

June 7, 2018

By electronic delivery to:
www.regulations.gov

The Honorable J. Michael Mulvaney
Acting Director
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

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

Dear Acting Director Mulvaney:

The American Bankers Association (ABA)¹ appreciates the willingness of the Bureau of Consumer Financial Protection (Bureau) to reflect on its work and processes by gathering comments through a series of Requests for Information (RFIs). The RFI process provides a transparent, efficient, and timely opportunity for all of those affected by the Bureau's work to help the Bureau identify how it might improve the way it pursues its important mission. In this letter, ABA writes in response to the Bureau's RFI regarding its rulemaking processes.²

Like all government agencies, the Bureau must pursue its objectives in full conformity with other important values, including fairness to those it regulates. As you have noted, the Bureau works for everyone: "those who use credit cards, and those who provide those cards; those who take loans, and those who make them."³ Unfortunately, the Bureau's focus all too often has been on increasing the scope of its authority, rather than on ensuring that its authority is exercised wisely and fully for the benefit of consumers, an approach that will usually be enshrined in and consistent with law and due process.

ABA's goal is not to revisit every policy decision or document every instance of overreach in the Bureau's many final rules. Instead, this letter will focus on providing constructive feedback for improving the rulemaking process to increase the likelihood that the Bureau's regulations will be data-driven, informed by an interested public, and good public policy.

¹ The American Bankers Association is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits, and extend nearly \$10 trillion in loans.

² See Request for Information Regarding Bureau Rulemaking Processes, 83 Fed. Reg. 10,437 (Mar. 9, 2018).

³ Mick Mulvaney, *The CFPB Has Pushed Its Last Envelope*, WALL ST. J., Jan. 23, 2018 (Mulvaney Op-ed).

I. Summary of Comment

The Bureau's rulemaking record to date is best characterized as a series of ambitious undertakings riddled with unintended—but often foreseeable—consequences. Unnecessarily complex rules promulgated by the Bureau have required frequent revision, straining Bureau and regulated industry resources and limiting consumer choice and access to financial products and services. The Bureau should change its approach so that it seeks to identify precisely the consumer harm it intends to eliminate and do so through a clear and simply crafted regulation, fully vetted with the public with an openness to public input, improved in accordance with information garnered through public rulemaking, and retaining the opportunity to revisit and revise as proven necessary.

The Bureau's approach to its obligations under the Small Business Regulatory Enforcement Act (SBREFA) must also be revisited. The Bureau should create simpler summary materials to assist participating Small Entity Representatives (SERs). If the Bureau is to meet its obligations under SBREFA, then SERs also need to be presented with, and have ample opportunity to consider, a number of well-defined and less burdensome regulatory alternatives for achieving the desired policy outcome. In addition, to promote transparency and accountability, ABA recommends publication of the Small Business Review Panel Final Report as soon as it has been completed. We also encourage the Bureau to report on each SER recommendation that leads to a revision in its rulemaking, thereby enabling the public to evaluate whether the small entity review process meaningfully shapes the Bureau's rulemaking process.

Despite promises to “articulate a research-driven, evidence-based perspective on consumer financial markets, consumer behavior, and regulations to inform the public discourse,”⁴ too often the Bureau structures data collections to avoid review or public scrutiny. For instance, the Bureau has repeatedly evaded the Paperwork Reduction Act's (PRA) accountability mandates by making data collection requests to nine or fewer banks subject to its supervisory jurisdiction, just under PRA thresholds. Moreover, the Bureau also shields its “market monitoring” information and data requests⁵ from public oversight by treating these requests as confidential supervisory information, even though the Bureau can – and should – provide anonymized and aggregated data to help the public test the veracity of the Bureau's findings and conclusions.

ABA recommends the creation of an Office of Chief Economist (OCE) dedicated to meaningful and robust cost-benefit analysis that informs the direction of the Bureau's work. ABA believes it is important for the OCE to be engaged at the earliest stages of rulemaking and policy development. If properly constructed and empowered, the OCE could significantly contribute to making the Bureau the data-driven agency it has long claimed to be.

In addition, ABA believes the Bureau should voluntarily submit itself to the decennial Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA) review that is required of the federal banking agencies. Should the Bureau agree to voluntarily participate in the EGRPRA

⁴ Consumer Fin. Protection Bureau (“The Bureau”), *Consumer Financial Protection Bureau Strategic Plan: FY 2013 – FY 2017*, 26 (Apr. 2013), <https://s3.amazonaws.com/files.consumerfinance.gov/f/strategic-plan.pdf>.

⁵ Dodd-Frank Act Section 1022 gives the Bureau broad “authority to gather information . . . regarding the organization, business conduct, markets, and activities” of any person that offers or provides a consumer financial product or service, or any service provider to such company.

review alongside its banking agency counterparts, it would be with the support of bankers across the country and in keeping with precedent.

II. Simplify Bureau Rulemakings to Reduce Errors and Facilitate Compliance

The Bureau's rulemaking record to date is best characterized as a series of ambitious undertakings riddled with unintended—but often foreseeable—consequences. Rushed efforts by the Bureau to transform industries and product lines have typically led to oversized and unnecessarily complex rules, which experience has shown limits consumer access to financial products and services and discourages innovation. The Bureau's solution for its initial mistakes tends to be regulatory revision after revision, which leads to unnecessary burden on the Bureau itself, the industries it oversees, and ultimately the consumers it seeks to protect. Frequent revisions also place vendors in a difficult position as they try to program systems around an evolving final rule.

