



MORTGAGE BANKERS ASSOCIATION

August 21, 2020

Submitted via Federal eRulemaking Portal: <http://www.regulations.gov>

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

**Re: Request for Comment: Advisory Opinion Proposal
Docket No. CFPB-2020-0019**

Dear Director Kraninger,

The Mortgage Bankers Association (MBA)¹ appreciates the opportunity to comment on the Consumer Financial Protection Bureau's (CFPB or Bureau) Advisory Opinion Proposal (Proposal). MBA applauds the Bureau for its efforts to strengthen its ability to offer guidance by adopting an advisory opinion (AO) mechanism. Like other recent Bureau initiatives, including the redesigned No-Action Letter program and new Compliance Aids tool, the proposed Advisory Opinion Program (AO Program or Program) is a promising proposal that adds to the Bureau's ability to use guidance to communicate regulatory expectations and articulate paths to compliance.

I. Overview

As MBA has consistently noted, an appropriately designed AO program can play an important role in strengthening the Bureau's overall guidance function. To fully meet its potential, an AO program must accommodate limited confidentiality, while providing timely,

¹ The Mortgage Bankers Association (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, DC, the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to 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, credit unions, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

reliable guidance in response to the rapid pace of technological development and increasing complexity of the modern financial services market.

As described below, the proposed AO Program is a strong step forward to meeting this goal. MBA believes that finalizing this program expeditiously will have great benefits to the industry and to consumers, and urges the Bureau to do so. MBA supports the framework outlined by the Bureau including: the proposed submission and content requirements for AO requests; the proposed standard for determining whether to issue an AO; and the proposed AO characteristics. In addition, we offer several recommendations to enhance the Program's effectiveness.

II. Features of the Proposed AO Program

a. Submission of AO Requests

The Bureau will accept AO requests from a regulated entity as well as from a third party representative (trade association or outside counsel) who submits a request on behalf of a regulated entity. In both instances, the party requesting the AO must be identified. Thus, as proposed, a trade association (or outside counsel) could submit a request on behalf of a member company (or client). Under such circumstances, the request need only identify the trade association (or outside counsel) requesting the AO, while the third party member company (or client), on whose behalf the AO is being requested, need not be identified.

The Bureau's proposal to allow trade associations and outside counsel to request AOs on behalf of third parties is particularly important. Absent this feature, regulated entities in need of guidance would, in many instances, be reluctant to pursue an advisory opinion.

First, regulated entities may decline to seek an otherwise necessary AO if doing so would require disclosing their association with an emerging technology. This is understandable given, for example, the need to protect proprietary research or a confidential business strategy. Second, regulated entities, many of which are fundamentally risk-averse, can be expected to avoid seeking an advisory opinion due to concerns over potential reputational risk should their request be rejected by the Bureau. Many regulated entities could forego pursuing guidance through an advisory opinion that might provide beneficial clarity for stakeholders so as to avoid these risks.

These concerns underscore the importance of allowing those that represent the interests of regulated entities to request an AO. Retaining this feature is essential to ensuring the Program's effectiveness in that it will encourage the issuance of advisory opinions where clarity could be beneficial. Thus, allowing requests by trade associations and outside counsel furthers the Bureau's statutory objectives of facilitating greater compliance and fostering innovation.

b. Content of AO Requests

In addition to the identity of the requesting party, a request for an AO must include:

- a description of the relevant factual background, with “all material facts and circumstances[;]”
- the specific legal question;
- the proposed interpretation;
- an explanation of the “potential uncertainty or ambiguity that such interpretation would address[;]” and
- support for why the proposed explanation is appropriate.²

The Proposal notes that “the request must concern actual facts or a course of action that the requestor is considering engaging in[.]”³ If satisfying these requirements means providing “information the requestor would not normally make public[.]” the requesting party can identify the non-public information.⁴ Such information will be treated as confidential pursuant to the Bureau’s Disclosure of Records and Information rule.

MBA supports the proposed content requirements for AO requests. Specifically, the requirement that AO requests address the requesting party’s actual facts or contemplated course of action ensures the Bureau’s limited resources are devoted to resolving regulatory uncertainty with meaningful, “real world” implications, rather than addressing speculative questions or academic legal disputes.

This does not foreclose other options for the Bureau to provide their views on legal questions if the need arises. Other options exist for parties without the requisite connection to actual facts or contemplated course of action necessary to request an AO, including seeking an interpretive rule directly from the Bureau or submitting a petition for rulemaking pursuant to § 553(e) of the Administrative Procedure Act.⁵ Further, should the need arise to expand the AO Program’s parameters to allow requests from parties lacking a nexus to actual facts or a contemplated course of action, the Bureau retains the ability to do so.

