U.S. Chamber of Commerce
Litigation Center

June 28, 2022

The Honorable Rohit Chopra
Director, Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

Dear Director Chopra:

I write to express the views of the U.S. Chamber of Commerce concerning several of the Consumer Financial Protection Bureau's imprudent and unlawful actions. American businesses and workers are concerned about the state of the economy. Rather than work to tackle these challenges, the Bureau is engaged in a project of its own, to aggrandize its power and reshape America's economy. At every turn, it is doing so without advance public participation or approval. That is not the system Congress designed, nor one which our laws will tolerate. The following four issues illustrate the point:

> The CFPB Policy Fellowship program circumvents civil-service laws and executive-branch guidance that prohibit preferential hiring and conflicts of interest.
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> The Bureau's revisions to its Rules of Practice for Adjudication Proceedings impermissibly expand the Director's powers in ways that undermine due process for defendant companies and violate the separation of powers.
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> The Bureau's effective repeal of its 2013 decision not to publish a final decision or order establishing supervisory authority over a covered person violates the Administrate Procedure Act because the revised rule did not go through the required notice-and-comment process.
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> The Bureau's interpretative rule claiming that state attorneys general have the authority to enforce the Consumer Financial Protection Act is inconsistent with federal law and exceeds the Bureau's authority. It would not, when the time comes, receive *Chevron* deference from the courts.

The Bureau's recent actions reveal a troubling pattern of failure to respect the limitations on its authority. That pattern is especially troubling because the Bureau is already so powerful, so unaccountable, and so foreign to our constitutional tradition and design.

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1. To begin with, the CFPB Policy Fellowship program circumvents civil-service laws. Last year, Acting Director Uejio launched the CFPB Policy Fellowship, which creates jobs analogous to those held by senior political and career staff but evades the strictures of the competitive service hiring process.[1] The "'competitive service' consists of all civil service positions in the executive branch," with only narrow exceptions that do not apply here for positions specifically excepted by statute or positions that require Senate confirmation. 5 U.S.C. §2102. Accordingly, hiring for competitive-service positions must follow a strict process governed by statutes and regulations. *Id.*; *see also* 5 C.F.R. §§332, 337. Yet, the Bureau hired over 20 "policy fellows" outside of this process to serve as project directors for the Director, with salaries, in some cases in excess of $200,000, that indicate significant responsibility.[2] This sort of backdoor favoritism is precisely what the civil-service laws are designed to prevent.

Regardless of the legalities, Members of the House Committee on Financial Services detailed why this program is misguided—opening the door to all manner of favoritism and ideologically driven personnel selection and mismanagement, as well as conflicts of interest. Indeed, the program could hardly have been designed better to achieve those ends. The terms of the program reportedly *permit fellows to engage in outside employment* with written approval from Bureau management. House Cmte. Ltr. at 1. The Bureau *does not publicly disclose* the roster of fellows. *Id*. Fellows also appear to be *exempt from filing financial disclosures* required of other federal employees with similar responsibilities. *Id.* These and other features create self-evident risks for conflicts of interest and make the program ripe for unchecked favoritism in selection.

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[1] *CFPB Policy Fellowship*, CFPB, https://www.consumerfinance.gov/about-us/careers/cfpb-policy-fellowship/ (last visited June 9, 2022); *see also* David Uejio (@CFPBUejio), Twitter (June 17, 2021, 10:00 AM), https://mobile.twitter.com/CFPBUejio/status/1405525650224541706 (announcing the program).

[2] *See* Letter from Members of the U.S. House of Representatives Committee on Financial Services to Director Chopra (May 12, 2022), https://republicans-financialservices.house.gov/uploadedfiles/2022-05-12_letter_to_chopra_on_fellows_program_final.pdf [hereinafter House Cmte. Ltr.]; Consumers First: Semiannual Report of the Consumer Financial Protection Bureau, Hearing Before the H. Comm. on Fin. Services, 117th Cong. (2022) (testimony of Hon. Rohit Chopra, Director, CFPB).

