

# United States Senate

WASHINGTON, DC 20510

January 13, 2020

Mr. Mark Bialek  
Inspector General  
Office of Inspector General  
Board of Governors of the Federal Reserve System  
20<sup>th</sup> St. and Constitution Ave. N.W.  
Mail Stop K-300  
Washington, DC 20551

Dear Mr. Bialek:

We write to request that you open an investigation into several Consumer Financial Protection Bureau (Bureau) settlements that provide limited or no restitution to harmed consumers. Under Director Kathleen Kraninger, the Bureau appears to be ignoring existing legal authority for calculating restitution in order to reduce the amount of restitution returned to harmed consumers or undercount the consumers who should receive restitution. The Bureau's approach to restitution under Director Kraninger also creates a perverse incentive for companies to violate the law by allowing them to retain all or nearly all of the funds they illegally obtain from consumers.

The Bureau's recent settlement with debt collector Asset Recovery Associates, Inc. (ARA) reflects the Bureau's new approach to restitution under Director Kraninger. In its consent order, the Bureau found that ARA used illegal debt collection practices—such as falsely and improperly threatening to sue or arrest consumers and misrepresenting to consumers that collection employees were attorneys—to induce consumers to make payments.<sup>1</sup> The consent order required ARA to pay \$36,800 in restitution, a \$200,000 civil money penalty, and injunctive relief including a prohibition from any further illegal collection practices.<sup>2</sup>

Through its investigation of ARA, the Bureau specifically found that the company had “regularly” engaged in these practices “since at least January 1, 2015,”<sup>3</sup> revealing that ARA's unlawful debt collection tactics were the rule, not the exception. Despite this finding, the Bureau limited restitution to only those consumers who affirmatively “complained about a false threat or

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<sup>1</sup> *CFPB v. Asset Recovery Associates, Inc.*, No. 2019-BCFP-0009 (Aug. 28, 2019) (“ARA Consent Order”), available at [https://files.consumerfinance.gov/f/documents/cfpb\\_asset-recovery-associates\\_consent-order\\_2019-08.pdf](https://files.consumerfinance.gov/f/documents/cfpb_asset-recovery-associates_consent-order_2019-08.pdf).

<sup>2</sup> *Id.* ¶¶ 30, 40.

<sup>3</sup> *In the Matter of: Financial Credit Services, Inc., d/b/a Asset Recovery Associates*, File No. 2019-BCFP-009 (Aug. 28, 2019) at ¶¶ , available at [https://files.consumerfinance.gov/f/documents/cfpb\\_asset-recovery-associates\\_consent-order\\_2019-08.pdf](https://files.consumerfinance.gov/f/documents/cfpb_asset-recovery-associates_consent-order_2019-08.pdf).

misrepresentation” by ARA.<sup>4</sup> The result is that consumers whom ARA subjected to illegal threats and misrepresentations in order to induce them to make payments but did not complain received no restitution. It also means that ARA gets to retain all but \$36,800 of the amount it illegally collected from consumers over a more than four-year period.

The Bureau’s settlement with ARA is no outlier, but rather represents a purposeful approach under Director Kraninger to cut out important restitution to consumers. Indeed, earlier this year, the Bureau settled three other cases that provided for zero restitution for consumers:

- On January 19, 2019, the Bureau announced a consent order with Sterling Jewelers Inc. for violating the Truth in Lending Act, Regulation Z, and the Consumer Financial Protection Act (CFPA) by opening store credit-card accounts without consumers’ consent, enrolling consumers in payment protection plans without their consent, and deceiving consumers about the financing terms associated with the credit-card accounts.<sup>5</sup> The Bureau required Sterling Jewelers to pay a \$10 million fine, but did not require the company to provide refunds of money consumers paid for the payment protection plans or any other monetary relief to consumers.
- On January 25, 2019, the Bureau announced a consent order with Enova International Inc., an online payday lender, for engaging in unfair acts or practices in violation of the CFPA for withdrawing funds from consumers’ accounts without their authorization.<sup>6</sup> The Bureau imposed a \$3.2 million civil penalty, but did not require Enova to pay back the funds they had unlawfully withdrawn from consumers’ bank accounts.
- On February 1, 2019, the Bureau announced a stipulated final judgment with NDG Financial Corporation and other defendants for running a payday lending enterprise that engaged in unfair, deceptive, and abusive acts practices in violation of the CFPA and the Credit Practices Rule.<sup>7</sup> The Bureau’s Amended Complaint, filed under Director Cordray, sought “damages and other monetary relief . . . to redress injury to consumers.”<sup>8</sup> The settlement, however, dropped the requests for restitution and other relief for victimized consumers.

