

Comments of Financial Regulation and Consumer Protection Scholars on
Docket No. CFPB-2018-0005
May 29, 2018

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

Dear Ms. Jackson:

The undersigned professors of consumer law and financial regulation and former regulators submit the following comments in response to the Consumer Financial Protection Bureau's Request for Information ("RFI") Regarding Bureau External Engagements (Docket No. CFPB-2018-0005). Each signatory's affiliation is indicated below his/her signature to provide institutional affiliation, but this comment does not represent the views of their institutions.

Sincerely,

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I. IT IS APPROPRIATE AND NECESSARY FOR THE BUREAU TO ENGAGE IN REGULAR OUTREACH AND CONVERSATION WITH A BROAD RANGE OF INDIVIDUALS AND ENTITIES AFFECTED BY CFPB ACTIVITIES, INCLUDING INDUSTRY, CONSUMERS, AND THEIR REPRESENTATIVES.

The work of the Bureau impacts the lives of tens of millions of consumers as well as consumer financial service providers within its jurisdiction. For this reason, it is essential that as the CFPB does its work, it engages in robust outreach and conversation with all parties affected by its work, including consumers, consumer groups and advocates that focus on an array of different consumer markets and issues, and the various industry participants within the Bureau's jurisdiction. Broad and transparent engagement with all sectors of affected stakeholders will ensure that the Bureau receives the fullest possible information for sound decision-making while preserving its legitimacy as a neutral independent agency.

The undersigned believe that the Bureau's outreach and engagement efforts with affected constituencies have been appropriate and robust in the past, and that the resulting regulations, supervisory activities, enforcement actions, educational efforts, and other work of the Bureau reflect a balanced, responsive, and inclusive approach by the Bureau. We encourage the Bureau to continue to engage with and listen to all affected constituencies, as more fully described herein.

II. THE BUREAU HAS EFFECTIVELY REACHED OUT TO AND HEARD FROM EXTERNAL PARTIES, INCLUDING INDUSTRY AND CONSUMERS, IN NUMEROUS WAYS.

A. THE BUREAU HAS EFFECTIVELY REACHED OUT TO AND HEARD FROM INDUSTRY AND CONSUMERS IN ITS RULEMAKING ACTIVITIES.

In the course of the Bureau's process before issuing a final rule, the Bureau has, in the past, regularly engaged with affected parties through numerous avenues. These avenues have included, but are not limited to, discussions with advisory boards, field hearings, roundtables, town halls, small business review panels (SBREFAs), and training and implementation activities.

It would be impossible to catalog the numerous ways the Bureau, in its rulemaking, has engaged externally over the short life of the Bureau. Instead, in this comment we focus on the many external engagement activities of the Bureau in regards to one key rule adopted by the Bureau: the Mortgage Servicing Rule.¹

In 2012, in accordance with Dodd-Frank, the Bureau proposed major changes to the mortgage servicing rule.² The final rule was adopted on February 14, 2013,³ and became effective January 10, 2014.⁴ The Bureau later adopted amendments to the rule on October 19, 2016,⁵ which became effective (in large part) on October 19, 2017.⁶

In writing the proposed rules the Bureau took into account numerous sources of external input. These varied sources included studies and enforcement actions by other governmental agencies, including the terms of the National Mortgage Settlement, actions by the Office of the Comptroller of the Currency and the Federal Reserve Board,⁷ law review articles,⁸ mortgage market news accounts,⁹ studies by consumer advocacy groups,¹⁰ and testimony before Congress.¹¹ In developing the mortgage servicing proposals, “Bureau staff met with mortgage servicers, force-placed insurance carriers, industry trade associations, consumer advocates, other Federal regulatory agencies, and other interested parties to discuss various aspects of the statute and the servicing industry.”¹² The Bureau “consulted with relevant Federal regulators both regarding the Bureau’s specific proposals and the need for and potential contents of national mortgage servicing standards in general.”¹³

