Over the past six years, the Consumer Financial Protection Bureau has grown from a small startup to a powerful agency with over 1,600 employees. Over the same period, the economy and our financial and political institutions have also been transformed. Accordingly, it makes sense to take a fresh look at the Bureau and see how it should evolve to reflect these changes as well as its own successes and challenges. This white paper and its recommendations explain how an updated Bureau — call it CFPB 2.0 — could advance consumer protection while promoting a vibrant, competitive mortgage lending market.
This white paper, prepared for MBA by its counsel at the law firm of Covington & Burling LLP, reflects the experience of the mortgage industry over the life of the Bureau. This experience is consistent with public accounts of the CFPB’s activities and the experiences of regulated institutions and their counsel. However, no industry has seen the Bureau in action more frequently or closely than the mortgage industry. The Dodd-Frank Act instructed the Bureau to establish far-reaching mortgage regulations, and those new rules, combined with significant enforcement actions and ongoing supervision, have made MBA deeply familiar with the Bureau.

MBA and its members are committed to compliance, consumer protection and a level playing field for all who offer mortgages and related services to the public. The industry and the Bureau share those goals. The Bureau now has an opportunity to reinvent the way it pursues consumer protection by focusing on guiding financial institutions that seek to comply with the law. This white paper and its recommendations are offered to that important end.
Executive Summary

This white paper begins by describing how the Bureau’s origins and organization led the new agency to focus on enforcement as its principal tool for changing industry practices. In its first years, the Bureau’s regulatory expertise was largely consumed by the need to meet deadlines on specific rules required under the Dodd-Frank Act, and its supervision program took time to stand up. In its first years, the Bureau spent relatively little time providing guidance to industry on its expectations.

The combination of aggressive enforcement and the absence of regulatory guidance evolved into a regime of “regulation by enforcement.” Director Richard Cordray has argued that the Bureau’s enforcement regime provides “detailed guidance for compliance officers” and that it “would be ‘compliance malpractice’ for the industry not to take careful bearings from [consent] orders about how to comply with the law.” Unfortunately, the reality is that the Bureau’s enforcement program offers only fragmentary glimpses of how the Bureau interprets the laws and regulations it enforces.

This paper explains why authoritative guidance is still needed. Rather than seeking to provide the equivalent of “detailed guidance” through enforcement, the Bureau should simply provide detailed guidance. Such guidance can be provided in a host of forms, including advisory opinions, bulletins, no-action letters, statements of policy, and answers to frequently asked questions. In contrast to enforcement orders, such guidance can be proactive, efficient, clear and comprehensive, and can allow for stakeholder input and revision when facts and circumstances warrant.

The Bureau has the authority, under the Administrative Procedure Act (APA), to issue interpretive rules that provide advance notice of how it interprets the laws and regulations entrusted to it. Unfortunately, the Bureau has been too hesitant to use this tool. Although such guidance documents are used throughout the federal government, MBA and others have repeatedly been frustrated in their efforts to obtain guidance from the Bureau. For example, the Bureau’s implementation of the TILA RESPA Integrated Disclosure (TRID) or Know Before You Owe (KBYO) rule did not meet the enormous need for timely, accessible and authoritative guidance to accompany the rule. In addition, the very limited guidance that the Bureau has made available often explains what practices violate the law without providing a path to compliance, and is accompanied by disclaimers that undermine its usefulness.

A new CFPB — CFPB 2.0 — can fulfill its consumer-protection mission by producing rules and guidance that prevent consumer harm rather than merely punishing harm after it occurs. Such a shift in emphasis recognizes the strides the Bureau and industry have made over the past six years in creating an environment where supervision and guidance are actively sought by industry to ensure compliance.
Recommendations for the Bureau

• Place priority on issuing appropriate guidance to facilitate compliance with federal law.

• Establish guidelines for when and how it will issue and revise rules and guidance.

• Acknowledge that it is bound by its guidance.

• Ensure industry input on mortgage and other issues.

• Provide timely answers to questions on regulations with authoritative guidance.

• Publish notice of changes in guidance and apply those changes prospectively.

• Provide time for regulated entities to comply.

• Ensure due process in its enforcement actions.
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CFPB 1.0: The Bureau’s First Six Years

Any proposal for improvement of the Bureau must start with an accounting of where it stands and how it got there. Although there are many criticisms of the Bureau’s past six years, this white paper will first focus on simply understanding the origins and workings of the early years of the Bureau.

Building the New Bureau

First proposed by now-Senator Elizabeth Warren in 2007, the idea of a “Financial Product Safety Commission” gathered momentum during the financial crisis, and was created and renamed by Title X of the Dodd-Frank Act in 2010. The fledgling agency was assigned enormous responsibilities, including the interpretation and enforcement of 18 existing major consumer-protection laws. The CFPB was also required to develop several new sets of regulations within tight timelines. In addition, the Bureau was given supervisory and enforcement responsibilities over the largest banks; countless nonbanks that offer or provide mortgages; student loans; or payday loans; and a wide range of service providers. The new agency also had a mandate to expand its supervision to larger participants in additional consumer financial services markets.

