



MORTGAGE BANKERS ASSOCIATION

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

**Re: Request for Information Regarding Bureau Guidance and Implementation Support,
Docket No. CFPB-2018-0013**

Dear Ms. Jackson:

The Mortgage Bankers Association (“MBA”)¹ appreciates the opportunity to comment on the Request for Information (“RFI”) from the Bureau of Consumer Financial Protection (the “Bureau” or “BCFP”) regarding the Bureau’s guidance processes. In addition to offering comments on this subject below, MBA would like to reiterate our belief in the need for a thorough reexamination of the Bureau’s operations and practices after a half-decade in operation. MBA released *CFPB 2.0: Advancing Consumer Protection* in September 2017 (the “White Paper”) to outline key considerations for the Bureau as it begins to think about the next five years. In brief, MBA recommended that:

- BCFP end “regulation by enforcement” by issuing rules and guidance to facilitate compliance rather than relying on fact-specific enforcement actions to announce new regulatory interpretations;
- BCFP communicate clearly when and how it plans to offer compliance guidance and acknowledge that it is bound by the guidance it releases; and
- BCFP provide more due process protections in its enforcement actions to ensure fairness and consistency.

These larger, thematic concerns apply to all Bureau operations and therefore are a theme of all of our comments on the RFIs that have been released to date. The RFI process can be a crucial starting point to gather the information necessary to determine how to best direct the BCFP going forward to ensure it best serves consumers and facilitates access to financial opportunity. MBA applauds this and the remaining RFIs to the extent that they are the beginning of this important process.

Changing the Bureau’s approach to guidance is a key part of ending “regulation by enforcement.” In the past, the Bureau used public enforcement actions to announce new, binding standards. This practice, commonly referred to as regulation by enforcement, was both unfair and an ineffective means of

¹ The MBA is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation’s residential and commercial real estate markets, to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA’s Web site: www.mba.org.

communicating the Bureau’s interpretations of the laws and regulations it enforces. MBA appreciates the Bureau’s plans to abandon the regulation by enforcement approach and encourages the Bureau to adopt an approach that employs guidance to communicate regulatory expectations and articulate paths to compliance. In support of these efforts, MBA offers the following recommendations which will assist the Bureau in fulfilling its mandate by providing regulated entities with certainty as to their legal and regulatory requirements.

1. Fundamental Guidance Principles

In developing, issuing, and using guidance, MBA urges the BCFP to follow the principles outlined in the Office of Management and Budget’s “Agency Good Guidance Practices” Bulletin (“OMB Bulletin”).² In addition, the Bureau should standardize its guidance practices with a formal guidance policy created through notice-and-comment rulemaking. Adopting a formal guidance policy that incorporates the best practice principles found in the OMB Bulletin will help the Bureau improve the effectiveness of its guidance activities to the benefit of consumers and the regulated community, and will help bind the BCFP over the long run to a fair and effective guidance framework.³

a. Adopt a formal guidance policy

As an initial matter, the Bureau should implement a formal guidance policy. Given the importance of such a policy, public participation in its creation is crucial. The Bureau should undertake notice-and-comment procedures before implementation. As proposed in the GUIDE Act, the policy should define: each type of guidance; the criteria for selecting each type; the process and timelines for requests for guidance; time periods for the Bureau to respond to a request for guidance; and the process for amending or revoking guidance.⁴ The policy should also establish a process for creating guidance that includes mechanisms for public participation before and after guidance adoption. Adopting a formal guidance policy will provide much needed transparency and consistency to this important function.

b. Use guidance appropriately

The Bureau must not use guidance to create new binding obligations. If the Bureau wishes to impose binding obligations on regulated parties, the appropriate process is through notice-and-comment rulemaking under the relevant statutory authority. Guidance should be understood as establishing *an acceptable method* of compliance, but not the *only* acceptable method of compliance. Regulated entities should have the ability to choose other methods to achieve compliance with the requirements of the statutes and rules under the Bureau’s jurisdiction. Because the path illuminated by guidance is not the exclusive means to achieve compliance, regulated entities should not be penalized for selecting an alternative path as long as they achieve compliance.

² Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

³ Many of the OMB Bulletin’s guidance principles, as well as the need to adopt a formal guidance policy, are requirements for the BCFP under the recently introduced “GUIDE Compliance Act,” a bipartisan bill designed to “regularize the provision of guidance and compliance information” by the BCFP. See HR 5534, “Give Useful Information to Define Effective Compliance Act”, or the “GUIDE Compliance Act” (introduced April 17, 2018).

⁴ HR 5534 at 3.

Basic standards of fairness and due process support the idea that the BCFP be bound by the guidance it issues. Stated differently, the Bureau should not penalize a party who, in good faith, relies on the Bureau's guidance. It follows that changes to guidance must not be enforced retroactively.⁵ Moreover, the Bureau should provide notice when it changes guidance so regulated parties have the opportunity to adjust their conduct accordingly.

A recent Department of Justice (DOJ) memo on guidance confirms this principle by stating, “[the DOJ is prohibited] from issuing guidance documents that effectively bind the public without undergoing the notice-and-comment rulemaking process.”⁶ The memo continues by extending this prohibition to guidance issued by any agency of the federal government: “Department civil litigators are prohibited from using guidance documents—or noncompliance with guidance documents—to establish violations of law in affirmative civil enforcement actions.”⁷

This principle on the appropriate use of guidance should be reflected in the Bureau's policies and practices for both supervisory and enforcement matters. The Bureau's guidance materials should explicitly state that guidance is not binding. Given the Bureau's history⁸, consent orders should include a notification indicating that the consent order applies to a specific set of facts, is the product of a negotiated settlement, and therefore should not be treated as establishing a broadly applicable standard of conduct. Much like the DOJ, the Bureau should, through policy, bar enforcement attorneys from using guidance as the sole basis for pursuing an enforcement action. In order to prevent confusion, supervisory staff, including examiners, should receive training on the distinction between non-binding guidance and legally binding requirements such as those created by laws and notice-and-comment rules (i.e. regulations).

c. Public participation is crucial

The determination on when guidance is necessary should be informed by the public. It is reasonable to assume entities responsible for ensuring compliance are both well-positioned and appropriately incentivized to identify areas of regulatory uncertainty. The Bureau should be open to receiving requests for guidance through a variety of channels (e.g. stakeholder engagement events, comments received during rulemaking, etc.).

⁵ Indeed, the Bureau is likely forbidden from enforcing any changes in guidance retroactively. *See* PHH Corporation v. CFPB, No. 15-1177 (decided Jan. 31, 2018).

⁶ *See* Memorandum Associate Attorney General Rachel Brand

⁷ *See* Press Release 18-96, Department of Justice, Office of Public Affairs (January 25, 2018)

(<https://www.justice.gov/opa/pr/associate-attorney-general-brand-announces-end-use-civil-enforcement-authority-enforce-agency>).

⁸ As explained by Former BCFP Director Richard Cordray, the Bureau's “... enforcement actions have been marked by orders, whether entered by our agency or by a court, which specify the facts and the resulting legal conclusions. These orders provide detailed guidance for compliance officers across the marketplace about how they should regard similar practices at their own institutions. If the same problems exist in their day-to-day operations, they should look closely at their processes and clean up whatever is not being handled appropriately. Indeed, it would be “compliance malpractice” for executives not to take careful bearings from the contents of these orders about how to comply with the law and treat consumers fairly.” *See* <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-consumer-bankers-association/>

Public participation should also extend to the Bureau's efforts to create guidance. Regulated entities offer a 'real-world' perspective that is essential to designing guidance that achieves the desired result of providing clarity, but does not result in unintended negative consequences. While public participation is generally beneficial during the guidance creation process, it increases the costs and time needed to create guidance. There are times when the costs of public participation outweigh its benefits. For this reason, the extent of public participation should vary depending on the nature of the guidance document.

The Bureau should establish a process to identify guidance documents that require more extensive public participation such as pre-adoption notice-and-comment. For example, the OMB bulletin states "[p]re-adoption notice-and-comment can be most helpful for significant guidance documents that are particularly complex, novel, consequential, or controversial." It then defines "significant guidance document" as:

"... a guidance document disseminated to regulated entities or the general public that may reasonably be anticipated to:

- (i) Lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;*
- (ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;*
- (iii) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or*
- (iv) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866, as further amended."*

While the OMB definition may not be perfectly suited for the BCFP, the Bureau should consider adopting a similar definition with explicit criteria for what constitutes significant guidance. Doing so would allow the Bureau to reserve time-consuming public notice-and-comment for when it is most necessary. The need for public participation on less significant guidance could be satisfied with less extensive participation (e.g. informal meetings with stakeholders).

There are circumstances, however, when pre-adoption notice-and-comment (or other form of contemporaneous public participation) is not possible due to an immediate need for significant guidance (i.e. when there isn't sufficient time for pre-adoption notice-and-comment). In these circumstances, the Bureau should adopt a means for notice-and-comment immediately after issuance which would substitute for pre-issuance notice-and-comment.

Finally, public participation is also important after guidance has been issued. It provides a means to identify guidance in need of an update, refinement, or, if the guidance is obsolete, elimination. By establishing formal mechanisms for public input after issuance, the Bureau can ensure guidance remains effective.

d. Improve guidance accessibility

The BCFP should ensure guidance materials are easily accessible through its website. One way the Bureau can improve accessibility is by centrally organizing all guidance by its regulatory and statutory basis. This could be accomplished using the Bureau's eRegulations tool which already displays Official Interpretations alongside their relevant regulations. The Bureau should enhance this function by linking all regulatory guidance to its underlying regulation. For example, a compliance professional using the eRegulations tool to review the TRID regulations would be directed to all relevant guidance documents discussing TRID. In this way, eRegulations would be a one-stop-shop for Bureau regulations and guidance. Such an arrangement is consistent with recent recommendations on the electronic presentation of regulations from the Administrative Conference of the United States.⁹

Along with displaying current guidance, the Bureau should ensure superseded guidance and rescinded guidance materials remain accessible. The Bureau should also link to relevant webinars and similar presentations. Previously, regulated entities received transcripts of webinars from trade associations and law firms. This practice should be continued by the Bureau on an official basis, with webinar transcriptions available on the Bureau's website.

2. Regulatory Inquiries Function

MBA appreciates the BCFP's willingness to provide guidance through the regulatory inquires function. Given the complexity of the regulatory scheme governing housing finance, this form of individualized assistance is valuable. There are, however, several ways the Bureau can improve the regulatory inquires function.

First and most importantly, the Bureau can improve the inquiries function by eliminating its broad disclaimer which severely limits the usefulness of the information received. Regulated parties should be able to rely on information provided by the Bureau. At minimum, the party submitting the inquiry should not be penalized for relying on it.

Next, several process improvements will help maximize the effectiveness of the inquiries function. First, the Bureau should accept inquiries by telephone, email, or through its website.¹⁰ In addition to expanding the channels available for inquiry submission, the Bureau should modify the inquiry response process. Parties submitting inquiries should receive a prompt reply with an acknowledgement of receipt within two business days. While the current estimated time to provide a substantive response, 10-15 business days, is generally reasonable, certain circumstances require a quicker turnaround.¹¹ For example, a quicker

⁹ "The Office of the Federal Register and the Government Printing Office are encouraged to work with agencies to develop ways to display the Code of Federal Regulations in electronic form in order to enhance its understanding and use by the public, such as developing reliable means of directing readers to relevant guidance in preambles to rules and to other relevant guidance documents." *See* Administrative Conference of the United States, Recommendation 2014-3, Guidance in the Rulemaking Process, 79 Fed. Reg. 35992, (June 10, 2014).

¹⁰ Currently, only questions "related specifically to the Home Mortgage Disclosure Act (HMDA) and its implementing Regulation C" are accepted "via phone, email, or a form accessed on a specific Bureau website dedicated to HMDA operational support." Questions that are not related to HMDA are accepted "through a phone message or a form accessed on the Bureau's website" and not through email. *See* Request for Information: Bureau Guidance and Implementation Support, CFPB-2018-0013 (April 2, 2018).

¹¹ *See* <https://reginquiries.consumerfinance.gov/> (last visited June 22, 2018).

response time would be helpful during the months before and after a new rule becomes effective, as well as during the weeks leading up to a regulatory reporting deadline (e.g. the annual HMDA submission deadline). The ability to have questions answered within 5-7 business days during these critical times would be particularly helpful for compliance professionals working in operations.¹²

Further, the Bureau should recognize the value of the information it receives through the regulatory inquires function. The subject matter and relative volume of inquires received paint a real time picture of the industry's regulatory uncertainty. This information should be used to identify areas where additional guidance materials—Implementation Support, Compliance Guides, Official Interpretations, Standalone Interpretive Rules, etc.—are necessary.

Finally, in addition to using regulatory inquires to diagnose industry uncertainty, the Bureau should aggregate and periodically publish the questions received through the regulatory inquiries function. This information—both questions and answers—should provide the source material for additional Bureau guidance in the form of Frequently Asked Questions (FAQs). As with individual inquiries, the value of FAQs lies in their reliability. Therefore, they should not be issued with a disclaimer. These FAQs should be regularly updated so as to reflect current concerns. The timing of FAQ updates should vary with the volume of regulatory inquiries received. During times of greater regulatory uncertainty, when the volume of regulatory inquiries is high, the Bureau should issue FAQs more frequently, perhaps monthly. Otherwise, quarterly FAQs should be sufficient. Over time, the guidance contained in these FAQs should be memorialized in more formal guidance.

3. Regulatory Implementation and Compliance Aids

As the complexity and breadth of the regulatory regime have grown, so too has the need for reliable implementation and compliance aids. The need is particularly great in the context of a new rule implementation. The mortgage industry's experience with the Bureau's TILA-RESPA Integrated Disclosure (TRID) rule clearly highlights the important role of guidance in regulatory implementation. In the case of TRID, a lack of adequate guidance on a highly technical rule had a drastic and unintended effect on market liquidity, nearly halting certain sectors of the housing finance system.¹³

MBA commends the Bureau for many of its efforts to ease the challenges of regulatory implementation. Tools such as the Small Entity Compliance Guides help reduce uncertainty in the implementation phase. To improve these efforts, the Bureau should frequently revise implementation and compliance support materials to ensure they remain relevant. They should reflect recent regulatory actions and judicial decisions. The examples used should account for changes in technology and business practices. As with

¹² While challenging to implement given the potential for the number of inquiries to spike during such times, the regulatory inquiry tool should not be deployed in isolation. It's best understood as a 'last line of defense' and should be supported by other forms of guidance (e.g. FAQs, webinars, other compliance aids) so as to prevent widespread, 11th hour confusion.

¹³ Despite allocating significant time and capital to incorporate TRID compliance into existing origination systems, many mortgage industry participants failed to achieve perfect compliance with the rule's numerous disclosure requirements. When quality control vendors reviewed this first batch of loans, they identified many (mostly) technical violations. These errors, as well as uncertainty regarding TRID liability, spurred private investors and quality control vendors to reject the loans. This had the drastic and unintended effect on market liquidity which substantially impeded certain sectors of the housing finance system.

other forms of guidance, maintaining relevant implementation and compliance support materials is best achieved through regular feedback with the regulated community.

4. Official Interpretations and Standalone Interpretive Rules

As the most substantial class of BCFP guidance, it is particularly important that Bureau's development and use of Official Interpretations and Standalone Interpretive Rules follow the OMB Bulletin principles described above. Despite their relative formality, Official Interpretations and Standalone Interpretive Rules are not binding on regulated entities and shouldn't be treated as such. While non-binding on regulated entities, these forms of guidance are significant, making public notice-and-comment crucial. Stakeholder participation during and after issuance should be used to ensure Official Interpretations and Standalone Interpretive Rules employ language and scenarios that reflect current industry realities (e.g. Official Interpretations include examples applying the rules to electronic transactions).

5. Recommendations for New Forms of Written Guidance

a. Improve the No-Action Letter Policy

Parties who wish to introduce innovative products or services to the housing finance market are subject to a complicated statutory and regulatory scheme. The question of whether they'll successfully navigate these requirements is often difficult to answer. As the BCFP has recognized, "regulatory uncertainty may discourage innovators from entering a market, or make it difficult for them to develop suitable products or attract sufficient investment or other support."¹⁴ This result is contrary to the Bureau's statutory objectives which include "facilitating [consumer] access" to and "innovation" in markets for consumer financial products.¹⁵ To address this concern, the Bureau created "Project Catalyst" and its principal component, the No-Action Letter (NAL) policy. Unfortunately, the current use and design of the NAL policy does little to encourage innovation. During the more than two years since first implementing Project Catalyst, the Bureau has issued one NAL. A brief review of the Securities Exchange Commission's website shows more than 200 SEC no-action letters issued during the same period. The Bureau should amend the NAL policy so as to improve its ability to "facilitate innovation and otherwise substantially enhance consumer benefits."¹⁶ To this end, MBA proposes the following recommendations:

The Bureau's NAL policy should encourage applications: As currently designed, the NAL policy is likely to discourage parties from seeking NALs. The policy states, "No-Action Letters will not be routinely available. The Bureau anticipates that No-Action Letters will be provided rarely and on the basis of exceptional circumstances ..."¹⁷ Providing NALs only in exceptional circumstances unnecessarily limits the ability of the NAL policy to facilitate innovation. Innovation is a function of trial-and-error, albeit in well-informed and carefully designed circumstances. Simply put, the more NALs issued, the more likely it is that innovation will be fostered.

¹⁴ BCFP, Notice of Proposed Policy on No-Action letters, 79 Fed. Reg. 62118, 62120 (Oct. 16, 2014).

¹⁵ 12 U.S.C. 5511(b)(5).

¹⁶ The 2016 NAL policy describes the Bureau's intent to "monitor the effectiveness" of the NAL policy and "to assess periodically whether changes to the policy would better effectuate" the policy's goals to facilitate innovation and enhance consumer benefits. 81 Fed. Reg. 8686, 8687.

¹⁷ 81 Fed. Reg. 8686, 8694 (Feb. 22, 2016).

Broaden the NAL policy:¹⁸ According to the Bureau, NALs are “not intended for either well-established products or purely hypothetical products that are not close to being able to be offered.”¹⁹ The Bureau should amend this restriction and open the NAL process to established products and products in the developmental phase. The overall complexities of the governing regulatory framework as well as the Bureau’s history of ‘regulation by enforcement,’ make compliance an equally uncertain endeavor for both established products and new products. In addition, preventing products in the developmental stage from seeking clarity through NALs *stifles* innovation by ignoring the realities of the product development process. Regulated parties are less likely to invest in new product design when the Bureau’s position on that product is unknown. Finally, the Bureau should open the NAL process to requests regarding Unfair, Deceptive, or Abusive Acts or Practices (UDAAP). The uncertainty surrounding what qualifies as a UDAAP remains a major obstacle for regulated entities seeking to offer consumers innovative and beneficial products.

Improve NAL process transparency: The Bureau has yet to communicate the criteria used to assess NAL applications. Moreover, the Bureau does not provide an explanation for its decision to deny an NAL application. This information is important for parties considering whether to pursue a NAL. Clarifying the decision-making criteria and providing explanations for denied applications would encourage more regulated entities to seek NALs.

