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June 7, 2018

Ms. Kristine M. Andreassen
Mr. Owen Bonheimer
Senior Counsels
Office of Regulations
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 Ms. Andreassen and Mr. Bonheimer:

The U.S. Chamber of Commerce (“the Chamber”) is the world’s largest business federation, representing the interests of more than three million companies of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness (“CCMC”) to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy. Strong and appropriate consumer protections are an important and necessary component of efficient capital markets.

We appreciate the opportunity to respond to the Bureau of Consumer Financial Protection’s (“the Bureau”) Request for Information (“RFI”) regarding the Bureau’s rulemaking processes. As discussed below, we believe that rulemaking should be the default policymaking tool for the Bureau and that the Bureau has used this tool successfully in some cases. We also believe, however, that there are opportunities for improvement. In particular, we urge the Bureau to reform its approach to rulemaking in the following three key ways:

- Provide genuine opportunities for stakeholder input, especially early in the rulemaking process;

- Engage in evidence-based rulemaking, grounded in sound economic analysis; and
- Prioritize quality over speed.

Background

Notice-and-comment rulemaking under the Administrative Procedures Act (“APA”) is the Bureau’s best tool for setting regulatory policy. It provides formal opportunities for engagement by all stakeholders, and procedural and judicial safeguards. Indeed, the Bureau’s use of the rulemaking process, while not perfect, has led to better outcomes than setting standards through informal means. As early as 2013, the Bipartisan Policy Center explained:

[W]hen the Bureau operated in a transparent, open, and iterative manner, repeatedly seeking input from all stakeholders throughout a process, the results were generally positive. However, when the Bureau made unilateral decisions, rolled out initiatives, rules, or processes as a result of a more closed, internal deliberation process, the results were far more likely to be problematic.¹

The Bipartisan Policy Center further noted that “[a]ll stakeholders, including regulated entities, would benefit substantially if the CFPB emphasized rule-making rather than guidance and consent orders.”² Businesses subject to the Bureau’s jurisdiction continue to dedicate significant resources on personnel and sophisticated systems to ensure their activities comply with the many standards governing the consumer financial services marketplace. They should not also be forced to expend resources or refrain from innovating because of uncertainty or lack of transparency surrounding the rulemaking process or the requirements of rules. The Bureau should minimize this uncertainty by promulgating rules, through a transparent rulemaking process that create strong consumer protections.

In a CCMC/Morning Consult poll released on March 23, 2018, consumers overwhelmingly preferred the current administration’s approach to regulation. A resounding 66% across party lines indicated they prefer the current approach because

¹ Bipartisan Policy Center, *The Consumer Financial Protection Bureau: Measuring the Progress of a New Agency*, at 5 (Sept. 2013).

² *Id.* at 19.

it “creates rules that protect consumers and provides businesses with the certainty of clear guidelines.”³

To be clear, the rulemaking process is not perfect. The process can be too cumbersome in some contexts and abused in others. Still, potential pitfalls in the rulemaking process in no way should prevent the Bureau from using rulemaking as its default tool for setting binding policy. The Bureau should work hard to address the shortcomings in its own use of the rulemaking process so that it allows “fair, transparent, and competitive” markets for consumer financial products and services to flourish.⁴ In this letter, we identify three particular areas for improvement in the rulemaking process by the Bureau going forward.

Discussion

(1) Provide Genuine Opportunities For Stakeholder Input, Especially Early In The Rulemaking Process.

The Bureau should embrace the benefits of providing stakeholders notice and opportunities to comment on proposed or contemplated rules. It should welcome the expertise of many different viewpoints and work hard to refrain from treating those opportunities as mere formalities. The Bureau should ensure that stakeholders have meaningful opportunities to comment at all appropriate times during a rulemaking process – not just in “check the box” exercises – and especially welcome comments early in the process when ideas are taking shape.

In particular, we would urge the Bureau to recognize the value of the process provided by the Small Business Regulatory Enforcement Fairness Act (SBREFA) and consider using this process even when not strictly required by statute. As you know, SBREFA requires the Bureau to undertake special procedures to ensure that it considers the views of relevant small businesses. In particular, SBREFA requires the Bureau to work with the Small Business Administration to convene panels of affected small businesses—often referred to as “SBREFA panels”—to discuss contemplated proposals.⁵

The Government Accountability Office (“GAO”) studied the Bureau’s use of SBREFA panels in 2016, including by interviewing 57 of the 69 small entity

³ https://www.centerforcapitalmarkets.com/wp-content/uploads/2018/04/CCMC_CFPB-Infographic_final.pdf

⁴ See 12 U.S.C. § 5511(a) (stating statutory purpose of the Bureau).