In fact, you personally "encouraged a lot of people to apply" and knew "a handful" of fellows prior to becoming Director.[3]

The program is deeply troubling. It layers on to the policy leadership of the Bureau a significant number of unaccountable people—indeed, unaccountable people unknown to the public, with outside employment unknown to the public. These individuals exercise immense authority in an agency already plagued by a lack of accountability. The Chamber shares the concerns of the Members of the House Committee on Financial Services and calls on the Bureau to eliminate or fundamentally reform this program, which is at odds with good government and any semblance of guardrails, protections, or transparency.

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2. Next, the Bureau's revised Rules of Practice for Adjudication Proceedings represent a dramatic departure from agency practice, with little regard for due-process and separation-of-powers concerns. Traditionally, the Bureau has favored adjudication of federal consumer-finance laws in federal court, but the revised rules shift to greater reliance on administrative adjudication while disposing of procedural safeguards in the process. Specifically, on February 22, 2022, the Bureau issued revised rules that provide new powers to the Director to review cases, to decide dispositive motions, and to refer such motions to an administrative law judge.[4]

It is telling that the Bureau rushed this policy change without any advance opportunity for public comment and without any effort to amplify its perfunctory request for post-hoc public participation. In fact, it only briefly noted in an announcement in the Federal Register that it welcomed comments on the rules, which went into effect immediately. *See* 12 C.F.R §1081 (Feb. 22, 2022) ("This procedural rule is effective on February 22, 2022. Comments must be received on or before April 8, 2022."). We have submitted our comments on this proposal,[5] but we wish to reiterate that this quiet

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[3] Consumers First: Semiannual Report of the Consumer Financial Protection Bureau, Hearing Before the H. Comm. on Fin. Services, 117th Cong. (2022) (testimony of Hon. Rohit Chopra, Director, CFPB).

[4] Interim Final Rule: Rules of Practice for Adjudication Proceedings, CFPB (Feb. 22, 2022), https://www.consumerfinance.gov/rules-policy/final-rules/rules-of-practice-for-adjudication-proceedings/.

[5] Comment of American Bankers Association, Bank Policy Institute, Consumer Bankers Association, Mortgage Bankers Association, and U.S. Chamber of Commerce on Rules of Practice for Adjudication Proceedings; Docket No. CFPB-2022-0009 (Apr. 8, 2022), *available at* http://www.centerforcapitalmarkets.com/wp-content/uploads/2022/04/U.S.-Chamber-of-Commerces-Comment-Letter-on-Adjudication-Rules-040822-Final-1.pdf.

revision and shift to a greater reliance on in-house administrative adjudication takes the Bureau in the wrong direction at a time when courts have expressed deep skepticism of this type of system.

These revisions raise serious constitutional concerns. As an overarching principle, the adjudication of disputes involving core private rights—*i.e.*, depriving someone of liberty or financial gain through the assessment of hefty fines—lies within the Article III judicial power. Due process requires that an executive agency not strip away core private rights without involvement of a court, outside longstanding historical exceptions. *Stern v. Marshall*, 564 U.S. 462, 484 (2011); *Ortiz v. United States,* 138 S. Ct. 2165, 2185-2187 (2018) (Thomas, J., concurring). Accordingly, the Bureau's efforts to move in-house the adjudication of more enforcement actions where defendants risk significant financial interests is troublesome to say the least.

Indeed, the U.S. Court of Appeals for the Fifth Circuit recently highlighted several constitutional defects with similar enforcement proceedings before administrative law judges of the SEC. *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022).