The Bureau would be better served by an approach that seeks to identify precisely a specific consumer harm and eliminate that harm with a simple and clear rule. If material issues later become apparent, then the Bureau should not hesitate to revisit its rule and expand its scope to regulate that harmful behavior. ABA does not object to regulatory revisions. However, ABA is concerned that some rules have required frequent revisions to address problems that were readily apparent, raised with the Bureau, and should have been addressed before rule finalization.

a) Overly complex rules drive up compliance costs

The size of the Bureau's rules is itself evidence of regulatory complexity. The Bureau's rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans was a staggering 1,690 pages, while the Bureau's final prepaid rule was a nearly identical length at 1,689 pages.⁶ The TILA-RESPA Integrated Disclosure (TRID) rule was 1,888 pages.⁷ Dodd-Frank required or enabled some 398 rulemakings, yet each of these three rulemakings are so large and complex that they compare in size to the Dodd-Frank Act itself, which measures roughly 2,300 pages.⁸

By creating overly complex regulations, the Bureau increases the cost of compliance, which ultimately harms consumers through reduced credit availability and higher cost products. Nowhere is the cost of the Bureau's rulemaking complexity more apparent than in its mortgage regulations. The cost to originate a mortgage loan has *nearly doubled* over the past decade, from approximately \$4,500 in 2008 to approximately \$8,957 in the first quarter of 2018.⁹ Servicing

⁶ See Prepaid Accounts under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 82 Fed. Reg. 18,975 (Apr. 25, 2017) (available at: <https://www.gpo.gov/fdsys/pkg/FR-2017-04-25/pdf/2017-08341.pdf>).

⁷ See Integrated Mortgage Disclosures Under the Real Estate Settlement Procedure Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 80,225 (Dec. 31, 2013) (available at: <https://www.gpo.gov/fdsys/pkg/FR-2013-12-31/pdf/2013-28210.pdf>).

⁸ Financial Services Comm., Oversight of Dodd-Frank Act Implementation, <https://financialservices.house.gov/dodd-frank/> (last visited June 7, 2018).

⁹ See Mortg. Bankers Assoc., MBA News (6.06.18) Independent Mortgage Bankers Report Net Production Losses in First Quarter of 2018 (June 6, 2018), <https://www.mba.org/2018-press-releases/june/independent-mortgage-bankers-report-net-production-losses-in-the-first-quarter-of-2018> (MBA Quarterly Mortgage Bankers Performance Report).

costs have also increased. From 2008 to 2015, the annual cost of servicing a performing loan nearly tripled, increasing from \$59 to \$163, and the annual cost of servicing a nonperforming loan *more than quadrupled*, increasing from \$482 to \$2,113.¹⁰

Respondents to ABA's 2017 Real Estate Lending Survey illustrate these challenges further. Some 96% of responding banks report higher mortgage-specific compliance costs as a result of Dodd-Frank Act regulations, while nearly three in four respondents said that the Bureau's Qualified Mortgage rules in particular have reduced credit availability.

b) Poorly crafted Bureau regulations have required frequent revision and attention

Too often, Bureau regulations have been proposed and finalized without taking into account legitimate concerns that impede the effective functioning of the regulation. For example, Dodd-Frank Act Section 1073 requires the Bureau to establish certain protections for international remittance transfers by consumers. Despite early and repeated explanations by industry that certain requirements of the rule could not be met, the Bureau declined to make changes until the defects of the regulation became more than clear after it was made final.¹¹ Indeed, the Bureau's failure to address those problems, clearly explained during the comment period, led the Federal Home Loan Bank of New York to announce that it would stop processing remittance transfers,¹² after which the Bureau began making changes to its final rule. The Bureau's webpage on remittance rule implementation shows a litany of proposed rules, amendments, official interpretations, and corrections that ultimately remedied a number of defects brought to attention earlier in the process.¹³

As noted in ABA's comment to the RFI on External Engagements, the Bureau has amended its mortgage-related rules 31 times.¹⁴ We stated that, "[t]he need for such a large number of revisions reflects a lack of understanding about how mortgage markets function, particularly

¹⁰ See Mortg. Bankers Assoc., MBA Chart of the Week: Servicing Costs Per Loan (Single-Family)-- Performing v. Non-Performing (July 25, 2017), [www.mba.org/servicing-newslink/2017/july/servicing-newslink-tuesday-7-25-17/news-and-trends/mba-chart-of-the-week-servicing-costs-per-loan-\(single-family\)-performing-v-non-performing](http://www.mba.org/servicing-newslink/2017/july/servicing-newslink-tuesday-7-25-17/news-and-trends/mba-chart-of-the-week-servicing-costs-per-loan-(single-family)-performing-v-non-performing). Importantly, these servicing costs do *not* reflect additional costs resulting from implementation of the Bureau's October 2016 Amendments to the Mortgage Servicing Rules, which became effective in October 2017 and April 2018.

