

August 21, 2020

Director Kathleen L. Kraninger
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Advisory Opinions Proposal, Docket No. CFPB-2020-0019, 85 Fed. Reg. 37394 (June 22, 2020)

Dear Director Kraninger,

Americans for Financial Reform Education Fund, Better Markets, Center for Responsible Lending, Consumer Federation of America, National Association of Consumer Advocates, National Consumer Law Center (on behalf of its low income clients) and U.S. PIRG submit these comments in response to the request for comments on the Consumer Financial Protection Bureau's (CFPB) proposed Advisory Opinion Program (AOP). We urge the CFPB to abandon the proposal, which will harm consumers by creating a one-sided avenue for industry to seek interpretations of the law that weaken consumer protections without public scrutiny or input.

I. Overview

We have significant concerns about the Bureau's pilot and proposed Advisory Opinion Program. While we encourage assistance to covered persons to comply with laws and regulations designed to protect consumers, the program as proposed will likely provide an avenue for covered persons and service providers to use a one-sided process to reinterpret and weaken the very laws and regulations the AOP ostensibly helps them honor. The CFPB should not be soliciting requests for clarification from industry alone, and advisory opinions simply should not be issued on a routine basis outside of a public process that ensures that all sides are heard.

For numerous reasons, the advisory opinion program as proposed risks harming consumers, businesses, and the CFPB's focus on its consumer protection mission. The CFPB should not allow regulated entities to seek favored interpretations of the law on "issues of substantive importance or impact" based on their own self-selected assertions, without critical input from affected parties. Identifying and removing regulatory burden, or even clarifying so-called ambiguities at the request of industry, should not be done behind closed doors; the CFPB's guidance materials must focus on compliance, not evasion and safe harbors for legally questionable actions. Advisory opinions pose a special risk of harm if they address questions of unfair, deceptive or abusive conduct. The proposed program diverts Bureau resources from consumer protection, and could result in a welter of opinions that complicate, rather than assist compliance.

Beyond being a bad policy, the proposed AOP risks violating the Administrative Procedure Act (APA). Opinions that address issues of substantive importance, provide regulatory relief, or provide safe harbors from liability may be substantive rules that require notice and comment. At the very least, the presumption of confidentiality and the lack of any public input, before or after the issuance of the advisory opinions, fall well short of administrative law best practices.

Under no circumstances should the Bureau accept advisory opinion requests from trade associations or law firms submitted on behalf of anonymous parties. That would prevent the Bureau from understanding the full context and preventing subterfuge. It would enable requestors to embroil the CFPB in private litigation or pending state or federal investigations, enforcement actions, supervisory actions, licensing or administrative proceedings.

The CFPB should emphasize transparency in advisory opinion applications, not work to shield information from the public. It also is simply not possible for the CFPB to appropriately prioritize requests or quantify benefits to consumers without public input from consumers and the general public.

II. The Proposed Advisory Opinion Program Will Harm Consumers, Providers and the CFPB’s Mission.

A. Opinions Should Not be Issued on Important Matters Based on One-Sided Information Without Public Input

A central feature of the AOP is that it will operate outside of the notice-and-comment framework of the Administrative Procedure Act (APA). AOs will be based solely on information from entities that are seeking a certain interpretation, without any procedure for input by consumers, consumer advocates, competitors or other members of the public. The CFPB also acknowledges that it will “not normally investigate the underlying facts of the requestor’s situation . . .”¹ While the CFPB states there will be a presumption that an AO is not appropriate if “the issue is better suited for the notice-and-comment process,” *id.*, the CFPB provides no elaboration on when that is the case or how it will make that decision.

At the same time, one of the proposed factors favoring issuance of an AO is that “the issue is one of substantive importance or impact . . .” *Id.* Yet it is on matters of substantive importance or impact that public input is especially critical. If a proposed interpretation under an AO could result in a significant change in the way industry does business or in the application of the law, the public should be able to weigh in with countervailing considerations.² This concern is particularly strong as the CFPB includes in the AOP’s ambit matters involving statutory uncertainty, where the public, including legislators, may have a significant stake in participating in addressing the purported uncertainty.

