

**Comment of Financial Regulation and Consumer Protection Scholars
And Former Regulators on Docket No. CFPB-2018-0009**

June 7, 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 Bureau Rulemaking Processes (Docket No. CFPB-2018-0009). We are concerned scholars and former regulators, including scholars specializing in financial regulation, consumer financial law, and administrative law.* Thank you for the opportunity to submit these comments for your consideration.

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¹ 5 U.S.C. § 553.

² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1012(a)(10), 1022

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EXECUTIVE SUMMARY

We Oppose Any Rollbacks That Would Water Down the Strengths of CFPB Rulemaking

- Since the Consumer Financial Protection Bureau opened its doors, the Bureau has created one of the most *inclusive, transparent, fact-based* and *responsive* rulemaking processes of any federal regulator. But now the Bureau is starting to roll back these four key strengths of its rulemaking process. We oppose that retreat and explain why it is essential to preserve and expand the strengths of the Bureau's rulemaking going forward.

Strength One: Preserve and Expand Fact-Based, Independent CFPB Rulemaking

- The CFPB has been committed to impartial, data-driven rulemaking and its empirical research benefits consumers and industry alike. The Bureau must refrain from any actions that would undermine that commitment, including:
 - Creating artificial obstacles to on-boarding quantitative data;
 - Prohibiting the use of qualitative data and consumer anecdotes when appropriate;
 - Compromising the independence of its cost-benefit analyses; and
 - Relying on new data, studies or reports after a Notice of Proposed Rulemaking appears without disclosing that reliance or re-opening the docket for additional public comment where appropriate.
- As the concurrent OMB Director, Acting Director Mick Mulvaney must: (1) preserve the CFPB's independence by rescinding his plan to move CFPB cost-benefit analysis into his office; and (2) recuse himself from further involvement in CFPB impact analyses.

Strength Two: Preserve and Expand the Bureau's Strong Tradition of Inclusive Public Outreach

- The Bureau should expand its strong tradition of inclusive public outreach to all segments of society, including its innovative use of social media and online feedback tools.
- The CFPB should continue to consider comments received after the comment period for a rulemaking has closed, so long as it does so transparently.

Strength Three: Maintain and Improve the Bureau's Transparency

- We oppose any efforts by new leadership to back-pedal from the Bureau's strong tradition of transparency during rulemakings.
- Because the Acting Director has praised industry lobbyists and received campaign contributions from them in the past, the Bureau should strengthen its *ex parte* policy to ensure timely public posting of all *ex parte* communications involving rulemakings.

Strength Four: Continue CFPB Responsiveness to the Public During the Implementation Phase

- The Bureau should continue its level of public responsiveness during implementation.

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Agency rulemakings are inherently exercises in democratic participation. That is why, when Congress enacted the notice-and-comment provisions of the Administrative Procedure Act (APA),¹ it provided an opportunity for *all* members of the public – regardless of their occupation, political affiliation, state of residence, income or wealth – to express their views on and help shape forthcoming agency rules. This opportunity for broad public participation is especially important in our representative democracy because agency heads are not elected by the public.

In the seven short years since the Consumer Financial Protection Bureau (CFPB or the Bureau) came into being, the Bureau has seriously embraced both the letter and the spirit of the APA. It has operated one of the most inclusive, transparent, fact-based and responsive rulemaking processes of any federal regulator. In the process, the Bureau has demonstrated its unwavering commitment to serving the American public. Its rulemaking history is one that the Bureau should be proud of and that all agencies should emulate.

We are now concerned that under its new leadership, the Bureau is retreating from its commitment to fair, open, and data-driven rulemakings and is responding to external pressure from industry. That would be a grave mistake. No major Bureau rule *can or will* satisfy every stakeholder on every issue it holds dear, whether the stakeholders are consumer advocates or members of industry. Rulemakings, especially major ones, are the product of compromise. But the Bureau's fact-finding processes, its notice-and-comment rulemaking procedures, and its implementation efforts provide every stakeholder with three important assurances: *one*, that public engagement will be transparent, *two*, that decisions will be informed wherever possible by thorough data analysis, and *three*, that industry, consumers and other members of the public will have ample opportunities to express their views and be heard. In these ways, the Bureau's rulemaking process affords fundamental respect and fairness to all members of the public. It is essential that these assurances not be abridged.

We open this comment letter in Section 1 by explaining the special role that CFPB rulemaking plays in protecting consumers and the economy at large. Section 2 provides a general description of the Bureau's rulemaking process and related activities. In Section 3, we detail four key strengths--fact-based rulemaking, inclusiveness, transparency, and responsiveness--that make the CFPB's rulemakings publicly accountable, grounded in fact and carefully decided. In this section, we discuss at length our concerns about recent indications that the Bureau is taking steps to undermine those strengths:

- *One*, by undermining the ability of the Research and Markets Teams to on-board and analyze key data;
- *Two*, jeopardizing the statutory independence of the CFPB by moving the cost-benefit analysis function to the Director's office, while the Acting Director is concurrently an official of the White House; and

¹ 5 U.S.C. § 553.

- *Three*, by openly expressing partiality to lobbying by industry representatives.

These steps are inimical to the impartiality, fairness, and transparency of CFPB rulemakings and we oppose them.

1. The Special Role of CFPB Rulemaking

By Congressional design, CFPB rulemaking plays a special role in safeguarding consumer welfare and our nation's financial stability. When Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act or Dodd-Frank), it made a carefully considered decision to assign exclusive rulemaking responsibility to the Bureau for the federal consumer financial laws.² In doing so, Congress sought to address three important problems that culminated in the 2008 financial crisis.

The first problem involved the previous allocation of key rulemaking authority for consumer financial protection to the Board of Governors of the Federal Reserve System before 2008. When the mortgage bubble was expanding, the Board refused to use its rulemaking authority to prohibit risky and exploitative mortgage lending.³ Part of that reticence was due to the Board's conflicting missions (causing it to elevate short-term bank profitability over long-term financial stability and consumer welfare) and part of it was due to then-Chairman Alan Greenspan's philosophical aversion to government intervention into markets.⁴ Because the Board refused to adopt rules that Congress had mandated by statute, in the Dodd-Frank Act, Congress transferred the Board's rulemaking powers for consumer financial protection to the newly created Bureau and made consumer financial protection its sole mission.⁵

The second problem involved regulatory arbitrage. The lack of strong federal consumer protection rules for mortgages pre-crisis caused about half the states to enact anti-predatory lending laws of their own. The uneven strength of those laws, the lack of such laws in many states, and the effects of federal preemption for national banks, federal savings associations, and their operating subsidiaries together produced an uneven playing field in which lenders switched to federal banking charters with weaker rules to escape strong state laws. Congress ended this ability to shop for the most permissive laws by consolidating rulemaking authority in the CFPB

² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1012(a)(10), 1022 (2010).

³ For a description of that history, see KATHLEEN C. ENGEL & PATRICIA A. MCCOY, *THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE AND NEXT STEPS* 194-98 (New York, N.Y.: Oxford Univ. Press, 2011). Specifically, the Board refused to promulgate two rules mandated by Congress -- one implementing provisions in the Home Ownership and Equity Protection Act (HOEPA) that required the Board to adopt a rule prohibiting unfair or deceptive mortgage practices and the other requiring the Board to promulgate a rule implementing integrated mortgage disclosures. *See id.*

⁴ *See id.* at 189-94; Prepared Statement of Patricia A. McCoy, Hearing on "Consumer Protections in Financial Services: Past Problems, Future Solutions" before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, March 3, 2009, at 25-27 (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1367977.

⁵ Specifically, in the Dodd-Frank Act, Congress instructed the Bureau to "implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services" [that] "are fair, transparent, and competitive." Dodd-Frank Act, § 1021(a).

and making CFPB rules applicable to virtually all providers of consumer financial services nationwide, regardless of their charter or location.⁶ In so doing, Congress leveled the competitive playing field and established a federal floor that protects reputable providers from ruinous competition by unscrupulous companies.

Finally, when Congress created the CFPB's rulemaking powers, it was mindful of the weak rulemaking powers of the Federal Trade Commission (FTC). In the 1975 Magnuson-Moss Act, Congress hobbled the FTC's rulemaking ability by imposing rigid rulemaking procedures on top of those already required by the APA. After Congress enacted Magnuson-Moss, the FTC adopted no significant rules governing nonbank providers⁷ and relied on enforcement actions instead.

Congress took pains to avoid replicating that situation in Dodd-Frank by conferring standard, more flexible APA rulemaking powers on the CFPB and applying those rules to banks and nonbanks alike. Because its rulemaking powers are more workable than those of the FTC, the CFPB does not have to rely on enforcement actions alone to exercise its jurisdiction. This benefits industry because, unlike enforcement, the rulemaking process affords regulated entities advance notice of the Bureau's expectations and ample opportunities for input. The rulemaking process also avoids the moral approbation that enforcement actions entail.

In the Dodd-Frank Act, Congress made sure to protect the independence of CFPB rulemakings to the same extent as rules promulgated by other federal banking regulators. Under Executive Order 12866, the Bureau and all other federal banking regulators are exempt from submission of their rules to the Office of Information and Regulatory Affairs (OIRA) of the White House's Office of Management and Budget (OMB) for review and cost-benefit analysis.⁸ This exemption is designed to ensure the neutrality of CFPB rules and to insulate them from manipulation for short-term political gain by the White House and OMB. In the place of White House oversight, Congress retains ultimate control over CFPB rules.

2. General Description of the Bureau's Rulemaking Process and Related Activities

We now turn to a description of the Bureau's rulemaking process. Normally, discussions of agency rulemaking focus on the formal legal aspects of that process. These include the public notice-and-comment procedures for informal rulemakings under the APA and other rulemaking requirements and authorities enacted by Congress in the Dodd-Frank Act.⁹

But these formal legal aspects are just one part of the story. The CFPB precedes major rulemaking proceedings with an extensive initial period of study, public consultation and

⁶ *Id.* § 1022(b)(4)(A).

⁷ *See, e.g.,* Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979 (2015).

⁸ Executive Order 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993). This results from an exemption in Executive Order 12866 for agencies deemed to be "independent regulatory agencies" under the Paperwork Reduction Act, including the CFPB. *Id.* § 3(b); 44 U.S.C. § 3502(5) (listing independent regulatory agencies, including the CFPB).

⁹ Congress conferred general rulemaking authority on the Bureau in that legislation. Dodd-Frank Act, §§ 1012(a)(10), 1022.

empirical analysis before a proposed rulemaking is even launched. Later, more study, public input, and empirical analysis occur during the proposed rule stage through to the unveiling of a final rule. After adoption, the Bureau takes its responsibility seriously to help industry participants and other members of the public with implementation of final rules by providing them with official commentaries, compliance aids and guidances, informal consultation, and online tools. More than once, when implementation problems have surfaced, the Bureau has even issued follow-on amendments to the rules to address those problems.

In short, CFPB rulemaking is thoughtful, analytical, and scrupulously fair. On the front end, it is built on a deep foundation of broad public input and rigorous data analysis. On the back end, it is followed by a detailed implementation process that provides guidance to regulated entities and continued opportunity for public input. It is important that these features be fostered and preserved.

a. Preliminary Consultation and Study

Major federal rulemakings do not occur in a vacuum. To the contrary, policymakers must decide that a rule is necessary to begin with. Assuming policymakers make the judgment to proceed with a rule, further input and analysis is needed to diagnose exactly what needs to be solved and assess the pros and cons of different courses of action.

