United States House of Representatives Committee on Financial Services
Subcommittee on Financial Institutions and Monetary Policy

“Consumer Financial Protection Bureau: Ripe for Reform”

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Testimony by William M. Himpler
President and Chief Executive Officer, American Financial Services Association

Mr. Chairman, Ranking Member Foster, and members of the committee, my name is Bill Himpler, and I am the President and CEO of the American Financial Services Association (AFSA). AFSA is the national trade association for the consumer credit industry. We protect access to credit and consumer choice. I appreciate the opportunity to testify.

My goal today is to demonstrate how the Consumer Financial Protection Bureau's (CFPB) refusal to operate within the law, and its unhelpful rhetoric, harms both consumers and creditors. The CFPB, therefore, is ripe for reform. Instead of continuing along its current path and exceeding its authority, I will suggest an alternative path focused on going after bad actors, such as credit repair organizations.

When the CFPB was created, it accepted the mandate to "make consumer financial markets work for consumers, responsible providers, and the economy as a whole."[1] Recent actions, and inactions, suggest that the Bureau has veered from its mission. Instead of making a concerted effort to protect the American consumer, the Bureau has ignored economics, legislation, bad actors, and its own rulemaking process and instead pursued polices that will limit consumer credit access. When this occurs, those Americans most in need of financial help will be the ones hurt. They will be left vulnerable to underregulated creditors or perhaps no creditors at all, and I am unsure which is worse.

Allow me to share five examples of the Bureau's overreach, each of which could have detrimental effects on how safely an American consumer can access credit, and collectively could throw the entire consumer credit market into disarray.

I. *The CFPB seeks to impose limits on arbitration, despite its own study showing that arbitration benefits consumers.*

In 2017, the CFPB finalized a rule that would eliminate pre-dispute arbitration agreements. Congress overturned the rule using its authority under the Congressional Review Act (CRA). As Congress has made clear, when a rule is overturned under the CRA, an agency is prohibited from doing anything "substantially similar." Despite the prohibition, the CFPB continues to pursue the elimination of arbitration, this time by proposing a nonbank registry where finance companies and others would be required to register certain terms and conditions, such as arbitration agreements and other beneficial agreements with consumers, that the Bureau would post in a public registry.

This public registry is an attempt to: (1) shame companies out of using lawful arbitration agreements, and (2) give plaintiffs' attorneys a roster of companies to sue. As House Financial Services Chairman Patrick McHenry (R-NC) said:

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[1] *The Bureau*. Consumer Financial Protection Bureau. https://www.consumerfinance.gov/about-us/the-bureau/#:~:text=We%20aim%20to%20make%20consumer.

> "This is another attempt by Director Chopra to unilaterally expand the CFPB's authority beyond Congress' intent and to mandate what Democrats were unable to legislate. This proposed registry of terms and conditions will facilitate the naming and shaming of firms to empower progressive activists. Requiring nonbank financial firms to register publicly with the Bureau is unprecedented—no other industry is required to make public such detailed contract information."[2]

If the CFPB is successful in this backdoor effort to limit pre-dispute arbitration agreements, consumers will be left with far inferior options. The best they could do might be to join a class action, where they have much less control over the process and may be rewarded with something as small as a few dollars or even a coupon. Alternatively, under arbitration, consumers would likely walk away from a dispute with a settlement that is much more beneficial, private, and more likely to make them whole.

II. The Bureau's focus on press releases and rhetoric over rules means struggling consumers remain just that … struggling.

The CFPB has issued guidance and press releases on so-called "junk fees." But guidance is not a legislative rule that was considered through a public process, and a press release likewise is not law. It is not clear how courts will consider "so-called" guidance and companies and consumers alike have no certainty about what is required, particularly when Bureau pronouncements conflict with current law. As Rep. Blaine Luetkemeyer (R-MO) rightly noted:

> "CFPB Director Chopra coined the term 'junk fees' in an effort to regulate industries and products he knows do not fall within the Bureau's jurisdiction. Despite the repeated use of their new favorite term, neither the White House nor the Bureau can provide a legal definition of the term or the statutory authority to pursue these actions. This is just the latest example of the Administration inventing a problem with the goal of expanding its control over the U.S. economy and shifting blame for the historic inflation and recession created by its disastrous economic policies. **Not only will the Bureau's actions do nothing to change the soaring price of everything we buy, they threaten to increase the cost of or completely eliminate financial products many consumers – particularly low-income families – depend on to make ends meet.**"[34] [emphasis added]

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[2] *McHenry Slams CFPB Director Chopra's Moves to Create Registry of Nonbank Financial Firms.* Financial Services Committee. (2023, January 11). https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=408498.

