Comment of Financial Regulation and Consumer Protection Scholars on Docket No. CFPB-2018-0011

June 19, 2018

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

Dear Sir or Madam:

Please see the submission below in response to the Consumer Financial Protection Bureau's Request for Information (RFI) Regarding the Bureau's Adopted Regulations and New Rulemaking Authorities (Docket No. CFPB-2018-0011). We are concerned scholars and former regulators, including scholars specializing in financial regulation, consumer financial law, and administrative law.[*]

This comment builds on our prior comment on the Bureau's RFI Regarding Rulemaking Processes and the two should be read together.[+] Thank you for the opportunity to submit this comment for your consideration.

Primary Drafter:

Patricia A. McCoy
Professor of Law, Boston College Law School
Former Assistant Director, Mortgage Markets, Consumer Financial Protection Bureau

---

Richard Alderman
Professor Emeritus and Director, Center for Consumer Law
University of Houston Law Center

William Black
Associate Professor of Economics and Law
University of Missouri-Kansas City

Susan Block-Lieb
Cooper Family Professor of Urban Legal Issues
Fordham Law School

[*] Affiliations of signatories are for identification only and do not represent the views of the various institutions.

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

Lauren Dreshman
Associate Professor/Paralegal and Law Program Director
Sinclair College

Kate Elengold
Clinical Associate Professor of Law; Director, Consumer Financial Transactions Clinic
University of North Carolina School of Law; Former Trial Attorney, United States Department of Justice

Kathleen Engel
Research Professor
Suffolk University Law School

Robert Fellmeth
Price Professor of Public Interest Law
University of San Diego School of Law

Linda Fisher
Professor of Law
Seton Hall University School of Law

Anne Fleming
Associate Professor of Law
Georgetown University Law Center

Pamela Foohey
Associate Professor of Law
Indiana University Maurer School of Law

Judith Fox
Clinical Professor
Notre Dame Law School

Jeffrey Gentes
Visiting Clinical Lecturer
Yale Law School

Michael Greenfield
George Alexander Madill Professor of Contracts and Commercial Law
Washington University in St. Louis

Dalié Jiménez
Professor of Law
University of California, Irvine School of Law

Kathleen Keest
Formerly Iowa Attorney General's Office, Consumer Protection Division

Daniela Kraiem
Associate Director, Women and the Law Program
American University, Washington College of Law

Adam Levitin
Agnes N. Williams Research Professor and Professor of Law
Georgetown University Law Center

Angela Littwin
Robert D. Krist Professor of Law
University of Texas

Cathy Mansfield
Professor of Law
Drake University Law School

Nathalie Martin
Frederick M. Hart Chair in Consumer and Clinical Law
University of New Mexico School of Law

Christopher Odinet
Horatio C. Thompson Assistant Professor of Law
Southern University Law Center

Gary Pieples
Teaching Professor and Clinic Director
Syracuse University

David Reiss
Professor of Law
Brooklyn Law School

Jacob Rugh
Assistant Professor of Sociology
Brigham Young University

Jacob Russell
Assistant Professor of Law
Rutgers Law School

Ann Shalleck
Professor of Law and Carrington Shields Scholar
American University, Washington College of Law

Lea Krivinskas Shepard
Professor of Law
Loyola University Chicago School of Law

Alexandra Sickler
Associate Professor of Law
University of North Dakota School of Law

Neil Sobol
Professor
Texas A&M University School of Law

Gregory Squires
Professor of Sociology and Public Policy and Public Administration
George Washington University

Mark E. Steiner
Professor of Law
South Texas College of Law Houston

Mark Totten
Associate Professor
Michigan State University College of Law

Rebecca Tushnet
Frank Stanton Professor of First Amendment Law
Harvard University

William Vukowich
Professor of Law
Georgetown Law School

Alan White
Professor of Law
CUNY School of Law

Amy Widman
Associate Professor
Northern Illinois University College of Law

Arthur Wilmarth
Professor of Law
George Washington University Law School

EXECUTIVE SUMMARY

This RFI is the Wrong Way to Initiate Wholesale Amendments to the Adopted Regulations

- It is inappropriate for the Consumer Financial Protection Bureau (CFPB or Bureau) to rush through wholesale amendments to its newly adopted rules through this breathtakingly vague RFI. The RFI does not even list the rules that are affected, let alone describe their requirements or identify any issues pertaining to specific rules. Without that basic information, the public cannot comment meaningfully on the questions raised by the RFI.