For one, these proceedings deprive the accused of the Seventh Amendment right to a jury trial in an Article III court. *Id.* at 451-59. In evaluating the SEC's enforcement action for fraud, the court recognized that fraud claims existed at common law with a civil penalty as the available remedy. The Seventh Amendment guarantees a jury "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars." *Id.* at 452 (quoting U.S. Const. amend. VII). Thus, "the action suffices for the jury-trial right to apply to an adjudication of the underlying facts supporting fraud liability." *Id.* at 454. Importantly, the court expressly rejected the SEC's contention that securities fraud liability involved public rights because Congress designed the underlying statutes to protect the public at large. *Id.* at 456-57. Even so, the court concluded, "[t]hat does not mean such suits concern public rights at their core," so the enforcement action seeking penalties for securities fraud must be reserved for an Article III tribunal and jury. *Id.* at 457.

For another, the statutory removal restrictions on administrative law judges violate Article II's Take Care Clause. *Id.* at 463-65. Because SEC administrative law judges "perform substantial executive functions," Article II requires that the President have sufficient control over those positions. *Id.* at 463. Yet, the multi-layered tenure protection afforded to administrative law judges unconstitutionally interferes with the President's ability to remove these officers. *Id.* at 464. *Jarkesy* is just the latest case in a recent string of cases curtailing agency reliance on administrative law judges. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (SEC administrative law judges are "officers of the United States" subject to the Constitution's Appointments Clause). The Supreme Court is only increasing its interest in this area by agreeing to review two additional cases next Term about the need for a federal forum to bring constitutional challenges to agency structures, including the use of tenure-protected administrative law judges: *SEC v. Cochran* and *Axon Enterprise Inc. v. FTC*. This issue is not going away; it is only gaining more attention.

The same exact flaws identified by the court in *Jarkesy* are present here. Just as the SEC may not enforce liability on a securities-fraud claim in an administrative proceeding, neither can the Bureau enforce liability for the violation of federal consumer-fraud law in an administrative setting. What's more, the revised rules expand the Director's authority to serve as the judge to decide dispositive motions at the administrative level. 12 C.F.R §1081. The revised rules make it harder for parties to exhaust claims and preserve them for appeal, which compounds the problem caused by denying parties immediate access to an Article III court. *Id.* Accordingly, while the law is trending one way, the Bureau is running in the opposite direction.

These concerns might explain why the Bureau has historically relied on administrative adjudication so infrequently. Even in earlier days, the Bureau had a troubling record in this regard. In one instance, Director Cordray retroactively inserted his own interpretation of the law to dramatically increase financial penalties imposed on a party. The U.S. Court of Appeals for the D.C. Circuit overturned the agency's decision, finding that the Bureau's order both "violated bedrock principles of due process" and incorrectly interpreted the law. *PHH Corp. v. CFPB*, 839 F.3d 1, 9 (D.C. Cir. 2016), *vacated* (D.C. Cir. Feb. 16, 2017), *reinstated in relevant part*, 881 F.3d 75, 83 (D.C. Cir. 2018) (en banc). The Bureau has not had better luck when its decision-making processes and structure are reviewed for other constitutional flaws. *See, e.g.*, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020).

The Bureau has enough constitutional problems on its hands without creating more for itself through dubious adjudications. The Bureau should heed the courts' warnings and rescind the revised rules.

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3. Separately, the Bureau violated the APA when it repealed its 2013 rule that established that the Bureau would not publish a final decision or order establishing supervisory authority over a covered person. Under that 2013 standard, "all documents, records or other items submitted by a respondent to the Bureau, *all* documents prepared by, or on behalf of, or for the use of the Bureau, and any communications between the Bureau and a person, shall be deemed confidential supervisory information." 12 C.F.R. §1091.115 (emphasis added). The standard went through the notice-and-comment process to guarantee confidentiality for businesses in certain proceedings, and "[a]fter consideration of the comments regarding confidentiality," the Bureau notably "agree[d] that all aspects of a proceeding under the final rule relate to the Bureau's supervisory process and should be deemed confidential supervisory information under 12 C.F.R. 1070.2(i)(1)."[6] Recently, the Bureau has effectively rescinded that rule to remove confidentiality protections from final decisions and orders at the Director's discretion. *See* §1091.115(c)(2) ("The Director will make a determination regarding whether a decision or order ... will be publicly released on the Bureau's website, in whole or in part. The respondent may file a submission regarding that issue, within seven days after service of the decision or order."). The Bureau wrongly decided that "this rule is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act" as a rule of agency organization, procedure, or practice.[7] Once more, providing industry the chance to comment[8] on a rule change only after it takes effect is of little comfort or help to regulated entities.

