MORTGAGE BANKERS ASSOCIATION

June 19, 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 the Bureau's Adopted Regulations and New Rulemaking Authorities, Docket No. CFPB-2018-0011

Dear Ms. Jackson,

The Mortgage Bankers Association ("MBA")[1] appreciates the opportunity to comment on this Request for Information ("RFI") from the Bureau of Consumer Financial Protection (the "Bureau" or "BCFP") regarding its adopted regulations and new rulemaking authorities. In addition to offering the comments 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 to outline key considerations for the Bureau as it beings to think about the next five years. In brief, MBA recommended that:

- BCFP end "regulation by enforcement" by issuing 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 run through all Bureau operations and therefore are a theme of each of the RFIs released to date. The RFI process can be a crucial starting point to gather the information necessary to determine how to best orient the Bureau's future direction to ensure it serves consumers and creates access to financial opportunity.

As discussed in detail below, we applaud the Bureau's decision to revisit its regulations in order to bring them in line with the underlying statutes adopted by Congress and to provide the industry with clear guidance so that it can better serve consumers.

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[1] MBA is the national association representing the real estate finance industry, an industry that employees 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.

I. General Recommendation

MBA appreciates the statements by Acting Director Mulvaney that the Bureau will end its past practice of using public enforcement actions to announce novel interpretations of its statutes and regulations, which has come to be known as "regulation by enforcement." However, it is not enough for the Bureau simply to stop applying new interpretations to past practices; instead, the Bureau has an affirmative and on-going obligation to re-examine its regulations and issue new interpretations that establish clear standards for complying with consumer protection laws that the industry can apply when providing products and services to consumers.

One of the Bureau's core functions, as established by Congress, is "issuing rules, orders, and guidance implementing Federal consumer financial law."[2] Congress directed the Bureau to ensure, among other things, that "markets for consumer financial products and services operate transparently and efficiently ***to facilitate access and innovation***" and that "outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens."[3]

Congress also required that the Bureau comply with the Administrative Procedures Act, which generally requires agencies to adopt regulations and interpretations through a participatory rulemaking process. The rulemaking process is orderly. It is informed by stakeholders representing various viewpoints and, when concluded, it sets forth requirements applicable to all regulated entities. Where there is ambiguity, the Bureau has clear authority to provide guidance on its rules through advisory opinions, bulletins, statements of policy, written answers to frequently asked questions, and other means.

II. Specific Recommendations Regarding Potential Modifications to the Adopted Regulations

The Bureau has requested that commenters identify their highest priorities. While MBA believes that all of the recommendations discussed below are important to the efficient functioning of the mortgage market, we have listed the adopted regulations in the order in which we believe they should be revisited by the Bureau. Overall, the most critical priorities for our membership are, in order:

1. the revisions and clarifications to the Loan Originator Compensation Rule discussed in § II.A of this letter, so that mortgage lenders have a level playing field to compete on price and service;
2. the revisions to the Ability-to-Repay/Qualified Mortgage Rule's Appendix Q discussed in § II.B.1, so that mortgage lenders can make credit available to self-employed borrowers and others who have been excluded by its unnecessarily strict requirements; and
3. the expansion of the ability to cure minor errors under the TILA-RESPA Integrated Disclosure Rule discussed in § II.C.1, so that mortgage lenders can resolve any inadvertent defects without fear of disproportionate liability.

[2] 12 U.S.C. § 5511(c)(5).
[3] 12 U.S.C. § 5511(b)(3) and (5)(emphasis added).

A. *The Loan Originator Compensation Rule*

The Truth in Lending Act ("TILA"), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), states that "no mortgage originator shall receive from any person and no person shall pay to a mortgage originator, directly or indirectly, compensation that varies based on the terms of the loan (other than the amount of the principal)."[4] From this simple statement, the Bureau extrapolated a Loan Originator Compensation Rule ("Compensation Rule") that, in an effort to prevent every possible form of evasion, is impractically broad and unworkably complex. In doing so, the Bureau exceeded its Congressional mandate and unnecessarily increased the cost, and decreased the availability, of credit, particularly in already underserved segments of the market.

Currently, the Compensation Rule broadly prohibits compensation based on loan terms or proxies for terms while providing a short list of expressly permissible compensation factors. The Bureau should explore ways to simplify the Compensation Rule, including but not limited to specifying a clear list of impermissible compensation factors rather than the current approach of providing a short list of permissible factors and a vague and complicated analysis that discourages everything else. The definition of a "proxy for a term" is particularly imprecise and difficult to apply and should be revisited. Failing to do so encourages different interpretations of an ambiguous test that unfairly disadvantages those companies that hew closest to the Bureau's rule.

In the alternative, a small number of modest changes to the Compensation Rule would better align the rule's incentive structure with market realities. These changes would also provide the industry with clearer guidance so that lenders can compete based on their ability to provide consumers with the best rates and customer service, rather than on disparate interpretations of an overly complex rule.

1. *The Bureau Should Encourage Price Competition by Expanding the Circumstances in Which a Loan Originator's Compensation May Be Decreased*

The Bureau implemented its mandate to disconnect loan originator compensation from loans terms by adopting a general rule whereby a loan originator's compensation may not be increased or decreased once loan terms have been offered to a consumer, including decreases in compensation that allow the creditor to provide the consumer with a lower-priced, more affordable loan.[5] While the Bureau believed that this prohibition was necessary to prevent loan originators from pricing loans high at the outset and then selectively negotiating lower pricing, its rule has the unintended consequence of discouraging creditors from reducing prices for borrowers who apply to multiple lenders and use that information to negotiate for the best rates and terms. In these circumstances, a rational lender will simply decide against making a loan if doing so is unprofitable due to the requirement to pay the loan originator full compensation for a discounted loan. For the consumer, the result is a more expensive loan, or the hassle and expense of switching lenders. This outcome, impeding shopping between loan originators, is expressly contradictory to the stated aims of the Bureau's Know before You Know / RESPA-TILA Integrated Disclosure rulemaking.

Simply put, the current rule makes price competition unprofitable, and therefore less likely to occur. To address this unfortunate outcome, the Bureau should amend the rule to permit lenders to respond to price

[4] 12 U.S.C. § 1639b(c)(1).
[5] Regulation Z, comment 36(d)(1)-7.

competition by reducing loan originator compensation. The ability to reduce loan originator compensation would allow lenders to offer consumers lower cost loans. This change would significantly enhance competition in the marketplace, a benefit to lenders and consumers alike.

2. *The Bureau Should Allow for Changes to a Loan Originator's Compensation in Order to Increase Loan Originator Accountability*

The Compensation Rule's prohibition on decreasing compensation after loan terms have been offered has another perverse result. It prevents creditors from holding their employees financially accountable for losses that result from mistakes or intentional noncompliance with company policy. As it stands, a loan originator that is responsible for an error, whether intentional or unintentional, may not bear any of the financial cost of that mistake. This runs directly contrary to the central premise of the Dodd-Frank Act amendments to TILA: compensation is the most effective way to incentivize loan originator behavior.

The inability to tie compensation to performance severely restricts the creditor's ability to manage its employees and disincentivize future errors. Effectively, the creditor is left with two extreme options: fire the loan originator or pay them full commission despite the error. This binary choice does not serve the interests of consumers, creditors, or loan originators. On the contrary, greater accountability on the part of loan originators will incentivize them to reduce errors and consistently comply with regulatory requirements and company policy, which will lead to a safer and more transparent market for consumers.

3. *The Bureau Should Provide an Alternative Path to Compliance for Certain Loan Types*

The Bureau should create an exemption or alternative path to compliance for loans in low-to-moderate income ("LMI") areas, loans made under local bond programs, and loans for smaller amounts. Ironically, even though the rule was intended in part to protect LMI consumers from being steered into expensive loans with higher rates or fees, the rule's rigidity has been a factor in making loans less available to consumers in LMI communities with lower housing prices.

This unintended consequence is the result of the fact that loan originators who do not specialize in smaller balance loans generally will not receive sufficient compensation to make originating these loans worthwhile. Because of robust underwriting, tax law-related paperwork, yield restrictions, and other program requirements, bond loans are often more expensive to produce. Covering these expenses is particularly difficult given that many bond loan programs include limits on the interest rates and fees that may be charged to borrowers. In the past, lenders would address this challenge by paying loan originators a smaller commission for a bond loan than for a traditional loan.

The inability to reduce loan originator compensation to offset HFA production costs means lenders that offer these loans, often do so at a loss. This has the effect of dramatically reducing the availability of bond loans, thereby raising prices for loans in LMI communities.

4. The Bureau Should Provide Clear Guidance with Respect to Permissible Practices

The Bureau is to be commended for providing a number of safe harbors that use compensation to incentivize loan originators to do their jobs well in a way that positively impacts consumers.[6] However, different interpretations of these safe harbors have led to confusion in the market and, unfortunately, competition based on a willingness to accept compliance risk in some circumstances. In order to avoid this, the Bureau should promptly release guidance specifying the permissibility of a number of compensation practices that are commonly used but not expressly granted a safe harbor by the Compensation Rule. Specifically, the Bureau should amend the Official Interpretations to Regulation Z to address the following practices:

- Permissible factors: The Bureau should provide additional guidance on the factors that the Bureau does or does not consider to be permissible bases for compensation, particularly loan purpose (*e.g.*, purchase versus refinance), lead source (*e.g.*, "self-generated" by a loan originator versus "company generated" by the creditor and then assigned to a loan originator), and origination channel (*e.g.*, "banked" when a creditor makes a loan originated by its employee or "brokered" when a creditor's loan originator takes the application but the loan is sent to another creditor).