Under the AOP, regulated entities may approach the Board for advice on questions framed so as to steer Bureau precedent, deemphasizing or omitting unfavorable details and highlighting facts designed to produce industry-friendly outcomes. The Bureau describes the AOP process as beginning with a unilateral request from a regulated entity concerning an issue “within the Bureau’s

¹ 85 Fed. Reg. at 37395 n.11.

² *See, e.g.*, Admin. Conf. of the U. S. Recommendation 2019-1, Agency Guidance Through Interpretive Rules, <https://www.acus.gov/research-projects/agency-guidance-through-interpretive-rules> (recommending public participation in the adoption and modification of interpretive rules).

purview” and “actual facts or a course of action the requestor is considering engaging in.”³ No opportunities for third-party input are provided; instead, requestors are entrusted to “set forth as completely as possible all material facts and circumstances,” independently characterizing issues of both fact and law.⁴ The request process’s description even solicits an “explanation of why the requested interpretation is an appropriate resolution of that uncertainty or ambiguity.”⁵ Although the Bureau properly retains the discretion not to adopt the requestor’s proposed interpretation, the Bureau cannot help but be influenced in its understanding of the issue by the proffered interpretation, especially if no countervailing perspective is allowed.

This process provides an avenue for regulated entities to exert one-sided influence in seeking creative ways to evade statutory or regulatory requirements, or to resolve ambiguities in favor a less protective approach.⁶ The program would create troubling byways into evolving areas of consumer protection regulations inaccessible to the very consumers they were implemented to protect. What an applicant claims is uncertainty or ambiguity could merely be a creative interpretation allowing evasion of critical consumer protection requirements. Applicants may omit key details about how an AO could affect consumers or competitors. An interpretation that seems innocuous in the request’s context could result in more significant evasions when applied to other parties who claim to be “similarly situated.”

While the AO will only apply to situations that conform to the facts as summarized by the Bureau in the AO, those facts may be incomplete, or may not anticipate other similar situations that pose concerns. Moreover, once the CFPB issues the AO, it will have no control over how the facts will be applied by courts. While an AO will not be a definitive statement of the law entitled to deference, courts may still give it weight. A broader view of the context in which an interpretation could be applied could lead the Bureau to realize that the requested interpretation is inappropriate, will facilitate evasions, and will undermine the statutory and regulatory requirements. In areas of legal ambiguity, the Bureau’s opinions will suffer without the input of consumers and their advocates as well as competitors, especially in the gray areas of permissible industry behavior where advisory opinions are likely to have the greatest prevalence and impact.

The one-sided process for AOs is especially troubling given the potential for AOs to give providers a safe harbor from liability even if their conduct violates the law. In proposing the AOP, the Bureau expressly identifies its intention to trigger the so-called “statutory safe harbors”⁷ in the good-faith reliance provisions of the Truth in Lending Act (TILA), Equal Credit Opportunity Act (ECOA), Electronic Fund Transfer Act (EFTA), Real Estate Settlement Procedures Act (RESPA) and perhaps even Fair Debt Collection Practices Act (FDCPA). Without complete input, advisory opinions may misapply relevant law and yet purport to absolve regulated entities engaged in harmful practices from liability to the detriment of consumers. A program to issue AOs marks a departure from the longstanding practice that the Official Staff Commentaries (OSC), normally adopted

³ 85 Fed. Reg. at 37395.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 37394 n.4, 37396.

⁷ 85 Fed. Reg. at 37395.

through notice and comment, are the official vehicle for interpretations on which companies may rely to take advantage of good-faith reliance provisions.⁸

B. Advisory Opinions Cannot Be Used to Provide Regulatory Relief or Protect Entities that Violate the Law.

Any advisory opinion program should focus on ensuring compliance with the law. Yet the CFPB has also indicated that it plans to use AOs for the purpose of meeting its objective of identifying and reducing unwarranted regulatory burdens from “outdated, unnecessary, or unduly burdensome regulations.”⁹ While that is indeed one of the CFPB’s statutory objectives, advisory opinions are an inappropriate vehicle for achieving that objective.

