



VIA ELECTRONIC SUBMISSION

The Honorable Mick Mulvaney
Acting Director
Bureau of Consumer Financial Protection
1700 G St. N.W.
Washington, D.C. 20552

Re: Docket No. CFPB–2018–0009 Request for Information Regarding Bureau Rulemaking Processes

Dear Acting Director Mulvaney:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits these comments on the Bureau of Consumer Financial Protection's (the Bureau) *Request for Information Regarding Bureau Rulemaking Processes*.¹ Advocacy encourages the Bureau to improve its small business outreach and to improve its Small Business Regulatory Enforcement Fairness Act (SBREFA) panel process in order to reduce the impact of its rulemakings on small entities.

Advocacy Background

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to

¹ 83 *Federal Register* 10437, March 9, 2018.

² 5 U.S.C. § 601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

In July 2010, the United States Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Act or Dodd-Frank).⁶ Section 1011 of the Act established the Bureau to supervise certain activities of financial institutions. Section 1100G, entitled "Small Business Fairness and Regulatory Transparency," amended 5 U.S.C. § 609, to include the Bureau with its coverage.

The Office of Advocacy performs outreach through roundtables, conference calls and other means to develop its position on important issues such as this one. Advocacy held a roundtable on this issue on May 10, 2018. The roundtable was attended by trade associations in the financial services industry. The trade associations' members were small entity representatives (SERs) at various outreach meetings conducted in accordance with 5 U.S.C. § 609. As such, the trade associations are well versed on the problems that their members encountered during the while serving as SERs. Advocacy's comments reflect the feedback that it received from the participants and will address the Bureau's rulemaking practices as they pertain to the Administrative Procedure Act (APA)⁷ and the RFA.

The Request for Information

On March 9, 2018, the Bureau published a *Request for Information Regarding Bureau Rulemaking Processes*.⁸ The Bureau's rulemaking processes are subject to a number of statutory requirements, including the APA, the RFA and the Paperwork Reduction Act (PRA).⁹ The Bureau is seeking comments and information from interested parties to assist the Bureau in assessing the overall efficiency and effectiveness of its rulemaking processes and, consistent with these and other pertinent laws, considering whether any changes to its rulemaking processes would be appropriate.¹⁰

The RFI points out that the Dodd-Frank Act authorizes the Bureau to exercise its authorities under federal consumer financial law to administer, enforce, and otherwise implement the provisions of federal consumer financial law. The Dodd-Frank Act further authorizes the Director of the Bureau to prescribe rules as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the federal consumer financial laws,

⁴ Small Business Jobs Act of 2010 (PL 111-240) § 1601.

⁵ Id.

⁶ Pub. L. 111-203.

⁷ 5 U.S.C. §§551-559.

⁸ 83 Federal Register 10437, March 9, 2018.

⁹ 44 U.S.C. §§3501-3521.

¹⁰ Id.

including both enumerated consumer laws and provisions of title X of the Dodd-Frank Act. The Bureau has engaged in rulemakings mandated by Congress as well as discretionary rulemakings pursuant to these and other authorities.¹¹

I. The Bureau's Request for Information and Subsequent Rulemakings Represent an Opportunity to Reduce the Impact of Its Regulations on Small Entities

Over the years, the Bureau has implemented number of rules to regulate the financial industry. The rules are expensive and burdensome for small entities. The RFI presents an opportunity for the Bureau to review its rulemaking procedures and develop policies and practices that may reduce the economic impact of its regulations on small entities. In order to do so, the Bureau should improve the data that it uses for its policymaking and take steps to develop less costly alternatives.

The Bureau should improve its initial outreach to small entities and gather information specific to the small entities it regulates.

Federal agencies should identify the scope of the problem and the impact of the solution on affected entities before moving forward with a regulatory proposal.¹² The Bureau often prepares studies prior to starting a rulemaking. Although the studies identify a problem, they do not necessarily reflect the role that small entities play in the problem or the economic characteristics of small members of the regulated industry.

The studies are an excellent opportunity for the Bureau to obtain the information that it needs to prepare SBREFA panel materials and an initial regulatory flexibility analysis (IRFA). At the very least, the studies should include information about the small entities that may be affected, adequate economic data about the small entities, the percentage of smalls contributing to the problem, and the economic implications/impacts of the any recommendations that may be in the study. Advocacy encourages the Bureau to gather information about the small business impact of its upcoming rules in order preparations for the SBREFA panel process and inform its RFA analysis.