In its notice of proposed rule-making, the Bureau specifically asked commenters to address the potential burden the regulations might have on small businesses, and to recommend adjustments to the rule that might be appropriate.¹⁴ In setting the effective date, the Bureau also asked for input from industry regarding the speed with which servicers would be able to modify their software, adopt policies and procedures, train staff, and otherwise implement new rules.¹⁵ The Bureau set the review timelines for loss mitigation applications (30 days), and the rule prohibiting foreclosure while a borrower was making payments pursuant to a trial loan modification, based on the existing industry standard.¹⁶

¹ 12 C.F.R. 1024.30 – 1024.41. For additional discussion of the Bureau’s public outreach efforts with respect to its rulemaking process, see the forthcoming Comments of Financial Regulation and Consumer Protection Scholars on Docket No. CFPB-2018-0009.

² 77 Fed. Reg. 57199 (Sept. 17, 2012).

³ 78 Fed. Reg. 10695 (Feb. 14, 2013).

⁴ *Id.* at 10696.

⁵ 81 Fed. Reg. 72160 (October 19, 2016).

⁶ *Id.* There were some interim amendments to the rule as well, catalogued in the 2016 rule at 81 Fed. Reg. 72160.

⁷ Proposed Rule with Request for Public Comment, 77 Fed. Reg. 57199, 57200, 57201, 57204, 57205 (Sept. 17, 2012).

⁸ *Id.* at 57202.

⁹ *See, e.g., id.* (citing to *Inside Mortgage Finance*).

¹⁰ *Id.* at 57203.

¹¹ *Id.*

¹² *Id.* at 57207.

¹³ *Id.*

¹⁴ *Id.* at 57206, 57209.

¹⁵ *Id.* at 57208.

¹⁶ *Id.* at 57268, 57270.

The Bureau's early intervention requirements were formed based on existing requirements on servicers imposed by private mortgage investors, the GSEs, Ginnie Mae, or government agencies offering guarantees or insurance for mortgage loans, such as FHA, the VA, or the Rural Housing Service.¹⁷ Similarly, in response to information obtained from consumer advocates, the Bureau proposed requiring that servicers provide information requested by borrowers and respond to errors identified by borrowers even if they were delinquent on their loans.¹⁸ The Bureau also set up a loss mitigation process that addressed "concern among mortgage market participants...regarding servicers' performance of loss mitigation activity in connection with the mortgage market crisis."¹⁹

In writing the rules, the Bureau considered the impact regulations might have on small businesses by convening a Small Business Review Panel and asking specifically, in the proposed rule, for comments regarding appropriate rule adjustments for small businesses.²⁰ The SBREFA panel consisted of representatives from 16 companies as small entity representatives.²¹ The Bureau tailored its proposed rule based on input from small servicers, including feedback received in the SBREFA panel, after which it decided not to exempt small servicers from the early intervention requirements of the loss mitigation rule, but asked "whether the Bureau should consider alternative means of compliance with proposed § 1024.39 that would provide small servicers with additional flexibility, such as by permitting small servicers to develop a more streamlined written notice under proposed § 1024.39(b)."²²

When the time came to draft and adopt final rules, the Bureau once again took into consideration the input received from various stakeholders and governmental entities.²³ It received over 300 comments, the majority of which "were submitted by mortgage servicers, industry groups representing servicers and businesses involved in the servicing industry."²⁴ Comments were received from "[l]arge banks, community banks and credit unions, non-bank servicers, and industry trade associations. The Small Business Administration Office of Advocacy submitted a comment and the remaining comments were submitted by vendors and attorney's [sic] representing industry interests. The Bureau also received a significant number of comments from consumer advocacy groups."²⁵ The Cornell e-Rulemaking Initiative submitted a 50-page comment synthesizing submissions of 144 registered participants to Cornell's Regulation Room project.²⁶ The Bureau's explanation of its regulatory choices discussed in great deal the comments received by all external parties and the rationales for the final rules.

