United States Senate
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS
WASHINGTON, DC 20510–6075

July 18, 2017

Honorable Keith Noreika
Acting Comptroller
Office of the Comptroller of the Currency
400 7th Street SW
Washington DC, 20219

Dear Acting Comptroller Noreika:

I am troubled by your letters to the Director of the Consumer Financial Protection Bureau (CFPB) and I seek clarification on the Office of the Comptroller of the Currency's (OCC) position on the CFPB's recent forced arbitration rulemaking.

You claim that OCC staff has reviewed the proposal and "expressed concerns about its potential impact on the institutions that make up the federal banking system and its customers."[1] The CFPB's final rule is substantially similar to the proposed rule it released in 2016, and is largely based on data the CFPB made publicly available in its report on forced arbitration in 2015.[2] According to the CFPB's final rule, several safety and soundness regulators were consulted during the lengthy rulemaking process and none, including the OCC, raised any safety and soundness concerns.[3] It is my understanding that this consultation process extended more than a month after you had been appointed Acting Comptroller on May 6th.[4] On June 26th, your staff stated via email "…the OCC has no comments on the draft text and commentary."[5] Last week, I had the opportunity to ask Federal Reserve Chair Yellen whether her staff would have raised an important issue like this during the CFPB's rulemaking process, and she answered in the affirmative.[6]

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[1] Keith Noreika, "Letter to CFPB Director Cordray," July 10, 2017.
[2] *Compare* Bureau of Consumer Financial Protection, Arbitration Agreements, July 10, 2017, available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_Arbitration-Agreements-Rule.pdf *with* Arbitration Study, CFPB Report to Congress, March, 2015 available at http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf
[3] CFPB Arbitration Rule, pg. 624.
[4] Director Cordray to Acting Comptroller Noreika, "Response to Arbitration Rulemaking Letter," July 12, 2017.
[5] Ibid.
[6] Hearing in the United States Senate Committee on Banking, Housing and Urban Affairs, "The Semi-Annual Monetary Policy Report to Congress," July 14th, 2017.

Notwithstanding your claim that the OCC staff has concerns, your letters raise no specific safety and soundness issues. Instead, they make several overtly political arguments against the adoption of the CFPB's rule.

For example, you note that one effect of the rule may be "simply enriching class-action lawyers."[7] Leaving aside the troubling appearance of an independent financial regulatory agency echoing a talking point used by banking lobbyists, the case studies in the CFPB's 2015 report on forced arbitration demonstrate that class actions have led to better outcomes for consumers.[8] Specifically, one of those case studies deals with banks manipulating the order in which they process checking account transactions to charge their customers more overdraft fees.[9] The CFPB's study found that consumers benefitted from class actions both through monetary relief and changes in bank practices, while consumers that were barred from class actions saw little or no relief.[10] It is especially surprising that you are not familiar with these outcomes. Previously, as an attorney in private practice, you represented Wells Fargo in just such a case, and attempted to quash a class action brought by consumers harmed in exactly the same way by invoking Wells Fargo's forced arbitration clause.[11] Indeed, Wells Fargo is one of the entities for which you were subject to a conflict of interest recusal until May 18th of this year.[12]

As another example, you raise the specter of "potentially ruinous liability" and assume increased costs and risks to reserves, capital, and liquidity of banks.[13] But as you know, a number of globally systemic banking institutions, including Bank of America, JP Morgan Chase, and HSBC, were required to remove forced arbitration clauses from their consumer banking contracts in 2006 as part of an antitrust case alleging they colluded with each other to set currency conversion fees.[14] It is my understanding that you are required to recuse yourself from all matters related to any of those entities, because you have represented all of them as well.[15]

Congress also banned forced arbitration in mortgage contracts in the Dodd-Frank Law in 2010. Prior to that, in 2004, government-sponsored enterprises banned their use in federally backed mortgages, which make up a majority of the United States mortgage market.[16] Several FINRA

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[7] Keith Noreika, "Letter to CFPB Director Cordray," July 10, 2017.

[8] Arbitration Study, CFPB Report to Congress, March, 2015 Section 8: What is the value of class action settlements?" available at http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

[9] Ibid. Section 8.3.8 "Case Study of Checking Account Overdraft Litigation"

[10] Ibid.

[11] Gutierrez v. Wells Fargo Bank, NA (United States Court of Appeals for the Ninth Circuit December 26, 2012). Accessed at: http://www.lieffcabraser.com/pdf/wells-fargo-overdraft-2010-opinion.pdf

[12] *See* Letter to OCC Executive Committee from Jennifer Dickey, Ethics Counsel "Ethics Recusal List for Keith A. Noreika, Acting Comptroller of the Currency," May 24th, 2017. Accessed at: http://online.wsj.com/public/resources/documents/occhead.pdf

[13] Keith Noreika, "Letter to CFPB Director Cordray," July 10, 2017.

