

CFPB Enforcement Concerns

The Bureau of Consumer Financial Protection's (CFPB's) past use of consent decrees and administrative decisions to make changes in the rules—rather than using rulemaking or published guidance—created uncertainty in the market and undue costs for consumers. The CFPB is now at a crossroads as it seeks to move forward as a non-political and vigorous consumer protection regulator. MBA continues to advocate for an approach that promotes greater regulatory certainty through the issuance of clearer rules, supplemented by timely, authoritative guidance.

OVERVIEW

- Past enforcement actions by the CFPB continue to raise questions about how the Bureau will apply laws that were transferred to it under the Dodd-Frank Act, as well as the process that it will follow in making changes in interpretation.
- Even when the CFPB has exercised its authority to issue guidance documents, the value of guidance has been largely diminished by the Bureau's use of disclaimers. By refusing to be bound by their own statements, the CFPB increased the potential for confusion amongst the regulated entities.
- In the landmark *PHH Corporation v. CFPB* case, the D.C. Circuit, sitting *en banc*, concluded that the CFPB had misinterpreted RESPA and the application of its statute of limitations. MBA filed an amicus brief in support of PHH.
- The CFPB's new leadership indicates a potential shift at the Bureau. In a series of Requests for Information (RFI), the CFPB sought feedback on all aspects of Bureau operations. MBA commented on all twelve of these RFIs and consolidated these recommendations in a CFPB 2.0 "road map" linking these practical steps with the high level reform principles discussed in MBA's 2016 "CFPB 2.0: Advancing Consumer Protection" white paper.

IMPACT

- The CFPB's past enforcement-first strategy:
 - Exposes lenders to "regulation by enforcement action" and opens up activities not previously believed to be prohibited to potential challenge by the CFPB, state regulators, attorneys general, and the plaintiffs' bar.

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- Fails to identify legal conduct beforehand. Rather, it identifies what the CFPB asserts as illegal, leaving the industry and consumers to traverse the minefield of potential conduct that may trigger enforcement.
- Is unduly costly, ultimately lessens competition and impacts the availability and affordability of credit for consumers.
- Causes uncertainty about what is and what is not permissible.
- Leads some companies to revise business arrangements while others await further guidance, resulting in an inconsistent application of the rules of the road that adversely impacts both industry and consumers.
- Drives up legal costs. A wide range of companies that arranged their businesses in view of guidance issued by previous regulators also are incurring legal expenses to revisit earlier decisions. These expenses are particularly burdensome for smaller companies and are ultimately borne by consumers.
- Notably, Dodd-Frank also grants the CFPB discretion to target "unfair, deceptive or abusive acts or practices" (UDAAP). Although the CFPB has not yet formally defined UDAAPs in a rulemaking, the CFPB has nonetheless issued several decisions penalizing certain practices—after-the-fact—as "abusive."

MBA'S POSITION / NEXT STEPS

- MBA's "CFPB 2.0: Advancing Consumer Protection" white paper provides recommendations to the Bureau moving forward on how to promote a vibrant, competitive mortgage lending market, while discussing the ongoing dangers of the Bureau's "regulation by enforcement" protocol. MBA strongly urges the CFPB to place priority on adopting a consistent framework for providing authoritative written guidance that facilitates efficient compliance, reduces implementation costs and ensures consistent consumer treatment across the market. CFPB 2.0 outlines that the framework should:
 - Require rulemaking or—where appropriate—written authoritative guidance in accessible form if the CFPB is making a change in prior guidance.
 - Acknowledge that the CFPB is bound by its guidance while private parties may determine other approaches to compliance.
 - Require the CFPB to comprehensively evaluate implementation and ongoing performance under rules and provide authoritative written guidance, amendments to the rule, and answers to questions as needed.
 - Prohibit enforcement prior to the issuance of rules or guidance and allow sufficient time for compliance after rules and guidance are issued.
 - Require publishing notice of changes in guidance and apply those changes prospectively while also providing time for regulated entities to comply.
 - Facilitate industry input on mortgage and other issues while also engaging in constructive dialogue with financial institutions.

- MBA strongly urges the CFPB to reform its enforcement process to ensure due process.
 - Restrictions on financial institutions over the disclosure of a Bureau Civil Investigative Demand or Notice and Opportunity to Respond and Advise run afoul of the First Amendment, as asserted by the American Civil Liberties Union (ACLU).
 - The Bureau should adopt a more transparent and predictable approach to issuing civil money penalties. This clarity could be provided by a published civil money penalty matrix.
- The CFPB’s RFIs have been a valuable opportunity to advocate for structural reform at the Bureau. MBA appreciates the Bureau’s willingness to undergo such a thorough review of its practices.
- Using recommendations from MBA’s RFI comment letters, MBA created a “road map” of reforms aimed at achieving CFPB 2.0’s goal of ensuring the Bureau becomes a fair, transparent, and non-political consumer protection regulator.
- Then-Acting Director Mulvaney’s comments at MBA’s 2018 Annual Convention indicated that the CFPB intends to initiate a rulemaking to consider the definition of “abusive.” MBA welcomes this development and will engage its members to respond to the Bureau’s anticipated rulemaking.
- Absent these regulatory changes, MBA supports re-introduction of the GUIDE Act, bipartisan legislation (H.R. 5534 and S. 3443) introduced in both the House and Senate in 2018 during the prior Congress, to permanently end regulation by enforcement. This legislation would create a statutory framework that would ensure Bureau guidance is a reliable path to compliance, but is not used to change a regulated entity’s legal obligations.