What is outdated, unnecessary or burdensome in industry’s point of view may be a critical protection from the consumer’s point of view. If regulations are outdated, unnecessary, or unduly burdensome – and therefore need to be changed – then they should be revised through the notice-and-comment process. The CFPB states that it does not intend to issue an AO that would change a regulation, and yet an opinion that enables an entity to avoid a regulation that is purportedly outdated, unnecessary or unduly burdensome would do exactly that.

The potential for regulatory relief through an advisory opinion is especially concerning to the extent that the CFPB attempts to trigger the good-faith reliance provisions of several statutes. The Bureau previously described its view that reliance on an interpretation or approval covered by those provisions makes an entity “immune from enforcement actions by any Federal or State authorities, as well as from lawsuits brought by private parties.”¹⁰ The emphasis on these good-faith reliance provisions as a central feature and benefit of advisory opinions is troubling, because those provisions potentially give a company protection even if its conduct violates the statute and the CFPB’s opinion has been “amended, rescinded, or determined by judicial or other authority to be invalid for any reason.”¹¹ Ordinarily, agencies shy away from stripping third parties of their rights or promulgating rules of general applicability via interpretive rules without public notice and comment. Here, the CFPB promises to do both. Because the CFPB’s AOP purports to have binding effect on third parties and alter their substantive rights, including protections against illegal and discriminatory credit practices, a public process is warranted.

As we previously discussed at greater length in connection with the Bureau’s prior proposal to grant safe harbors, the purpose of the good-faith reliance provisions is to help companies comply with the law, not to give the Bureau the authority to issue interpretations that provide regulatory relief, that amount to substantive rules, or that do not comply with statutory or regulatory

⁸ The CFPB has not proposed to amend numerous statements in the introduction to those commentaries making them the nearly exclusive good-faith reliance vehicle. *See* Comments of NCLC et al. on Policy on No-Action Letters and the BCFP Product Sandbox, Docket No. [CFPB-2018-0042] at 6-8 (Feb. 11, 2019), <https://www.nclc.org/images/pdf/rulemaking/nclc-comments-nal-product-sandbox.pdf> (“NCLC Sandbox Comments”).

⁹ 85 Fed. Reg. at 37395.

¹⁰ 83 Fed. Reg. at 64042.

¹¹ *See, e.g.*, 15 U.S.C. § 1640.

provisions.¹² Moreover, inappropriate use of advisory opinions to provide regulatory relief may not automatically entitle a regulated entity to protection from the good-faith reliance provisions.¹³ Further, only the Fair Debt Collection Practices Act specifically identifies reliance on advisory opinions as affording a safe harbor; TILA, for example, references a “rule, regulation, or interpretation thereof,”¹⁴ which has long been understood to mean, as to interpretations, only those codified in the Official Interpretations.¹⁵

C. Advisory Opinions Should Not Be Issued on UDAAP Issues.

Another area where the one-sided nature of advisory opinions issued under the AOP becomes problematic is in the resolution of questions concerning unfair, deceptive, or abusive acts and practices (“UDAAPs”). Although the CFPB states that the proposed advisory opinions will generally avoid addressing “[h]ighly fact-intensive applications of general [UDAAP] standards,” the Bureau notes that “there may be times when the Bureau is able to offer advisory opinions that provide additional clarity on the meaning of such [UDAAP] standards.”¹⁶ Advisory opinions should not be used at all for UDAAP issues.

In 2016, the Bureau persuasively explained why UDAAP relief is risky:

First, evaluation of whether an act or practice constitutes a UDAAP is typically an intensively factual question that requires detailed consideration of a wide range of potentially relevant circumstances. Such evaluations can be more complicated, and uncertain, than evaluation of an act or practice with respect to a regulatory or statutory provision that is drawn more narrowly and precisely than the statutory UDAAP prohibitions. This complexity may be especially pertinent in the context of requests for NAL treatment under the Policy, which are limited to instances in which there is substantial uncertainty regarding whether the particular aspects of the product identified in the request are unfair, deceptive, or abusive. Second, as noted in the Proposed Policy, the Bureau has quite limited resources to devote to consideration and issuance of NALs at this time. The Bureau is concerned that devoting attention to UDAAP-focused NAL requests could misallocate its resources away from more narrowly-focused cases that are more likely to be workable NAL candidates.....¹⁷

¹² NCLC Sandbox Comments at 4 to 10.