The required rulemaking and tight timelines under the Dodd-Frank Act resulted in an initial Bureau focus on developing the new sets of regulations for mortgage origination, servicing, loan originator compensation, high-cost loans, appraisals and integrated mortgage disclosures. The Bureau also adopted existing regulations inherited from former regulators for many of the 18 consumer laws it was assigned, such as the Real Estate Settlement Procedures Act (RESPA).1 Relatively few resources were dedicated by the Bureau to providing guidance to promote compliance with these laws. Over time, the Bureau issued some small-entity compliance guides required by law; held occasional webinars; and dedicated some resources to answering telephone inquiries from individuals concerning the new Dodd-Frank Act mortgage rules.2 However, the webinars and telephonic responses were not transcribed nor widely circulated, and virtually every guide, webinar and telephone response was prefaced by a disclaimer that only official rules and commentary were authoritative.

The Bureau’s initial supervisory efforts also got off to a slow start. Experienced bank supervisors took time to hire and train, and the pool of potential employees with experience relevant to nonbank supervision was small. Early exams were marked by disputes and controversy due to a combination of the more critical approach taken by examiners and the relative inexperience of some examiners with financial processes and institutions. The presence of enforcement attorneys on the earliest exam teams sent a message — perhaps unintended — that problems identified in an examination could be on a fast track to enforcement.

Meanwhile, enforcement got off to a faster start. Former Ohio Attorney General Richard Cordray was appointed in late 2010 to lead enforcement at the Bureau, and he expressed his enthusiasm for “doing on a 50-state basis the things I cared most about as a state attorney general.”3 The Bureau found it relatively easy to fill its enforcement ranks with attorneys with litigation or investigative experience, and the Bureau inherited files of investigations that had been initiated by predecessor agencies. Where additional investigation was needed, these attorneys used the Bureau’s Civil Investigative Demand (CID) authority to make broad demands for documents and other information.

2 The small business guides and informal guidance were required under the Small Business Regulatory Enforcement Fairness Act (SBREFA), Pub. L. No. 104-121, 110 Stat. 847 (1996), Sections 212, 213.
This emphasis on enforcement short-changed important elements in the Congressional blueprint for the Bureau. In the Dodd-Frank Act, Congress made clear that the Bureau should not merely enforce the law, but also help “markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.”

Regulation by Enforcement

The combination of an absence of regulatory guidance and aggressive enforcement helped spawn the Bureau’s policy of “regulation by enforcement.” Instead of updating the rules, official staff commentary or guidance it inherited, the Bureau often deployed new interpretations through enforcement actions, leading to both concern and confusion among regulated entities. For example, the Bureau took a position on RESPA that a panel of the D.C. Circuit Court of Appeals found “flouts not only the text of the statute but also decades of carefully and repeatedly considered official government interpretations.”

After his appointment to director of the CFPB, Director Cordray publicly embraced the idea that enforcement cases themselves are and should be valuable sources of guidance to financial institutions. In remarks to the Consumer Bankers Association on March 9, 2016, Director Cordray explained that regulation through enforcement was an economical use of Bureau resources. He lauded the Bureau’s “thoughtful strategy” of “working towards a pattern of actions that conveys an intelligible direction to the marketplace.” The director also asserted that Bureau consent orders “provide detailed guidance for compliance officers,” and explained that they are “intended as guides to all participants in the marketplace.” In light of this guidance, the director asserted “it would be ‘compliance malpractice’ for executives not to take careful bearings from the contents of these [consent] orders about how to comply with the law and treat consumers fairly.”

These remarks in support of regulation by enforcement reflect at least four significant misimpressions. First, Director Cordray’s suggestion that the Bureau’s orders “provide detailed guidance for compliance officers” is mistaken. In reality, compliance officers are routinely — and reasonably — unable to take direction from consent orders. Such orders necessarily relate to a single, very specific fact pattern. As such, they identify discrete illegal practices rather than a pathway to compliance.

Second, the detailed guidance in consent orders may be incorrect. As the Bureau has elsewhere explained, “While some guidance may be found in the Bureau’s previous public actions, the outcome of one matter is not necessarily dispositive to the outcome of another.” For example, if PHH had settled its pending case with the Bureau, the resulting consent order would likely have set forth — and so guided compliance officers to adopt — a view of RESPA that a Court of Appeals later found “is not a reasonable interpretation of the statute.” While PHH did not settle, the possibility of a similar mistake exists whenever a nonpublic, two-party negotiation announces a new legal standard.


5 As the Department of Treasury has explained: “The CFPB’s habit of effectively announcing new prohibitions through enforcement action ... deprives regulated parties of fair notice concerning the rules to which they must conform their conduct.” Department of the Treasury, A Financial System that Creates Economic Opportunities: Banks and Credit Unions (June 2017) (“Treasury Report”) at 82.