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<sup>4</sup> *Id.* ¶30, 3(a) (providing restitution to “Affected Consumers,” which is defined as “consumers who complained about a false threat or misrepresentation”).

<sup>5</sup> *CFPB v. Sterling Jewelers Inc.*, Case No. 1:19-cv-00448 (S.D.N.Y. Jan. 16, 2019), available at [https://files.consumerfinance.gov/f/documents/bcftp\\_sterling-jewelers\\_complaint.pdf](https://files.consumerfinance.gov/f/documents/bcftp_sterling-jewelers_complaint.pdf).

<sup>6</sup> *In the Matter of Enova International, Inc.*, File No. 2019-BCFP-0003 (Jan. 25, 2019), available at [https://files.consumerfinance.gov/f/documents/cfpb\\_enova-international\\_consent-order\\_2019-01.pdf](https://files.consumerfinance.gov/f/documents/cfpb_enova-international_consent-order_2019-01.pdf).

<sup>7</sup> *CFPB v. NDG Financial Corp.*, Case No. 1:15-cv-05211 (S.D.N.Y. Feb. 4, 2019), available at [https://files.consumerfinance.gov/f/documents/cfpb\\_ndg-financial-corp\\_consent-order.pdf](https://files.consumerfinance.gov/f/documents/cfpb_ndg-financial-corp_consent-order.pdf).

<sup>8</sup> *CFPB v. NDG Financial Corp.*, Case No. 1:15-cv-05211 (S.D.N.Y. Dec. 11, 2015), Amended Complaint ¶¶ 336-37 (DE 47), available at [https://files.consumerfinance.gov/f/documents/cfpb\\_northway\\_amended-complaint\\_122015.pdf](https://files.consumerfinance.gov/f/documents/cfpb_northway_amended-complaint_122015.pdf).

The U.S. House Financial Services Committee conducted an investigation and on October 16, 2019, issued a report (House Report) containing its findings on these three cases.<sup>9</sup> The House Report included internal memoranda from career staff in the Bureau’s Office of Enforcement and Legal Division that recommended and provided legal support for providing for restitution for consumers.<sup>10</sup> Director Kraninger overruled the Bureau’s career staff, however, and refused to require any of these three entities to provide redress to the consumers they had harmed—even though at least one of the entities offered to repay \$1.3 million to victimized consumers.<sup>11</sup> In response to the House investigation, the Bureau explained that it did not seek restitution in these cases because it could not determine “with certainty” which consumers had been harmed or the amount of the harm.<sup>12</sup>

The Bureau has provided restitution for uncompensated victims through its Civil Penalty Fund. The Bureau’s claims that they cannot determine “with certainty” which consumers were harmed is in direct contradiction to your Office’s January 2016 report on the Civil Penalty Fund.<sup>13</sup> Your report described how the Bureau locates victims of fraud and abusive practices and found that the Bureau had the internal controls needed to find and locate victims in a manner that is “generally effective and efficient.”<sup>14</sup>

Thus, in each of these cases, the Bureau departed from the well-established standard operating procedure and legal standard for restitution. The Ninth Circuit set forth the standard for restitution in Bureau cases in *CFPB v. Gordon*.<sup>15</sup> As the court explained, restitution is “‘a form ancillary relief’ that a court can order ‘[i]n the absence of a proof of actual damages’.”<sup>16</sup> Restitution is measured by “the full amount lost by consumers” or the amount that “reasonably approximates the defendants’ unjust gains.”<sup>17</sup> In debt collection cases by the Bureau and the FTC, courts have ordered defendants like ARA to refund to consumers the *entire* amount they collected through the unlawful collection scheme.<sup>18</sup> For example, in a prior Bureau debt

