

**Comment of Financial Regulation and Consumer Protection Scholars
on Docket No. CFPB-2018-0012**

June 25, 2018

Comment Intake
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Dear Sir or Madam:

Please see the submission below in response to the Consumer Financial Protection Bureau's Request for Information (RFI) Regarding the Bureau's Inherited Regulations and Inherited Rulemaking Authorities (Docket No. CFPB-2018-0012). We are concerned scholars and former regulators, including scholars specializing in financial regulation, consumer financial law, and administrative law.*

This comment builds on our prior comments on the Bureau's RFIs Regarding General Rulemaking Processes (Docket No. CFPB-2018-009) and Adopted Regulations and New Rulemaking Authorities (Docket No. CFPB-2018-0011). The three should be read together.

Thank you for the opportunity to submit this comment for your consideration.

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EXECUTIVE SUMMARY

The CFPB is Using RFIs for Sham Purposes

- The CFPB has revealed that its stated reason for its many RFIs is not the real reason. The stated reason is “to seek public input” on the various RFI topics that the Bureau planned to evaluate. Instead, the CFPB is using the RFI responses as “cover” for various policy changes, when, in fact, the responses do not support such changes.

This RFI impedes public input by being impossibly vague and broad

- This RFI seeks input on twenty different sets of unrelated regulations and all their component parts. Nowhere did the CFPB specify which provisions it is considering changing. Likewise, it failed to ask specific questions that would enable meaningful responses. The Acting Director, by conducting closed-door meetings with industry, has privileged the financial services industry and left consumers in the dark about the changes industry wants and that the CFPB is considering.

The CFPB is Disguising what Should have been Notice and Comment Rulemaking as Requests for Information

- The CFPB has stated that the rule-related RFIs are for the purpose of obtaining information on desired changes to existing rules and recommendations for new rules. This type of inquiry falls under the Administrative Procedure Act, which requires very specific steps in the “process for formulating, amending, or repealing a rule.”¹

If the CFPB’s Illegitimate RFI Process is Successful, the Financial Security of Consumers, Hardworking American Families, and Financial Markets will be in Jeopardy

- If the CFPB’s illegitimate RFI process is successful, the financial security of consumers, hardworking American families, and financial markets will be in jeopardy.

¹ 5 U.S.C.A. 551(5).

Comment of Financial Regulation and Consumer Protection Scholars on Docket No. CFPB-2018-0012

The Request for Information (RFI) by the Consumer Financial Protection Bureau (“CFPB” or “Bureau”) Regarding the Bureau’s Inherited Regulations and Inherited Rulemaking Authorities asks whether the Bureau should make any changes to existing inherited regulations or add any new regulations.²

I. Description of “Inherited Regulations” and Incorporation of Prior Responses

This RFI is one of three CFPB RFIs on rulemaking. Previously, the Bureau issued an RFI on its rulemaking processes.³ We filed a separate comment on that RFI.⁴ The second RFI was on Adopted Regulations.⁵ We also submitted a comment on that RFI.⁶ The Inherited Regulations RFI is the final rule-related RFI. Our response to this RFI should be read together with the previous two responses.

Inherited Regulations are “the various regulations that” other federal agencies issued before the Dodd-Frank Act transferred their consumer-related rulemaking authority to the CFPB.⁷ In circumstances where the Bureau amended an Inherited Regulation, it classifies that rule as an Adopted Regulation.⁸ Inherited Regulations include:

- Truth in Lending Regulation Z
- Homeownership Equity Protection Act
- Credit Card Act of 2009
- SAFE Mortgage Licensing Act
- Fair Debt Collection Practices Act
- Federal Trade Commission Act
- Fair Credit Reporting Act

² Consumer Financial Protection Bureau, *Request for Information Regarding the Bureau’s Inherited Regulations and Inherited Rulemaking Authorities*, 83 Fed. Reg. 12,881 (March 26, 2018) [hereinafter Inherited Regulations RFI].

³ Consumer Financial Protection Bureau, *Request for Information Regarding Bureau Rulemaking Processes*, 83 Fed. Reg. 10,437 (March 9, 2018).

⁴ Comment of Financial Regulation and Consumer Protection Scholars and Former Regulators on Docket No. CFPB-2018-0009 (June 7, 2018) (available at <https://lawdigitalcommons.bc.edu/cfpb-comments/6/>).

