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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Policy on Ex Parte Presentations in Rulemaking Proceedings

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Policy Guidance and Procedural Rule.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) has adopted the following updated policy on ex parte presentations in rulemaking proceedings. The original policy was posted on the CFPB's website on August 16, 2011.

DATES: The substantive amendments made in paragraph (e)(1) of this updated Policy on Ex Parte Presentations in Rulemaking Proceedings apply only to informal rulemaking proceedings where the CFPB has published general notice of proposed rulemaking on or after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. All other revisions apply [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], to all CFPB informal rulemaking proceedings subject to the Policy, including rulemakings that have not been finalized.

FOR FURTHER INFORMATION CONTACT: Stephen Hayes, Counsel, Legal Division, 1700 G Street, NW., 20552, 202-435-9585.

SUPPLEMENTARY INFORMATION:

I. Background

On August 16, 2011, the CFPB posted on its website a Policy on Ex Parte Presentations in Rulemaking Proceedings.¹ This Policy generally requires public disclosure of ex parte presentations made to CFPB decision-making personnel concerning pending rulemakings. Since its publication, the CFPB's Policy has promoted fairness and transparency in rulemaking proceedings by ensuring that the general public has access to input the CFPB receives during such proceedings. Based on public feedback and the CFPB's implementation experiences, the CFPB has made certain revisions to ensure the Policy operates effectively to foster fairness and transparency in the CFPB's rulemaking proceedings to which the Policy applies. Most of the revisions in the Updated Policy are non-substantive, and do not affect the scope or requirements under the Policy. Instead, they clarify the Policy's provisions and requirements, ensure consistency in terminology throughout the Policy, make technical amendments, and facilitate compliance with the procedures in the Policy. The discussion below provides background on the Policy and describes the revisions.

Under the CFPB's Policy, an "ex parte presentation" means "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." These presentations are only covered by the Policy to the extent they are made to "decision-making personnel." The Updated Policy makes certain non-substantive changes to this definition. First, in the Prior Policy, the "decision-making personnel" limitation was contained in paragraph (d), which describes the Policy's disclosure requirements. For clarity, the Updated Policy instead moves that limitation to the

¹ This supplementary material refers to the CFPB's Ex Parte Policy posted on August 16, 2011 as the "Prior Policy," and to the updated policy in this document as the "Updated Policy." At times, this document uses the term "Policy" when discussing aspects of the Policy that are unchanged.

definition of “ex parte presentation,” in paragraph (b). This change does not affect the scope of disclosure obligations under the Policy.

Second, the Updated Policy makes clear that ex parte presentations can include communications “made in any form, including those made in person, or via mail, telephone, e-mail, or other medium. A communication may be an ‘ex parte presentation’ even if the person making the communication does not intend or desire it to be publicly disclosed.” The CFPB’s Policy has always covered these types of communications, but the CFPB has received feedback suggesting that outside parties may not have always understood this scope of coverage. The new clarificatory language addresses that feedback.

The Policy continues to define “ex parte presentations” to not include: (i) “Statements by any person made in a public meeting, hearing, conference, or similar event, or public medium such as a newspaper, magazine, or blog”; (ii) “Communications that are inadvertently or casually made”; (iii) “Inquiries limited to the status of a rulemaking or concerning compliance with procedural requirements”; or (iv) “Communications that occur as part of the CFPB’s regular supervisory, monitoring, research, and/or other statutory responsibilities, which communications are only incidentally relevant to, and not intended to influence the outcome of, a rulemaking proceeding.” The Updated Policy inserts the word “enforcement” into clause (iv), to make clear that communications that occur as part of the CFPB’s regular enforcement activities, if incidentally relevant to, and not intended to influence the outcome of, a rulemaking proceeding, also are not ex parte presentations. These communications have always been excluded from the definition of “ex parte presentation” because they occur as part of the CFPB’s regular statutory responsibilities. For clarity, the Updated Policy makes that coverage explicit.

