



**America's
Credit Unions**

May 17, 2024

Office of Management and Budget
725 17th Street NW
Washington, DC 20503

RE: Methods and Leading Practices for Advancing Public Participation and Community Engagement With the Federal Government (Document Number 2024-05882)

Dear Sir or Madam:

On behalf of America's Credit Unions, I am writing in response to the Office of Management and Budget's (OMB) Request for Information, "Methods and Leading Practices for Advancing Public Participation and Community Engagement With the Federal Government" (RFI). America's Credit Unions is the voice of consumers' best option for financial services: credit unions. We advocate for policies that allow the industry to effectively meet the needs of their nearly 141 million members nationwide. America's Credit Unions appreciates the opportunity to comment on the importance of public participation to the regulatory process. The rulemaking, supervision, and enforcement activities of the federal government have significant and wide-ranging consequences for vast numbers of Americans on a daily basis. To ensure that those activities are conducted with full cognizance of the views and concerns of impacted parties, it is crucial that the executive branch agencies engage with these parties in an open, transparent, and comprehensive manner. As a voice for credit unions, America's Credit Unions supports regulatory rulemaking with robust comment periods and discourages behavior designed to circumvent the rulemaking process.

General Comments

Notice and comment rulemaking is the backbone of responsible regulation. As industry grew more complex in the early 20th century, so did its oversight. The government's answer to this burgeoning complexity was to defer regulation to the federal agencies and the executive branch grew in size and power. Concerned with preserving the separation of powers and the autonomy of Congressional supervision, Congress passed the Administrative Procedure Act in 1946 (APA). The APA requires federal agencies and other executive branch departments to notify the public when new regulations are disseminated, allow time and opportunity for public input, and subject those regulations to judicial review. A robust comment period and opportunity for all manner of public input must be preserved to ensure that the safeguards of the APA are met.

In 1996, Congress passed the Small Business Regulatory Enforcement Fairness Act (SBREFA), which recognized that small businesses have disproportionately fewer resources to bear regulatory burden and provided new avenues for them to participate in rulemaking. One such tool is Small Business Advocacy Review (SBAR, or SBREFA) panels. Unfortunately, some

agencies view the SBREFA panel as a “check the box” exercise and fail to provide the necessary information and opportunity for a fulsome discussion and cost-benefit analysis.

Finally, some agencies circumvent notice and comment rulemaking by issuing “guidance” rather than releasing a clear regulation. Some communicate compliance expectations through enforcement, necessitating close tracking of agency behavior to understand compliance expectations. Entities subject to regulation and supervision by the federal government in the vast majority of cases strive to comply with the ever-changing regulatory environment in which they operate. In order to do so, those entities must have clear rules of the road to fully understand their obligations. A failure to provide those rules of the road causes uncertainty among regulated entities and creates a chilling effect, stifling innovation. Enforcement should never be used as a substitute for regulatory rulemaking.

Notice and Comment Rulemaking

In June 2014, a segment of the satire news series *Last Week Tonight with John Oliver* discussed a proposal on net neutrality by the Federal Communications Commission (FCC) and included directions on how to respond to the proposal. The subsequent volume of comment submissions crashed the FCC’s website.¹ While the FCC did not acknowledge that the segment was the impetus behind the influx of comments, the regulatory comment page received 45,000 comments while the proposal with the next highest number of comments had 2,000 responses.² The logical inference is that when the American public is sufficiently noticed, believe they understand the impact of the regulation on their lives, and are aware of proper submission procedures, they are eager to participate.

The first requirement is for the regulation to be noticed as a proposal. It is not sufficient for an agency to publish a blog post or a guidance document suggesting how they intend to do business going forward. Full notice in the *Federal Register* is required. The second requirement is for a robust and fulsome comment period. Complex and impactful regulations require time for potential commenters to read the regulation, evaluate its potential impact, and draft a response. While the comment period is often tailored to the proposal, in some instances, a 30-day comment period may not be sufficient. Agencies should respond to requests from stakeholders to extend comment periods and offer extensions as appropriate. Extending comment periods upon legitimate request should be the norm and not an exception.

Further, some proposals appear to be posted as a mere formality. The Consumer Financial Protection Bureau (CFPB or Bureau) recently noticed a rule restricting the amount of overdraft fees for financial institutions over a certain threshold. Concurrently, the President of the United

¹ Aamoth, Doug (June 5, 2014). "John Oliver's Net Neutrality Rant Crashes FCC Servers". *Time*. <http://time.com/2817567/john-oliver-net-neutrality-fcc/>

² Hu, Elise (June 3, 2014). "John Oliver Helps Rally 45,000 Net Neutrality Comments To FCC". *NPR*. <https://www.npr.org/sections/alltechconsidered/2014/06/03/318458496/john-oliver-helps-rally-45-000-net-neutrality-comments-to-fcc>

States announced that overdraft fees would be eliminated. It is difficult to believe that any public comment could be persuasive enough to neutralize the President's directive.