Given the wide variety of facts and legal issues that could be addressed through an AO, it is likely that entities seeking an AO will, in certain circumstances, be required to submit, or

² CFPB, *Advisory Opinions Proposal*, June 22nd, 2020 (Docket No. CFPB 2020-0019).

³ *Id.*

⁴ *Id.*

⁵ Arguably, interested parties can, under § 553(e) of the Administrative Procedure Act, also petition the Bureau to issue, amend, or repeal an interpretive rule. See Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331 (2011).

choose to voluntarily provide, non-public information. Presumably, sensitive material (e.g. proprietary data, privileged information, etc.) would be necessary to support most requests involving the intersection of the Bureau's regulations and an emerging technology. Regulated entities will not provide this information without confidence in the Bureau's ability to preserve its confidentiality. The proposal to treat non-public information in accordance with the guidelines set out in the Bureau's Disclosure of Records and Information rule provides the assurance regulated entities need to disclose sensitive information. These protections are an essential part of the AO Program.

c. Standard to Evaluate AO Requests

Along with the contents of an AO request, the Proposal describes the criteria the Bureau intends to consider when determining whether to address a topic through an advisory opinion. As proposed, the Bureau will give priority to requests concerning areas of uncertainty that, if resolved, would further the Bureau's statutory objectives, including providing consumers with timely and understandable information with which to make financial decisions, reducing unwarranted regulatory burdens, promoting the consistent enforcement of federal consumer financial law, and ensuring "markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation." In describing the selection criteria, the Proposal makes clear that AO will not be used "on issues that require notice-and-comment rulemaking under the APA, or that are better addressed through that process."

We commend the Bureau for clarifying the standard it intends to apply when determining whether to address a topic through an AO. By making these standards clear, the Proposal promotes uniformity in its decision-making, resulting in greater transparency and fairness in the selection of which issues to address with an AO. MBA also supports the Proposal's strong emphasis on the need to use AOs appropriately. To ensure the AO Program is used appropriately, the Bureau intends to avoid using AOs to address issues that may benefit from notice-and-comment rulemaking, even when notice-and-comment is not required under the APA. We believe this approach strikes a reasonable balance. It provides the Bureau with a necessary tool to address regulatory uncertainty in a timely manner, while reserving the Bureau's discretion to solicit greater stakeholder feedback when appropriate.

III. MBA Recommendations

To further strengthen the Program, we encourage the Bureau to establish clear, publicly available procedures explaining how the Bureau will receive, process, and respond to requests for advisory opinions. At minimum, these procedures should incorporate the following key requirements:

a. Receiving and Processing AO Requests

AO Program procedures should require the Bureau to promptly confirm to the requesting party that the AO request has been received. The procedures should establish a timeline within which the Bureau will approve or deny an AO request. This timeline should be communicated to the requesting party as part of the Bureau's acknowledgement of receipt of the AO request. If a decision cannot be made within this timeline, the Bureau should provide the requesting party with a new timeline and an explanation for the delay.

b. Responding to AO Requests

If the Bureau decides to deny a party's request for an AO, it should explain the basis for the decision. Where appropriate, the explanation should include suggestions for ways the requesting party could modify the AO request in a way that would address the deficiencies that caused the denial (e.g., request for new or additional information, expanded legal analysis, etc.).

If an AO request is approved, the Bureau should be required to disclose to the requesting party an estimated target date by which the formal AO will be released. The Bureau should be expected to meet the target date for issuing the formal AO and endeavor to provide notice if that appears unlikely.

c. Designate Clear Program Ownership

Along with creating procedures establishing how the Bureau will receive, process, and respond to AO requests, the Bureau should designate a specific CFPB office responsible for overseeing the AO Program. The designated office should be tasked with ensuring AO requests are handled in accordance with Program procedures and that decisions to address an issue through an AO are made using the appropriate decision-making standard. As the office responsible for "rulemaking, interpretive guidance and regulatory implementation functions[,] the Bureau's Office of Regulations would seem to be the office best suited for managing the AO Program.

Creating clear procedures for handling AO requests and assigning overall Program ownership are critical steps to developing an effective, lasting AO Program. Adopting the procedures recommended by MBA will help ensure the Program operates transparently, following a set timeline. Likewise, clear ownership and centralizing responsibility for managing the Program will promote accountability and consistency. Accordingly, a party that submits an AO request will, with reasonable certainty, know when to expect a decision and, if their request is approved, when to expect a formal advisory opinion.

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IV. Conclusion

MBA appreciates the opportunity to offer feedback on the Bureau's AO Program proposal. We are hopeful that these recommendations contribute to the development of an effective and lasting advisory opinion mechanism. We welcome the opportunity to discuss the AO Program and our recommendations further. 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,

A handwritten signature in black ink, appearing to read "Pete Mills". The signature is fluid and cursive, with a large initial "P" and "M".

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