

June 7, 2018

Comment Intake
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: *Request for Information Regarding Bureau Rulemaking Process*
(Docket No. CFPB-2018-0009)

To Whom It May Concern:

The American Financial Services Association (AFSA)¹ appreciates the Bureau of Consumer Financial Protection's request for comment and information (RFI) to assist it in assessing the overall efficiency and effectiveness of its rulemaking process and whether any changes to its rulemaking process would be appropriate.

AFSA's comments fall into two broad themes. AFSA's primary concern is that guidance issued by the Bureau should not supplant rulemaking. Guidance should only be an interpretation of an existing rule. Guidance should not set forth new policy that serves as the basis for enforcement actions or supervisory findings. AFSA's secondary concern is that the Bureau should credibly consider all the information it gathers during the rulemaking process, including information from sources with whom it may sometimes disagree.

Our comments follow the Bureau's RFI and include suggestions for each stage of the rulemaking process: the initial outreach and information gathering, the notice of proposed rulemaking (NPRM), and the final rule.

I. Guidance Should Not Supplant Rulemaking

AFSA's primary comment on the Bureau's rulemaking process relates to the difference between guidance and rules. Guidance should be a clear interpretation of a specific rule. It should be issued to help financial institutions comply with that rule. It should not be a policy statement issued as a basis for enforcement actions. If the Bureau intends on using a certain policy as the basis for enforcement, that policy should follow the formal rulemaking process required by the Administrative Procedure Act (APA).

An example of the Bureau's misuse of guidance can be found in CFPB Bulletin 2013-02, Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act (ECOA), issued in March 2013.² By releasing the policy as guidance, the Bureau avoided public analysis of its assumptions and findings, while still changing the vehicle finance market. By releasing guidance rather than engaging in APA rulemaking, the Bureau skirted Congress' express denial of Bureau regulatory authority over auto, recreation vehicle, and motorcycle retailers engaged in indirect financing activities.

¹ Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

² This guidance has been repealed by Congress and the President under the process and authority granted by the Congressional Review Act (CRA). Although the guidance is no longer in effect, its repeal under the CRA is reflective of the problems inherent in using guidance as a *de facto* rule and the uncertainty it creates for consumers and the consumer finance market.

Despite the fact that it was released as “guidance,” the Bureau’s policy acted as a *de facto* rule. Indeed, the Government Accountability Office (GAO) found that, “The Bulletin provides information on the manner in which CFPB plans to exercise its discretionary enforcement power. It expresses the agency’s views that certain indirect auto lending activities may trigger liability under ECOA.”³ The GAO concluded, “In sum, the Bulletin advises the public prospectively of the manner in which the CFPB proposes to exercise its discretionary enforcement power and fits squarely within the Supreme Court’s definition of a statement of policy.”⁴

In the future, AFSA asks that the Bureau use guidance to provide clear interpretations of rules and go through the formal APA rulemaking process when it intends to use the rule as a basis for enforcement.

II. Initial Outreach and Information Gathering

1. Mechanisms Used by the Bureau for Gathering Information, Data, and Feedback from Stakeholders

AFSA appreciates the substantial effort undertaken by the Bureau to gather information, data, and feedback from stakeholders in advance of a rulemaking. The Bureau often issues requests for information, holds meetings, and conducts studies before issuing proposed rules. However, those efforts are undermined if the Bureau neglects to consider the information gathered during the actual rulemaking process.

The arbitration rulemaking process is illustrative. The Bureau held roundtables, field hearings, conducted surveys, engaged in the Small Business Regulatory Enforcement Fairness Act (SBREFA) process, and completed a more than 700-page study prior to releasing a final rule on arbitration. Industry representatives explained at each step of the process that arbitration was beneficial for consumers. In fact, the Bureau’s own study demonstrated how consumers fared better in arbitrations than in class actions. Yet, the Bureau’s final rule neglected to reflect this evidence and banned mandatory pre-dispute arbitration—a predetermined result. Fortunately, the rule was ultimately overturned by Congress under the CRA. A final rule that accounted for the information gathered during the rulemaking process may have better withstood Congressional scrutiny.