¹³ As we discussed in connection with the Bureau’s prior proposal to issue “approvals” under the good-faith reliance provisions, whether a company relies in good faith is likely a question of fact for a court, and a company cannot unthinkingly rely on an interpretation that changes the requirements of statutes or regulations in ways that are “demonstrably irrational.” An AO also would not protect a company from liability for a product or service that was on the market prior to the Bureau’s approval. *See* at 10-11.

¹⁴ 15 U.S.C. § 1640(f).

¹⁵ *See* NCLC Sandbox Comments at 6-8. Moreover, as discussed in Section III below, in some circumstances advisory opinions may not be viewed as interpretive rules.

¹⁶ 85 Fed. Reg. at 37396.

¹⁷ 81 Fed. Reg. 8686, 8689 (Feb. 22, 2016).

This assessment accurately represents the typicality of UDAAP issues’ fact-intensiveness, the uncertainty of any conclusions obtained in a vacuum, and the need for a more intensive evaluation than the Bureau intends for AOs. The CFPB simply cannot come to a reasoned conclusion about whether a particular practice is unfair, deceptive or abusive without getting more input than a one-sided proposal that the Bureau will not investigate. The short summary of facts in a CFPB advisory opinion will not provide sufficient assurance that the practice will not harm consumers. Advisory opinions on UDAAP issues also have a special risk of being misapplied in unforeseen “similarly situated” contexts, given the broader reach of UDAAP standards compared to more specific provisions of other statutes. Because of these and other risks, the CFPB should not issue AOs on UDAAP issues.

D. The Proposed AOP Will Consume Bureau Resources and Complicate Compliance

Due to advisory opinions’ accessibility under the program, the Bureau risks reallocating a massive number of hours that could be directed at its primary objectives: updating and enforcing critical consumer protections. Whereas advisory opinions addressing evolving areas of law are problematic for the reasons addressed above, the inevitable bulk of advisory opinions that do not concern novel areas of law create the separate problem of inefficiently consuming the Bureau’s time and energy, as well as that of compliance officials throughout industry. In order to comply with its consumer protection mandate and to act responsibly, the Bureau cannot issue advisory opinions without sufficient, time-consuming due diligence. Anything less than thorough and thoughtful consideration about the ramifications for an opinion is merely a rubber-stamp that violates the Bureau’s duties. Yet if the Bureau performs a careful review of each request, the AOP will create high opportunity costs for the Bureau’s core missions of law enforcement, supervision, rulemaking, complaint resolution, and education.¹⁸

Multifarious opinions not only complicate Bureau resource allocation; they complicate compliance for regulated entities as well, repeating the mistakes of the bygone TILA staff opinions system. In 1981, the Federal Reserve abandoned the old system of informal staff letters interpreting TILA because it was unworkable. More than 1500 one-off letters had been issued in the first twelve years of TILA, and the “cumulative effect of the interpretations ha[d] been to complicate, rather than facilitate, compliance by layering one set of distinctions on top of another. Rather than resolving questions, this material in the aggregate ha[d] served to generate further questions.”¹⁹ Indeed, the Senate Report on TILA Simplification cited those advisory opinions as a key reason that “simplification” of the pre-eminent consumer protection statute was needed, noting, “Creditors . . . have encountered increasing difficulty in keeping current with a steady stream of administrative interpretations”²⁰ The CFPB fails to acknowledge this history and gives no reason that the outcome of its AOP, multiplied over all of the consumer financial laws and not solely confined to

¹⁸ Furthermore, because those seeking opinions may be engaged in unusual, unexplored, or risky practices, due diligence review could be particularly complex and potentially contentious. Issuing opinions covering novel products, services, or business models without engaging in a Bureau-wide clearance process will create a risk of inconsistent Bureau positions and communications. And if the Bureau uses shortcuts to minimize these internal coordination efforts, the government risks backing itself into policy positions without attention to the consequences of those decisions for the American public.

¹⁹ 46 Fed. Reg. 28560 (May 27, 1981).

²⁰ S. Rep. No. 368, 96th Cong., 2d Sess., *reprinted in* 1980 U.S.C.C.A.N. 236, 252.