- The Bureau should not revamp rules of such vital importance to American families' welfare under an Acting Director whose term will expire within days. The Bureau should halt this initiative until a permanent Director has been nominated and confirmed by the Senate and then follow the procedures mandated by Congress in the Dodd-Frank Act.

The CFPB Must Use the Process Congress Prescribed for Assessing Significant Rules

- In Section 1022(d) of the Dodd-Frank Act, Congress required the Bureau to conduct an empirical assessment of every significant regulation it adopts and publish a report on that assessment within five years of the rule's effective date. Three of these assessments are already underway. To march ahead with proposed amendments to significant rules without completing all of these studies would bypass the careful, neutral research evaluation of all major rulemakings that Congress contemplated. Instead, the Bureau should defer consideration of any major revisions to each Adopted Regulation until its 1022(d) assessment has been completed.

- For Adopted Regulations that are not significant, the CFPB should first conduct its traditional outreach and empirical analysis instead of leaping to the conclusion that those rules need to be amended based solely on the responses to this uninformative RFI.

- The Bureau should stop impeding data collection for the empirical reviews of its rules.

The CFPB Should Not Create Dangerous Loopholes or Rush to Displace Hard Copy Disclosures

- The CFPB should be wary of major new loopholes to the Adopted Regulations to avoid a repeat of the regulatory race to the bottom that led to the 2008 financial crisis.

- The CFPB should not supplant hard copy mandatory disclosures with electronic ones unless rigorous qualitative and quantitative testing shows that electronic disclosures would do a better job informing consumers.

The CFPB Should Consider a New Credit Reporting Rule in Response to the Equifax Breach

- The CFPB should consider a new rule to strengthen identity theft protections, given the continued enormous risks to consumers emanating from the Equifax breach.

Comment of Financial Regulation and Consumer Protection Scholars on Docket No. CFPB-2018-0011

The RFI by the Consumer Financial Protection Bureau (CFPB or Bureau) on Adopted Regulations raises the question: should the Bureau amend every single substantive rule that it has adopted since its creation? This vague, unfocused RFI is the wrong way to re-open the Bureau's new rules, because it is devoid of the information needed to allow the public to meaningfully comment. Instead, the Bureau should engage in its normal, careful process of neutral fact-gathering and empirical assessment before deciding whether to initiate any major amendments to the Adopted Regulations.

I. Description of the "Adopted Regulations"

This RFI is one of three RFIs on rulemaking by the Bureau. Previously, the Bureau issued an initial RFI regarding its rulemaking processes.[1] We filed a separate comment on that RFI.[2] This comment builds on our earlier rulemaking comment and the two comments should be read together.

This RFI, on the Bureau's Adopted Regulations,[3] is the second in the series. A third rulemaking RFI addresses the CFPB's Inherited Regulations.[4] Because this comment pertains solely to the Adopted Regulations, we start by explaining the difference.

The Bureau defines its "Adopted Regulations" as the rules that the CFPB "has prescribed . . . under Federal consumer financial law in rulemakings mandated by Congress, as well as its discretionary rulemakings."[5] In contrast, the "Inherited Regulations" are "the various regulations that" other federal agencies issued before the Dodd-Frank Act transferred their consumer-related rulemaking authority to the CFPB.[6] In circumstances where the Bureau amended an Inherited Regulation, it classifies that rule as an Adopted Regulation.[7] Examples of Adopted Regulations include, but are not limited to:[8]

- the mortgage servicing rule;
- rules governing mortgage origination;
- the integrated disclosure rule for mortgages;

---

1 *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 Processes RFI].

2 Comment of Financial Regulation and Consumer Protection Scholars and Former Regulators on Docket No. CFPB-2018-0009 (June 7, 2018), https://lawdigitalcommons.bc.edu/cfpb-comments/6/ [hereinafter Prior Rulemaking Comment].

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

4 The CFPB has issued a separate RFI for its Inherited Regulations. Bureau of Consumer Financial Protection, *Request for Information Regarding the Bureau's Inherited Regulations and Inherited Rulemaking Authorities*, 83 Fed. Reg. 12,881 (March 26, 2018).