For CFPB rulemakings that are mandated by statute, Congress makes the decision to initiate a rulemaking, but entrusts the details of the rule to the Bureau's discretion.¹⁰ For rulemakings that Congress empowered the Bureau to issue at its discretion, Congress tasked the Bureau with analyzing whether a rulemaking should go forward in the first place.¹¹

When the Bureau contemplates exercising its discretion, it is important not to leap to judgment. For that reason, the Bureau has made it a practice to elicit broad public input and conduct substantial preliminary analysis in advance of any proposed rulemaking to assure that all rulemaking decisions reflect balanced judgment. This assures that a wide range of perspectives are considered and options are carefully weighed before the Bureau chooses among those options for a Notice of Proposed Rulemaking.

i. Broad Public Input

Getting input from a broad spectrum of stakeholders—including consumers, non-profit advocates, and industry representatives—is key to the Bureau's initial period of neutral evaluation. By fostering active public engagement, the Bureau receives needed facts and viewpoints from a full range of perspectives that helps it ensure neutral and well-informed policy decisions.

¹⁰ Examples include the ability-to-repay rule and the TILA-RESPA integrated disclosure rule for residential mortgages. *See, e.g., id.* §§ 1100A(5), 1411-1414.

¹¹ A recent example was the mandatory arbitration rule. *Id.* § 1028(b). These discretionary rulemakings include potential amendments to the inherited regulations and discretionary rulemakings under other new agency powers conferred by Congress in the Dodd-Frank Act.

The TILA-RESPA integrated disclosure rulemaking for residential mortgages provides a useful case study of the CFPB’s broad public outreach. The mortgage disclosure outreach process started in September 2010, ten months before the CFPB formally opened its doors. That fall, members of the CFPB Implementation Team (Team)¹² held multiple meetings with community banks, credit unions, settlement agents, other mortgage industry representatives, vendors, consumer groups, and other banking regulators to educate themselves on the challenges consumers and industry faced with the-then federal mortgage disclosures.¹³ In December 2010, the Team held a mortgage disclosure symposium where industry members, marketing experts, designers, public interest groups, and other interested stakeholders briefed the Team on various potential approaches for improving the disclosures.¹⁴

Later, as part of its outreach process for the mortgage disclosure rulemaking, the Bureau developed Internet tools to make it easy for members of the public—including financial services providers and consumers alike—to share their suggestions and concerns.¹⁵ For instance, when it was developing the mortgage disclosure prototypes in 2011, the Bureau posted two prototypes on its “Know Before You Owe” website each month and elicited public feedback on the designs through an online interactive tool. In the first seven rounds of input, the Bureau received 27,000 comments on the prototypes, about half from consumers and half from industry, either through its online portal or by email. The comments proved extremely helpful to the staff by pinpointing where the prototypes fell short and identifying useful solutions. Using those comments, the Bureau’s staff was able to quickly process the feedback, revise the sample forms, and then post the new prototypes online for a fresh round of public comments.¹⁶

This iterative and intensive feedback process played a crucial role by informing Bureau staff of the most important problems with various disclosure prototypes, of stakeholders’ key goals, and of design, cost and implementation considerations. Drawing on this experience, the Bureau later

¹² The Treasury Department created the Team in early fall 2010 to stand up the CFPB. The Team members who worked on the mortgage disclosure project later transitioned to the Bureau.

¹³ For a description, see Bureau of Consumer Financial Protection, *Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z); Final Rule*, 78 Fed. Reg. 79,730, 79,741-44 (Dec. 31, 2013) [hereinafter TRID Final Rule].

¹⁴ The preamble to the final TILA-RESPA integrated disclosure rule gave a sense of the impressive depth and breadth of the Bureau’s public outreach efforts pre-rulemaking (*id.* at 79,744):

While developing the proposed forms and rules to integrate the disclosures, and throughout its qualitative testing of the prototype disclosure forms, the Bureau continued to conduct extensive outreach to consumer advocacy groups, other regulatory agencies, and industry representatives and trade associations. The Bureau held meetings with individual stakeholders upon request, and also invited stakeholders to meetings in which individual views of each stakeholder could be heard. The Bureau conducted these meetings with a wide range of stakeholders that may be affected by the integrated disclosures, even if not directly regulated by the final rule. The meetings included community banks, credit unions, thrifts, mortgage companies, mortgage brokers, settlement agents, settlement service providers, software providers, appraisers, not-for-profit consumer and housing groups, and government and quasi-governmental agencies. Many of the persons attending these meetings represented small business entities from different parts of the country.

¹⁵ Leonard J. Kennedy, Patricia A. McCoy, & Ethan Bernstein, *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century*, 97 CORNELL L. REV. 1141, 1158, 1165-66 (2012).

¹⁶ For a fuller description of this public feedback process, see *id.* at 1165-66; TRID Final Rule, *supra* note 13, at 79,744.

developed prototype disclosures for student loans and credit cards and, again, solicited public input from citizens, consumer groups, and the financial services industry.¹⁷

These outreach efforts are not limited to mortgages, student loans, or credit cards.¹⁸ Since its launch date in July 2011, the Bureau has continued to solicit the views of consumers, community leaders, industry representatives, and government officials on other policy questions through hundreds of meetings, roundtables, town halls, other public meetings, briefing calls, and the complaint and inquiry process. To broaden these efforts, the Bureau has also issued Requests for Information (RFIs)¹⁹ and Advance Notices of Proposed Rulemakings²⁰ inviting public input to illuminate areas needing study and to identify data sources.²¹ Instead of relying on *Federal Register* publication and press releases alone, the Bureau regularly spreads word of the opportunity to comment through the Internet and social media.²²

The Bureau also has expanded its avenues for public input in other ways. In one important step, the CFPB kicked off regular field hearings around the country to hear from individual consumers, advocates, and industry about the issues in specific consumer financial services markets. One such field hearing was on payday lending in Birmingham, Alabama, another was on mandatory arbitration clauses in Albuquerque, a third was on credit card lending in Chicago, and there have been many more. In another step, the Bureau convened four new advisory councils--the Consumer Advisory Board, the Community Bank Advisory Council, the Credit Union Advisory Council, and the Academic Research Council--to provide it with ongoing, informed perspectives from different sectors on potential rulemakings.²³ The Bureau also adopted its “Policy for Consultation with Tribal Governments” in 2013 in order to facilitate feedback from tribal governments and tribal members before issuing Notices of Proposed Rulemaking.²⁴

¹⁷ Kennedy et al., *supra* note 15, at 1166.

¹⁸ For a description of these broader post-launch outreach efforts, see, e.g., Consumer Financial Protection Bureau, Semi-annual report of the Consumer Financial Protection Bureau, October 1, 2016-March 31, 2017, at 52-53 (Spring 2017) [hereinafter March 2017 Semi-annual Report].

¹⁹ See, e.g., Consumer Financial Protection Bureau, *Impacts of Overdraft Programs on Consumers*, 77 Fed. Reg. 12,031, 12,031-33 (Feb. 28, 2012); Consumer Financial Protection Bureau, *Request for Information Regarding Private Student Loans and Private Educational Lenders*, 76 Fed. Reg. 71,329, 71,330 (Nov. 17, 2011).

²⁰ Bureau of Consumer Financial Protection, *Debt Collection (Regulation F); Advance Notice of Proposed Rulemaking*, 78 Fed. Reg. 67,848, 67,853 (Nov. 12, 2013); Bureau of Consumer Financial Protection, *Electronic Fund Transfers (Regulation E); Advance Notice of Proposed Rulemaking*, 77 Fed. Reg. 30,923, 30,925 (May 24, 2012) (prepaid cards).

²¹ See, e.g., Consumer Financial Protection Bureau, *Request for Information Regarding Bureau Rulemaking Processes*, 83 Fed. Reg. 10,437, 10,439 (March 9, 2018) [hereinafter Rulemaking RFI].

²² For a description of the Bureau’s various social media campaigns inviting the public to comment on inquiries into prepaid cards, overdraft protection, private student loans, reverse mortgages, and payday loans through live-streaming, blog posts, Twitter, and Facebook, see Patricia A. McCoy, *Public Engagement in Rulemaking: The Consumer Financial Protection Bureau’s New Approach*, 7 BROOKLYN J. CORP., FINAN. & COMMERCIAL L. 1, 13-15 (2013) [hereinafter McCoy 2013].

²³ See Consumer Financial Protection Bureau, Advisory Groups, <https://www.consumerfinance.gov/about-us/advisory-groups/> (viewed Apr. 25, 2018); Dodd-Frank Act, § 1014.

²⁴ Consumer Financial Protection Bureau, Policy for Consultation with Tribal Governments (2013), https://files.consumerfinance.gov/f/201304_cfpb_consultations.pdf (viewed Apr. 27, 2018).

In some cases, Congress mandated preliminary consultation in the Dodd-Frank Act. For instance, the Bureau by law must consult with specific federal regulators prior to proposing a rule (and later during the comment period) concerning the rule’s consistency with fellow regulators’ prudential, market, or systemic objectives.²⁵ In addition, Congress required the Bureau to set up a separate major feedback channel for draft proposed rules that could have a significant economic effect on a substantial number of small businesses. This channel has made the preliminary stage even more responsive to public input, as we now discuss.

ii. Small Business Review Panels

This special feedback channel is known as the small business review panel process and was mandated by the Dodd-Frank Act.²⁶ In that legislation, Congress imposed special procedural requirements on any CFPB notice-and-comment rulemaking “which will have a significant economic impact on a substantial number of small entities”²⁷ under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).²⁸ The only other federal agencies that are subject to SBREFA requirements are the Environmental Protection Agency and the Department of Labor’s Occupational Safety and Health Administration.²⁹

SBREFA, among other things, requires the formation of a review panel with representatives from the CFPB, the Chief Counsel for Advocacy of the Small Business Administration, and the Office of Management and Budget’s Office of Information and Regulatory Affairs.³⁰ Before the Bureau may publish a proposed rule that falls under SBREFA, the review panel must meet with a selected group of representatives from small businesses to get their feedback on the potential economic benefits and burdens of a future proposed rule and to explore alternative approaches that might minimize the regulatory burden on small businesses.³¹ Later, within sixty days of convening, the review panel must issue a public report on the comments of the small business representatives.³² The report must also present the review panel’s findings on the potential economic impacts of any proposed rule on small businesses and any significant alternatives that could accomplish the rule’s objectives while minimizing its impacts.³³ The CFPB takes the comments and findings into account when drafting a proposed rule.³⁴

²⁵ Dodd-Frank Act, § 1022(b)(2)(B)-(C). The CFPB and the Federal Trade Commission also entered into a Memorandum of Understanding for consultation prior to any rulemaking on unfair, deceptive, or abusive acts or practices. See Rulemaking RFI, *supra* note 21, at 10,438-39.

²⁶ Dodd-Frank Act, § 1100G(a). This discussion of the SBREFA process is taken from McCoy 2013, *supra* note 22, at 18-20.

²⁷ 5 U.S.C. § 609(a). For a list of CFPB rulemakings that have utilized the SBREFA process so far, see Rulemaking RFI, *supra* note 21, at 10,438 n.9. For a general description of the CFPB’s SBREFA process, see CFPB, Small Business Review Panels, <https://www.consumerfinance.gov/policy-compliance/rulemaking/small-business-review-panels/> (visited Apr. 26, 2018).

²⁸ Pub. L. No. 104-121, 110 Stat. 857 (1996).

