

# Notice and Comment Like a Rock Star

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Musicians know they've created a hit when thirty-somethings have known all the song's words since middle school. Likewise, most consumer finance lawyers recall verbatim Regulation Z's guidance to lenders that, "The annual percentage rate is a measure of the cost of credit, expressed as a yearly rate." Pure genius. But like great music, time-tested regulations do not happen by accident; they require the thoughtful input of industry experts — *ergo*, the Notice and Comment feature of informal rulemaking under the Administrative Procedure Act. When agencies make substantive rules, they often allow the public to provide letters with "comments" on the proposed rule. The comment period varies — for major rules it may be months, minor rules may have the minimum 30-day timeframe. Each comment is read. And these comments matter—particularly in complicated industries like banking and consumer finance. While the Environmental Protection Agency churns out regulations faster than the Bee Gees turned out albums, the Consumer Financial Protection Bureau is rising on the charts with 53 final rules since July 2011. While many rules were issued in conjunction with other financial regulators, several CFPB rules have been "major regulations," a term defined by Executive Order to include regulations that will have an annual impact on the economy of \$100 million or more, impose significant costs on consumers or industry, or have an adverse impact on U.S. businesses. This week, the CFPB released its final rule on reloadable pre-paid cards. It issued major proposed regulations this summer regarding mandatory arbitration clauses and small-dollar lending. And another proposed rule about debt collection is coming soon. With all this action in the consumer finance space, what is an

affected company to do — particularly a small business without a bevy of lawyers? Fortunately, you can comment like a rock star. Strike the right chord and your words will resonate in policy and law for decades to come. Effective comments have components that aren't too different from a song that goes platinum. They play to their audience, have a recognizable structure, a balanced tone, and lyrics that touch on hopes and fears. Plus, the song does something original, and features strong technical details like melody, harmony, or super-sweet guitar riffs. Comments on CFPB regulations have several audiences. The first reviewers separate the hundreds of comment letters into categories. Rule processes differ, but the initial categories are something like: form letters that say the same thing; incoherent expressions of outrage; and thoughtful comments that provide an original or nuanced perspective. While agency personnel read and catalog all comments, thoughtful pieces, like the works of John Lennon or Simon and Garfunkel, get the most airtime and have the greatest influence. Therefore, introduce your comment by explaining who you are and what perspective you offer. Lay out a recognizable structure by identifying the provisions on which you will comment — using page citations where possible and bullet points for flourish and organization. Avoid noisy pejoratives. Conclude your prelude with something catchy by summarizing the issue, concern, and alternative proposal that you offer. Your audience obviously includes the policymakers in the Bureau's Regulations office: often lawyers or former industry professionals who have spent months or years working on the proposed regulation. Take at face value what they say about the rule's goal and purpose (a reviewing court will). This audience wants to hear about whether the rule achieves its goal. Powerful messages to the Bureau's Office of Regulations involve unintended consequences that will harm consumers, the inability to monitor or enforce a provision, that industry practice makes a proposed provision ineffective or counter-productive, or that an alternative achieves the purpose better or at a lower cost. For example, in the mortgage servicing rulemaking, the Bureau replaced a detailed provision with a commenter's recommendation to require "reasonable policies and procedures" to achieve the same goal. Comments about implementation deadlines are often accepted. Moreover, the Bureau will accept common sense proposals based on observations of consumer behavior and industry practice. In addition, praise sensible provisions. Positive views will balance your tone and demonstrate reasonableness. It may also protect a favored provision from its critics. Show technical mastery of every argument by including facts and examples. These can include studies, personal observations, data, descriptions of a particular process, pictures, screenshots, charts or diagrams, sample disclosures, or other materials that might help the rule-writers understand the issue your comment identifies. Be warned that, like a Flock of Seagulls hairdo, your submission to the Federal Register becomes part of the public record forever. After playing to the aspirations of the Office of Regulations, the audience that will turn your work into a mega-hit is the Bureau's Legal Division. Hope and opportunity play well in the Office of Regulations; the attorneys in Legal respond to the rhetorical equivalent of Death Metal. The Administrative Procedure Act (APA), as well as the Small Business Regulatory Enforcement Fairness Act (SBREFA), provide affected firms the ability to challenge regulations — or parts of regulations — in federal court. The Legal Division's job is to defend such a challenge. Issues that courts review under the SBREFA range from the agency's consideration of less-burdensome alternatives to compliance with

procedures, including, of particular note:

- whether the agency evaluated alternative regulatory approaches and proffered reasonable reasons for rejecting or accepting them;
- the agency's effort to collect comments from small entities through a variety of mechanisms; or
- the agency's decision to certify that a rule will not have a significant impact on a substantial number of small entities, and the factual basis for the certification.

Your regulators, including the CFPB, have a statutory obligation to consider alternative regulatory approaches. Influential comments offer different approaches and explain why the alternative achieves the goal, how the approach improves outcomes for affected consumers or industry, and provide estimates of efficacy or cost. Rock star comments, like a good bass guitar line, carry through to the end of the song. Do this by vamping on refrains from the APA's "arbitrary and capricious" decisions. Courts review agency rulemakings for evidence that the agency has not truly taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making. Federal courts remand regulations to agencies for reconsideration for a number of reasons. For example, courts reject rules that:

- afford different treatment for similarly situated parties;
- base rationale on incorrect law;
- offer a conclusory or illogically reasoned statement of basis and purpose;
- fail to address a statutory factor;
- fail to respond to significant arguments submitted in comments;
- rely on factually insupportable assertions;
- fail to explain the rejection of a salient alternative regulatory strategy;
- fail to provide notice to the public;
- that violate another statute or regulation; or,
- that evidence agency bias or pre-judgment.

Rock star comments support APA lawyers' later efforts to make these arguments in court by providing facts, opinions, and analyses during the Notice and Comment period. In effect, Rock star comments create a strong factual base in the administrative record so lawyers can later riff on them during judicial review. Finally, few recording artists succeed without spotting trends. Even if the Bureau doesn't publish a provision in the Federal Register that appears in the final rule, courts

nevertheless will say that the rule meets the APA's notice requirements if a provision is a "logical outgrowth" of the published proposal. If you divine through field hearings, notes accompanying deadline extensions, or public statements that the Bureau is considering an alternative approach, make sure you raise your voice on that issue, as well. In consumer finance, the times they are a-changing. As Bob Dylan advises, "you better start swimming or sink like a stone." Participating in Notice and Comment rulemaking is an effective and direct method of ensuring that federal regulations have a solid factual basis and that the agency considers your view.

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