¹⁷ *Id.* at 57281.

¹⁸ *Id.* at 57237.

¹⁹ *Id.* at 57265.

²⁰ *Id.* at 57206-57207. The SBREFA report can be found at https://files.consumerfinance.gov/f/201208_cfpb_SBREFA_Report.pdf [hereinafter SBREFA Report].

²¹ SBREFA Report, *supra* note 20, at 13.

²² 77 Fed. Reg. 57199, 57260 (Sept. 17, 2012).

²³ Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X), Final Rule; Official Interpretations, 78 Fed. Reg. 10695 (Feb. 14, 2013).

²⁴ *Id.* at 10705-06.

²⁵ *Id.* at 10706.

²⁶ *Id.*

Once the rule was adopted, the Bureau continued its significant engagement with external stakeholders.²⁷ It adopted an implementation plan through which the Bureau worked with industry to implement the rules, including publication of plain language and interpretive guides.²⁸ It hired as its program manager for servicing the late Laurie Maggiano, who was hailed as the “architect of the Home Affordable Modification Program” and named a “woman of influence” in 2013 by HousingWire.²⁹ It conducted extensive trainings for housing counselors, reaching over 5000 housing counselors in over 20 cities.³⁰ It issued compliance guides.³¹ It issued plain language guides for consumers.³² In its own words: “After the January 10, 2014 effective date of the rules, the Bureau has continued to engage in ongoing outreach and monitoring with industry, consumer advocacy groups, and other stakeholders.”³³

When the Bureau learned of servicer implementation challenges, it “issued two final rules amending discrete aspects of the 2013 Mortgage Servicing Final Rules.”³⁴ In its change to the rules in 2016, the Bureau noted that the changes were meant “to address important questions raised by industry, consumer advocacy groups, and other stakeholders.”³⁵

The Bureau’s external engagements on this one rule demonstrate both the need for and the effectiveness of the Bureau’s focus on input from all external stakeholders. The undersigned encourage the Bureau to continue this sort of varied and robust dialogue with the many and varied external stakeholders impacted by the Bureau’s work.

B. THE BUREAU HAS EFFECTIVELY REACHED OUT TO AND HEARD FROM INDUSTRY AND CONSUMERS THROUGH ITS FIELD HEARINGS AND ROUNDTABLES.

The Bureau has made effective use of field hearings and roundtables, held all over the United States, as a way of hearing from and reaching out to average Americans, be they consumers, business owners, or industry representatives, where they live and work. Field hearings generally consist of prepared remarks by the Bureau Director and a welcome by a local public official whose portfolio includes financial services or consumer affairs, followed by a panel discussion consisting of Bureau employees, industry representatives, and consumer representatives. After the panel discussion, attendees are invited to sign up to make a comment. All of the field

²⁷ 81 Fed. Reg. 72160, 72162-63.

²⁸ 81 Fed. Reg. 72160, 72162.

²⁹ 2013 Women of Influence, available at <https://www.housingwire.com/articles/27764-women-of-influence?page=21>.

³⁰ See HUD Champion of Service Award for CFPB trainings, available at <https://www.hudexchange.info/resources/documents/Housing-Counseling-Bridge-Newsletter-2014-07.pdf>; Brenda Muniz, “We’re training housing counselors on the new mortgage servicing rules”, CFPB Blog, July 7, 2014, available at <https://www.consumerfinance.gov/about-us/blog/were-training-housing-counselors-on-the-new-mortgage-servicing-rules/>.

³¹ See, e.g., <https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/mortserv/>.

³² Help for Struggling Borrowers, a guide to the mortgage servicing rules effective on January 10, 2014, available at https://files.consumerfinance.gov/f/201402_cfpb_mortgages_help-for-struggling-borrowers.pdf.

