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Via electronic submission

June 7, 2018

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 Independent Community Bankers of America (“ICBA”)¹ appreciates the opportunity to comment on the Bureau of Consumer Financial Protection’s (“BCFP” or “Bureau”) request for information (“RFI”) regarding the overall efficiency and effectiveness of its rulemaking processes. Reiterating comments made in response to previous RFIs, ICBA appreciates this effort.

Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act” or “Act”) authorizes the Bureau to administer, enforce, and implement federal consumer protection laws.² The Act further authorizes the Director of the Bureau to propose rules to enable the Bureau to

¹ The Independent Community Bankers of America®, the nation’s voice for nearly 5,700 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services. With nearly 52,000 locations nationwide, community banks employ 760,000 Americans, hold \$4.9 trillion in assets, \$3.9 trillion in deposits, and \$3.3 trillion in loans to consumers, small businesses, and the agricultural community. For more information, visit ICBA’s website at www.icba.org.

² 12 U.S.C. 5512(a).

carry out its purpose.³ The Bureau has engaged in rulemakings mandated by Congress as well as discretionary rulemakings. The Bureau's rulemaking processes are subject to the statutory requirements discussed below.

Notice of Proposed Rulemaking ("NPRM")

Pursuant to the Administrative Procedure Act ("APA"), the Bureau is required to publish a notice of proposed rulemaking in the Federal Register each time it proposes, amends or repeals a rule.⁴

Small Business Review

The Bureau is subject to the Regulatory Flexibility Act of 1980 ("RFA") which requires the Bureau to seek feedback from small businesses prior to proposing a rule. The Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA") amended the RFA to require some federal agencies to assemble a SBREFA panel prior to issuing a notice of proposed rulemaking (NPRM), if the proposed rule is likely to have a significant impact on a substantial number of small entities. The Dodd-Frank Act subjected the Bureau to the SBREFA requirements.

Impact Analysis

The Dodd-Frank Act requires the Bureau to evaluate the potential benefits and costs resulting from the proposed rule.⁵ The Bureau also must consider the impact of proposed rules on depository institutions and credit unions with \$10 billion or less in assets, and on consumers in rural areas.⁶

Consultation with Federal Agencies

Pursuant to the Dodd-Frank Act, the Bureau must consult with prudential banking regulators or other federal agencies prior to proposing a rule and before issuing a final rule to help ensure consistency with prudential, market, or systemic objectives administered by such agencies.⁷ Additionally, the Bureau and the Federal Trade Commission are parties to a memorandum of understanding which requires them to consult each other before proposing or finalizing a rule concerning unfair, deceptive, or abusive acts or practices, to avoid duplication or conflict between the agencies.⁸

Many of the Bureau's rulemaking processes and how those processes are implemented are discretionary and are the subject of this RFI.

³ 12 U.S.C. 5512.

⁴ 5 U.S.C. 533(b).

⁵ 12 U.S.C. 5512(b)(2)(A)(i).

⁶ 12 U.S.C. 5512(b)(2)(A)(ii).

⁷ 12 U.S.C. 5512(b)(2)(B).

⁸ 12 U.S.C. 5581(b)(5)(D).

ICBA Comments

Executive Summary

ICBA is consistent in its support for reasonable regulations that protect consumers and promote community banks' ability to meet the financial needs of their customers. We believe that our recommendations will further underscore our support and will improve the Bureau's rulemaking process as it relates to the SBREFA process, NPRMs and final rules.

- ICBA recommends the Bureau improve the SBREFA process by:
 - allowing additional time for small entity representatives to review SBREFA meeting materials and prepare for the SBREFA panel, and Bureau staff time to obtain appropriate knowledge relative to the topic,
 - ensuring the final SBREFA report includes justifications for any feedback that will not be considered or reflected in the proposed rule, and
 - ensuring feedback received from small entity representatives is reflected in proposed and final rules.
- ICBA recommends the Bureau improve the NPRM process by:
 - streamlining the number of pages in the notice by providing a concise list of areas in which the Bureau seeks comments immediately after the summary section and avoiding redundancy in the supplementary information and background sections,
 - adding a table of contents that includes links to all sections,
 - establishing longer comment periods for proposed rules that do not have a statutory deadline, and
 - timely responding to stakeholder requests to extend comment periods.
- ICBA recommends the Bureau improve the final rule process by:
 - streamlining the number of pages in the final rule by limiting content to the summary, background, section-by-section analysis and legal authority,
 - adding a table of contents that includes links to all sections and documents,
 - removing all supplemental content to a separate document,
 - including a separate red-lined final rule to allow for the speedy identification of changes to existing regulations,
 - simultaneously releasing all implementation and supporting materials with the final rule,
 - timely responding to stakeholder requests to extend compliance deadlines instead of delaying a decision to a few days before the deadline,
 - working with the prudential regulators to facilitate release of examination procedures six to nine months before a final rule's effective date, and

- using its authority under the Dodd-Frank Act to exempt community banks from final rules that hamper their ability to provide financial products and services to their customers.