[14] In Re Currency Conversion Fee Antitrust Litigation (United States District Court for the Southern District of New York November 8, 2006). Accessed at: http://law.justia.com/cases/federal/district-courts/FSupp2/265/385/2459416/

[15] Letter to OCC Executive Committee.

[16] CFPB Arbitration Rule, pg. 25

regulated companies have been required to recognize class actions since 1992, and since 1976 forced arbitration has been banned in commodities contracts by the CFTC.[17]

In these and other examples where customers have had access to the courts, the results do not support your argument. After the financial crisis of 2008, multi-billion dollar consent orders for widespread fraud and abuse dwarfed the largest class actions that have been successfully brought against banks or financial institutions.[18] Even in these extraordinary circumstances, none of this liability proved "ruinous" to the individual financial institutions or the United States banking system.[19]

Finally, I am concerned that you reference section 1023 of the Dodd-Frank Act for precisely the opposite purpose for which it was intended.[20] Through an extensive rulemaking process, the CFPB appears to have complied with section 1022 of Dodd-Frank by making every effort to collaborate with safety and soundness regulators to ensure its rule did not negatively affect the safety and stability of the US banking system. Using section 1023 to impair the CFPB's rulemaking process after CFPB has fulfilled its obligation to include safety and soundness considerations sets a dangerous precedent, allowing regulators to interfere with the implementation and enforcement of consumer protection laws in order to shield banks from judicial scrutiny.

It is disappointing but not altogether surprising that the OCC is trying to manufacture an argument that a vital consumer protection conflicts with the safety and soundness of banks. The agency made the same evidence-free argument in 2009 when the Comptroller of the Currency opposed giving the CFPB jurisdiction over national banks.[21]

The argument that consumer protections will jeopardize the soundness of banks is as specious today as it has been in the past.[22] It is disappointing that the leadership of an agency that before the crisis was both lax in its consumer protection responsibilities and actively prevented states from exercising theirs has learned nothing from that crisis.[23] It is particularly troubling that a person serving in an acting capacity with the unusual status of special government employee,

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[17] Financial Industry Regulatory Authority Manual Section 12204 "Class Action Claims" accessed at: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4110

[18] Schoen, John. "7 Years on from crisis, $150 billion in bank fines and penalties." CNBC.com. April 30, 2015. Available at: http://www.cnbc.com/2015/04/30/7-years-on-from-crisis-150-billion-in-bank-fines-and-penalties.html

[19] Many of the market values of these institutions actually increased upon announcement of these payments.

[20] Keith Noreika, "Letter to CFPB Director Cordray," July 10, 2017.

[21] *See* Statement of John C. Dugan, Comptroller of the Currency, before the Committee on Banking, Housing, and Urban Affairs, United States Senate, Aug. 4, 2009, at 25-26, available at https://www.banking.senate.gov/public/_cache/files/eb5bdf3c-c8ff-4ff8-8be0-d6093436c267/23C6AE00CC53D93492511CC744028B5E.dugantestimony8409.pdf.

[22] *See* Cheyenne Hopkins, *OCC Presses Fed to Alter Proposal on Card Reform*, Am. Banker, Aug. 21, 2008 ("We believe that particular aspects of the proposed rule would have unintended and undesirable consequences that raise safety and soundness concerns ...' Mr. Dugan wrote.") available at https://www.americanbanker.com/news/occ-presses-fed-to-alter-proposal-on-card-reform.

[23] *See* Fin. Crisis Inquiry Comm'n, Fin. Crisis Inquiry Report 13 (Gov't Printing Ofc. 2011) (quoting former Illinois Attorney General Lisa Madigan that "the OCC was 'particularly zealous in its efforts to thwart state authority over national lenders, and lax in its efforts to protect consumers from the coming crisis.'") available at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf.

who has circumvented the Senate confirmation process and its related disclosures, is raising a procedural objection to the CFPB's rule so late in the process and in the name of transparency.

For these reasons, please provide:

1. Your agency's data, analysis, documentation, or other work product that supports your claim that the CFPB's rule could pose a threat to the stability of the federal banking system;
2. Documentation of the OCC's contacts with CFPB throughout the rulemaking process, consistent with section 1022, OCC's attempts, successful or otherwise, to register its concerns with the CPFB, or an explanation of why the OCC withheld its concerns rather than engaging in good faith in the extensive consultation process as required by law; and
3. Your agency's legal analysis supporting the conclusion that its actions are consistent with the requirements set forth in section 1023.

I expect that you will provide the committee with the requested information before filing any petition with the Financial Stability Oversight Council to stay CFPB's rule.

Thank you for your attention to this matter.

Sincerely,

Sherrod Brown

Sherrod Brown
Ranking Member
Senate Committee on Banking, Housing and Urban Affairs

cc: Hon. Mike Crapo, Chairman, Senate Committee on Banking, Housing and Urban Affairs
Hon. Steven Mnuchin, Secretary of the Treasury