

April 24, 2012

By electronic delivery to:

Mr. Richard Cordray
Bureau of Consumer Financial Protection
1801 L Street, N.W.
Washington, D.C. 20036

The Honorable Mr. Cass R. Sunstein
OIRA Administrator
Office of Management and Budget
725 17th Street, N.W.
Washington, DC 20503

Dr. Winslow Sargeant
Chief Counsel, Office of Advocacy
U.S. Small Business Administration
409 3rd Street, N.W. 20416

Re: Small Business Regulatory Enforcement Fairness Act Panels

Dear Gentlemen:

The Bureau of Consumer Financial Protection (Bureau) has now convened two small business review panels to provide feedback on regulatory proposals being considered to integrate the disclosures required by the Real Estate Settlement Procedures Act (RESPA) and the Truth-in-Lending Act (TILA) and to implement the mortgage servicing provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). As you are aware, Dodd Frank Act section 1100G mandates that the first step in the integration of the two rules is the convening of a small entity review panel as required by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). Under that law, when a rule under development may have a “significant impact on a substantial number of small entities,” representatives from the Bureau, the Small Business Administration’s Office of Advocacy (Advocacy), and the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA) form a review panel (the Panel). The Panel meets with representatives of small businesses that will be affected by the various regulatory proposals under consideration to consider their potential impact on small entities as well as their effect on the cost and availability of credit.

The American Bankers Association (ABA) strongly supports the SBREFA review process. We believe that it offers the possibility for important information gathering, collaboration, and consensus building that may significantly improve the rules promulgated by the Bureau. Indeed, we believe that eliciting this input is critical to the Bureau’s commitment to being data driven and ensuring a competitive market for all financial service providers, regardless of their size.¹

¹ See Prepared Remarks of Richard Cordray, Director of the Bureau of Consumer Financial Protection, to the U.S. Chamber of Commerce, March 28, 2012, available at <http://www.consumerfinance.gov/speeches/prepared-remarks-by-richard-cordray-before-the-u-s-chamber-of-commerce/> (describing the Bureau’s commitment to “a constructive,

Indeed, we believe as a general rule that regulations that place uncompetitive regulatory burdens on smaller institutions will be counterproductive to consumer interests. For that reason, we believe that robust SBREFA Panels are essential to the mission of the Bureau.

ABA recognizes that these are the first occasions for the Bureau to convene SBREFA Panels and to comply with the statutory requirements of SBREFA as amended by section 1100G.² Accordingly, the Bureau, working in collaboration with staff from Advocacy and OIRA, has had to create a process for selecting and eliciting input from small businesses that will serve as the model for future SBREFA reviews conducted by the Bureau. With this in mind, ABA offers the following suggestions for improvements to the process to ensure that it affords small entities the opportunity for engagement that Congress envisioned and as is needed for the Bureau to succeed in its efforts of providing genuine benefit to consumers:

- 1. Facilitate Small Entity Representative (SER) identification, selection, and preparedness by better leveraging trade association participation.** ABA appreciates the invitation from the Bureau to nominate SERs but believes this outreach can be enhanced by improving communication surrounding the identification and appointment of SERs. Identifying candidates is difficult in the limited time period the trade associations have received before the convening of a Panel. This period should be more reasonable in its length so as to ensure optimal participation. In addition, we believe that the representative nature of the SER appointment is impaired by not better communicating the selection of nominated SER candidates to trade associations and providing the background and contact information among the selectees well in advance of the Panel meeting. After all, each SER should be in effect speaking on behalf of many similar firms.

In order to prepare a selected small entity well to be a true representative of its peers, trade associations can help their SER access other small entities members who have valuable information to provide. However, this cannot happen overnight. To be prepared best for the Panel meeting, understanding who all the representatives are will help trade associations reach out to affected small entity members from uniquely affected areas of the country that may have been overlooked by the Bureau or that may have important experiences and information to share in the effort to provide optimal regulation for firms and their customers. In addition, we believe that having this information will enable SERs to communicate with one another even before the convening meeting, facilitating the exchange of information and/or reactions to a proposal, and even, as appropriate, draw upon their customers for input. It is not sufficient to leave this work to the limited timeframe for comment follow-up. To be the best SER possible and avoid the criticism of the process as being perfunctory, the hard work of obtaining input from representative firms, their peers, and their customers must be given adequate time in advance of the Panel meeting.

transparent, evidenced-based, rulemaking process that will keep markets competitive and hold businesses accountable to reasonable and equal standards.”).

