



MORTGAGE BANKERS ASSOCIATION

March 16, 2020

Russell T. Vought  
Acting Director  
Office of Management and Budget

**RE: Request for Information: Improving and/or Reforming Regulatory Enforcement and Adjudication (Docket ID: OMB-2019-0006)**

Acting Director Vought,

The Mortgage Bankers Association appreciates the opportunity to comment on the Office of Management and Budget’s (“OMB”) request for information (“RFI”) regarding the importance of appropriate due process protections in regulatory enforcement proceedings and administrative adjudications (“agency proceedings”). While regulatory proceedings are not judicial, they can often carry similarly severe consequences for those that are the subject to them. The mere existence of a pending enforcement action, let alone its resolution or an adjudicatory decision, can result in very damaging financial and reputational consequences. In light of this, it is important that those subject to these regulatory proceedings are afforded transparency, due process, procedural fairness and, if appropriate, sanctions that are proportional to the conduct and harm at issue.

MBA has been interested in this issue and the interaction between agency proceedings and the appropriate role of regulatory agencies in recent years—particularly with regard to the Consumer Financial Protection Bureau and its past practice of “regulation by enforcement.”<sup>1</sup> The following recommendations are derived from that work and reflect some possible best practices for OMB to consider as a part of this RFI.

**I. The Importance of “Clear Rules of the Road”**

A threshold issue that must be considered in the context of agency proceedings is whether regulated entities have fair notice of proscribed conduct. One key step that can be taken to ensure systemic fairness is to provide reliable guidance to regulated entities and be responsive to inquiries around ambiguities to create clear rules of the road. Regulatory agencies can ensure that they are doing so by adopting the following best practices:

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<sup>1</sup> MBA discusses the problematic nature of “regulation by enforcement” in two white papers: *CFPB 2.0: Advancing Consumer Protection* and *The Road Map to CFPB 2.0*. These resources offer concrete examples of how to both avoid the need for agency proceedings by creating clear expectations on the front end as well as examples of best practices for agency proceedings. MBA’s *CFPB 2.0: Advancing Consumer Protection* and *The Road Map to CFPB 2.0* can be downloaded here: <https://www.mba.org/advocacy-and-policy/cfpb-20-advancing-consumer-protection>.

- ❖ *Adopt a clear guidance policy.* Adopt a guidance policy through notice-and-comment rulemaking. The policy should reflect the guidance principles outlined in the Office of Management and Budget’s “*Agency Good Guidance Practices*” Bulletin and should clearly define the various types of guidance and the circumstances in which each will be used.<sup>2</sup> At minimum, the guidance policy should address the following items:
  - *Provide guidance in response to public feedback.* Market developments, often driven by advances in technology, frequently cause regulatory uncertainty. It is therefore crucial that a regulatory agency’s guidance policy include a mechanism to receive public input to identify where guidance is necessary. Consistent with the recent joint statement issued by the federal financial regulators, agencies should encourage stakeholder involvement in the guidance creation process. Such collaboration will help ensure guidance is effective and not unduly burdensome.<sup>3</sup>
  - *Use guidance appropriately.* Guidance should be used to clarify regulatory ambiguity, communicate supervisory priorities, and describe best practices. It should not be used to create binding obligations. Agencies should formalize their commitment not to initiate enforcement actions based solely on guidance.<sup>4</sup> To create substantive standards or impose binding obligations on regulated parties, regulatory agencies must utilize notice-and-comment rulemaking under the relevant statutory authority.
  - *Guidance should be clearly reliable.* Because guidance is not binding, it should be understood as establishing an acceptable method of compliance, but not the only acceptable method of compliance. Regulatory agencies should not penalize a party who, in good faith, relies on guidance. Disclaimers should not be used to dissuade parties from relying on guidance to achieve compliance. Changes to guidance should be accompanied by appropriate notice and applied prospectively so regulated parties can adjust their conduct accordingly. Finally, agencies should implement steps to ensure guidance reflects the current regulatory landscape including relevant regulatory actions and instructive judicial decisions.

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<sup>2</sup> See OMB, *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432 (Jan. 25, 2007).

<sup>3</sup> *Interagency Statement Clarifying the Role of Supervisory Guidance* (September 11, 2018), available at [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/interagency-statement\\_role-of-supervisory-guidance.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/interagency-statement_role-of-supervisory-guidance.pdf).

<sup>4</sup> See generally, U.S. Department of Justice, *Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases* (January 25, 2018), available at <https://www.justice.gov/file/1028756/download>.

- ❖ *No-action letters and advisory opinions* – Through a process of public notice-and-comment, regulatory agencies should consider adopting practical and robust no-action letter (NAL) and advisory opinion policies.<sup>5</sup>

## II. Best Practices for Fairness in Agency Proceedings

### *Civil investigative demands*

The beginning of an investigation in an agency proceeding is often initiated by a civil investigative demand (“CID”) or similar compulsory process. From the perspective of regulated entities, receipt of a CID or similar request frequently marks the beginning of an expensive, uncertain process of indeterminable duration. CIDs share many of the consequences of a formal legal action—legal costs, reputational harm, business disruption—but offer few of the protections. In this way, CIDs can represent a significant burden. MBA’s made the following recommendations in response to the CFPB’s request for information on their CID processes.<sup>6</sup> These recommendations are intended to minimize CID burden by improving the fairness and transparency of the CID process. We believe they are broadly applicable as best practices across enforcement agencies.

