



MORTGAGE BANKERS ASSOCIATION

June 7, 2018

Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20522

RE: Request for Information Regarding Bureau Rulemaking Processes, Docket No. CFPB-2018-0009

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 rulemaking 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.

Rulemaking and how it is conducted is a crucial part of addressing these issues. MBA greatly appreciates the opportunity to assist in the assessment of the overall efficiency and effectiveness of the Bureau’s

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.

rulemaking processes. MBA believes both the Bureau's rulemaking and accompanying guidance processes deserve priority attention.

Introduction

Mortgage lenders in the past five years have had difficulties with the Bureau's uneven rulemaking process and its lack of authoritative guidance for both the rules required under Dodd-Frank Wall Street Reform and Consumer Protection Act² and rules under other laws the Bureau is assigned. These problems have in some cases led to considerable confusion among regulated entities, uneven compliance and ultimately worked to undermine consumer protection and increase borrowers' costs because of higher compliance costs and delays associated with uncertainty. The TILA-RESPA Integrated Disclosures (TRID) rulemaking is perhaps the best example of the Bureau's processes failing consumers and market participants alike.

Consequently, MBA believes that the Bureau should, through the rulemaking process, develop, propose and adopt standards and requirements to govern its own provision of rules and guidance, in essence establishing a BCFP "rule on rules." This is a particularly appropriate time to consider such a rule in light of the Bureau's recent rulemaking experiences, which can inform the development of such a rule.

Clearly, many of the suggestions in this comment can and should be adopted today as routine practices of the Bureau. However, a establishing a formal "rule on rules" would guide the Bureau today *and in the future*. Such a rule would help ensure the Bureau does a better job of protecting consumers and decreasing unnecessary costs through rules and guidance rather than, as in the past, simply using enforcement cases to articulate standards. In this regard, we share the U.S. Court of Appeals' view in PHH v. CFPB³: "(A) new interpretation that is retroactively applied contravenes the bedrock due process principle that people should have fair notice of what conduct is prohibited."

The decision went on to state:

In *SmithKline*⁴, in a sentence that all but decides the case before us, the Supreme Court further stated: An "agency should not change an interpretation in an adjudicative proceeding where doing so would impose new liability on individuals for past actions which were taken in good-faith reliance on agency pronouncements." *Id.* at 2167 (internal quotation marks and alterations omitted) (quoting *NLRB v. Bell Aerospace Co.*, [416 U.S. 267](#), 295, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974)). The Court elaborated: "It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference." *Id.* at 2168. Because automatically accepting the Department of Labor's new interpretation "would result in precisely the kind of unfair surprise against which our cases have long warned," the Supreme Court refused to defer to the Department of Labor's retroactive application of a changed interpretation of its own regulations. *Id.* at 2167 (internal quotation marks omitted).

² [Pub.L. 111-203, H.R. 4173](#) (July 21, 2010)

³ See PHH v. CFPB, 839 F. 3d at 46. (Panel decision)

⁴ *Christopher v. SmithKline Beecham Corp.*, ___ U.S. ___, [132 S.Ct. 2156](#), 2167, 183 L.Ed.2d 153 (2012)

All of those fundamental anti-retroactivity principles are Rule of Law 101...⁵

Beyond these legal concerns, rulemaking through enforcement has proven to be a counterproductive consumer protection strategy. It forces compliance staff to do costly guesswork and distorts the market in favor of those willing to undertake “riskier” approaches. A rule on rules is the right place to explicitly reject “rulemaking by enforcement” by committing the Bureau to necessary rules and guidance and setting the standards for them — now and for the future.

Following a General Comment further explaining MBA's view that the Bureau should establish a “rule on rules” below, this letter provides comments on each of the numerically identified stages of the rulemaking process addressed in the RFI. It then provides a comment on how the Bureau's resources might be better deployed to improve rulemaking and guidance.

I. General Comment: In Support of a “Rule on Rules”

MBA appreciates the diligence that the Bureau brought to producing the major rules required under Dodd-Frank affecting the mortgage industry, including the Ability to Repay, Loan Originator Compensation and Servicing rules. We are keenly aware that had these rules not been produced within the tight time frames required under the law, the market would have lacked needed direction beyond the statute.