It bears emphasis that comments submitted through the methods set forth in a notice of proposed rulemaking for the submission of comments are not ex parte presentations, and therefore are not subject to the requirements under the Policy. Moreover, the CFPB notes that the Policy addresses the public disclosure obligations for ex parte presentations as set forth in the Policy. Although decision-making personnel may in their discretion consider ex parte presentations in the course of developing a final rule covered by the Policy, the Policy does not require such consideration. As the Policy makes clear, once a proposed rule is published, the CFPB “expects that the primary means of communicating a person’s view in the course of a rulemaking will be through the submission of written comments to the rulemaking docket. Ex parte presentations should supplement and not substitute for those submissions.”

The Updated Policy also clarifies that it applies only where “the CFPB is required by section 553 of the Administrative Procedure Act (APA) to publish general notice of proposed rulemaking.” The Prior Policy stated that it applied to informal (notice and comment) rulemaking procedures “conducted in accordance with section 553 of the Administrative Procedure Act, including proceedings in which public comment is sought as a matter of discretion.” The CFPB solicits public feedback on a range of documents and in a variety of ways, many of which are not conducted in accordance with section 553 of the APA. In order to avoid confusion regarding when outside parties must comply with the Policy, this revision makes clear that the Policy does not apply where the CFPB voluntarily seeks comment, but is not legally required to do so in accordance with section 553 of the APA.

The Policy applies once the CFPB has published a proposed rule on its website or in the Federal Register, whichever is earlier. Input the CFPB receives before a rule is proposed is not covered by the Policy, although parties should keep in mind that their communications with the

CFPB might be made public as required by law or for other reasons. The Prior Policy applied until publication of a final rule in the Federal Register, or final disposition of the notice of proposed rulemaking or interim final rule. The Updated Policy continues to cease applying upon final disposition of the notice of proposed rulemaking, although the term “interim final rule” is removed, consistent with the revision to the language regarding the applicability of the Policy, because the APA does not require general notice of proposed rulemaking for interim final rules. The Updated Policy makes a minor technical change to the date the Policy ceases to apply to a rulemaking. The Prior Policy ceased to apply upon the date of publication of the final rule in the Federal Register. In addition to ceasing to apply on this date, the Updated Policy ceases to apply upon the date of publication of the final rule on the CFPB’s website, if earlier than Federal Register publication. The CFPB has made this change for consistency with when the Policy applies, which is the earlier of website or Federal Register publication, and because CFPB rules are considered issued at the time they are posted on the CFPB’s website.

The Policy continues to provide that its requirements do not apply to presentations: (i) “to the General Counsel and his or her staff that concern judicial review of a matter that has been decided by the CFPB”; (ii) “by other Federal government agencies, offices, or their staff”; or (iii) “by members of Congress or their staff,” unless “such presentations are of major significance, contain information or argument not already reflected in the rulemaking docket, and are plainly intended to affect the ultimate outcome of the rulemaking.” The Updated Policy makes two non-substantive clarifications to the Policy, which make explicit: (1) that Federal government agencies include “components of the Federal Reserve System;” and (2) that clauses (ii) and (iii) above apply only when the entities identified in those clauses are acting “in their official capacities.”

The Updated Policy also makes a substantive change to this paragraph, by providing that the Policy’s requirements do not apply to communications “by State attorneys general or their equivalents, State bank regulatory authorities, or State agencies that license, supervise, or examine the offering of consumer financial products or services, including their offices or staff, when acting in their official capacities.” The Updated Policy specifies that “State” means “any State, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States or any federally recognized Indian tribe.” The CFPB has special partnerships with these sister entities, including certain cooperative supervisory and enforcement relationships, and these entities often have uniquely valuable insights into proposed rulemakings. In the CFPB’s experience, communications from these entities have at times been sensitive, and the CFPB believes that these entities are likely to provide more frank and robust feedback if communications are not subject to the disclosure requirements of the Policy. The Updated Policy therefore includes a tailored exemption from coverage designed to further those objectives, as well as the purposes of the Policy in general.

