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ARTICLES

PUBLIC ENGAGEMENT IN RULEMAKING: THE CONSUMER FINANCIAL PROTECTION BUREAU'S NEW APPROACH

*Patricia A. McCoy**

INTRODUCTION

On July 21, 2010, Congress authorized the formation of the first federal agency devoted solely to consumer financial protection in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).¹ A few weeks later, President Obama appointed Professor Elizabeth Warren, who had first proposed the creation of the Consumer Financial Protection Bureau (CFPB, Bureau, or the agency) together with Professor Oren Bar-Gill,² to build the Bureau. One year after Dodd-Frank's passage, the Bureau opened its doors.

Dodd-Frank thrust demanding rulemaking responsibilities on the Bureau, subject to tight statutory deadlines.³ As my colleagues and I prepared to undertake those rulemakings, we gave hard thought to how to conduct those proceedings openly and transparently. Of all the federal banking regulators, the Bureau is the only agency whose sole mission is to ensure financial protection for consumers. From a procedural perspective, it seemed to us, our mission to help consumers leaned strongly in favor of full transparency and the broadest possible direct outreach to individual consumers and other members of the public in advance of promulgating a rule.⁴

We had strong process reasons for reaching out early in the rulemaking process. In the financial services area, government intervention into private markets raises strong concerns. These concerns advise broad public participation at the earliest opportunity possible. Many of the Bureau's rulemaking mandates, for example, require balancing consumer protection with healthy access to credit, while avoiding unanticipated consequences

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1. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 1011, 124 Stat. 1376, 1964 (2010) (codified at 12 U.S.C. § 5491 (2010)); CFPB, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU, JULY 21–DECEMBER 31, 2011, at 2 (2012) [hereinafter SEMI-ANNUAL REPORT], available at http://files.consumerfinance.gov/f/2012/01/Congressional_Report_Jan2012.pdf.

2. Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 1–2, 98 (2008).

3. See Dodd-Frank Act, Titles X and XIV, 124 Stat. at 1955–2113, 2136–212.

4. SEMI-ANNUAL REPORT, *supra* note 1, at 3.

and unnecessary costs. To reconcile these many objectives, first we needed to inform ourselves about the dynamics of the relevant consumer market. Second, we needed to flesh out a full set of policy options for addressing the consumer issues that that market posed. Finally, we needed to evaluate those policy options with the best possible data. We strongly felt that public input would assist that process by shedding light on issues, perspectives, and solutions.

It was equally important that this outreach take place early. For brand new rulemakings, we were concerned that waiting to elicit public input until we published a proposed rule and notice for comment might be too late. Without opportunity for meaningful public feedback at the pre-proposal stage, we were concerned that some proposals might be too “hard-baked” to easily switch to other, quite different options after the formal comment period closed.

The CFPB inherited other, complex rulemakings in proposed rule form. Those rulemakings posed challenges of their own. The Bureau only had limited input into those proposed rules before they were published and the proposals did not always solicit comment on key issues that came to light after those rulemakings were transferred to the Bureau. Sometimes, after transfer, analyses by the Bureau uncovered new issues that merited additional public input. Other times, the Bureau was eager to solicit data and studies from the public because there were scant government data on point.

Wide public outreach was also important to help the Bureau avoid capture by regulated entities. As we built the Bureau, fostering a culture that was responsive to ordinary Americans—based on grass-roots outreach in every state—was uppermost in our minds. One way of creating that culture was by building direct ties to individual consumers,⁵ not only through field visits but also through the CFPB’s web presence.

For these reasons, the Bureau decided in a series of cases to depart from the way that rulemakings had been conducted in the past at other agencies. In this Article, I describe several of the rulemaking innovations pioneered by the Bureau. Section I discusses the Bureau’s use of online outreach and social media to elicit public reaction early on, before publication of a proposed rule. This outreach included soliciting mass online feedback, both in the early stages of rulemakings and in other situations where the Bureau or a sister agency was considering whether to initiate a rulemaking or adopt a model form. Section II describes how the Bureau solicited public Internet feedback on other occasions outside of the rulemaking context to help it better understand specific markets and how those markets affect consumers.

5. See, e.g., Rob Blackwell, *Cordray Defends Complaint Database, Talks Qualified Mortgage Plan*, AM. BANKER (July 9, 2012) available at http://www.americanbanker.com/issues/177_132/cfpb-cordray-defends-complaint-database-talks-qualified-mortgage-plan-1050769-1.html.

In Section III, I discuss two Bureau procedures—the small business review panel process and the Bureau’s *ex parte* presentation policy—and how those procedures injected greater transparency into the rulemaking process. The last section offers some concluding remarks about the benefits and challenges of expanded public outreach by agencies via the Internet.

I. AVENUES FOR PUBLIC INPUT PRE-PROPOSAL

The first time the Bureau sought engagement with the general public before the proposed rule stage was in connection with the new, integrated mortgage disclosure mandated by Dodd-Frank. That interaction proved so successful that the Bureau reached out again via the web for public input on early drafts of a college cost worksheet and an overdraft fee disclosure. Later, the Bureau sought the public’s reaction online, in anticipation of possible future rules, on people’s experiences with prepaid cards, overdraft protection, payday lending, and private educational loans.

A. DISCLOSURES AND WORKSHEETS

The earliest examples of Bureau requests for public, online feedback early in the rulemaking process involved disclosures. The visual, design-driven nature of disclosures made them particularly well suited to public input via the web.

1. Integrated Mortgage Disclosure

Currently, people who are shopping for mortgages are entitled to receive two federal disclosure forms within three days of application. One, under the Truth in Lending Act (TILA),⁶ discloses information such as the annual percentage rate, the finance costs, and the amount financed.⁷ The other, under the Real Estate Settlement Procedures Act (RESPA),⁸ consists of a good faith estimate of closing costs.⁹ Later, at closing, lenders must provide every residential mortgage borrower with a final TILA disclosure plus a final closing cost disclosure under RESPA known as the HUD-1.¹⁰ Previously, before the Bureau’s creation, the Federal Reserve Board (the

6. Truth in Lending Act (TILA), Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–93 (2001)).

7. 15 U.S.C. §§ 1602(v), 1604(b), 1605–1606 (2001).

8. Real Estate Settlement Procedures Act (RESPA), Pub. L. No. 93-533, 88 Stat. 1724 (1974) (codified as amended at 12 U.S.C. §§ 2601–17 (2006)).

9. 12 U.S.C. § 2604(c) (2006). Current versions of the TILA and RESPA application-stage forms can be found online. *H-2 Loan Model Form*, GPOACCESS.GOV, <http://ecfr.gpoaccess.gov/graphics/pdfs/ec27se91.024.pdf> (last visited Nov. 26, 2012); *Good Faith Estimate (GFE)*, HUD.GOV, <http://www.hud.gov/offices/hsg/rmra/res/gfestimate.pdf> (last visited Nov. 26, 2012).

10. 12 C.F.R. §§ 1024.8, 1026.17(b) (2012) (RESPA and TILA, respectively). Current versions of the TILA and RESPA closing-stage forms can be found online. *H-2 Loan Model Form*, *supra* note 9; *Settlement Statement (HUD-1)*, HUD.GOV, <http://www.hud.gov/offices/adm/hudclips/forms/files/1.pdf> (last visited Nov. 26, 2012).