²⁹ 5 U.S.C. § 609(d).

³⁰ *Id.* § 609(b)(3).

³¹ *Id.* § 609(b); Press Release, CFPB, Consumer Financial Protection Bureau Convenes Small Business Panel for Know Before You Owe Mortgage Disclosures (Feb. 21, 2012) [hereinafter Small Business Panel].

³² 5 U.S.C. § 609(b)(5).

³³ *Id.* § 609(b)(5); CFPB, FACT SHEET: SMALL BUSINESS REVIEW PANEL PROCESS (2012) [hereinafter FACT SHEET].

³⁴ See, e.g., CFPB Mortgage Disclosure Team, *SBREFA, Small Providers, and Mortgage Disclosure*, CFPB (Feb. 21, 2012).

The main purpose of SBREFA was to elicit comments from small businesses on the effects of potential CFPB regulations. But the SBREFA process had an unanticipated benefit, which is written disclosure to the public at large of rulemaking options under consideration by the Bureau before a proposed rule is published. This benefit stems from the fact that before every SBREFA outreach meeting, the CFPB typically distributes briefing materials to the small business representatives who are chosen for outreach as well as to the general public.³⁵ The materials provide a rich overview of the options that the CFPB has under consideration, including information on the background of the rulemaking, a description of the alternative approaches being considered, a preliminary analysis of the likely economic impacts of those approaches on small businesses, and a list of questions and issues on which the review panel will seek input.³⁶ Thus, the SBREFA process offers the added benefit of informing the entire public of the direction in which the Bureau is headed before any proposed rule comes out. That gives the public added opportunity for input before the Bureau's approach becomes hard-baked into a proposal.

iii. Market and Data Analysis

The CFPB does not rush into rulemakings. To the contrary, the Bureau has preceded virtually all of its major proposed rulemakings with careful empirical analyses.³⁷ Further, where the Bureau has discretionary rulemaking authority, the agency does not pre-judge the need for a rule. Instead, the Bureau's Regulations, Markets, and Research Division (RMR) conducts economic studies of the market in question, usually based on large data sets following consultation with industry, academia, think tanks, consumer groups and others, to evaluate whether a rule should even be considered in light of the competing benefits and costs. If a discretionary rulemaking moves forward, the Bureau will run more empirical analyses to pinpoint how the market has failed and to evaluate competing approaches for how to fix it.³⁸

Take the payday lending rule, which was one of the Bureau's discretionary rules. RMR studied the payday lending market for more than four years before the Bureau issued its final payday lending rule in fall 2017.³⁹ During that period, RMR issued four empirical reports analyzing and measuring consumer welfare outcomes in the payday lending industry.⁴⁰ Similarly, the Bureau

³⁵ For example, by August 2012, the Bureau made its SBREFA briefing materials available online to the public for three mortgage rulemakings. The first time was for the integrated mortgage disclosure rulemaking discussed earlier; later, the Bureau released the briefing materials for the mortgage loan originator and mortgage servicing rulemakings. *Id.*; Ashley Gordon, *What the Proposed Mortgage Servicing Rules Could Mean for You*, CFPB (Apr. 10, 2012); Press Release, CFPB, Consumer Financial Protection Bureau Considers Rules to Simplify Mortgage Points and Fees (May 9, 2012); *see also* Small Business Panel, *supra* note 31; Press Release, CFPB, Consumer Financial Protection Bureau Outlines Borrower-Friendly Approach to Mortgage Servicing (Apr. 9, 2012).

³⁶ FACT SHEET, *supra* note 33.

³⁷ The ability-to-repay rule was a special case. Because the Bureau inherited that rulemaking from the Board of Governors of the Federal Reserve System, which had issued the proposed rule, this initial research occurred both at the Bureau and at the Federal Reserve.

³⁸ These analyses build on an existing foundation of the ongoing monitoring of consumer financial markets for developments and any risks to consumers required by Section 1022(c) of the Dodd-Frank Act.

³⁹ Consumer Financial Protection Bureau, *Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 82 Fed. Reg. 54,472 (Nov. 17, 2017).

⁴⁰ Consumer Financial Protection Bureau, Supplemental findings on payday, payday installment, and vehicle title loans, and deposit advance products (June 2, 2016); Consumer Financial Protection Bureau, Online Payday Loan Payments (Apr. 20, 2016); Consumer Financial Protection Bureau, CFPB data point: Payday lending (March

preceded the issuance of its mandatory arbitration rule in summer 2017⁴¹ with two major empirical studies of problems with arbitration clauses in the two preceding years.⁴²

These episodes epitomize the Bureau's longstanding commitment to in-depth, neutral evaluation before making any decision to initiate discretionary rulemakings. Here, again, the TILA-RESPA integrated disclosure rulemaking for residential mortgages provides a good example of this research process. Before issuing a proposed rule, the Bureau considered it important to design sample disclosure forms that informed mortgage applicants about the features, benefits, and risks of their loans as effectively as possible. To come up with those forms, the CFPB undertook the most sophisticated testing of disclosures in history of any U.S. banking regulator. During the qualitative testing phase, the Bureau did field testing of ten rounds of prototype forms in nine cities over a year.⁴³ This extensive course of testing afforded multiple opportunities to fine-tune the forms in response to experiences with real consumers and lending officials in the field.

Nothing in this process, moreover, prejudices the need for discretionary rulemakings. To the contrary, the CFPB has conducted many studies on consumer financial markets without commencing rulemakings. Examples include, but are not limited to, reverse mortgages,⁴⁴ overdrafts,⁴⁵ and student loans.⁴⁶ This research stage is designed to guard against any rush to judgment resulting in unnecessary or overbroad rulemaking proceedings. Indeed, in one instance, serious problems in the debt collection market suggested a need for a rule but the Bureau concluded that further study was required, so it issued an Advance Notice of Proposed Rulemaking (ANPR) instead to gather additional data on the consumer welfare implications of debt collection practices.⁴⁷

In short, the CFPB has done a remarkable job of public engagement and empirical research during the information-gathering phase before rulemakings are initiated. It has gone above and beyond by pioneering innovative technologies to reach out to people. It has made its thinking transparent through the public release of the SBREFA briefing materials, before any proposals solidify. It has studied consumer problems empirically and neutrally to determine whether the facts support intervention before the Bureau initiates a rule. This is how rulemaking should be.

24, 2014); Consumer Financial Protection Bureau, White Paper on Payday Loans and Deposit Advance Products (Apr. 24, 2013).

⁴¹ Consumer Financial Protection Bureau, *Arbitration Agreements: Final rule; official interpretations*, 82 Fed. Reg. 33,210 (July 19, 2017). Congress subsequently nullified this rule under the Congressional Review Act.

⁴² Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress 2015* (March 10, 2015); Consumer Financial Protection Bureau, *Arbitration study preliminary results* (Dec. 12, 2013).

⁴³ TRID Final Rule, *supra* note 13, at 79,743.

⁴⁴ *See, e.g.*, Consumer Financial Protection Bureau, A closer look at reverse mortgage advertisements and consumer risks (June 3, 2015); Consumer Financial Protection Bureau, *Reverse Mortgages Report* (June 28, 2012). Congress gave the Bureau authority to issue rules on reverse mortgages in Section 1076 of the Dodd-Frank Act.

⁴⁵ *See* Consumer Financial Protection Bureau, *Consumer voices on overdraft programs* (Nov. 21, 2017); Consumer Financial Protection Bureau, *CFPB Data Point: Frequent overdrafters* (Aug. 4, 2017); *see* Jeff Bater, *CFPB Rulemaking Agenda Under Trump Pared Back*, Bloomberg Law Banking Daily, May 9, 2018.

⁴⁶ *See, e.g.*, Consumer Financial Protection Bureau, *CFPB Data Point: Student loan repayment* (Aug. 16, 2017).

⁴⁷ *See, e.g.*, Bureau of Consumer Financial Protection, *Debt Collection (Regulation F); Advance Notice of Proposed Rulemaking*, 78 Fed. Reg. 67,848, 67,853 (Nov. 12, 2013).

b. APA Rulemaking Proceeding Process

Normally, the CFPB commences the notice-and-comment APA rulemaking process by publishing a Notice of Proposed Rulemaking (NPRM) in the *Federal Register*.⁴⁸ Among other things, the NPRM details the text or substance of the proposed rule, the justification for the proposal, and the statutory authority for the rule. Following publication of the proposed rule, the public has the opportunity to submit written comments on the proposal by a stated deadline. Comments may be submitted electronically and are available for public viewing online at *regulations.gov*. After the official comment period has closed but while a rulemaking is pending, the Bureau has also had an informal practice of allowing members of the public to submit additional written replies to the first round of comments.

After the formal comment period has closed, the Bureau's staff reviews the comments with an eye to needed changes.⁴⁹ Then, management and staff conduct further internal deliberations involving all of the divisions of the Bureau to decide on the final path and shape of the rule.

Sometimes, the Bureau reopens proposed rulemakings or conducts additional data analysis rather than proceed directly to issuance of the final rule. This happened in the ability-to-repay rulemaking, where new issues came to the fore after the Board of Governors of the Federal Reserve Board published the proposed rule on May 11, 2011, before the Bureau had opened its doors and inherited the rulemaking.⁵⁰ Because some of these issues had not been aired for comment in the original notice of proposed rulemaking, the Bureau decided to reopen the comment period to allow the public to comment on the new issues, information, and data.⁵¹

Meanwhile, most major CFPB rulemaking proceedings continue to undergo intensive empirical research by RMR's markets experts and economists after the NPRM is issued to evaluate new issues, including those flagged in the comments. For example, following publication of the proposed TILA-RESPA integrated disclosure rule, the Bureau conducted quantitative testing of the final disclosure forms with 858 consumers in twenty locations across the country to make sure that the new forms were more effective than the old ones before issuing the final rule.⁵²

Once the Bureau decides to issue the final rule, more analysis and writing remains. The Bureau will make any needed changes to the final text of the rule. In addition, much care will go into writing the preamble to the final rule. The preamble will include responses to the comments and justifications for the final form of the rule. Importantly, the preamble also will set forth the Bureau's impact analysis of the potential benefits and costs to consumers and covered persons, including any potential reduction of access by consumers to consumer financial products or services due to the rule.⁵³

⁴⁸ 5 U.S.C. § 553. The only exception is where the Bureau issues an ANPR. See Rulemaking RFI, *supra* note 21, at 10,438, for a summary of the contents of NPRMs.

⁴⁹ In some circumstances, the Bureau could even decide, based on the comments, to postpone a discretionary rulemaking.

⁵⁰ See Board of Governors of the Federal Res. Sys., *Regulation Z; Truth in Lending*, 76 Fed. Reg. 27,390 (proposed May 11, 2011) (noting that the CFPB was scheduled to open on July 21, 2011).

⁵¹ See Bureau of Consumer Financial Protection, *Truth in Lending (Regulation Z)*, 77 Fed. Reg. 33,120, 33,120-21 (June 5, 2012).

⁵² TRID Final Rule, *supra* note 13, at 79,748-49.

⁵³ See Dodd-Frank Act, § 1022(b)(2).

To issue the final rule, the Bureau must publish the final text plus the preamble to the rule in the *Federal Register* at least thirty days before its effective date.⁵⁴ In practice, to give affected parties sufficient time to comply, the Bureau provides much more time before major rules take effect.