Section 553 of the APA generally requires a federal agency to provide public notice and an opportunity for comment on any proposed rule. 5 U.S.C. §553. The law provides limited exceptions for "rules of … procedure." §553(b)(3)(A). The basis for this procedural-rule exception is that an agency can change procedures so long as it does not affect members of the public and their obligations. *Pickus v. United States Bd. of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974). The D.C. Circuit has made clear that procedural rules are limited to "technical regulation of the form of agency action and proceedings ... which merely prescribes order and formality in the transaction of [agency operations]." *Id.* at 1113-14. "This category ... should not be deemed to include any action which goes beyond formality and substantially affects the rights of those over whom the agency exercise authority." *Id.* at 1113.

Here, the Bureau conceded that "[a] central principle of the supervisory process is confidentiality." Revised Supervisory Rule Publication at 3. Yet, the CFPB decided "that there should be a procedural mechanism to determine whether all or part of a decision or order should be publicly released" in the interest of transparency. *Id.* The CFPB provides no guidance on how the Director will determine what enjoys the continued protection of confidentiality and what is released to the public at the Director's discretion. Regulated entities have an interest in confidentiality, and this rule

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[6] Consumer Financial Protection Bureau, Procedural Rule to Establish Supervisory Authority over Certain Nonbank Covered Persons Based on Risk Determination, 78 Fed. Reg. 40352, 40360 (July 3, 2013).

[7] Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination; Public Release of Decisions and Orders, CFPB (Apr. 29, 2022), https://files.consumerfinance.gov/f/documents/cfpb_public-release-of-decisions-and-orders_procedural-rule_2022-04.pdf [hereinafter Revised Supervisory Rule Publication].

[8] U.S. Chamber of Commerce, Comments on Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination; Public Release of Decisions and Orders, Docket No. CFPB-2022-0024 (May 31, 2022), *available at* http://www.centerforcapitalmarkets.com/wp-content/uploads/2022/05/220531_Comments_PublicDecisionFinalOrder_CFPB-PDF.pdf.

change is substantive in that it affects the degree to which an entity's information will be kept confidential, how that determination will be made (through the Director's apparently unfettered discretion), and how an entity can participate in the determination process. *See EPIC v. DHS*, 653 F.3d 1, 6 (D.C. Cir. 2011) (rejecting the government's argument that it was imposing a procedural rule exempt from notice-and-comment because the rule "intrudes upon [a person's] privacy in a way [the previous standard] does not"). Accordingly, "the change substantively affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking." *Id.*; *Arizona v. City & Cnty. of San Francisco*, 596 U.S. __ (2022) (Roberts, C.J., concurring) (slip op. at 2) (recognizing "the usual and important requirement, under the Administrative Procedure Act, that a regulation originally promulgated using notice and comment … may only be repealed through notice and comment").

The Bureau violated the APA by repealing its 2013 confidentiality rule without going through notice and comment. The Bureau should rescind the revisions, restore confidentiality protections, and allow businesses and the public to comment before it enacts such a change.

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4. Finally, the Bureau's interpretative rule stating that state attorneys general have the authority to enforce the Consumer Financial Protection Act (part of Dodd-Frank) is incorrect in several respects.[9] The interpretative rule claims that States can bring claims under Section 1042 of Dodd-Frank for violations of other enumerated consumer [financial protection] laws." Interpretative Rule at 4-5. That claim is unambiguously wrong. The Consumer Financial Protection Act does not authorize States broadly to enforce all provisions of the Act under Section 1042. *See* 12 U.S.C. §5552.