Having said that, however, the regulatory process for the mortgage rules required under Dodd-Frank has been inconsistent. Some rules, such as the Ability to Repay Rule,⁶ were proposed after very considerable outreach and public input with timely follow-up and necessary amendments.⁷ Indeed, even during the proposal process, the comment period was reopened to address issues raised by relevant data.

On the other hand, the TRID Rule⁸, offered little in the way of timely follow-up rulemaking or authoritative guidance, even though the rule was exceedingly demanding and complex. Detailed questions first began to arise before the end of 2013, when the rule was finalized. Technical revisions to the rule were not proposed until 2016 and finalized until 2017, while authoritative guidance remained largely unavailable. The limited guidance that was offered was typically oral or in other forms not recognized by the Bureau itself as authoritative, and usually provided with disclaimers that explicitly stated it was not binding on the Bureau.

Additionally, notwithstanding that the Bureau had adopted HUD's rules and published guidance in 2013 when responsibility for RESPA was transferred from HUD to the Bureau under Dodd-Frank, the Bureau to date has not amended the rule or issued authoritative interpretations through the rulemaking or guidance process that varied from HUD's rules and interpretations.⁹ Instead, its enforcement actions offered new interpretations, which practice was rejected by the Court in PHH.

⁵ See PHH v. CFPB, 839 F. 3d at 47. (Panel decision)

⁶ 78 FR 6407 (January 30, 2013)

⁷ See, for example, 78 FR 35429 (June 12, 2013)

⁸ Originally published 78 FR 79730 (December 2013), Amendments 82 FR 37656 (July 7, 2017)

⁹ The Bureau did issue non-authoritative guidance on Management Services Agreements (MSAs) that mainly recounted enforcement cases. Available at CFPB https://files.consumerfinance.gov/f/201510_cfpb_compliance-bulletin-2015-05-respa-compliance-and-marketing-services-agreements.pdf

The lack of new authoritative rules and guidance reflecting the Bureau's views along with the BCFP's enforcement actions has resulted in a lack of clarity and confusion about which RESPA interpretations pertain. Companies large and small continue to incur the costs of engaging counsel to discern an approach and the resulting responses have differed. This has resulted in a varied consumer experience and ultimately increased costs due to uncertainty.

Having witnessed all of this and its consequences, MBA strongly believes that in order to regularize its rulemaking process, the Bureau should develop and publish a "rule on rules." Such a rule would require notice and comment rulemaking, when BCFP, pursuant to statute, first establishes or changes a rule affecting the public.¹⁰ Beyond that, the rule on rules would also provide how the Bureau should operate at each stage of the rulemaking process.

Similarly, the rule would prescribe that authoritative guidance should be issued to articulate the BCFP's interpretations of statutes and rules and offer criteria for how and when particular types of guidance should be employed. Notably, recently introduced bipartisan legislation, The Give Useful Information to Define Effective Compliance or GUIDE Act,¹¹ would by statute require the BCFP to issue necessary and appropriate guidance. While this bill awaits legislative action, the Bureau should consider adopting these requirements in a rulemaking outlining its views on regulation and guidance.

More specifically, in MBA's view, a rule on rules would:

1. Require the Bureau to present its views on appropriate rulemaking and guidance vehicles depending on the circumstances. These would include rules established following notice and comment and interim final rules. Similarly, guidance could be provided in interpretive rules, policy statements, bulletins, letters, frequently asked questions and more. The uses of each also would be described.
2. Provide ample opportunity under its own notice and comment process for commenters to address the specifics of these and other guardrails proposed in the rule on rules.
3. Provide direction to the Bureau on each stage of the rulemaking process, identified in this RFI, including directions for initial outreach and information gathering, how the notice and comment process should operate including standard default time frames for comment periods and effective dates, what preliminary documents such as those for outreach and SBREFA might contain, what the NPRM and final rule should contain, and what post rule outreach and various types of follow up guidance should be made available under particular circumstances.
4. Expressly end rulemaking through enforcement while maintaining the avenue of interim, emergency rules with comment afterwards, where necessary to protect consumers.
5. Require that guidance be binding on the Bureau and accorded the appropriate level of deference by Courts, which the Bureau in the past regrettably disclaimed for guidance. Please note MBA intends to comment in greater detail on the need and legal basis for authoritative guidance in comments on the Guidance and Implementation Support RFI.¹²

¹⁰ 5 U.S.C. 553

¹¹ H.R. 5534, Guide Compliance Act, 115th Congress (2017-2018)

¹² Docket No. CFPB-2018-0013

II. Particular Subjects Enumerated in RFI Along with Proposed MBA Comments

In this section, MBA provides comments on each of the numerically identified stages of the rulemaking process addressed in the RFI.