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<sup>9</sup> “Settling For Nothing: How Kraninger’s CFPB Leaves Consumers High and Dry,” Report Prepared by Majority Staff of the Committee on Financial Services, Oct. 2019, at 14, *available at* [https://financialservices.house.gov/uploadedfiles/cfpb\\_report\\_settling\\_for\\_nothing.pdf](https://financialservices.house.gov/uploadedfiles/cfpb_report_settling_for_nothing.pdf)

<sup>10</sup> *Id.* at 9-11.

<sup>11</sup> *Id.* at 11, 13-14.

<sup>12</sup> *Id.* at 14; see also *id.* at 78-81 (Addendum to Mar. 5, 2019 letter from K. Kraninger to Chairwoman M. Waters and Rep. A. Green).

<sup>13</sup> Office of Inspector General for the Federal Reserve Board of Governors. “The CFPB’s Civil Penalty Fund Victim Identification Process Is Generally Effective but Can Be Enhanced.” *The Federal Reserve System Board of Governors*. January 2016. Available at: <https://oig.federalreserve.gov/reports/cfpb-civil-penalty-fund-jan2016.pdf>

<sup>14</sup> *Id.* at 3.

<sup>15</sup> 819 F.3d 1179 (9th Cir. 2011). Although the Bureau has only been in existence since 2011, courts have applied long-standing standard for restitution applied to the Federal Trade Commission (FTC) in Bureau actions. *See infra*, n. 14 and 16.

<sup>16</sup> 819 F.3d 1179, 1195 (quoting *FTC v. Stefanichik*, 559 F.3d 924, 931 (9th Cir. 2010) and *FTC v. Gill*, 265 F.3d 944 (9th Cir. 2011)).

<sup>17</sup> *Id.*

<sup>18</sup> *See CFPB v. Universal Debt & Payment Solutions, LLC*, 2019 WL 1295004, \*19 (N.D. Ga. Mar. 21, 2019); *FTC v. Williams, Scott & Assocs., LLC*, 679 F. App’x 836, 839-40 (11th Cir. 2017) (net revenue of unlawful debt-relief scheme, not net profit, is the correct measure of “unjust gain” in FTC action).

collection case, the district court determined that the correct amount of restitution was the \$5,261,484, which represented the total amount that the defendants had collected from consumers through their unlawful debt-collection scheme.<sup>19</sup>

Accordingly, we believe there was no legal basis for the Bureau to withhold or limit restitution to just those consumers who complained in its settlement with ARA. And in all four cases, the Bureau made a conscious decision to disregard legal precedent in order to allow companies that violated the law to keep all, or nearly all, of the money they illegally collected from consumers. This new approach to providing restitution to consumers is fundamentally at odds with the Bureau's mission: it fails to provide relief to victimized consumers, it allows bad actors to retain the profits from their illegal conduct, and it is unfair to those companies who follow the law.

Based on the foregoing, we request that the Inspector General open an investigation that addresses the following questions:

1. What is the standard that the Bureau applied in the above cases to determine whether to provide restitution, which consumers are eligible for restitution, and the amount of restitution?
2. Is the standard for restitution that the Bureau applied in the above cases different than the standard applied by courts and in prior Bureau settlements? If so, what is the case law or legal support for the Bureau's new restitution standard?
3. To determine the number of consumers whom the Bureau may have improperly excluded from receiving restitution in the ARA case, please include the following in your investigation:
  - a. From January 1, 2015 through the date of the Consent Order, from how many consumers did ARA attempt to collect a debt?
  - b. From January 1, 2015 through the date of the Consent Order, from how many consumers did ARA actually collect a debt?
  - c. From January 1, 2015 through the date of the Consent Order, what is the total amount that ARA collected from consumers?
4. For each of the four cases:
  - a. What did Bureau career staff in Enforcement recommend for restitution?
  - b. Did political appointees, including Eric Blankenstein and Brian Johnson, overrule career staff's recommendations?
  - c. Did political appointees further restrict restitution by eliminating claims?
  - d. Did Director Kraninger ratify the decision of political appointees to limit or eliminate restitution?