Board) had jurisdiction over TILA disclosures, while the Department of Housing and Urban Development (HUD) had jurisdiction over disclosures under RESPA.¹¹

For years, the forms were criticized on multiple grounds. They did not provide consumers with the information they needed, they disclosed information in confusing ways, and they needlessly required two forms with overlapping disclosures when one form would do. In particular, before 2010, the forms failed to alert consumers to some of the biggest risks they faced from complex mortgage products with large potential payment shock.¹² For instance, during the recent housing bubble, too many borrowers with hybrid adjustable-rate mortgages (ARMs) or less than fully amortizing loans did not understand that their monthly payments could go up, often substantially.¹³ Similarly, as an examination of the model forms makes clear, the forms did not present information in a manner that encouraged comparison shopping because consumers could not gauge the back-end risks of those loans in dollar terms.¹⁴

Congress attempted to tackle some of these problems in 1996 when it instructed HUD and the Board to merge the TILA and RESPA forms.¹⁵ After years passed and HUD and the Board were unable to arrive at a coordinated solution,¹⁶ Congress transferred jurisdiction over TILA and RESPA to the CFPB in the Dodd-Frank Act, effective July 21, 2011, and told the Bureau to integrate the TILA and RESPA forms, with the proposed

11. See 15 U.S.C. § 1604(a) (2009), amended by Dodd-Frank Act § 1100A, 124 Stat. at 2107–2110 (codified at 15 U.S.C. § 1604(a) (formerly 12 U.S.C. §§ 2602(6), 2617(a) (2009))).

12. See, e.g., Patricia A. McCoy, *Rethinking Disclosure in a World of Risk-Based Pricing*, 44 HARV. J. ON LEGIS. 123 (2007) [hereinafter *Rethinking Disclosure*]. In late 2008, HUD revised the good faith estimate to provide fuller disclosure of these risks; the new form took effect on January 1, 2010. HUD, *Real Estate Settlement Procedures Act (RESPA): Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs: Final Rule*, 73 Fed. Reg. 68204, 68204–05 (Nov. 17, 2008) (to be codified at 24 C.F.R. pts. 203, 3500).

13. See, e.g., Raj Date, *Written Testimony of Raj Date, Deputy Director, CFPB, Before the House Financial Services Subcommittee on Insurance, Housing, and Community Opportunity*, CFPB (June 20, 2012), <http://www.consumerfinance.gov/speeches/written-testimony-of-raj-date-deputy-director-consumer-financial-protection-bureau/#1>; *Rethinking Disclosure*, supra note 12, at 143–47.

14. See, e.g., *Rethinking Disclosure*, supra note 12, at 133–34.

15. Act of Sept. 30, 1996, Pub. L. No. 104-208, § 2101, 110 Stat. 3009, 3009–398 (codified at 12 U.S.C. § 2601 (1996)).

16. CFPB, INTEGRATED MORTGAGE DISCLOSURES UNDER THE REAL ESTATE SETTLEMENT PROCEDURES ACT (REGULATION X) AND THE TRUTH IN LENDING ACT (REGULATION Z): PROPOSED RULE WITH REQUEST FOR PUBLIC COMMENT 29–32 (2012) [hereinafter REQUEST FOR PUBLIC COMMENT], available at http://files.consumerfinance.gov/f/201207_cfpb_proposed-rule_integrated-mortgage-disclosures.pdf.

rule due out by July 21, 2012.¹⁷ The proposed rule came out ahead of schedule on July 9, 2012.¹⁸

Given the rulemaking's complexity and the long lead time needed for consumer testing, the TILA-RESPA proceeding was the first rulemaking initiated by the Bureau. Initial planning for the rule started in September 2010, just two months after Dodd-Frank was passed, and while efforts to form the Bureau were just getting underway.¹⁹ During the fall of 2010, the staff engaged in the normal fact finding that agencies undertake in anticipation of rules. This included brainstorming sessions with affected stakeholders—such as consumer representatives, housing counselors, lenders, other agencies, settlement services providers, and vendors—to identify issues and possible solutions; reviewing the existing research and comment letters on past disclosure proposals by HUD and the Board; hiring experienced consultants to assist us with the design and testing; and holding an academic research symposium to explore consumer decision-making processes and better ways to design disclosures.²⁰

That was just the start. In addition, it was important to us to take a data-driven approach involving rigorous consumer testing to develop the new disclosure form. In past decades, consumer testing of federal disclosures had evolved from consumer focus groups to “mall-intercept” testing (where federal representatives quizzed passersby in shopping malls about different possible disclosure forms) to qualitative testing involving structured, one-on-one interviews with individuals in laboratory settings around the country.²¹ In May 2011, after developing two prototype forms, we embarked on five rounds of qualitative testing of the application-stage form.²² Later, starting in late fall of 2011 and continuing through March 2012, the Bureau held five more rounds of qualitative testing for the disclosure form provided at closing.²³ Following the comment period, the

17. Dodd-Frank Act, Pub. L. No. 111-203, § 1032(f), 124 Stat. 1376, 2007 (2010) (codified at 12 U.S.C. § 5532 (2010)).

18. Press Release, CFPB, Consumer Financial Protection Bureau Proposes “Know Before You Owe” Mortgage Forms (July 9, 2012), <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-proposes-know-before-you-owe-mortgage-forms/>; see also REQUEST FOR PUBLIC COMMENT, *supra* note 16.

19. Before July 21, 2011, when the Bureau opened its doors, these efforts took place at the U.S. Department of the Treasury, which Congress charged with “standing up the Bureau.” See U.S. DEP’T TREAS., SEMI-ANNUAL REPORT TO CONGRESS ii (2011), available at <http://www.treasury.gov/about/organizational-structure/ig/Agency%20Documents/Sept%202011%20SAR%20Final%20-%20October%2031.pdf>.

20. See, e.g., REQUEST FOR PUBLIC COMMENT, *supra* note 16, at 39–40; Date, *supra* note 13.

21. See Jeanne M. Hogarth & Ellen A. Merry, *Designing Disclosures to Inform Consumer Financial Decisionmaking: Lessons Learned from Consumer Testing*, 97 FED. RES. BULL. 1, 4, 6, 8–9 (2011).

22. REQUEST FOR PUBLIC COMMENT, *supra* note 16, at 44–45.

23. *Id.* at 46.

Bureau considered conducting large-scale quantitative testing before issuing the final rule.²⁴

During the qualitative testing, trained interviewers met one-on-one with 92 individual consumers and 22 lenders and mortgage brokers, for a total of 114 participants.²⁵ Each consumer was asked a series of questions to determine whether the draft forms disclosed information in ways that allowed them to understand different loan features, compare those features, and notice changes in terms and features during the loan process. Our object in designing the questions was to discover what helped consumers understand and use the information, not just what they liked. The interviewers asked lenders and brokers a different set of questions, which included asking them to explain the loans as they would to a customer and identify implementation problems.²⁶

In order to simplify the form, the Bureau also wanted to know what information was extraneous. When testing confirmed that a particular piece of information was not important to consumers at the application stage, the agency considered whether to move that information to the closing-stage form or delete it altogether. For information that was important, the Bureau also thought about which delivery mode worked best: a static disclosure form, an interactive web-based tool, or something else? For instance, figuring out the trade-off between the interest rate and points is much better suited to an online calculator than a paper disclosure form.

Almost every month, we held a new round of testing in a different part of the country.²⁷ The application-stage testing started in Baltimore in May 2011, then moved to Los Angeles, Springfield, Massachusetts, Albuquerque, New Mexico, and Chicago in succeeding months.²⁸ Testing for the closing-stage disclosure began in Des Moines, Iowa, in November 2011, followed by testing sessions in Birmingham, Alabama, Philadelphia, Pennsylvania, Austin, Texas, and Baltimore.²⁹ Some parts of the prototypes tested well right from the start; others needed more work. Accordingly, after every round, we carefully evaluated the testing results and comments from the public, revised the draft forms, and tested the new forms in the next round the following month.³⁰ In addition, we tested prototypes both in

24. *Id.* at 49.

25. Conversations with Benjamin Olson, Deputy Assistant Director for Regulations (Acting), and Richard Horn, Senior Counsel, at the CFPB (July 2012).