- Team arrangements: The Bureau should clarify that the prohibition on "pooled compensation"[7] does not prevent the common practice of loan originators working together as a team. The Bureau should also clarify that the reference to "loan originators who originate transactions with different terms and are compensated differently" refers to loan originators using different rate sheets and receiving different commission percentages.

- Reassigning applications: The Bureau should clarify that, when paying the predetermined fixed commission to the loan originator who took the application would prevent the creditor from lowering its price to match or beat a competitor's price, the creditor is permitted to generate a pricing concession for the borrower by reassigning the application to a different loan originator who will receive a lower fixed commission for that loan. This benefits the consumer by lowering the price of the loan while allowing the creditor to reduce its costs accordingly.

- Simultaneous seconds: The Bureau should clarify that it is permissible to treat a simultaneous first mortgage and an accompanying subordinate second mortgage as one "unit" for compensation purposes. Under the current Compensation Rule, lien position is a term of the transaction and therefore it appears that fixed-rate subordinate seconds should be treated the same as first mortgages. In cases where loan originators receive a payment that is fixed in advance for every loan the originator arranges for the creditor, this provides a loan originator with a powerful incentive to double his or her income by steering consumers to a transaction with a simultaneous second, even if a single loan is in the consumer's best interest.

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[6] Regulation Z, comment 36(d)(1)-2.i.
[7] Regulation Z, comment 36(d)(1)-2.iii.

5. *The Bureau Should Clarify the Definition of Loan Originator to Exclude Persons Only Peripherally Involved in the Transaction*

As currently written, the Compensation Rule applies to any person that "[r]efer[s] a consumer to any person who participates in the origination process as a loan originator."[8] The Compensation Rule exempts certain activities from the definition of a referral, but this exemption hinges upon whether the referral is "based on his or her assessment of the consumer's financial characteristics[.]"[9]

This distinction is unreasonably vague and nearly impossible to implement in practice. It should be revised. A number of financial industry participants may be captured by this definition of "loan originator" even though they clearly do not engage in the actual origination of mortgage loans and do not pose steering risk. For example, a bank teller that simply refers a bank customer to a loan originator in his or her branch office may be deemed a loan originator because the teller is likely to have some knowledge of the customer's financial characteristics. Similarly, a financial advisor may, in order to serve the interests of his or her client, refer that client to a loan originator as a professional courtesy. Although neither the teller nor the financial advisor are actually loan originators by any reasonable definition, the simple act of referring a client to a loan originator could subject them to the Compensation Rule's restrictions.

B. Ability-to-Repay and Qualified Mortgage Rule

The Dodd-Frank Act amended TILA to establish an ability-to-repay ("ATR") requirement for mortgage loans and directed the Bureau to establish criteria for Qualified Mortgages ("QMs") that would enjoy certain protections from liability.[10] In addition to requiring the Bureau to issue regulations implementing these provisions, the Dodd-Frank Act specifically stated that the Bureau "may prescribe regulations that revise, add to, or subtract from the criteria that define a qualified mortgage upon a finding that such regulations are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of this section…."[11] We request that the Bureau use this authority to make the following changes:

1. *The Bureau Should Amend the QM Rule to Address Appendix Q*

In the time since the Bureau finalized the QM rule, lenders and investors in the mortgage market have shown a clear preference for QM loans. And while loans eligible for sale to the government-sponsored enterprises ("GSEs") or insurance from a government agency such as the Federal Housing Administration ("FHA"), Veterans Administration ("VA"), or United States Department of Agriculture ("USDA") currently achieve QM status, other loans must meet the requirements of the general definition of QM to do so. These requirements, generally based on a now-obsolete version of Federal Housing Administration ("FHA") guidelines,[12] include satisfying the conditions for calculating consumer income and debt specified in Appendix Q to Part 1026 of Regulation Z. Under the current rule, the Appendix Q standards

[8] Regulation Z, comment 36(a)-1.i.A.1.
[9] Regulation Z, comment 36(a)-4.ii.B.
[10] 15 U.S.C. § 1639c.
[11] 15 U.S.C. § 1639c(b)(3)(B)(i).
[12] *See* 78 Fed. Reg. at 6528 ("[A]ppendix Q incorporates the definitions and standards in the HUD Handbook 4155.1, *Mortgage Credit Analysis for Mortgage Insurance on One-to-Four-Unit Mortgage Loans*, to determine and verify a consumer's total monthly debt and monthly income, with limited modifications to remove portions unique to the FHA underwriting process").

are used to ensure consumers meet the 43 percent debt-to-income ("DTI") ratio threshold developed by the Bureau.

Broadly speaking, the Bureau's objective in publishing Appendix Q was to provide loan originators with clear and objective standards to use when validating and calculating consumer financial information. Despite this worthy objective, the numerous problems associated with Appendix Q have created unnecessary obstacles for non-GSE, non-government-insured loans to achieve QM status—obstacles that are unrelated to credit risk.

The standards detailed in Appendix Q are woefully misaligned with established industry standards for calculating consumer income and debt. This misalignment results in material differences for consumers with income that is not found on Form W-2, such as rental income, retirement income, or income from self-employment. The standards codified in Appendix Q are static and therefore lack the flexibility needed to respond to changing market conditions or consumer demographics. Further, the lack of an established compliance framework for Appendix Q contributes to uncertainty among lenders in interpreting many of its provisions. This causes inconsistencies in credit decisions for similarly-situated consumers.

These challenges cause unnecessary difficulties for consumers seeking non-GSE, non-government-insured loans, even though many such consumers have strong credit profiles. Because Appendix Q provides a less accurate representation of cash flow than existing underwriting standards that are widely used in the industry, it also leads to less accurate credit decisions. Implementation of Appendix Q reduces efficiency in origination processes, as lenders must provide additional training and institute new procedures to use a methodology that differs significantly from existing underwriting standards.

It is clear that alternatives to—not replacements for—Appendix Q are needed to better serve consumers and provide greater certainty for lenders. Alternatives should reflect established industry underwriting standards while maintaining strong government oversight. Rather than the Bureau introducing its own changes to Appendix Q and maintaining its standards over time, it should instead modify the QM rule to allow the use of existing and accepted underwriting methodologies, such as those of FHA, VA, USDA, and the GSEs, in addition to Appendix Q. Specifically, Regulation Z should be amended to permit the use of specific alternatives to Appendix Q including the guides or handbooks maintained by FHA, VA, USDA, or those of any entity supervised by the Federal Housing Finance Agency ("FHFA"), subject to approval by FHFA.

This approach ensures that no harm is done in the market, as it preserves the status quo option for lenders that are comfortable using the Appendix Q methodology. It also avoids weakening consumer protections and encourages wide industry adoption by leveraging systems that the vast majority of lenders already have in place. Implementation would also be fairly simple as it eliminates the need for continual amendments to detailed underwriting guidelines, a time and resource intensive process due to the requirements of the Administrative Procedure Act.

Finally, this approach maintains strong government oversight by relying on the existing mechanisms in place at the largest federal mortgage programs. Importantly, it does not delegate authority to the GSEs, as the Bureau would instead give FHFA the discretion to approve the GSE standards. Rather than enshrining the role of the GSEs, this approach ensures that FHFA maintains its authority to evaluate the standards of any reformed GSEs or new guarantors that enter the market in the future.

2. *The Bureau Should Make the GSE Patch Permanent and Expand It to Include Jumbo Loans*

A primary method by which creditors originate QMs is by making loans that are eligible for purchase or guarantee by the GSEs and meet certain other criteria.[13] This is commonly referred to as the "GSE patch." This provision expires on the date the GSEs exit conservatorship or on January 10, 2021, whichever is earlier.[14]

As of this writing, there is no indication that the GSEs are close to exiting conservatorship and the sunset date is a mere two and a half years away. We also note that, in the preamble to the final ATR/QM Rule, the Bureau specifically stated that, although it believed at the time that the January 2021 expiration provided an adequate period for the market to adjust, the Bureau would be revisit the subject in the future: "[B]ecause the Bureau is obligated by statute to analyze the impact and status of the ability-to-repay rule five years after its effective date, the Bureau will have an opportunity to confirm that it is appropriate to allow the temporary provision [which encompasses the GSE patch] to expire prior to the sunset."[15] As such, not only do we applaud the Bureau's decision to revisit its regulations, we note that it is required by statute to do so in this case.[16]

To provide certainty for markets and to expand access to credit, the GSE patch should be extended indefinitely. Further, the Bureau should grant QM status to jumbo loans that meet GSE purchase or guarantee criteria except for the loan amount (i.e. loans too large for GSE purchase or guarantee). GSE eligibility is currently capped at $453,100 for a one-unit property, and at $679,650 in designated high-cost markets.[17] Loans exceeding this amount do not qualify for QM status under the GSE patch, even if they otherwise meet GSE underwriting standards. This unnecessarily increases the cost for these loans and unfairly disfavors consumers in the jumbo loan market.