5 Adopted Regulations RFI, *supra* note 3, at 12,287.

6 *Id.* at 12,287.

7 *Id.* at 12,287.

8 *Id.* at 12,287-88 & n.11.

- the remittance rule; and
- the prepaid rule.

The Bureau exempted the Home Mortgage Disclosure Act rule and the payday lending rule from the list of Adopted Regulations, saying that it had "previously announced that it intends to engage in rulemaking processes to reconsider those rules."[9] Congress also repealed the mandatory arbitration rule under the Congressional Review Act, presumptively removing it from the list of Adopted Regulations.

II. It is Inappropriate and Premature to Initiate Major Amendments to the Adopted Regulations through this RFI

This RFI is sketchy and sweeping in scope, requesting comment on whether the Bureau should launch new rulemakings for virtually *all* of the rules it has issued under Federal consumer financial law. Even though the RFI covers multiple major rules, it does not deign to provide readers with a complete list of the rules affected.[10] Likewise, it is impossible to discern any particular issues with specific rules on which the CFPB seeks input. Without this information, ordinary consumers—who are the people the CFPB is charged with protecting--cannot comment meaningfully on the questions raised by the RFI.

Presumably, the CFPB knows the issues that industry would like the CFPB to address and, to the extent the Bureau is in the dark about the concerns of financial services firms, it will soon know industry's grievances through the RFI responses. In contrast, the public can only speculate about the Acting Director's agenda and the interests of industry, both of which impede the public's ability to provide the Bureau with a targeted and meaningful response.

It would be completely inappropriate for the Bureau to contemplate wholesale amendments to its newly adopted rules based on such a defective RFI. Not only is this RFI breathtakingly vague and broad, it is being rushed through before the term of the Acting Director comes to an end (which he told Congress may be as soon as June 22). We are deeply concerned that the real purpose of the RFI may be to provide a fig leaf for a plan by the Acting Director to gut major CFPB rules protecting consumers.

We call on the Bureau to halt any consideration of opening new rulemakings for any of the Adopted Regulations as premature. Doing so would be especially inappropriate in view of the fact that the term of the Acting Director will expire within days.[11] The Bureau should not revisit rules of such critical importance to the American people's welfare under a short-term Acting Director who was never confirmed by the Senate for his post at the CFPB.

---

[9] *Id.* at 12,288.

[10] Instead, the RFI refers readers to a full list of final rules on the CFPB's website. Adopted Regulations RFI, *supra* note 3, at 12,287-88 n.11. Readers are left to assemble the list of Adopted Regulations for themselves.

[11] This comment is due on June 19, 2018. Acting Director Mulvaney told the House Financial Services Committee during a colloquy at a hearing on April 11, 2018, that he would have to leave his post at the CFPB on June 22, 2018, if the President did not nominate a permanent director by then. *See Mulvaney tells panel his CFPB stint ends June 22 if Trump fails to submit a nomination*, Regulatory Report (April 11, 2018), https://www.regreport.info/2018/04/11/mulvaneys-cfpb-stint-ends-june-22-if-trump-fails-to-submit-a-nomination/.

Furthermore, any major revisions to the Adopted Regulations at this stage would fly in the face of Bureau's proud tradition of data-driven rulemaking. As we described in our comment on the Bureau's rulemaking process, the Bureau wisely has preceded its rulemakings to date with an initial stage of fact-gathering and sophisticated empirical evaluation. This fact-gathering stage is designed to provide the Bureau with a neutral assessment of the benefits and harms of future rulemaking and to guard against a rush to judgment. In contrast, this RFI suggests that the Bureau should proceed with rulemaking without first engaging in neutral evaluation and data analysis to determine whether there is any basis for re-opening any of the Adopted Regulations.

The fact that the Adopted Regulations have only been on the books for a few years is another reason why major revamps of any of the rules would be premature. None of the Adopted Regulations has been in effect for more than five years and many have been in effect for only a few. During that time, all indications are that the rules have succeeded in their goal of protecting consumers. In addition, there has been no opportunity to observe the effects of the rules during an economic downturn. Any shortening of the review period to less than five years—particularly if the economy continues to expand—would hamper the Bureau's ability to gather meaningful results on the effect of the Adopted Regulations.