The CFPB is accountable for its rulemakings both through Congressional oversight plus multiple avenues of review. Aggrieved parties can challenge the Bureau's final rules under the APA in federal court.⁵⁵ In addition, upon the petition of any member agency of the Financial Stability Oversight Council (FSOC), FSOC may set aside any final CFPB rule in whole or in part if it decides that the regulation or provision would put the safety and soundness of the U.S. banking system or the stability of the U.S. financial system at risk.⁵⁶ Congress, with approval from the President, can nullify a CFPB rule within sixty days of publication or receipt of a mandatory report on the rule to Congress,⁵⁷ whichever is later, under the Congressional Review Act.⁵⁸ Congress can also amend the U.S. Code to overturn a CFPB rule.

c. Implementation

The CFPB's rulemaking process does not end with the promulgation of a final rule. Once a final rule has been announced, the Bureau undertakes a thorough implementation process to facilitate industry's compliance with the rule.⁵⁹

The Bureau thinks seriously about implementation issues long before a final rule is announced. In the testing and online public comment on the mortgage disclosure prototypes, for example, the CFPB asked lenders and brokers to identify implementation problems so that they could be addressed.⁶⁰ Similarly, the public comment process and small business review panel closely examined the ease of implementation for the new data standards for expanded data reporting under the Home Mortgage Disclosure Act (HMDA).⁶¹ The agency's focus on the practical implementation runs throughout all of its substantive rulemakings.

⁵⁴ See 5 U.S.C. § 553(d). For a description of the preamble to a final rule, see Rulemaking RFI, *supra* note 21, at 10,438.

⁵⁵ 5 U.S.C. § 702. 5 U.S.C. § 706(2) sets forth the standard for review:

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;

...

⁵⁶ Dodd-Frank Act, § 1023(a); *see also id.* § 1023(b)-(f).

⁵⁷ For a description of this report, see Rulemaking RFI, *supra* note 21, at 10,438.

⁵⁸ 5 U.S.C. § 801.

⁵⁹ Meanwhile, the Bureau's RMR Division conducts assessments of existing rules to gauge their effectiveness and any need for change. We plan to discuss that assessment process in a response to the Bureau's Request for Information on Adopted Rules.

⁶⁰ See Kennedy et al., *supra* note 15, at 1164; McCoy 2013, *supra* note 22, at 6. The Bureau has also instituted and expanded its eRegulations platform to make CFPB regulations and their commentaries easier to navigate and understand. March 2017 Semi-annual Report, *supra* note 18, at 69.

⁶¹ Bureau of Consumer Financial Protection, *Home Mortgage Disclosure (Regulation C); Proposed Rule*, 79 Fed. Reg. 51,732, 51,761-62 (Aug. 29, 2014).

After the Bureau unveils a final rule, the staff devotes substantial resources to supporting industry implementation through written materials, public outreach, conference speeches, outreach meetings, phone calls, and coordination with other federal regulators.⁶² Central to this process is the creation of compliance aids to assist market participants with the transition. Typically, these aids include guides, instructional videos and webinars, summaries of the rule, compliance timelines, coverage charts and other reference charts, relevant sections of the examination manual, consumer education materials, online tools, FAQs, and, in the case of disclosure rules, sample forms and design files.⁶³ In addition to these compliance aids, the CFPB issues official guidance on specific rules from time to time.⁶⁴

For the TILA-RESPA mortgage disclosure rule, for example, the Bureau created five separate compliance guides: a small entity compliance guide, a guide to the loan estimate and closing disclosure forms, a guide for real estate professionals, a guide for settlement professionals, and a readiness guide to prepare for examinations. The Bureau updated these guides as needed. In addition, the Bureau created seven compliance videos and posted a “question index” to find out which video answered which question.⁶⁵

The CFPB makes official guidances and compliance aids easily accessible on the agency’s website. For each major rule, the Bureau creates a public website for implementation.⁶⁶ On top of links to the final rule in question, any official guidance, and the compliance aids, each website provides a link where industry professionals can ask the staff compliance questions. In addition, service providers can sign up online for email updates about the rule’s implementation. Another link connects readers to the “Supervisory Highlights” webpage, where CFPB examination staff describe any compliance problems they have encountered to date with the rule.

⁶² March 2017 Semi-annual Report, *supra* note 18, at 65, 67.

⁶³ Consumer Financial Protection Bureau, Implementation and Guidance, <https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/> (viewed Apr. 27, 2018). The HMDA implementation materials are even more extensive. The Bureau’s Resources for HMDA Filers website contains filing instruction guides, links to a technology preview webpage and a page to file online, and online tools including a Loan/Application Register (LAR) formatting tool, a file format verification tool, a rate spread calculator, and a check digit tool. March 2017 Semi-annual Report, *supra* note 18, at 66-67; Consumer Financial Protection Bureau, Resources for HMDA Filers, <https://www.consumerfinance.gov/data-research/hmda/for-filers> (viewed Apr. 28, 2018).

⁶⁴ *See, e.g.*, March 2017 Semi-annual Report, *supra* note 18, at 65-69; Consumer Financial Protection Bureau, Implementation and Guidance, <https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/> (viewed Apr. 27, 2018); Consumer Financial Protection Bureau, Status of New Uniform Residential Loan Application and Collection of Expanded Home Mortgage Disclosure Act Information about Ethnicity and Race in 2017 under Regulation B, <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/status-new-uniform-residential-loan-application-and-collection-expanded-home-mortgage-disclosure-act-information-about-ethnicity-and-race-2017-under-regulation-b/> (viewed Apr. 27, 2018).

⁶⁵ Consumer Financial Protection Bureau, TILA-RESPA Integrated Disclosure rule implementation, <https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/tila-respa-disclosure-rule/> (viewed Apr. 27, 2018).

⁶⁶ *See, e.g.*, Consumer Financial Protection Bureau, Title XIV rules: mortgage origination, <https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/title-xiv-mortgage-rules/> (viewed Apr. 27, 2018).

Fine-tuning the rules when needed through amendments is another important part of the implementation process. Rules may have clerical errors that need to be fixed. Amendments may be needed to solve compliance difficulties in the field. Examples include the need to harmonize a rule to facilitate compliance with other requirements under state law or to create a safe harbor for information obtained by providers using CFPB online tools. In these and other circumstances, the Bureau has not hesitated to amend its final rules when needed. In addition, the CFPB has repeatedly amended its rules to expand exemptions for small business participants and to extend effective dates upon industry request. All in all to date, the Bureau has amended its Home Mortgage Disclosure Act rule twice,⁶⁷ its prepaid rule twice,⁶⁸ its TILA-RESPA mortgage disclosure rule five times,⁶⁹ its loan originator compensation rule twice,⁷⁰ its escrow rule once,⁷¹ its mortgage servicing rule seven times,⁷² and its electronic fund transfer rule eight times.⁷³ The CFPB also issued two interpretive rules for its 2013 final rule under the Home Ownership and Equity Protection Act (HOEPA),⁷⁴ another interpretive rule for its 2013 mortgage servicing rule⁷⁵ and still another for the ability-to-repay rule,⁷⁶ plus a supplemental final rule for appraisals on high-cost mortgages.⁷⁷

⁶⁷ Consumer Financial Protection Bureau, Home Mortgage Disclosure Act (Regulation C), <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/regulation-c-home-mortgage-disclosure-act/> (viewed Apr. 27, 2018).

⁶⁸ Consumer Financial Protection Bureau, Prepaid Accounts under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z), <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/prepaid-accounts-under-electronic-fund-transfer-act-regulation-e-and-truth-lending-act-regulation-z/> (viewed Apr. 27, 2018).

⁶⁹ Consumer Financial Protection Bureau, 2013 Integrated Mortgage Disclosure Rule Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/2013-integrated-mortgage-disclosure-rule-under-real-estate-settlement-procedures-act-regulation-x-and-truth-lending-act-regulation-z/> (viewed Apr. 27, 2018).

⁷⁰ Consumer Financial Protection Bureau, Loan Originator Compensation Requirements under the Truth in Lending Act (Regulation Z), <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/loan-originator-compensation-requirements-under-truth-lending-act-regulation-z/> (viewed Apr. 27, 2018).

⁷¹ Consumer Financial Protection Bureau, Escrow Requirements under the Truth in Lending Act (Regulation Z), <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/escrow-requirements-under-truth-lending-act-regulation-z/> (viewed Apr. 27, 2018).

⁷² Consumer Financial Protection Bureau, Title XIV Rules: Mortgage Servicing, <https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/mortserv/> (viewed Apr. 27, 2018).

⁷³ Consumer Financial Protection Bureau, Electronic Fund Transfers (Regulation E); Amendments, <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/electronic-fund-transfers-regulation-e/> (viewed Apr. 27, 2018).

⁷⁴ Consumer Financial Protection Bureau, High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Regulation X), <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/high-cost-mortgage-and-homeownership-counseling-amendments-truth-lending-act-regulation-z-and-homeownership-counseling-amendments-real-estate-settlement-procedures-act-regulation-x/> (viewed Apr. 27, 2018).

⁷⁵ Consumer Financial Protection Bureau, Safe Harbors from Liability under the Fair Debt Collection Practices Act for Certain Actions Taken in Compliance with Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/safe-harbors-liability-under-fair-debt-collection-practices-act-certain-actions-taken-compliance-mortgage-servicing-rules-under-real-estate-settlement-procedures-act-regulation-x-and-truth-lending-act-regulation-z/> (viewed Apr. 27, 2018).

In sum, the CFPB has prided itself on inclusive public engagement, a high degree of transparency, a strong factual basis for its rules, and responsiveness to the public in its rulemaking process. Now, with the new leadership, it is essential to preserve and build on this strong tradition going forward.

3. Key Strengths of CFPB Rulemaking and the Importance of Preserving Them

The CFPB has run one of the most impressive rulemaking processes of any federal agency to date, chiefly due to four key strengths. The Bureau's rulemakings have been evidence-based, inclusive, transparent, and responsive to the public. By embracing these four strengths, the CFPB has taken to heart the purpose behind APA rulemaking, which Congress intended to be an inherently democratic, public-facing process. There are recent concerns, however, that the Bureau's current leadership is backing away from that tradition, as we now discuss.

a. Data-Driven Decision-Making [RFI Questions 1.b, 4.c, 10]

From its creation, the CFPB has prided itself on decision-making that is firmly based on empirical research and facts. The CFPB has been scrupulous to avoid interpreting its statutory mission of consumer financial protection as a rush to judgment. Rather, every time the CFPB has contemplated substantive rulemaking, it has based its decisions on rigorous social science research.

This commitment to fact-based rulemaking is one of the most impressive aspects of the Bureau's rulemaking process. Right from the start, the Bureau put a priority on data-driven analysis and hard-baked that culture into its structure and rulemaking process. The research team within RMR employs highly regarded Ph.D. researchers in economics, psychology, and behavioral decision-making⁷⁸ who analyze large data sets using sophisticated quantitative methods to examine key questions raised by rulemakings. Separately, the markets teams in RMR monitor the U.S. consumer financial markets for emerging risks and provide empirical policy analyses of those markets, including mortgages, credit cards, small dollar lending, student loans, deposits, debt collection, and credit reporting.⁷⁹ Meanwhile, the Bureau's Academic Research Council,

⁷⁶ Consumer Financial Protection Bureau, Application of Regulation Z's Ability-To-Repay Rule to Certain Situations Involving Successors-in-Interest, <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/application-regulation-zs-ability-repay-rule-certain-situations-involving-successors-interest/> (viewed Apr. 27, 2018).