³³ 81 Fed. Reg. at 72163.

³⁴ *Id.*

³⁵ *Id.*

hearings are live-streamed. They are also video recorded and available through the CFPB's website and YouTube.

For example, the field hearing on Consumer Access to Financial Records, held in Salt Lake City, Utah on November 17, 2016,³⁶ had the following agenda:

Introduction

Zixta Martinez

Associate Director for External Affairs, CFPB

Opening remarks

Richard Cordray

CFPB Director

Welcome

Honorable G. Edward Leary

Commissioner of the Utah Department of Financial Institutions

Panelists

David Silberman

Acting Deputy Director,

Associate Director, Research, Markets and Regulations

CFPB

Holly Petraeus

Assistant Director, Office of Servicemember Affairs

CFPB

Keo Chea

Acting Assistant Director, Office of Community Affairs

CFPB

Ed Mierzwinski

U.S. PIRG

Joe Valenti

Center for American Progress

Ryan Falvey

Center for Financial Services Innovation

Rob Morgan

American Bankers Association

³⁶ The video of the field hearing can be found at <https://www.consumerfinance.gov/about-us/events/archive-past-events/field-hearing-consumer-access-financial-records-salt-lake-city-utah/>.

Alaina Gimbert
The Clearing House

Steven Boms
Envestnet Yodlee

In conjunction with each field hearing, the Director and staff generally participate in a roundtable discussion in which individuals from consumer groups and industry get a chance to talk to the Director and staff about issues relevant to and of concern to the local community.

The undersigned encourage the Bureau to continue engaging with average American citizens through field hearings and roundtables. By taking the Bureau to the people where they live, the Bureau can gather important information about markets, and continue to make the work of the Bureau more transparent and more accessible to all Americans.

C. THE BUREAU HAS EFFECTIVELY REACHED OUT TO AND HEARD FROM INDUSTRY AND CONSUMERS THROUGH ITS CONSUMER ADVISORY BOARD.

The Bureau has historically sought advice and input from its Consumer Advisory Board (CAB), which consists of industry representatives, consumer advocates, and academics. The current CAB has equal numbers of industry representatives and advocates plus three academics. All the CAB members provide service to the CFPB and the country without any compensation

The CAB has played an important role in all aspects of the Bureau's work. When the Bureau first came into being, the initial CAB members were deeply involved in crafting the many rules that the Dodd-Frank Act required the Bureau to issue. The CAB's feedback was invaluable to these many rule-makings. Although the pace of rule-making has slowed, it has not stopped and the CAB continues to participate in rule-making discussions.

CAB members learn a great deal from the Bureau and, in turn, provide feedback on the Bureau's educational efforts, enforcement priorities, the Catalyst program, and other activities. The CAB members also bring issues that they observe in the field to the Bureau for discussion and possible investigation. Topics can range from the challenges that fintech providers are facing to new, exploitative credit products. They also bring information from Bureau staff back to their communities, for example, resources for community organizations and banks to provide their customers.

The value of the CAB lies in its constitution. Having industry people and consumer advocates work through issues in the financial marketplace has led to more agreement than one would expect. The culture of the CAB is for each person to listen carefully to other people's opinions and to render their own opinions with grace and openness. This culture makes for lively, respectful, and productive discussions.

Until Mr. Mulvaney's appointment, CAB members held two days of meetings in Washington, D.C., twice a year, and another set of two-day meetings elsewhere in country. The bulk of the

meeting time involved only CAB members and Bureau staff. This structure enabled people to speak openly and encouraged honest dialogue over grandstanding.

On the second day of the two-day meetings, the Bureau would hold two CAB sessions open to the public. At these sessions, CAB members discussed their perspectives on different consumer issues, presented information on their own work, and listened to staff descriptions of Bureau research and projects.

Between meetings, CAB members participated on conference calls to plan for upcoming meetings and to work on the various projects of three CAB subcommittees. In sum, until the fall of 2017, the CAB played an important role at the CFPB and was able to reach consensus on many complicated issues.

