

*Submitted via www.regulations.gov July 15<sup>th</sup>, 2019*

Consumer Financial Protection Bureau 1700 G Street, NW Washington, DC 20552

Re: Docket No. CFPB-2019-0024, Plan for the Review of Bureau Rules for Purposes of the Regulatory Flexibility Act

Dear Director Kraninger:

Thank you for the opportunity to comment on the notice<sup>1</sup> announcing the Consumer Financial Protection Bureau's plan for retrospective review of rules under section 610 of the Regulatory Flexibility Act (RFA).<sup>2</sup> The undersigned consumer, civil rights and community groups believe that the CFPB must not allow the section 610 review plan, or individual reviews conducted under that authority of existing regulations, to override, distract from or in any way conflict with the CFPB's primary mission of protecting consumers from harmful practices or violations of the law, including unfair, abusive or deceptive financial products or practices.

Thus, we urge the CFPB to restrict its section 610 review plan, and individual reviews taken thereunder, to only those rules that the CFPB had initially identified as "significantly impacting a significant number of small entities" at the time of the rule promulgation for purposes of complying with the RFA.<sup>3</sup> This is necessary to align the CFPB's section 610 retrospective review process with the plain language of section 610 as well as the clear interpretation of such language by multiple agencies which have restricted their section 610 review processes to those existing rules that included both initial and final regulatory flexibility analyses when initially promulgated due to the agency finding that the rule would "significantly impact a significant number of small entities."

In addition, we encourage the CFPB to avoid duplication and redundancy with respect to the multiple retrospective review processes that the CFPB must comply with by statute. In order to do so, CFPB must streamline and harmonize its multiple retrospective review statutory requirements by allowing reviews that the CFPB has conducted under section 1022(b) of the Dodd Frank Act<sup>4</sup> to satisfy the requirements for review under section 610 of the RFA. Retrospective reviews conducted pursuant to Dodd-Frank section 1022(b) will generally precede reviews under section 610 of the RFA due to the section 1022(b) requirement that the CFPB analyze existing significant rules five years after promulgation, as opposed to the ten year post promulgation retrospective review requirement in section 610 of the RFA.

Finally, a section 610 review should not be a skewed process use to weaken protections, and indeed a rule review should assess whether the rule has achieved its goal of protecting consumers and whether more is needed to address market changes or less than effective protections. It is critical that the CFPB not allow its "backward" looking retrospective review mandate to interfere, distract from, or undermine in any way its "forward" looking mission from Congress to protect consumers, including from small businesses that may violate the law or engage in abusive, deceptive, unfair, or otherwise fraudulent practices with respect to financial products. The CFPB's regulations and enforcement actions have achieved considerable success in protecting consumers, as was the clear intent of Congress is

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<sup>1</sup> 84 Fed. Reg. 21732.

<sup>2</sup> 5 U.S.C 610.

<sup>3</sup> 5 U.S.C. 605(b).

<sup>4</sup> Public Law 111-203, 124 Stat. 2081 (2010).

establishing the CFPB. CFPB enforcement actions have recouped up to 17 billion in penalties on behalf of consumers. It would be entirely inappropriate for the CFPB to rescind or weaken in any way rules that are working effectively to protect consumers as Congress intended. Indeed, the recent Dodd-Frank section 1022(b) reviews found that that one of the rules it analyzed had been effective in reducing the rate of delinquent loans proceeding to foreclosure sale.<sup>5</sup> At the same time, some rules, such as the opt-in overdraft fee rule which is the subject of the CFPB's first section 610 review, have been important first steps but have at times been evaded and have not eliminated abusive practices from the marketplace.<sup>6</sup> We believe it is crucial for the integrity of the CFPB's section 610 review process and for the CFPB's fidelity to its mission to avoid the perception that it is using this process as a one-sided avenue to accomplish political goals in weakening or repealing CFPB rules that industry stakeholders oppose based on alleged compliance concerns that are being stipulated by those very stakeholders.

