



ALAN WILSON
ATTORNEY GENERAL

August 1, 2017

The Honorable Mick Mulvaney
Director, Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Director Mulvaney:

State Attorneys General have paid close attention to the issues of the Consumer Financial Protection Bureau as it relates to its regulatory footprint and the rule of law. Many Attorneys General have commented on numerous rules expressing concerns that proposed rules pre-empt existing state laws. Many Attorneys General filed an amicus in the PHH case, which is still pending in federal court. Many Attorneys General have led and joined challenges to the constitutionality of the entity and the appointment process of its Director.

We are writing to you today to express our hope that you, as Director of the Office of Management and Budget, will direct the Office of Information and Regulatory Affairs (OIRA) to conduct a cost-benefit analysis of recent and pending CFPB rules. State Attorneys General filed comments (enclosed) on both the arbitration rule, which the CFPB recently issued and is pending Congressional Review Act action, and the small dollar rule, which is likely to be formalized before Labor Day.

Since at least the Reagan Administration, OMB has been assigned responsibility to ensure that regulations are consistent with applicable law, properly recognize and balance the costs and benefits of regulation, minimize unnecessary burdens, and do not conflict with the policies or actions taken or planned by other agencies. To carry out these policies, OIRA conducts centralized review of regulatory actions, assisting agencies in assessing the costs and benefits of regulatory alternatives, ensuring that the burdens of regulation are minimized and that unacceptable or unreasonable costs are avoided. Such OIRA review takes account of the views of stakeholders and harmonizes federal actions with State, local and tribal law, and avoids actions that are inconsistent, incompatible, or duplicative.

Executive Order 12,866 (September 30, 1993) issued by President Clinton requires that “significant regulatory actions” be submitted for review to OIRA for an analysis on the cost-benefit analysis and risk assessment. These “significant actions” include those which: (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way

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the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

Executive Order 13,132 (August 10, 1999), also issued by President Clinton, requires agencies to do the following (among other things) when considering regulations that would preempt State law: (1) establish an "accountable process to ensure meaningful and timely input by State and local officials"; (2) consult with State officials to avoid, where possible, potential conflicts with State law; and (3) document compliance by including in the Federal Register publication of each covered regulation a description of the agency's consultations with State officials, a summary of their concerns, and a statement of the agency's position regarding the need for the regulation and the extent to which the agency has addressed the State regulators' concerns.

Although Presidents have not mandated that independent agencies submit to centralized regulatory review by OIRA, they have not excluded independent agencies from benefiting from regulatory review. Executive Order 13,579 (July 11, 2011) stated that "independent regulatory agencies should comply" with the "general requirements" applicable to executive agencies, including the promotion of "economic growth, innovation, competitiveness, and job creation," and directed independent agencies to prepare and submit plans for review of existing regulations. Actions such as Executive Order 13,579 provide precedent for OIRA providing guidance and assistance to independent agencies to improve the effectiveness of their regulations.

We hope OMB/OIRA will offer to provide that kind of assistance to CFPB before it submits a final rule for publication. In particular, OMB should request that CFPB submit its intended action to OIRA for review and agree to defer submission for publication until it has received the results of OIRA's review and considered them. OMB's request should make clear that it is not, at this time, relying on the President's constitutional authority—in general, with respect to supervision and control of the Executive Branch, or in particular, with respect to CFPB, see *PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1 (D.C. Cir. 2017)—to compel that the agency submit to such review, but that the request should not be understood to suggest an absence of that authority.

Depending on the ultimate outcome of the PHH case, one could also argue that even the rules promulgated by the CFPB prior to the arguments in the case should be reviewed by OIRA. The impact of the rules previously promulgated, recently filed, and under comment by the CFPB is immense. We are not convinced the Bureau reviewed more than 1 million comments received on the arbitration and small dollar rules before moving forward with administrative action. OIRA's expertise is necessary to ensure that any final rule adheres fully to the principles of good government, reasonable regulation, and sound science. OIRA also has the unique ability to serve as a "second set of eyes" to ensure that all good alternatives have been considered, that CFPB's

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assumptions are appropriate and defensible, and that it has not missed opportunities to bring cost-benefit analysis to bear.

Ultimately, either the CFPB should comply with the Executive Orders until such time as the PHH case is decided or it should delay any further rulemaking until a court decides whether or not the CFPB is an independent agency and constitutionally structured. While we wait for the court's decision in PHH, hopefully, OIRA, OMB or the GAO can determine whether the CFPB complied with the APA, the Regulatory Flexibility Act, SBREFA (analyzing the impact to small businesses), and the applicable Executive Orders.

Please let us know how we can be of assistance to you and OIRA in any review and analysis. Our comment letters and the letter sent to the CFPB by the Office of the Comptroller of the Currency regarding the arbitration rule are attached.

Sincerely,



Alan Wilson
Attorney General of South Carolina



Steve Marshall
Attorney General of Alabama



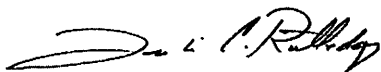
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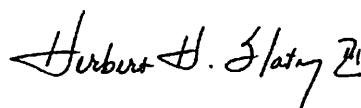
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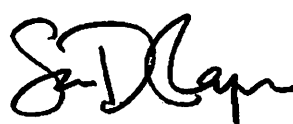
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Enclosures:

10 State Comment Letter on Arbitration
Rule
OCC Letter re: Arbitration
18 State Comment Letter on Small Dollar
Rule

AW/jh