26. *See, e.g.*, REQUEST FOR PUBLIC COMMENT, *supra* note 16, at 44; Date, *supra* note 13.

27. *See* REQUEST FOR PUBLIC COMMENT, *supra* note 16, at 44–46; Date, *supra* note 13.

28. *See* REQUEST FOR PUBLIC COMMENT, *supra* note 16, at 45.

29. *See id.* at 45–46.

30. *See id.* at 44–46; KLEIMANN COMM’N GRP., KNOW BEFORE YOU OWE: EVOLUTION OF THE INTEGRATED TILA-RESPA DISCLOSURES 47–154 (2012), available at http://files.consumerfinance.gov/f/201207_cfpb_report_tila-respa-testing.pdf.

English and Spanish during the first two rounds to see if reactions to the prototypes varied depending on the language.³¹

So far, most of what I have described resembles what sister agencies had done in recent past disclosure rulemakings.³² But it was also important to us to use an open and transparent process when developing the forms before publishing the proposed rule. Designing the draft forms in isolation, just among ourselves, would have been too divorced from real world experience and prone to bureaucratic stereotypes. Similarly, restricting consultation to our counterparts at other federal agencies, consumer groups, and trade associations would have restricted the input, in all likelihood, to “inside the Beltway” interests and points of view.

To avoid these problems, we sought to enlist help directly from consumers—as well as experienced members of industry, community organizations, and researchers—throughout the country and at every stage of developing the form. Our objective was to reach out to the American people as broadly as possible, on multiple occasions, before issuing the proposed rule. Consequently, we decided to depart from past practice by using the Internet and social media to solicit public feedback on the draft forms while they were still being designed and while the qualitative testing was being conducted. To the best of our knowledge, it was the first time that any federal banking regulator had elicited mass public input on prototype disclosure forms before a proposed rule was published.

We kicked off the outreach campaign, a web-based initiative called “Know Before You Owe,” in May 2011, simultaneously with the first testing session in Baltimore.³³ In the weeks leading up to roll out, the TILA-RESPA rulemaking team posted announcements on the CFPB’s website, on Facebook, and on Twitter³⁴ explaining the purpose of mortgage disclosures, talking about the need to improve those disclosures, and announcing our plans to unveil the prototype forms in the upcoming weeks for people’s reaction. For readers who wanted to get involved, the Bureau suggested that they sign up for e-mail updates and tell their friends and family about the project on Twitter and Facebook and through e-mail.

31. See REQUEST FOR PUBLIC COMMENT, *supra* note 16, at 41–42.

32. For an overview of sister agencies’ prior approach to designing and testing financial disclosures, see Hogarth & Merry, *supra* note 21, at 1.

33. See, e.g., REQUEST FOR PUBLIC COMMENT, *supra* note 16, at 44–46.

34. See Patricia McCoy, *Know Before You Owe: Designing a New Disclosure*, CFPB (May 11, 2011), <http://www.consumerfinance.gov/blog/know-before-you-owe-designing-a-new-disclosure/>; see also Patricia McCoy, *Know Before You Owe: Help Us Make Your Mortgage Forms Better*, CFPB (May 9, 2011), <http://www.consumerfinance.gov/blog/know-before-you-owe-help-us-make-your-mortgage-forms-better/>.

Soon after, concurrent with the first testing session in Baltimore,³⁵ the Bureau posted two prototypes of the mortgage disclosure on its website and asked the public to comment on the alternatives.³⁶

The two forms featured an Internet feedback tool with two channels: one for consumers and one for industry participants. Consumers were asked to click on the consumer tool, which asked them which form they preferred. Next, consumers could register their reactions to each alternative by mousing over and clicking on the parts they liked or disliked. They could also tell us if important information was missing and type additional comments into text boxes. Industry participants were directed to the industry tool, where they could comment on usability and ease of implementation. Readers could also post comments to our blog posts and send us their thoughts by e-mail.

Multiple times, after revising the prototype forms, the Bureau reopened the Internet tool to the public for comments on the new revisions. The focus of the questions changed in every round. In the first round, in May 2011, we asked readers to select the design they found most useful and to comment on that design. Later rounds focused on the second page of the application-stage form (containing settlement cost disclosures), the closing-stage disclosure, and concepts that proved hard to convey initially.

Eventually, the Bureau received over 150,000 visits to its “Know Before You Owe” website and over 27,000 text box comments and e-mails on the forms.³⁷ The Bureau did not treat the comments as a vote on particular forms or their features because the comments were not statistically representative. Nevertheless, the comments gave us considerable food for thought.³⁸

As the first step in analyzing the comments, the Bureau’s information technology team compiled the clicks into a heat map by recording where readers clicked on the forms.³⁹ The heat map reproduced every draft disclosure with colors showing which parts readers clicked the most. Areas shaded in red or white received the most clicks; areas shaded in purple or gray received the least. From the maps, we could tell which areas of the sample disclosures received the most attention and which received the least. In round one, for instance, the loan amount, the projected loan payments, and the estimated closing costs all got close attention. Readers focused

35. The first round was announced on the CFPB’s website. Patricia McCoy, *Know Before You Owe. Go!*, CFPB (May 18, 2011), <http://www.consumerfinance.gov/blog/know-before-you-owe-go/>.

36. *Know Before You Owe*, CFPB, <http://www.consumerfinance.gov/knowbeforeyouowe/> (last visited Nov. 26, 2012).

37. See, e.g., REQUEST FOR PUBLIC COMMENT, *supra* note 16, at 46; Date, *supra* note 13.

38. See, e.g., CFPB Mortgage Disclosure Team, *13,000 Lessons Learned*, CFPB (June 23, 2011), <http://www.consumerfinance.gov/blog/13000-lessons-learned/>.

39. See CFPB Web Team, *Mortgage Disclosure is Heating Up*, CFPB (June 24, 2011), <http://www.consumerfinance.gov/blog/mortgage-disclosure-is-heating-up/>.

closely on the “Key Loan Terms” and “Cautions” sections on page one, but less on page two of the disclosure.

The heat maps offered other insights as well. Sometimes we could tell whether readers were reading items that were logically linked through to their conclusion. We could also compare different formats for presenting the same information to see which format received more attention. Similarly, sometimes there were differences between what consumers and lenders commented on. Industry members, for example, were more interested than consumers in the applicant and lender information at the top of the form.

We had more to learn from the comments themselves. Interestingly, the same problems that surfaced in the qualitative testing sessions almost always showed up in the online comments. Similarly, parts of the forms that tested well were usually favorably received in the Internet comments. The strong resemblance between the qualitative testing results and the Internet feedback results gave us confidence about what to keep and what to change. The comments were also helpful in suggesting *how* to fix particular flaws in the prototype forms. While the qualitative testing was extremely useful in pinpointing what did not work, it did not tell us how to fix it. By soliciting comments from a far broader segment of the public concurrent with the testing, we received helpful suggestions as to solutions, some of which had occurred to us and some of which had not. Because we conducted multiple rounds of testing, we were able to take many of those suggestions and test them in later rounds. Later drafts were more refined and tested increasingly better, as a result, as compared with earlier drafts.⁴⁰

“Know Before You Owe” turned out to be a much bigger success than even we expected, and it confirmed the value of getting public input on Bureau forms early and often. Within months, people across the board—both consumers and lenders—were asking whether we would provide the same opportunity for early input into future disclosure initiatives by the Bureau. With that, the Bureau expanded “Know Before You Owe” into a model disclosure for college financial aid offers.

