



May 29, 2018

VIA Electronic Submission and U.S. Mail

Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

Re: Request for Information Regarding Bureau External Engagements, Docket No. CFPB-2018-0005

Dear Ms. Jackson,

The Consumer Bankers Association (“CBA”)¹ appreciates the opportunity to comment in response to the Bureau of Consumer Financial Protection’s (“Bureau”) request for information on practices regarding external engagements (“RFI”).² CBA and its member institutions believe that informed, transparent governing is the best way to produce informed policy that is good for both depository institutions and consumers. Furthermore, we believe a well-functioning Bureau is critical to maintaining a thriving and stable consumer finance marketplace and our concerns here lie not with the Bureau’s mission but with the methods the Bureau has often employed, mainly in the past, to pursue an ostensibly predetermined political agenda and to unilaterally shape the public message for important policy considerations and other Bureau actions.

As such, we believe there are several areas in which the Bureau could improve the process of external engagement moving forward. These are addressed below.

¹ The Consumer Bankers Association (CBA) is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation’s largest bank holding companies as well as regional and super community banks that collectively hold two-thirds of the total assets of depository institutions.

² Request for Information Regarding Bureau External Engagements, 83 FR 8247 (February 21, 2018).

Field Hearings and other Public Forums

CBA believes one of the most critical means of public engagement is achieved by conducting field hearings, town halls, and other public forums for debate and education of proposals and related issues. It is critical that the Bureau gather all interested parties to provide public feedback for policy considerations. An open forum provides the opportunity for all stakeholders to voice concerns and opinions; a critical means of feedback in addition to formal notice and comment procedures. Accordingly, we urge the Bureau to continue its practice of holding public forums for greater input.

To ensure these forums provide as much value as possible, we would encourage the Bureau to provide relevant hearing materials to witnesses in advance of the hearing. Our experience from participation in past hearings has been less than informative. Often, participants are merely advised of the “issue” that will be discussed but not given any contextual documents ahead of time (in one case, for example, a 1,700 page proposed rule that was not made available with adequate time to prepare). Witnesses cannot be expected to discuss an issue in any meaningful way if they are not properly and fully informed about the particulars of what is being discussed. That simply amounts to a press conference, not a hearing. Sharing information well ahead of time will go a long way in encouraging more dialogue and participation at Bureau events and will enhance their value for the Bureau and the other stakeholders.

We would also recommend the Bureau go one step further than their usual one-per-issue field hearing model and conduct regular stakeholder meetings for policy considerations in order to keep all interested parties informed and allow for greater public input and debate. These additional meetings could take the form of webinars or other remote access mediums in order to accommodate a larger number of participants and to keep efforts and costs at a minimum.

Supervisory Highlights

The Bureau should retain its practice of publishing *Supervisory Highlights*. The Bureau’s last report was its Summer 2017 *Supervisory Highlights*, which was issued in September 2017 and covered supervisory activities generally completed between January through June 2017.³ It previously issued *Supervisory Highlights* covering supervisory activities generally completed between September through December 2015 and between September through December 2016 in, respectively, March 2016 and April 2017.

In the CFPB’s Request for information on its supervisory program, one of the topics on which the Bureau sought comment is the usefulness of *Supervisory Highlights* to share findings and

³ <https://www.consumerfinance.gov/policy-compliance/guidance/supervisory-highlights/>

promote transparency.⁴ As we wrote in our response to that request, *Supervisory Highlights* is useful for sharing examination findings and experiences, and for promoting transparency with respect to examinations. Institutions rely on *Supervisory Highlights* to make changes to their operations and compliance practices; therefore, the Bureau should provide as much information about examination findings as possible while preserving confidentiality. To that end, *Supervisory Highlights* should present anonymized cases with detailed legal analysis to provide greater insight into the Bureau's supervisory processes.

Although we greatly appreciate *Supervisory Highlights*, it is important that it does not become a backdoor method for the Bureau to institute policy. *Supervisory Highlights* should not be the source of "guidance" or "interpretations" that effectively constitute new regulatory obligations. For example, the Summer 2017 issue of *Supervisory Highlights* included an extended discussion interpreting false representations in connection with information provided by consumers in loan applications that would have been better suited for formal regulatory guidance.