In addition, excluding jumbo loans from QM status through the GSA patch has slowed the return of the private label securities market for these loans. Consequently, the jumbo market today is predominantly a portfolio lending market, with potential capital markets investment largely remaining dormant. To introduce more diverse private capital into the jumbo loan market, an extension of QM status to jumbo loans that otherwise meet the GSE eligibility standards is warranted.

3. *The Bureau Should Extend the Qualified Mortgage Safe Harbor to All Qualified Mortgages Regardless of Pricing*

The ATR/QM Rule provides a safe harbor from liability for QMs where the annual percentage rate of the loan does not exceed the average prime offer rate by more than 150 basis points for most first-lien transactions and 350 basis points for other transactions.[18] QMs that exceed this threshold are only entitled

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[13] 12 C.F.R. § 1026.43(e)(4)(i)-(ii).
[14] 12 C.F.R. § 1026.43(e)(4)(iii).
[15] Ability-to-Repay and Qualified Mortgage Standards under the Truth in Lending Act (Regulation Z); Final Rule, 78 Fed. Reg. 6407, 6534 (Jan. 30, 2013).
[16] 12 U.S.C. § 5512(d).
[17] News Release, Federal Housing Finance Agency, FHFA Announces Maximum Conforming Loan Limits for 2018 (Nov. 28, 2017) *available at* https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-Maximum-Conforming-Loan-Limits-for-2018.aspx.
[18] 12 C.F.R. § 1026.43(e)(1)(i).

to a presumption of compliance that can be rebutted in litigation against the creditor or the assignee by showing that the creditor knew the consumer lacked sufficient residual income to repay the loan.[19] Put simply, QMs outside of the safe harbor carry significant risk of costly litigation. Even if the claims are unfounded, they raise complex questions of fact that can lead to expensive discovery. Because "rebuttable presumption QMs" carry greater risk than "safe harbor QMs," this distinction has significantly curtailed the availability of credit to consumers who do not qualify for pricing below the safe harbor threshold.

The safe harbor should be expanded to encompass all loans that meet the QM standards, regardless of loan price. The rebuttable presumption is not required by TILA and was not contemplated in the Dodd-Frank Act. The purpose of the QM protections is not to control prices. It is instead to encourage creditors to make, and investors to buy, mortgage loans that meet certain "safe" underwriting standards.

Alternatively, if the Bureau is determined to maintain price controls within the QM framework, the 150 basis point threshold should be increased to 650 basis points for a first-lien transaction in order to align the ATR/QM Rule with the APR threshold in the 2013 Home Ownership and Equity Protection Act and its implementing regulation.[20] This would bring a greater number of loans within the safe harbor, and reduce the threat of frivolous litigation on loans that default for reasons unrelated to the ATR/QM Rule. In addition, the Bureau should provide clear guidance on how creditors may calculate residual income so that they can avoid unnecessary liability under the rule.

4. *The Bureau Should Significantly Increase the Points and Fees Threshold for Smaller Loans*

The QM definitions also regulate pricing by establishing the maximum amount of "points and fees" that may be charged on a QM loan. Specifically, TILA provides that creditors may not charge points and fees on a QM loan that exceed three percent of the loan amount but directed the Bureau to adjust the threshold "in order to permit lenders that extend smaller loans to meet the requirements of the presumption of compliance…."[21] While the Bureau recognized that many loan costs are fixed and do not vary with loan amount, it set the thresholds for smaller loans at levels that prevent lenders from making profitable QM loans.

In 2018, loans below $105,158 are permitted to have fees in excess of three percent,[22] whereas the average loan size is approximately $260,000. As a consequence, moderate-income borrowers and borrowers in lower-cost housing markets seeking smaller loans too often experience difficulty obtaining credit because, to make the loan, creditors must choose between absorbing a loss or making a non-QM loan that cannot be easily sold on the secondary market and that, as noted above, also has substantial litigation risk if the borrower ever defaults. Accordingly, the loan size threshold for exceptions to the three percent points and fees cap should be increased to $200,000, with future adjustments for inflation and a sliding scale that permits progressively higher points and fees caps for progressively smaller loans.

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[19] 12 C.F.R. § 1026.43(e)(1)(ii).
[20] 12 C.F.R. § 1026.32(a)(1)(i).
[21] 15 U.S.C. § 1639c(b)(2)(A)(vii) and (b)(2)(D).
[22] 12 C.F.R. § 1026.43(e)(3)(i); *see also* Truth in Lending (Regulation Z) Annual Threshold Adjustments (Credit Cards, HOEPA, and ATR/QM), 82 Fed. Reg. 41158 (Aug. 30, 2017)

5. The Bureau Should Clarify the Treatment of Bona Fide Discount Points

The ATR/QM Rule limits the amount of discount points (i.e. amounts paid by the borrower to lower the interest rate) that can be excluded from the points and fees calculation. The limit is based on the amount by which "the interest rate without any discount" exceeds the average prime offer rate.[23] In addition to being an inappropriate price control, this requirement introduced significant uncertainty because neither the regulation nor the official interpretations explain how the industry should determine "the interest rate without any discount."

Bureau staff helpfully attempted to address this uncertainty by meeting with the MBA in August 2013 and providing informal guidance on how to determine the undiscounted rate. The industry largely followed this informal guidance but, to provide certainty for all market participants, this informal guidance should be incorporated into the Bureau's official interpretations.

Further, the Bureau should take this opportunity to address the effect of its informal guidance on consumers with low credit scores. Many such consumers are only eligible for adjustable-rate mortgages with high loan level price adjustments. For example, if the consumer is required to pay two points for the undiscounted rate, the creditor could not exclude the maximum amount of bona fide discount points unless the consumer paid a total of four points. This is prohibitively expensive. While Bureau staff declined to take up this issue in 2013, that decision should be revisited.

6. The Bureau Should Eliminate the Differential Treatment of Fees Charged by Affiliates and Wholesale Lenders

The TILA points and fees definition includes certain amounts retained by affiliates of the creditor.[24] This treatment unfairly penalizes affiliated settlement service providers in favor of nonaffiliates. The Bureau should use its discretion to treat fees equally regardless of whether they are paid to affiliates or nonaffiliates. This approach would benefit consumers by encouraging greater competition between providers.

Further, under the current points and fees definition, compensation paid to a loan originator employed by the creditor is not included in points and fees, whereas compensation paid to a mortgage broker is included.[25] This distinction grants an arbitrary and unfair advantage to retail lenders. It should be eliminated.

7. The Bureau Should Make Permanent and Expand the Ability of Creditors to Cure Defects After Consummation

The Bureau appropriately granted creditors the right to obtain QM status by curing inadvertent overages in points and fees. The ability to cure is limited to 120 days after consummation and only available to transactions consummated on or before January 10, 2021.[26] Because cures result in refunds for consumers and do not otherwise affect the terms of the loan, they should be allowed without limitation.

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[23] 12 C.F.R. § 1026.32(b)(1)(i)(E)-(F).
[24] 15 U.S.C. § 1602(bb)(4)(C)(iii).
[25] 12 C.F.R. § 1026.32(b)(1)(ii).
[26] 12 C.F.R. § 1026.43(e)(3)(iii).

Also, creditors should be permitted to obtain QM status by curing immaterial, technical underwriting defects (such as the failure to obtain an updated pay stub) after consummation.

8. The Bureau Should Expand the Exemption for Loans Sold to Small Creditors and Held in Portfolio

The Bureau should expand the exemption for small creditor portfolio loans included in Section 101 of the Economic Growth, Regulatory Relief, and Consumer Protection Act to include loans sold within 90 days of origination to insured depository institutions with less than $10 billion in consolidated assets. The exemption should apply regardless of whether the seller is covered by the asset threshold. Such an exemption will increase liquidity and financial opportunity for consumers while also encouraging responsible lending by applying only to creditors that retain "skin in the game."

C. Know Before You Owe or TILA-RESPA Integrated Disclosure Rule

The Loan Estimate ("LE") and Closing Disclosure ("CD") forms adopted by the Bureau in its Know Before You Owe or TILA-RESPA Integrated Disclosure rule ("TRID Rule") represent a significant improvement over the pre-existing forms. By eliminating duplicative disclosures, they reduced the stack of papers consumers receive at closing. However, as discussed in the MBA's June 7, 2018 letter regarding Bureau Rulemaking Processes, the Bureau's requirements for completing and issuing the forms are incredibly complex. In some areas they are incomplete or contradictory. This creates significant risk for creditors and increases costs for consumers. The Bureau could eliminate these issues by clarifying, correcting, and simplifying the TRID Rule.

To address these issues, the Bureau should consider wholesale revisions to ensure the rule does not extend beyond its statutory mandate. In particular, TILA and RESPA require creditors to provide "good faith estimates" of costs.[27] The Bureau expansively interpreted these provisions to adopt a complex set of "tolerance" rules. In most circumstances, these rules prohibit creditors from charging borrowers for the actual costs associated with a transaction if those costs exceed the amount originally disclosed.[28] In other words, the Bureau converted a statutory requirement to provide a cost *estimate* into a regulatory requirement to provide a cost *guarantee*. The Bureau should amend the regulation so that it meets, but does not exceed, the actual statutory mandate.