TILA, will be at all different from the Federal Reserve’s failed experiment. An advisory opinion may give the requester a measure of clarity in one narrow circumstance, but overall the financial industry will become saddled with an increasingly cluttered and confusing precedential landscape.

The CFPB brushes away the potential confusion created by a welter of new advisory opinions by stating: “AOs will be signed by the Director, addressing concerns that an AO program could lead to the proliferation of conflicting staff-level opinions.”²¹ But the Director’s signature does not change the risks. The problem that led the FRB to eliminate opinion letters was not primarily that one staff member issued an opinion in conflict with that of other staff. It is that 1500 opinions “layering one set of distinctions on top of another” simply “served to generate further questions.”

This problem would be even worse today than it was with the TILA letter system several decades ago. Those 1500 letters were generated under a single statute, TILA, and at a time when the number and type of entities potentially subject to TILA was far smaller than today. Yet the Bureau has proposed the AOP be used to grant relief under a number of other statutes, only exacerbating the problem.

Furthermore, although technological advances make it easier to search and index advisory opinions, technological advances have also lowered requestors’ burdens in seeking Bureau guidance. It is far easier to write up and send off a request for an interpretation when it can be done on a computer and through email rather than on a typewriter and through the U.S. mail. Law firms will undoubtedly have templates that they promote to all of their clients. Over time, the result could be an enormous body of advisory opinions with unclear relationships to each other, an unclear impact on the Bureau’s approach to entities other than the recipients, and an unclear connection to the Official Staff Commentary, the regulations, or the statute. The mere fact that the CFPB proposes to publish these advisory opinions in the Federal Register and on its website does not mitigate the challenges potentially posed by an unconstrained AOP. Because the CFPB has set no parameters on the AOP to ensure that it in fact promotes regulatory clarity rather than multiplying regulatory burden, muddying regulatory interpretation, and diverting critical public consumer protection resources, its implementation is imprudent.

III. Advisory Opinions Risk Running Afoul of the APA

The CFPB’s stated intention to issue advisory opinions on issues “of substantive importance or impact”²² and to utilize advisory opinions to address “outdated, unnecessary, or unduly burdensome regulations”²³ risks running afoul of the APA and its notice and comment requirements. The opinions have the potential to affect evolving issues of substantive law and could constitute legislative, not interpretive rules, thus requiring notice-and-comment rulemaking. Although the CFPB assures us it will not violate the APA, it sets absolutely no markers for how it will do that.

²¹ Advisory Opinion Pilot, 85 Fed. Reg. 37331, 37332 (June 22, 2020).

²² 85 Fed. Reg. at 37395.

²³ 85 Fed. Reg. at 37395.

The CFPB’s intention to invoke the good-faith reliance provisions of several federal statutes – frustrating consumer recourse for potential law violations – heightens this possibility. By providing a safe harbor for corporations operating in a gray area, the CFPB binds the public, a key test for determining whether a rule is legislative or interpretive. And although Congress has permitted covered persons to take advantage of an interpretation as a safe harbor, the long-standing precedent is that those interpretations were codified in the Official Interpretations and almost always promulgated after notice and comment. Moreover, given the CFPB’s failure to set parameters around its interpretations, there is nothing to stop the CFPB, in the name of resolving so-called “ambiguity,” from effectively amending or repealing a regulation or drastically changing the interpretation of a statute. Indeed, given the likely pressure on the CFPB to issue advisory opinions quickly, on limited facts with no public engagement, the CFPB could well find itself overlooking a necessary implication of an interpretation offered, resulting in opinions that do not merely track preexisting requirements but instead adopt a new position far different from the current understanding.

In other comments, we have addressed at greater length the potential for APA violations through other CFPB programs that opine on matters of so-called uncertainty.²⁴ We incorporate those comments by reference here. Without any guarantee that the advisory opinions will not bleed into legislative rules and impair substantive consumer rights, the risk of procedural deficiency—both prudentially and under the APA—that results from implementing the AOP is too high to justify its adoption.

IV. Advisory Opinions Should Not Be Accepted from Anonymous Parties and Should Not Impact Enforcement, Supervisory Action or Litigation.