2. Student Aid Worksheet

College students have increasingly come to rely on student loans to finance college educations as undergraduate tuitions have soared, in part due to state cutbacks in assistance to higher education and losses to private universities’ endowments during the financial crisis. Many students end up heavily in debt as a result. For instance, the average member of the Class of 2010 who borrowed to meet education costs graduated owing \$25,250.⁴¹ In

40. KLEIMANN COMMC’N GRP., *supra* note 30.

41. See Tamar Lewin, *College Graduates’ Debt Burden Grew, Yet Again, in 2010*, N.Y. TIMES, Nov. 2, 2011, at A20.

total, student loan indebtedness was so large that by 2011, it surpassed total credit card indebtedness.⁴²

The debt burden that awaits many new college graduates can impair their future financial well-being and their ability to get married, start families, and buy homes. Consequently, it is essential that students contemplating college be able to understand their loans and meaningfully compare their student aid offers from different colleges. Currently, however, this is difficult because there is no standardized form for financial aid offers; instead, colleges and universities use their own designs. The resulting proliferation of financial aid offer forms makes it hard for students and parents to measure the costs and risks of student loans and to comparison-shop financial aid offers from different schools.

To tackle this problem, in mid-2011 the U.S. Department of Education (DOE) announced plans to develop a model form that colleges and universities could use to transmit student financial aid offers.⁴³ Working side-by-side with the DOE, the CFPB helped to develop a sample “thought-starter” form and then collected feedback from the public on the sample form.⁴⁴

As with the mortgage disclosure project, the Bureau announced the joint student loan initiative in a blog entry in October 2011 and posted the sample financial aid worksheet to its website for public reaction.⁴⁵ Readers had the chance to submit comments on the sample form online and also in response to the blog entry. The Bureau further used a media event in Minneapolis to drive attention to the CFPB website. In addition, the Bureau published a list of information items that could go on such a form, some of which were included in the sample while others were not. The Bureau asked readers to rank the items from the most to least useful so it could get a sense of people’s preferences.

42. In 2011, outstanding revolving consumer credit (including credit card debt) totaled nearly \$851 billion, while total outstanding student debt topped \$1 trillion. *Compare* Board of Governors of the Federal Reserve System, Consumer Credit – G.19 (Nov. 2012), <http://www.federalreserve.gov/releases/g19/Current/> (noting \$851.4 billion in revolving consumer credit was outstanding in 2011), with Rohit Chopra, *Too Big to Fail: Student Debt Hits a Trillion*, CFPB (Mar. 21, 2012), <http://www.consumerfinance.gov/blog/too-big-to-fail-student-debt-hits-a-trillion/>, and Josh Mitchell & Maya Jackson-Randall, *Student-Loan Debt Tops \$1 Trillion*, WALL ST. J., Mar. 22, 2012, at A5 (noting total outstanding student debt topped \$1 trillion in 2011).

43. U.S. DEP’T EDUC., MODEL FINANCIAL AID OFFER FORM, <http://www2.ed.gov/policy/highered/guid/aid-offer/index.html> (last modified Aug. 30, 2012). The Department of Education announced the initiative in response to Section 484 of the Higher Education Opportunity Act, Pub. L. No. 110-315, § 484, 122 Stat. 3078, 3286–87 (2008) (codified at 20 U.S.C. § 1092 (2008)), which required the Secretary of Education to convene a group to recommend improvements to financial aid offer forms and then develop a model form. *See, e.g.*, U.S. Dep’t of Educ., Public Meeting on Recommendations for Improvement of Student Financial Aid Offer Forms, Development of Model Financial Aid Forms, 76 Fed. Reg. 45,546 (July 29, 2011).

44. Rohit Chopra, *Know Before You Owe: Let’s Tackle Student Loans*, CFPB (Oct. 26, 2011), <http://www.consumerfinance.gov/blog/know-before-you-owe-lets-tackle-student-loans/>.

45. *Id.*

Over twenty thousand readers viewed the draft form online. In January 2012, after reviewing readers' comments, the Bureau posted a summary of the feedback online and transmitted it to the DOE.⁴⁶ A few months later, when college acceptance letters peaked in April, the Bureau kicked off the next phase of the project by releasing its beta version of a "Financial Aid Comparison Shopper"—an interactive, online tool to help families compare the cost of college education and financial aid offers across schools.⁴⁷ The prototype allowed students to compare several financial aid offers along dimensions such as estimated monthly student loan payments after graduation, grant and scholarship offers, graduation rates, retention rates, and federal student loan default rates for individual schools. Readers were invited to comment on the beta version after giving it a test run, which they could do by entering their financial aid information and getting a rough estimate of their monthly loan payment after graduation.⁴⁸ Later on, the CFPB reminded readers to submit their comments a week before the testing period closed.⁴⁹

3. Credit Card Agreements

By year-end 2011, "Know Before You Owe" expanded again, this time to credit cards. Credit card agreements have long been notorious for being complicated and dense and for burying key terms in reams of legalese. Consequently, in an effort to bring clarity to those agreements, the CFPB circulated a design for a model credit card agreement in a blog post in December 2011 and asked readers to comment on the prototype.⁵⁰ After clicking on a link, viewers could review a simplified model agreement and type their thoughts about the prototype into a text box.⁵¹ While readers were submitting comments, the Bureau announced that it would test the model

46. Memorandum from Rohit Chopra, Student Loan Ombudsman, CFPB, to *Know Before You Owe: Student Loans* project participants (Jan. 2012), http://files.consumerfinance.gov/f/2012/01/Memorandum_KBYOStudentLoans_FeedbackSummary_Jan2012.pdf; see Rohit Chopra, *Your Feedback on Know Before You Owe: Student Loans*, CFPB (Jan. 27, 2012), <http://www.consumerfinance.gov/blog/your-feedback-on-know-before-you-owe-student-loans/>.

47. Press Release, CFPB, Consumer Financial Protection Bureau Releases Financial Aid Comparison Shopper (Apr. 11, 2012), <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-releases-financial-aid-comparison-shopper/>.

48. Peter Jackson & Rohit Chopra, *Paying for College: Help Us Make it Easier for You to Choose*, CFPB (Apr. 11, 2012), <http://www.consumerfinance.gov/blog/paying-for-college-help-us-make-it-easier-for-you-to-choose/>.

49. CFPB Web Team, *One Week Left To Participate In Our Beta Test*, CFPB (May 9, 2012), <http://www.consumerfinance.gov/blog/one-week-left-to-participate-in-our-beta-test/>.

50. Marla Blow, *Know Before You Owe: Making Credit Card Agreements Readable*, CFPB (Dec. 7, 2011), <http://www.consumerfinance.gov/blog/know-before-you-owe-making-credit-card-agreements-readable/#more-10067>.

51. *Know Before You Owe: Credit Cards*, CFPB, <http://www.consumerfinance.gov/credit-cards/knowbeforeyouowe/> (last visited Aug. 22, 2012).

agreement with a credit card issuer and then revise the model agreement based on the online feedback and testing results.⁵²

4. Other Examples

In February 2012, the Bureau took to the blogosphere twice more to air sample disclosures, once for checking account statements and again for monthly statements for mortgage loans.⁵³ In the first case, the agency circulated a draft form that would add a “penalty fee box” to checking account statements to inform depositors with overdrafts how much they had overdrawn and the total overdraft fees charged.⁵⁴ Unlike the mortgage disclosure and student loan initiatives, this disclosure was presented more as a thought experiment, with no signal that a rulemaking or other final action was anticipated. Readers were invited to give their views on the draft disclosure by posting comments to the blog entry.

That same month, the CFPB posted a second blog entry with an early draft model of a periodic statement for mortgages⁵⁵ that was mandated by Dodd-Frank.⁵⁶ In contrast with the integrated TILA-RESPA mortgage disclosure, which lenders must provide soon after application and again before closing, most consumers would receive this periodic statement every month after closing on their mortgages. Readers were invited to submit their comments on the draft model by e-mail or online.