⁵ See generally 5 U.S.C. §§ 603, 609.

representatives that participated in the four SBREFA panels that it reviewed.⁶ Those representatives confirmed that they generally believed that the process was valuable, but also made clear that the Bureau could improve its approach. Significantly, the GAO reported that:

- Two-thirds of the participants believed that the Bureau had not allotted enough time to discuss at least one of the topics on the panel agenda.⁷ Similarly, one third of the participants suggested that more time or additional meetings would have improved the process.⁸
- Thirteen of the fifty seven participants “stated that they felt that [the Bureau] treated the process as a formality.”⁹ However, fifteen said that the Bureau “did not appear to consider their views in its rulemaking.”¹⁰ For example, a participant believed that the Bureau may have been “good at following processes but felt that it did not listen to input. He added that he felt the Bureau’s mind was made up before the panel took place.”¹¹ Another participant described the panel as “more symbolic than meaningful,” in part because there ultimately was “no reflection of input from small entity representatives in the rule.”¹² Similarly, a participant reported feeling “defeated when she saw what came out after the panel.”¹³ Another believed that the Bureau’s “officials already had their mind made up as to what should be in the rule” when they began the panel.¹⁴
- Participants commented on how the SBREFA “process was hindered by CFPB’s lack of knowledge of their industry.”¹⁵ Indeed, “10 of 57 small entity representatives suggested CFPB obtain more knowledge of industry practices before convening the panels. For example, one representative believed CFPB was surprised by answers representatives provided to their questions because the agency lacked real world experience; the representative suggested CFPB do site visits with typical

⁶ Government Accountability Office, *Consumer Financial Protection Bureau: Observations From Small Business Review Panels*, GAO-16-647 (Aug. 2016).

⁷ *Id.* at 22.

⁸ *Id.* at 23.

⁹ *Id.* at 16.

¹⁰ *Id.* at 25.

¹¹ *Id.* at 16.

¹² *Id.*

¹³ *Id.* at 25.

¹⁴ *Id.*

¹⁵ *Id.* at 16.

small entities to become better informed.”¹⁶ Another participant explained, for example, that “during the panel meeting there was limited time to talk about the actual rule because small entity representatives had to explain certain banking processes to CFPB.”¹⁷ One participant observed that holding a second meeting of the panel could have helped address this issue since the first meeting could be dedicated to closing knowledge gaps and the second meeting could be dedicated to actual discussion of the policies under consideration.¹⁸

These concerns about the Bureau’s use of SBREFA panels are consistent with broader concerns that we have long held about how the Bureau approaches public engagement with stakeholders more generally. Thus, we believe that the Bureau can continue to improve its rulemaking processes by:

- Dedicating increased time to hearing from affected stakeholders prior to releasing proposed rules;
- Holding roundtables with stakeholders that have different viewpoints to better understand the nuances and impacts of policies; and
- Developing a sufficient understanding of stakeholder business models so that engagement with stakeholders is based on a solid foundation of shared understanding of the challenges that businesses face.

Broadly, we ask the Bureau to promote engagement with stakeholders of all sizes throughout the rulemaking process. The Bureau has done this at times during its tenure. Some of the participants in the SBREFA panels believed, for example, that the Bureau did a good job in listening to their view points. But SBREFA panels only capture a subset of affected companies, and the Bureau must also reach out to larger companies before it can gain a complete and accurate picture of industry views. And the number of negative experiences of SBREFA panelists and of stakeholders more generally confirms that the Bureau has an opportunity to improve its SBREFA approach. This is no small matter. Engaging effectively with stakeholders is a core element of a proper approach to rulemaking – and failure to do so can lead to dramatically flawed rules.

¹⁶ *Id.* at 19-20.

¹⁷ *Id.* at 16.

¹⁸ *Id.* at 17.

The Bureau unfortunately provided a case study on the possible consequences of inadequate public engagement in its failed arbitration rulemaking process. There, the Chamber and other stakeholders repeatedly asked the Bureau for additional opportunities to provide feedback on the process for developing and implementing the study mandated by Congress. Specifically, in June 2012, the Chamber urged the Bureau to prepare and publish a draft study plan describing the substantive issues to be addressed in the study, to employ roundtables with interested stakeholders, and to solicit additional input on its draft conclusions before releasing its final study. The Bureau unfortunately chose another path. As 13 Senators and 61 Representatives explained,

The Bureau ignored requests from senior Members of Congress for basic information about the study preparation process. The Bureau also ignored requests to disclose the topics that would be covered by the study, and failed to provide the general public with any meaningful opportunities to provide input on the topics. Because the materials were kept behind closed doors, the final *Arbitration Study* included entire sections that were not included in the preliminary report that was provided to the public.¹⁹

This failure to allow stakeholder comment in the early stages of the process impacted the rest of the Bureau's arbitration rulemaking. It not only undermined trust in the Bureau's willingness to work in good faith with stakeholders of diverse views, but it also ensured that weaknesses in the study's approach were not addressed. The result was the creation of a flawed foundation for an equally flawed rule that was rejected under the Congressional Review Act.

We encourage the Bureau to learn from these past mistakes as it enhances its rulemaking process. It should ensure that stakeholders have adequate opportunity to comment at all critical stages of a rulemaking. For example, to address the problems seen in the arbitration rulemaking, we would urge the Bureau to allow public comment before proposed rules are issued and to solicit comment on the evidence that the Bureau intends to rely on in developing a rule. And more generally, we would urge the Bureau to embrace public engagement as described above.

¹⁹ Rep. Patrick McHenry and Senator Tim Scott et al., Letter to Director Cordray (June 17, 2015).