2. Convening a SBREFA Panel

The SBREFA panel process presents similar concerns about the Bureau’s consideration of information it has gathered. As part of the SBREFA process, small entity representatives (SERs) dedicate significant time and resources to analyze SBREFA proposals, prepare their testimony, travel to Washington for the panel, and then write a summary of their response. Considering the thoroughness of this effort, the Bureau would benefit if it more carefully considering feedback it received from the SERs.

As a related point, the Dodd-Frank Wall Street Reform and Consumer Protection Act requires the Bureau to perform a regulatory flexibility analysis that must include a description of any projected increase in the cost of credit for small entities and any significant alternatives to the proposed rule which would accomplish the same objective.⁵ The regulatory flexibility analysis for the arbitration rule did not really consider how the cost of credit for small entities could increase, nor did it really offer other alternatives.

³ GAO Letter to Sen. Patrick J. Toomey, “Bureau of Consumer Financial Protection: Applicability of the Congressional Review Act to Bulletin on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act,” p. 5. Available at <https://www.gao.gov/assets/690/688763.pdf>.

⁴ *Ibid.*

⁵ 12 U.S.C. § 1100G

3. *Consultations with Tribal Governments*

AFSA does not have a comment on this section.

III. Notices of Proposed Rulemaking

4. *The Content of the NPRM Itself*

AFSA believes that NPRMs should be shorter and streamlined. The NPRM for the final rule on payday, vehicle title, and certain high-cost installment loans was 1,341 pages. More specifically, the background section could have been significantly shorter, as could the section-by-section analysis, which was somewhat repetitive.

While NPRMs overall could be streamlined, the impact analysis section should be enhanced to better reflect how the proposed rule will actually affect the marketplace. For example, the regulatory flexibility analysis in the June 2015 larger participant rule for the vehicle finance market did not include any discussion of the fact that the Bureau's expansive definition of "refinancing" covered an unspecified number of small businesses.

The Bureau's analysis also did not discuss the impact that the larger participant rule would have on the small businesses that were covered by the rule. As a result, the Bureau's assessment of the rule significantly underestimated the impact the rule would have, when in reality, supervised entities spend millions on compliance with the rule.⁶

While we believe there is room for improvement in much of the NPRM, we commend the Bureau on its use of sample forms. The forms provide useful interpretations and illustrations of the regulatory text and are quite helpful.

5. *The Bureau's Issuance of the NPRM*

AFSA appreciates the Bureau's general practice of releasing the NPRM on its website in advance of publication in the Federal Register. The additional response time provided by that practice has been helpful. The high-level summary material accompanying the NPRM is also useful.

6. *Comment Periods for NPRMs*

AFSA strongly supports comment periods of at least 90 days, with longer ones for lengthier or complex NPRMs. A 90-day or longer reply period leads to better, more informed comment letters. Key stakeholders need time to both read and analyze the impact of NPRMs (especially if they are over a thousand pages in length), and then analyze and formulate informed commentary. This process can involve significant coordination and dedication of resources, depending on the scope and complexity of the NPRM, the potential impact on stakeholders, the need to gather data or information as part of the response, and the nature of the responding organization.

⁶ The final larger participant rule stated, in explicably and wholly unrealistically: "Bureau assumes, conservatively, that an entity might dedicate the equivalent of one full-time compliance officer and one-tenth of a full-time attorney to the exam. The average hourly wage of a compliance officer in a nonbank entity that operates in activities related to installment lending is \$33.97, and the average hourly wage of a lawyer in the same industry is \$83.88.102 Assuming that wages account for 67.5 percent of total compensation, the total labor cost of an examination would be about \$27,611.1." 79 FR 60777

In addition to comment periods, “reply periods” may provide the Bureau with additional data and information. Reply periods would need to be at least 60 days to allow stakeholders time to read other comments and compose their response.