Next, the Prior Policy directed outside parties to submit summaries of oral ex parte presentations or written ex parte presentations within three business days after a presentation. In response to feedback the CFPB has received regarding difficulties complying with that timing requirement, the Updated Policy extends that period for outside parties from three to ten business days. For clarity, the Updated Policy also instructs that summary memoranda include “the identity of the person(s) preparing the memorandum” and “the date of the memorandum.” The Prior Policy directed outside parties to file ex parte presentation materials directly to the public rulemaking docket at www.regulations.gov, as well as submitting them to the CFPB. In response to feedback regarding technical limitations outside parties have experienced making submissions

to rulemaking dockets on www.regulations.gov after comment periods have closed, the Updated Policy provides that outside parties need not themselves file ex parte materials directly to the public rulemaking docket, and instead instructs them to email required materials to the CFPB's Executive Secretary and to the CFPB employee point of contact for the presentation, if applicable. The Updated Policy also updates the e-mail and mailing address of the Executive Secretary of the CFPB.

The Prior Policy provided that CFPB staff may require filers to correct inaccuracies or missing information in ex parte materials. The Updated Policy clarifies and supplements that clause, explaining "that CFPB staff may communicate with the presenter regarding the summary memorandum or presentation, including, for example, requiring the submitter to correct any inaccuracies or insert missing information, or regarding treatment of confidential information, as appropriate." In light of the technical limitations experienced by outside parties making submissions to rulemaking dockets on www.regulations.gov after comment periods have closed, as described above, the Updated Policy provides that CFPB will post ex parte presentations and summary memoranda "on the public rulemaking docket in accordance with [the] policy, including making reasonable efforts to do so within a reasonable period of time before publication of the final rule."

The Updated Policy clarifies procedures for requesting confidential treatment under the Policy. The Prior Policy provided that where a filer believed that one or more documents or portions thereof should be withheld from public inspection, the filer should electronically request that the information not be made available for public inspection, and it instructed the filer to file with the CFPB's Executive Secretary confidential and public copies of the documents. The Updated Policy makes several non-substantive clarifications to this paragraph for clarity, and it

instructs the submitter to explain why confidential treatment is requested and why such information would be properly withheld from disclosure under the Freedom of Information Act, 5 U.S.C. 552. These changes reflect and clarify practices under the Policy, and the CFPB believes they will facilitate requests for confidentiality.

Finally, the Updated Policy makes non-substantive changes to a provision reserving CFPB discretion to deviate from the Policy where public interest requires, and it inserts as an example that such discretion may be exercised to apply the Policy “during proceedings other than those described in paragraph (a) [of the Policy], and not to apply the policy during proceedings described in paragraph (a), such as where the CFPB has determined that a rule for which general notice of proposed rulemaking was provided in accordance with section 553 of the APA will not be finalized.”

II. Legal Authority and Effective Date

Section 1022(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) authorizes the CFPB to prescribe rules as may be necessary or appropriate to enable the CFPB to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions of those laws.² In addition, section 1012(a) of the Dodd-Frank Act authorizes the Bureau “to establish the general policies of the Bureau with respect to all executive and administrative functions, including—(1) the establishment of rules for conducting the general business of the Bureau, in a manner not inconsistent with this title * *

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² 12 U.S.C. 5512(b).

³ 12 U.S.C. 5492(a).

As described above, the Updated Policy makes changes to paragraph (e)(1) by including a clause providing that the Policy’s requirements do not apply to communications “by State attorneys general or their equivalents, State bank regulatory authorities, or State agencies that license, supervise, or examine the offering of consumer financial products or services, including their offices or staff, when acting in their official capacities.” The Updated Policy specifies that “State” means “any State, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States or any federally recognized Indian tribe.” These substantive revisions apply only to informal rulemaking proceedings subject to the Policy where the CFPB has published general notice of proposed rulemaking at least thirty days after publication of the Updated Policy in the Federal Register. All other revisions apply thirty days after the date of publication of this document in the Federal Register, to all CFPB informal rulemaking proceedings subject to the Policy, including rulemakings that have not been finalized.