⁷⁷ Consumer Financial Protection Bureau, Appraisals for Higher-Priced Mortgage Loans, <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/appraisals-higher-priced-mortgage-loans/> (viewed Apr. 27, 2018).

⁷⁸ See Consumer Financial Protection Bureau, CFPB Researchers, <https://www.consumerfinance.gov/data-research/cfpb-researchers/?page=1#o-filterable-list-controls> (viewed Apr. 30, 2018).

⁷⁹ See Kennedy et al., *supra* note 15, at 1155-56. For examples of this monitoring, see Consumer Financial Protection Bureau, Consumer credit trends, <https://www.consumerfinance.gov/data-research/consumer-credit-trends/> (viewed Apr. 30, 2018); Consumer Financial Protection Bureau, Mortgage Performance Trends, <https://www.consumerfinance.gov/data-research/mortgage-performance-trends/> (viewed Apr. 30, 2018).

comprised of leading economists and other academics, provides expert advice to RMR on research methodologies, data collection, and analytic strategies.⁸⁰

Far from working in a vacuum, the CFPB's markets and research teams are fully integrated into the rulemaking process from start to finish. Once a rulemaking has been initiated, members of those teams and staff from the Bureau's other divisions actively work with RMR's attorneys to ensure that the Bureau's rulemaking decisions are based on a firm grasp of the market in question and are tailored to address real consumer harms at the least cost.⁸¹

The CFPB brings its research and markets teams to bear on all major questions raised in major rulemakings: Is there harm to consumers? If so, what is the nature of the market failure and can the market self-correct? Exactly which segment of consumers is harmed and what is the extent of their harm? What are the countervailing benefits to consumers, in type and in size? Assuming that a rule is called for, what is the best way to tailor that rule to address the problem while preserving current benefits to consumers and minimizing costs to industry?

The Bureau draws on a broad range of quantitative and qualitative data to tackle these questions. The research economists and markets experts in RMR analyze large data sets, some assembled by the federal government⁸² and others purchased from private vendors. Their work is augmented with qualitative analysis and field insights from CFPB examinations, consumer complaints, public responses to RFIs, and other sources,⁸³ which are used, among other things, to identify potential problems for further research. This breadth and depth of data sources ensure that CFPB's rulemakings rest on strong empirical foundations.

In short, in just the few short years of its existence, the CFPB has done a remarkable job in establishing its capacity for thorough empirical analysis. It on-boarded major data sets and attracted some of the best experts from around the country to staff its research and markets teams. And it has made good on its commitment to data-driven rulemaking through its process of in-depth, neutral social science research before embarking on rulemaking initiatives.

Given the CFPB's strength in empirical research and markets analysis, the CFPB should refrain from any action that would undermine that strength. *We stress that the CFPB's impartial empirical research benefits consumers and industry alike.* CFPB research guards against over-regulation by the Bureau by zeroing in on the exact nature of any consumer harm and by crafting

⁸⁰ March 2017 Semi-annual Report, *supra* note 18, at 56; *see also* Consumer Financial Protection Bureau, Academic Research Council, <https://www.consumerfinance.gov/about-us/advisory-groups/academic-research-council/> (viewed Apr. 30, 2018). For examples of such recommendations, see Annual report of the Academic Research Council, October 1, 2016-September 30, 2017, at 6-7 (2017), <https://www.consumerfinance.gov/about-us/advisory-groups/academic-research-council/> (viewed Apr. 30, 2018).

⁸¹ Kennedy et al., *supra* note 15, at 1156.

⁸² Examples include the Home Mortgage Disclosure Act dataset and the National Mortgage Database. *See* Federal Financial Institutions Examination Council (FFIEC), HMDA & PMIC Data Products, <https://www.ffiec.gov/hmda/hmdaproducts.htm> (viewed Apr. 30, 2018); Federal Housing Finance Agency, National Mortgage Database (NMDDB[®]), <https://www.fhfa.gov/PolicyProgramsResearch/Programs/Pages/National-Mortgage-Database.aspx> (viewed Apr. 30, 2018).

⁸³ *See, e.g.*, Consumer Financial Protection Bureau, How We Use Complaint Data, <https://www.consumerfinance.gov/complaint/data-use/> (viewed Apr. 30, 2018); March 2017 Semi-annual Report, *supra* note 18, at 64.

tailored solutions. The Bureau’s research into costs and benefits keeps the agency keenly attuned to the twin concerns of minimizing regulatory burden while maintaining consumer access to financial products and services. At the same time, the Bureau’s commitment to research is vital to making sure that questionable market conduct is analyzed and addressed instead of being swept under the rug.

We are deeply concerned about a number of recent developments at the Bureau that could jeopardize the agency’s evidence-based rulemaking going forward:

i. Obstacles to On-boarding Quantitative Data

The CFPB relies heavily on data, including outside data collected by the Bureau, in its rulemaking process. This information includes consumer data on credit cards and mortgages reported in company disclosures to the CFPB, data in commercial databases and government datasets, and information on trends gleaned from the Bureau’s examinations, enforcement actions, and consumer complaint database. Without these robust data originating from the private sector and other external sources, the rigor and impartiality of CFPB rulemaking would be seriously threatened.

In a press conference on December 4, 2017, Acting Director Mulvaney announced that he had frozen the CFPB’s collection of personal information, including loan level data, on privacy and information security grounds. In imposing the freeze, Mr. Mulvaney halted the collection of data that could trace back to *either* consumers or businesses.⁸⁴ Subsequently, in an email to Bureau employees on May 31, 2018, he announced plans to resume the collection of consumers’ personally identifiable information because an outside consultant had determined that the agency’s information security systems “appeared to be well-secured.”⁸⁵

The data freeze had an immediate and damaging effect on essential data flows to the rulemaking process. The Bureau shut down the Extranet, which CFPB examiners depended on to upload company data in advance of examinations. This crippled Supervision’s ability to conduct examinations and analyze trends. Meanwhile, the Bureau’s Enforcement attorneys were barred from reviewing electronic evidence produced in discovery, which hampered enforcement.⁸⁶ The agency also stopped the Research team from the long-planned onboarding of data that was required to carry out the reviews of certain rulemakings mandated by Congress in the Dodd-

⁸⁴ See, e.g., Yuka Hayashi, *New CFPB Chief Curbs Data Collection, Citing Cybersecurity Worries*, WALL ST. J., Dec. 4, 2017.

⁸⁵ Evan Weinberg, *CFPB to Resume Data Collection After Data Security Review*, BANKING DAILY, BLOOMBERG BNA, May 31, 2018.

⁸⁶ See James Kim & Bowen “Bo” Ranney, *CFPB data collection freeze impacting CFPB examinations*, Consumer Finance Monitor (Ballard Spahr, Dec. 15, 2017); Letter from Sen. Elizabeth Warren to Leandra English & Mick Mulvaney 2-4 (Jan. 4, 2018), https://www.housingwire.com/ext/resources/files/Editorial/2018_01_04_Letter_to_English_and_Mulvaney_on_CFPB_Data_Collection.pdf [hereinafter Warren letter].

Frank Act.⁸⁷ Questions also linger about the freeze's effect on the processing and handling of the consumer complaint process.⁸⁸

We strongly agree that protecting data privacy and the security of sensitive data is of the utmost importance. However, the December data freeze was unprecedented and unnecessary and served to paralyze key functions of the Bureau. No other federal agency has ever halted data onboarding in response to a data breach. Instead, if a data breach occurs, federal agencies typically plug the leak as quickly as possible while resuming data collection.⁸⁹ Accordingly, the CFPB's data freeze was outside of accepted cybersecurity norms, particularly because the Bureau's IT systems "appeared to be well-secured." Instead, we fear its purpose was to impede core responsibilities of the Bureau.

Since May 2017, the Bureau's Inspector General (IG) has issued several reports on data security at the Bureau.⁹⁰ In the most important of these reports, the IG found that the Bureau's information security program was operating at a level-3 maturity (consistently implemented), on a scale of 1 to 5, and that several of the program's activities were operating at a higher level-4 maturity. Despite room to improve, the CFPB's cybersecurity readiness exceeded that of the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Securities & Exchange Commission, and the Department of the Treasury, which never stopped data collection.⁹¹ While the IG proposed improvements, it *never* recommended a halt to the Bureau's data collection, whether for personally identifiable information (PII) or otherwise. Meanwhile, the Bureau concurred with all of the IG's recommendations and has taken action to implement them.

In short, nothing in the CFPB's continuing efforts to rectify any shortcomings in its data security program justified the data freeze imposed on December 4. If any aspects of that freeze persist, they do serious damage to the Bureau's core functions, including rulemaking, and should be rescinded immediately.

⁸⁷ Dodd-Frank Act, § 1022(d).

⁸⁸ Separately, we have strong concerns about Acting Director Mulvaney's planned closure of the consumer complaint database and any possible degradation of the consumer complaint process, both for the welfare of aggrieved consumers and the vigor of the CFPB's internal data collection and risk monitoring processes. *See* Remarks by Mick Mulvaney, Acting Director, Consumer Financial Protection Bureau, April 24, 2018, American Bankers Association Annual Conference, Washington, D.C., at 5, <https://www.documentcloud.org/documents/4446622-Transcript-Mulvaney-ABA-Conference-4-24-2018.html> (viewed May 3, 2018) [hereinafter April 24, 2018 Remarks]; Comments of Financial Regulation and Consumer Protection Scholars, and former Regulators on Docket No. CFPB-2018-0006.

⁸⁹ Kate Berry, *Mulvaney response to CFPB data security gaps baffles cyber experts*, AM. BANKER, Apr. 23, 2018; Warren Letter, *supra* note 86, at 2-4.

⁹⁰ Office of Inspector General, Board of Governors of the Federal Reserve System and Consumer Financial Protection Bureau, Report on the Independent Audit of the Consumer Financial Protection Bureau's Privacy Program, Audit Report 2018-IT-C-003, at 2 (Feb. 14, 2018); Office of Inspector General, Board of Governors of the Federal Reserve System and Consumer Financial Protection Bureau, Audit of the CFPB's Encryption of Data on Mobile Devices, Executive Summary, 2018-IT-C-002R (Jan. 25, 2018); Office of Inspector General, Board of Governors of the Federal Reserve System and Consumer Financial Protection Bureau, 2017 Audit of the CFPB's Information Security Program, Audit Report 2017-IT-C-019, at 2-3 (Oct. 31, 2017); Office of Inspector General, Board of Governors of the Federal Reserve System and Consumer Financial Protection Bureau, The CFPB Can Improve Its Practices to Safeguard the Office of Enforcement's Confidential Investigative Information, Evaluation Report 2017-SR-C-011 (May 15, 2017).

⁹¹ Warren Letter, *supra* note 86, at 4-5.

ii. Use of Qualitative Data and Consumer Anecdotes

The Bureau's recent data freeze intersects with another issue that has appeared in this RFI, which is the appropriate use of qualitative data in CFPB research and rulemaking. There have been suggestions that qualitative data—including descriptive information about problems encountered by individual consumers in the consumer financial marketplace—should not be used in research or decision-making by the Bureau. The discounting of consumer experience by regulators in the years leading up to the financial crisis shows the dangers of this position, and we strongly urge the Bureau to seek out and treat seriously qualitative data on consumer use of financial products.

Qualitative data serve an important role in the Bureau's research efforts. The Bureau relies on copious qualitative data in analyzing market structures, market dynamics, company internal controls, incentive systems, and consumer psychology. This reliance on qualitative data is intrinsic to the CFPB's research efforts and must continue.

