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

Re: Docket No. CFPB-2018-0009, Request for Information Regarding Bureau Rulemaking Processes

Dear Mr. Mulvaney:

Public Citizen thanks the Bureau for the opportunity to submit comments regarding the Bureau's Request for Information regarding Bureau rulemaking processes. Public Citizen is a non-profit organization with 400,000 members and supporters nationwide. We represent the public interest through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues that include consumer protections with respect to financial products.

In just the few short years of its existence, the CFPB has issued rules that protect consumers in the markets for mortgages, prepaid cards, remittances, payday loans, and other financial products. The CFPB's process for writing rules has been thoughtful, considered, robust, and transparent in part due to special procedural and analytical requirements that Congress placed on the CFPB when it created the new agency. Like all agencies across the federal government, the CFPB seeks and responds to public comment, as required by the Administrative Procedure Act (APA). On top of the existing rulemaking requirements under the APA that apply to all federal agencies when promulgating regulations and seeking input, Congress has placed specific analytical and procedural requirements on the CFPB that are in some cases unique to this agency and result in a rulemaking process that is significantly more extensive than virtually every other federal agency's rulemaking process. Given the additional burden the CFPB faces when promulgating, amending, or repealing its rules as compared to other agencies, there is simply no basis (beyond a backdoor attempt to slow the process), for the CFPB to use any potential discretionary authority to modify its rulemaking process as grounds to add even more procedural and analytical requirements to a rulemaking process that is already one of the most inclusive, transparent, and comprehensive among all agencies.

For instance, when issuing rules, the CFPB considers the potential benefits and costs of the regulation to both consumers and regulated entities, as well as the impact on depository institutions with \$10 billion or less in assets and consumers in rural areas. See 12 U.S.C. § 5512(b)(2). These tailored requirements to assess impacts on smaller financial institutions and rural consumers are unique among financial agencies. The CFPB's consideration of these potential benefits and costs and impacts has involved thoughtful and detailed analyses that the CFPB publishes with both its proposed and final rules. We applaud the CFPB's careful attention to these topics. We recommend that in considering the potential

benefits, costs, and impacts of its regulations, that the CFPB continue to use meaningful data from a wide range of sources including both quantitative data and consumer anecdotes and other qualitative information, from the CFPB's own sources (such as consumer complaints) and external sources.

We especially urge the CFPB to continue recognizing the value of qualitative data in identifying and describing benefits that are real and tangible for consumers, but that cannot be reduced to monetary or quantified values. Federal agencies across the government have long been encouraged to treat qualitative benefits on equal footing as quantified benefits or costs for purposes of impact analyses in order to achieve statutory goals set out in authorizing legislation to protect people. For example, OMB has encouraged Executive agencies that when agencies are not able to express all of the benefits or costs in monetary units, which occurs often, cost-benefit analysis "is less useful, and it can even be misleading, because the calculation of net benefits in such cases does not provide a full evaluation of all relevant benefits and costs."¹ Analysts should therefore attempt to quantify benefits or costs as much as possible but "exercise professional judgment" in determining whether non-quantified factors are important enough to justify consideration of the regulation.²

Pursuant to statute, the CFPB also devotes particular attention to the concerns of small entities. The CFPB is one of only three agencies, and the sole financial regulator, that creates a special process to consider the input of small businesses, pursuant to the Small Business Regulatory Enforcement and Fairness Act (SBREFA). Pursuant to the Dodd-Frank Act's amendments to SBREFA, the CFPB actively seeks small business input prior to proposing any rule that is determined to have a significant impact on a significant number of small entities. Under the statute, representatives of small businesses that would be impacted by the rule are identified and asked to provide feedback that is reflected in a formal report that is issued publicly. *See generally* 5 U.S.C. § 609(b), (d). We encourage the CFPB to continue using its SBREFA process with an eye toward seeking the full range of perspectives from small businesses, including perspectives on the benefits to small businesses from CFPB rules. For example, in the pending rulemaking on Business Data Lending (Regulation B),³ which is intended to provide the CFPB with available data on lending to women and minority-owned small businesses, the CFPB should consider seeking feedback directly from minority and women small business owners as part of its SBREFA Panel in the course of the rulemaking.