¹¹ See Raymond Natter, *Dodd-Frank Act and Remittances to Post-Conflict Countries: The Law of Unintended Consequences Strikes Again*, 25 LOY. CONSUMER L. REV. 403 (2013) ("The absence of any explanation for why the CFPB has declined to exercise its authority to address the acknowledged difficulties in complying with the remittance regulation in certain cases (such as providing remittances to post-conflict countries) raises significant legal and public policy issues.").

¹² See also Press Release, Fed. Home Loan Bank of NY, FHLBNY to Stop Processing International Wire Transfers at Year-End (Nov. 30, 2012) (available at: <http://www.fhlbny.com/news-events/press-releases/prior-releases/2012/press112012.aspx>).

¹³ See The Bureau, *Electronic Fund Transfers (Regulation E); Amendments*, <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/electronic-fund-transfers-regulation-e/> (last visited June 4, 2018).

¹⁴ See Am. Bankers Association and State Bankers Associations, *Request for Information Regarding Bureau External Engagements* (May 25, 2018), <https://www.aba.com/Advocacy/commentletters/Documents/cl-RFI-ExternalEngagements20180525.pdf>.

with regard to portfolio lending, rural markets, and timing considerations that drive the mortgage lending process.”¹⁵ Such frequent changes divert people and resources from serving customers.

Another challenge for bank compliance and legal staff is that changes to rules and accompanying implementation resources are not clearly indicated in the text. This forces bank staff to compare versions in search of the changes made in these voluminous materials, which is an unnecessary burden. ABA recommends that the Bureau precisely document the changes made when amending its rules and accompanying materials.

c) Use the advance notice of proposed rulemaking (ANPR) process more effectively

Whenever the Bureau proposes to write a rule, it should consider beginning with an advance notice of proposed rulemaking (ANPR).¹⁶ The ANPR process permits the Bureau to gather initial insights from the public before it formally proposes a rule. In the Bureau’s ANPR process and its rule-writing outreach more broadly, the Bureau can reach a wider range of the public. There is a wide diversity of financial institutions providing services to consumers, and outreach should involve consultation with a representative sample of all types of institutions.

When properly crafted, ANPR’s can solicit the type of information and feedback that will facilitate the development of rules that are clear, effective, and administrable. When using the ANPR process, the Bureau should give particular attention to developing credible regulatory alternatives for consideration and soliciting input on significant policy issues and a limited number of key technical questions.

The Bureau’s ANPR on prepaid cards was largely consistent with this recommendation.¹⁷ In contrast, the Bureau’s ANPR on debt collection completely lacked focus; it included 162 questions, and even that number vastly understates the scope of the information request, because many questions had multiple parts.¹⁸ An ANPR of that size not only discourages stakeholder feedback, it also risks degrading the quality of the information provided as commenters attempt to respond to too many questions.

III. Revise SBREFA Process to Better Guide and Improve Bureau Rulemaking

The Dodd-Frank Act amended the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) to designate the Bureau as a “covered agency” required to convene a Small Business Advocacy Review Panel (SBAR Panel) before promulgating any rule that will have a significant economic impact on a substantial number of small entities.¹⁹ This amendment demonstrates

¹⁵ *Id.*

¹⁶ Though circumstance dependent, the ANPR process may be more appropriate for new requirements and less appropriate for reforms and revisions to existing rules.

¹⁷ See Electronic Fund Transfers (Regulation E); Advance Notice of Proposed Rulemaking, 77 Fed. Reg. 30,923. (May 24, 2012) (available at: <https://www.gpo.gov/fdsys/pkg/FR-2012-05-24/pdf/2012-12565.pdf>).

¹⁸ See Debt Collection (Regulation F); Advance Notice of Proposed Rulemaking, 78 Fed. Reg. 67,848. (Nov. 12, 2013) (available at: <https://www.gpo.gov/fdsys/pkg/FR-2013-11-12/pdf/2013-26875.pdf>).

¹⁹ See 5 U.S.C. § 609(a) (2012).

Congress' concern that Bureau rule-writers consider the potential impact of regulatory proposals on small businesses and on the cost and availability of credit.²⁰

In keeping with its statutory obligation, the Bureau has convened seven SBAR Panels to date. However, ABA believes that the Bureau should significantly revise its approach to the small entity review process if SBAR Panels are to become meaningful sources of input that inform and improve the Bureau's rule-writing. In April 2012, ABA sent a letter of recommendations for improvement of the SBREFA process to former Director Cordray.²¹ In August 2012, ABA offered a statement for the record before the House Committee on Small Business.²² We supplement those recommendations with the following.

a) Craft better regulatory alternatives and embrace SBAR Panel input

ABA believes the Bureau should invoke the SBREFA process earlier in the consideration of possible regulations. Too often, the Bureau's policy choices are very far developed before being discussed by the members of a SBAR panel. The SBAR Panel should help inform the policy *direction* of the Bureau, not be a last step in the process of crafting a notice of proposed rulemaking.