Consumer Advisory Board Participation

The Bureau should implement and maintain an equal amount of representation of industry participants on advisory groups, specifically the Consumer Advisory Board ("CAB") in order to ensure a well-rounded view of critical policy issues. The CAB is an important source of feedback for the Bureau for regulatory, supervisory, and enforcement issues and it is vital to the policymaking process that the Bureau receive feedback from all sides. Unfortunately, this has not been the practice. There are currently only three bankers, one is retired, out of twenty-five total members on the CAB. We believe better representation of industry participants will promote a more informed process, and we urge the Bureau to seek the advice and participation of more banking practitioners on the CAB. When we raised this issue with the Bureau in the past, we were informally told the banks and other industry participants had regular communication with the Bureau because of the supervisory process and did not have the same need to participate in the CAB as others. However, the communication individual bankers may have with their regulator, in the context of the supervisory or enforcement process, is highly limited and does not in any way replace the opportunity for robust policy discussions in CAB.

Additionally, the Bureau should focus Advisory Board agendas on issues earlier in the pipeline so input from the CAB members has a chance to be meaningful. Doing it after a rule has been finalized (as it did with the small-dollar rule in the fall of 2017) is just a press conference. The Bureau should also promote candid discussions through non-public Advisory Board and Council meetings by distributing minutes.

⁴ Request for Information on Supervisory Processes, 83 FR 8234 (February 20, 2018).

Participation in Industry Events

CBA encourages the Director and other Bureau staff to attend industry gatherings such as annual meetings and conferences promoted by industry. There are numerous options for participation from numerous organizations. CBA maintains a yearly convention, CBA LIVE, which provides our membership the opportunity to hear from policymakers on the issues at hand. Bureau staff has participated in our past conferences and are extremely appreciative of the relationships forged through this participation and the guidance that is provided. The American Bar Association also has regular meetings of the Consumer Financial Services Committee, where the nation's top lawyers discuss issues relevant to consumer financial services regulation. We encourage the Bureau to continue this practice of participation in industry events as it is an important part of the flow of information.

Midnight Embargo

In the past, the Bureau has employed many techniques intended to control messaging on policy issues. Specifically, the use of "midnight embargoes" on press releases. The Bureau has often given press outlets a press release on a significant new regulation around mid-day with the understanding that they will not make it public until midnight. These embargoes prevent reporters from sharing these releases with outsiders. Techniques like this seem to be more acceptable for a political organization, not a federal regulator.

In essence, this strategy results in stories appearing in the print edition of most major newspapers the following day without substantive input from outside stakeholders. Often, observers, including CBA, who are contacted during the embargo period decline to comment in advance of seeing the report or regulation. As a result, the initial articles on a new regulation or study will often appear with the Bureau as the sole source, giving them absolute control over when the information can go public, while still giving the reporters access prior to the release of information.

Midnight embargoes are extremely rare among banking regulators. The Federal Reserve Board, Office of the Comptroller of the Currency and Federal Deposit Insurance Corporation have not used midnight embargoes in recent memory, nor are they common among other financial regulators and enforcement agencies, such as the Federal Housing Finance Agency and the Federal Trade Commission. The Bureau, in contrast, has used midnight embargoes for nearly every major new rule, proposal, and study it has released. It frequently does so immediately prior to a field hearing or significant announcement. In effect, the tactic denies industry the opportunity to comment on the initial story discussing an important new action. While media organizations can obviously write follow-up stories containing those views, such articles are rarely given the space and primacy of the first-day take.

This form of embargoing important information makes it difficult for the financial services industry and other stakeholders to present our viewpoint in the media. As Justice Louis Brandeis once said, “...sunlight is the best disinfectant.”⁵ Accordingly, we urge the Bureau to reconsider the use of midnight embargos.

Facts Asserted in Consent Orders

Historically, the Bureau has been inflexible in negotiating the revision, removal, or inclusion of facts in consent orders. This has led to facts that are inaccurate or incomplete. As an initial matter, prudential regulators typically do not include extensive statements of facts, unlike the Bureau. Even with respect to those agencies that include facts in their consent orders, such as the Department of Justice, those fact sections only include sufficient facts to support each prong of their claim. Moreover, these agencies permit institutions to meaningfully discuss the facts to be included prior to finalizing a consent order.