[3] *Luetkemeyer on Guidance Issued by CFPB on "Junk Fees."* (2022, October 26). U.S. Representative Blaine Luetkemeyer. https://luetkemeyer.house.gov/news/documentsingle.aspx?DocumentID=400769/

If the Bureau has identified a problem in the consumer finance marketplace, it should follow the Administrative Procedure Act (APA), which gives consumers, advocacy groups, and financial institutions an opportunity to comment on the rulemaking.

III. The CFPB is using regulation by enforcement to change the decades-old Truth in Lending Act (TILA)[5] with little concern for harm to American consumers.

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), the CFPB has the authority to amend Regulation Z, which implements TILA. A joint CFPB and New York Attorney General (NY AG) enforcement action, however, attempts to create an ability to repay standard that does not exist in any consumer finance law or regulation.

The CFPB and NY AG claim that it is abusive to not consider a borrower's "recurring debt obligations, rent or mortgage payment, or any of the other necessary expenses an individual incurs each month, including the cost of food, healthcare, or childcare," despite the fact such an analysis is not required. An auto finance company or bank – in fact any business – should not be sued for not following a rule that does not exist.

If the CFPB wants to create an ability to repay standard or wants to mandate an acceptable default rate, it should seek authority from Congress to do so, and then proceed with informed rulemaking, which is crucial to avoiding unintended consequences that harm consumers. For example, when the Bureau was drafting the Payday Lending Rule, it initially proposed an ability to repay standard that would have drastically reduced installment lending. After hearing from installment lenders, the Bureau decided not to apply that standard to installment lending. This change preserved a safe and affordable form of credit for many Americans.

If creditors changed their practices based on the principles outlined in the CFPB and NY AG lawsuit, it would substantially limit credit availability for consumers and likely eliminate the approximately $20 billion subprime auto credit market. The lawsuit implies there is some threshold of expected loss (*e.g.,* 25%) which is somehow predatory or illegal (*i.e.,* "You knew these customers couldn't afford to pay."). If this avenue of attack were successful, it would affect the availability of credit to Americans. For example, if a 25% charge-off rate is unacceptable, a creditor would be forced to refuse extending credit to any applicant who might default, as it is impossible to predict with any accuracy the 25% who will default.

By managing default rates consistent with credit risk, the consumer finance market makes credit available to significantly more Americans than would be possible if they were legally required to apply some arbitrary default rate deemed federally acceptable. The lawsuit creates a standard of an unacceptable default rate out of thin air, but does not say what an acceptable default rate would be. This is the Bureau seeking to fine a company for not obeying the speed limit, but refusing to post what the speed limit is.

[5] *N.Y., CFPB vs. CAC*, United States District Court for the Southern District of New York. Case No. 23 Civ. 0038 (2023). https://ag.ny.gov/sites/default/files/cac_complaint.pdf.

There is no federal law, state law or regulation that dictates what is or is not an acceptable default rate. By implying that there is, the CFPB is engaging in lawmaking by enforcement. Mandating an acceptable default rate is one way of eliminating risk-based pricing, which requires that consumers with higher likelihoods of default pay higher interest rates to offset the potential for credit losses. Risk-based pricing has made credit accessible to millions of Americans who would otherwise be unable to get credit to buy a car. Eliminating risk-based pricing won't lower prices for consumers, it will push them out of the market all together.

Moreover, there's an overarching principle here that must not be lost. That is: creditors are in the business of putting money in consumers' hands in exchange for a promise and the expectation of repayment with agreed-upon interest. The creditor performs due diligence upfront; in return the consumer gets credit to consolidate bills, buy a truck, pay for household expenses, make repairs, or whatever their needs may be.

It is irresponsible and incorrect to put forward the notion that creditors hope consumers will fail to repay what is owed. Such a business model is unsustainable. Rather, creditors seek to create satisfied customers who will share their positive experiences with their friends and neighbors. In fact, the vast majority of auto loans in the United States are paid on time because auto finance companies and banks have rigorous ability to repay methods. Millions of Americans enjoy the benefits of having an affordable vehicle because of responsible lending.

The CFPB and others have also perpetuated a myth that consumers alone are harmed by delinquency and default on their obligations. Financial challenges or uncertainty are upsetting for anyone, but it is the creditor who bears the risk of loss and who suffers economic harm when a consumer defaults on a credit obligation. This ongoing distortion again highlights the preference of the CFPB for heated rhetoric over calm consideration of the facts.