SBREFA Panels

SBREFA panels (“Panels”) are comprised of representatives from the Bureau, the U.S. Small Business Administration (“SBA”) and the Office of Management and Budget (“OMB”). SBREFA requires the Panel to meet with a selected group of small entity representatives (“SERs” or “small businesses”) that are likely to be subject to the rules the Bureau may issue. SERs are paneled for rulemakings, and ICBA is pleased that community banks were chosen as SERs for several Panels. To date, the Bureau has held six SBREFA Panels.⁹ When SERs are selected, the Bureau sends background information and a draft of the proposed rule under consideration to each participant in preparation for the Panel outreach meeting.

During the Panel outreach meeting, SERs provide the Panel with feedback on the impact of complying with the proposed regulations and discuss regulatory alternatives that could minimize any adverse effect. In addition, the Dodd-Frank Act requires the Bureau to seek input from the SERs on whether the proposals under consideration could increase the cost of credit for small businesses and alternatives to minimize an increase. Within 60 days of convening a SBREFA Panel, the Panel issues a report which documents all input received from small businesses during the Panel process. The Bureau then uses the report and SERs’ feedback to assist in finalizing the proposed rule.

ICBA is quite appreciative of the Bureau’s commitment to including community bank representatives on SBREFA Panels. Community banks appreciate that there is a statutory process that requires the Bureau to solicit, consider and incorporate their input during its rulemaking process, however, ICBA believes certain improvements are needed to ensure the Panel accomplishes its statutory objectives.

SERs have concerns about the Bureau’s management of the SBREFA process and believe that the proposed and final rules do not sufficiently reflect their input.¹⁰ Before the Panel convenes, SERs are required to review the complex and comprehensive SBREFA materials from the Bureau. The process requires reading, undertaking an analysis to determine how the proposal(s) could affect their institutions and sometimes seeking legal counsel. Furthermore, SERs participate on several conference calls and travel to Washington, D.C. at their own expense to execute their responsibilities. Because of the enormous sacrifice community bankers make, the Bureau should be more judicious in heeding the feedback they receive and ensuring that such feedback is reflected in proposed and final rules.

⁹ The Bureau has held SBREFA panels on: Integrated Mortgage Disclosures under RESPA and TILA; Mortgage Servicing; Loan Originator Compensation Requirements; HMDA; and, the Payday Rule.

¹⁰ Similar to comments expressed by Community Bank Advisory Council members. See, ICBA Response to the BCFP’s RFI on External Engagements, May 29, 2018.

Another area ripe for improvement is the time allotted for the process. As stated above, the SBREFA process is a substantive exercise requiring sufficient time to review materials and prepare for the outreach meeting. The SBREFA process requires the Panel to complete its report within 60 days after the Panel is "convened,"¹¹ which is the date the Panel is formally established by the CFPB, SBA, and OMB.

SERs report receiving materials less than 10 days prior to the Panel outreach meeting which makes it challenging for them to adequately prepare for the meeting. ICBA recommends the Bureau send materials at least 30 business days before convening a Panel or amend its definition of "convene" to mean the day the Panel meets in order to provide SERs sufficient time to undertake a comprehensive analysis of the complex materials, solicit feedback within their respective institutions, and develop discussion points for an effective Panel meeting. Building additional time into the process would also allow the Bureau more time for completing the report within the required 60 days and provide a level of assurance that all scenarios and impacts are considered.

The additional time would also allow the Bureau's staff to reach out to the bankers to become more knowledgeable about the everyday aspects of community banking so that time allotted to discuss the proposed rule and provide input is preserved during the Panel outreach meeting. As noted in a 2016 report issued by the Government Accountability Office ("GAO Report"), the Bureau's staff lacked practical knowledge of the banking process which impacted the time available to discuss the rule itself because SERs had to educate them during the outreach meeting.¹²

The GAO Report also noted that both the Bureau and SBA acknowledged the challenge of sending materials to SERs with time for review, convening a meeting with SERs to gather their input, allowing time for SERs to provide written comments, and drafting the Panel report within 60 days. Based on the Bureau's definition of "convene," the entire process is vulnerable. Since an established timeframe for conducting the meeting is not provided, the later a Panel meets after being formally established, the less time it has to produce a thorough report. Hence, the process hampers the Panel's ability to properly fulfill its purpose. The potential rule that is the subject of a Panel is not given the proper treatment from SERs, and the Panel's report and any subsequent rule may be based on incomplete or inaccurate information given the flawed process.