Together, these web initiatives represent an ambitious effort by the CFPB to elicit early public feedback during the development of new disclosures. The most complex of those initiatives—the integrated mortgage disclosure project—invited multiple rounds of public comment, which were followed up with ten rounds of revisions. Meanwhile, the student loan worksheet invited readers to try out an interactive version of the worksheet during the beta testing periods. Other less complicated disclosure initiatives asked for input from the public on a one-time basis.

II. FACT-GATHERING VIA SOCIAL MEDIA

Early on, the Bureau also turned to the web to learn about people’s experiences with different types of financial products. During its start-up period, the Bureau was acutely aware of the need to acquire quantitative data and other information to help it understand the markets for consumer

52. Blow, *supra* note 50.

53. CFPB Web Team, *Live from New York City!*, CFPB (Feb. 22, 2012), <http://www.consumerfinance.gov/blog/live-from-new-york-city/>; Whitney Patross, *A Model Form for Mortgage Statements*, CFPB (Feb. 13, 2012), <http://www.consumerfinance.gov/blog/a-model-form-for-mortgage-statements/>.

54. *Live From New York City!*, *supra* note 53.

55. Patross, *supra* note 53.

56. Dodd-Frank Act, Pub. L. No. 111-203, § 1420, 124 Stat. 1376, 2155–56 (2010) (codified at 15 U.S.C. § 1638).

financial services and consumer issues in those markets. As part of that effort, the Bureau quickly embarked on acquiring the relevant major datasets. Concurrently, the CFPB turned to Internet outreach to understand whether particular financial services products posed consumer protection problems, the nature of those problems, and their magnitude.

A. PUBLIC COMMENT OUTSIDE OF RULEMAKING PROCEEDINGS

In several instances outside of the disclosure context, the Bureau solicited online public comment in order to gather facts and data on other issues involving consumer financial protection. One of those solicitations was expressly in anticipation of rulemaking. In others, the Bureau sought information at an even earlier stage to help it decide whether to take action at all and, if so, how.

In each of these cases, the Bureau went about information gathering by publishing a standard request for comment in the *Federal Register*. Rather than stopping there, however, the Bureau harnessed the power of the Internet to publicize the opportunity for comment through blog posts and videos of field events.

On one of those occasions, the Bureau asked for public comment through a conventional Advance Notice of Proposed Rulemaking (ANPR). In May 2012, the CFPB issued an ANPR seeking input on problems with prepaid cards, which are substitutes for federally-regulated bank accounts and debit cards, but are not currently subject to federal rules.⁵⁷ Although the Bureau could have simply published the ANPR in the *Federal Register* with no further fanfare, it decided instead to advertise the advance notice widely through mass media. First, it kicked off the ANPR by holding a public event on prepaid cards in Durham, North Carolina, which was streamed live on video on the CFPB's website.⁵⁸ Simultaneously, the Bureau posted a blog entry inviting readers to sign up to receive an e-mail announcement when the comment period opened.⁵⁹ Another announcement on the Bureau's webpage summarized the questions in the ANPR in easy-to-understand language and provided a link making it easy for readers to read the ANPR and submit comments online.⁶⁰ The CFPB also encouraged the public to weigh in via Twitter feeds and Facebook.⁶¹

In other instances, the Bureau solicited preliminary public input on consumer issues with specific financial products without issuing a full-

57. CFPB, Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 30923, 30925 (May 24, 2012); see also *What's the Deal with Prepaid Cards?*, CFPB, <http://www.consumerfinance.gov/notice-and-comment/whats-the-deal-with-prepaid-cards/> (last visited Nov. 26, 2012).

58. *Live From Durham, NC!*, CFPB (May 23, 2012), <http://www.consumerfinance.gov/blog/live-from-durham-nc/>.

59. *Id.*

60. *What's the Deal with Prepaid Cards?*, *supra* note 57.

61. *Id.*

blown ANPR. The agency took this approach, for instance, with respect to overdraft protection. In February 2012, the CFPB announced in a blog post that it was launching an inquiry into checking account overdraft programs to find out how those programs affect consumers.⁶² As part of that inquiry, the Bureau sought data from banks and also published a *Federal Register* Notice and Request for Information on overdraft programs from members of the public.⁶³ As with the prepaid card initiative, the blog post summarized the questions in the information request in less formal language and provided a link where viewers could read the notice online. Readers could also view a video of a CFPB roundtable with the public exploring problems with overdraft programs.⁶⁴

The Bureau used the same approach when seeking mass feedback on issues with private student loans. In a blog entry in November 2011, the CFPB announced, “We’d love to hear from students, families, school counselors, lenders, servicers, and anyone who has anything to do with private student loans.”⁶⁵ The agency explained that it planned to use the comments to help it prepare a report to Congress on private student loans mandated by the Dodd-Frank Act.⁶⁶ In the blog post, readers could click on a link that brought up a *Federal Register* notice with a request for information on student loans and instructions on how to submit comments.⁶⁷ The Bureau also asked readers to spread the word about the information request via e-mail, Facebook, and Twitter.⁶⁸ Later, after almost 2000 comments came in, the Bureau followed up with another blog post in June 2012 telling readers that they could now read the comments online.⁶⁹

Another time, the Bureau reversed the order by using another statutorily mandated report to Congress as the occasion for requesting public comment, this time on reverse mortgages. In June 2012, concurrent with releasing the reverse mortgage report to Congress, the Bureau announced on its blog that it was seeking public comment on follow-up questions on reverse mortgages that were generated by the report.⁷⁰ Readers could click

62. *Live From New York City!*, *supra* note 53; see also Press Release, CFPB, Consumer Financial Protection Bureau Launches Inquiry Into Overdraft Practices (Feb. 22, 2012), <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-launches-inquiry-into-overdraft-practices/>.

63. CFPB, Impacts of Overdraft Programs on Consumers, 77 Fed. Reg. 12031, 12031–33 (Feb. 28, 2012).

64. *Live From New York City!*, *supra* note 53.

65. Rick Hackett, *Chime in on Private Student Loans*, CFPB (Nov. 16, 2011), <http://www.consumerfinance.gov/blog/chime-in-on-private-student-loans/>.

66. Dodd-Frank Act, Pub. L. No. 111-203, § 1077, 124 Stat. 1376, 2075–76 (2010).

67. CFPB, Request for Information Regarding Private Education Loans and Private Educational Lenders, 76 Fed. Reg. 71329, 71330 (Nov. 17, 2011).

68. Hackett, *supra* note 65.

69. Rohit Chopra, *Thousands of Voices on Private Student Loans*, CFPB (June 13, 2012), <http://www.consumerfinance.gov/blog/thousands-of-voices-on-private-student-loans/>.

70. Megan Thibos, *Understanding Reverse Mortgages*, CFPB (June 28, 2012), <http://www.consumerfinance.gov/blog/understanding-reverse-mortgages/>.

on a link that brought them to the request for information⁷¹ with instructions on how to comment electronically. They could also sign up for an e-mail alert notifying them when the comment period began.

Another one of the Bureau's field hearings provided the occasion to ask for full-fledged public input into payday loans. In January 2012, the agency held a field hearing in Birmingham, Alabama, where citizens had an opportunity to testify about their experiences with payday loans.⁷² Later, when the field hearing transcript came out in March 2012, the Bureau announced on its blog that it was inviting public comment on the transcript online.⁷³ Through a link in the blog post, readers could go to a *Federal Register* announcement of a notice of comment on the transcript⁷⁴ where they could submit comments electronically on the transcript or on payday loans more generally.

Financial abuse of senior citizens is one more area where the Bureau opened a public inquiry and solicited public comment. In June 2012, Skip Humphrey, the head of the CFPB's Office of Older Americans, posted an entry on the CFPB's blog asking "the public—especially people working directly with seniors"—for input on how to "best determine the legitimacy of the credentials of financial planners and advisors."⁷⁵ Humphrey asked for the feedback to assist his office's research into certifications and designations of senior financial advisors. Then he invited viewers to click on a link containing the *Federal Register* notice and instructions about how to comment.⁷⁶ Readers could also post comments to the blog post itself.