In addition, the Bureau should improve its initial outreach to small entities to better understand their business models prior to starting a rulemaking. Small entities operate differently from the larger members of an industry. A solid understanding of the small entity's business model may assist the Bureau with developing alternatives that are more responsive to small entities without compromising the statutory mission of the agency.

¹¹ 83 Federal Register at 10438.

¹² Office of Advocacy, US Small Business Administration, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, August 2017, page 11.

The Bureau should improve its SBREFA panel process by improving the information in the SBREFA materials provided to small entity representatives, and by providing more time for small entity representatives to review those materials and respond to them.

The SBREFA panel process requires the Bureau to conduct special outreach efforts to ensure that small entity views are carefully considered prior to the issuance of a proposed rule, if the rule is expected to have a significant economic impact on a substantial number of small entities. This outreach is accomplished through the work of small business advocacy review panels consisting of a representative or representatives from the rulemaking agency, the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) and the Chief Counsel for the Office of Advocacy. The panel solicits information and advice from SERs, who are individuals who represent small entities affected by the proposal. SERs help the panel better understand the ramifications of the proposed rule. The product of a SBREFA panel's work is its panel report on the regulatory proposal under review.

The SERs receive a packet of information about a potential rulemaking. The Bureau has a duty to provide useful data in that packet of information to the SERs so that they are able to understand the upcoming rule and why the Bureau has selected a particular approach. At a minimum, the Bureau should inform the SERs about the content of the upcoming rule, its costs and benefits, significant alternative approaches that the Bureau has considered, a preferred alternative, and the data that the Bureau is using to support its assumptions. This information would allow the SERs to provide more useful input at the meeting as well as in their written comments. Advocacy encourages the Bureau to improve the materials that are sent to the SERs to meet this standard.

Most importantly, the Bureau should discuss the potential regulatory alternatives with small businesses during the formulation of the proposal. Early small business input is critical in shaping cost-effective regulations and fulfills the requirements of a variety of Executive Orders on regulatory policy. Soliciting input only at a later stage makes it more difficult for the Bureau to make meaningful modifications in the proposal.

The Bureau should improve its interactions with SERs prior to the SBREFA panel SERs meeting, particularly its teleconference calls by providing more time for SERs to prepare for the calls and by scheduling sufficient time to consider and respond to the SERs' comments and to allow SERs to respond to Bureau comments.

In the early SBREFA panels, the Bureau had very little interaction with the SERs prior to the panel being officially convened because of statutory deadlines imposed by the Dodd-Frank Act. However, in recent years, the Bureau has held conference calls with the SERs prior to the panel being convened and the SERs meeting in Washington, DC. While this is an improvement over the early SBREFA panels, the process is still problematic.

The materials that are presented to the SERs for the conference calls are complex. In order for the conference calls to be productive, the SERs need sufficient time to review the materials to prepare for the calls. During the calls, the Bureau asks questions that require some thought or additional information-gathering by the SERs. In those circumstances, rather than expecting the

SERs to provide an instantaneous answer, the Bureau should schedule follow-up calls. The follow-up calls would provide the participants with an opportunity to give careful consideration to the questions and provide thoughtful feedback at a later date.

The Bureau should improve its method of dealing with proprietary information.

The pre-panel conference calls often have several participants, and at times, people have joined in, or left the call, without identifying themselves. There was no way of ensuring that the only persons listening to the call are the persons who registered to participate.

This lack of security for the conference calls is problematic because the Bureau requested information about how the SERs operated their businesses. Some of this information can be proprietary information. Since the SERs did not know who was on the calls, they were not comfortable providing the information.

To alleviate the concern about confidentiality, the Bureau should solicit information about sensitive material through a structured information request that would allow the SERs to provide confidential answers. In doing so, the Bureau should explain the procedure for gathering information, how the information will be used and the steps that the Bureau will take to assure that the information remains confidential.

The Bureau should improve its interaction with SERs during the SBREFA process.

Advocacy is concerned that the SBREFA outreach meeting does not focus on the issues that are most important to the SERs. The roundtable participants stated that at times it seems as though the Bureau was more interested in adhering to its agenda than receiving input from the SERs on certain issues.