8 Id.

9 Id.


11 PHH v. CFPB, 839 F. 3d at 109, rehearing en banc granted, order vacated.
Third, in the same remarks, Director Cordray cites “others” as insisting that the Bureau should “articulate rules for every eventuality before taking any enforcement actions at all.” With all due respect, MBA has not sought “rules for every eventuality.” Nor has MBA argued against “taking any enforcement actions at all.” Instead, MBA has sought guidance from the Bureau on significant practical questions that arise under applicable law in the normal course of business.

Fourth, Director Cordray argues that seeking to articulate rules can be “a hopeless endeavor” because it will not stop “the ingenuity of the dishonest schemer.” That may be true, but such a view overlooks the benefits of rules and guidance to the honest financial services provider looking for a safe path through a minefield of regulations. It also overlooks the benefits of clear interpretations to consumers, as well as federal and state examiners and enforcement officials in carrying out their work.

After six years, the Bureau can and should move away from regulation through enforcement. Director Cordray today faces — as will his successor — a very different job than the one Director Cordray accepted over five years ago. The Bureau’s supervisory teams are now fully staffed and have spent years carefully reviewing the nation’s financial institutions and other financial service providers. The Bureau’s regulatory team has largely completed the rules required by the Dodd-Frank Act and may now focus on explaining and updating other existing rules. Leaps forward in innovation and financial services technology now also require attention and regulatory guidance. The CFPB should address these new circumstances in new ways.

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12 Richard Cordray, Prepared Remarks of CFPB Director Richard Cordray at the Consumer Bankers Association, supra note 7, at 3.

13 Similarly, it is a straw-man argument to suggest that the only alternative to regulation by enforcement “is just a random series of actions that takes a few wild swipes at the bad actors without systematically cleaning up the practices that harm consumers across the marketplace.” Id. An enforcement program centered on investigating and punishing violations of established law, coupled with detailed guidance where the law is less clear, would prevent and deter misconduct in a far more systematic fashion than a series of enforcement actions that appear to announce new legal standards.

14 Id.
Guidance Is Needed and the CFPB Has the Authority to Issue It

The Bureau’s greatest missed opportunity over the past six years is that it has not done more to prevent harm to consumers by providing advance guidance to the vast majority of financial institutions that want to comply with the law. Such guidance can be legally offered in a host of ways and settings. Informal guidance provided as part of the supervisory process can efficiently address institution-specific issues. Guidance documents, including advisory opinions, bulletins, no-action letters, statements of policy, and answers to frequently asked questions can apply widely and guide an entire industry, as well as provide the necessary details for businesses that must translate the law into operational policies and procedures. Notice-and-comment rulemaking or official commentary is essential when the Bureau seeks to articulate new standards, fill in the interstices in existing laws or level the playing field by ensuring that all competitors meet certain minimum standards.

The Importance of Guidance

A wide range of types of guidance should have an important place in the Bureau’s overall approach. As Director Cordray said at his confirmation hearing:

At the Bureau, our bigger and more flexible toolbox includes research reports, rulemaking, market guidance, consumer education and empowerment, and the ability to supervise and examine both large banks and many nonbank institutions. I know from my own experience that lawsuits can be a very slow, wasteful and needlessly acrimonious way to resolve a problem. The supervisory tool, in particular, offers the prospect of resolving compliance issues more quickly and effectively without resorting to litigation. We are continuing to build our capacity to make effective use of this entire range of tools.15

Director Cordray’s comments correctly suggest that a focus on enforcement, to the exclusion of other tools, diminishes an agency’s effectiveness. By definition, enforcement takes place only after conduct that may be harmful takes place. In contrast, guidance seeks to prevent harm from occurring. Enforcement creates conflict, which consumes time, money and energy. Guidance is focused on constructive engagement and problem solving. Enforcement is most often resolved through private negotiations between two parties with disparate power and incentives that may result in outsized damages and conclusions that may not accurately reflect the underlying rules. Guidance can be established through a transparent process that incorporates all stakeholders. Enforcement resolves specific issues with reference to one set of facts, while guidance can anticipate and address a broad array of scenarios. Enforcement requires that laymen and lawyers alike parse individual cases and extrapolate from them. Guidance can be accessible, comprehensive and clear.

Enforcement cases offer very limited guidance to financial institutions that want to follow the law. Enforcement cases do not identify legal conduct. They simply identify some conduct that the Bureau asserts is illegal, and leave industry and consumers alike to puzzle through what other conduct would violate the same statute or regulation. In many cases, this uncertainty discourages conduct that the Bureau would not deem illegal, including innovative ways of designing and delivering financial services. In others, it creates an uneven playing field, as it allows entities with an aggressive approach to legal or compliance uncertainty to unfairly compete with entities that take a more circumspect approach.

The Authority for Guidance

The Bureau has ample authority to provide various types of guidance. As is well evidenced by the Bureau’s activities over the past six years, the Bureau has the authority to issue binding regulations under the 18 consumer-protection laws transferred to the Bureau by the Dodd-Frank Act, as well as under the Act itself. Such regulations have “the force and effect of law, if “rooted in a grant of power by the Congress.” Given their significance, such quasi-legislative acts are subject to notice-and-comment procedures under the APA. The Bureau has issued a raft of regulations in its six years, many of which were mandated by the Dodd-Frank Act.

