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August 1, 2018

Senator Mike Crapo  
Chairman  
Senate Banking Committee  
United States Senate  
Washington, DC 20510

Dear Chairman Crapo:

I write to urge you to delay a Committee vote on the nomination of Kathleen Kraninger to serve as Director of the Consumer Financial Protection Bureau until the Committee receives all responsive and non-privileged information and documents that Committee members have requested.

The Trump Administration has identified Ms. Kraninger's purported management abilities as her only qualification for the CFPB job, but both the Administration and Ms. Kraninger have refused to turn over basic information Committee members have requested about her management record at the Office of Management and Budget. Ms. Kraninger and the Trump Administration have offered no credible legal or factual basis for withholding this information, yet you are accepting their position and pressing forward with a rushed vote on Ms. Kraninger's nomination. I am deeply concerned by your willingness to accept their untenable position and by your refusal to work with your Committee members – as you have in the past – to resolve their good-faith concerns.

### **The Importance of Ms. Kraninger's Management Record**

The CFPB Director is responsible for protecting every American from being cheated by financial firms, but Ms. Kraninger has no substantive experience in consumer protection or finance. At her hearing, she confirmed that she has never conducted oversight of banks, credit unions, payday lenders, credit bureaus, debt collectors, or student loan processors, and has had no final decision-making responsibility for enforcement of state or federal consumer protection laws. Based on Ms. Kraninger's own testimony, her only relevant substantive experience is working on a program in college to promote financial literacy.<sup>1</sup>

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<sup>1</sup> Kathleen Kraninger, Testimony before the Senate Banking Committee, Hearing to Consider Nominees for the Bureau of Consumer Financial Protection and the Export-Import Bank, July 19, 2018 (responses to Sen. Heitkamp).

Thus, Ms. Kraninger's case for the CFPB job rests entirely on her purported management abilities. That is also the case the Trump Administration has made, noting that she currently "oversees \$250 billion in budgetary resources"<sup>2</sup> and would bring "much-needed management experience"<sup>3</sup> to the CFPB. And that is the case Ms. Kraninger has made, testifying that she has "taken a broader leadership role ... for seven Cabinet agencies and thirty other Federal agencies" in her year-and-a-half at OMB.<sup>4</sup>

Because Ms. Kraninger's management record is central to her fitness for the job, the Senate has an obligation to carefully scrutinize that record. Indeed, the Committee has nothing else to review to assess Ms. Kraninger's suitability.

On June 18<sup>th</sup>, Ranking Member Brown and I asked Ms. Kraninger to turn over certain relevant information and documents about her role in developing and implementing the policies that resulted in the Trump Administration separating thousands of children from their parents at the southern border.<sup>5</sup> In addition to raising concerns about the morality of the Administration's actions at the border, members of this Committee from both parties have expressed concern about the Trump Administration's management failures in implementing the child separation policy.<sup>6</sup> Our request sought information and documents to ascertain Ms. Kraninger's role in managing this failed policy – which, again, is particularly relevant to evaluating the Administration's claim that Ms. Kraninger's management ability has earned her a promotion to run the CFPB.

But at Ms. Kraninger's nomination hearing, you dismissed our request as seeking information about "extraneous administration policies that the requesters do not like."<sup>7</sup> It is true that I find the child separation policy to be morally reprehensible (a view many Republicans and Democrats on this Committee share), but I sought this information because I wanted to understand Ms. Kraninger's role in a massive and costly management failure. As for seeking information about an "extraneous" policy, there is nothing in Ms. Kraninger's record that is not extraneous because she has no relevant experience for the CFPB job. I would happily limit my review to Ms. Kraninger's record on consumer finance issues, but there is none. Ms. Kraninger's

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<sup>2</sup> White House, "President Donald J. Trump Announces Intent to Nominate and Appoint Personnel to Key Administration Posts," June 18, 2018, <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-appoint-personnel-key-administration-posts-11/>.

<sup>3</sup> Seattle Times, "Trump to nominate OMB official to lead consumer watchdog," Jill Colvin, June 16, 2018, <https://www.seattletimes.com/business/apxtrump-to-nominate-omb-official-to-lead-consumer-watchdog/>.

<sup>4</sup> Kathleen Kraninger, Testimony before the Senate Banking Committee, Hearing to Consider Nominees for the Bureau of Consumer Financial Protection and the Export-Import Bank, July 19, 2018.

<sup>5</sup> Letter from Senators Warren and Brown to Kathleen Kraninger, June 18, 2018, <https://www.warren.senate.gov/imo/media/doc/Kraninger%20Letter%20Final%206.18.181.pdf>.

<sup>6</sup> Office of U.S. Senator Elizabeth Warren, "Record of Failure: Kathy Kraninger's Disastrous Tenure at the Office of Management and Budget," July 2018, <https://www.warren.senate.gov/imo/media/doc/2018.7.18%20Kraninger%20Record%20Of%20Failure.pdf> (citing statements from Sens. Corker and Kennedy).

<sup>7</sup> Kathleen Kraninger, Testimony before the Senate Banking Committee, Hearing to Consider Nominees for the Bureau of Consumer Financial Protection and the Export-Import Bank, July 19, 2018 (opening statement of Sen. Crapo).

management of “seven Cabinet agencies,” including the agencies responsible for child separations at the border, cannot simultaneously qualify her for the CFPB job and be off-limits from scrutiny by members of this Committee.

### **Ms. Kraninger’s Management Failure at OMB**

Ms. Kraninger’s written responses for the record underscore the need for the documents and other information we have requested about her role in the Administration’s child separation policy.