Expand NAL protections: Under the current policy, a NAL provides the recipient with little meaningful protection. The policy makes clear that NALs are non-binding on the Bureau, “subject to modification or revocation at any time at the discretion of the staff for any reason,” and that “no other government agency or person, and no court, has any obligation to honor or defer to it in any way.”²⁰ What remains is a far from confidence-inspiring assurance that Bureau “staff has no present intention to recommend initiation of an enforcement or supervisory action.”²¹

In order to relieve regulatory uncertainty and truly encourage innovation, the Bureau should expand the NAL protections. NALs should be binding on the Bureau as long as the recipient relied in good faith on the letter (i.e. NAL rescission should not be applied retroactively). In addition, the NAL assurance against Bureau enforcement and supervisory actions should extend to actions based on federal consumer financial protection laws by other regulators with Dodd-Frank authorities.

b. Adopt a Robust Advisory Opinion Mechanism

While a commitment to improve the NAL policy would be a positive development, more is necessary. The discouraging effects of regulatory uncertainty are not limited to “innovators,” but are felt broadly, by

¹⁸ Broadening the NAL policy would bring the BCFP’s NAL process in line with the Securities Exchange Commission’s (SEC) NAL process. The SEC NAL policy is not limited to new products. The SEC accepts NAL requests on the securities law implications for any conduct. Specifically, NALs may be sought whenever an individual or entity “is not certain whether a particular product, service, or action would constitute a violation of the federal securities law.” See <https://www.sec.gov/fast-answers/answersnoactionhtm.html> (visited June 28, 2018).

¹⁹ Id. at 8693.

²⁰ Id. at 8695.

²¹ Id. at 8694.

all financial service providers.²² Businesses that lack confidence in the regulatory footing of any proposed activity will often decide against it, even when the activity is lawful and would benefit consumers. In this way, the negative consequences of regulatory uncertainty flow from industry to the public. To address this concern, MBA recommends the Bureau follow the example set by other federal regulators responsible for administering complex regulatory schemes and adopt a process for issuing advisory opinions.²³ Through such a device, the Bureau could clarify the applicability of consumer financial protection laws and regulations to specific, factual situations.

While the specifics should be determined through notice-and-comment rulemaking, a Bureau advisory opinion mechanism should provide reliable guidance for the opinion's recipient and other similarly situated parties. Advisory opinions should be published so that other regulated entities can obtain the benefit of the opinion. They should be anonymized and describe the requester in general terms that identify any characteristics material to the Bureau's opinion (*e.g.* "a mid-size mortgage servicing company"). Finally, such decisions should be incorporated into formal policy.

6. Disclaimers

The value of Bureau guidance materials lies in their reliability. Unfortunately, the Bureau's practice of using disclaimers to make guidance non-binding on the Bureau erodes much of its reliability. Regulated entities must be able to rely on guidance to ensure they are operating within the rules. MBA therefore asks that the Bureau stand by its guidance and use disclaimers only when absolutely necessary and provide the rationale for doing so.

7. Conclusion

MBA appreciates the opportunity to comment on this RFI. We are hopeful that these recommendations lead to a more effective guidance process and welcome the opportunity to continue to meet with you and your staff to discuss this comment and any specific regulatory changes under consideration. Please feel free to direct any questions or comments to me directly (pmills@mba.org) or to Justin Wiseman, Managing Regulatory Counsel (jwiseman@mba.org).

Sincerely,



Pete Mills
Senior Vice President, Residential Policy and Member Engagement
Mortgage Bankers Association

²² “[R]egulatory uncertainty may discourage innovators from entering a market, or make it difficult for them to develop suitable products or attract sufficient investment or other support.” BCFP, Notice of Proposed Policy on No-Action letters, 79 Fed. Reg. 62118, 62120 (Oct. 16, 2014).

²³ See, e.g., 52 U.S.C. § 30108 (FEC advisory opinions); 16 C.F.R. § 1.3 (FTC advisory opinions); 16 C.F.R. § 1000.7 (CPSC advisory opinions).