- ❖ *Clarify the “reason to believe” standard for issuing a CID.* Establish a standard that clearly articulates what constitutes sufficient “reason to believe” to initiate an investigation by issuing a CID.
- ❖ *Provide specific notifications of purpose for the CID.* At a minimum, notification of purpose statements should clearly describe the specific conduct under investigation, including the relevant time period. Broad references to all laws under the jurisdiction of the regulatory agency and similarly non-specific citations should be replaced by references to the exact statutory provisions of law alleged to have been violated.
- ❖ *Petitions to modify or set aside a CID or similar request should be confidential.* Once submitted, pending petitions should be kept under seal or otherwise treated as confidential. Failure to do so requires the recipient to weigh the reputational harm of disclosing an investigation against the need to defend their rights. Petition reviews should be conducted by a neutral arbiter. Regulatory agencies should endeavor to provide clear guidance on the standard of review used to assess petitions.
- ❖ *Timelines need to be realistic.* Regulatory agencies should have flexible petition filing and meet-and-confer timelines. CIDs often seek data going back for significant periods of time. It is not uncommon for the information requested to be well outside any applicable statute of limitations pursuant to which an enforcement action could or should be brought. Gathering such data is often a time and labor-intensive process.

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<sup>5</sup> Notably, the CFPB has begun consideration of positive developments on this issue with its recently proposed policy guidance and procedural rule, *Policy on No-Action Letters and the BCFP Product Sandbox*, 83 Fed. Reg. 64036 (Dec. 13, 2018), available at <https://www.govinfo.gov/content/pkg/FR-2018-12-13/pdf/2018-26873.pdf>.

<sup>6</sup> See CFPB’s *Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes* (Docket No. CFPB-2018-0001) and MBA’s response here: <https://www.regulations.gov/document?D=CFPB-2018-0001-0067>.

This is especially true when the requested data is stored across multiple software systems, some of which may no longer be in use.

- ❖ *Entities are entitled to know when an investigation concludes.* Regulatory agencies should provide prompt written notification when it decides to end an investigation. Failure to do so leaves an entity under a cloud of suspicion that can impact their ability to run their business.

### *Fairness in Enforcement*

The initiation of an enforcement proceeding results in significant legal, reputational, and financial risks for the subject. It is important that regulatory agencies are sensitive to these concerns by acting transparently and consistently.

- ❖ *Be transparent in the early stages of investigations.* Regulatory agencies should clarify the nature and scope of investigations early in the investigative process and provide regular updates on the status of the action.
- ❖ *Adopt transparent procedures for concluding an investigation.* Agencies should adopt a comprehensive investigation termination process, including a periodic requirement for internal reviews to determine whether to proceed, close, or otherwise deescalate. In addition, agencies that also have supervisory or similar powers should implement a process through which matters that start in enforcement can be transferred to supervision.
- ❖ *Require fairness and consistency in the NORA or similar process.* Regulated entities should have the ability to respond to allegations and provide important factual response before the initiation of a proceeding. For instance, the CFPB's Notice and Opportunity to Respond and Advise ("NORA") process serves as a critical protection against entities suffering undue reputational and financial burden from Bureau enforcement actions. Given its importance, the NORA process and similar regulatory processes that precede the initiation of an enforcement action should be applied consistently and made available to all entities facing the possibility of public charges. Institutions should receive adequate written notification of the factual and legal basis for the planned charges and should be able to expect consistency in that process. NORA letters often follow months or years of investigation by the agency, but afford respondents only 14 days to reply, subject to a page limit. Reply deadlines and length restrictions should be extended to provide recipients with adequate flexibility in preparing their response. Finally, institutions should not be restricted from disclosing the existence of a NORA or a similar request.
- ❖ *Establish a civil money penalties matrix or provide a clear rubric governing the imposition of penalties.* The assessment of civil money penalties should be proportional to the harm caused and predictable. Regulatory agencies should adopt a matrix based on the relevant statutory criteria for determining civil money penalty amounts.<sup>7</sup>

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<sup>7</sup> See e.g. The Office of the Comptroller of the Currency's matrix for civil money penalties available here: <https://www.occ.gov/news-issuances/federal-register/2018/83fr66599.pdf> <https://www.occ.gov/news-issuances/federal-register/2018/83fr66599.pdf>.

*Fairness in Administrative Adjunctions*

Administrative actions can appear to lack some of the procedural protections and impartiality of judicial proceedings. The adjudicators are often tied—formally or informally—to the investigatory agency. As the consequences can be severe, Regulatory agencies should endeavor to ensure that those in administrative adjudications have appropriate protections.

- ❖ *Be transparent in forum selection decisions.* As an initial matter, Regulatory agencies should adopt a transparent process for determining when to bring an administrative proceeding rather than proceeding in federal court.
- ❖ *Allow for removal to federal court if respondent elects to do so.* Through formal rulemaking, agencies should consider creating an automatic removal mechanism giving respondents the ability to remove a pending matter to an appropriate federal district court.

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MBA appreciates the opportunity to contribute to the discussion on this important matter and applauds OMB's willingness to consider the above recommendations on how to ensure adequate due process in regulatory enforcement and adjudication. Please contact Justin Wiseman, Associate Vice President and Managing Regulatory Counsel, at (202) 557-2854 or [jwiseman@mba.org](mailto:jwiseman@mba.org) with any questions or other follow-up on this comment.

Thank you for your consideration of these views.

Sincerely,



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