The Payday Lending Rule is an example of the Bureau's policy direction being too far developed when the SBAR Panel was convened. The Small Entity Representatives (SERs) who participated in that Panel expressed significant concern that the prescriptive underwriting requirements in Bureau's proposed rule would "mak[e] it difficult, if not impossible, for small entities to remain in business."²³ The SERs recommended, as a "less burdensome alternative" to those requirements, that the Bureau require additional disclosures during the loan origination process.²⁴ Although the Bureau made substantive but modest revisions to the final rule, the Bureau did not meaningfully consider the SERs' recommendation, which would have required a completely different focus to the rule. Instead, the Bureau forged ahead with a final rule that

²⁰ An SBAR Panel is composed of representatives from the covered agency, OMB's Office of Information and Regulatory Affairs (OIRA), and the Chief Counsel for Advocacy of the Small Business Administration. Small Entity Representatives (SERs) help inform the SBAR panel with advice and recommendations. Through the SBAR Panel process, SERs review background materials on a rule under development and offer feedback on the impact of that rule in addition to feedback on potential alternatives. Within 60 days of formally convening a SBAR Panel, the agency must release a Small Business Review Panel Final Report describing the input received and recommending less burdensome alternatives for achieving the policy objectives.

²¹ See Richard R. Riese, *Small Business Regulatory Enforcement Fairness Panels* (Apr. 24, 2012), [https://www.aba.com/archive/Comment Letter Archive/Comment%20Letter%20Archive/ABALetter-SBREFA-2012Apr.pdf](https://www.aba.com/archive/Comment%20Letter%20Archive/ABALetter-SBREFA-2012Apr.pdf).

²² See Am. Bankers Ass'n, *Know Before You Regulate: The Impact of CFPB Regulations on Small Business* (Aug. 1, 2012) (Statement for the Record on behalf of the American Bankers Association), <https://www.aba.com/Advocacy/Testimonies/Documents/08012012ABASStatementfortheRecord-SBREFASmBiz.pdf>.

²³ The Bureau, *Final Report of the Small Business Review Panel on CFPB's Rulemaking on Payday, Vehicle Title, and Similar Loans*, 33 (June 25, 2015), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/3a_-_SBREFA_Panel_-_CFPB_Payday_Rulemaking_-_Report.pdf [hereinafter Small Dollar Lending SBREFA Report].

²⁴ *Id.*

closely resembled its flawed outline and drew criticism from the Small Business Administration's Office of Advocacy.²⁵

The Bureau should also recognize the value that advisors to the SERs provide, such as regulatory policy and administrative law experts, and allow their direct involvement as a resource during the SBAR Panel to provide input and perspective whenever it is appropriate. Past practice has been to discourage direct advisor participation. Recognizing that obtaining SER input is the central purpose of the small entity review process, ABA believes that advisors are capable of being an important resource to the SBAR Panel that does not unduly divert attention away from the SERs.²⁶

b) Provide SERs with simpler summary materials

The Bureau should better prepare the SERs in advance of the SBAR Panel. This begins with simpler summary materials that clearly identify the major policy matters under review, alternative approaches, and the places where their input can make a difference. In contrast, the SBAR Panels on debt collection and payday lending asked SERs to review more than a 100-page outline of materials.²⁷ These outlines resembled final summaries of well-developed rules, discouraging participation. While ABA recognizes it is important to provide the SERs with enough substance to understand the Bureau's planned approach, alternatives, and relevant cost/benefit information, a 100-page outline is simply too long. Adding to the problem, the compressed timeline for review asks too much of participating SERs to prepare adequately in advance of the SBAR Panel meeting. As owners of small businesses seeking to represent similarly situated businesses, their participation as SERs has reasonable limits.

ABA recommends that the Bureau consider the EPA's example and draft two sets of materials, a streamlined outline of proposals for the SERs and a more detailed document for advisors and others with the time to review the data and information informing the policy options.

c) Fully engage SERs before the SBAR Panel

To promote informed SER participation, ABA recommends that the Bureau engage SERs well before the SBAR Panel convenes. For instance, the Bureau could hold multiple calls with the SERs to review the outline in stages to ensure that the details and implications of each policy choice under consideration are fully explored and to identify issues for which additional information and data are needed. Also, extending SER contact over a longer period would

²⁵ See U.S. Small Business Administration Office of Advocacy, *Comments on the Proposed Rule on Consumer Financial Protection Bureau Payday, Vehicle Title, and Certain High-Cost Installment Loans* (Oct. 07, 2016), <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2016/10/Payday-Lending-Comment-for-Electronic-Filing.pdf>

²⁶ The Environmental Protection Agency considers advisor feedback during its SBREFA reviews, and EPA's SBREFA review process is generally considered to be effective.

²⁷ See The Bureau, *Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered* (July 28, 2016), https://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf; The Bureau, *List of Materials Provided to Small Entity Representatives* (Mar. 26, 2015), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/3d_-_SBREFA_Panel_-_CFPB_Payday_Rulemaking_-_Appendices_B-E_1.pdf

facilitate greater interaction among SERs (increasing the likelihood of reaching consensus on a regulatory framework that will work optimally for consumers and small businesses) and enable more outreach to other small business colleagues to access additional feedback. This reduces the risk of the Bureau receiving limited input at the SBAR Panel, as was the case in the SBAR Panel review of the proposed TILA-RESPA integration, where SERs received the outline of proposals a mere two weeks before the convening meeting.²⁸

d) Share Small Business Review Panel Final Reports immediately after they are completed

The Bureau should make its Small Business Review Panel Final Reports (Final Report) available to the public immediately after they are completed. To date, the Bureau has waited to release its Final Report with the notice of proposed rulemaking to which it pertains. For example, the Final Report prepared in connection with the Bureau's Payday Lending Rule was completed on June 25, 2015, but not issued until the release of its proposed rule one year later, in June 2016.