In her responses, Ms. Kraninger made the narrow assertion that she “had no role in setting the zero tolerance policy” that resulted in the separation of children from their parents, but implied that she was extensively involved in the implementation of this policy. According to Ms. Kraninger:

Since the beginning of the administration, **officials within the Office of Management and Budget (OMB), including ....me...participated in meetings related to immigration and border security policy** that included relevant officials across the administration. **OMB has an extensive role** in supporting agencies as they implement the President’s priorities and agenda, which includes reviewing legislative proposals, regulatory proposals, and the availability of budgetary resources, including those regarding immigration and border security.....OMB was engaged in discussions regarding resource needs, including ....analysis of those needs and appropriations law.<sup>8</sup> (emphasis added)

This is an important admission by Ms. Kraninger and appears to reveal that she was deeply involved in the implementation and budgeting of the child separation policy. Her involvement in this massively mismanaged undertaking to separate children from their parents raises serious questions about her management skills and experience – and reaffirms the need for Committee members to get a more detailed account of her specific role in the child separation policy.

### **Ms. Kraninger’s Unjustified Failure to Respond to Committee Requests**

In response to the June 18<sup>th</sup> letter and in response to written questions for the record, Ms. Kraninger refused to turn over relevant documents and information about her role in the child separation policy. She provided two reasons for her refusal. Both are inadequate.

On four separate occasions, she denied requests for documents and information by claiming that “[i]n light of the confidentiality interests that attach to executive branch decision-making, I am unable to answer this question.” This appears to be an assertion of the deliberative

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<sup>8</sup> Ms. Kathleen Kraninger, Responses to Questions for the Record, Committee on Banking, Housing, and Urban Affairs, Nomination Hearing, July 19, 2018.

process privilege. But when asked directly if she or the Trump Administration were formally asserting any privileges, she refused to assert any privileges herself and stated that she was “not in a position to comment on behalf of the Administration” about any assertion of privilege.

It appears that neither Ms. Kraninger nor the Trump Administration is formally asserting the deliberative process privilege, perhaps because they both realize that the privilege does not cover many of the types of documents requested in the June 18<sup>th</sup> letter and in the written questions for the record. To assert the deliberative process privilege, an agency must show the record meets two requirements: the record must be both “predecisional,”<sup>9</sup> and “deliberative,” meaning the record was a “direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.”<sup>10</sup> Courts have found that several categories of documents I have requested are not protected by the deliberative process privilege, including calendars and call logs,<sup>11</sup> final decision memos,<sup>12</sup> and any documents including explanations for the basis for decisions.<sup>13</sup> To the extent Ms. Kraninger was involved in meetings or phone calls related to the child separation policy, and either made or was included on final decision memos related to the child separation policy, these materials are not privileged and should have been provided to the Committee.

Yet at Ms. Kraninger’s nomination hearing, you seemed to accept the legal claim that deliberative process privilege protects all requested documents despite clear legal precedent to the contrary – and despite the Administration’s refusal to even formally assert the application of that privilege.<sup>14</sup>

Similarly, on ten separate occasions, Ms. Kraninger responded to requests for documents by indicating that “any such documents would not belong to me, and, as a result, I would not have the authority to produce any such documents if they existed.” But this canned answer is nonsense. Although she may not be the custodian of these documents, she was involved in preparing them, can identify them, and can obtain agency assistance to produce them. Her ownership of the documents is not relevant – whoever owns them within the Trump Administration, they can and should produce the documents to the Committee so that we can evaluate the management record that the Trump Administration itself has argued is the basis for Ms. Kraninger’s nomination.

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<sup>9</sup> *Ancient Coin Collectors Guild v. U.S. Dep’t of State*, 641 F.3d 504, 513 (D.C. Cir. 2011).

<sup>10</sup> *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975); *See Brennan Ctr. For Justice at New York Univ. Sch. Of Law v. DOJ*, 697 F.2d 184, 194 (2d Cir. 2012).

<sup>11</sup> *See, e.g., Electronic calendars of the five most senior USDA officials were agency records and thus subject to disclosure under FOIA. Consumer Fed’n of Am. V. USDA*, 455 F.3d 293 (D.C. Cir. 2006). Appointment calendars, daily agendas, telephone logs, etc. are agency records and subject to disclosure when they are created for the express purpose of facilitating daily activities and distributed for agency business purposes. *Bureau of Nat’l Affairs, Inc., United States DOJ*, 742 F.2d 1484 (D.C. Cir 1984).

<sup>12</sup> *Rockwell Int’l Corp. v. DOJ*, 235 F.3d 598 (D.C. Cir. 2001).

<sup>13</sup> *Rockwell Int’l Corp. v. DOJ*, 235 F.3d 598, 603 (D.C. Cir. 2001).

<sup>14</sup> Kathleen Kraninger, Testimony before the Senate Banking Committee, Hearing to Consider Nominees for the Bureau of Consumer Financial Protection and the Export-Import Bank, July 19, 2018 (opening statement of Sen. Crapo).

**The Committee Should Delay a Vote Until Ms. Kraninger Provides All Relevant Requested Documents and Information**

Ms. Kraninger's management experience is the basis for her nomination to run the CFPB but she and the Trump Administration are denying Committee members the ability to evaluate that experience. Instead of rushing forward with a vote on Ms. Kraninger's nomination this week, I urge you to postpone the vote and work with me and other members of the Committee who are seeking relevant information in good faith about a nominee to a critically important position.

Sincerely,



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Elizabeth Warren  
United States Senator