There are many types of qualitative data, including what are sometimes derisively called anecdotes. Consumers or their advocates report individual people's experiences with financial services or products, including the harm American consumers have experienced from unfair and deceptive practices. These anecdotes are relayed through a variety of channels, including responses to RFIs, ANPRs, or NPRMs, field hearings, town halls, or other face-to-face meetings, other forms of external engagement, public inquiries, consumer complaints, enforcement actions, and supervisory findings. This evidence is crucial to the development of rules that create a fair marketplace for three reasons.

First, understanding actual consumer experience is critical to formulating inquiries about the types of data needed to understand the functioning of the market and the questions to be tested. Until the Bureau grasps how consumers actually use and perceive consumer financial products, and how they are sometimes misled and harmed in the use of those products, it cannot know which quantitative datasets or data fields could show the existence or extent of the problems which the rulemaking aims to correct. For example, during the explosive growth of abusive subprime mortgages in the 2000s, the subprime mortgage industry defended the quality of its loans by noting the manageable level of defaults on these loans. But loan default rates usually do not rise during property bubbles because troubled borrowers can retire their debts by selling their homes or refinancing their loans. Instead, the loan default rates masked systematic efforts during the latter years of subprime growth to “churn” refinancing loans through sharply higher use of loans with false “stated incomes,” fraudulent appraisals and other tactics reflecting deteriorated underwriting standards. Consumer reports should have been used to point to the collection of data that would have exposed the misleading reliance on overall default rates, and thus that could have led the Federal Reserve to promulgate HOEPA rules to constrain this destructive lending.

Consumer inquiries and complaints, examination findings, and enforcement investigations are canaries in the mine, alerting the Bureau to new and emerging types of consumer harm. While one report is not a trend, it puts the Bureau on notice that there may be a need to inquire whether other consumers are suffering the same harm.

During the lead-up to the financial crisis, the Federal Reserve Board heard countless accounts from community leaders and others about the dangers of subprime mortgages, but it discounted those reports and sat on its hands.⁹² In the ensuing crisis, millions of households lost their homes to foreclosure and the global financial system nearly collapsed. Congress later responded by transferring the Board's rulemaking powers over consumer financial protection laws to the CFPB. If the CFPB were to start ignoring anecdotes as did the Federal Reserve, it would do so at high risk to itself and the public that it serves. Instead, consumer narratives should be the impetus for further research and inquiry, not something to be discarded.

Second, some problems are not effectively captured by quantitative data. Lenders, for instance, can produce data showing pristine compliance with existing disclosure laws while training its sales force to use oral practices that effectively mislead consumers. Identifying how consumers actually experience consumer finance and how they perceive being harmed in that market can point to consumer misunderstandings that are not easily captured in data that can be harvested from industry records.

The Bureau's December data freeze exacerbated the treatment of anecdotes inordinately. If anecdotes count for nothing standing alone *and* the Bureau could not analyze those claims using large data sets due to supposed privacy or data security concerns, then consumer harms, for all intents and purposes, would end up being ignored.

A dismissive stance toward consumer reports runs the added danger of one-sided decision-making. Consumers are not the only source of anecdotes. Industry provides the Bureau with plentiful anecdotes of its own to illustrate compliance problems or regulatory costs, which is helpful to understanding how to make efficient rules that promote compliance. The danger is that industry anecdotes will be credited, while consumer anecdotes will not, leading to biased and myopic rulemakings and impact analyses.

Third, consumer reports of experience can inform how to make rules effective in practice. The Bureau, for instance, has mounted extensive and widely praised qualitative studies of laboratory test results for proposed disclosures.⁹³ This is no different than the routine use by industry of consumer focus groups and qualitative data gathering in developing new consumer products. The wisdom produced by varied sources of information about how the marketplace functions is essential to understanding how to act effectively in promulgating rules that will work in practice. This is no less true for Bureau rulemaking than it is for lenders and other businesses developing strategies to sell consumer financial services.

We close this discussion with one related point. The Bureau should continue to make data publicly available to the greatest extent possible, consistent with consumer privacy and the protection of truly proprietary data. This will allow outside researchers to test the magnitude and ramifications of anecdotal reports. Otherwise, data will end up being locked up in government and industry hands, leaving the larger public with anecdotes alone. That would be a serious

⁹² Binyamin Appelbaum, *Fed Held Back As Evidence Mounted on Subprime Loan Abuses*, WASH. POST, Sept. 27, 2009.

⁹³ See Kleimann Communication Group, Inc., *Know Before You Owe: Evolution of the Integrated TILA-RESPA Disclosures* (July 9, 2012).

problem, particularly if the Bureau failed to test those anecdotes using quantitative data when possible. The Bureau’s recent decision to re-open the 2015 HMDA final rule⁹⁴ is the most important episode to raise this concern, but it is not the only one.

iii. Impact Analyses [RFI Question 4.c]

In RFI Question 4.c, the Bureau solicits comment on “[i]mpact analyses for the proposed rule, including the qualitative and quantitative analysis therein, and the data on which they rely.”

The CFPB is required to produce impact analyses when conducting rulemakings. The main impact analysis is the so-called “Section 1022(b)(2) Analysis” mandated by Section 1022(b)(2) of the Dodd-Frank Act, which states:

In prescribing a rule under the Federal consumer financial laws—

(A) the Bureau shall consider—

- (i) the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule; and
- (ii) the impact of proposed rules on covered persons, as described in section 1026,⁹⁵ and the impact on consumers in rural areas . . .

In addition, the Regulatory Flexibility Act (RFA)⁹⁶ requires the CFPB to consider whether proposed and final rules would have a significant economic impact on a substantial number of small entities.

The CFPB takes both types of impact analyses extremely seriously. While not required to do so by statute, the Bureau goes to great lengths to quantify and monetize its impact analyses whenever possible.

It is difficult to respond to RFI Question 4.c because the Bureau has not identified any issues surrounding its assessment of its impact analyses and its methodologies and underlying data. Given this lack of context, we confine our comments on the impact analyses to six points.

First, if the Bureau wishes to properly solicit public feedback on its approach to impact analyses, it should issue a separate, new Request for Information in which it fully fleshes out the methodologies that it currently uses for impact studies and any resulting issues. That RFI should give specifics about the qualitative and quantitative analyses that the Bureau uses and any issues concerning those approaches and the data relied on. The Bureau should also describe what new

⁹⁴ Consumer Financial Protection Bureau, CFPB Issues Public Statement On Home Mortgage Disclosure Act Compliance (Dec. 21, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-public-statement-home-mortgage-disclosure-act-compliance/> (viewed May 3, 2018). The public statement announcing the new rulemaking raises at least two concerns in that regard: (1) that numerous entities that are now required to report under HMDA would be exempted from HMDA reporting; and (2) that some new, important data fields added in the 2015 HMDA rule would be rolled back. *See id.*

⁹⁵ This refers to depository institutions and credit unions with \$10 billion or less in assets. Dodd-Frank Act, § 1026(a).

⁹⁶ 5 U.S.C. §§ 601-612.

approaches it might consider to its impact analyses going forward. Without a detailed enumeration of the Bureau’s current approach and any critiques or issues, it is virtually impossible to comment on any changes the Bureau might be contemplating to its impact studies.

Second, we need to stress that in ordinary rulemakings, the Bureau has no statutory obligation to perform a net benefit analysis. Instead, Section 1022(b)(2) of Dodd-Frank mandates the Bureau to “consider” the potential costs and benefits, without requiring it to calculate net benefit. While we applaud the Bureau for seeking to quantify and monetize costs and benefits whenever possible, we oppose *requiring* the agency to do more than its authorizing statute requires.

Third, and in this regard, we must emphasize that OIRA standards for impact analyses *do not* apply and may not be lawfully imposed on CFPB rulemakings. This legal requirement is intrinsic to Congress’ decision in the Dodd-Frank Act to establish the CFPB “in the Federal Reserve System, [as] *an independent bureau . . .*”⁹⁷ For this reason, the Bureau, like all other federal banking regulators, is exempt from submitting its rules to OIRA for review and cost-benefit analysis.⁹⁸

Fourth, there are important reasons why Congress exempts impact analyses by federal banking regulators, including the CFPB, from OIRA and OMB oversight. First, the exemption insulates the Bureau, its fellow federal banking regulators, and the health of the economy at large from interference for purposes of short-term political gain by OMB and the White House. Second, in financial regulation, often it is harder to quantify benefits in the form of harms avoided than it is to quantify costs. The Bureau and other federal banking regulators must make many rulemaking decisions under circumstances of incomplete data and future uncertainty. Requiring federal banking regulators, including the Bureau, to fully monetize harms avoided—which might prove impossible--would dangerously tilt rulemaking analyses toward inaction and the status quo.

Fifth, if Mr. Mulvaney were serious about impact analyses, then he would allow the Bureau to collect and analyze the complete data needed to properly do them. But his data freeze raised questions about the Bureau’s ability going forward to collect data on consumer benefits. If the freeze had that effect, then there was a serious danger that any impact analyses would be artificially heavy on costs while understating the benefits.

Finally, we are deeply concerned that Mr. Mulvaney’s dual service as the heads of both the CFPB and OMB undermines the independence that Congress required from OMB and OIRA. Mr. Mulvaney’s recent statements and actions have confirmed those concerns. After he took over the helm of the CFPB, he was quoted saying: “You could imagine that the Office of Management and Budget under the Trump administration might look very cautiously, even cynically, against rules that were produced by” the previous CFPB Director, Richard Cordray.⁹⁹ Later, in an email to staff, Mr. Mulvaney demanded even more quantitative cost-benefit analysis

⁹⁷ 12 U.S.C. § 5491(a).

⁹⁸ Executive Order 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993); *see note 8 supra*.

⁹⁹ Ian McKendry, *Mulvaney’s first days at CFPB: payday, personnel and a prank*, AM. BANKER, Dec. 4, 2017.

of proposed agency rules than the Bureau already provides.¹⁰⁰ In the most alarming development to date, Mr. Mulvaney announced plans to create an Office of Cost Benefit Analysis that would be housed within the director's office.¹⁰¹ He made that announcement even though this RFI seeking public comment on *that very topic* remained open.

As these statements show, Mr. Mulvaney is scrutinizing CFPB rulemakings under the aegis of OMB and OIRA. His plan to move the cost-benefit analysis researchers into his office and have them report directly to him is the culmination of that assault and a serious affront to the agency's independence as mandated by Congress. Further, the timing of his announcement raises concerns that this RFI is nothing more than cover for what he is intent on doing anyway. To comport with the law, Mr. Mulvaney must immediately rescind the plan to move the cost-benefit unit into his office and recuse himself from further involvement in CFPB impact analyses.

iv. Consideration of New Data, Studies and Reports After the NPRM is Released [RFI Questions 10 and 11]

Finally, in RFI Question 10, the Bureau asked for input on the “[c]onsideration of new data, studies, and reports issued by other agencies or third parties after the NPRM is released.”

In many cases, consideration of those data will bolster the evidence base for any final rule that is issued, thereby improving the quality of the rule and its ability to withstand review. Public transparency is essential, however, when considering those sources. Consequently, we firmly support the Bureau's consideration of new data, studies and reports after an NPRM's issuance, but only on three conditions.

The first condition is that the Bureau should mention any new data, studies and reports it considered (to the extent that they are relevant) in the written preamble to the final rule. If the information was instrumental or dispositive in the shape of the final rule, the Bureau's written description should discuss and evaluate those data, studies and reports in detail [see RFI Question 11].