III. Regulatory Requirements

The updated CFPB Policy on Ex Parte Presentations in Rulemaking Proceedings is a policy statement and procedural rule that articulates the CFPB’s policies and expectations for communications with persons outside the CFPB during informal rulemaking proceedings where general notice is required by section 553 of the APA. It is exempt from notice and comment rulemaking requirements under the APA pursuant to 5 U.S.C. 553(b). Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis. 5 U.S.C. 603(a), 604(a). The CFPB has determined that this policy does not impose any new or revise any existing recordkeeping, reporting, or disclosure

requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

IV. Final Policy

The text of the Policy is as follows:

CFPB Policy on Ex Parte Presentations in Rulemaking Proceedings

(a) SCOPE.—This policy applies to communications with persons outside the Consumer Financial Protection Bureau during informal rulemaking proceedings where the CFPB is required by section 553 of the Administrative Procedure Act (APA) to publish general notice of proposed rulemaking.

(b) DEFINITIONS.—For purposes of this policy, the following definitions apply:

(1) EX PARTE PRESENTATION.—

(A) Except as provided in subparagraph (b)(1)(B), the term “ex parte presentation” means any written or oral communication by any person outside the CFPB to any decision-making personnel that imparts information or argument directed to the merits or outcome of a rulemaking proceeding. Ex parte presentations include such communications made in any form, including those made in person, or via mail, telephone, e-mail, or other medium. A communication may be an “ex parte presentation” even if the person making the communication does not intend or desire it to be publicly disclosed.

(B) Ex parte presentations do not include the following:

(i) Statements by any person made in a public meeting, hearing, conference, or similar event, or public medium such as a newspaper, magazine, or blog;

(ii) Communications that are inadvertently or casually made;

(iii) Inquiries limited to the status of a rulemaking or concerning compliance with procedural requirements; or

(iv) Communications that occur as part of the CFPB's regular supervisory, enforcement, monitoring, research, and/or other statutory responsibilities, which communications are only incidentally relevant to, and not intended to influence the outcome of, a rulemaking proceeding.

(2) DECISION-MAKING PERSONNEL.—The term “decision-making personnel” means any employee of the CFPB who is or may reasonably be expected to be involved in formulating a CFPB rule.

(c) POLICY.—It is the CFPB's policy to provide for open development of rules and to encourage full public participation in rulemaking actions. The CFPB encourages decision-making personnel to contact the public directly when factual information is needed to resolve questions of substance and to be receptive, consistent with the limitations on CFPB staff time, to communications from persons affected by or interested in a CFPB rulemaking. However, to promote fairness and reasoned decision-making, the CFPB's policy is to require public disclosure of ex parte presentations according to CFPB guidelines. The CFPB expects that the primary means of communicating a person's views in the course of a rulemaking will be through the submission of written comments to the rulemaking docket. Ex parte presentations should supplement and not substitute for those submissions.

(d) DISCLOSURE.—Except as provided in paragraph (e), the following requirements apply from the date of publication in the *Federal Register* (or on the CFPB's Web site, whichever is earlier) of a notice of proposed rulemaking for public comment until the date of publication in the *Federal Register* (or on the CFPB's Web site, whichever is earlier) of the final rule or final disposition of the notice of proposed rulemaking:

(1) ORAL EX PARTE PRESENTATIONS.—A person who makes an oral ex parte presentation shall, not later than ten business days after the presentation, submit to the CFPB’s Executive Secretary and the CFPB employee point of contact for the presentation, a memorandum summarizing the presentation. The memorandum must contain the identity of the person(s) preparing the memorandum; the date of the memorandum; a list of all persons attending or otherwise participating in the presentation; the date of the presentation; and a summary of data presented and arguments made during the presentation by the person(s) making the presentation. If the oral ex parte presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s prior written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. CFPB staff may communicate with the presenter regarding the memorandum summarizing the presentation, including, for example, requiring the submitter to correct any inaccuracies or insert missing information, or regarding treatment of confidential information, as appropriate. CFPB staff will post such memoranda on the public rulemaking docket in accordance with this policy, including making reasonable efforts to do so within a reasonable period of time before publication of the final rule.