However, the Bureau has many more tools to provide guidance than notice-and-comment rulemaking. The APA also provides for interpretative rules “issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.” Such guidance can be more efficiently produced than binding regulations because guidance is typically exempt from notice-and-comment procedures. Accordingly, it can be a uniquely effective tool to set forth the Bureau’s views on the dictates of a regulation or statute. As the Office of Management and Budget (OMB) has explained:

> [g]uidance documents, used properly, can channel the discretion of agency employees, increase efficiency, and enhance fairness by providing the public clear notice of the line between permissible and impermissible conduct while ensuring equal treatment of similarly situated parties.

These benefits have been recognized by the vast array of federal agencies that issue guidance documents, including such disparate departments as Agriculture, Education, Health and Human Services, and Labor, as well as agencies as diverse as the Consumer Product Safety Commission, the Environmental Protection Agency, the Food and Drug Administration and the Internal Revenue Service.

Likewise, financial services regulators have long provided various forms of guidance to industry. For example, the Federal Reserve Board issues Supervision and Regulation Letters. The FDIC

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16 For ease of reference, binding rules issued under the notice-and-comment provisions of the APA are referred to as “regulations” herein. Interpretive rules, advisory opinions and other nonbinding guidance are referred to as “guidance.”


provides guidance in Financial Institution Letters. The OCC issued forty-seven Bulletins in 2016, and is on pace to issue a similar number in 2017.23

The Bureau has acknowledged and occasionally exercised its authority to issue guidance documents over the past six years. However, such guidance has been too infrequent, and many of these documents include the following language, which encapsulates the status of such guidance for private parties:

This Compliance Bulletin and Policy Guidance is a non-binding general statement of policy articulating considerations relevant to the Bureau’s exercise of its supervisory and enforcement authority.24

This disclaimer undermines the value of the guidance it accompanies.

Guidance can provide direction to financial institutions on a wide range of conduct, rather than being limited (as consent orders are) to the past conduct of one particular entity.25

Notably, the Bureau also issues quarterly Supervisory Highlights that signal where the Bureau has been active in resolving legal or compliance issues without enforcement. These reports are helpful, but insufficient. As the title indicates, these reports can provide only high-level descriptions of the relevant conduct and law. Moreover, like consent orders, the Supervisory Highlights focus on how the specific practices of particular institutions violated the law without necessarily providing broader guidance about how other institutions may fully comply with the law.

Unfortunately, the Bureau has explicitly resisted expanding the ways it provides such guidance. When the Bureau adopted a final rule on no-action letters, several industry trade associations urged it to “adopt a policy for providing definitive regulatory interpretations ... such as ... interpretive rules and letters and advisory opinions.”26 Such a policy would have been in keeping with other agencies’ efforts to formalize their use of guidance documents.27 Instead of engaging in such a project, the Bureau recounted its existing efforts, and explained its unwillingness to do more by noting that:

many regulated entities have access to resources, counsel, advice, and processes of their own ... that they may use to assist in the interpretation of regulatory requirements and achieve regulatory compliance.28

The argument that financial institutions can figure things out for themselves misses the mark in several respects.

• First, the Bureau’s own statement implicitly concedes that some regulated entities — likely smaller entities — lack the resources, counsel, advice and processes to achieve compliance.


24 See, e.g., CFPB Compliance Bulletin and Policy Guidance; 2016-02, Service Providers. This language often includes additional explanation, such as “It is therefore exempt from notice and comment rulemaking requirements under the Administrative Procedure Act pursuant to 5 U.S.C. 553(b). Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis. 5 U.S.C. 603(a), 604(a). The Bureau has determined that this Compliance Bulletin and Policy Guidance does not impose any new or revise any existing recordkeeping, reporting or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act, 44 U.S.C. 3501, et seq.” id.


• **Second**, the Bureau’s argument ignores the inefficiency and potential for confusion and inconsistency that comes from requiring each regulated entity to independently resolve ambiguities in complex regulations.

• **Third**, the Bureau’s suggestion that regulated entities should rely on their resources and counsel is inconsistent with Director Cordray’s warning, in early 2016, that financial institutions should “shrug off the naysaying consultants and lawyers who breed a culture of fear and hypothesized problems to hype their services.”

• **Fourth**, the Bureau’s insistence that financial institutions can achieve compliance without further guidance is belied by the Bureau’s enforcement actions against entities that have been advised by counsel that they are in compliance with the law.

Instead of avoiding guidance, the Bureau could embrace it by adopting or adapting the framework OMB has established for the Executive Branch. This approach contains important safeguards, including:

• adopting written procedures for the internal clearance of significant guidance documents;

• avoiding mandatory language, such as “shall” or “must” except to bind agency staff; and

• allowing for public feedback and requests for modification.

As the OMB, the courts and Congress have all emphasized, these less formal procedures are appropriate only if guidance documents — unlike rules promulgated following notice and comment procedures — are not treated as binding on private parties by the issuing agency. “[A]gencies can appropriately bind their employees ... without undertaking pre-adoption notice and comment rulemaking.” However, a guidance document should make clear to regulated entities that “[y]ou can use an alternative approach if the approach satisfies the requirements of the applicable statutes.” Nevertheless, those who choose to follow the guidance can be assured that it is binding on the agency’s exercise of its powers, including enforcement.