The second condition is that all data, studies and reports that are received through *ex parte* contacts between the issuance of an NPRM and that of a final rule should be timely posted to the public rulemaking docket. Normally, the Bureau's Policy on Ex Parte Presentations in Rulemaking Proceedings will apply to such submissions.¹⁰² As we will discuss, however, there

¹⁰⁰ Memorandum from Mick Mulvaney (Jan. 23, 2018), <http://bit.ly/2DZELLC>. In that email, Mr. Mulvaney said this about the Bureau's impact analyses:

Speaking of data: the Dodd Frank Act requires us to “consider the potential costs and benefits to consumers and covered persons.” To me, that means quantitative analysis. And while qualitative analysis certainly can play a role, it should not be to the exclusion of measurable “costs and benefits.” In other words: there is a lot more math in our future.

Here it is worth noting that Mr. Mulvaney's efforts to hamper data collection by the Bureau makes the cost-benefit analysis he advocates all the harder.

¹⁰¹ 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.

¹⁰² See Section 3.c.i *infra*.

have been serious delays in posting such submissions to regulations.gov. Below, we recommend a change to the Ex Parte Policy to ensure timely posting.

The last condition is that the Bureau should seriously consider re-opening the record to allow the public to comment and respond to those data, studies and reports, particularly where additional information or interpretations could alter the outcome of the final rule. This is especially important where those sources raise new issues and the original NPRM did not put the public on notice of the issue in question. Admirably, the CFPB took precisely this step in the ability-to-repay rulemaking. After the original NPRM appeared (it was issued by the Federal Reserve Board shortly before the Bureau opened its doors), two new issues—the extent of liability exposure and where to set a possible debt-to-income ratio cap for qualified mortgages—rose to the fore in the Bureau’s deliberations. Accordingly, the Bureau reopened the rulemaking to solicit public comment on those two issues and the underlying data sources.¹⁰³ The CFPB should follow the same approach whenever newly received information could affect the outcome of final rules.

b. Inclusiveness [RFI Questions 1-3, 5-7, 9, 12]

The CFPB deserves praise for its commitment to inclusiveness in its rulemaking proceedings to date. Its External Engagement staff and all other Bureau staff involved in those outreach efforts take the goal of democratic participation seriously and have bent over backwards to solicit public comment from all affected stakeholders, consumers and industry alike. Staff have made tireless efforts to go into local communities and engage the public face to face. Most impressively, they have harnessed new technologies—including emails, social media, and online interactive tools—to seek comment from ordinary Americans located in the farthest reaches of the country.

This broad and imaginative outreach is true not only to the letter, but also to the spirit of, the Administrative Procedure Act. In the APA, Congress sought to allow *all* members of the public – regardless of their occupation, political affiliation, state of residence, income or wealth – to express their views on and help shape forthcoming agency rules. For this reason, all NPRMs are published in the *Federal Register*, which the federal government disseminates online at no cost to the public. Industry participants, trade associations, national consumer advocacy groups, and scholars such as ourselves know to scan *Federal Register* notices daily for upcoming comment periods of interest. However, the average consumer and local community organizations probably do not scan *Federal Register* notices and may not be aware of the *Federal Register* to begin with.

Accordingly, if publicity of upcoming comment periods were confined to *Federal Register* notices alone, public comment would be badly tilted toward special interests. Commendably, in its external engagement to date, the Bureau has been sensitive to that problem and has gone to great lengths to elicit rulemaking comment from the general public in innovative ways (especially outside the Beltway). To that end, the CFPB has deployed twenty-first century communications methods to achieve the original intent of the APA. Thanks to those efforts and

¹⁰³ Bureau of Consumer Financial Protection, *Truth in Lending (Regulation Z): Notice of reopening of comment period and request for comment*, 77 Fed. Reg. 33,120 (June 5, 2012). To its credit, the Bureau re-opened the comment period despite a tight Congressional deadline for the final rule.

innovations, the CFPB's rulemaking process is better as a result. Meanwhile, through its deep public engagement, the CFPB has made itself accountable to the entire American populace.

It is important, at this key juncture in the Bureau's young life, not to retreat from its deep and vibrant engagement with the public in rulemaking proceedings. The Bureau should continue to engage in all of its types of public outreach to the same wide spectrum of stakeholders and with the same frequency as it has since its inception.

During the information-gathering phase before the publication of any NPRM, we support all of the added ways in which the Bureau has sought public participation. We encourage the continued use of RFIs "concerning market conditions or issues, particular regulatory options, or the process or content of Bureau Research" [RFI Question 1.a] to give the public a chance for input *before* the agency solidifies a proposal. Similarly, we applaud the Bureau's "[e]fforts to gather data from industry, academics, think tanks, consumer groups, and others to support quantitative analysis" [RFI Question 1.b], on the condition that such use be transparent. Such data can provide a stronger factual foundation for any eventual rule and should be expanded, not curtailed.

Turning to publication of NPRMs and final rules in the *Federal Register*, we similarly support the Bureau's practice of releasing those documents in advance on the agency's website, as well as supporting materials and activities such as press releases, summaries, consumer-facing blog posts, and remarks by the Director at public events or on press calls [RFI Questions 5 and 12]. These materials assist public understanding of proposed or final rules and are a far more effective way for the Bureau to explain its rules than the standard *Federal Register* preamble.

We also urge the Bureau to continue its use of online tools and other innovative mechanisms to solicit public feedback on NPRMs [RFI Question 7]. The Bureau's smash success eliciting public feedback on the integrated mortgage disclosures through its online tool shows the power of such engagement. Sadly, it appears that the Cornell University's eRulemaking Initiative,¹⁰⁴ which the Bureau interfaced with from 2012 to 2014, has closed; we hope the Bureau will explore new and better alternatives to the Cornell website. In keeping with the Bureau's tradition of transparency, the agency should make all such feedback available online on a timely basis for public view, either through regulations.gov or through the Bureau's own website.

In a similar vein, the Bureau raises the issue whether it should provide "'reply periods' for commenters to review and formally respond to other commenters' comment letters, and whether and to what extent the Bureau should consider comments received after the close of the comment period" [RFI Question 6]. We start by noting that the APA does not formally address this question. At the same time, the APA does not prohibit the Bureau from receiving or considering responses to the original round of written comment letters after the comment period has closed. In addition, under the APA, the Bureau has discretion to re-open public comment periods. More often, the Bureau can (and does) receive oral and written responses to written comments on an *ex parte* basis after the deadline for the comment period has passed.

¹⁰⁴ Regulation Room, <http://regulationroom.org/> (viewed May 3, 2018).

The ability to submit and receive these responses is invaluable to stakeholders and the Bureau alike. Major written comments submitted during the comment period are often long and can present new information or arguments that were not aired in the NPRM. Frequently, the meaning or validity of that information or arguments is subject to interpretation. Permitting responses to written comments after the comment period has closed allows all affected stakeholders to be heard. It also improves the quality and impartiality of the rulemaking by making sure that counterarguments and differing viewpoints are taken into account.

That said, we do oppose a *formal* second reply period. Setting a formal reply period would cause several problems. First, it would increase the burden on all commenting parties, who would feel compelled to read and respond to prior comments and to submit a second set of comments. Second, it would add to the burden of CFPB staff to read all of those comments. Third, it would drag out the rulemaking process.

But the biggest problem with a formal reply period is that it would result in one-sided input by industry players, to the severe detriment of ordinary consumers and the general public, including academics and consumer advocacy organizations. Ordinary people who file comments do not review other comments and are not going to have the time to submit a second set of comments. Even academics and public interest organizations rarely have the time to do so. Simply spending the time to review a proposed rule and to write comments also already imposes a considerable burden on those who do not have a financial interest in a rule and takes time away from other obligations to submit comments.

On the other hand, industry players, trade associations and their attorneys and lobbyists pay salaried staff who have ample time to submit a second set of comments. If a formal reply period existed, they would submit lengthy replies to comments by consumers and other consumer-facing commenters with nothing to balance them out.

In addition, having a formal reply period could disincline the Bureau to consider additional input beyond the reply period or the formal comment process. Yet it may be important for the public to be able to provide input through more informal channels or through written means long after the comment period has closed when the key issues have become more crystallized.

Thus, so long as the Bureau has enough time before finalizing a rule, we encourage it to accept informal input after the comment period has closed, *so long as the Bureau is transparent*. To that end: In the rare circumstances when the Bureau re-opens a public comment period to solicit responses to initial comments, transparency is guaranteed. However, when the Bureau receives those responses on an *ex parte* basis, there is a danger that those responses will result in closed-door rulemaking unless they are timely posted online for public view. Consequently, we make recommendations below to ensure that the Bureau's policy on *ex parte* communications results in faster posting of those responses online. This will give transparency to what otherwise is a valuable form of public input.

c. Transparency and Concerns About Agency Capture [RFI Questions 1.a, 2.d, 7-10]

Early in its existence, the Bureau made a strong and impressive commitment to transparency so that its rulemaking proceedings would be impartial and fully informed. Now with the change in leadership, we have grave concerns that the Bureau, under Acting Director Mulvaney, is back-pedaling from its strong tradition of neutral and broad-based public engagement. There has been only one public announcement of an upcoming field hearing or town hall since his appointment.¹⁰⁵ Similarly, Mr. Mulvaney has not published his complete calendar on the Bureau's website.¹⁰⁶ Meanwhile, on June 6, 2018, he disbanded the current membership of one of its most effective consumer-facing feedback channels--the Consumer Advisory Board —after refusing to meet with it,¹⁰⁷ even though he had proceeded to meet with the Bureau's Community Bank Advisory Council in May.¹⁰⁸

These actions, combined with Mr. Mulvaney's recent remarks before the American Bankers Association (ABA) indicating that he engaged in "pay to play" as a Congressman, are alarming and raise concerns that the Bureau under his aegis is curtailing consumer input while meeting with industry behind closed doors. As he explained to the ABA, he only met with constituents and with lobbyists who contributed money, stating:¹⁰⁹

If you were a lobbyist who never gave us money, I didn't talk to you. If you were a lobbyist who gave us money, I might talk to you.

Mr. Mulvaney then praised industry lobbying as one of the "fundamental underpinnings of our representative democracy, and you have to continue to do it."¹¹⁰ Meanwhile, eight of the ten financial companies that received the most complaints in the Bureau's consumer complaint database contributed to Mr. Mulvaney when he served in Congress.¹¹¹

These pay-to-play remarks put a cloud over the Bureau's impartiality and commitment to consumer welfare. To remove that cloud, full transparency is necessary to ensure that the

¹⁰⁵ See Consumer Financial Protection Bureau, Town hall in Topeka, Kan., on fighting elder financial exploitation in your community (May 16, 2018), <https://www.consumerfinance.gov/about-us/events/town-hall-topeka-kan-fighting-elder-financial-exploitation-your-community/>.

¹⁰⁶ See Consumer Financial Protection Bureau, Leadership calendar, <https://www.consumerfinance.gov/about-us/the-bureau/leadership-calendar/> (viewed May 3, 2018); Comment of Financial Regulation and Consumer Protection Scholars and Former Regulators on Docket No. CFPB-2018-0005.

¹⁰⁷ See Email from Delicia Hand (CFPB) dated June 6, 2018, at 10:18:57 AM EDT; Kate Berry, *Is Mulvaney trying to purge CFPB's advisory board?*, Am. Banker, June 4, 2018; National Consumer Law Center, Texas Appleseed & California Reinvestment Coalition, Press Release, Acting Director Mulvaney Fires Members of Advisory Boards of Consumer Financial Protection Bureau, Endangering Financial Well-Being of American Families (June 6, 2016).