The Bureau's voluminous proposed rules tend to direct attention towards reviewing and responding to the proposed rule and away from a meaningful review of the Final Report. The Bureau's current practice meets its statutory obligation that "such report shall be made public as part of the rulemaking record."²⁹ However, the Bureau is under no statutory obligation to withhold the Final Report from the public until the notice of proposed rulemaking.

ABA recommends, as an immediate step, that the Bureau publicize the Final Report related to its July 2016 SBAR Panel on debt collection.³⁰ A Final Report for this SBAR Panel is still not on the Bureau's website nor is the SBAR Panel on debt collection even listed.³¹ ABA believes the Bureau should publicly share these and similar materials in the future to further the interests of good governance and transparency.

e) Publish reports identifying SER recommendations that have resulted in revision of a proposed or final rule

ABA recommends that the Bureau publish a summary report for each rule that identifies every instance in which a SER's recommendation led to a revision of a proposed or final rule. The Bureau should also note if there were any rulemakings where no SER recommendations were reflected in the proposed or final rule. The Bureau should display these reports on the Bureau's website.

Currently, the Bureau offers no public insight into whether these SBAR Panels or the recommendations of SERs had any meaningful impact on its rulemaking efforts. The Bureau's general practice has been to note the SERs' recommendations and simply ask for additional comment on the recommendation in the proposed rule, leaving the strong impression that the SER's concerns were ignored and will be routed to the general collection of public comments.

²⁸ See Mulvaney, *supra* note 3, at 4.

²⁹ See 5 U.S.C. § 609(b)(5).

³⁰ See *Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking*, *supra* note 23.

³¹ See The Bureau, Small Business Review Panels, <https://www.consumerfinance.gov/policy-compliance/rulemaking/small-business-review-panels/> (last visited June 4, 2018).

This practice is contrary to the primary objective of SBREFA—that is for input from small entities to play a unique role in shaping agency rules at the *pre-proposal* stage to make regulation less burdensome and potentially more effective. Highlighting this information and making it public will assist interested parties in evaluating whether SBREFA has worked effectively to shape Bureau rules, or whether the Bureau has simply treated SBREFA as a perfunctory exercise to be completed before issuance of a notice of proposed rulemaking.³²

IV. Stop Evading Congress’ Requirements for Transparent Use of Data in Rulemaking

The Administrative Procedure Act mandates that an “agency shall give interested persons an opportunity to participate in ... rule making through submission of written *data*, views, or arguments ...”³³ However, Bureau practices have undermined the effective use of data to inform the Bureau’s rulemaking, despite the Bureau’s claims of being a “data-driven agency.”³⁴ These practices often impose significant burdens on regulated entities, weaken the contribution of information to quality rulemaking, and undercut the role of data to prevent regulatory abuses.

a) Stop evading the Paperwork Reduction Act through constricted data requests

Congress has recognized the value of public feedback to inform the government’s methodologies in collecting data, including information collections used to support rulemaking. The PRA mandates that government agencies obtain approval by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget through a process that gives the public two opportunities for comment, prior to conducting a data collection involving 10 or more persons or entities. The Bureau has frequently skirted the PRA’s requirements by making requests for data to fewer than 10 firms, for no apparent reason other than to avoid PRA requirements.

For example, in 2012, the Bureau used its authority to gather data on debit overdraft practices from nine large banks to inform potential rulemaking.³⁵ Not only were the identities of the nine banks unknown, confidentiality concerns limited the data that could be shared in the Bureau whitepaper subsequently published. The data reported consisted largely of summary, descriptive statistics that seriously limited opportunities for public review.

Similarly, in 2014, the Bureau ordered fewer than 10 large credit card issuers to provide information on credit card debt collection and debt sale policies and practices.³⁶ In both

³² An assessment on the efficacy of the SBREFA process seems particularly appropriate in light of findings from a GAO study on the Bureau’s SBREFA process which found that only 7 of 57 SERs interviewed were satisfied with the Bureau’s final rules. See U.S. Gov’t Accountability Office, *Consumer Financial Protection Bureau: Observations from Small Business Review Panels* (Aug. 2016), <https://www.gao.gov/assets/680/678964.pdf>.

³³ 5 U.S.C. § 553(c) (2012) (emphasis added).

³⁴ See The Bureau, *The CFPB Strategic Plan, Budget, and Performance Plan and Report*, 7 (Apr. 2013) (“The CFPB is a data-driven agency... Our aim is to use data purposefully, to analyze and distill data to enable informed decision-making in all internal and external functions.”), <https://files.consumerfinance.gov/f/strategic-plan-budget-and-performance-plan-and-report-FY2012-14.pdf>.