The fact is, creditors in the consumer finance industry want to build successful businesses by serving their customers. They believe in consumer protection and appropriate guardrails. Creditors want clarity in the rules; not to evade, but to comply. Creditors want predictability in their interactions with their regulators, not wild swings in priorities or undisciplined guidance. Creditors want the CFPB to focus on ensuring that: "[M]arkets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation."[6]

IV. Regulation via press release can have serious consequences for consumers.

In December 2022, the CFPB issued a press release on the Servicemembers Civil Relief Act (SCRA). The press release ignores the statutory requirements of the SCRA, fails to account for the impact of the recommendations on the securitization market, and does not address the limitations of the Defense Manpower Data Center (DMDC) SCRA website. If creditors follow the recommendations laid out in the press release, it will create dire consequences for the men and

[6] 12 U.S.C. §5511(b)(5).

women serving our country. If the CFPB had solicited feedback and conducted an APA rulewritng they could have foreseen the negative unintended consequences that will result from the lack of educated policymaking.

In its press release, the CFPB recommends that creditors: (1) apply SCRA interest rate reductions for all accounts held at an institution if a servicemember invokes their rights for a single account, (2) automatically apply SCRA rights, and (3) develop comprehensive and periodic indicators of SCRA interest rate reduction utilization.

These recommendations are not consistent with the plain language of the SCRA.[7] The SCRA requires that servicemembers provide to the creditor written notice of their active-duty service and a copy of military orders before receiving the benefit of the interest rate reduction.[8] The CFPB lacks authority to change the statute.

Besides contradicting statutory language, the CFPB's press release fails to account for the impact its recommendations could have on the secondary market. The recommendation in the press release to automatically apply the SCRA's interest rate reduction creates ambiguity under the requirements of some asset-backed securitization (ABS) programs. Some ABS transactions place repurchase obligations on creditors if certain events occur, which typically include changing the customer's interest rate unless the change is required by law. As noted, the SCRA places specific requirements that must be met for the rate reduction to be required by law. It is unclear how creditors would need to treat those servicemember accounts if they were to follow the CFPB recommendations contained in the press release.

Finally, the press release reflects the Bureau's disinterest not only in rulemaking, but in being even minimally informed about processes or lack thereof, thereby harming both consumers and the industry it regulates. Specifically, the CFPB's press release advises creditors to proactively check the DMDC SCRA website to identify borrowers eligible for the SCRA interest rate reduction. However, it is not clear that the DMDC SCRA website can handle the increased volume without crashing, provide accurate data, or securely protect consumers' data.

If every creditor checked every account monthly, the number of accounts checked on the DMDC SCRA website would increase dramatically. A captive vehicle finance company with a portfolio of two million accounts outstanding and a two percent repossession rate might complete 40,000 annual checks (one for each account prior to repossession) of the DMDC SCRA website. If that same captive followed the CFPB's suggestion and checked its entire two million account portfolio monthly, they would have to complete 120 million checks annually for assumed 60-month contracts. And that's just one creditor.

[7] 50 U.S.C. §§ 3901—4043.

[8] Some creditors may not require that active duty servicemembers strictly comply with the prerequisites the SCRA imposes on servicemembers to receive interest rate reductions. Instead, the creditor may voluntarily check the DMDC website when a servicemembers informally requests a rate reduction. If the DMDC confirms the servicemembers status, the creditor will provide the rate reduction.

The increase from 40,000 checks to 120 million checks represents *a 3,000-times multiple* of the number of checks of the DMDC SCRA website, a drastic change in scale. There is no discussion in the CFPB's press release as to whether the DMDC SCRA website can handle that volume without crashing. In our members' experience, the DMDC system is already periodically down or unable to provide accurate data.

In February, for example, a notice was posted on the DMDC's website stating that requested files were incorrectly returning errors and that the issue would not be fixed until April. When the site is down or data are unavailable – whether for a crash or maintenance – creditors cannot access it for interest rate reductions or to be sure they are meeting compliance requirements regarding repossessions, harming both borrowers and creditors.

Furthermore, the DMDC SCRA website meets neither government data security requirements nor well-accepted corporate data security requirements. The website for example, is unable to accept or send encrypted data, and it does not require multifactor authentication to verify the identity of its users. Because the DMDC SCRA website cannot receive encrypted data, personally identifiable information is being sent to and received from the DMDC in an unencrypted, and therefore unsecure, manner. Multifactor authentication, which is required by many regulators, is not required to obtain data from the DMDC SCRA website to validate the identity of the person accessing the database information. Recommending that creditors proactively check their entire customer base with the DMDC SCRA website without these data protection safeguards is contrary to the CFPB's consumer protection mandate because it would increase the risk of a large-scale data breach of personally identifiable information (*e.g.,* names, social security number, and dates of birth) for millions of consumers.