(2) WRITTEN EX PARTE PRESENTATIONS.—A person who makes a written ex parte presentation (including documents shown or given to decision-making personnel during oral ex parte presentations) shall, not later than ten business days after the presentation, submit to the CFPB’s Executive Secretary and the CFPB employee point of contact for the presentation, if applicable, a copy of the presentation. CFPB staff may communicate with the presenter

regarding the written ex parte presentation. CFPB staff will post written ex parte presentations on the public rulemaking docket in accordance with this policy, including making reasonable efforts to do so within a reasonable period of time before publication of the final rule.

(3) SUBMISSION REQUIREMENTS.—

(i) Any memorandum summarizing an oral ex parte presentation or written ex parte presentation (and cover letter, if any) shall identify the proceeding to which it relates, including the docket number, if any, and must be labeled as an ex parte submission.

(ii) All submissions under paragraphs (d)(1) and (2) shall be made electronically by emailing the required materials to the Executive Secretary (at CFPB_expartedisclosures@cfpb.gov) and the CFPB employee point of contact for the presentation, if applicable. If electronic submission would present an undue hardship, the submitter must request an exemption from the electronic submission requirement, stating the nature of the hardship, and submit by mail or by hand to the Executive Secretary an original and one copy of the written ex parte presentation or memorandum summarizing an oral ex parte presentation, with a copy by mail to the CFPB employee point of contact for the presentation, if applicable. (Mail may be sent to the Office of the Executive Secretary, Consumer Financial Protection Bureau, 1700 G Street, NW., Washington, DC 20552.)

(iii) In cases where a member of the public believes that one or more of the documents or portions thereof covered by this policy (whether a written ex parte presentation or summary of an oral ex parte presentation) should not be posted on the public rulemaking docket, he or she should submit electronically a request for confidential treatment under this policy. Such requests should explain why confidential treatment is requested and why such information would be properly withheld from disclosure under the Freedom of Information Act, 5 U.S.C. 552. Unless

otherwise agreed to with the CFPB, such requests should include a copy of the document(s) containing the confidential information and marked prominently as “Confidential,” and a copy of the same document(s) with confidential information redacted and marked “Public Copy.”

(iv) CFPB staff may in their discretion elect to prepare written summaries of oral ex parte presentations and post them to the rulemaking docket in lieu of requiring the person who made the ex parte presentation to prepare such summaries.

(e) EXEMPTIONS.—

(1) The requirements in section (d) do not apply to ex parte presentations (i) to the General Counsel and his or her staff that concern judicial review of a matter that has been decided by the CFPB; (ii) by other Federal government agencies, offices, or their staff (including components of the Federal Reserve System), when acting in their official capacities; (iii) by State attorneys general or their equivalents, State bank regulatory authorities, or State agencies that license, supervise, or examine the offering of consumer financial products or services, including their offices or staff, when acting in their official capacities; or (iv) by members of Congress or their staff, when acting in their official capacities, unless such presentations are of major significance, contain information or argument not already reflected in the rulemaking docket, and are plainly intended to affect the ultimate outcome of the rulemaking. For purposes of this policy, State means any State, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States, or any federally recognized Indian tribe. All entities are welcome to post written comments to the rulemaking docket.

(2) The CFPB may properly withhold from the rulemaking docket information exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552.

(f) CFPB DISCRETION.—Where the public interest so requires in particular rulemaking proceedings, the CFPB and its staff retain the discretion to deviate from this ex parte policy set forth above, including to apply this policy during proceedings other than those described in paragraph (a), and not to apply the policy during proceedings described in paragraph (a), such as where the CFPB has determined that a rule for which general notice of proposed rulemaking was provided in accordance with section 553 of the APA will not be finalized.

(g) VIOLATIONS.—Persons who fail to adhere to this policy are subject to such sanctions as may be appropriate. Any person who becomes aware of a possible violation of any of the requirements of this policy may advise the Office of General Counsel of all the facts and circumstances that are known to him or her.

Dated: April _17_, 2017.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

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