Another area of concern is the perception that the Bureau's mind is set and that convening a Panel is done only to fulfil statutory obligations. This notion is further underscored by SERs indicating that the feedback from smaller institutions is not always reflected in proposed rules.

Stakeholders want to believe their input is not only extracted but reflected in rulemakings. ICBA believes this perception can be improved by reforming the process and including in the

¹¹ The Bureau considers a panel to be convened on the date it is established and not the first meeting.

¹² GAO Report - Consumer Financial Protection Bureau – Observation from Small Business Review Panels (2016) P.16.

SBREFA report justifications for why feedback will not be considered or reflected in the proposed rule.

Notice of Proposed Rulemakings

Transparency, context, and historical foundation are vital when responding to an NPRM. Stakeholders who respond to NPRMs have varying levels of understanding, and the depth of the content must be comprehended by all audiences. But oftentimes, commenters have limited time and resources to sift through several hundred pages of dense and complex content. Because of these varying levels of understanding, those submitting comments need the flexibility to toggle throughout the document to reference information needed during the analysis and drafting processes. ICBA's recommendations for improving the NPRM process and making it easier for potential commenters to navigate through, digest and analyze the proposal include:

- streamlining the number of pages in the notice by providing a concise list of areas in which the Bureau seeks comments immediately after the summary section and avoiding redundancy in the supplementary information and background sections,
- adding a table of contents that includes links to all sections,
- establishing longer comment periods for proposed rules that do not have a statutory deadline, and
- timely responding to stakeholder requests to extend comment periods.

Final Rules

Similarly to NPRMs, final rules need to be streamlined as well. The Bureau's final rules are unreasonably long. The last five final rules released by the Bureau average 1,145 pages.¹³ Those responsible for analyzing, determining applicability, implementing, and ensuring compliance need a user-friendly mechanism that allows them to manage the document. ICBA's recommendations for modifying and reducing the content in final rules are:

- streamlining the number of pages in the final rule by limiting content to the summary, background, section-by-section analysis and legal authority,
- adding a table of contents that includes links to all applicable sections or documents,
- removing all supplementary content to a separate document, and
- including a separate red-lined final rule to allow for the speedy identification of changes to existing regulations.

¹³ TRID Rule, 560 pages; Arbitration Rule, 775 pages; Prepaid Rule, 1890 pages; Pay Day Rule, 1700 pages; HMDA Rule, 800 pages.

To further improve the final rule process and prepare entities for a smooth compliance and implementation experience, ICBA recommends that all guidance, compliance guides, toolkits, and all other supporting materials be released simultaneously with the final rule. We also recommend the Bureau work in conjunction with the prudential regulators to release examination procedures six to nine months before a final rule becomes effective. Finally, we recommend that if after the release of all supplemental documents, stakeholders believe, based on their practical and operational assessment, additional time is needed to meet the compliance deadline, the Bureau should timely heed such request instead of delaying a decision to a few days before the compliance deadline.

Bureau Exemption Authority

Under Section 1022(b)(3) of Title X of the Dodd-Frank Act, the Bureau has authority to exempt any class of covered persons, service providers or category of consumer financial products or services from any provision of Title X or any Bureau rule. While ICBA applauds the Bureau for using its exemption authority in a meaningful way in its final rule on Payday, *Vehicle Title*, and *Certain High-Cost Installment Loans*,¹⁴ by and large, under previous leadership, the Bureau was hesitant to use this authority. ICBA strongly urges the Bureau to use this authority to tailor regulations to exempt community banks from any final rule that hampers community banks' ability to provide financial services and products to their customers. Feedback obtained from SERs, NPRMs, and through other external engagement mechanisms should not only be used to evaluate the potential content of a rule, but at all times should be evaluated to determine community bank exemption potential. ICBA is hopeful that under the new leadership, the Bureau will expand consideration of exemptions as an element in its overall rulemaking process.

We appreciate the opportunity to provide input on this RFI. If you have any questions or would like additional information, please contact Rhonda Thomas-Whitley (Rhonda.Thomas-Whitley@icba.org) at 202-659-8111.

Sincerely,

/s/

Rhonda Thomas-Whitley
Assistant Vice President & Regulatory Counsel

¹⁴ Any lender that makes 2,500 or fewer covered short-term or balloon-payment small-dollar loans per year and derives no more than 10 percent of its revenue from such loans is exempt from the rule's full-payment test and the principal-payoff option.