¹⁰⁸ See Consumer Financial Protection Bureau, Spring 2018 Community Bank Advisory Council meeting in Washington, D.C. (May 14, 2018), <https://www.consumerfinance.gov/about-us/events/spring-2018-community-bank-advisory-council-meeting-washington-dc/>.

¹⁰⁹ See April 24, 2018 Remarks, *supra* note 88, at 11.

¹¹⁰ See *id.*

¹¹¹ See Public Citizen, *Companies With the Most Complaints in CFPB Database Were Mulvaney Donors* (May 8, 2018), <https://www.citizen.org/media/press-releases/companies-most-complaints-cfpb-database-were-mulvaney-donors>.

Bureau is listening to all affected stakeholders--consumers and industry members alike--as we now discuss.

i. CFPB Policy on Ex Parte Presentations in Rulemaking Proceedings [RFI Question 9]

When an NPRM is issued and through the time a final rule comes out, the APA contemplates that the written comment process will provide the main channel for public input into rulemakings. This process has two important features that promote transparency: *one*, a deadline that provides a cut-off on written comments; and *two*, public posting of the written comments (which are available for reading online at regulations.gov).

The rulemaking process can be long, however, and external parties may want to communicate with the Bureau about pending rulemakings one-on-one about recent developments, outside of the written comment process. These communications and discussions can provide valuable information to the Bureau and help it craft better tailored and more responsive rules. At the same time, *ex parte* communications pose the danger of undue influence if conducted behind closed doors. Accordingly, the Bureau issued its CFPB Policy on Ex Parte Presentations in Rulemaking Proceedings (Ex Parte Policy)¹¹² to ensure that potentially useful *ex parte communications* take place during pending rulemakings in an atmosphere of openness. The Ex Parte Policy is the cornerstone of the Bureau's transparency efforts.

The CFPB's Ex Parte Policy seeks to strike a balance with this straightforward requirement: *ex parte* communications with decision-making personnel at the Bureau about pending rulemakings, starting with the publication of an NPRM through issuance of a final rule, must be documented in writing within ten days and posted to the public rulemaking docket for online view.¹¹³

The Bureau's Ex Parte Policy was one of the strongest policies of its type when it was first adopted. It has cast laudable sunshine onto the Bureau's rulemaking process. We recommend four improvements, however, to ensure that the Ex Parte Policy in fact provides transparency on a timely basis:

- *First*: Under the original version of the Policy, outside parties making oral presentations to CFPB decision-making personnel concerning pending rulemakings had three days to post a written summary of the communications to the rulemaking docket. According to the Bureau, outside parties had technical difficulties posting these submissions on regulations.gov. Accordingly, in 2017, the Bureau reviewed the Policy to excuse outside parties from posting the written summary to the rulemaking docket. Now, instead, outside parties simply need to email the required materials to the CFPB's Executive

¹¹² Bureau of Consumer Financial Protection, *Policy on Ex Parte Presentations in Rulemaking Proceedings*, 82 Fed. Reg. 18,687 (Apr. 21, 2017) [hereinafter Ex Parte Policy]. The 2017 policy revised the Bureau's original *ex parte* policy, which was issued on August 16, 2011. Consumer Financial Protection Bureau, *Policy on Ex Parte Presentations in Rulemaking Proceedings*, CFPB Bull. 11-3 (Aug. 16, 2011), https://files.consumerfinance.gov/f/2011/08/Bulletin_20110819_ExPartePresentationsRulemakingProceedings.pdf (viewed May 4, 2018); see Kennedy et al., *supra* note 15, at 1158-59; McCoy 2013, *supra* note 22, at 20-21.

¹¹³ See Ex Parte Policy, *supra* note 112, at 18,689-90. The disclosure requirement does not apply to *ex parte* presentations by other federal agencies, offices, or their staff, by members of Congress or their staff in many cases, by state attorneys general or certain state regulators, or to the General Counsel's office that concern judicial review of a decision by the Bureau. See *id.* at 18,690.

Secretary and to the CFPB employee point of contact for the presentation. The new Policy provides that CFPB staff will post the summaries and other required written materials “on the public rulemaking docket in accordance with this policy, including making reasonable efforts to do so within a reasonable period of time before publication of the final rule.”¹¹⁴

Unfortunately, this new procedure has been known to result in lengthy delays in the posting to the public rulemaking docket of summaries of *ex parte* discussions and written materials. In some cases, the written materials have not been posted publicly until after the written rule has been issued. We are highly sympathetic to the often crushing demands on RMR staff’s time. At the same time, these delays defeat the purpose of the Ex Parte Policy and make it needlessly difficult or impossible for other interested parties to respond when *ex parte* summaries are posted soon before a final rule is unveiled or, worse, afterwards. Accordingly, we urge the Bureau to revise the Policy to set a hard but reasonable deadline from receipt (of, say, ten business days) for Bureau staff to post written records of *ex parte* contacts to the public rulemaking docket. The CFPB should also dedicate the necessary additional staff time and resources to make that possible.

- *Second:* In a similar vein and given these delays, we further recommend that the CFPB post on its website for public view a log of each *ex parte* contact with CFPB decision-making personnel directed to the merits or outcome of a rulemaking proceeding. The log should list each such *ex parte* contact (whether oral or written) within five business days of its occurrence or receipt and state: (1) the names of all outside persons who attended or otherwise participated in any presentation to the Bureau and their institutional affiliation(s); (2) the date of any presentation; (3) the names and institutional affiliations of all individuals who prepared any written materials presented *ex parte* to the Bureau; (4) the names of all Bureau officials and staff who attended the presentation; and (5) the street address, city and state of the contact. Meanwhile, the Acting Director, Deputy Director, and senior staff, including political appointees, who now oversee all division heads, should post their complete daily calendars of their work for the Bureau to the CFPB’s website immediately.
- *Third:* In its provisions on the handling of written materials with potentially confidential material, the Ex Parte Policy states, among other things, that the outside party should provide the Bureau with two versions of the document with the confidential information: one redacted and one not. However, the Policy does not commit the Bureau to posting the redacted version of the document to the public rulemaking docket. The CFPB should amend the policy to ensure that all redacted versions of written materials containing confidential information can in fact be timely viewed on regulations.gov.
- *Fourth:* Under the current Ex Parte Policy, the CFPB reserves the discretion “not to apply the policy” during certain rulemaking proceedings under Section 553 of the APA where public interest requires. While the Policy mentions that this could occur where the CFPB has determined that no final rule will be issued, the Preamble states that this is only “an example.”¹¹⁵ Currently, when leadership’s commitment to transparency at the Bureau is in question, we have concerns that this exception could be improperly expanded to situations where a final rule is ultimately issued. Under this provision, what

¹¹⁴ Ex Parte Policy, *supra* note 112, at 18,688, 18,690.

¹¹⁵ *Id.* at 18,688-90.

would stop the Bureau, for example, from suspending publication of *ex parte* contacts pending internal debates whether to proceed to a final rule, based on the reasoning that a final rule might *not* be issued? Because there is no way to cabin this exception against misuse, it should be eliminated.

ii. Transparency During the Initial Information-Gathering Stage and the Implementation Stage [RFI Questions 1.a, 2.d]

The Ex Parte Policy does not apply to the initial information-gathering stage, before an NPRM is ever issued, or the implementation stage. Consequently, the degree to which these stages are transparent is largely at the discretion of the Bureau.

Under its former leadership, the Bureau staked out and carried through on its commitment to transparency during the information-gathering in impressive and innovative ways. We have catalogued the depth and breadth of that outreach and transparency above, ranging from requests for information and the occasional ANPR soliciting public comment, to the posting of data sets for public analysis. We applaud all those efforts while stressing that it is imperative to continue to solicit the same inclusive feedback while assuring transparency to the same high degree.

In this regard, it is important to continue posting written comments in response to requests for information and ANPRs to regulations.gov. Further, it is essential to continue publicly releasing the outline of a proposed rule under consideration, along with outreach to other stakeholders, as part of the SBREFA process [RFI Question 2.d]. Doing so helps encourage broad public input when it really counts, before a proposed rule crystallizes. Moreover, *not* releasing that outline to the public during the SBREFA process would secretly and unfairly tilt the playing field toward industry because nothing would stop small business participants in the SBREFA process from privately disseminating the outline to other industry members. That would prejudice the very consumers whom the Bureau was established to protect and undermine the Bureau's integrity.

iii. Level of Detail in Preambles [RFI Questions 4, 11]

The detailed content of the Bureau's preambles to major rulemakings should also be preserved because it injects transparency into the rulemaking process. The extended discussion of the legal basis, evidentiary record, and impact analyses helps Bureau rules withstand any possible judicial challenge. Detailed preambles also provide a historical record for future policymakers to consult.

To the extent the length of the CFPB's rulemaking preambles poses a concern, the answer is not to artificially truncate those documents. Instead, the CFPB should continue to rely on other tools such as press releases, summaries, highlights, outreach calls and public events, and the like to help explain rules to the public in an easy-to-understand and digestible manner.

d. Ongoing Responsiveness [RFI Questions 4.a, 4.d, 12]

The CFPB has gone to great lengths to be responsive to industry and other stakeholders throughout the implementation phase. That level of responsiveness is praiseworthy and should be maintained and deepened as necessary.

Above, we discussed in detail the wide suite of implementation aids and tools and the CFPB's efforts to facilitate implementation through public outreach. The Bureau's responsiveness also extends to its development of commentary, appendices and model and sample forms [RFI Question 4.d]. In this respect, we wish to draw attention to an especially helpful feature of the Bureau's eRegulations tool. This tool imbeds links to Official Interpretations by the CFPB into each affected subsection of the Bureau's rules.¹¹⁶ Under this feature, when readers consult a specific subsection of a rule, the Official Interpretation link is easy to find, immediately following the subsection. This simple but ingenious CFPB innovation makes it extremely convenient for readers and substantially aids their understanding of a rule.

Similarly, to the extent possible, the CFPB should continue to conduct implementation outreach and roll out implementation materials simultaneously with the release of a final rule instead of waiting until the *Federal Register* announcement or later [RFI Question 12]. Doing so provides timely answers to the natural and inevitable questions that surround the unveiling of a major rule. In addition, the CFPB's current practice advances compliance by giving regulated entities the maximum time possible to implement the rule.

4. Conclusion

Under the new leadership, there are signs that the Bureau is headed toward a Catch-22 that would paralyze principled, impartial rulemaking. If the Bureau cannot consider qualitative data, including consumer anecdotes, and if it cannot analyze consumer issues using large data sets due to supposed privacy or data security concerns, then there will be no evidentiary basis to redress serious consumer harms. At the same time, the Bureau will not be able to perform the impact studies that the Acting Director demands, let alone quantitative impact studies at all. Meanwhile, there are serious fears that agency capture of the rulemaking process is unfolding behind closed doors. We call upon the Bureau to reverse these developments immediately and return to the data-driven decision-making, inclusiveness, transparency, and responsiveness that the American public deserves from the CFPB and the process it employs when writing rules.

¹¹⁶ For an example, see the eRegulations page for 12 C.F.R. § 1026.43(a)(3)(iv), located https://www.consumerfinance.gov/eregulations/1026-43/2016-14782_20160627#1026-43-a.