If the Acting Director's intention is to hurriedly reverse some or all of the Adopted Regulations, he will risk litigation. The Adopted Regulations were all based on a deep evidentiary foundation. The Bureau assembled such a strong factual record for those rules originally that not one of the Adopted Regulations was successfully challenged in court for lack of evidence.

Given the extensive empirical evidence justifying the original rules, the Bureau will face an uphill struggle if it seeks to overturn any of those rules as unfounded in fact. To succeed, the Bureau would have to refute its own prior fact-findings *with even stronger empirical evidence*. Given the lack of evidence of changed circumstances and the rules' success to date in safeguarding consumers, that would not be easy.

Assuming that the Bureau eventually amends some or all of the Adopted Regulations, any drastic revisions will invite a court challenge to the rulemakings as arbitrary and capricious.[12] In that litigation, the Bureau would find itself in the uncomfortable position of defending a 180-degree reversal on the facts when the Adopted Regulation in question had only been in effect for five years or less. If the Bureau lost, it would create confusion in the marketplace and tarnish the Bureau's reputation. In the meantime, the substantial sunk costs spent on implementation of the original rule and public education would be wasted, imposing a heavy toll on industry and the public at large.

To avoid this sort of rush to judgment, Congress decreed a specific process of neutral empirical assessment for the Adopted Regulations under Section 1022(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act or Dodd-Frank).[13] Instead of racing to commence new rulemakings, the CFPB should first put each significant Adopted Regulation through the 1022(d) process when the time comes, as we now discuss.

---

[12] 5 U.S.C. § 706(2)(A) states that courts may reverse agency rules where they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ."

[13] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1022(d) (2010).

III. Congress Prescribed the Process for Review of Significant Adopted Regulations

In 2010, Congress laid down the procedure for evaluating the effectiveness of every significant rule adopted by the Bureau. This provision is found in Section 1022(d) of the Dodd-Frank Act and requires the Bureau to conduct an empirical assessment of every significant new regulation and publish a report on that assessment within five years of the effective date of the rule.[14] The purpose of this assessment is to gauge the rule's effectiveness: "The assessment shall address, among other relevant factors, the effectiveness of the rule . . . in meeting the purposes and objectives of [Title X of Dodd-Frank] and the specific goals stated by the Bureau."[15] Importantly, Dodd-Frank states that the assessment shall be based on empirical evidence: "The assessment shall reflect available evidence and any data that the Bureau reasonably may collect."[16] During that assessment, the Bureau must solicit public comment on whether to modify the rule: "[t]he Bureau shall invite public comment on recommendations for modifying, expanding, or eliminating the newly adopted significant rule or order."[17]

These provisions instruct the Bureau to study the effectiveness of each significant rule impartially and empirically after a decent interval for implementation and observation. Specifically, the Dodd-Frank Act sets a five-year deadline for every look-back assessment: "The Bureau shall publish a report of its assessment under this subsection not later than 5 years after the effective date of the subject rule or order."[18]

In practice to date, the CFPB has waited until the fourth year that a new rule has been in effect to undertake the 1022(d) assessment. In 2017, the Bureau initiated 1022(d) assessments for three significant rules: the remittance rule,[19] the RESPA mortgage servicing rule,[20] and the ability-to-repay/qualified mortgage rule.[21] In each case, the Bureau launched the assessment process by publishing a *Federal Register* notice.[22] Each notice summarized the contents of the rule in question and its rulemaking history, and explained why the Bureau determined that the rule was a "significant rule" under Section 1022(d).[23] After these preliminaries, the notice described the

---

14 Dodd-Frank Act, § 1022(d)(1).

15 *Id.*

16 *Id.*

17 *Id.* § 1022(d)(3).

18 *Id.* § 1022(d)(2).

19 Bureau of Consumer Financial Protection, *Request for Information Regarding Remittance Rule Assessment: Notice of assessment of remittance rule and request for public comment*, 82 Fed. Reg. 15,009 (March 24, 2017).

20 Bureau of Consumer Financial Protection, *Request for Information Regarding 2013 Real Estate Settlement Procedures Act Servicing Rule Assessment: Notice of assessment of 2013 RESPA servicing rule and request for public comment*, 82 Fed. Reg. 21,952 (May 11, 2017).