The SERs spend valuable time preparing for the meeting and lose time from their businesses by participating in the process. It is important for them to feel as though they are discussing the issues that are most important to them. In order to make the meeting beneficial, it may be helpful for the Bureau to ask the SERs to identify the most important issues during the pre-panel process and again at the beginning of the outreach meeting. It would allow the Bureau to prioritize the issues and allocate the time according to the interest in the issue. It would also help to assure that the most important issues are given enough time to be discussed fully. In addition, the Bureau may want to take steps to assure that every SER has been heard on an issue before moving on to the next topic.

II. The SBREFA Panel Report Should Contain Recommendations to the Bureau on How to Reduce the Impact of the Upcoming Regulation and the Bureau Should Adopt Those Recommendations; the Bureau Should Make the Panel Report Available to the Public

Among other things, the SBREFA panel reports include an explanation of the action considered, a summary of the SERs input, including recommendations, and the recommendations of the panel to the agency. The roundtable participants have been disappointed with the content of the

reports. Specifically, they have been frustrated by the fact that the panel only recommends that the Bureau will take comment on the things suggested by the SERs rather than recommending changes based on the panel recommendations in the proposed rule. Advocacy encourages the Bureau to incorporate the panel recommendations in the text of the proposed rule. If a recommendation cannot be included in a proposed rule, the Bureau should explain why it was rejected.

Currently, the Bureau releases the panel report when it releases the NPRM. The roundtable attendees expressed disappointment over the fact that the panel report is not provided to the public until the proposed rule is issued. They stated that it would be helpful for the report to be released to the public at the time that it is completed. Attendees also stated that it would be nice for the Bureau to send a hard copy of the report to the SERs that participated in the process along with thank you note. Advocacy encourages the Bureau to release the report to the public at the time that it is completed and to provide a hard copy of the report to the SERs.

III. The Bureau Should Consider New Data and Studies Presented by SERs, Particularly Where Those Studies Meet the Standards for Data Established by the Bureau.

During the SBREFA panel for the payday lending rule, some of the SERs presented studies about the impact that the rule may have on their businesses. The studies were performed by reputable organizations and were quite detailed. However, the SERs felt that the Bureau was dismissive of the data and findings that they presented.

Private studies are expensive. Small entities put forth a great deal of effort and resources to obtain them. As a matter of good rulemaking, information that is presented by the public should be given full consideration in the rulemaking process. If the Bureau believes that the data from studies should not be considered, the Bureau should explain its reasons for not considering it.

IV. Advocacy Recommends that the Bureau Improve Its Notice of Proposed Rulemaking (NPRM) by Adhering to the Plain Writing Act, and by Establishing Comment Periods Conducive to Allowing Small Businesses an Opportunity to Read, Understand the Proposed Rule and to Formulate a Comment.

The Bureau's NPRMs do not conform to the readability standards of the Plain Writing Act.

Advocacy believes that the Bureau is trying to provide information to the public in its rulemakings. However, the Bureau's attempt to provide information has led to academic NPRMs and final rules that are more nebulous than transparent. For example, the NPRM for the small dollar/payday lending rule was over 1300 pages. It was difficult to navigate and comprehend.

The Plain Writing Act of 2010 requires that federal agencies use "clear Government communication that the public can understand and use." The length and complexity of the Bureau's rulemakings may discourage the public from submitting public comments. The public

should not have to hire an attorney to understand a rule that the Bureau proposes or finalizes. Advocacy encourages the Bureau to use plain writing in future rulemakings and in any compliance guides that it may draft pursuant to the requirements of the RFA.

The Bureau should establish comment periods that allow the opportunity to fully digest the proposal, gather information from vendors and other sources, contemplate viable alternatives and provide thoughtful comments.

The CFPB rulemakings are long and complex. Because of the size of the rulemakings, the proposals often do not appear in the Federal Register for several weeks after they are on the Bureau's website.

Reviewing the Bureau's proposals is a massive undertaking. Initially, Dodd-Frank imposed statutory deadlines with which the Bureau needed to comply. The Bureau is no longer under such time constraints. As such, Advocacy encourages the Bureau to provide comment periods that reflect the complexity of the proposal. Longer comment periods would allow the opportunity to fully digest proposals, gather information from vendors and other sources, contemplate viable alternatives and provide thoughtful comments.