Initial Outreach and Information Gathering

1. Mechanisms used by Bureau for gathering information, data and feedback

MBA believes that early outreach is essential to shaping workable rules and that, while there has been outreach by the Bureau in the past, the process should be improved and regularized. Specifically, standards around the use of RFIs and ANPRs should be established, requirements for outreach should be formalized and early outreach focused on relevant areas to formulate the rule, such as technology concerns. Here again, the rule on rules would be an ideal place to spell out these requirements.

- a. *Requests for Information* - MBA particularly appreciates the Bureau's use of Requests for Information in instances where information is sought to help the Bureau consider next steps. The rule on rules should make clear that these vehicles ordinarily are used for information gathering to help shape *possible* future regulatory or guidance actions for which comment will again be sought. If any further regulatory action is to be taken following consideration of the comments received in response to an RFI or ANPR, the rule on rules should require that the public be informed of that intent and its rationale, as well as the rationale for the decision.

These procedural steps are important. For example, the Bureau's consumer complaint system was established after the issuance of an RFI, but without a proposed rule. Inasmuch as the complaint system established new requirements for the public, it likely should have gone through a more robust notice and comment process that likely would have better considered the implications of the system outlined in MBA's recent comments on the Complaint Database RFI.

- b. *Requirements for Pre-rule Outreach* - The rule should require that the Bureau as part of its pre-rule outreach develop relevant criteria for pre-rule review. Such a review should include common use case scenarios and check lists to determine what should be covered and how. Transactions in the mortgage industry vary and are complex. For example, in the origination process, construction lending, wholesale lending and simultaneous subordinate liens all have very different characteristics and implications. Where a rule such as TRID broadly covers origination, the outreach process should ensure an early appreciation of the different concerns implicated by such a rule including that transactions are dynamic —charges and borrowers change.

Pre-rule outreach should also begin the process of gathering information on the necessary systems and technical changes. Almost all regulatory actions taken today involve significant computer programming, workflow changes, and personnel training. Also, failing to consider all systems changes will make a rule far less effective, e.g. ignoring the prevalent use of mobile devices in conjunction with TRID.

Also, to ensure effective outreach, the rule should require regular BCFP outreach to regulated entities. Interacting with industry associations and other stakeholders, for example, might include pre-rule discussions at conferences, special and regular meetings and web-based calls and also could be the subject of a new ongoing industry advisory body. The rule also should ensure that all stakeholders' concerns are invited fairly.

MBA is a large repository of industry data. We look forward to making significant data available to the Bureau during the outreach process to the extent feasible. As a general matter, certain data may not be available from parties unless it is treated as confidential trade secrets information and data sharing with other agencies and other governmental units is restricted.

Finally, as indicated below, the rule should address the outreach required by Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)¹³ as discussed below.

2. Convening SBREFA Panels

MBA believes the SBREFA process has proven extremely valuable in surfacing and addressing unnecessary burdens and issues early on in the regulatory process. One BCFP proposal would have required lenders that paid loan originator compensation to offer a flat fee for origination regardless of the loan size. The process made clear, however, that the costs for smaller lenders to offer flat fees would have been unduly high if they could offer them at all.¹⁴

Considering its value, MBA believes that under the rule on rules, the SBREFA process should be established as the norm for Bureau rulemaking with very narrow exceptions. Also, considering the fact that the Bureau has in the past foregone the SBREFA process, such as for the Ability to Repay Rule, the rule should also require a more transparent process notifying the public in advance when the Bureau has decided to forego SBREFA, including the rationale for the decision, with an opportunity for public input.

One problem that should be addressed in the rule is that few small lenders qualify as small businesses under the SBREFA thresholds. Considering the value of the SBREFA process, MBA believes BCFP should, consistent with the spirit of the law extend the SBREFA process in the rule to a greater set of smaller lenders that might not otherwise qualify. We also urge that the process seek to embrace smaller lenders with diverse business models as well as include input from technology vendors that serve these communities.