In the Advisory Opinion Pilot Program, the CFPB is not accepting requests from entities such as trade associations or law firms on behalf of unnamed third parties. But in the proposed AO program, the CFPB would accept such requests and permit the underlying requestor to remain anonymous. The CFPB should require the ultimate requestor to be identified in all cases. Identification of the entity or entities that are seeking and will use the advisory opinion is an essential element of an application.

The CFPB cannot properly evaluate the consequences of an advisory opinion without having open eyes about the context in which it will be used. A bare-bones description in an application is not the same thing as being able to draw on the CFPB’s or public experience with a company or product. The CFPB must know who the requestor is if it hopes to assess correctly the appropriateness of issuing an advisory opinion condoning the conduct in question.

It is especially critical that the CFPB know whether a company that is seeking an advisory opinion is potentially the subject of state or federal enforcement, supervisory action, license revocation proceeding, or private litigation. The CFPB has stated the requestor “must provide a statement on whether the unidentified third party is the subject of an ongoing public Bureau

²⁴ See NCLC Sandbox Comments at 23-28.

enforcement action or an ongoing Bureau enforcement investigation conducted by the Bureau's Office of Enforcement."²⁵ The requester also must state "whether the issue being requested is the subject of any known or reasonably knowable active litigation or federal or state agency investigations."²⁶ These requirements are totally inadequate for several reasons.

First and most importantly, the CFPB should have a rule against issuing advisory opinions when the issue or requester are the subject of a state or federal investigation, enforcement action, supervisory or administrative action, license revocation proceeding, or private litigation. Issuing an opinion that can be used in those situations is especially likely to impair the rights of consumers or other government agencies and result in a legislative rule requiring notice and comment under the APA. If the requester or issue is controversial enough to be the subject of a pending action, then the public interest in having a full opportunity for notice and comment by all stakeholders is especially critical. If the CFPB wishes to intervene in private litigation, it should file an amicus brief, not put its thumb on the scales of justice through an opaque, backdoor AOP.

Second, the CFPB should not take the submitter's word at face value. It must be able to verify for itself whether the opinion could impact an ongoing enforcement action, litigation or investigation. The interested party could be the subject of an investigation that the requester is not aware of. Only by knowing the name of that party will the CFPB be able to determine whether the advisory opinion could interfere with an as yet nonpublic enforcement or supervisory action.

Third, the CFPB should require the requester to affirm that the facts and representations in the request are true and accurate, and that affirmation should bind not only the requestor (which may be willfully ignorant) but also the party in interest. Yet the proposed AOP says nothing about requiring such an affirmation, and the CFPB in fact deleted such a requirement from the no-action letter program.²⁷

V. The CFPB Should Emphasize Transparency in Advisory Opinion Applications, Not Work to Shield Information from the Public.

The CFPB states that "where information submitted to the Bureau is information the requestor would not normally make public, the Bureau intends to treat it as confidential pursuant to its rule, Disclosure of Records and Information, to the extent applicable."²⁸ This statement is in tension with the requirements of the Freedom of Information Act (FOIA). The Bureau appears committed to doing everything it can to block the public from understanding the intentions and impact of companies that are requesting favored interpretations of the law, the representations they have made, and the risks they pose for consumer harm.

Some of the information that companies submit may be protected from FOIA disclosure, but the proposal asserts far too broadly the CFPB's intention to protect information that requesters

²⁵ 85 Fed. Reg. at 37395.

²⁶ *Id.*

²⁷ *See* NCLC Sandbox Comments at 39; 84 Fed. Reg. 48229, 48237 (Sept. 13, 2019).

²⁸ 85 Fed. Reg. at 37395.

do not normally make public. Requesters that avail themselves of a one-sided process are not entitled to an automatic expectation of confidentiality. FOIA requires, for example, that to withhold information, an agency must not only determine that an exemption applies, but also conclude that disclosure would foreseeably harm an exemption-protected interest.²⁹ The CFPB does not explain how or why it can forecast now that information generally will satisfy both requirements. Thus, the CFPB should not presume that such information is exempt from public records requests. Rather than encouraging secrecy on matters that impact consumer protection, the Bureau should stand on the side of the public and promote transparency.