B. OTHER EXAMPLES OF ONLINE PUBLIC ENGAGEMENT

In addition to outreach surrounding formal requests for comment in the *Federal Register*, in the first year of its existence, the Bureau provided other opportunities online for consumers and the general public to report their experiences with consumer loans and bank accounts. While these

71. CFPB, CONSUMER USE OF REVERSE MORTGAGES: NOTICE AND REQUEST FOR INFORMATION (June 28, 2012), http://files.consumerfinance.gov/f/201206_cfpb_Reverse_Mortgage_FRnotice.pdf, reprinted in 77 Fed. Reg. 39222 (July 2, 2012).

72. See CFPB Web Team, *Getting a Complete Picture of the Payday Market*, CFPB (Jan. 20, 2012), <http://www.consumerfinance.gov/blog/getting-a-complete-picture-of-the-payday-market/>.

73. Zixta Q. Martinez, *Share Your Input on Payday Lending for the Official Record*, CFPB (Mar. 23, 2012), <http://www.consumerfinance.gov/blog/share-your-input-on-payday-lending-for-the-official-record>.

74. CFPB, Request for Comment on Payday Lending Hearing Transcript, 77 Fed. Reg. 16817 (Mar. 22, 2012).

75. Skip Humphrey, *Protecting Older Americans from Financial Abuse*, CFPB (June 14, 2012), <http://www.consumerfinance.gov/blog/protecting-older-americans-from-financial-abuse/>; see also Press Release, CFPB, Consumer Financial Protection Bureau Launches Inquiry on Elder Financial Abuse (June 14, 2012), <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-launches-inquiry-on-elder-financial-abuse/>.

76. CFPB, REQUEST FOR INFORMATION REGARDING SENIOR FINANCIAL EXPLOITATION (Apr. 27, 2012), http://files.consumerfinance.gov/f/201206_cfpb_rfi_senior_financial_exploitation.pdf, reprinted in 77 Fed. Reg. 36491 (June 19, 2012).

reports are nonrandom and anecdotal in nature, they nevertheless serve an important function by allowing the Bureau to detect early trends and to roughly gauge the relative magnitude of one type of problem to another.

One of the earliest examples of this type of engagement was the “Tell Your Story” feature on the CFPB’s website.⁷⁷ Readers who click on the “Tell Your Story” page are taken to a text box where they can write their story, “good or bad,” about experiences they have had with consumer financial products. One of the Bureau’s earliest outreach efforts, “Tell Your Story” was up and running on July 21, 2011, the day the Bureau opened for business. One reason “Tell Your Story” was launched so early was because the CFPB’s Consumer Response initiative was only accepting credit card complaints on launch date⁷⁸ and was still phasing in its complaint-handling services for other types of consumer financial products.⁷⁹ “Tell Your Story” lives on, however, because citizens like having an official outlet to talk about their experiences without having to file a formal complaint. Meanwhile, the stories help the Bureau’s staff better understand what is going on in the marketplace.⁸⁰

During the CFPB’s first year, Consumer Response provided another way for consumers to report their experiences online. In contrast to “Tell Your Story,” Consumer Response allows individuals to file complaints online and seek a response.⁸¹ Once a complaint comes in, the CFPB screens it and forwards it, as appropriate, to the servicer or financial services provider in question for response. If the consumer disputes the company’s response or the company fails to respond on a timely basis, Consumer Response will investigate the case and refer it when appropriate to supervision or enforcement.⁸² By June 1, 2012, the CFPB had received 45,630 consumer complaints, 44 percent of which had been submitted

77. *Tell Your Story*, CFPB, <https://help.consumerfinance.gov/app/tellyourstory> (last visited Nov. 26, 2012).

78. *See, e.g.*, CFPB, CONSUMER RESPONSE: A SNAPSHOT OF COMPLAINTS RECEIVED 2 (June 19, 2012) [hereinafter CONSUMER RESPONSE], *available at* http://files.consumerfinance.gov/f/201206_cfpb_shapshot_complaints-received.pdf. The Consumer Response section on the CFPB’s website offers assistance to individual consumers in resolving their mortgage, credit card, and other consumer credit complaints against financial services providers. *Id.* Starting on launch date, Consumer Response also offered distressed homeowners referrals to free housing counselor services. *Id.*

79. *See, e.g., id.*

80. *See* SEMI-ANNUAL REPORT, *supra* note 1, at 16. In a similar initiative, the Bureau’s Financial Education section invited the public on the Bureau’s blog to e-mail their stories about common money mistakes that people make to help the section improve financial education efforts going forward. Dan Rutherford, *Help the CFPB Solve the Most Common Consumer Mistakes*, CFPB (June 4, 2012), <http://www.consumerfinance.gov/blog/help-the-cfpb-solve-the-most-common-consumer-mistakes/>.

81. *Submit a Complaint*, CFPB, <http://www.consumerfinance.gov/complaint/> (last visited Nov. 26, 2012). Consumers can also file complaints by phone, mail, e-mail, fax, and referral from other agencies. CONSUMER RESPONSE, *supra* note 78, at 3.

82. *See, e.g.*, CONSUMER RESPONSE, *supra* note 78, at 3.

through the CFPB's website.⁸³ Although Consumer Response's primary purpose is to facilitate the resolution of complaints, these accumulated reports provide a rich source of data that can help the Bureau understand current and emerging trends.⁸⁴ Later in June 2012, the Bureau made its consumer complaint database available online, allowing members of the public to research the types of complaints the CFPB receives and the outcomes of those complaints.⁸⁵

A few months after Consumer Response started taking in complaints, the Bureau created a separate online channel where company employees and other industry participants could report suspected violations of federal consumer financial laws. In a blog post, the Bureau encouraged tipsters and whistleblowers to call a toll-free hotline or submit law enforcement tips to whistleblower@cfpb.gov.⁸⁶ In another related initiative, the CFPB—working with the state Attorneys General and the Department of Defense—created the Repeat Offenders Against Military Database (ROAM), the first central repository of actions taken by federal, state, and local law enforcement against businesses that target financial scams against members of the military.⁸⁷ At the same time it launched the new database, the CFPB invited members of the public to e-mail any information they might have about formal actions involving financial schemes targeting the military to the Bureau.

As these cases demonstrate, the Bureau has embraced the web on numerous occasions to find out about people's experiences with a host of consumer financial services. This form of outreach typically comes at the earliest possible stage, before any decision is made to initiate a rulemaking. Examples include fact-finding inquiries on prepaid cards, overdraft protection, private student loans, reverse mortgages, payday loans, and financial abuse of senior citizens. In addition, the Bureau depends on "Tell Your Story," Consumer Response, its whistleblower program, and the ROAM database of financial scams targeting the military to help inform itself about new consumer problems and trends.

83. *Id.* at 4.

84. Blackwell, *supra* note 5.

85. Press Release, CFPB, Consumer Financial Protection Bureau Launches Consumer Complaint Database (June 19, 2012), <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-launches-consumer-complaint-database/>.

86. Kent Markus, *The CFPB Wants You to Blow the Whistle on Lawbreakers*, CFPB (Dec. 15, 2011), <http://www.consumerfinance.gov/blog/the-cfpb-wants-you-to-blow-the-whistle-on-lawbreakers/#more-10577>; *see also* Press Release, CFPB, Consumer Financial Protection Bureau Begins Taking Whistleblower Tips (Dec. 15, 2011), <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-begins-taking-whistleblower-tips/>.

87. Holly Petraeus & Kent Markus, *A New Tool for Protecting the Military Community*, CFPB (Jan. 25, 2012), <http://www.consumerfinance.gov/blog/a-new-tool-for-protecting-the-military-community/#more-11475>.