Notices of Proposed Rulemaking

3. The content of the NPRM itself

MBA has not had particular difficulties with the contents of Bureau Notices of Proposed Rulemakings (NPRMs). These issuances have generally provided detailed background and section-by-section analyses. Going forward, however, it makes sense for the rule on rules to memorialize what is to be contained in an NPRM as well as when NPRMs are required.

MBA believes that that notice and comment process should be employed for new rules and significant changes to them that govern regulated entities' responsibilities. Authoritative and binding guidance, however, should be employed for interpretations. Unnecessary rulemaking where an interpretation would

¹³ Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). P.L. 104-121, March 29, 1996 (As Amended by P.L. 110-28, May 25, 2007)

¹⁴ Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Residential Mortgage Loan Origination Standards Rulemaking, https://files.consumerfinance.gov/f/201208_cfpb_LO_comp_SBREFA.pdf

be sufficient slows the process unduly. The Office of Management and Budget has long approved provision of authoritative guidance.¹⁵

As for the BCFP's supporting analyses, they have been notably questionable in the past, minimizing the costs of change (see both the TRID and the Servicing rules' analyses as examples). We are heartened to see the establishment of an Office of Cost-Benefit Analysis at the Bureau. More robust initial cost-benefit analyses will help strike the appropriate balance between consumer protections and access to financial opportunities.

4. The Bureau's issuance of the NPRM including its practice of generally posting the NPRM on its website in advance of Federal Register publication along with supporting materials or a consumer facing blog post.

MBA appreciates this practice because it increases the time available for review and comment. Such advance notice is particularly welcome in an environment when there is a demand for comments on several issuances simultaneously.

5. Comment periods for NPRMs including the length of the comment period and extensions and whether the Bureau should provide for reply periods for commenters.

MBA believes that affording sufficient time for comments is essential to ensuring meaningful stakeholder input. Considering that the length of comment periods for Bureau issuances has varied, MBA believes the rule on rules is again the right place to establish consistent time limits for comments.

MBA appreciates the Bureau's 90-day comment periods for these RFI's and believes that 90 days should be the default length of a comment period for significant rules. Shorter comment periods of 30 -60 days could be prescribed for less significant and complex matters. All comment periods should be subject to adjustment if there is a public exigency or necessity. If there is a compelling need for a shortened comment period, it should be determined in writing. Interim final rules with comment periods following rulemaking should be available in limited circumstances under the rule on rules.

Criteria for what is significant and requiring a longer comment period should also be defined and proposed in the rule on rules based, for instance, on the rule's impact on consumers and the market. Likewise, criteria should be provided to define what is insignificant, including small technical changes and revisions to individual provisions.

Finally, good practice suggests that the Bureau should extend or reopen a comment period when there is new data or particular information from commenters or others deserving reply.

6. Mechanism for encouraging additional feedback on all or part of NPRM including the use of online tools to solicit public feedback such as the Bureau's engagement of the Cornell's Rulemaking Initiative

¹⁵ OMB Final Bulletin for Agency Good Guidance Practices, 72 FR 3432(Jan. 25, 2007)

MBA supports efforts to encourage additional feedback on NPRMs. It is vital that rules are informed by sufficient feedback from affected industries and other stakeholders, including governmental entities and organizations.

Longer comment periods help facilitate wider feedback, as does the sequencing or grouping of initiatives that impact similar issues. Beyond that, outreach by the Bureau at industry conferences, meetings and similar venues has been fruitful in gaining input. Such outreach has the added benefit of helping regulated entities comply and helping regulatory staff better understand industry concerns.

7. The Bureau's processing and posting of comments received to its electronic docket on www.regulations.gov

Requirements for the Bureau's processing and posting of comments are indeed important and should be detailed in the rule on rules. These include the Bureau's means of accepting comments, the timeframe to post comments, treatment of duplicative comments, posting similar or related comments, treatment of anonymous comments and ways it should tabulate comments received. By addressing these concerns in the rule on rules, current and future staff will not need to invent or reinvent the Bureau's policies on an *ad hoc* basis.

8. Outreach and engagement by the Bureau during and after the comment period including meetings with stakeholders and disclosure of such communications under the Bureau's *ex parte* policy.