(2) Engage In Evidence-Based Rulemaking Grounded In Sound Economic Analysis.

Federal rules can move markets and dramatically affect the public and economy. Even a small detail in a Bureau rule, for example, can mean the difference between a consumer having access to a mortgage or being unable to buy a house. These unintended consequences are real and have impacted the availability of products and services. For example, non-mortgage lenders are dominating in the marketplace post-mortgage rule implementation, some banks stopped doing HELOANs as a result of the TILA/RESPA Integrated Disclosure rule, and others have experienced issues with the remittance rules that forced them to change their services. The enormous significance of Bureau rulemaking demands that rules not be based on speculation, political winds, or personal preferences. Instead, the Bureau's rulemaking must be based on sound evidence that supports informed judgments about the effects of the proposed rule in the marketplace.

The Bureau has asserted it is a data-driven agency, but, the Bureau could significantly increase its evidence-based analysis when formulating rules. The Bureau's arbitration rulemaking is again instructive. The Bureau had a specific statutory duty to study consumer arbitration. Even so, the Bureau pursued a study that failed to gather data about the relevant questions, including the benefits of arbitration. The Bureau's own rulemaking in fact revealed these inadequacies by deciding to collect arbitration agreements so they could be studied. Thus, one of the key components of the Bureau's final rule was a requirement that arbitration providers submit information about individual arbitrations to the Bureau to monitor the agreements and ascertain the fairness of the agreements.²⁰ This aspect of the rule, which was subsequently overturned, raised an obvious question: if the Bureau could not ascertain the fairness of arbitration agreements, why was it finalizing a regulation?

Going forward, the Bureau should ensure that its staff, proposals, and studies ask the most relevant questions and obtain adequate evidence to answer them conclusively before writing the rule. In particular, the Bureau should conduct robust economic analysis of proposed rules to ensure their benefits outweigh their costs. The Bureau must understand how a given rule will work in the real world if it is to have the desired effect, and what the unintended consequences might be in order to mitigate them. Although the Bureau might have good intentions, those good intentions might not translate exactly as intended in the real world. Speaking to

²⁰ Bureau of Consumer Financial Protection Final Rule, Arbitration Agreements [Docket No. CFPB-2016-0020] (July 16, 2017).

practitioners and conducting a robust economic analysis will help to determine how rules will impact consumers, small businesses, and the overall economy.

A rigorous cost-benefit analysis, grounded in facts, is essential to ensure that rules actually work by maximizing the benefits for consumers and promoting fair and efficient markets. As explained in the Chamber's Bureau reform agenda, "[t]hrough the use of cost-benefit analysis in financial services regulation, regulators can determine if their proposals will actually work to solve the problem they are seeking to address. Basing regulations on the best available data is not a legal 'hurdle' for regulators to overcome as they draft rules, as some have described it, but rather a fundamental building block to ensure regulations work as intended."²¹ Thus, instead of treating it as a check-the-box exercise after conclusions are already drawn and the ink is already dry, the Bureau should use cost-benefit analyses as a central tool in a data-driven regulatory tool box.

(3) Prioritize Quality Over Speed.

Finally, we would add one simple point: the Bureau should prioritize sound rulemaking over swift rulemaking. It is far better for the Bureau to slowly get rules right than for it to quickly get them wrong, especially where there can be practical consequences to consumers and industry.²² In some cases, abiding by this philosophy will require undertaking additional rounds of notice and comment when it becomes clear that substantial changes will be made in a proposed rule. In other cases, it will mean working with companies and other stakeholders for an extended period of time before implementing a regulation. Failure to take these steps could lead to unintended consequences in a final rule that were not previously evaluated by stakeholders (e.g. the prepaid card rulemaking)²³ or delays in implementation (e.g. the TRID implementation).²⁴ We appreciate that the Bureau has taken steps to address errors (e.g. by eventually re-opening the prepaid rule for comments and extending the TRID deadline), but going forward it would be much more efficient and promote a better functioning marketplace if the Bureau acted more deliberately and thoughtfully in the first iteration of a rulemaking.

²¹ U.S. Chamber Center for Capital Markets, Paul Rose and Christopher Walker, *The Importance of Cost-Benefit Analysis in Financial Regulation* at v (March 2013), <http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/CBA-Report-3.10.13.pdf>.

²² Of course, as noted in our May 14, 2018 comment on the Bureau's enforcement activities we would advocate for faster rulemaking over policy-making by enforcement actions. Interim final rules subject to further comment remain appropriate where the rules are administrative and do not impact covered persons, or where they only reduce burden.

²³ See Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z); Delay of Effective Date, 82 Fed. Reg. 18975 (April 25, 2017).

²⁴ See Statement by CFPB Director Richard Cordray on Know Before You Owe Mortgage Disclosure Rule (June 17, 2015) (acknowledging error in submitting the rule for congressional review that caused delay).

Ms. Kristine M. Andreassen

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We thank you for the opportunity to submit these comments and would be happy to discuss these issues further.

Sincerely,

A handwritten signature in black ink, appearing to be 'TK' followed by a long horizontal flourish.

Tom Quaadman