III. NEW CFPB PROCEDURES PROMOTING TRANSPARENCY IN RULEMAKINGS

So far, I have detailed examples of outreach by the Bureau to the public. During the Bureau's inaugural year, it also implemented two procedures—one on small business review panels and the other on *ex parte* presentations during rulemakings—that increased the transparency of the rulemaking process for members of the public at large.

A. SMALL BUSINESS REVIEW PANEL PROCESS

One relatively rare method that the Bureau has used to increase public transparency has been the small business review panel process mandated by the Dodd-Frank Act. In section 1100G of the Act,⁸⁸ Congress imposed special procedural requirements on any CFPB rule “which will have a significant economic impact on a substantial number of small entities”⁸⁹ under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).⁹⁰ The only other federal agencies that are subject to SBREFA requirements are the Environmental Protection Agency and the Department of Labor's Occupational Safety and Health Administration.⁹¹

SBREFA, among other things, requires the formation of a review panel with representatives from the CFPB, the Chief Counsel for Advocacy of the Small Business Administration, and the Office of Management and Budget's Office of Information and Regulatory Affairs.⁹² Before any proposed rule that is subject to SBREFA is published, the review panel is required to meet with a selected group of representatives from small businesses to get their feedback on the potential economic benefits and burdens of a future proposed rule and to explore alternative approaches that might minimize the regulatory burden on small businesses.⁹³ Later, within sixty days of convening, the review panel must issue a public report on the comments of the small business representatives.⁹⁴ The report must also set out the review panel's findings on the potential economic impacts of any proposed rule on small businesses and any significant alternatives that

88. Dodd-Frank Act, Pub. L. No. 111-203, § 1100G(a), 124 Stat. 1376, 2112 (2010) (codified as amended at 5 U.S.C. §§ 604(a), 609(d) (2011)).

89. 5 U.S.C. § 609(a) (2011).

90. Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (1996).

91. 5 U.S.C. § 609(d).

92. *Id.* § 609(b)(3).

93. *Id.* § 609(b); Press Release, CFPB, Consumer Financial Protection Bureau Convenes Small Business Panel for Know Before You Owe Mortgage Disclosures (Feb. 21, 2012), <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-convenes-small-business-panel-for-know-before-you-owe-mortgage-disclosures/> [hereinafter Small Business Panel].

94. 5 U.S.C. § 609(b)(5).

could accomplish the rule's objectives while minimizing its impacts.⁹⁵ The CFPB will then take the comments and findings into account when drafting the proposed rule.⁹⁶

SBREFA was designed to elicit comment from small businesses subject to SBREFA on the effects of new CFPB regulations. But the SBREFA process had an unanticipated benefit, which is written disclosure to the public at large of rulemaking options under consideration by the Bureau before a proposed rule is published. This benefit stems from the fact that before every SBREFA outreach meeting, the CFPB typically distributes briefing materials to the small business representatives who are chosen for outreach as well as to the general public. These materials provide a rich overview of the options under consideration, including information on the background of the rulemaking, a description of the alternative approaches being considered, a preliminary analysis of the likely economic impacts of those approaches on small businesses, and a list of questions and issues on which the review panel will seek input.⁹⁷

By August 2012, the Bureau had made its SBREFA briefing materials available online to the public for three mortgage rulemakings. The first time was for the integrated mortgage disclosure rulemaking discussed earlier,⁹⁸ later, the Bureau released the briefing materials for the mortgage loan originator and mortgage servicing rulemakings.⁹⁹ For the integrated mortgage disclosure rulemaking, the Bureau posted the materials on its blog and then asked consumers and other financial services providers to e-mail their thoughts or post comments on the options that the Bureau was considering.¹⁰⁰ Similarly, in a later blog entry for the mortgage servicing rulemaking, the Bureau posted its SBREFA materials online and gave people an opportunity to post comments.¹⁰¹ An accompanying press release

95. 5 U.S.C. § 609(b)(5); CFPB, FACT SHEET: SMALL BUSINESS REVIEW PANEL PROCESS (2012), http://files.consumerfinance.gov/f/2012/02/20120221_cfpb_factsheet-small-business-review-panel-process.pdf [hereinafter FACT SHEET].

96. See, e.g., CFPB Mortgage Disclosure Team, *SBREFA, Small Providers, and Mortgage Disclosure*, CFPB (Feb. 21, 2012), <http://www.consumerfinance.gov/blog/category/small-business-review/> [hereinafter *SBREFA*].

97. FACT SHEET, *supra* note 95.

98. See *supra* Section I.A.1.

99. *SBREFA*, *supra* note 96; Ashley Gordon, *What the Proposed Mortgage Servicing Rules Could Mean for You*, CFPB (Apr. 10, 2012), <http://www.consumerfinance.gov/blog/what-the-proposed-mortgage-servicing-rules-could-mean-for-you/>; Press Release, CFPB, Consumer Financial Protection Bureau Considers Rules to Simplify Mortgage Points and Fees (May 9, 2012), <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-considers-rules-to-simplify-mortgage-points-and-fees/> [hereinafter *Rules to Simplify*]; see also Small Business Panel, *supra* note 93; Press Release, CFPB, Consumer Financial Protection Bureau Outlines Borrower-Friendly Approach to Mortgage Servicing (Apr. 9, 2012), <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-outlines-borrower-friendly-approach-to-mortgage-servicing/> [hereinafter *Borrower-Friendly Approach*].

100. *SBREFA*, *supra* note 96.

101. Gordon, *supra* note 99.

stated that the Bureau planned to conduct outreach with consumer groups, industry, and other agencies while the SBREFA process was going on.¹⁰² In the third case, the Bureau put out a press release describing the proposals it was considering for the mortgage loan originator compensation rule and asked the public to e-mail their comments on the SBREFA briefing materials to the Bureau.¹⁰³

Not all rulemakings at the Bureau are subject to SBREFA. But for those that are—in other words, proposed rules that would have a significant effect on a large number of small businesses—the Bureau is using the SBREFA process, combined with the web, to air policy options under consideration with consumers, financial services providers, and sister agencies before a proposed rule comes out. In the past, at other agencies, this sort of outreach might have been conducted behind-the-scenes with hand-selected focus groups. The Bureau has departed from this practice by circulating those options in writing for the whole world to see and comment on electronically.

B. DISCLOSURE OF *EX PARTE* COMMUNICATIONS

One reason the Bureau opted for greater rulemaking transparency was as an antidote to Washington's "business-as-usual" practice of holding *ex parte* meetings with private parties, which are most often trade associations and citizens' groups. *Ex parte* meetings can be of use, both in airing different proposals and in vetting problems with those approaches. Similarly, such meetings can help agency officials understand markets and gather needed data when new issues crop up. Nevertheless, *ex parte* meetings can raise concerns about agency capture and fairness to other members of the public when the fact of these meetings and their content are not publicly disclosed.

To address these concerns, the Bureau adopted a policy on *ex parte* presentations in rulemaking proceedings in August 2011.¹⁰⁴ Under the policy, both the occurrence and the content of certain written and oral *ex parte* presentations¹⁰⁵ must be disclosed in writing in the rulemaking docket within three business days after the presentation.¹⁰⁶ The policy applies to *ex*

102. Borrower-Friendly Approach, *supra* note 99.

103. Rules to Simplify, *supra* note 99.

104. CFPB, CFPB BULL. NO. 11-3, CFPB POLICY ON EX PARTE PRESENTATIONS IN RULEMAKING PROCEEDINGS (2011), http://files.consumerfinance.gov/f/2011/08/Bulletin_20110819_ExPartePresentationsRulemakingProceedings.pdf [hereinafter CFPB BULLETIN 11-3]. See Leonard Kennedy, *Promoting Openness in CFPB Rulemaking*, CFPB (Aug. 19, 2011), <http://www.consumerfinance.gov/blog/promoting-openness-in-cfpb-rulemaking/>.