In MBA's view, this is another particularly important area. Engagement of stakeholders during and after the comment process provides opportunities for them to explain their comments in a manner that provides the most relevant information possible to the Bureau and additional detail where helpful. Engagement at both times can also begin to focus the Bureau on areas that may need to be clarified in a final rule or accompanying guidance or both.

The rule on rules should highlight the usefulness of meetings. The rule should also require that all stakeholders be given the same opportunity to comment and none given an unjustified advantage before, during and after the rulemaking process.

Rules governing disclosure of *ex parte* communications should be maintained to add transparency to the rulemaking process. Nevertheless, they should be developed and applied carefully so that they don't result in the unintended consequence of forcing stakeholders to forego such meetings, depriving the Bureau of valuable input. For example, where a stakeholder has a new initiative and seeks to discuss it with the Bureau as relevant to a rulemaking, considering the competitive market, protocols allowing a more general description of the meeting subject may be essential.

9. Consideration of the new data, studies and reports by other agencies or third parties after the NPRM is released

The Bureau should be cognizant of and consider reports by other agencies both before and after the NPRM is released. If significant information is made available that is relevant to the rule, the comment period should be reopened absent special circumstances. For instance, the Bureau reopened the comment

period when additional loan default data was made available by the Federal Housing Finance Agency in conjunction with the Ability to Repay rule¹⁶

Final Rules

10. Content of the notice issuing the final rule including the elements listed in topic 4 (for NPRMs) as well as the Bureau's explanation of the rationale for the final rule, section-by-section, summary of responses and comments received.

Generally, the text and explanations in BCFP final rules have proven useful. However, MBA believes that care should be taken so that final rules are not unnecessarily long and therefore unduly difficult to assimilate. Similarly, we urge that in drafting rules and commentary the Bureau minimize references to other regulations' sections to the extent possible. Instead, for example, efforts should be made to refer to a simpler item such as a named space on a form. The structure of the TILA regulation is such that citations are extensive and referring to them works against making rules comprehensible.

In some cases, particularly in preambles, tabular presentation of how comments were resolved in relation to what was finally decided may prove useful.

Additionally, while the Bureau's commentary accompanying rules has proven extremely valuable in explaining the rules, experience has shown that commentary published with the rule does not eliminate the need for explanatory guidance after a rule is published. Unforeseen concerns come into focus after a rule is published and being implemented that need to be addressed in authoritative guidance.

11. The Bureau's release of the final rule on its website in advance of publication in the Federal Register and supporting materials including press release or comments.

Release of final rules pending their publication in the Federal Register is valuable so companies can understand a rule's demands as early as possible to begin compliance. The early release of materials accompanying rules is also very valuable, since our experience shows that these summaries and FAQs are disseminated widely.

III. Complementary Staffing and Structure

MBA believes the allocation of staff to regulatory and guidance work is crucial to improving both the regulatory and guidance processes. The assignment of staff prepared to understand and address problems soon after they appear would significantly improve the rules and guidance process. Unfortunately, it does not appear that sufficient staff was available for this type of follow up work in the past. Quite often, industry requests for additional guidance on complex rules have been declined due to "inadequate resources." While this is understandable given the immense volume of Dodd-Frank required rulemaking, future rulemaking initiatives should take this need into account.

Accordingly, MBA respectfully urges the Bureau consider allocating sufficient staff so that staff is not only available to develop rules but also to act as stewards of them. Under such a model, staff assigned to each rule or rules would have experience and/or significant training with both the rule and how it works in

¹⁶ 77 FR 33120 (June 5, 2012)

the market. Following rule production, these staff would be capable of consulting on the rule, identifying when authoritative follow up rules and/or guidance are necessary, and then help produce any necessary materials.

IV. Conclusion

MBA appreciates the opportunity to comment on this RFI. The RFI process begun by this BCFP addresses many of the areas of concern expressed by our members.

Our industry is well attuned to complying with clear rules and guidance. Unfortunately, the experience of the past five years makes clear that both the BCFP's rulemaking and guidance processes could be improved. The development, proposal, public comment and ultimately finalization of a BCFP "rule on rules" governing its own rulemaking and guidance process, or at least the inclusion of these points in BCFP practices, with the allocation of necessary staff, is the best course for the BCFP to take to protect consumers and decrease their costs.

We 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,

A handwritten signature in cursive script, appearing to read "Pete Mills".

Pete Mills
Senior Vice President,
Residential Policy and Member Engagement