This could be achieved by removing the overly burdensome and complex "tolerance" and redisclosure scheme. In its place, the Bureau could adopt a simplified requirement that (1) the initial LE be based on the best information reasonably available; (2) revised LEs be issued and updated based on the best information reasonably available when the borrower requests a change to the loan terms or product; and (3) the CD disclose actual costs or the best information reasonably available when actual costs are unknown.

In addition, MBA proposes the following targeted changes, which would provide needed clarity and certainty regarding the Bureau's expectations and the liability associated with unavoidable errors.

[27] 12 U.S.C. § 2604(c); 15 U.S.C. § 1638(b)(2)(A).
[28] 12 C.F.R. § 1026.19(e)(3).

1. *The Bureau Should Amend Regulation Z to Clarify the Liability Associated with TRID Errors*

Properly completing TRID disclosures requires careful application of a hyper-technical rule to complex mortgage and real estate transactions that involve multiple unrelated parties. Technical errors are inevitable. The rule should acknowledge this reality and allow creditors to correct errors.

Currently, liability associated with TRID errors is unclear and disproportionate to the potential consumer harm caused by various common and unavoidable mistakes. While the Dodd-Frank Act directed that the TILA and RESPA disclosures be combined into a single disclosure, it did not amend the statutory provisions governing liability for the disclosures. This silence continues to cause concern. TILA permits borrowers to sue creditors and assignees for failing to comply with the pre-existing TILA mortgage disclosure requirements. On the other hand, RESPA does not provide a private right of action for the disclosures incorporated into TRID. Despite industry requests for clarity, the Bureau declined to create a bright line rule, instead choosing to address the issue by explaining that:

> TILA provides for a private right of action, with statutory damages for some violations, whereas RESPA does not provide a private right of action related to the RESPA [Good Faith Estimate] and RESPA settlement statement requirements …. While the final regulations and official interpretations do not specify which provisions relate to TILA requirements and which relate to RESPA requirements, the section-by-section analysis of the final rule contains a detailed discussion of the statutory authority for each of the integrated disclosure provisions.… [T]he authority for the integrated disclosure provisions is based on specific disclosure mandates in TILA and RESPA, as well as certain rulemaking and exception authorities granted to the Bureau by TILA, RESPA, and the Dodd-Frank Act. The details of the Bureau's use of such authority are described in the section-by-section analysis [in the preamble to the final TRID rule]. The Bureau believes these detailed discussions of the statutory authority for each of the integrated disclosure provisions provide sufficient guidance for industry, consumers, and the courts regarding the liability issues raised by the commenters.[29]

The CFPB subsequently stated—albeit not in formal guidance—that, "while the [TRID] rule does integrate the TILA disclosures with the disclosures required under [RESPA], it did not change the prior, fundamental principles of liability under either TILA or RESPA."[30] Industry has continued to voice concerns regarding the lack of guidance surrounding liability. In response, the CFPB published annotated versions of the LE and CD that provide citations to the underlying statutory provisions of TILA. However, these "TILA Mapping Disclosures" do not appear to completely align with the preamble to the TRID Rule.

This lack of certainty has unnecessarily hindered the sale of loans, resulting in reduced credit availability. For example, loan purchasers—who have potential TILA liability exposure—have refused to purchase loans where the settlement agent's license ID number is missing. Creditors wishing to sell mortgage loans are directed to refund fees where the fee amount was disclosed accurately but placed in the wrong

[29] 78 Fed. Reg. 79730, 79757 (Dec. 31, 2013).
[30] Letter from Richard Cordray, Director, CFPB to David Stevens, President and CEO, MBA (dated Dec. 29, 2015), http://static.ow.ly/docs/Director%20Cordray%20to%20David%20Stevens%20MBA%202015.12.29%20copy_49CV.pdf.

section of the form. These technical issues do not result in borrower harm and should not create liability for a creditor or an assignee that inhibits the sale of a loan on the secondary market. Instead, creditors should be given the opportunity to correct these errors. If liability attaches, it should be appropriately related to the severity of the error that occurred.

To resolve these issues, the Bureau should amend the TRID rule by:

- Clarifying in a formal interpretation that errors on the initial LE, or any CD other than the final CD provided to the consumer, do not provide for a separate private right of action. Director Cordray stated that this was the case in a non-binding letter to the MBA from December 2015.[31] Although such guidance is welcome, it does not afford a sufficient level of certainty and protection to creditors or subsequent purchasers.
- Providing additional mechanisms for correcting errors, including:
  - Allowing creditors to correct numeric and non-numeric errors on the LE using a revised LE or a CD, unless a closing cost was understated;
  - Establishing a mechanism to correct clerical numeric errors that do not affect the finance charge, even if the CD provided at consummation contained the error; and
  - Establishing a mechanism to cure untimely provision of the LE and CD. Today, creditors can cure errors that extend the rescission period by issuing corrected disclosures and informing the borrower that their rescission period has not expired. This is commonly referred to as "reopening rescission." A similar cure mechanism could be made available for TRID timing errors.
- Clarifying that TILA Section 130(b)[32] can be used to correct errors (1) associated with disclosures that were not adopted under TILA Part B and (2) that are not "mathematical."

2. *The Bureau Should Clarify What Constitutes a Bona Fide Personal Financial Emergency*

The TRID Rule includes strict waiting periods that can be waived in the case of a "bona fide personal financial emergency." Few creditors grant such waivers because they are concerned that a regulator or court will later determine that the emergency did not qualify as a bona fide personal financial emergency under the rule.

To level set, the initial LE must be delivered at least seven business days before consummation and the initial CD must be received at least three business days before consummation.[33] Consumers may modify or waive these waiting periods if "the consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency."[34] The official interpretations only provide one example of a qualifying bona fide personal financial emergency: "The imminent sale of the consumer's home at

[31] Letter from Richard Cordray, Director, CFPB to David Stevens, President and CEO, MBA (dated Dec. 29, 2015), http://static.ow.ly/docs/Director%20Cordray%20to%20David%20Stevens%20MBA%202015.12.29%20copy_49CV.pdf.
[32] 15 U.S.C. § 1640(b).
[33] 12 C.F.R. § 1026.19(e)(1)(ii)(B) and (f)(1)(ii)(A).
[34] 12 C.F.R. § 1026.19(e)(1)(v) and (f)(1)(iv).

foreclosure, where the foreclosure sale will proceed unless loan proceeds are made available to the consumer during the waiting period…."[35]

By adopting an "intentionally narrow" regulation,[36] the Bureau effectively eliminated the statutory exception established by Congress. Indeed, MBA is unaware of a lender that would make a loan to a consumer who is days away from losing their home in a foreclosure. Therefore, we request that the Bureau provide additional examples of qualifying events that creditors may actually encounter. For example, the rule should include an example that allows a consumer to waive the waiting period to ensure the loan closes within the time required by a purchase contract if the consumer would otherwise lose their earnest money deposits. This circumstance should be considered a bona fide personal financial emergency because the failure to close on time could prevent borrowers from becoming homeowners and the lost earnest money deposit could represent a significant portion of their life's savings.

3. *Absent a Wholesale Rewrite of the Tolerance Regime, the Bureau Should Simplify and Relax Tolerance Requirements*

In addition to exceeding the Bureau's statutory authority (as discussed above), the TRID Rule's tolerance regime imposes unnecessary, overly burdensome, and unfair requirements on creditors. For example, creditors are expected to predict and control pricing imposed by other companies for services that are difficult, if not impossible, to predict. This must be completed at a time when the creditor has only six pieces of information about the transaction. Yet what constitutes a permitted change that allows the creditor to reset tolerances is unreasonably limited. There are a variety of ways in which the Bureau could address these concerns, including by:

- Establishing an alternative, simplified tolerance regime. The current tolerance regime is complicated and costly to implement and monitor. The Bureau could establish a simpler tolerance regime that would reduce compliance costs while still retaining controls around cost estimates. One alternative would be to provide that the LE is in good faith as long as the total amount disclosed in sections D and E on the final CD is within 10% of the amount disclosed in those same sections on the original LE. The Bureau could also establish a de minimis standard so that refunds are not required for minor amounts (*e.g.*, amounts less than $5).
- Simplifying the 10% tolerance category. The rules for the 10% tolerance category are unnecessarily complex and overly burdensome. This increases compliance costs while providing very few, if any, benefits to borrowers. For example:
    - *When may creditors reset tolerances?* Creditors are clearly prohibited from resetting tolerances following a changed circumstance affecting settlement charges until costs in the 10% tolerance category have increased by more than 10% due to the changed circumstance. However, there is confusion within the industry as to whether the same rule applies to changed circumstances affecting eligibility or to borrower requested changes. The Bureau should amend the rule to (1) clarify that creditors have the option of waiting to reset tolerances until any combination of permitted changes under § 1026.19(e)(3)(iv) causes the aggregate amount of fees in the 10% tolerance category to exceed 10% of the originally disclosed amount; and (2) also allow creditors to reset tolerances for the 10% tolerance

[35] Regulation Z, comments 19(e)(1)(v)-1 and 19(f)(1)(iv)-1.
[36] 78 Fed. Reg. 79730, 79806 (Dec. 31, 2013).

category for any increase caused by a permitted change under § 1026.19(e)(3)(iv), even if the permitted change does not cause fees to increase by more than 10%.