SBREFA Panels

According to the Small Business Size Standards identified by the Small Business Administration (SBA), credit unions with assets under \$850 million are considered small businesses.³ This classification applies to approximately 89 percent of credit unions. As a procedural matter, certain agencies, including the Bureau, are required, under the SBREFA⁴, to conduct a small business review panel before publishing a proposed rule with an Initial Regulatory Flexibility Analysis. The intent of the law is for small businesses to have a voice in the regulatory process and to have an opportunity to communicate the expected impact of an impending rule on these businesses. However, in the fall of 2023, the CFPB convened a SBREFA panel (Panel) to a Consumer Reporting Rulemaking (Outline) which one member of the Panel described as “a sea change” for the industry.

The Bureau set an inordinately short timeline for this SBREFA process that failed to provide the Small Entity Representatives (SERs) sufficient time or information to properly evaluate what would be the impact of the proposed changes to the affected small business entities. The Outline was distributed to the SERs on Friday, September 15, 2023, and was not available for review on the Bureau website until September 21, 2023. The first Pre-Panel Meeting was scheduled only two weeks later, on Monday, October 2, 2023. While the expected government shutdown and participant pushback necessitated a delay to the following week, the notice arrived at 5:30 PM Eastern on Friday, September 29, 2023. Any SER or guest with the foresight to review the information prior to that weekend had already rushed through the material.

Further, subsequent to the Pre-Panel and Panel events, SERs were given less than three weeks to articulate any written comments they wish to make. Guests were encouraged to submit comments by October 30, only 10 days after the final Panel meeting closed on October 19, 2023. Moreover, the Bureau requested SERs provide cost estimates as to the impact of the proposed changes. However, cost estimates require more detail than was provided in the Outline and time to gather information from internal business units. The Bureau provided neither in sufficient measure.

The SBREFA requires the CFPB to convene a review panel and report on the comments of the SERs and its findings within 60 days. The CFPB interpreted “convene” to mean the initial establishment of the panel instead of the date of the first formal meeting of the panel members.⁵ In contrast, the EPA “convenes” the 60-day clock at the first formal meeting of the panel

³ 13 CFR 121.201.

⁴ 5 U.S.C. 601, et al.

⁵ U.S. Government Accountability Office Report, CFPB Observations from Small Business Review Panels (Aug. 2016) at 9, <https://www.gao.gov/assets/gao-16-647.pdf>.

members.⁶ The CFPB’s interpretation of “convene” unnecessarily truncated the timeline for SER participants to actively review the proposals under consideration and offer meaningful feedback. All agencies required to hold SBREFA panels should adopt consistent interpretations of this requirement so that stakeholders across industries are able to participate in a standardized feedback process. The CFPB’s timeline for SBREFA Panels was insufficient to conduct a fair and reasonable process that afforded SERs and other stakeholders adequate time to review materials, participate in the process, and provide written comments. An agency with the intent to receive and consider input by the smallest and most vulnerable entities it regulates would not have rushed through the motions of a panel just to “check the box” and move forward with its regulatory agenda.

Unacceptable Alternatives

Despite the flaws in the execution of the notice and comment rulemaking process noted above, there are far more egregious practices such as avoiding the APA’s requirements and regulating through informal communication and enforcement.

Agencies such as the CFPB regularly post their guidance on a blog or through a newsletter. On April 24, 2024, the Bureau released through its blog⁷ a report that purported to show ways in which mortgage servicers were mistreating their clients. The blog post noted, “In response to the CFPB’s findings, mortgage servicers are taking corrective actions, including changes to their policies and procedures. For the fee-related findings, servicers are remediating homeowners, including providing refunds.”⁸ This report followed a Request for Information in 2023, but no additional regulation has been proposed. Instead, this report serves as both regulation and enforcement, causing private entities to modify their behavior on the basis of naming and shaming. Regulatory guidance should be clear and subject to public comment, not conducted by subversive methods.

Conclusion

America’s Credit Unions appreciates the opportunity to comment on this topic. If you have any questions or concerns, please do not hesitate to contact me at asmith@AmericasCreditUnions.org or (703) 842-2803.

⁶ *Id.*

⁷ <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-stop-illegal-junk-fees-in-mortgage-servicing/>.

⁸ *Id.*

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Sincerely,

A handwritten signature in black ink that reads "Amanda L. Smith". The signature is written in a cursive, flowing style.

Amanda L. Smith
Senior Regulatory Affairs Counsel