³⁵ The Bureau, *CFPB Study of Overdraft Programs: A white paper of initial data findings*, 4 (June 2013), http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf.

³⁶ The Bureau, *The Consumer Credit Card Market*, 237 (Dec. 2015), http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf.

examples, the decision to request the data from no more than nine banks permitted the Bureau to avoid the PRA. The PRA was enacted “to ensure the greatest possible public benefit from and to maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government” and “to improve the quality and use of Federal information to strengthen decision making, accountability, and openness in Government and society.”³⁷ By requesting data from only nine banks, the Bureau undermines the accountability structure of the PRA.

b) Stop abusing PRA’s generic clearance process

The Bureau avoids public scrutiny of its data collection efforts by making extensive and impermissible use of the PRA’s “generic clearance” process. Typically, the PRA requires a Federal agency to provide two opportunities for public comment when seeking to conduct a survey or other data collection.³⁸ However, OIRA provides an expedited avenue for this requirement, i.e. where the collection does “not raise substantive or policy issues.”³⁹ In these instances, once the agency provides two opportunities for public comment on the *generic clearance*, and OIRA grants its approval, subsequent individual surveys made under that generic clearance may be “reviewed on an expedited basis and are generally not required to undergo further comment.”⁴⁰ OIRA has provided three examples of non-controversial, non-substantive information collections that are appropriate for this expedited review: “customer satisfaction surveys, focus group testing, and website usability surveys.”⁴¹

The Bureau has used this process to avoid public scrutiny of proposed information collections involving *substantive policy matters*. For example, in 2011, the Bureau used a generic clearance to conduct qualitative testing on model forms related to overdraft services. In 2013, the Bureau used an approved generic clearance regarding consumer education to conduct a survey on “Consumer Understanding and Decision-making Related to Overdrafts.”⁴² Both collections on overdraft protection services by their nature raised substantive policy issues. However, by conducting these collections under a generic clearance, the Bureau avoided public review of the surveys’ methodology. Methodological decisions—such as the number of frequent users of overdraft in the pool of survey respondents and how survey questions are phrased—significantly impacted the data generated.

³⁷ 44 U.S.C. § 3501 (2012).

³⁸ *Id.* § 3506(c)(2)(A) (establishing initial, 60-day comment period); *Id.* § 3507 (establishing second, 30-day comment period).

³⁹ Memorandum from Cass R. Sustein, Administrator, for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, 5 (Apr. 7, 2010), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/inforeg/PRAPrimer_04072010.pdf [hereinafter OIRA 2010 Memo]; John D. Graham, Admin., Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, Exec. Office of the President, *Guidance on Agency Survey & Statistical Information Collections*, 6 (Jan. 20, 2006), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/inforeg/pmc_survey_guidance_2006.pdf.

⁴⁰ See OIRA 2010 Memo, *supra* note 36, at 5.

⁴¹ *Id.*

⁴² Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, Exec. Office of the President, Qualitative Research of Consumer Understanding and Decision-making Related to Overdrafts, Office of Info. & Regulatory Affairs, https://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=201404-3170-001&icID=210062 (last visited June 4, 2018).

To prevent future abuse of the generic clearance process, the Bureau should provide notice to the public whenever it requests approval, under a generic clearance, of an individual information collection on a topic of a current or likely future subject of rulemaking.

c) Permit public review of anonymized and aggregated data collected pursuant to market monitoring authority

In support of its duty “to monitor for risks to consumers” in markets for consumer financial products or services, Congress gave the Bureau exceedingly broad authority “to gather information . . . regarding the organization, business conduct, markets, and activities” of any person that offers or provides a consumer financial product or service, or any service provider to such company.⁴³ Accordingly, the Bureau may “require covered persons and service providers . . . to file with the Bureau, under oath or otherwise, in such form and within such reasonable time as the Bureau may prescribe by rule or order, annual or special reports, or answers in writing to specific questions, furnishing information described in paragraph 4.”⁴⁴ Unlike federal law governing subpoenas—which provides authority to ask a court to quash or modify the subpoena—Section 1022 does not provide a process to challenge or limit the breadth of the order.

Moreover, in its privacy regulation, the Bureau has defined as “confidential supervisory information” any data or information gathered pursuant to a Section 1022 order.⁴⁵ This permits the Bureau to publish findings and conclusions about the data, but significantly limits the public’s ability to review and evaluate the data and comment on the Bureau’s findings. As ABA has expressed on many occasions, the Bureau *should* provide access to the anonymized data and adequate time for the public to evaluate and comment on the research. By doing so, the Bureau will clearly demonstrate its commitment to the rigorous, fact-based analysis that the Dodd-Frank Act requires. To date, however, the Bureau has not chosen to do so. ABA renews its recommendation that the Bureau amend its privacy rule to enable public review of anonymized and aggregated data collected using Section 1022.

V. Create an Office of Chief Economist to Pursue Cost-Benefit Analysis in Rulemaking

News reports have stated recently that the Bureau is undertaking an effort to build an office dedicated to cost-benefit analysis.⁴⁶ ABA supports this effort and agrees that quantitative analysis can play a valuable role that is not captured by qualitative analysis alone. ABA recommends that the Bureau create an Office of Chief Economist (OCE) to pursue these ends.