In contrast, Bureau consent orders include extensive fact sections, and the Bureau typically is unwilling to engage in a meaningful dialogue. When institutions attempt to negotiate with the Bureau’s Enforcement Division to revise their proposed facts, Enforcement typically refuses the institution’s revisions, noting that the Bureau is entitled to include any facts in the consent order that support its narrative. This remains the case even where the institution requests to expand the narrative to include facts that Enforcement acknowledges are accurate.

Enforcement’s inflexibility regarding facts in its consent order is exacerbated by its tendency to include facts that are inflammatory and mischaracterize the facts at issue in the case. This practice has severe negative effects on the institution that signs the consent order, as well as the consumer financial services market, as institutions routinely review Bureau consent orders to determine how to meet regulatory expectations. In addition, investors, counterparties, media, and the general public review consent orders to understand an institutions’ practices. If the Bureau overstates or embellishes facts in a consent order, then the market, investors, counterparties, the media, and the public will remain misinformed regarding the facts at issue. As these parties have begun to understand that factual allegations sometimes are exaggerated, they also tend to discount the veracity of the Bureau’s allegations, thus lowering the Bureau’s credibility.

To avoid these negative effects, CBA recommends that the Bureau not include extensive facts in consent orders, and instead limit the facts to those solely necessary to support each prong of its claim(s). Whether or not extensive fact sections remain, the Bureau should require Enforcement to allow institutions to negotiate and, where reasonable, correct and revise

⁵ From an observation by Supreme Court Justice Louis Brandeis in *Other People's Money And How the Bankers Use It* (1914).

Enforcement's facts in its proposed consent orders. Similarly, we request that the Bureau discontinue use of inflammatory language that misrepresents the facts at issue in the case.

These recommendations, if adopted, will ensure that consent orders more accurately reflect the conduct at issue, instead of including embellished narratives that may mislead the public.

Press Releases for Enforcement Actions

In addition to the Bureau's tendency to overstate or embellish facts in its consent orders, the Bureau tends to do the same in its accompanying press releases. Specifically, Bureau press releases often include facts that are inflammatory, legal conclusions that are unsupported, and titles that misrepresent the conduct at issue. In fact, the Bureau Ombudsman examined this issue as it relates to press releases in 2015, finding "some words used with legal meanings or interpretations in the press releases that were not in the consent orders" and "some summarization in the press releases that resulted in certain factual elements seeming more important than they otherwise might, even if factually correct."⁶ Although the Ombudsman's report indicated the Bureau intended to avoid this practice in the future, our members have continued to witness the Bureau overstating and embellishing facts both in consent orders and press releases.

As with the Bureau's consent orders, its inflammatory press releases have severe negative effects on the overall market. Once the Bureau publishes a press release, the investors, counterparties, media, and the general public are alerted to potential unlawful conduct by an institution, and turn to the press release for the facts. In addition, institutions routinely review Bureau press releases to stay mindful of how to better comply with the Bureau's legal authorities. If the Bureau's press releases are inaccurate, then the market, investors, counterparties, the media, and the public will be misinformed about an institution and its conduct, which will constitute a major blow to the institution's ability to operate and thrive in its industry.

To avoid these consequences, CBA recommends the Bureau implement internal guidelines that govern the content of press releases, including what can and should be said, and provide institutions with its draft press release and any other related Bureau materials for publication prior to the consent order's execution. The Bureau must allow the institution to negotiate and, where agreeable, revise these materials to ensure their accuracy and completeness. These recommendations, if adopted, will ensure that press releases accurately reflect the conduct at issue, consistent with our recommendations regarding consent orders.

⁶ https://files.consumerfinance.gov/f/201512_cfpb_report_ombudsman-office.pdf

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Again, CBA greatly appreciates the opportunity to share our thoughts and to work with the Bureau on these and other important issues. Please do not hesitate to reach out to CBA directly at dpommerehn@consumerbankers.com or 202-552-6368 should you need anything further.

Sincerely,



David Pommerehn
Associate General Counsel and Vice President
Consumer Bankers Association