- *What costs are included in the baseline calculations when determining whether tolerances have been exceeded?* Generally, a creditor determines whether it has exceeded tolerances by comparing the amounts originally disclosed (the "baseline amounts") to the amounts actually imposed on or paid by the borrower. However, the calculations are more complex for the 10% tolerance category. For example, the Bureau has stated that the following amounts must be subtracted from the baseline amounts: (1) services that are not performed;[37] and (2) services for which the borrower actually shops.[38] Does this also mean that services for which the seller or another party agrees to pay are excluded from the baseline amounts? Such a rule unfairly penalizes creditors when service providers unexpectedly change their fee naming conventions or when other parties agree to become obligated to pay most, but not all, fees in the 10% tolerance category. The rule should be simplified so that the baseline is always the amount originally disclosed, regardless of whether the consumer shops for some services, the third party changes its fee names, or another party chooses to pay for some 10% tolerance category services.

- <u>Clarifying that a lender may decrease a lender credit that was provided to pay for a specific fee if the cost of that fee decreases</u>. Comment 19(e)(3)(i)-5 currently states that "if the creditor discloses a $750 estimate for "lender credits" to cover the cost of a $750 appraisal fee, but subsequently reduces the credit by $50 because the appraisal fee decreased by $50, then the requirements of § 1026.19(e)(3)(i) have been violated because, although the amount of the appraisal fee decreased, the amount of the lender credit decreased." However, this is inconsistent with § 1026.19(e)(3)(iv), which permits a creditor to reduce lender credits if a permitted change occurs. The decrease in the cost of the service for which the lender credit is paying should fit squarely within § 1026.19(e)(3)(iv) because information specific to the transaction has changed and, thus, creditors should be permitted to reduce lender credits in these circumstances.

- <u>Fees paid to affiliates of the creditor or broker should not be subject to 0% tolerance</u>. When the Bureau adopted the TRID Rule, it assumed that creditors could control its affiliates and any broker affiliates just as it could its own employees. However, that has proven to be untrue in practice. Affiliates are independent entities and should be treated like any other third party.

4. *The Bureau Should Clarify How Post-Consummation CDs Must Be Completed*

The TRID Rule requires creditors to provide post-consummation CDs in certain instances. However, the form is not designed to disclose activities that occur after consummation, and the rule provides little guidance on how to complete disclosures provided after consummation. This can lead to consumer confusion. The lack of clarity on what may and must change only exacerbates the issue. To address these concerns, the Bureau should clarify disclosure requirements for post-consummation CDs, including:

[37] Regulation Z, comment 19(e)(3)(ii)-5.
[38] Small Entity Compliance Guide v 5.2, § 7.7, p. 56.

- Whether the best information reasonably available standard requires that each disclosure be updated, even for changes that would not have triggered a new disclosure;
- Whether post-consummation changes to closing costs should affect amounts in the "At Closing" column and "Cash to Close" lines. For example, if a borrower paid a $40 deed recording fee at closing but that amount was refunded back to the borrower after consummation, the rule should clarify whether that refund should reduce the amount disclosed:
    - In the "At Closing" column and on the "Deed" line under E.01; and
    - In other disclosures affected by line E.01, including the Calculating Cash to Close and Summaries of Transactions tables on page 3 and, on page 2, the amounts disclosed on the following lines: E. Taxes and Other Government Fees, I. Total Other Costs (Borrower-Paid), Other Costs Subtotals, J. Total Closing Costs (Borrower-Paid), and Closing Costs Subtotals; and
- Whether post-consummation changes can increase the finance charge and APR.

5. *The Mailbox Rule Should Be Modernized to More Appropriately Address Electronic Delivery*

The TRID Rule provides that, if the LE or CD is not hand delivered, the disclosure is considered received three business days after it is sent, unless the creditor has evidence that the consumer received the disclosures earlier than three business days.[39] This "mailbox rule" is generally consistent with TILA itself, which states that, "[i]f the [LE disclosures] are mailed to the consumer, the consumer is considered to have received them 3 business days after they are mailed."[40]

The Bureau applied the same rule for electronically delivered disclosures, even though TILA's three-day rule only applies to mailed disclosures.[41] The Bureau created this bright line rule because it was concerned that, without it, creditors "would likely seek to document evidence of receipt, such as through recorded verbal or written acknowledgements or affidavits, which may unnecessarily delay many transactions."[42]

While MBA welcomes such clear guidance, the Bureau should consider further refining and modernizing the rule to reflect efficiencies created by electronic delivery. In particular, because electronic delivery does not possess the same logistical challenges that apply to mailed disclosures, the rule should be revised so that disclosures are deemed to be received the same day they are sent electronically, as long as they are delivered in accordance with the Electronic Signatures in Global and National Commerce Act.[43] This could be done by amending the mailbox rule to specifically state that the consumer is considered to have received disclosures delivered electronically "on the same day the disclosures are delivered using the electronic delivery method agreed upon by the consumer and creditor, if the creditor previously obtained consent to deliver such disclosures electronically and the consumer has not withdrawn such consent."

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[39] 12 C.F.R. § 1026.19(e)(1)(iv) and (f)(1)(iii).
[40] 15 U.S.C. § 1638(b)(2)(E).
[41] Regulation Z, comments 19(e)(1)(iv)-2 and 19(f)(1)(iii)-2.
[42] 78 Fed. Reg. at 79855.
[43] *See* 15 U.S.C. § 7001.

The Bureau should also provide additional examples illustrating how technology impacts receipt of disclosures, including examples involving loans with multiple borrowers who use different communication methods (*e.g.*, one receives electronic disclosures and the other receives mailed disclosures).

6. The Bureau Should Create Additional Model Forms

The Bureau created several sample completed disclosures when it initially adopted the TRID Rule. These completed disclosures have been instrumental in helping the industry understand how to apply the rule's technical requirements. However, as the Bureau has acknowledged, the current samples include some errors, do not reflect recent amendments to the rule, and illustrate a very limited set of transactions. Further, many creditors have been hesitant to offer complex products, such as construction loans, that do not have sample disclosures out of fear that they will misinterpret the TRID Rule's hyper-technical requirements. This has limited access to credit.

Updating the current samples and providing additional samples of other common transactions would be tremendously helpful in ensuring the industry applies the TRID Rule consistently and accurately. In particular, consistent with Section 109(b) of the Economic Growth, Regulatory Relief, and Consumer Protection Act, the Bureau should consider creating additional illustrations of representative transactions, including assumptions, construction-to-permanent loans, construction-only loans, and simultaneous subordinate lien transactions.

7. The Bureau Should Provide Guidance on TRID Rule Requirements for Wholesale Transactions

There is almost no guidance on how the TRID Rule applies to brokered transactions. This has resulted in inconsistent interpretations and applications of the rule. The Bureau should provide examples of the creditor's and broker's obligations in various specific scenarios, such as when the broker submits an application to one creditor and then later decides to submit the same application to another creditor. The examples should describe the disclosure requirements as well as the liability associated with errors.

8. The Bureau Should Revise the Definition of "Application" to Allow Critical Information Necessary to Process the Application and Provide the LE

The Bureau narrowed the definition of "application" for purposes of the TRID Rule to provide certainty to consumers and encourage shopping. However, the current definition does not achieve this goal. Instead, it hinders the creditor's ability to collect the information needed to provide reliable estimates and avoid surprises for consumers later in the process. The Bureau should expand the definition to allow creditors to require additional information necessary to process the application including, for example, the following:

- The consumer's current address so that the creditor can deliver or mail the LE to the consumer as required; and
- The consumer's desired loan product so that the creditor can provide a useful estimate.

9. The BCFP Should Clarify That the Three Business Day Waiting Period Does Not Apply to CDs Delivered to Non-Borrowers Who Have a Right to Rescind

Comment 17(d)-2 states that, "[i]n rescindable transactions, the disclosures required by § 1026.19(f) must be given separately to each consumer who has the right to rescind under § 1026.23." Because the comment cites to § 1026.19(f) generally, which includes the requirement to provide a CD (§ 1026.19(f)(1)(i)), the requirement to ensure receipt of the CD three business days before consummation (§ 1026.19(f)(1)(ii)(A)), and the mailbox rule for CDs that are not provided in person (§ 1026.19(f)(1)(iii)), many have concluded that non-borrowers who have a right to rescind must receive the CD at least three business days before consummation.

This obligation can delay closings and harm consumers because non-borrowers are not part of the credit transaction and may not have provided consent to receive disclosures electronically. This means that, even when the creditor has actual proof that the borrower received disclosures and is ready to proceed, it may be forced to wait until the non-borrower "receives" the disclosures under the mailbox rule.

The Bureau should revisit this comment and consider clarifying that creditors need only ensure that non-borrowers who have a right to rescind receive the CD at or before consummation. This would ensure these non-borrowers are afforded the rights required under 15 U.S.C. § 1635 while removing the unnecessary burden imposed on creditors and borrowing consumers.