21 Bureau of Consumer Financial Protection, *Request for Information Regarding Ability-to-Repay/Qualified Mortgage Rule Assessment: Notice of assessment of Ability-to-Repay/Qualified Mortgage rule and request for public comment*, 82 Fed. Reg. 25,246 (June 1, 2017).

22 *See* notes 19-21 *supra.*

23 The Bureau based its significant rule determination for the remittance and RESPA mortgage servicing rules on a variety of factors, including the estimated aggregate annual cost to industry of complying with the rule, important anticipated effects on the price and quantity of the consumer financial services provided, important effects on business operations, and the degree of compliance risks to providers. *See* 82 Fed. Reg. at 15,012; *id.* at 21,954-55. Meanwhile, the Bureau found the ability-to-repay/qualified mortgage (QM) rule to be significant based on the

plans for the assessment, including the goals of the rule being evaluated, the questions to be addressed, potential data sources, applicable metrics, methodologies, and study design. In the last section, the notice issued a request for public comment inviting members of the public to submit information, data, and comments on the Bureau's plans for assessment of the rule's effectiveness.

While each 1022(d) notice elicited recommendations for modifying, expanding, or eliminating the rule, the Bureau stated emphatically that the Section 1022(d) assessments "are for informational purposes only and are not part of any formal or informal rulemaking proceedings under the Administrative Procedure Act."[24] The Bureau added that it did not "anticipate that the assessment report [would] include specific proposals . . . to modify any rules, although the findings made in the assessment [would] help inform the Bureau's thinking as to whether to consider commencing a rulemaking proceeding in the future."[25]

Technically, nothing in Section 1022(d) prevents the CFPB from amending significant rules before the five-year look-back assessment has concluded or has even been initiated. Indeed, over the past five years, the Bureau has made minor amendments to fine tune many of the Adopted Regulations.[26] However, minor amendments are one thing and major amendments are another.

Under the statutory scheme, any effort to make major changes to significant rules in advance of the look-back review would be premature. The look-back period in Section 1022(d) contemplates that enough time will first pass to generate a sufficient amount of meaningful data on the experience with the rule. Given the substantial sunk costs to industry of installing compliance systems and the potential for public confusion, it is better to let major rules settle in and accumulate a track record during the full look-back period, allow the 1022(d) assessment process to run its course, and then consider the results before contemplating any major changes to significant rules.

For the three rules that are currently undergoing 1022(d) assessments, there is no point in considering major amendments to those rule until the assessments are complete. The Bureau should postpone any consideration of major amendments to those rules until those assessments are finished, the assessment reports have been published,[27] and the Bureau has taken the necessary amount of time to digest those reports. For other Adopted Regulations that are significant, the Bureau should stay its hand from any major revisions until the look-back period has passed and the 1022(d) assessments have been completed.

---

effect of the qualified mortgage presumption of compliance on mortgage originations operations, access to credit considerations, and "possible effects on innovation, overall product design and competition." *Id.* at 25,248.

[24] 82 Fed. Reg. at 15,010; 82 Fed. Reg. at 21,952; 82 Fed. Reg. at 25,247.

[25] 82 Fed. Reg. at 15,010; *see also* 82 Fed. Reg. at 21,953; 82 Fed. Reg. at 25,247.

[26] Prior Rulemaking Comment, *supra* note 2, at 19.

[27] The CFPB plans to publish the 1022(d) report on the remittance rule by October 28 of this year and the reports on the RESPA mortgage servicing rule and the ability-to-repay/qualified mortgage rule by January 10, 2019. 82 Fed. Reg. at 15,010; 82 Fed. Reg. at 21,953; 82 Fed. Reg. at 25,247.

IV. The Bureau Should Similarly Conduct Neutral Fact-Gathering and Empirical Analysis before Considering Amending Non-Significant Adopted Regulations

Not all of the Adopted Regulations are significant rules covered by Section 1022(d). So far, the CFPB has determined that one Adopted Regulation -- the TILA mortgage servicing rule -- is not significant[28] and there may be other Adopted Regulations in that category.