The Bureau also asks how it should make its advisory opinions that are not incorporated into the Official Interpretations and codified in the Code of Federal Regulations available to the public in a useful format. The answer to that is clear and easy: the Bureau should re-commit to codifying any and all interpretive rules issued, whether denominated as advisory opinions or by some other name, in the Official Interpretations, rather than attempting to create a shadow system of interpretations.

VI. Prioritizing Requests and Quantifying Benefit to Consumers Requires Public Input

The CFPB asks two remaining questions in the AOP proposal that we have not addressed directly elsewhere: how to prioritize requests and how to quantify benefits to consumers. For the Bureau to do either of these adequately, it must open the AOP up to greater public participation.

Fundamentally, the Bureau should prioritize requests in line with its core statutory mission: to protect consumers. The Bureau cannot know, however, without public input from consumers and others, where the risks and benefits to consumers lie or which advisory opinions are most likely to promote fair, transparent, and competitive markets. It is regulatory hubris for the Bureau to think that its roughly 1500, mostly Washington-based employees can correctly size the impact or importance of any regulatory interpretation based solely on a summary representation of decontextualized fact presented by industry. Nor is it appropriate for the Bureau to outsource this core obligation -- identifying its regulatory priorities through robust engagement with all its stakeholders -- to Washington lobbyists and law firms that submit one-off requests on behalf of paying clients.

Similarly, neither the Bureau nor a business can adequately quantify likely consumer benefits from a regulatory interpretation without input from all stakeholders. Assuming that businesses know best what the benefits of their conduct are for consumers—and that that judgment is not clouded by businesses' self-interest—is naïve, paternalistic, or deeply cynical. Consumers are better positioned than businesses to identify the benefits they receive from various courses of conduct by financial services providers, but the AOP proposal has no plan whatsoever for ensuring consumer input.

Moreover, the Bureau must use caution in how it defines benefits and be careful that risks are identified and quantified as well as benefits. The Bureau's mandate is not access to credit and financial markets *per se* but access to affordable, responsible credit and other financial products and

²⁹ See 5 U.S.C. § 552(a)(8)(A)(i)(I).

services. The benefits the Bureau is charged with promoting include fair and transparent markets, not the balkanized submarkets likely produced by its proposed AOP. Access alone is not a benefit, particularly if it leaves a family homeless or a student borrower with debt and impaired credit for life. Asking, as the Bureau does, about benefits without also asking about countervailing risks prejudices the outcome and assumes, erroneously, that all consumer financial products and services always and universally produce benefits alone.

VII. Conclusion

The proposed Advisory Opinion Program's ostensible purpose of helping regulated entities comply with consumer protection law is part of the Bureau's mission. However, the program as proposed creates such an array of legal and prudential hazards that its implementation risks real harm to consumers. Due to the one-sided nature of guidance requests, advisory opinions could be based on biased or incomplete representations of both fact and law—problems exacerbated by the invocation of the good-faith reliance provisions of several statutes and the legal consequences that follow from them. Furthermore, the AOP risks creating a cluttered regulatory landscape for regulated entities and courts, as well as an inefficient allocation of resources for the Bureau. Finally, the AOP also risks violating the requirements of the APA for legislative rules. Until the CFPB is prepared to establish public safeguards to prevent these risks and to promote consumer protection, its core mission, through the use of advisory opinions, it should scrap the AOP.

On the record before us, we believe the Bureau's AOP is fatally flawed. Instead of expending its limited resources developing a program to respond, without defined limits, to every request from every regulated entity who asks, the CFPB should shoulder the responsibility of developing its own regulatory agenda. The CFPB should on its own initiative identify and address areas of regulatory uncertainty. Rather than adopting a one-size-fits-all approach of issuing one-off interpretive rules, constrained by limited factual and legal development, the Bureau should determine, on a case-by-case basis, what form of guidance, whether compliance aid or interpretive rule or notice and comment rulemaking, is best suited to address the identified regulatory uncertainty while also fulfilling the Bureau's core statutory mandates of protecting consumers and promoting access to fair, transparent, and competitive markets.

* * *

Thank you for considering these views.

Respectfully Submitted,

Americans for Financial Reform Education
Fund
Better Markets
Center for Responsible Lending
Consumer Federation of America
National Association of Consumer Advocates
National Consumer Law Center (on behalf of
its low income clients)
U.S. PIRG