While the Bureau has claimed to be a data-driven agency,⁴⁷ experience has shown that its policy making is not data-driven. For instance, the Bureau’s Payday Lending Rule uses the term “cost-

⁴³ 12 U.S.C. § 5512(C)(4) (2012).

⁴⁴ *Id.* § 5512(C)(4)(B)(ii).

⁴⁵ See 12 C.F.R. § 1070.2(i)(iv) (2013).

⁴⁶ See Lalita Clozel, *Mulvaney to Prioritize Business Costs in CFPB Reorganization*, WALL ST. J., May 10, 2018, <https://www.wsj.com/articles/mulvaney-to-prioritize-business-costs-in-cfpb-reorganization-1525972114>

⁴⁷ *E.g.*, The Bureau, *supra* note 31, at 7 (“The CFPB is a data-driven agency... Our aim is to use data purposefully, to analyze and distill data to enable informed decision-making in all internal and external functions.”).

benefit” only once, in a footnote, despite being 1,690 pages in length.⁴⁸ Analysis of the Payday Lending Rule demonstrates that the Bureau gave lip service to cost-benefit analysis.⁴⁹

The Payday Lending Rule requires lenders to collect information from borrowers and other sources in order for the lender to assess the borrower’s ability to repay the loan. The Bureau acknowledges the significant burden such collection would impose on lenders, stating that the rule would require an Annual Time Burden of over 8 million hours and an Annual Cost Burden of \$100 million (figures that at least one organization criticized as “dramatically underestimated”).⁵⁰ But the Bureau did not attempt to mitigate this burden by considering alternatives or justify the burden by quantifying the benefits of the rule. These are concerns that the Small Business Administration’s Office of Advocacy has expressed to the Bureau directly:

Advocacy believes that the CFPB has underestimated the potential economic impact of this rulemaking on small entities. In determining the economic impact of the ATR requirements, the CFPB’s RFA analysis appears to be limited to the costs of the new recordkeeping system, the costs of obtaining verification evidence and the costs of making an ATR determination consistent with that evidence. The CFPB has not provided an adequate estimate of the aggregate impact that the ATR requirements may have on the revenue stream of small entities, if their customers no longer qualify for loans. Advocacy encourages the CFPB to include these additional costs in the analysis of the economic impact of the loss of revenue.⁵¹

Similarly, the Treasury Department criticized the cost-benefit analysis of the Bureau’s Final Rule prohibiting the use of Arbitration Agreements (Arbitration Rule), which essentially banned arbitration in clear disregard of data in the Bureau’s own Arbitration Study.⁵²

Should the Bureau create an OCE, it is important for that office to be engaged early in policy considerations. The Bureau should use data to inform foundational decisions such as whether market intervention in the form of a new regulation is appropriate. A data-driven Bureau would rely upon the OCE to conduct robust cost-benefit analysis of proposals and alternative approaches. Further, when conducting cost-benefit analysis, the Bureau should look beyond an

⁴⁸ See *The Bureau, Payday, Vehicle Title, and Certain High-Costs Installment Loans: Final Rule*; official interpretation, https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710_cfpb_final-rule_payday-loans-rule.pdf (last visited June 4, 2018).

⁴⁹ See Competitive Enterprise Institute, *Bureau of Consumer Financial Protection Information Collection Request: Request for OMB Rejection of the Bureau’s Submission for its Final “Payday Lending” Rule* (Jan. 11, 2018) (offers a full description of the Bureau’s inadequate Paperwork Reduction Act analysis of the Payday Rule), https://cei.org/sites/default/files/Payday%20Lending%20PRA%20Request%20to%20OIRA%20Corrected%20Letterhead_0.pdf.

⁵⁰ See Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, Exec. Office of the President, Reporting, Recordkeeping, and Disclosure Requirements, https://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=201606-3170-001&icID=221772 (last visited June 4, 2018).

⁵¹ See U.S. Small Business Administration Office of Advocacy, *supra* note 21.

⁵² U.S. Dept. of Treasury, *Limiting Consumer Choice, Expanding Costly Litigation: An Analysis of the CFPB Arbitration Rule* (Oct. 23, 2017), <https://www.treasury.gov/press-center/press-releases/Documents/10-23-17%20Analysis%20of%20CFPB%20arbitration%20rule.pdf>.

individual rule and also consider the cumulative impact of all rules impacting the same financial product or service. Though some incremental changes might be justified in isolation, market participants exit product lines by assessing the cumulative costs impacting profitability relative to the risk of continuing to offer a product. As discussed above, meaningful cost-benefit analysis is also a critical element of the SBREFA process. Accordingly, the OCE should be engaged in the SBREFA process.

The creation of an OCE would be in keeping with precedent at other agencies. For instance, the Federal Trade Commission (FTC) has a division dedicated to economics that dates back to 1915.⁵³ More recently, the Federal Communications Commission (FCC) voted in January 2018 to create an Office of Economics and Analytics.⁵⁴ FCC's new office "provide[s] economic analysis for rulemakings, transactions, adjudications, and other Commission actions."⁵⁵

VI. Voluntarily Review Regulations under EGRPRA Process

Pursuant to the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA), the federal banking agencies must review all of their regulations no less frequently than every 10 years to identify and remedy the regulations that unnecessarily burden America's banks.⁵⁶ When EGRPRA was enacted, authority to promulgate consumer financial protection rules resided with the federal banking agencies and the rules were subject to the EGRPRA review.⁵⁷ However, the Dodd-Frank Act failed to ensure that the consumer protection statutes transferred to the Bureau would continue to be subject to the EGRPRA review. The effect of this oversight has been to reduce significantly the scope of the EGRPRA review.

The Bureau is legally required to conduct a different review under Dodd-Frank's Section 1022(d).⁵⁸ However, that section requires only a one-time review of a "significant rule" and 5 years after the effective date of the rule.

Fortunately, the Bureau can participate voluntarily in the EGRPRA process with the banking agencies. In fact, there is now 20 years of precedent for this practice. For both decennial EGRPRA review periods, the National Credit Union Administration (NCUA) has conducted a review of its regulations at the same time and in a manner consistent with the EGRPRA review. In both instances, the NCUA's voluntary findings were published with the EGRPRA final report alongside the sections relating to the work of the federal banking agencies.

⁵³ See Paul Pautler, *A History of the FTC's Bureau of Economics*, AM. ANTITRUST INST., Sept. 08, 2015, https://www.antitrustinstitute.org/sites/default/files/FTC%20Bureau%20of%20Economics%20History_0.pdf.

⁵⁴ See Press Release, Fed. Communications Comm'n, FCC Votes to Establish Office of Economics & Analytics (Jan. 30, 2018) (available at: https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0130/DOC-348934A1.pdf).

⁵⁵ *Id.*

⁵⁶ See 12 U.S.C. § 3311 (2012).

⁵⁷ For instance, one issue raised in the 2007 EGRPRA report discussed the need to simplify consumer disclosures in mortgage transactions covered by the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA).⁵⁷ Dodd-Frank transferred TILA and RESPA to the Bureau.

⁵⁸ See 12 U.S.C. § 5512(d) (2012).

It is also clear from the most recent EGRPRA outreach hearing transcripts that bankers sought the Bureau's participation and were disappointed that the Bureau was not a participant.⁵⁹ As well said by one banker—

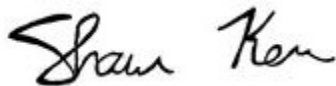
It is unfortunate that many regulations that community banks must comply with are not subject to review under EGRPRA since rulemaking authority for those rules has been transferred to the CFPB, so I really can't dwell on this issue. But it certainly should be evident that for the EGRPRA process to work, the CFPB should be part of this process.⁶⁰

A desire to have the Bureau voluntarily participate in the EGRPRA process was a sentiment reflected in meetings across the country.⁶¹ This is a sensible outcome and is particularly important for institutions that are subject to the Bureau's regulations but continue to be supervised by their primary federal banking regulator.

VII. Conclusion

Thank you for the opportunity to share ABA's views on the Bureau's rulemaking processes through this RFI. Should you have any questions, please do not hesitate to contact the undersigned at skern@aba.com or (202) 663-5253.

Sincerely,



Shaun Kern
Senior Counsel
Office of Regulatory Policy

⁵⁹ See *EGRPRA Outreach Meeting Transcript from Dallas, TX*, 48 (Feb. 04, 2015) (Statement of Joe Quiroga, President, Texas National Bank in Mercedes, Texas: "I think it is a little odd that, you know, part of the burden that we have as bankers, a lot of the big burdens that we have over the last couple of years is related to CFPB, and them not being here to at least listen to some of our concerns is kind of a cause for concern from a small minority-owned institution, and so just want to go on the record as saying that so that at least maybe down the road that comment is heard."), <https://egrpra.ffiec.gov/outreach/outreach-meeting-transcript-dallas.pdf>.

⁶⁰ See *EGRPRA Outreach Meeting Transcript from Washington, DC*, 175 (Dec. 2, 2015) (Statement of Martin Neat, President and CEO, First Shore Federal Savings & Loan Association, Salisbury, MD), <https://egrpra.ffiec.gov/outreach/outreach-meeting-transcript-dc.pdf>.

⁶¹ See *EGRPRA Outreach Meeting Transcript from Chicago, IL*, 140 (Oct. 19, 2015) (Statement of Todd Grayson, President, South Central Bank, Chicago, Illinois: "I would have wished the CFPB were here and maybe some Congressional aides, because I understand that some of the things you would like to even change, along with us, are out of your hands."), <https://egrpra.ffiec.gov/outreach/outreach-meeting-transcript-chicago.pdf>; see also *EGRPRA Outreach Meeting Transcript from Kansas City, MO*, 66 (Aug. 4, 2015) (Statement of Jack Hopkins, President and CEO, Cortrust Bank, Mitchell, South Dakota: "Finally, and I was not going to say this but I have to. I'm extremely disappointed that the CFPB is not a part of this. They currently have the rule-writing authority and should have been an actor in this game."), <https://egrpra.ffiec.gov/outreach/outreach-meeting-transcript-kansas-city.pdf>.