Even though Adopted Regulations that are not significant do not undergo 1022(d) review, it would be a grave mistake to overhaul those rules based on the comments to this RFI alone. As we explained at length in our prior response to the rulemaking processes RFI,[29] from its inception the Bureau has engaged in an initial process of neutral fact-gathering and empirical analysis to determine whether discretionary rulemakings should even go forward. As part of that process, the Bureau elicited input from all segments of society, including ordinary citizens, consumer advocates, and industry representatives. In addition to meetings, town halls, and field hearings, the Bureau regularly issued RFIs[30] and Advance Notices of Proposed Rulemakings[31] inviting comment on issues needing study and possible data sources.[32] Unlike this RFI, which is thoroughly uninformative, the past RFIs pinpointed discrete consumer finance markets or practices (such as overdraft fees or private student loans) and provided readers with helpful, detailed descriptions of the legal context and substantive issues at stake. These multiple feedback channels generated the full range of facts and perspectives that the CFPB needed for careful, balanced, and responsive rulemaking.

During the initial evaluation period, the Bureau's Regulations, Markets, and Research Division (RMR) conducted empirical research on the policy issues involved, usually based on aggregate data sets and in light of input from industry, academia, think tanks, consumer groups and others on the studies' data sources, methodology, and design. One of the major purposes of this research, by Ph.D. social scientists and expert market analysts, was to help the CFPB assess whether a new rule was even needed.

Before deciding whether to embark on major amendments to any of the non-significant Adopted Regulations, the Bureau should undergo the same initial process of neutral fact-gathering and empirical research that it has conducted in the past. Scrapping this procedure would result in ill-considered, poorly justified amendments that would be a magnet for legal challenges. It would also open up the CFPB to charges of politically biased rulemaking.

The vague RFI on Adopted Regulations makes no mention of any plans to undertake the broad public outreach and neutral research evaluation that has preceded the Bureau's major rulemaking

---

[28] 82 Fed. Reg. at 21,954-55.

[29] Prior Rulemaking Comment, *supra* note 2, at 14-15, 20-22.

[30] *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).

[31] 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).

[32] *See, e.g.*, Rulemaking Processes RFI, *supra* note 1, at 10,439.

initiatives to date. We are gravely concerned that the Bureau is dispensing with that process in a rush to roll out major rulemaking amendments based on lobbying behind closed doors.[33] We reiterate: members of the general public do not know what revisions industry actors may be pushing and this RFI does nothing to inform them. Similarly, we are disturbed at the prospect of major rulemaking revisions based on untested assertions instead of research into the facts. If leadership pushes forward with rule amendments on that basis, it would result in incalculable harm to the consumers whom the Bureau is supposed to protect and to the Bureau's reputation for probity.

V. The Bureau Should Stop Impeding Data Collection for the 1022(d) and Other Empirical Assessments

The current 1022(d) assessments raise another serious concern involving the proper procedures for new rulemakings, having to do with data collection. On December 4, 2017, Acting Director Mulvaney gave a press conference at which he announced a freeze on all CFPB collection of personal information, including transaction-level data, due to privacy and information security concerns. As part of that freeze, Mr. Mulvaney stated he was halting the collection of data traceable to *either* consumers or businesses.[34] About six months later, in an email to Bureau employees dated May 31, 2018, he said he planned to restart the collection of consumers' personally identifiable information because an outside consultant had concluded that the Bureau's information security systems "appeared to be well-secured."[35]

The freeze dealt an immediate blow to the 1022(d) assessment process. Invoking the freeze, the Bureau prohibited the Research team from uploading critical and long awaited datasets that were needed to conduct one or more of the ongoing 1022(d) assessments. Also due to the freeze, CFPB examiners were forbidden from onboarding routine company data in preparation for examinations and Enforcement attorneys were prohibited from analyzing electronic evidence obtained in discovery.[36] Because the Research team also planned to use information gained from Supervision and Enforcement in its 1022(d) assessments,[37] the inability to upload or review information relevant to Supervision or Enforcement was an added impediment to the 1022(d) reviews. The clock kept ticking on the tight Congressional deadlines for those reviews, even as the data freeze brought them to a halt.

---

[33] The Bureau's *ex parte* policy does not require disclosure of private discussions to date between Bureau officials and outside parties urging revisions to the Adopted Regulations. *See* Prior Rulemaking Comment, *supra* note 2, at 33, 35.

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

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

[36] *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].

[37] *See, e.g.*, 82 Fed. Reg. at 15,013.