We look forward to hearing back from you regarding our concerns about the Bureau departing from the well-established standard operating procedure and legal standard for restitution by February 12, 2020. For more information, please contact Carol Wayman at 202.224.3150 or at

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<sup>19</sup> *Universal Debt*, 2019 WL 1295004 at \*19.

Carol Wayman@cortezmasto.senate.gov on Senator Cortez Masto's staff and Jan Singelmann at 202.224-1048 at Jan\_Singelmann@banking.senate.gov on Senator Brown's staff.

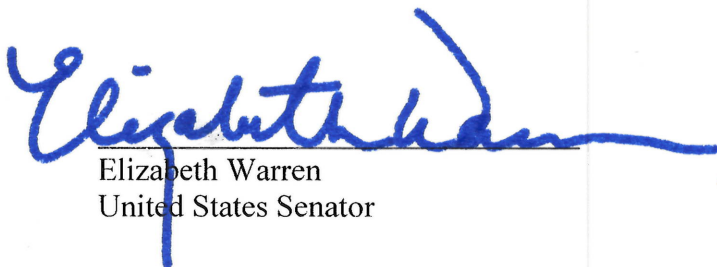
Sincerely,



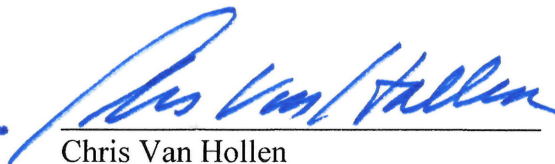
Catherine Cortez Masto  
United States Senator



Sherrod Brown  
United States Senator



Elizabeth Warren  
United States Senator



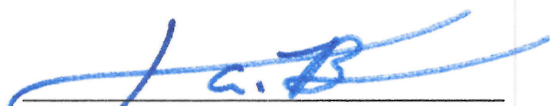
Chris Van Hollen  
United States Senator



Tina Smith  
United States Senator



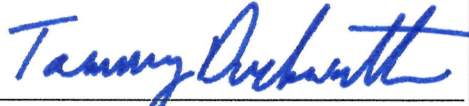
Richard Blumenthal  
United States Senator



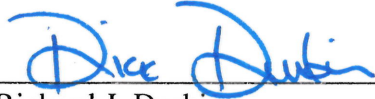
Cory A. Booker  
United States Senator



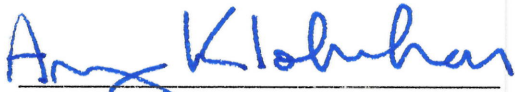
Benjamin L. Cardin  
United States Senator



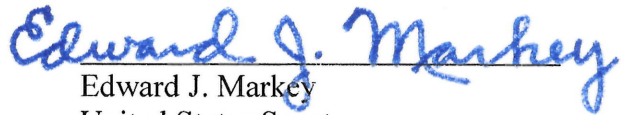
Tammy Duckworth  
United States Senator



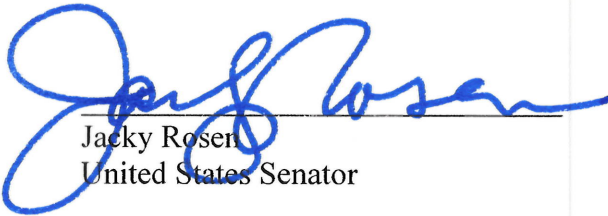
Richard J. Durbin  
United States Senator



Amy Klobuchar  
United States Senator



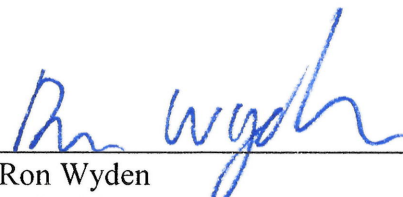
Edward J. Markey  
United States Senator



Jacky Rosen  
United States Senator



Bernard Sanders  
United States Senator



Ron Wyden  
United States Senator