The Bureau need not leave all judicial deference behind in issuing such guidance. “Interpretive rules do not have the force and effect of law and are not accorded that weight in the adjudicatory process.” However, courts will generally defer to “an agency’s interpretation of its own ambiguous regulation,” provided it is not plainly erroneous, inconsistent with the regulation, or a post hoc rationalization. Similarly, “rulings, interpretations and opinions ... while not controlling — constitute a body of experience and informed judgment to which courts ... may

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29 *[Prepared Remarks of CFPB Director Richard Cordray at the Credit Union National Association (Feb. 23, 2016)](https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-credit-union-national-association)*. Director Cordray made this remark to further disparage “a cottage industry of lawyers and consultants [who] sowed fear about the outsized legal liability that the [Qualified Mortgage] rule would pose for mortgage lenders.”

30 For example, it is difficult for the Bureau to suggest that the advice of counsel will be sufficient to anticipate a situation where “the CFPB now says the opposite of what HUD’s prior interpretations and Regulation X all say.” *[PHH v. CFPB]*, 839 F. 3d at 42, *rehearing en banc granted, order vacated*. Furthermore, the advice of counsel will not prevent a Bureau enforcement action against a financial institution or its leaders. See, e.g., *[Consumer Fin. Prot. Bureau v. CashCall, Inc.]*, No. CV 15-7522, 2016 WL 4820635, at 12 (C.D. Cal. Aug. 31, 2016).


32 See *id.* at 3433.

33 *Id.* at 3437.

34 *Id.*

35 *Perez*, 135 S. Ct. at 1204 (internal quotations and citation omitted); see also William Funk, *A Primer on Nonlegislative Rules*, 53 Admin. L. Rev. 1321, 1322 (2001) (Such guidance documents “are not ‘law’ in the way that statutes and substantive rules that have gone through notice and comment are ‘law,’ in the sense of creating legal obligations on private parties.”)

properly resort for guidance.”

“The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking the power to control.” In other words, Bureau guidance will receive judicial deference where it is deserved.

In many ways, guidance documents are more effective than enforcement as a mechanism to meet the Bureau’s stated goals. Director Cordray has explained that enforcement orders are designed to “provide detailed guidance for compliance officers.” However, the Bureau could accomplish the same goal by simply providing detailed guidance for compliance officers. Instead of enforcement “working toward a pattern of actions that conveys an intelligible direction to the marketplace,” the Bureau could provide that intelligible direction directly, through a guidance document. Similarly, instead of telling regulated entities that consent orders “are also intended as guides to all participants,” the Bureau could simply provide guides to all participants. In every case, accomplishing the desired result through guidance would require fewer Bureau resources, avoid the unfairness of “setting an example” by punishing one entity for broader industry practices, allow for more comprehensive and clear guidance, and help ensure a level playing field for companies eager to follow the rules.

The Need for Guidance

Despite the advantages of guidance, and Director Cordray’s endorsement of its critical place in the Bureau’s toolbox, MBA and others have been frustrated in their efforts to obtain detailed and definitive guidance from the Bureau. A review of the Bureau’s Official Guidance website reveals a trickle of guidance compared with the

38 Id.
39 Richard Cordray, Prepared Remarks of CFPB Director Richard Cordray at the Consumer Bankers Association, supra note 7, at 3.
40 Id.
41 Id.
geyser of regulations.\textsuperscript{42} For example, the Bureau appears to have issued 16 final rules in 2016 but only a half-dozen guidance documents.\textsuperscript{43}

One important shortfall in guidance relates to the TRID or KBYO rule.\textsuperscript{44} This CFPB regulation requires the use of new, standard disclosure forms to be provided for virtually all mortgage borrowers nationally at the time of mortgage application and settlement, and also introduces a three-day waiting period before closing for borrowers to review their closing forms. These changes affected an enormous number of settlement service providers, including lenders, title and real estate agents, appraisers and third-party technologists. Under the new rule, both lenders and assignees face significant potential liability for failures to comply.

The absence of timely, authoritative written guidance from the CFPB resulted in confusion, a complicated implementation process and ultimately harmed borrowers.

The Bureau did not do enough to ease the enormous transition to this new regulatory framework. While the Bureau produced several webinars and participated in conferences and forums relating to implementation, many questions regarding this detailed, complex rule remained unanswered for too long. Despite repeated requests from MBA, the CFPB steadfastly refused to offer timely, accessible FAQs or other authoritative guidance to regulated entities, except on a handful of technical matters. The CFPB did assign some staff to answer questions a but the responses were never widely circulated nor treated as authoritative.

TRID also demonstrates the need for the Bureau to provide timely authoritative guidance to explain rules rather than only relying on the slow-moving notice-and-comment rulemaking or the official staff commentary process. MBA and others started raising their detailed questions in 2013 on critical TRID issues even before the rule was to become final. The Bureau responded by proposing revisions to the rule for public comment in August 2016. Years after the questions first arose — and nearly a year after the rule was proposed — a final rule was issued in 2017.