V. The CFPB's misinterpretation of the Military Lending Act (MLA) would harm servicemembers.

The CFPB joined with the U.S. Defense and U.S. Justice Departments in an amicus brief[9] that demonstrates a fundamental misunderstanding of the MLA. The MLA was intended to regulate payday, title, and tax refund anticipation loans. It clearly exempted vehicle and housing finance. In the amicus, the CFPB claims that if an auto finance company or bank finances a vehicle with an additional product, like a GAP waiver,[10] it is covered by the MLA and would likely violate the MLA. Loans that violate the MLA are null and void.

With this amicus brief, the CFPB is attempting an end run around Congress' clear intent in an effort to bring vehicle financing under the MLA. If the court agrees with the CFPB's interpretation, this would have the serious consequence of making a number of loans that were made legally, suddenly null and void. Cars that our service men and women financed would no longer be theirs.

[9] *Brief of Amici Curiae Consumer Financial Protection Bureau and Federal Trade Commission in Support of Plaintiffs-Appellants and Reversal*, Louis v. Bluegreen Vacations Unlimited, Inc., Case No. 21-cv-61938 (2022).

[10] In the event of an accident, Guaranteed Asset Protection or a GAP waiver covers the difference between what the insurer pays, its fair market value and the amount owed on the loan or lease.

Would they have to buy them again? Would they have to turn them in? What havoc would this wreak in the secondary markets? In an attempt to go after a legal product that the CFPB simply doesn't like – GAP waivers – the Bureau has given no thought to the weighty consequences of its actions.

Meanwhile, there is little to no data or documented evidence that the MLA is achieving even its most fundamental goals: protecting the financial well-being of our servicemembers and their families. The Department of Defense' MLA regulations issued in 2015 prevented a number of installment lenders from being able to lend to servicemembers, curtailing their access to credit.

This January, the Urban Institute released a study using credit bureau data from 2013 to 2021 to see if the MLA improved credit and debt outcomes for military service members, particularly those with subprime credit scores. The results?

- The MLA had little to no effect "on the credit health of most service members and their families."
- There is no evidence that the policy "decreased delinquency and collections rates among borrowers with subprime credit scores, nor did the policy have an impact on these consumers' credit scores."
- There is suggestive evidence that consumers with deep subprime credit scores had less access to credit under the MLA.

I highlight this study because it is one of the few data-driven studies of the MLA's effects. To date, the Department of Defense has not released any data regarding the success or failure of the MLA. It has not released data to Congress. It has not released data to regulatory agencies. And it certainly has not released data to the public.

Yet, policymakers at the federal and state level continue efforts to use the supposed "success" of the MLA as the rationale to impose such anti-consumer policies on all consumers, from a 36% rate cap to bans on the sale of ancillary products for vehicles. If an industry made such false claims about the success or failure of a product or service as federal and state policymakers have about the MLA, I can envision several different federal regulators that would investigate such claims.

These are five recent examples of the CFPB's recent failures to operate within the law, to appropriately serve consumers, or to clearly and transparently supervise the industries Congress has mandated it regulate. Rather than efforts at overreach and breeding uncertainty in markets, there is a role for the CFPB to pursue legitimate bad actors.

VI. Instead of trying to go after well-regulated financial institutions and products, the CFPB should pursue such bad actors as credit repair organizations (CROs).

The prevalence of so-called CROs is increasing at an alarming rate. CROs market themselves to financially distressed consumers, promising to increase credit scores or rebuild credit. CROs use

form letters and template communications designed for mass SPAM-like deployment to credit bureaus and creditors, while charging consumers exorbitant fees through initial work fees and monthly subscription services that can cost thousands of dollars but yield few positive results.

- CROs *often provide no benefit.* CROs dispute negative items on credit reports, regardless of accuracy, with little or no due diligence on their part and flood credit bureaus and creditors with identical and meritless letters disputing the accuracy of negative information. However, if the information is accurate, neither the creditor nor the credit bureau will remove it, leaving the consumer's credit score unchanged.
- CROs *cost the consumer a significant amount of money*. Credit repair via CROs isn't cheap. Consumers are often charged an illegal, upfront fee or an expensive monthly subscription fee. A monthly subscription can be over $150. The consumer would be better off using that money to repay debts. However, consumers can at no cost obtain copies of their credit reports from annualcreditreport.com, and review and notify the credit bureaus of inaccuracies.
- CROs *may damage the consumer's credit worthiness*. Many CROs encourage consumers to stop paying their debts and to stop communicating with their creditors. Doing so prevents creditors from working with their borrowers, increases late or missed payments, increases the amount of interest that accrues on credit accounts and could lead to repossession (in the case of an auto loan).
- CROs *divert resources from legitimate disputes.* Flooding creditors and credit bureaus with identical and meritless disputes diverts compliance resources away from legitimate consumer disputes which limits efficacy of investigations. CROs also use false identity theft claims to attempt to have negative credit information removed, which often requires consumers to file fraudulent police reports for meritless claims, exposing them to unnecessary legal consequences.