7. Mechanisms for Encouraging Additional Feedback on NPRMs

As described above, shortening and streamlining NPRMs would facilitate improved feedback on NPRMs.

8. The Bureau’s Processing and Posting of Comments to its Electronic Docket

Posting comments on regulations.gov is simple and efficient. AFSA hopes the Bureau continues using this process.

9. Outreach and Engagement by the Bureau During and After the Comment Period

AFSA values the Bureau’s meetings with stakeholders both during and after the comment period. As described above, these meetings are most valuable when the Bureau credibly reviews and thoughtfully considers the comments made during the meeting. As just one example, during the arbitration rulemaking process, the Bureau appeared to approach stakeholder meetings formulaically, which was confirmed by the fact that despite all of the feedback, the final rule was substantially similar to the proposed rule.

By contrast, AFSA’s experience with the payday, vehicle title, and certain high-cost installment loan rule was much different, and the final rule benefited from genuine incorporation of stakeholders’ feedback. AFSA is grateful for the time that Bureau staff – from the Director to the rule writers – took to meet and talk with AFSA staff and members. Based on the final rule, it is clear that the Bureau understood and incorporated AFSA’s comments—and more importantly, the Bureau’s changes to the rule clearly benefitted consumers.

10. Consideration of New Data, Studies, and Reports Issued by Other Agencies or Third Parties After the NPRM is released

To the extent that it is relevant, the Bureau should consider data and other evidence that is issued after the NPRM. Ignoring such relevant feedback seems counterproductive and could lead to an ineffective or unnecessarily harmful rule.

IV. Final Rules

11. The Content of the Notice Issuing the Final Rule

As with proposed rules, the Bureau’s final rules should be significantly shorter and more streamlined. For example: the final rule for payday, vehicle title, and certain high-cost installment loans is 1,690 pages; the final Home Mortgage Disclosure Act rule is 797 pages; the final arbitration rule is 775 pages; and the final prepaid account rule is 1,689 pages. In particular, the background sections and the section-by-section analysis could be - much shorter and streamlined.

In addition to issuing shorter final rules, AFSA strongly believes that the Bureau should do a more thorough impact analysis in both the proposed and final rules. The impact analysis in the final rule should reflect any comments received in response to the proposed rule.

And lastly, the Bureau should ensure that the final rule provides entities with sufficient time to comply with any new requirements or standards. The Bureau can ensure that any compliance deadlines or grace periods associated with a new rule are appropriate by engaging with stakeholders and considering their feedback and input as to associated costs, burdens, and reasonable timelines associated with complying with a new rule. In addition to promoting compliance, providing entities with sufficient time to comply with any new rules will reduce the need to provide compliance extensions or delay a rule's effective date.

12. The Bureau's Release of the Final Rule on its Website in Advance of Publication in the Federal Register

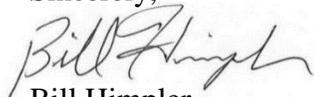
AFSA appreciates that the Bureau releases the final rule on its website in advance of publication in the Federal Register. However, we do not think it is necessary or effective to release the rule to the press prior to the public.

V. Conclusion

AFSA is grateful for the opportunity to comment on this RFI. We hope our suggestions will assist the Bureau in assessing the overall efficiency and effectiveness of its rulemaking process. We believe that the Bureau's rulemaking process will improve by making all policy changes through rulemaking, not guidance. We also believe that the Bureau's rulemaking process can be enhanced with careful consideration of all the feedback received, shorter NPRMs and final rules, and a sufficient comment period.

Please contact me by phone, 202-466-8616, or email, bhimpler@afsamail.org, with any questions.

Sincerely,



Bill Himpler
Executive Vice President
American Financial Services Association