The absence of timely, authoritative written guidance from the CFPB resulted in confusion, a complicated implementation process and ultimately harmed borrowers. Uncertainty deprived some borrowers of timely closings and denied others the benefits of lender and seller credits. In addition, the lack of guidance led investors to take different positions on legal issues, which unduly complicated or prevented the sale of loans. The lack of guidance on cures and corrections even seized up the secondary mortgage market for a time. When the Bureau finally exchanged letters with MBA regarding this important subject, it refused to publish the letter in the Federal Register, which would have ensured its wider circulation and given it additional precedential value. Instead the CFPB took the position that TRID liability issues will be settled by the courts. This may be true, but such resolution will occur only after years of confusion, undue costs, constricted credit and stifled innovation.

While this issue provides a particularly vivid example of the Bureau’s failure to provide adequate guidance, there are many others. For instance, when Congress added “abusive” to established prohibitions on unfair and deceptive acts and practices (UDAAP), Senator Chris Dodd remarked on the Senate floor, “[t]he word ‘abusive’ does need to be defined.”\(^\text{45}\) However, the Bureau has refused to issue any guidance on how it would enforce the new standard, nor did it clarify its expectations in the Bureau’s Supervisory Manual.\(^\text{46}\) Instead, the Bureau has brought a grab bag of enforcement cases that invoke the term. These cases are often resolved through settlements that fail to meaningfully explain why particular conduct is “abusive” as well as unfair or deceptive. As a result, six years after the standard became law, entities still do not know how the Bureau interprets “abusive.”

Moreover, even when the Bureau has provided guidance, it may not be meaningful. For example, MBA has repeatedly asked the Bureau to clarify what kinds of Marketing Services Agreements (MSAs) the Bureau deems acceptable under Section 8 of RESPA. The need for such clarification has been underscored by Bureau enforcement cases that fundamentally reinterpret the anti-kickback language in RESPA.\(^\text{47}\) However, the Bureau’s Compliance Bulletin on the issue largely rehashes its enforcement cases, while insisting that “the outcome of one matter is not necessarily dispositive to the outcome of another.”\(^\text{48}\) The bulletin then goes on to describe “grave concerns” with the use of MSAs, and to explain that entities may violate provisions of RESPA “even where the terms of the MSA have been carefully drafted to be technically compliant with the provisions of RESPA.”\(^\text{49}\) The end result of this approach is to discourage some cautious companies from entering into any such agreements, while leaving the law unclear enough to allow other companies to employ MSAs to their advantage.


\(^{\text{46}}\) The Bureau’s Supervisory Manual provides detailed explanations, with examples, of what the Bureau deems “unfair” or “deceptive.” See CFPB Supervision and Examination Manual, UDAAP at 1-8. However, the Supervisory Manual provides no such guidance on “abusive,” and merely repeats the relevant language of the Dodd-Frank Act. Id. at 9.

\(^{\text{47}}\) See supra note 50, quoting the now-vacated panel opinion in PHH Corp v. CFPB.


\(^{\text{49}}\) Id. at 5.
CFPB 2.0: Moving Forward

A new emphasis on guidance would help fulfill the Bureau’s mission. Consumer protection is best accomplished by preventing harm — not by catching and punishing harm after it has occurred. That is why Congress gave the Bureau a full toolbox and not just a hammer.

A reboot of the CFPB to focus on guidance would also help address the risk that an agency with a single director develops a myopic view of an issue. Notice-and-comment rulemaking under the APA is necessarily shaped by an open process that includes input from a wide range of stakeholders. However, less formal guidance documents can also be published for comment or otherwise made available for public review and response. Guidance documents also can be reviewed and revised promptly in response to new data and experience and then be applied prospectively to future conduct. Such broad input and flexibility is not possible when the Bureau makes law through enforcement orders. An emphasis on guidance will better ensure that the Bureau’s actions reflect multiple, diverse perspectives.

The Bureau and Industry Have Evolved Over the Past Six Years

One reason the time is ripe for a rethinking of the Bureau’s structure is that financial institutions have raised their compliance standards across the board, and the Bureau is actively supervising their continuing vigilance. Large financial institutions and their service providers are now spending more on compliance — in dollars, employees and management attention — than ever before. The traditional emphasis on safety and soundness has been joined by a strong focus on consumer protection. Products and practices that the Bureau criticized in its first six years are no longer offered or followed. Vendor management and compliance management systems have grown far more sophisticated and far-reaching. Entities such as nonbank mortgage lenders, debt collectors and consumer reporting agencies now maintain compliance management systems and are now examined by the Bureau for the adequacy of such systems.

MBA and its members have fully participated in this leap forward. The new responsibilities imposed by the Dodd-Frank Act and other laws caused banks, nonbanks and their service providers to rethink and strengthen their systems, policies and procedures for origination and servicing. The Secure and Fair Enforcement for Mortgage Licensing Act (SAFE Act) also has brought new training, testing, licensing and registration requirements to help ensure mortgage originators in every state and territory of the United States are far better qualified to serve the public.