D. Unfair, Deceptive, or Abusive Acts or Practices

The Bureau should use its rulemaking or guidance authority to issue more specific standards with respect to unfair, deceptive, or abusive acts and practices ("UDAAPs"). MBA has noted in prior RFI responses that the BCFP has attempted to define through enforcement what acts and practices might be considered UDAAPs. Regulation by enforcement creates confusion and fear throughout the industry, robs industry participants of due process rights, and delivers incomplete and untimely guidance to the industry via negotiated consent orders.

Although it is possible for creditors and servicers to piece together what might constitute UDAAPs by reading consent orders and supervisory highlights, the Bureau should articulate clear UDAAP standards—particularly with respect to what constitutes an abusive act or practice—for the mortgage industry. In particular, the Bureau should make a conclusive determination that an act or practice that complies with a specific regulatory requirement—such as TILA's "clear and conspicuous" disclosure standard—cannot be deemed a UDAAP. The Bureau should also limit abusiveness claims to intentional behavior. Finally, the Bureau should use the available authorities and tools to preempt state UDAAP statutes or otherwise minimize the risk that such statutes will be applied in a manner that is inconsistent with the BCFP's standards.

E. TILA-RESPA Mortgage Servicing Rules

Mortgage servicers have made great strides navigating the complex topography of the new, comprehensive regulatory requirements the Bureau created to govern mortgage servicing practices, and in particular default servicing. Unfortunately, many of these requirements go far beyond the modest amendments Congress made to TILA and RESPA in Title XIV of the Dodd-Frank Act. The Bureau should consider bringing its rules in line with Congress's actual mandate. In the absence of such a wholesale revision and realignment of the BCFP's mortgage servicing rules, MBA offers general suggestions for improving the existing national mortgage servicing standards and specific recommendations for how to amend the servicing rules to better serve both borrowers and servicers.

1. *The Bureau Should Amend its Servicing Rules to Clearly Preempt State Law, Which Will Avoid Duplicative Regulatory Regimes and Create a Comprehensive and Cohesive National Standard*

Overlapping and duplicative regulation is a serious driver of increasing cost and complexity for mortgage servicers. Although the BCFP issued comprehensive mortgage servicing requirements, the lack of unified national servicing standards for federally related mortgage loans should be addressed through a multi-agency process. The U.S. Treasury recognized this issue in its report on reducing regulatory burden and creating economic opportunity. The report calls on the Bureau to work with "prudential regulators and state regulators to improve alignment where possible in both regulation and examinations" in mortgage servicing.[44] MBA strongly supports this recommendation.

The standards embodied in the Bureau's mortgage servicing rules are extremely detailed. Implementing these rules required mortgage servicers to engage in extensive system updates and employee training. Permitting states to layer on duplicative or incrementally expanded requirements only increases costs and complexity, with little added benefits for borrowers. This is because the Bureau standards, following Congressional legislation, were intended to be comprehensive and provide all mortgage borrowers with defined processes and clear avenues for redress, regardless of their state of residence.

In light of this, the Bureau should withdraw the official interpretation to 12 CFR § 1024.5(c)(1) and promulgate a new interpretation making clear that the BCFP's RESPA servicing rules preempt more restrictive state laws for federally related mortgage loans. This is appropriate given the breadth of the rules' coverage, the ability of the Bureau to amend them with nationwide effect, and the extensive effort undertaken by industry to come into compliance.[45]

2. *Transferee Servicers Should Receive Some Protections From Liability for the Acts and Practices of Prior Servicers*

The Bureau's rules, guidance, and supervisory process have made clear that successor servicers are responsible for the entirety of the servicing file. This includes responsibility for missing data or data errors that may have been made by prior servicers. New servicers also are responsible for the operational

[44] U.S. Department of Treasury. *A Financial System That Creates Economic Opportunities, Banks and Credit Unions*, at p. 137 (June 2017) *available at* https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf.

[45] There is a strong argument that preemption is appropriate here given the inclusion of numerous mortgage servicing provisions in Dodd-Frank, together with creation of a federal agency to add to and enforce these laws, as well as RESPA's jurisdiction over *federally related* mortgage loans. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." (internal citations omitted)).

errors or omissions of the transferor servicer that may carry over to the new servicer’s support of the borrower. While the heightened regulatory expectations around servicing transfers have improved the industry’s diligence and cooperation at the time of a servicing transfer, concerns about the liability of the transferee servicer reduce liquidity in the servicing market.

This regulatory regime, and the fears regarding liability for the acts of a prior servicer, may make it impossible for a failing or severely distressed servicer to transfer servicing rights to a healthy servicer. Such strict successor liability contributes to market illiquidity and could actually have the perverse effect of tying consumers to a failing servicer if better servicers are unwilling to take on the portfolio. The BCFP should consider providing clear guidelines for such cases—rather than situational responses—to ensure consistency. This will improve the market’s ability to value servicing transfers and assess potential liabilities.

3. The BCFP Should Review the Language Used in Its Model Notices and Allow Servicers to Make Non-Substantive Modifications to These Notices While Remaining Within the Safe Harbor

BCFP servicing rules provide a safe harbor for servicers who choose to use the model forms for certain borrower notifications and, as a result, many servicers have chosen to incorporate the model forms as templates for required notifications. Unfortunately, many consumers find the language contained in the model forms to be off-putting. For example, servicers have received complaints from consumers about the force-place insurance notifications contained in Appendix MS-3 which states: “You should immediately provide us with your insurance information.” That same information could be conveyed by saying: “If you have already obtained insurance coverage on this property, it is important that we have that information so that we do not obtain or charge you for different insurance coverage. Please provide such information to us, at the address listed below, by [date required].”

We urge the Bureau to consider modifying the language in the model forms to make it more consumer friendly. Alternatively, the Bureau should expand the safe harbor protections to permit servicers to make non-substantive alterations to the model forms.

4. The Bureau Should Make a Number of Changes to the Servicing Rule’s Loss Mitigation Requirements

- <u>Increase Flexibility Around Oral Applications</u>: A loss mitigation application is defined in 12 C.F.R. § 1024.31 as “an oral or written request for a loss mitigation option that is accompanied by any information required by a servicer for evaluation for a loss mitigation option.” The Bureau should revise this definition or add commentary to clarify that servicers are not required to accept oral loss mitigation applications, but instead are permitted to accept oral applications if appropriate given their loss mitigation offerings. While the Bureau understandably wants servicers to engage borrowers in loss mitigation early in the delinquency, it is not helpful to the borrower to require a servicer to accept an oral application when the servicer’s loss mitigation offerings require the borrower to, at some point, submit documents to have their application evaluated. When a borrower submits an oral application to a servicer, the practical effect is that the servicer is required to send the acknowledgement letter pursuant to § 1024.41(b)(2) within five days of that conversation. That acknowledgement letter will ask the borrower to provide the exact same information requested in the paper application servicers typically send to delinquent borrowers to help them apply for assistance. This results in a duplicative mailing that limits the true value of the acknowledgement letter, which should be to inform the borrower with specificity—after they have submitted some documentation—what documents and information remain outstanding before they can be evaluated for loss mitigation options. For servicers that offer streamlined loss mitigation options requiring little documentation, taking oral applications may make sense; however, most investor guidelines require the borrower to submit documentation prior to deeming an application complete.

- <u>Increase the Deadline for Acknowledging a Loss Mitigation Application</u>: The five business day timeline for acknowledging a loss mitigation application, and deeming it complete or incomplete, is operationally challenging. The time-frame would be manageable if servicers merely had to acknowledge receipt; however, in addition to ensuring the application is routed to the proper department, servicers must also conduct a preliminary analysis of the application to determine whether, under the applicable investor guidelines, the application is complete and, if not, what additional documents are required. The Bureau should either retain this time-frame and require only that the servicer acknowledge the application, or maintain the current substantive requirements but extend the amount of time a servicer has to review the application.

- <u>Allow Servicers to Consider Borrowers for Only Non-Retention Loss Mitigation Options Where the Borrower Does Not Want to Remain in the Property</u>: In certain instances, delinquent borrowers want to leave their house for reasons that are purely personal. For instance, a borrower may feel they simply cannot continue to service the debt incurred, or they may have better job prospects elsewhere and feel the need to relocate. Where a delinquent borrower expresses a clear interest in leaving their house, it makes sense for a servicer to quickly consider the borrower for a short sale or deed-in-lieu of foreclosure, rather than make the borrower submit documentation for all potential loss mitigation options—including retention options such as a loan modification. Unfortunately, § 1024.41 does not permit this. Instead, it requires a servicer to ignore the borrower's intent and consider the borrower for all available loss mitigation options. The amendments that took effect October 2017 provide some flexibility for a servicer to honor a borrower's intent, but are still quite restrictive and servicers seeking to honor a borrower's expressed intent still risk technical non-compliance with the new provision. The Bureau should amend the rule to clearly enable servicers to honor a borrower's desire not to retain the house and give servicers the option to expedite the application and evaluation process where this is the case. Doing so will reduce the borrower's burden by easing documentation requirements and will enable servicers to more quickly place borrowers into a suitable loss mitigation alternative.

- <u>Clarify Permissibility of Streamlined Loss Mitigation Options</u>: Some investors and servicers, including the GSEs, have developed streamlined loss mitigation alternatives, which enable a delinquent borrower to qualify for a loss mitigation option without having to formally apply for loss mitigation. These options can reduce borrower burden from having to assemble documentation and shorten by months the process for providing borrowers with a loss mitigation option. However, the regulation can be read to require that, where a borrower has both applied for loss mitigation and accepted a streamlined loss mitigation alternative, the servicer must continue processing the application pursuant to the requirements of § 1024.41 even though the borrower has already agreed to a loss mitigation alternative. While borrowers can be confused by the dual loss mitigation processes taking place, many servicers feel obligated to complete the § 1024.41 application procedures. The Bureau should clarify in the regulation that a consumer who accepts a streamlined offer, and who also has a loss mitigation application pending, will be considered under the regulation to have withdrawn that loss mitigation application.

- Provide Clarity Regarding When Servicers May Evaluate an Incomplete Loss Mitigation Application: Section 1024.41(c)(2)(ii) permits a servicer to evaluate an incomplete loss mitigation application if the servicer has exercised "reasonable diligence" in obtaining documents and information to complete a loss mitigation application, but the application remains incomplete for "a significant period of time under the circumstances." The lack of specificity around these vague standards, and the risk of violating the general prohibition against evaluating an incomplete loss mitigation application, has encouraged many servicers to completely forego use of this exemption. The Bureau should offer additional guidance, and perhaps a safe harbor, to enable servicers to rely on this carve out. This would result in better outreach and loss mitigation assistance for borrowers.

- Remove Refinances From the Definition of "Loss Mitigation Option": Commentary to § 1024.31 indicates that a "refinancing" can be a type of "loss mitigation option." This means that a borrower applying to refinance their loan in an effort to alleviate a delinquency may come under both the loss mitigation procedures of § 1024.41, as well as the regulatory regime for applications for new loans (*e.g.*, TRID). The Bureau should clarify that a borrower seeking to refinance an obligation, even when they are doing so to alleviate a hardship, is subject only to federal regulatory regime set up for new loan applications.

- Permit Borrowers to Waive Appeal Period: Section 1024.41(h) requires servicers who deny a borrower's loss mitigation application for a loan modification give the borrower time to appeal that denial. In certain instances, this requirement can delay a servicer's additional attempts to offer borrowers other loss mitigation assistance, such as when a borrower wants to immediately pursue a short sale or deed-in-lieu of foreclosure. To address this concern, the Bureau should create a process whereby a borrower can waive their right to an appeal. This will give servicers the confidence to move forward with other loss mitigation options rather than wait for the appeals period to expire. This is particularly critical where the borrower has a buyer interested in the property, but needs to move quickly to secure the deal.

- Clarify When Foreclosure May Proceed Where Borrower Has Already Received Benefits of § 1024.41: Section § 1024.41(f) is silent as to whether the prohibition against initiating a foreclosure prior to the 120th day of delinquency applies to situations where the borrower has submitted a complete application under the regulation and completed the evaluation process. The Bureau should clarify that a servicer may proceed with foreclosure in the event the borrower has received the procedural benefits of § 1024.41, and the borrower has failed to bring the loan current.

- Revise Foreclosure Hold Requirements to Better Reflect Realities of Interaction With Courts: Although the Bureau's rules require a servicer to take reasonable steps to place a proceeding on hold and avoid a judgment or sale of the property, certain jurisdictions, and even certain individual judges, are not receptive to foreclosure delays. Where a court refuses to permit a delay in the foreclosure action pending evaluation of a complete loss mitigation application, a servicer must simply dismiss the foreclosure action. This can impact the servicer's ability to collect on the secured debt due to various limitations such as the applicable statute of limitations or jurisdictional limits on the number of times an action may be voluntarily dismissed. The Bureau's rules should not force a servicer to dismiss a properly filed foreclosure action for the sake of compliance with § 1024.41(g). Alternatively, the Bureau could provide an exemption from complying with this section where (1) dismissal of the foreclosure would cause any portion of the underlying debt to be uncollectable due to statute of limitations issues, (2) governing law or rules limit the number of times an action can be voluntarily dismissed, or (3) a court has specifically declined to allow the servicer to voluntarily dismiss or halt the progress of a foreclosure proceeding.

5. The Bureau Should Clarify Certain Periodic Statement Requirements

- Offer Flexibility on the Disclosure of Default Servicing Fees: Section 1026.41(d)(4) requires a servicer to disclose on the periodic statement all transaction activity that has occurred since the last statement. This includes the imposition of fees or charges coming due in the prior period. While it is clear when some fees have been imposed, such as late fees, determining when a default servicing fee has been imposed, and how much that fee is, can be challenging. For example, when a loan is in default, a servicer will incur foreclosure attorney fees in connection with the loan. These costs will eventually be borne by the borrower. However, it can be difficult to determine with immediacy the amount charged, and the manner in which those fees accrue to the borrower's account. While it is critical for borrowers to know when default servicing fees are assessed to their account, the rule should provide flexibility with regard to when the fee must be disclosed on the periodic statement. The same need for flexibility holds true for reinstatement quotes.

- Clarification on Multiple Statements in Same Billing Cycle: Under the current rule, consumers who consistently make their mortgage payment after the end of the grace period, but before the next payment due date, receive two periodic statements each month. This causes unnecessary confusion for the consumer. When a consumer does not make a payment by the end of the grace period, a statement will be generated around the 17th of the month. That statement will advise the consumer of the total amount due for the next month. This amount will include the past due payment from the prior month and the next payment due. However, if the consumer makes a payment before the first of the next month (*e.g.*, the consumer makes a payment on the 26th), another statement will be automatically generated. It will show the application of that payment and state the amount now due. The Bureau should provide an interpretation that multiple statements are allowable but are not required in this scenario.

- Clarification Regarding Post Charge-Off Payments: In some circumstances, borrowers will make payments on charged off loans or servicers will receive a payment in furtherance of the settlement of the account. The Bureau should provide clarifications that the servicer is not obligated to resume periodic statements solely due to the receipt of a post-charge off payment from the borrower.

- Exempt Servicers From Periodic Statement Requirements Where Borrower in Bankruptcy Indicates Intent to Surrender the Property: A servicer's ability to communicate with borrowers in bankruptcy is extremely limited. A narrow exception exists when the property securing the lien is a principal residence. Where a borrower indicates an intent to surrender the property in connection with a bankruptcy, it is reasonable for a servicer to assume the property is not the borrower's principal residence. To ensure that the conflict between the Bureau's existing requirements in § 1026.41(e)(5)(i)(B)(4) and the discharge injunction requirements of § 524 of the Bankruptcy Code do not have to be clarified through expensive litigation, the Bureau should revise its current requirements to exempt borrowers in bankruptcy who indicate an intent to surrender the property. In this case, servicers should not be required to provide periodic statements unless the borrower opts ***in*** to continuing to receive statements. Such an amendment will ensure borrowers receive periodic statements if they wish to do so, and protect servicers from an unnecessary risk of litigation for violating the Bankruptcy Code.

6. The Bureau Should Clarify Certain Requirements Related to Successors-in-Interest

The Bureau's requirements for successors-in-interest ("SII") have only been in effect for a few months. MBA expects to have additional feedback on this aspect of the servicing rules as its members discover new complications and challenges. The SII requirements are extremely burdensome. They effectively require mortgage servicers to become experts on probate and trust laws in more than 50 jurisdictions. The cost of compliance is not a one-time effort. Servicers will need to expend ongoing costs and efforts to keep their legal research up to date with changes in probate and trust law. MBA expects to ask for significant revisions to these requirements as our servicer members identify implementation issues.

However, MBA wishes to highlight the following significant ambiguities in the rules:

- It would be helpful if the Bureau confirmed that the specifically enumerated requirements pertaining to SIIs constitute the universe of protections that must be offered to SIIs.
- Where the borrower is in bankruptcy, is the servicer permitted to send the SII borrower statements as if the SII was the borrower?
- In some situations (such as after a divorce), an account may have both a confirmed SII and a living borrower who is no longer actively involved with the loan. Does this provision allow servicers to send notices and disclosures *only* to the confirmed SII and not to the other borrower? Can the servicer issue escrow balance refunds, insurance proceeds, or other funds to the confirmed SII and not to the living customer?[46]
- The rule does not provide recognition that it takes some time for probate matters to become final, particularly with respect to intestate succession. Are servicers required to treat anyone who may have a right in the property as an SII? And what should be the approach where the property is held by a trust or in an estate, but no particular beneficiary or heir is to receive the property? Can the servicer issue escrow balance refunds, insurance proceeds, or other funds to the estate of a deceased customer rather than a SII? MBA expects it would make the most sense for the servicer to work with the trustee or executor rather than with each individual beneficiary and heir when the property is likely to be sold and the proceeds distributed.

MBA is also concerned that the SII requirements obligate servicers to make legal statements they are not actually capable of making. For example, § 1024.32(c)(1)(i) requires the SII notice to indicate that "the servicer has *confirmed* the successor in interest's identity and ownership interest in the property." Servicers should be able to indicate that they have reviewed sufficient information regarding the SII's identity and property interest to release information about the loan to the SII, and provide protections

[46] Note that MBA does not believe the BCFP has the authority to indicate whether a servicer can issue insurance proceed refunds to an SII rather than to the living borrower or the borrower's estate.

under Regulation X, but should not be mandated to make affirmative statements regarding legal determinations.