² See §1100G amending 5 U.S.C. §609(d)(2)(In addition to the requirements of an Initial Regulatory Flexibility Analysis, a proposed rule by the Bureau rule must 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 relating to issues described in subparagraphs (A) and (B) and subsection (b).

In addition, a Final Regulatory Flexibility Analysis by the Bureau must include a description of the steps the agency has taken to minimize any additional cost of credit for small entities.)

- 2. Provide ample time to the SBREFA review process.** ABA believes that the timetable established for SER participation in both the RESPA-TILA and mortgage servicing rule makings unnecessarily limited their ability to provide input. We understand that most SERs were invited to participate and were provided with information about the SBREFA process and the regulatory proposals being considered just two weeks before the convening meetings. The time provided was inadequate to permit a thorough review of the proposed alternatives, to consider the ramifications of each, and to try to gauge their potential impact on compliance costs and operations. For the SBREFA process to improve rulemaking and to reduce regulatory burden on small entities – and most of all to reduce the negative consequences for consumers – the Bureau must provide SERs with more time to prepare for the initial meeting. Given additional time, for example, SERs could spend more time consulting with staff about required policy and process changes and third-party vendors about anticipated software and system changes. Finally, allowing only a week after the convening meeting for SERs to provide written comments to the Panel further limited the ability of SERs to provide information and feedback.

The aspirations of the SBREFA process – information gathering, collaboration, and consensus-building around less burdensome alternatives to achieve a regulatory goal – take time, and ABA is concerned that the process and timetable established by the Bureau for SBREFA review is inadequate. ABA encourages the Bureau to follow the Environmental Protection Agency's example in which there are typically several months after SERs are identified and before the SBREFA Panel is officially convened. During this pre-panel outreach period, the SERs meet periodically with the Panel either in person or by conference call. Presumably, each meeting permits the discussion to delve further into the proposed alternatives and to identify issues for which additional discussion and data are needed. Also, extending SER participation over a longer period facilitates greater interaction between SERs, increasing opportunities to reach consensus on a regulatory framework that will work optimally for consumers and small entities. Experience with the SBREFA process for EPA rules suggests that consensus recommendations by SERs have a very strong chance of adoption by the agency.

- 3. Gather information from third-party service providers about potential implementation costs and share that information with SERs.** In preparation for a SBREFA review, ABA urges the Bureau to gather and share with SERs any information from third-party service providers about anticipated system and software changes (and potential costs) required by regulatory proposals under consideration. We understand that during the RESPA-TILA convening meeting there were assumptions about required changes and costs, but no real information or data. ABA believes that the Bureau – whose access is far superior to that of small entities – should have an affirmative duty to obtain this information and to provide it so that SERs can react to it and suggest how the changes might affect their business practices and fees and gauge the likely impact on customer service. In addition, having this information available should minimize the variation between SER cost and burden estimates, providing the Panel with greater confidence in the information it is collecting.
- 4. Encourage SERs to identify alternative, less burdensome means to achieve desired regulatory outcomes.** The identification and recommendation of less burdensome alternatives, such as phased in deadlines, reduced obligations, thresholds, or exemptions for small entities, is an important objective of a SBREFA panel. ABA believes that the briefing materials and discussion questions prepared for the SERs considering the RESPA-TILA integration and the mortgage servicing rule focused attention on costs, burden, and time tables for achieving compliance rather than on identifying potential superior

alternatives. We urge the Bureau to encourage consideration of viable alternatives by suggesting a range of options in the written materials and ensuring that there is ample time for discussion of these alternatives throughout the convening meeting with SERs.

As stated above, ABA understands that the Bureau is in the process of implementing a new step in its rule making process, a step that we consider essential to the success of the Bureau's mission. We hope that like many of the other Bureau "firsts" that this will be an iterative process and that the Bureau will consider implementing each of our suggestions. We believe that doing so will ensure that the small business review Congress chose to add to Bureau rule making is meaningful and results in consumer protection rules that work for both consumers and small businesses.

Please feel free to contact me at rriese@aba.com or 202-663-5051 if you or a member of your staff has any questions.

Sincerely,



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