As we explained in our response to the RFI on rulemaking processes, the December data freeze was not only unnecessary, it was overkill under well-established data security norms.[38] Other federal agencies have had data breaches to date, but none of them stopped collecting data as a result. Instead, those agencies quickly plugged the leaks and resumed data collection.[39] The CFPB should have done the same.

Needless to say, a 1022(d) assessment without data is no assessment at all. The effect of the data freeze was to stop the 1022(d) process in its tracks. While the December order may have been partly lifted, aspects of that freeze may persist. Nothing stops management, moreover, from paralyzing the 1022(d) process by imposing a data freeze again. Consequently, we insist that the Bureau stop impeding the Research, Supervision, and Enforcement teams and provide them with full access to the data that they need for the 1022(d) assessments and their other functions, in adherence with established cybersecurity protocols. We make the same demand for all other empirical reviews conducted by the Research and Markets teams in advance of rulemaking.

VI. Responses to Specific Topics Enumerated in the RFI

Most of the questions listed at the end of this RFI[40] simply track the statutory language or are too sketchy to permit a meaningful response without additional information. However, in this section we venture some preliminary responses to three of the enumerated questions.

A. Question 1.a: Should Adopted Regulations be Tailored by Size or Type of Institution?

Question 1.a asks whether any of the Adopted Regulations should "be tailored to particular types of institutions or to institutions of a particular size"? Again, the proper way to solicit comment on this question is to pose it for a *specific rule* and to tell the public *how* the proposed amendment would be tailored to *which type or size* of institutions. Without that level of detail, we cannot comment on specific proposals that may have been aired at the Bureau.

We do wish to make a general comment, however, keying off the larger discussion in our response to the rulemaking processes RFI.[41] Before the enactment of the Dodd-Frank Act, regulatory arbitrage by type of entity and charter became such a serious problem that it precipitated a race to the bottom in mortgage lending standards. In the Dodd-Frank Act, Congress sought to halt this regulatory arbitrage by applying CFPB rules to virtually all providers of consumer financial services nationwide, regardless of location or charter.[42] The resulting level playing field creates a national floor that allows reputable companies to furnish valuable financial services to consumers without destructive competition from shady operators.

---

38 Prior Rulemaking Comment, *supra* note 2, at 23.

39 Kate Berry, *Mulvaney response to CFPB data security gaps baffles cyber experts,* AM. BANKER, Apr. 23, 2018; Warren Letter, *supra* note 36, at 2-4.

40 *See* 83 Fed. Reg. at 12,288-89.

41 Prior Rulemaking Comment, *supra* note 2, at 8-9.

42 Dodd-Frank Act, § 1022(b)(4)(A).

In view of this important objective of Title X of Dodd-Frank, any proposal to create a two-tier system of regulation--one tier for one category of companies and a second for another—raises grave regulatory arbitrage concerns. To the extent that the Bureau is contemplating such a proposal or proposals, it is essential for the Bureau to be fully transparent in doing so, to seek more feedback after fully informing the public about the details for specific amendments, and to conduct extensive empirical research into the possible adverse effects of creating large regulatory loopholes.

B. Question 1.d: Are Any of the Adopted Regulations Incompatible or Misaligned with New Technologies?

Question 1.d asks whether aspects of the Adopted Regulations are "incompatible or misaligned with new technologies, including by limiting providers' ability to deliver, electronically, mandatory disclosures or other information that may be relevant to consumers . . ."

This is another question that requires further information before we and other members of the public can formulate a full response. For instance, what new technologies have providers flagged? How do any of the Adopted Regulations arguably limit providers' ability to deliver electronically mandatory disclosures?

Any proposal to shift mandatory disclosures to electronic delivery alone (whether at the consumer's option or otherwise) raises serious questions about the effectiveness of that form of delivery. We know that other types of companies, such as retailers, provide consumers who are shopping on their websites with disclosures or contracts online and ask those customers to acknowledge or consent to them through some sort of click-through or other proxy for assent. Empirical research has shown that virtually no consumers actually read those electronic disclosures.[43] There is no reason to think that electronic delivery of mortgage disclosures or other consumer finance disclosures would perform any better.