It has long been understood, based on the clear text of the statute, that States have the authority under Section 1042 to enforce prohibitions created by Dodd-Frank itself—*i.e.*, including unfair, deceptive, or abusive acts or practices—but not to enforce other statutes, such as the Truth in Lending Act or Fair Debt Collections Practices Act. Subject to some exceptions, 12 U.S.C. §5552(a)(1) provides that "the attorney general … of any State may bring a civil action in the name of such State … to enforce *provisions of this title* or regulations issued under this title" and that "[a] state regulator may bring a civil action … to enforce *the provisions of this title* or regulations issued under this title with respect to any entity that is State-chartered, incorporated, licensed, or otherwise authorized to do business under State law." (Emphases added.) The statute

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[9] Authority of States to Enforce the Consumer Financial Protection Act of 2010, CFPB (May 19, 2022), https://files.consumerfinance.gov/f/documents/cfpb_section-1042_interpretive-rule_2022-05.pdf [hereinafter Interpretive Rule].

expressly does not use the defined term of "*enumerated consumer laws*" and thus does not authorize States to enforce those laws. *See id.*; §5481(12). Moreover, the statute clearly states that it does not affect the operation of any provision of other federal enumerated consumer laws that relates to the authority of a state attorney general or state regulator to enforce such a law. *See* §5552(a)(3) ("No provision of this title shall be construed as modifying, limiting, or superseding the operation of any provision of an enumerated consumer law that relates to the authority of a State attorney general or State regulator to enforce such Federal law."); *see also* §5481(12) (listing enumerated consumer laws). So, to the extent that a provision of an enumerated consumer law expressly or implicitly precludes state officials from enforcing it, Dodd-Frank does not change that limitation.

A statute also should not be lightly construed to upset the balance of authority between federal and state officials. *E.g.*, *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 603 (2011). A federal agency has no authority to change the federal-state balance unless Congress has clearly delegated that authority. *See Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (rejecting agency's interpretation of Clean Water Act that "would result in a significant impingement of the States' traditional and primary power over land and water use"). Of course, a federal agency has no authority to delegate authority to enforce federal statutes to state officials. *See Printz v. United States*, 521 U.S. 898, 933 (1997) ("'The Federal Government may not compel the States to enact or administer a federal regulatory program.'"); *see also TransUnion v. Ramirez*, 141 S. Ct. 2190, 2207 (2021) (recognizing that "the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch" under its "Article II authority").

Setting aside the erroneous nature of the Bureau's interpretation, its interpretative rule clearly lacks the force of law, and thus is not entitled to *Chevron* deference. *See Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 2551 (D.C. Cir. 2014) ("Legislative rules generally receive *Chevron* deference, but interpretive rules and general statements of policy often do not."). Even if it were a legislative rule, deference is unwarranted on issues concerning federalism and the bounds of state authority. *See United States v. Mead*, 533 U.S. 218, 226-27 (2001) (limiting application of *Chevron* to circumstances where "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law," as through a grant of rulemaking or adjudicative authority, "and that the agency interpretation claiming deference was promulgated in the exercise of that authority"); *Solid Waste Agency,* 531 U.S., at 173 (refusing to accord agency *Chevron* deference because "the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power"); *Rapanos v. United States*, 547 U.S. 715, 738–39 (2006) (similar). Congress did not—and realistically could not—delegate authority to the CFPB to manage the federal-state balance on nationally important issues of consumer protection.

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Altogether, the Bureau's recent actions demonstrate that the agency has a pattern and practice of acting outside the bounds of clear legal limits. The Bureau must restrain itself by taking corrective action and rescinding the improper acts identified in this letter. The Chamber hopes you do. If not, we will not hesitate to take legal action to defend businesses against the Bureau's unlawful actions.

Sincerely,

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