In addition, the CFPB's statute includes a requirement for "retrospective review." The CFPB must assess each significant rule five years after its effective date. *See* 12 U.S.C. § 5512(d). This statutory requirement is particularly notable because under it, the CFPB will evaluate its rules more frequently than agencies that follow only the Regulatory Flexibility Act, which applies to agencies across the federal government and requires review of certain rules only every 10 years. *See* 5 U.S.C. § 610. The CFPB has taken its retrospective review requirement seriously, publishing detailed plans for its reviews and seeking public comment on those plans.⁴

¹ OMB Circular A-4, "Regulatory Analysis," September 17, 2003. The circular is available at http://www.whitehouse.gov/omb/assets/regulatory_matters_pdf/a-4.pdf.

² *Id.*

³ <https://www.gpo.gov/fdsys/pkg/FR-2017-05-15/pdf/2017-09732.pdf#page=1>

⁴ *See* CFPB, *We Are Seeking Comment on Our Plan for Assessing the ATR/QM Rule*, <https://www.consumerfinance.gov/about-us/blog/we-are-seeking-comment-our-plan-assessing-atrqm-rule/> (May 25, 2017); CFPB, *We Are Seeking Comment on Our Plan for Assessing the Mortgage Servicing Rule*, <https://www.consumerfinance.gov/about-us/blog/we-are-seeking-comment-our-plan-assessing-mortgage->

In developing its rules, as well as its retrospective review plans, the CFPB has been creative, thorough, thoughtful, and transparent in seeking input and conducting outreach to interested parties. For example, the CFPB's recently issued rule regarding payday and vehicle title loans relies on more than five years of research and outreach, including multiple public events and hundreds of stakeholder meetings. See 82 Fed. Reg. 54472, 54503-19 (Nov. 17, 2017). We urge the agency to continue its commitment to outreach, research, and transparency, which we believe supports robust and informed rulemaking processes.

The CFPB should not politicize its important outreach and research processes or its consideration of the benefits, costs, and impacts of its rules. For this reason, Public Citizen opposes the CFPB's recent decision to move to create a new Office of Cost Benefit Analysis within the director's office. The CFPB should continue trusting its senior career staff to lead objective and thorough analyses of the relevant benefits and costs.

Public Citizen also strongly opposes any attempt to require centralized regulatory review of CFPB regulations by the White House's Office of Management and Budget (OMB). Moreover, any requirement for OMB review would be in severe tension with Congress's decision to expressly designate the CFPB as independent, 12 U.S.C. § 5491(a), and to restrict the OMB's authority "over the affairs or operations of the Bureau," 12 U.S.C. § 5497(a)(4)(E). As the CFPB's only Senate-confirmed director explained, "[t]his would give any President unprecedented authority to influence the policy and rulemaking functions of independent regulatory agencies and would constitute a fundamental change in the role of independent regulatory agencies."⁵ It would be especially problematic because the CFPB is currently under the authority of Acting Director Mick Mulvaney, who simultaneously heads OMB. By the very nature of his dual roles, Mulvaney's presence at the CFPB guts the agency's independence. Any increase in the OMB's authority over the CFPB would only exacerbate the problem. Further, such review is entirely unnecessary, since Congress has already directed the CFPB to conduct its own extensive analyses of its regulations.

The CFPB rulemaking process is among the most comprehensive, rigorous, and driven by data and evidence, of any rulemaking process across the federal government, which was the intent of Congress in fashioning the CFPB's rulemaking process. The CFPB should carefully consider this Congressional design, and the limits of the CFPB's discretionary authority in making changes to its rulemaking process, as it continues to assess its rulemaking processes.

For questions, please contact Amit Narang at anarang@citizen.org

Sincerely,

Public Citizen

[servicing-rule/](#) (May 4, 2017); CFPB, *We Are Seeking Comment on Our Plan for Assessing the Remittance Rule*, <https://www.consumerfinance.gov/about-us/blog/cfpb-seeks-comment-its-plan-assessing-remittance-rule/> (Mar. 17, 2017).

⁵ See <https://sensible safeguards.org/wp-content/uploads/Financial-Regulators-Oppose-IARAA-2015.pdf>.