7. The Bureau Should Time-Limit and Further Clarify the Early Intervention Requirements

- <u>The Early Intervention Requirements Should Only Apply Early in the Borrower's Delinquency</u>: Although the live contact and written letter requirements set forth in § 1024.39 are labeled "early intervention," they actually require a servicer to engage in specific types of contact throughout the borrower's delinquency. The Bureau's clarifying amendments effective October 2017 were helpful in that they provided a better articulation of the rules; however, the clarification reiterated that "early intervention" obligations apply from the first missed payment through to foreclosure sale, no matter how much time passes in between. Requiring a servicer to engage in outreach month after month over the course of multiple years creates unnecessary regulatory burden and complication without a corresponding benefit to borrowers. If a borrower ignores a servicer's outreach efforts for, say, six months, it makes no sense for the servicer to be required to keep sending "early intervention" communications in hopes that something will change and the borrower will re-engage with the servicer.[47] If the borrower does choose to reengage, and actually submits a loss mitigation application, the requirements of § 1024.41 will apply, and the servicer will be required to reengage. Focusing these requirements on early periods of delinquency will also reduce the complex interplay between these requirements, the Fair Debt Collection Practices Act, and the requirements of the Bankruptcy Code. The Bureau should amend these requirements to focus on true early intervention.

- <u>Create Exemptions for Written Notification</u>: Section 1024.39(b) requires servicers to send a written notice within 45 days of the borrower's initial delinquency, and then every 180 days thereafter if the borrower remains delinquent. To avoid borrower confusion, the Bureau should create a specific cut-off date for when the "45-day" letter no longer must be sent, or create exceptions to the requirement for sending a letter. As currently written, borrowers may receive the letter at the time a loss mitigation application is pending or just prior to a foreclosure sale—two times when it is inappropriate to provide yet another disclosure regarding loss mitigation options. This results in borrower confusion without a corresponding benefit. The Bureau should revise the requirement to address this concern.

- <u>Harmonize Delinquency Definitions</u>: Comment 1024.39(a)-1.ii provides that a borrower performing under a loss mitigation plan designed to bring the borrower current on a previously missed payment is not delinquent for purposes of § 1024.39. However, this commentary appears to be at odds with the general definition of delinquency adopted as part of the 2016 amendments, as well as the fact sheet issued contemporaneously with those amendments. Those documents suggest that a temporary loss mitigation program does not modify the existing loan contract, and that a borrower may continue to be delinquent even when performing on a temporary loss mitigation option. The Bureau should harmonize these potentially conflicting statements.

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[47] MBA appreciates codification of the guidance whereby a servicer's obligations are reduced where a borrower remains unresponsive for six months, but still believes this safe harbor is difficult to operationalize throughout the entirety of delinquency.

- Exempt Call Recordings from Regulation X's Record Retention Requirements: Section 1024.38(c) requires a servicer to retain records that document actions taken with respect to a borrower's mortgage loan account until one year after the date the loan is discharged or servicing is transferred by the servicer to a transferee servicer. At present, it is unclear whether a servicer is required to retain actual call recordings, which arguably contain evidence supporting compliance with the early intervention requirements of § 1024.39(a). Retaining calls is expensive, takes up significant space on company servers, and can be extremely burdensome for servicers—particularly smaller servicers. The Bureau should consider expressly stating that a file notation indicating that an outbound call occurred is sufficient to constitute compliance with the early intervention requirements and should expressly exclude call recordings from the record retention requirements.
- Direct Servicers to Provide Delinquent Borrowers Who File for Bankruptcy Only One Written Notice During the Pending Bankruptcy Proceeding: Borrowers who file for bankruptcy are best served when they receive the written notice detailing their loss mitigation options shortly after they file for bankruptcy. It is at this critical juncture of the bankruptcy case when the borrower will be making decisions about how to proceed in bankruptcy and whether they desire to retain their property. Making this amendment to the regulation, and permitting servicers to forgo sending written early intervention notices later during the proceeding, will mitigate the risk of servicers violating a discharge injunction in instances where borrowers indicate they do not wish to retain the property.

8. *The Bureau Should Provide Guidance, and Potentially Change the Timing, with Respect to Calculating Payments on Adjustable Rate Loan Notices*

For adjustable-rate mortgage ("ARM") loans paid in advance, it is not possible to calculate the next payment due if that payment comes after the next interest rate and payment adjustment. The Bureau should provide guidance on this matter. One suggested solution is to remove the requirement to provide a billing statement until such time as the next payment amount can be calculated. This date would necessarily be at least 75 days before the next payment would be due. This approach would be helpful because most ARMs in today's mortgage market have a 45-day look back and then have 30 days to accrue interest before such interest can be collected. In the alternative, the Bureau could permit the monthly periodic statement's "amount due" to indicate "To-Be-Determined" where the loan has been prepaid beyond the date of the interest rate change.

These notices can also be confusing to borrowers because of the manner in which the effective date of the rate change and the new payment due date are presented on the disclosure. The Bureau should offer flexibility so that servicers can recite on these notices the new payment due date in both the banner of the notice as well as the body of the notice.

9. *The Bureau Should Amend Its "File Assembly" Requirement to Reflect the Significant Growth of a Servicing File Over Many Years*

Servicers are required by § 1024.38(c)(2) to maintain their servicing records in a manner that enables them to compile documents and data constituting a servicing file within five days. Servicing files grow significantly over the years. An account file may expand to thousands of pages after just a few years of servicing. After ten or twenty years, it will be extremely burdensome for servicers to assemble huge files in such a short time frame. The Bureau should amend this requirement to provide a longer time frame for servicers to assemble older servicing files.

10. The Regulation B Valuation Requirements Should Not Apply to Loss Mitigation

When the Bureau promulgated its valuation rule under the Equal Credit Opportunity Act, it declined to create an express exception for loss mitigation transactions. Rather than offering clarity on the applicability of Regulation B to loss mitigation applications, the Bureau simply indicated that "questions on coverage of [loss mitigation] transactions are best addressed with reference to the existing provisions of Regulation B."[48]

This rule requires a creditor to deliver a disclosure of the right to receive an appraisal or valuation to the applicant within three business days of application. The timing makes sense for new mortgage applications because it is consistent with a mortgage originator's obligation to deliver all the initial disclosures within three days of application. The timing does not make sense for mortgage servicers taking loss mitigation applications because they are required to acknowledge receipt of the application within five business days of application. For a servicer to comply with this requirement, it would arguably need to receive the application, send a stand-alone disclosure to the borrower regarding the right to receive a valuation three days later, and then officially acknowledge the application two days after that.

Given the tension between the requirements of § 1002.14 and the mortgage servicing rules, the Bureau should issue guidance expressly exempting mortgage servicers taking loss mitigation applications from the requirements of § 1002.14.

E. Limited English Proficient Consumers

The industry has a strong desire to serve Limited English Proficient ("LEP") individuals but needs clarity and consistency around the applicable standards. One of the most significant concerns is whether institutions must provide translated documents and/or disclosures. Although many institutions offer accommodations such as interpreters or bilingual staff, few offer translated documents due to operational, legal, and cost considerations.

Some regulations require translations (Remittance Transfer Rule, Prepaid Accounts Rule), but many do not. For example, the TRID Rule includes a Spanish translation, but does not mandate its use. Most of the regulations the Bureau inherited from other regulators permit, but do not require, the use of translated disclosures.

The best approach may be found in CFPB's Fall 2016 *Supervisory Highlights,* which seems to support non-English marketing *without* translated documents as long as "the extent and limits of language services provided" is disclosed. This gives institutions flexibility to reach LEP populations, including groups too small to justify document translation costs. The disclosure of "the extent and limits of services provided" allows consumers to factor the availability of such services into their decision making, and take any steps they feel are necessary to protect themselves (e.g. engaging an interpreter to assist).

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[48] Disclosure and Delivery Requirements for Copies of Appraisals and Other Written Valuations Under the Equal Credit Opportunity Act (Regulation B), Bureau of Consumer Financial Protection, 78 Fed. Reg. 7215, 7223 (Jan. 31, 2013).

If Bureau instead concludes that translated documents are required when serving LEP consumers, it should provide guidance on when such disclosures are required and which languages must be supported. The Bureau should also provide translated model disclosures that will serve as a safe harbor.

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MBA appreciates the opportunity to provide our views on how to improve the Bureau's adopted regulations. The RFI process begun by the Bureau addresses many of the concerns outlined here, and MBA will continue to be actively engaged with our members to provide the Bureau with robust commentary. We welcome the opportunity to continue to meet with you and your staff to discuss these proposals as well as specific regulatory changes that would benefit consumers, industry and other stakeholders. Please feel free to direct any questions or comments to me directly, or to Pete Mills, Senior Vice President, Residential Policy and Member Engagement (pmills@mba.org), or Justin Wiseman, Managing Regulatory Counsel (jwiseman@mba.org).

Sincerely,

Pete Mills
Senior VP Residential Policy & Member Engagement