105. An *ex parte* presentation is defined, with certain exceptions, as "any written or oral communication by any person outside the CFPB that imparts information or argument directed to the merits or outcome of a rulemaking proceeding." CFPB BULLETIN 11-3, *supra* note 104, § (b)(1)(A).

106. *Id.* § (d).

parte presentations to CFPB decision-making personnel about pending rules between the date a notice of proposed rulemaking or interim final rule is published in the *Federal Register* for comment, and the date the final rule is published in the *Federal Register* or the rulemaking is terminated.¹⁰⁷

The policy was adopted in part to encourage and allow CFPB staff to “contact the public directly when factual information is needed to resolve questions of substance.”¹⁰⁸ This was particularly helpful at the Bureau’s beginning, when it inherited several proposed rules from other agencies. Some of those rulemakings were highly complicated and raised new and difficult issues that had not necessarily been contemplated by the draft rules when they were proposed. If the Bureau had been able to handle the rulemaking from the start, it could have asked the public for facts to help it resolve these issues, both before the proposed rule was published and in the request for comment accompanying the proposed rule. These avenues for fact gathering no longer remained available, though, after the predecessor agency published the proposed rule that transferred later to the CFPB. The *ex parte* policy allowed the Bureau’s staff to engage in the type of fact-finding that is helpful for well-informed rulemaking, while assuring that all such discussions are promptly summarized in writing and filed in the rulemaking docket so that no communications happened behind closed doors.

On occasion, these *ex parte* contacts can unearth issues or questions that lead to reopening the request for public comment. That happened in the ability-to-repay rulemaking, when issues that surfaced in *ex parte* communications with members of the Bureau after the proposed rule was published prompted the Bureau to issue a second request for comment in the rulemaking. This rulemaking, which was possibly the most important consumer rulemaking affecting residential mortgages in a generation, was instituted to implement Dodd-Frank’s command¹⁰⁹ that “no creditor may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan.”¹¹⁰ The Board of Governors of the Federal Reserve Board published the proposed rule for notice and comment on May 11,

107. The disclosure requirements do not apply to *ex parte* presentations by other federal agencies, offices, or their staff, by members of Congress or their staff in many cases, or to the General Counsel’s office that concern judicial review of a decision by the Bureau. *See id.*

108. *Id.*

109. Bd. of Governors of the Fed. Reserve Sys., Regulation Z; Truth in Lending, 76 Fed. Reg. 27390 (proposed May 11, 2011) (as stated in the summary of the proposed rulemaking).

110. Dodd-Frank Act, Pub. L. No. 111-203, §§ 1411–14, 124 Stat. 1376, 2142–53 (2010) (codified at 15 U.S.C. § 1639c(a) (2010)).

2011, before the Bureau opened its doors.¹¹¹ On July 21, 2011, the rulemaking transferred to the Bureau, which immediately began analyzing approximately 1800 comment letters submitted by the public in anticipation of a final rule.¹¹²

After the original comment period closed on July 22, 2011, the Bureau received additional information and new data relevant to the rulemaking through a variety of sources, including *ex parte* meetings and the Bureau's own data collection efforts. These meetings and data analysis, among other things, brought new issues to the fore and generated new information and data on point. Because some of these issues had not been aired for comment in the original notice of proposed rulemaking, the Bureau decided to reopen the period for comment to allow the public to comment on the new issues, information, and data.¹¹³ These issues included whether the definition of a qualified mortgage should specify a maximum ratio for a consumer's total debts to income and the size of the litigation risk associated with claims for ability-to-repay violations.¹¹⁴

In the year or so since the *ex parte* policy was adopted, the policy opened a window onto the types of meetings between the Bureau's personnel and outside groups that regularly occur in connection with rulemakings. That transparency, in turn, can help create the impetus to reopen comment on newly arisen issues by the public at large.

CONCLUSION

In its inaugural year, the Consumer Financial Protection Bureau took significant strides to increase the transparency of rulemakings and the fact-finding process that precedes them. The most striking of these has been the use of the Internet and social media to solicit online feedback from the general public during the preliminary stages of rulemaking, before a proposed rule is published. The Bureau has also used the web in advance of any rulemaking to encourage mass input on issues in the marketplace for consumer financial services. At the same time, the CFPB has used the small business review panel process to increase public transparency before a proposed rule is issued, while the *ex parte* rule boosts transparency during the period between the notice of proposed rulemaking and the issuance of a final rule.

111. See Bd. of Governors of the Fed. Reserve Sys., Regulation Z; Truth in Lending, 76 Fed. Reg. 27390 (proposed May 11, 2011) (noting that the CFPB was scheduled to open on July 21, 2011).

112. See CFPB, Truth in Lending (Regulation Z), 77 Fed. Reg. 33120, 33121 (June 5, 2012) (describing steps the CFPB took after rulemaking transferred to the CFPB and the comment period closed).

113. *Id.* at 33120 (reopening comment period to obtain comments on new data obtained after the first comment period closed).

114. *Id.* at 33124.

Greater openness has many benefits for the public as well as for the CFPB. It can help ensure that a greater panoply of voices is heard. It can guard against agency capture and help foster trust in government. Similarly, broader public outreach can provide the Bureau with a direct conduit to what is happening on the ground in local communities and an improved ability to detect trends raising regulatory concerns.

At the same time, fuller outreach through the Internet and social media poses challenges that agencies need to anticipate and manage. One challenge is the ability to absorb masses of information and disseminate that information in a usable way to the staff who need it. This can be particularly demanding when thousands of comments flood in and the turnaround times for reviewing those comments is short, for instance, due to tight rulemaking deadlines.

At the Bureau, we developed a number of helpful techniques to help us digest online comments in a timely manner. One of those techniques involved asking structured questions. We relied heavily on this technique in the TILA-RESPA integrated mortgage disclosure project, where we posted the draft forms for public viewing multiple times. We sequenced the qualitative testing in stages to focus on different topics every month, such as the design, the disclosures about risk and price, and the closing cost disclosures. Because we were focused on fine-tuning different parts of the form, depending on the month, we structured the questions on the Internet feedback tool every month to help readers zero in on the same parts we happened to be refining. While people had the opportunity to register other comments whenever they wanted, the focused comments were particularly timely. Designing structured questions took significantly more staff time and more design work by the Bureau's IT department. It also increased the possibility of design bugs and glitches, which we monitored closely. Despite the added resources involved and the possible risks, though, the payoff was big, we thought.

Many people also asked us whether the Bureau could distinguish comments from consumers and comments from members of industry. Often, this was obvious from the tenor of the comments. But in addition, we adopted other safeguards, including, but not limited to, separate channels for online consumer and industry feedback. While no system is foolproof, these steps helped us identify and categorize viewpoints by consumers and by industry.

Finally, some of our counterparts at other federal agencies were concerned that circulating the draft TILA-RESPA forms so early online, before the proposed rule stage, would undermine the results from the qualitative testing by tempting us to treat that non-random public input as "votes." The Bureau took this concern extremely seriously. In refining the forms, we consciously put first reliance on the results from the qualitative testing. To the extent the Internet feedback confirmed the testing results,

however, it doubled our confidence in them. Similarly, the Internet comments were useful in suggesting possible solutions to problems that needed fixing.

In short, the Bureau's highly positive experience with the early public feedback on the integrated mortgage disclosure convinced us that going to the public early and often improves transparency and leads to better decision-making. Embracing this feedback requires proper staffing, enough IT resources, a thick skin, and the confidence to reject the attitude that "the experts know best." When agencies can break out of the traditionally secretive rulemaking mode, however, everyone wins: the agency and, most of all, the public.