Given this dire track record in the electronic environment, the Bureau needs to tread extremely carefully if it decides to go down this path. The Bureau would need to mount the same or better intensive qualitative and quantitative testing of the proposed disclosures that it undertook for the integrated mortgage disclosure rule.[44] Further, the Bureau would need to empirically test the take-up, readership, and comprehension rates by consumers for electronic disclosures under mandatory, opt-in, and opt-out regimes. Without compelling evidence that electronic disclosures—when compared to paper disclosures—would provide consumers with "timely and understandable information to make responsible decisions about financial transactions"[45] and produce markets for consumer financial products and services that "are fair, transparent, and competitive,"[46] an electronic disclosure rule would likely not withstand judicial challenge.

---

[43] *See, e.g.*, Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*," 43 J. LEGAL STUD. 1 (2014).

[44] *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, 79,748-49 (Dec. 31, 2013); Kleimann Communication Group, Inc., Know Before You Owe: Evolution of the Integrated TILA-RESPA Disclosures (July 9, 2012).

[45] Dodd-Frank Act, § 1021(b).

[46] Dodd-Frank Act, § 1021(a).

C. Question 1.e: Should Any of the Adopted Regulations be Modified to Better Protect Consumers against Identity Theft?

The Bureau has not identified any Adopted Regulations on point, which hampers the ability of people to provide responsive comments. We do observe, however, that the Bureau has not issued an Adopted Regulation, or proposed a future rule, under the Fair Credit Reporting Act (FCRA) to address the issues raised by Equifax data breach. Similarly, the CFPB's latest rulemaking agendas announce no plans to initiate a future FCRA rule.[47]

The Equifax debacle inflicted staggering harm on consumers and has the potential to inflict more such harm on consumers for years to come. Among other things, the Equifax episode showed how obsolescent FCRA and its rules have become. One free credit report per year from each credit reporting agency is small solace against identity theft when personally identifiable data that was obtained in the Equifax hack could be used by an imposter at any time to open a large credit line in an innocent customer's name. Cleaning up fraudulent credit lines is often a long drawn-out nightmare. And while security freezes provide some protection against future frauds, they are cumbersome to order.[48] In these respects and others, FCRA and its rules could do a far better job of protecting consumers from identity theft.

This is no hypothetical matter. According to Equifax, some *148 million* consumers had their personally identifiable information hacked,[49] putting all of them at immediate and ongoing risk of identity theft. Given the enormity of this harm, the CFPB's failure to consider a rulemaking to address this unfolding disaster is nothing short of baffling. We call on the Bureau, as soon as possible, to issue a detailed RFI seeking comment on the need for a potential new rule, under the FCRA and any other relevant laws within its purview, to strengthen protections to consumers in response to the Equifax breach.

D. Conclusion

This RFI elicits comments from consumers and their advocates without providing them with any truly meaningful opportunity for informed input. Meanwhile, the Acting Director's remarks at a recent real estate convention, urging industry representatives to comment on this and other rulemaking RFIs,[50] raises concerns about agency capture and biased rulemaking. The Bureau should bring to a halt what appears to be a rush to reverse its rules. Instead, it should conduct its normal, careful fact-gathering and impartial research assessments before contemplating any major changes to the Adopted Regulations.

---

[47] *See, e.g.*, Bureau of Consumer Financial Protection, *Semiannual Regulatory Agenda*, 83 Fed. Reg. 27,234 (June 11, 2018); Consumer Financial Protection Bureau, Spring 2018 Rulemaking Agenda (May 10, 2018), https://www.consumerfinance.gov/about-us/blog/spring-2018-rulemaking-agenda/ (viewed May 16, 2018).

[48] In the Economic Growth, Regulatory Relief, and Consumer Protection Act, Congress recently gave consumers the right to security freezes without charge. Publ. L. No. 115-174, § 301(a)(2) (2018).

[49] Merrit Kennedy, *Equifax Says 2.4 Million More People Were Impacted By Huge 2017 Breach*, NATIONAL PUBLIC RADIO (March 1, 2018), https://www.npr.org/sections/thetwo-way/2018/03/01/589854759/equifax-says-2-4-million-more-people-were-impacted-by-huge-2017-breach.

[50] Rachel Witkowski, *Mulvaney vows to 'bring sanity' to Qualified Mortgage rule*, AM. BANKER, May 15, 2018. The CFPB has not posted the text of this speech on its website.