Federal agencies and consumer groups have warned consumers about CROs. The CFPB issued an advisory[11] warning to consumers to not be misled by companies offering paid credit repair services. The Bureau has also sued Lexington Law and CreditRepair.com, two of the largest credit repair companies.

The Federal Trade Commission (FTC) says the following about credit CRO claims, "Do yourself a favor and save some money... Don't believe these claims: they're very likely signs of a scam. Indeed, attorneys at the Federal Trade Commission, the nation's consumer protection agency, say they've never seen a legitimate credit repair operation making those claims."[12] The FTC has brought scores of law enforcement actions against these bogus credit-related services, and the agency has partnered with the states to bring hundreds of additional lawsuits. The FTC shut down

[11] *Don't Be Misled by Companies Offering Paid Credit Repair Services*. (2019, December 3). https://files.consumerfinance.gov/f/documents/092016_cfpb_ConsumerAdvisory.pdf.

[12] *Credit Repair How to Help Yourself*. (2012). https://consumer.ftc.gov/sites/default/files/articles/pdf/pdf-0034-credit-repair.pdf.

a CRO that collected at least $213 million from consumers through their unlawful credit repair and investment opportunity scheme.[13]

The Department of Justice joined the FTC in suing CROs, saying, "Credit repair scams affect consumers who already are suffering from low credit scores."[14] The DOJ and FTC have gone after CROs for filing fake ID theft reports, often without the consumers' knowledge.

Consumer advocacy groups have also noted how CROs harm consumers. The National Consumer Law Center (NCLC) reports that there is an epidemic of disreputable CROs that charge exorbitant fees for promises they can't keep.[15] The Consumer Federation of American (CFA) found that over two-fifths of consumers think that CROs are always or usually helpful in correcting any credit report errors or taking other measures to improve one's credit score. CFA added that experts agree that on the contrary, these companies tend to charge relatively high fees to do what consumers could do on their own for free.[16]

AFSA encourages the CFPB to focus on bad actors who are taking advantage of consumers. If the CFPB protected consumers from predatory CROs, the agency would be fulfilling one of its clear mandates to protect consumers and to enhance their financial well-being.

VII. Conclusion

The American economy continues to emerge from the crisis caused by the COVID pandemic, and like other industries there are lessons to be learned from that shared experience over the past several years.

For the consumer credit market, one lesson was just how important access to credit is for consumers to stay in their homes and on the road with their vehicles, to keep businesses open, or to cover unexpected expenses. AFSA and its members are committed to serving consumers in a well-functioning marketplace. We at AFSA agree with Director Chopra that, "Markets work best when rules are simple, easy to understand, and easy to enforce." We encourage the director to follow his own words.

Transparency and accountability are crucial to ensuring lending institutions maintain and grow access to credit for American households. Without understanding the expectations of regulators,

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[13] *Debt Relief and Credit Repair Scams*. (2018, October 31). Federal Trade Commission. https://www.ftc.gov/news-events/topics/consumer-finance/debt-relief-credit-repair-scams.

[14] *Court Imposes Restrictions on Credit Repair Company to Protect Consumers*. (2022, March 21). Department of Justice. https://www.justice.gov/opa/pr/court-imposes-restrictions-credit-repair-company-protect-consumers.

[15] *What States Can Do About Credit Repair Abuses*. NCLC. https://www.nclc.org/resources/what-states-can-do-about-credit-repair-abuses/.

[16] *Annual Survey Reveals That Low-Income Consumers Are Most Likely To Seek Credit yet Know the Least about Credit Scores · Consumer Federation of America.* (2020, July 20). Consumer Federation of America. https://consumerfed.org/press_release/annual-survey-reveals-that-low-income-consumers-are-most-likely-to-seek-credit-yet-know-the-least-about-credit-scores/.

creditors will seek to limit risk and tighten access to credit, thus increasing costs for borrowers, threatening a well-functioning consumer credit marketplace and the worthy goal of economic opportunity for all.

The consumer credit industry stands ready to work collaboratively with policymakers and regulatory bodies to help maintain and expand an economic environment that affords our fellow Americans the opportunity to pursue and attain the American Dream.

Thank you.