⁵ Consumer Financial Protection Bureau, *Request for Information Regarding the Bureau’s Adopted Regulations and New Rulemaking Authorities*, 83 Fed. Reg. 12,286 (March 21, 2018) [hereinafter Adopted Regulations RFI].

⁶ Comment of Financial Regulation and Consumer Protection Scholars and Former Regulators on Docket No. CFPB-2018-0011 (June 19, 2018).

⁷ Adopted Regulations RFI, *supra* note 5, at 12,287.

⁸ *Id.*

- Gramm–Leach–Bliley Act
- Consumer Leasing Act
- Real Estate Settlement Practices Act
- Equal Credit Opportunity Act
- Home Mortgage Data Act
- Electronic Funds Transfer Act
- Interstate Land Sales Full Disclosure Act
- Truth in Savings Act
- Fair Credit Billing Act
- Homeowners Protection Act
- Alternative Mortgage Transaction Parity Act
- Expedited Funds Availability Act
- 12 U.S. Code § 1831t - Depository Institutions Lacking Federal Deposit Insurance

II. The CFPB is Using RFIs for Sham Purposes

The CFPB has revealed that its stated reason for its many RFIs is not the real reason. The stated reason is “to seek public input” on the various RFI topics that the Bureau planned to reevaluate.⁹ Instead, the CFPB is using the RFI responses as “cover” for various policy changes, when, in fact, the responses do not support such changes.

The RFI process is important for all stakeholders because it enables them to share their experiences, insights, and concerns about the CFPB and the rules and policies it adopts. For the CFPB, the RFI responses can be used to justify its actions. The importance of the RFIs cannot be overstated and, for this reason, the CFPB must act with integrity in requesting, evaluating and relying on responses to RFIs.

To our consternation, the CFPB leadership’s RFI process is a sham. A few days after the deadline for RFI responses on external engagements closed, the CFPB announced that it was canceling all future meetings of all its advisory boards, having previously canceled every meeting since Mr. Mulvaney took office. The CFPB informed the advisory board members in two phone calls on June 6, 2018. In justifying the cancellations and effectively terminating the advisory boards, including the statutorily mandated Consumer Advisory Board (CAB), one of Mr. Mulvaney’s political appointees, Anthony Welcher, stated that “the RFIs was [sic] a big driver for [the] process”¹⁰ of shutting down the advisory boards. When a CAB member asked for more information about the RFI responses that recommended dismissing the advisory boards, Mr. Welcher admitted that “no comments were made about dissolving [the advisory boards]. . . . The RFI process allowed—there were comments that had been submitted along the way, and then in the final review, nothing changed from the direction we were headed.”¹¹ In sum, the CFPB

⁹ Inherited Regulations RFI, *supra* note 2, at 12,882.

¹⁰ 6.6.18 11am Advisory Boards and Councils Recorded Call (available from the CFPB).

¹¹ *Id.* The termination of the CAB also prevented the CFPB from hearing about emerging problems in consumer financial markets, which is one of the duties of the CAB. By silencing the CAB, the political

did not tell the truth when saying that the leadership relied on the RFI responses in terminating the advisory boards. And, the CFPB had planned the terminations before the RFI response period had ended.

Meanwhile, Mr. Mulvaney moved to commandeer or dismantle other core functions of the Bureau before the RFI responses on those functions were even due. For instance, on May 9, 2018, he announced that he was creating a new Office of Cost-Benefit Analysis that would be housed within the director's office.¹² He made that announcement even though the RFI on Bureau rulemaking processes seeking public comments on *that exact topic* was still open and did not close for another month.

On April 24, 2018, Mr. Mulvaney announced plans to shutter the CFPB's consumer complaint database¹³ even though the RFI on that topic did not close for public comment until June 4.

Lastly, as we discuss in the next section, the CFPB's Adopted Regulations RFI and Inherited Regulations RFI were equally vague and sweeping, raising concerns that both RFIs are smokescreens for existing plans by the Acting Director to reverse landmark CFPB rules protecting consumers.