V. The Bureau Should Identify Its Understanding of the Requirement to Consider the Impact of Its Rules on the Cost of Credit to Small Entities and Establish a Methodology to Follow in Calculating That Cost

The Dodd-Frank Act included a provision that requires the Bureau to consider the impact of its rules on the cost of credit to small entities. Specifically, it states that for each initial regulatory flexibility analysis the Bureau shall include a description of any projected increase in the cost of credit for small entities; any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any increase in the cost of credit for small entities; and advice and recommendations of representatives of small entities relating to the cost of credit on small entities and alternatives to minimize the increase in the cost of credit. Similarly, the Bureau is also required to provide a description of the steps the agency has taken to minimize any additional cost of credit for small entities when it prepares a final regulatory flexibility analysis.

The Bureau's compliance with the cost of credit provisions has been limited to a few questions at the end of SBREFA panel SERs' meetings, and a few lines in the RFA section of its rulemakings. Since the law is vague in terms of how it should be addressed. It may be helpful for the Bureau to publish an RFI on the topic of the cost of credit on small entities. The RFI may help the Bureau understand the public's interpretation of the statute and expectations in terms of the Bureau's statutory compliance. This, in turn, may assist the Bureau in developing guidelines for addressing the issue.

VI. The Bureau Should Simplify Its Final Rules, and Include Readers' Aids, such as Tables of Contents, to Improve Readability

Like the NPRMs, the Bureau's final rules tend to be long and dense. For example, the final rule, including the preamble, for small dollar/payday lending was almost 1700 pages. It was opaque and difficult to understand. Small entities do not have the time to read a rule of that length or the financial resources to hire an attorney to read such a cumbersome rule. Larger businesses can hire law firms and other experts to review the rule and make recommendations on its impact. Advocacy encourages the Bureau to simplify its final rules. As stated in the NPRM section, a table of contents that links to the particular sections in the electronic version would be helpful. In addition, Advocacy encourages the Bureau to include a redlined version of the rule so that the public can easily ascertain the changes that were made during the rulemaking process.

VII. The Bureau Should Improve Its Compliance Guides by Improving Readability, Using Fewer Disclaimers, and by Providing Written Clarification upon Request.

Section 212 of SBREFA requires the agency to publish one or more small entity compliance guides whenever a rule requires a FRFA.¹³ Agencies are required to publish the guides with the publication of the final rule, post them to websites, distribute them to industry contacts, and report annually to Congress.¹⁴ The spirit of the law is for agencies to provide an explanation so that a small entity can comply with the law. The guide should be written in plain language. It should help the small entity understand the new regulations and the steps that a small entity must take to comply.

The Bureau publishes compliance guides with its final rules. However, the roundtable participants were exasperated by the Bureau's compliance guides. They stated that they are difficult to understand and that the compliance guides include disclaimers. They also stated that if a small entity needs clarification, the Bureau will not provide clarification in writing.

A compliance guide with a disclaimer is not useful. A small entity should be able to feel comfortable in the fact that if it follows the guide, it will be in compliance with the law. The disclaimer negates the usefulness of the guide because a small entity cannot be certain that it is in compliance even if it follows the guide. Advocacy encourages the Bureau to remove disclaimer language from its compliance guides.

Advocacy also encourages the Bureau to simplify the compliance guides so that they are user friendly. Advocacy further encourages the Bureau to provide answers to questions in writing and publish the answers to the questions at the end of the year so that other small entities may benefit from the answers.

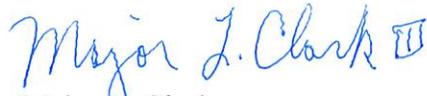
¹³ Small Business Regulatory Enforcement Fairness Act, Pub. Law 104-121 § 212.

¹⁴ The Small Business and Work Opportunity Act of 2007 added these additional requirements for agency compliance to SBREFA.

Conclusion

Thank you for the opportunity to comment on this important RFI and for your consideration of Advocacy's comments. If you have any questions regarding these comments or if Advocacy can be of any assistance, please do not hesitate to contact me or Jennifer Smith at (202) 205-6943.

Sincerely,

Handwritten signature of Major L. Clark in blue ink.

Major L. Clark
Acting Chief Counsel
Office of Advocacy
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Handwritten signature of Jennifer A. Smith in black ink.

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