Just as the past six years have changed the industry, they have also transformed the CFPB. In supervision, the Bureau has acquired, trained and provided hands-on experience to a large number of examiners. These examiners are now much more experienced with how financial institutions work than the first generation of Bureau examiners. Financial institutions are now much more likely to encounter teams of examiners with industry and subject-matter expertise. The result is that supervision is much more prepared to provide useful guidance to regulated entities, thereby proactively preventing consumer harm.

Similarly, the Bureau’s regulations staff has been through years of striving to meet the tight deadlines set forth in the Dodd-Frank Act. With those regulations behind them, the Bureau’s regulations staff should be redeployed and augmented as necessary to provide ongoing guidance on issues that are vexing financial institutions in their efforts to comply with the law. Such guidance will help the supervision staff determine which areas of the rules demand revision as the Bureau reviews its existing rules. The Bureau should also seek to review and modernize existing regulations in light of the rising tide of financial innovation.
The Bureau Should Change its Approach to Guidance

The changes described in this paper provide a unique opportunity for the Bureau to shift its emphasis to protecting consumers by providing guidance to industry. Instead of bringing enforcement cases that announce new standards, the Bureau could target its legal actions at entities that violate established rules. Such a focus would be wholly consistent with the approach to consumer protection that Director Cordray described to the MBA:

> We intend for everyone to pay careful attention to what we are saying and act accordingly. We do not want to play “gotcha” with industry. We want industry to follow the rules — because that is good for consumers, honest businesses, and the economy as a whole. 50

This approach, however, works best when the Bureau informs industry what it believes those rules require.

Instead of providing definitive guidance, the Bureau reflexively undermines its own efforts through disclaimers. The Bureau should stand by its guidance. Indeed, these disclaimers are inconsistent with the Bureau's position in litigation that:

> “[a]s the agency currently charged with implementing and enforcing RESPA and the regulations promulgated thereunder, the Bureau ... is in the best position to offer this Court an authoritative position on, the RESPA questions presented in this case.” 51

A Bureau that insists in court on its expertise and authority of its views should not distance itself from those views when others rely upon them.

Recommendations: The Bureau should:

- **Place a priority on issuing appropriate guidance to facilitate compliance with federal law.** Such guidance can and should take a host of forms, including bulletins, advisory opinions, statements of policy and responses to frequently asked questions.

- **Establish guidelines for when and how it will issue and revise rules and guidance.** Within a reasonable time, the Bureau should issue a proposed rule for public comment defining each type of rule and guidance the Bureau will provide, the criteria the Bureau will use for selecting each type and the process and timelines for each.

- **Acknowledge that it is bound by its guidance.** The Bureau should stand by its interpretations of law, and agree not to hold a person liable for an act or omission that was permissible under the Bureau’s guidance.

Note that private parties are not bound by its guidance. As the OMB Bulletin for Agency Good Guidance Practices makes clear, guidance may bind the agency but not private parties. Private parties may determine there are other approaches to complying with a statute.

The Bureau Should Listen More Closely to Other Viewpoints

A Bureau that evolves toward providing more guidance should also evolve into an institution that listens more attentively to those it regulates. The Bureau’s mission of consumer protection is effectuated by shaping industry practices, and so can be significantly furthered by engaging in constructive dialogue with providers of financial services. In addition, financial institutions have expertise in operations that the Bureau often lacks, and know — from grappling with the task of implementing statutes and regulations — where guidance is most needed.


The Bureau also should take special care to obtain industry input on the amount of time needed to implement regulatory changes. Too many times, the Bureau has imposed unrealistic deadlines for regulatory compliance, which are then extended when reality asserts itself. For example, an overly ambitious schedule on TRID implementation ultimately necessitated an extension of the effective date and a grace period for compliance. Similarly, the Bureau added six months to the effective date of the prepaid accounts rule. More recently, the Bureau extended the comment period on a Request for Information on Small Business Lending, and proposed revisions to its new HMDA rule on Home Equity Lines of Credit reporting — both after talking with industry representatives about problems with the Bureau’s original plans.52

Establishing and then shifting timelines and requirements disrupts orderly planning and budgeting, as the race to comply starts as a sprint and then becomes a marathon. Ongoing communication between the Bureau and industry will produce more realistic, and firmer, deadlines.

MBA appreciates the many courtesies that the Bureau has shown it and its members over the years. However, interaction between industry and its regulator need to be part of the Bureau’s standard operating procedure rather than the product of ad hoc requests and meetings. Answering questions from the industry is part of that engagement, as well as helping to ensure effective implementation. To that end, the Bureau should conduct regular industry forums that can help initiate, rather than merely respond to, proposed guidance. Such engagement could be broad-based (e.g., independent mortgage banker issues) or targeted to specific issues (e.g., defining Qualified Mortgages). Both types would likely prove more effective than many of the Bureau’s current Advisory Boards and Field Hearings, which sometimes seem to center on set piece speeches from the Bureau and its supporters.