These events revealed that:

1. even when not telling the truth, one of Mr. Mulvaney's chosen staff pointed to the RFI responses to support his position, which reflects just how important the RFI responses are for bolstering the CFPB's positions;
2. the CFPB leadership is willing to mislead members of the CAB and the larger public to stifle public input through its advisory boards;
3. the CFPB has given the public the impression that it will make critical decisions about its activities based on public input through the RFI process when, in fact, the CFPB has already made at least some decisions on topics related to the RFIs before the deadlines for the public responses to RFIs; and
4. although it is a public agency, the CFPB does not care what the American people think or want.

III. This RFI impedes public input by being impossibly vague and broad

appointees at the CFPB have eliminated a significant vehicle for the staff to learn of such wrongdoing. 12 U.S.C.A. 1014.

¹² Memorandum from Mick Mulvaney to DL DFPB All Hands, A Note on Staffing and Bureau Organization, (May 9, 2018), <https://www.documentcloud.org/documents/4454936-CFPB-Memo.html> (viewed May 22, 2018); Evan Weinberger, *Mulvaney Brings More Political Oversight in CFPB Restructuring*, BLOOMBERG LAW BANKING DAILY, May 9, 2018.

¹³ See Remarks by Mick Mulvaney, Acting Director, Consumer Financial Protection Bureau, April 24, 2018, American Bankers Association Annual Conference, Washington, D.C., at 5 (available at <https://www.documentcloud.org/documents/4446622-Transcript-Mulvaney-ABA-Conference-4-24-2018.html>) (viewed May 3, 2018) [hereinafter April 24, 2018 Remarks].

The inherited rules RFI impedes consumer input by being impossibly vague and impossibly broad. The Inherited Regulations RFI “seeks public input regarding the substance of the Inherited Regulations, including whether the Bureau should issue additional rules. . . .The Bureau is seeking feedback on all aspects of the inherited regulations.”¹⁴ It then asks for suggestions for updates or modifications to the rules, and any aspects of the Inherited Regulations that should not be modified. The substantive portion of the RFI is 5 pages long. Nowhere does the RFI state the specific provisions the Bureau is considering revising. Similarly, the RFI does not specify any regulations that the Bureau is contemplating adopting.

For obvious reasons, the standard practice is for RFIs to ask very specific questions. For example, the substantive portion of the RFI seeking input on Payday Loans, Vehicle Title Loans, Installment Loans and Open End Lines of Credit,¹⁵ was 34 pages long and included background information and numerous detailed questions.¹⁶ The very first question reflects the approach of the standard CFPB RFI:

Is there a viable business model in extending high-cost, non-covered loans for terms longer than 45 days without regard to the borrower’s ability to repay the loan as scheduled? If so, what are the essential characteristics of this business model or models and what consumer protection concerns, if any, are associated with such practices?¹⁷

Vagueness is not the only problem with the Inherited Regulations and other rule-related RFIs. The breadth of the regulations covered by this RFI is astounding. Unlike the payday lending RFI discussed above, the Inherited Regulations RFI covers twenty sets of rules, each of which has many components. To give a sense of the scope of the Inherited Regulations RFI, we have listed the parts of just one of the many regulations that fall within the RFI:¹⁸

PART 226—TRUTH IN LENDING (REGULATION Z)

Subpart A—GENERAL

- §226.1 Authority, purpose, coverage, organization, enforcement, and liability.
- §226.2 Definitions and rules of construction.

¹⁴ Inherited Regulations RFI, *supra* note 2, at 12,882-83.

¹⁵ Consumer Financial Protection Bureau, *Request for Information on Payday Loans, Vehicle Title Loans, Installment Loans and Open End Lines of Credit* (June 1, 2016) (available at https://files.consumerfinance.gov/f/documents/RFI_Payday_Loans_Vehicle_Title_Loans_Installment_Loans_Open-End_Credit.pdf).

¹⁶ *Id.*

¹⁷ *Id.* at 17.

¹⁸ 12 C.F.R. pt. 1026. Regulation Z was issued pursuant to the Truth in Lending Act, 15 U.S.C.A. 1601 *et seq.*

§226.3 Exempt transactions.

§226.4 Finance charge.

Subpart B—OPEN-END CREDIT

§226.5 General disclosure requirements.

§226.5a Credit and charge card applications and solicitations.

§226.5b Requirements for home equity plans.

§226.6 Account-opening disclosures.

§226.7 Periodic statement.

§226.8 Identifying transactions on periodic statements.

§226.9 Subsequent disclosure requirements.

§226.10 Payments.

§226.11 Treatment of credit balances; account termination.