Since joining the Bureau, Acting Director Mulvaney has taken steps that undermine the value of the CAB. In the name of transparency, he has mandated that all CAB conference calls and in-person meetings be open to the public. This has had the effect of silencing people who worry that there could be repercussions if their statements are made public. Instead of thoughtful conversations, members of the CAB are now more likely to take entrenched positions that do not serve consumers or industry, and certainly do not advance the work of the CFPB.

In an interesting twist, the Acting Director does not want transparency to apply to him. In the one call the CAB had with the Acting Director, he refused to make the call public. In addition, in a meeting scheduled for February 2018, the CAB was advised that when Mr. Mulvaney engaged with the CAB, the public could not be present.

Mr. Mulvaney ultimately cancelled the long-scheduled February meeting because of his travel schedule.³⁷ CAB members, who purchased their tickets for the meetings, are still waiting reimbursement from the CFPB.

More recently, Mr. Mulvaney announced that the June CAB meeting, which had been scheduled for two days, was going to be cut down to one day for budgetary reasons and because of his schedule. (Richard Cordray made himself available for all CAB meetings on both days unless he had a critical conflict such as having to testify before Congress).

In another example of Mr. Mulvaney's lack of transparency, CAB members are no longer informed of which CFPB staff are participating or listening to CAB conference calls. To the extent this new practice makes CAB members feel they are being "watched," Mr. Mulvaney has created yet another impediment to the effectiveness of the CAB.

We urge the Bureau to and reinstate the practices Director Cordray adopted in support of the CAB and transparency.

³⁷ As we discuss in the next section, unlike Director Cordray, Mr. Mulvaney refuses to be transparent about his activities.

D. THE BUREAU STRUCTURE ENSURES THAT EXTERNAL PARTIES AFFECTED BY THE WORK OF THE BUREAU HAVE A VOICE INSIDE THE BUREAU.

The Bureau is structured in a way that ensures external engagement with different constituencies affected by the Bureau's work. For example, in April 2013 the Bureau established the Office of Financial Institutions and Business Liaison.³⁸ This office was designed "to facilitate and coordinate dialogue with all industry participants."³⁹ As of spring 2017, the office had "hosted hundreds of meetings, briefing calls, and public appearances with financial institutions and financial industry trade associations."⁴⁰

On the consumer side, the Bureau maintains a division focused on consumer education and engagement.⁴¹ Within that division are offices focused on consumer engagement, financial education, students and young consumers, older Americans, service-member affairs, and financial empowerment.⁴²

The undersigned encourage the Bureau to continue with a structure that allows certain offices and positions to be consumer-facing, and others to be industry-facing, so that all external voices will be heard.

III. THE BUREAU HAS, HISTORICALLY, ATTAINED TRANSPARANCY REGARDING EXTERNAL ENGAGEMENT THROUGH PUBLICATION OF CALENDARS FOR THE DIRECTOR AND SENIOR STAFF.

In order to ensure that the Director and senior Bureau staff are engaging in wide and varied external engagements, and meeting with all affected constituencies, the Bureau must ensure that the calendars and activities of senior staff are transparent and available for public view. Through this transparency, the American public can be assured that the Director of the Bureau and senior staff have personally heard from all relevant constituencies, and any actions will be taken with a wide lens.

The CFPB posts on its websites the calendars of the director, other agency heads, and senior staff. In this regard, the CFPB website currently hosts the calendars for Elizabeth Warren (2010-2011); Raj Date (2012-2013); Steve Antonakes (2013-2015); Richard Cordray (2012-2017); Leandra English (2017-2018); and Mick Mulvaney (2017-2018).