Recommendations: The Bureau should:

• Ensure industry input on mortgage and other issues. The Bureau should establish regular industry forums with appropriate representation of independent mortgage bankers, banks, credit unions and community banks. The Bureau should also hold regular meetings with industry and other stakeholder groups to facilitate the Bureau’s rulemaking lookbacks.

• Provide timely answers to questions on regulations with authoritative guidance. The Bureau should invite questions from the public within prescribed time limits after the publication of each regulation, and periodically thereafter, and the Bureau should be required to respond publicly, within prescribed time limits, to such questions with authoritative guidance.

The Bureau Should Reform its Enforcement Processes

As the Bureau evolves toward an emphasis on guidance, it can and should rethink the way it uses its enforcement program. First and foremost, the Bureau should commit to establishing legal standards through written guidance rather than through enforcement. Although the panel opinion in PHH Corp. v. CFPB has been vacated pending the full court’s review, the Bureau should still heed its sharp rejection of the Bureau’s use of an enforcement proceeding to announce a new legal standard.53 “[A] new interpretation that is retroactively applied … contravenes the bedrock due process principle that the people should have fair notice of what conduct is prohibited.”54

The Bureau should also review its enforcement processes to ensure they provide due process to the investigated. Two examples suffice. The PHH panel opinion points out the implausibility of the Bureau’s position that Congress decided, without any discussion, to allow the Bureau to bring administrative actions decades after the relevant statute of limitations had passed.55 Similarly, the Bureau’s current proposal to restrict financial institutions from disclosing a Bureau CID or Notice

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53 See PHH v. CFPB, 839 F. 3d at 44.
54 Id. at 46.
55 See id. at 54; see also Treasury Report, supra, at 89-90 (recommending that the CFPB promulgate rules before adopting novel positions in enforcement actions).
and Opportunity to Respond and Advise (NORA) is ill conceived. As the American Civil Liberties Union (ACLU) noted in its comment letter, such a prior restraint on speech — particularly speech that might include criticism of the Bureau’s enforcement program — violates the very core of the First Amendment.56

Due process for the regulated also strongly suggests that the Bureau create a Civil Money Penalty (CMP) matrix that rationalizes and explains the Bureau’s approach to such penalties. The OCC uses such a matrix “to help ensure that CMPs are imposed consistently and equitably.”57 The FDIC likewise uses a matrix to support “the appropriateness and/or level of CMPs.”58 The Bureau has no such matrix, and its consent orders imposing CMPs offer little to no rationale for the Bureau’s decisions. The absence of a matrix undermines the deterrent effect of CMPs because there seems to be little rhyme or reason to CMP determinations. The absence of a matrix also results in an inefficient allocation of agency resources, as companies conclude that driving a hard bargain — or even litigating with the Bureau — can result in diminished CMPs. Notably, the Federal Trade Commission recently announced an initiative to improve its enforcement processes similar to that proposed here.59

The Bureau should also examine its processes to determine whether a particular issue is handled in supervision or in enforcement. At present, the Bureau has an Advisory Review Committee process, which provides “a deliberative and rigorous process to determine ‘whether matters that originate from examinations will be resolved through a confidential supervisory action … or through a public enforcement action.’”60 There is no indication — from the Bureau or in practice — that there is a similar process to determine whether matters that originate from enforcement should be dealt with through a confidential supervisory action.

Furthermore, moving forward, the CFPB should review the way it publicizes its activities — particularly enforcement cases. Most enforcement matters are resolved through painstaking negotiations over the language of a consent order and related documents. Those materials reflect a series of compromises between a Bureau that is concerned about potential violations of law and a financial institution that may strongly disagree with the Bureau’s analysis. Unfortunately, after both parties put aside their strongest views in order to reach a settlement, the Bureau often issues a press release that is inconsistent with the relevant consent order. Instead of resolving the matter, this practice invites public jousting between the agency and the settling party — and confusion among those seeking to understand the order.

Recommendations: The Bureau should:

- **Publish notice of changes in guidance and apply those changes prospectively.** The Bureau should not revoke, amend or issue rules or guidance that is inconsistent with applicable guidance without providing adequate advance notice in the same form as the initial rule or guidance.

- **Provide time for regulated entities to comply.** Changes in rules and guidance should apply only prospectively unless the Bureau publishes a specific finding that there is an urgent need to dispense with advance notice.

- **Ensure due process in its enforcement actions.** The Bureau should: (a) respect statutes of limitations in administrative proceedings; (b) establish a CMP matrix; (c) withdraw its proposal to restrict free speech in connection with CIDRs and NORAs; (d) review its protocols for the issuance of press releases; and (e) publish proposed rules or provide a statement of enforcement policy on the circumstances under which it will bring “abusive” cases.
Conclusion

MBA and its members are committed to compliance, consumer protection and to a level playing field for all who offer mortgages and related services to consumers. The Bureau is now at a crossroads and has an opportunity to rethink the way it pursues consumer protection. This White Paper and the recommendations contained in it are meant to help the Bureau in this process. MBA looks forward to working with the Bureau on this important effort.

For more information, visit mba.org/CFPBv2.