§226.12 Special credit card provisions.

§226.13 Billing error resolution.

§226.14 Determination of annual percentage rate.

§226.15 Right of rescission.

§226.16 Advertising.

Subpart C—CLOSED-END CREDIT

§226.17 General disclosure requirements.

§226.18 Content of disclosures.

§226.19 Certain mortgage and variable-rate transactions.

§226.20 Subsequent disclosure requirements.

§226.21 Treatment of credit balances.

§226.22 Determination of annual percentage rate.

§226.23 Right of rescission.

§226.24 Advertising.

Subpart D—MISCELLANEOUS

- §226.25 Record retention.
- §226.26 Use of annual percentage rate in oral disclosures.
- §226.27 Language of disclosures.
- §226.28 Effect on State laws.
- §226.29 State exemptions.
- §226.30 Limitation on rates.

Subpart E—SPECIAL RULES FOR CERTAIN HOME MORTGAGE TRANSACTIONS

- §226.31 General rules.
- §226.32 Requirements for certain closed-end home mortgages.
- §226.33 Requirements for reverse mortgages.
- §226.34 Prohibited acts or practices in connection with credit subject to §226.32.
- §226.35 Prohibited acts or practices in connection with higher-priced mortgage loans.
- §226.36 Prohibited acts or practices in connection with credit secured by a dwelling.
- §§226.37-226.38 [Reserved]
- §226.39 Mortgage transfer disclosures.
- §§226.40-226.41 [Reserved]
- §226.42 Valuation independence.
- §226.43 Appraisals for higher-priced mortgage loans.
- §§226.44-226.45 [Reserved]

Subpart F—SPECIAL RULES FOR PRIVATE EDUCATION LOANS

- §226.46 Special disclosure requirements for private education loans.

- §226.47 Content of disclosures.
- §226.48 Limitations on private education loans.

Subpart G—SPECIAL RULES APPLICABLE TO CREDIT CARD ACCOUNTS AND OPEN-END CREDIT OFFERED TO COLLEGE STUDENTS

- §226.51 Ability to Pay.
- §226.52 Limitations on fees.
- §226.53 Allocation of payments.
- §226.54 Limitations on the imposition of finance charges.
- §226.55 Limitations on increasing annual percentage rates, fees, and charges.
- §226.56 Requirements for over-the-limit transactions.
- §226.57 Reporting and marketing rules for college student open-end credit.
- §226.58 Internet posting of credit card agreements.
- §226.59 Reevaluation of rate increases.

- Appendix Appendix A to Part 226--Effect on State Laws
- Appendix Appendix B to Part 226—State Exemptions
- Appendix Appendix C to Part 226—Issuance of Staff Interpretations
- Appendix Appendix D to Part 226—Multiple Advance Construction Loans
- Appendix Appendix E to Part 226—Rules for Card Issuers That Bill on a Transaction-by-Transaction Basis
- Appendix Appendix F to Part 226—Optional Annual Percentage Rate Computations for Creditors Offering Open-End Plans Subject to the Requirements of §226.5b
- Appendix Appendix G to Part 226—Open-End Model Forms and Clauses
- Appendix Appendix H to Part 226— Closed-End Model Forms and Clauses
- Appendix Appendix I to Part 226—Federal Enforcement Agencies
- Appendix Appendix J to Part 226—Annual Percentage Rate Computations for Closed-End Credit Transactions
- Appendix Appendix K to Part 226—Total Annual Loan Cost Rate Computations for Reverse Mortgage Transactions

Appendix	Appendix L to Part 226—Assumed Loan Periods for Computations of Total Annual Loan Cost Rates
Appendix	Appendix M1 to Part 226—Repayment Disclosures
Appendix	Appendix M2 to Part 226—Sample Calculations of Repayment Disclosures
Appendix	Appendix N to Part 226—Higher-Priced Mortgage Loan Appraisal Safe Harbor Review
Appendix	Appendix O to Part 226—Illustrative Written Source Documents for Higher-Priced Mortgage Loan Appraisal Rules
Appendix	Supplement I to Part 226—Official Staff Interpretations

The vagueness and breadth of the Inherited Regulations RFI makes it impossible for any stakeholders to meaningfully respond unless, that is, they already know the changes that the Bureau is considering. Responses to FOIA requests reveal that Mr. Mulvaney and his political appointees have been meeting regularly with representatives from financial services and related industries. The CFPB has kept many of these meetings and their contents secret. The closed-door meetings, coupled with Mr. Mulvaney’s express commitment¹⁹ to put business concerns ahead of consumers’ financial welfare, lead to the ready conclusion that the meetings enable the Bureau to tell industry which rule changes it is contemplating. By the same token, these secret meetings give industry an opportunity to tell the Bureau what changes it hopes it will make to benefit companies subject to CFPB oversight.