A sampling of these calendars shows that before 2018, the calendars were complete and transparent, showing the hourly activities of each of the named Bureau staff. The calendars reveal that these individuals divided their time among the Bureau's many constituencies, and also spent time on internal bureau items. For example, in March 2015 (picked randomly), the

³⁸ Semi-Annual Report of the CFPB, spring 2017 at 52, available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201706_cfpb_Semi-Annual-Report.pdf.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Semi-Annual Report of the CFPB, spring 2017, *supra* note 38, at 43-51.

⁴² A Bureau organizational chart can be found at <https://www.consumerfinance.gov/about-us/the-bureau/bureau-structure/>.

schedule for Director Richard Cordray shows numerous items in each of these categories, including preparing for and participating in a Congressional Hearing, two community roundtables (Arbitration and Payday), two field hearings (Arbitration and Payday); and one industry roundtable (Payday); and meetings/calls with industry representatives, including the CEO of Citigroup, the CEO of the Independent Community Bankers of America, the CEO of the American Bankers Association, the Urban Financial Services Coalition, the U.S. Chamber of Commerce Board of Directors, the CEO of LinkedIn, and the President of the Mortgage Bankers Association.

Unfortunately, this detailed transparency has virtually disappeared under Director Mulvaney's leadership. For example, Director Mulvaney's March 2018 Calendar has almost no information on it.⁴³ Deputy Director English's calendar for February 2018 is similarly devoid of information.⁴⁴ This paucity of information and transparency is particularly alarming in light of Director Mulvaney's remarks at an American Bankers Association meeting on April 24, 2018 that as a Congressman he would only meet with constituents and with lobbyists who had given him money.⁴⁵ By retreating from the transparency that characterized the Bureau through 2017, the CFPB has embarked on a dangerous path that threatens to endanger its integrity, accountability, and legitimacy.

The undersigned urge the Bureau to continue seeking public and private feedback through diverse outreach by senior staff and the Director to all constituencies impacted by the work of the Bureau, and to make this outreach transparent through publication of comprehensive calendars for the Director and senior staff.

CONCLUSION

In conclusion, we urge the Bureau to continue its robust strategies for external engagements. Starting from its inception, the Bureau had a goal of engaging with outside groups in all fifty states.⁴⁶ In bringing that goal to fruition, the Bureau has reached out to and taken into consideration the views of large banks, small banks, credit unions, small businesses, large businesses, progressive groups, chambers of commerce, trade groups, consumers, consumer advocates, student groups, Hispanic-American groups, seniors groups, African-American groups, military families, members of Congress, mayors and governors, state attorneys general, and many more. The Bureau has admirably sought, and should continue to seek, public and private feedback from diverse external stakeholders through rulemaking outreach, field hearings and roundtables outside of Washington, D.C., and the other external engagements discussed in this

⁴³ Director Mulvaney's calendar is available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_mick-mulvaney-calendar_03-2018.pdf (visited May 18, 2018).

⁴⁴ Deputy Director English's calendar is available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_leandra-english-calendar_02-2018.pdf (visited May 18, 2018).

⁴⁵ See, e.g., Glenn Thrush, *Mulvaney, Watchdog Bureau's Leader, Advises Bankers on Ways to Curtail Agency*, New York Times, April 24, 2018.

⁴⁶ See, e.g., Victoria McGrane & Maya Jackson Randall, *Banking's Scourge on Charm Offensive*, Wall St. J., March 15, 2011, available at <https://www.wsj.com/articles/SB10001424052748703749504576172510974842034> (showing CFPB map tracking contacts in states).

comment. We encourage the Bureau to maintain the diversity and activities of its advisory groups. We encourage the Bureau to plan well in advance for public and private events, such as field hearings, to maximize public participation and constructive input, and to set up a mechanism for the public to suggest topics, locations, timing, frequency, participants, and other important elements of public events.

We discourage the Bureau from conducting events and external engagements that are private, and also encourage the Bureau to continue improving transparency by keeping comprehensive executive calendars that are up to date and available to the public.