean the embarrassment of returning the letter to supervisors in Washington who then would become aware of the factual error).

Companies should not be required to take on this significant burden and expense. The Bureau should use the same correction process utilized successfully by the federal bank regulators.

4. The Involvement of Enforcement Personnel in the Examination Process Is Both Random and Counterproductive.

We have previously raised with you the concerns of many companies that the presence of enforcement attorneys during examinations undermines the non-adversarial nature of the examination process, appears to send the message that a principal purpose of the examination process is to gather information for use in bringing enforcement actions, and therefore inevitably will chill communication during the examination process.

The 2012 annual report of the Bureau's Ombudsman's Office includes a discussion of that Office's review of the issue, and states that the Office "recommended that the CFPB review implementation of the policy to have enforcement attorneys present at supervisory examinations. Until that review is complete, the Ombudsman recommended that the CFPB establish ways to clarify the Enforcement Attorney role in practice at the supervisory examination." (*Report* at page 14.) Although that Report was issued last November, the presence of enforcement attorneys during examinations continues at some companies, but not at others; and at some types of examinations, but not at others. Companies have not been provided with any explanation regarding the presence of enforcement attorneys at examinations—including why they attend some examination meetings and not others.

We urge the Bureau to comply with the recommendation of the Ombudsman's Office and clarify the role of enforcement attorneys in the examination process.

5. The Bureau Should Not Misuse the Supervision Process to Demand Huge Amounts of Data.

Numerous companies report requests from the Bureau to provide—supposedly as part of their obligations under the examination process—huge volumes of data. These requests have produced several different concerns.

First, these requests are extremely onerous. They often require companies to reformat and resort data accordingly to the Bureau's parameters, which sometimes are altered, requiring businesses to incur significant costs.

Second, these requests are often unfocused, overly inclusive, and not coordinated with other regulators. The Bureau should make targeted requests based on a clear interest in protecting consumers, and should ensure that they are working with other state and federal entities to prevent duplicative requests.

Third, some Bureau personnel have indicated that the Bureau plans to use this information to enhance its understanding of the financial services marketplace, and not to perform its examination function. If that is true, the Bureau's requests are improper and the Bureau is obligated to use its authority to request information under Section 1022(c)(4), which requires the Bureau to make its requests "by rule or order" (Section 1022(c)(4)(B)(ii)).

6. The Bureau Should Not Use the Supervision Process to Provide Guidance Regarding Its View of Statutory Requirements Or To Impose Non-public Interpretations Of Statutory Requirements.

In our July 2 letter, we expressed concern that the supervision process could be used "to coerce changes in products or practices based on non-public, one off 'standards' that have not been adopted through the public notice-and-comment process," noting that it was at that time "unclear whether companies today are being held to higher, one-off standards, or whether these standards are being equitably applied to all supervised entities."

Unfortunately, these fears have been realized fully. A number of companies indicate that Bureau personnel provide detailed "one-off" interpretations of applicable statutes and rules during the examination process, and make clear their expectation that the entity under examination will comply with those standards.

This apparently well-established practice has two significant adverse consequences:

- The Bureau is able to force compliance with "standards" that it is not obligated to defend, or even announce, in public; and

- Different burdens are "imposed" on businesses that compete against each other in the marketplace, possibly skewing the companies' costs or opening the door to future enforcement action against the company not told about the Bureau's "private" interpretation of the law.

The Bureau should require public disclosure of any interpretation of a statute or rule provided privately during an examination. Public disclosure will chill any impulse to adopt interpretations that cannot be defended and will enable all similarly-situated businesses to learn of the Bureau's views.

Investigatory Demands for Information

Civil investigative demands are a legitimate tool of law enforcement. But the law is well settled that such demands cannot be unjustifiably burdensome.

The Bureau has adopted what appears to be a practice of issuing extremely expansive requests for information. While we take no position on the underlying issues of the particular matter, an examination of one example posted on the Bureau's Web site—the demand issued to PHH Corporation, which is attached to PHH's legal challenge to the demand[†] suggests substantial overreach by the Bureau:

- The Bureau requested every document produced *for more than a decade* relating to any aspect of PHH's mortgage insurance business. For example—
    - "[a]ll documents relating to the selection of Mortgage Insurance Providers or allocation of business among Mortgage Insurance Providers by the Company . . .";
    - "[a]ll documents relating to the policies and procedures for communicating to consumers the selection of a Mortgage Insurance Provider";
    - "[a]ll documents relating to the underwriting or pricing of mortgage insurance reinsurance";

[†] *see* http://files.consumerfinance.gov/f/201209-_cfpb_phhcorp_petition_0001.pdf

- And ***thirty*** additional requests worded in similarly broad terms.

Your rejection of PHH's challenge to the breadth of this request is troubling, because it effectively gives carte blanche to Bureau investigators to impose huge financial burdens on companies at the outset of an investigation.

We are not aware of any other agency that routinely issues such broad demands. For example, a review of the challenged CIDs posted on the Federal Trade Commission's Web site[‡] (*see* http://www.ftc.gov/os/quash/index.shtm) indicates that the Commission's staff frequently request only "[d]ocuments sufficient to" provide the relevant information, and focus requests for "all" documents on the specific area under investigation.

The Bureau should reconsider its policy in this area, and adopt an approach that is consistent with that employed by the Federal Trade Commission and other federal regulatory agencies.

We thank you for consideration of these comments and would happy to discuss these issues further with you or your staff.

Sincerely,

David Hirschmann

[‡] *see* http://files.consumerfinance.gov/f/201209-_cfpb_phhcorp_petition_0001.pdf