The cozy relationship between the CFPB and financial firms gives industry representatives a tremendous advantage because they can craft their RFI responses to address the changes the CFPB anticipates making. They can also recommend any changes that were well received by the CFPB during the meetings with Mr. Mulvaney and his political appointees.

Consumers and advocates are in the dark, attempting to address issues that are hidden from their view and pleading their cases to an Acting Director who is allied with industry and who has made it clear that he wants to reduce the consumer protection regulations under which financial firms must operate. In sum, the CFPB’s RFI practices handicap consumers and American families and privilege the representatives from financial services industry. The RFI process that should be and looks to be transparent has actually become the opposite.

The CFPB has engaged in the same short-circuiting of public feedback by imposing very short deadlines to respond. The response time is 90 days, which is about the same amount

¹⁹ See April 24, 2018 Remarks, *supra* note 13, at 5; Rachel Witkowski, *Mulvaney vows to ‘bring sanity’ to Qualified Mortgage rule*, AM. BANKER, May 15, 2018.

of time that was given for people to comment on the very narrow topic of payday lending regulation discussed above.

The unworkable RFIs, tight deadlines, and the mischaracterization of the RFI responses demonstrate that the CFPB's RFI process is a mockery and illegitimate.

IV. The CFPB is Disguising what Should have been Notice and Comment Rulemaking as Requests for Information

The CFPB has stated that the rule-related RFIs are for the purpose of obtaining information on desired changes to existing rules and recommendations for new rules. This type of inquiry falls under the Administrative Procedure Act, which requires very specific steps in the “process for formulating, amending, or repealing a rule.”²⁰

Specifically, if the CFPB is contemplating a new rule, or an amendment or repeal of an existing rule, it must:

- publish a notice of proposed rulemaking in the Federal Register;
- provide the public with information about the rulemaking proceedings, including the governing legal authority for the rulemaking; and
- specify “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”²¹

In addition, during notice-and-comment rulemaking, people outside the CFPB are prohibited from having *ex parte* communications with “any decision-making personnel that imparts information or argument directed to the merits or outcome of a rulemaking proceeding.”²² In its rulemaking RFIs, the CFPB appears to be doing all the things you would expect to see in a Notice of Proposed Rulemaking, but without giving adequate notice or following proper procedures. Of equal importance, the CFPB cannot escape its own prohibition on *ex parte* communications by mischaracterizing proposed rulemakings as requests for information.

V. If the CFPB's Illegitimate RFI Process is Successful, the Financial Security of Consumers, Hardworking American Families, and Financial Markets will be in Jeopardy

²⁰ *Id.* at 1.

²¹ 5 U.S.C.A. 553(b)(1-3)

²² Consumer Financial Protection Bureau, *Policy on Ex Parte Presentations in Rulemaking Proceedings*, 82 Fed. Reg. 12,687, 18,689 (April 21, 2017).

The CFPB will consider *ex parte* communications if specific requirements are met: “A person who makes an oral *ex parte* presentation shall . . . submit to the CFPB's Executive Secretary and the CFPB employee point of contact for the presentation, a memorandum summarizing the presentation.” *Id.* at 18,689-90. Any person making *ex parte* written communications must likewise submit the presentation to the same entities. The CFPB then posts the submissions to the public rulemaking docket. *Id.*

The points we make here are not simply to contest the RFI process. They are about history. Prior to the financial crisis, the Office of Thrift Supervision and the Office of the Comptroller of the Currency were captured by the financial services industry. In addition, the one regulator that could have imposed market-wide discipline on the lending industry—the Federal Reserve – refused to exercise its Congressional mandate to protect consumers. When Congress created the CFPB, it was in response to industry capture and the unwillingness of the Federal Reserve to curtail abusive lending. Now, the current administration of the CFPB is mimicking the past federal bank regulators, which is sure to again harm the American people.