### **The Scope of CFPB's Retrospective Review Plan is Too Broad**

We believe the potential scope of the CFPB's retrospective review plan is too broad and must be narrowed. In its notice, the CFPB stated "Each year, the Bureau plans to initiate 610 reviews of final rules." The CFPB further states in its notice, "For each rule, the Bureau will first assess whether it is having a significant economic impact on a substantial number of small entities and so is subject to 610 review. The Bureau may also decide to exercise its discretion to review rules issued by the Bureau or by the Bureau's predecessor agencies that may not otherwise be subject to 610 review." Thus, the CFPB considers virtually all final rules issued by the CFPB, as well as those inherited by the CFPB, to be subject to its section 610 retrospective review plan. It is inappropriate for the CFPB to establish such a broad scope for its retrospective review plan under section 610. Instead, the CFPB should follow other agencies that have extensive experience in conducting section 610 reviews and have narrowed those reviews to only rules that were initially determined to have required a Regulatory Flexibility Analysis upon promulgation.

For example, the Environmental Protection Agency (EPA) has conducted dozens of section 610 reviews, more than most, if not all, other agencies. Those reviews are compiled on EPA's website.<sup>7</sup> Close scrutiny of those reviews reveals that since 2008, almost all of EPA's section 610 reviews were related to rules that had required a Regulatory Flexibility Analysis due to a determination by the EPA at the time of promulgation that the rules would "significantly impact a significant number of small entities." EPA is also subject to an additional requirement, as is the CFPB, that EPA conduct small business review panels prior to proposing rules that require a Regulatory Flexibility Analysis. In other words, since 2008, EPA has almost always restricted section 610 reviews to those rules that required both Regulatory Flexibility Analyses and small business review panels.

We encourage the CFPB to follow EPA's lead in narrowing its retrospective review plan under section 610 of the RFA to only those rules that the CFPB found would require a Regulatory Flexibility Analysis and a small business review panel at the time of promulgation. This will ensure that the CFPB is using its limited resources on retrospectively assessing only those rules that are most likely to impact small business stakeholders instead of wasting its resources on section 610 reviews of rules that are unlikely

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<sup>5</sup> <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-publishes-assessments-ability-repay-and-mortgage-servicing-rules/>

<sup>6</sup> <http://bit.ly/overdr-opp>

<sup>7</sup> <https://www.epa.gov/reg-flex/regulatory-flexibility-act-section-610-reviews>

to impact small business stakeholders, thereby preserving CFPB resources for its “forward” looking primary congressional mandate to protect consumers.

### **CFPB Should Streamline its Retrospective Review Plan**

We urge the CFPB to consider streamlining its multiple statutory requirements regarding retrospective reviews of its rules in order to avoid wasteful duplication and redundancy. The CFPB has already commenced retrospective reviews of its rules under section 1022(d) of the Dodd-Frank Act which requires the CFPB to review significant rules it has issued five years after promulgation of the rule. Earlier this year, the CFPB issued its report on the first rules it has reviewed, finding that they are generally working as intended and should not be modified.

The Small Business Administration has issued guidance to agencies on compliance with the Regulatory Flexibility Act that indicates that agencies can satisfy the section 610 review requirement under the RFA if the agency has already conducted a retrospective review under a separate statutory requirement.<sup>8</sup> It makes little sense, and is redundant and wasteful, for the CFPB to subject rules to separate retrospective review requirements when such review requirements are largely similar. We urge the CFPB to streamline and harmonize its Dodd-Frank section 1022(d) and RFA section 610 review requirements by categorically exempting rules that have undergone review under one of the statutory requirements from review under the other statutory requirement.

### **Conclusion**

In order to protect the integrity of its retrospective review plan, preserve limited CFPB resources, and stay faithful to the CFPB’s primary mission of protecting consumers, the CFPB must narrow and tailor its retrospective review plan under section 610 of the RFA to only those rules that the agency has already found are likely to impact small businesses at the time of the rule promulgation; must streamline and harmonize its multiple retrospective review processes; and must conduct even-handed reviews of rules to address whether they are adequately protecting consumers and not merely whether they impose burdens on industries that abuse consumers.

Respectfully Submitted,

Consumer Action

Consumer Federation of America

National Consumer Law Center

Public Citizen

Woodstock Institute

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<sup>8</sup> <https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf>