MBa®

MORTGAGE BANKERS ASSOCIATION

February 23, 2018

The Honorable Mick Mulvaney
Acting Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Dear Acting Director Mulvaney,

The Mortgage Bankers Association (MBA)[1] appreciates the Bureau's recent call for public suggestions on ways to improve the Bureau's operations and associated requests for information (RFIs). MBA looks forward to expressing our views on the published RFIs and forthcoming ones. We also appreciate the recent meeting you hosted, and welcome the Bureau's commitment to both meet its statutory consumer protection mandate while constructively engaging with industry for thoughts on how to best accomplish its goals. In that spirit, MBA would like to offer general thoughts on cross-cutting reforms that would enable the Bureau to better serve both industry and consumers. Many of those reforms are outlined in MBA's "CFPB 2.0" white paper released last year. The key recommendations from that paper emphasize:

Guidance Rather Than Regulation by Enforcement

Guidance should be the Bureau's primary tool for regulatory interpretation.

Rather than "regulation by enforcement", MBA recommends that the Bureau shape industry practices through guidance. Enforcement actions should not be used to announce new standards or interpret rulemakings for stakeholders. New standards should only be established through rulemakings, while guidance should be used to provide definitive interpretations and clarity on how entities can be in compliance with existing rules. Guidance can and should be communicated in a variety of ways, including advisory opinions, bulletins, and statements of policy, written answers to frequently asked questions and as part of the supervision process. Such a regime leaves enforcement actions to be used as a predictable deterrent for clearly proscribed conduct.

Guidance should be reliable.

On previous occasions when the Bureau has issued guidance, its value has been negated by disclaimers making the guidance non-binding on the Bureau. Guidance is only valuable when it can be relied upon to ensure compliance with the rule and MBA therefore asks that the Bureau

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[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mba.org.

stand by its guidance. Businesses should be confident that they can achieve regulatory compliance by following guidance from their regulators. The Bureau should not hold a party liable for an act or omission that was permissible under the Bureau's guidance.

Guidance should be designed with stakeholder input.

Rulemaking and guidance priorities should be informed by stakeholder input. Communication with stakeholders can provide the Bureau with a better understanding of industry practices, consumer needs and highlight the areas where guidance is most impactful. The outreach process should be formalized in a manner which provides for regular meetings with and calls for information from a diverse group of interested parties. This type of discourse is particularly important when determining the amount of time needed by industry to respond to regulatory changes. In addition to identifying future priorities and gauging implementation timeframes, feedback solicited through broad-based industry engagement should inform the Bureau's rulemaking lookbacks.

Guidance after rulemaking is necessary.

Industry engagement is crucial following the publication of significant new regulations because this is when uncertainty is at its greatest and clarification most useful. To help eliminate this uncertainty, the Bureau should invite questions after rulemaking and periodically thereafter. The Bureau should endeavor to provide timely answers to questions with authoritative written guidance. By doing so, the Bureau can provide businesses with confidence in how to fully comply with the law as they do the work to update their systems and train their personnel to adapt to the changes.

Changes should be announced in advance.

Changes to rules or guidance should be announced with adequate advance notice. Notice should be communicated in the same form as the initial rule or guidance. Absent a specific finding of an urgent need to dispense with advance notice, changes should apply prospectively.

The regulatory process should be clearly defined.

Given the obvious importance of predictability in the regulatory regime, MBA asks the Bureau to adopt a clearly defined regulatory process going forward. The Bureau could accomplish this by issuing a proposed rule for public comment that:

- defines each type of rule and guidance the Bureau will provide;
- sets out the criteria the Bureau will use to select each type;
- establishes the process and timelines for how it will issue and revise each type of rule and guidance; and
- creates guidelines for ensuring regulated entities have time to comply.

The regulatory process should also take into account the significant technical changes that are occurring across the financial services space. The Bureau should consider a defined process to review and modernize the existing regulatory structure in a manner promotes responsible innovation.

Greater emphasis on due process and consistency in enforcement

There should be emphasis on greater due process in enforcement.

In addition to adopting an emphasis on guidance, the Bureau should reform its enforcement processes. The recent announcement calling for a review of the Bureau's use of CIDs is a welcome step in this direction and we hope further reforms will not unduly burden the free speech rights of those under investigation by the Bureau. Other important reforms outlined in *CFPB 2.0* include honoring statutes of limitations in administrative proceedings and establishing a civil money penalty matrix to provide consistency in enforcement. Finally, the Bureau should evaluate the tone and content of its enforcement press releases to ensure that they fairly and impartially relay the particulars of a case to the public without sensationalism.

Provide a definition for "abusive" under UDAAP.

The Bureau's authority under the Dodd-Frank Act to prosecute "unfair, deceptive, and abusive acts and practices" ("UDAAPs") has become one of its chief enforcement tools. Despite its frequent use, there remains a great deal of uncertainty surrounding the conduct the Bureau classifies as a "UDAAP." This is particularly true with respect to the "abusive" prong of UDAAP. While regulations and case law exist which can illuminate the "unfair" and "deceptive" prongs, the new "abusive" act or practice standard has not been defined. MBA recommends that the Bureau address this uncertainty by providing more clarity describing the circumstances under which the Bureau will bring "abusive" cases under UDAAP.

Other Key Regulatory Principles and Concerns

Maintaining a level playing field for market participants

MBA appreciates that one of the key objectives of the CFPB's strategic plan is to "enforce federal consumer financial law consistently, without regard to the status of a person as a 10 depository institution, in order to promote fair competition." As we noted in the joint trades meeting last week, this principle is particularly important in the mortgage market where the diversity of business models, channels, and charters/licenses varies significantly. Consumers and competition benefit when rules are applied uniformly across the market, and regulatory arbitrage is mitigated. Exemptions from rules for whole categories of institutions based on size, or charter should be avoided whenever possible. Rules should be written with sufficient clarity and appropriate cost-benefit analysis so that all institutions can comply regardless of the size of the company.

Rules Should Not Encroach on Business-Purpose, Commercial Real Estate Transactions

While the CFPB's focus is on the protection of consumers, the CFPB's reach extends beyond consumer-facing transactions in some instances. For example, the current Home Mortgage Disclosure Act (HMDA) regulations broadly sweep in multifamily, business-purpose loans. We believe that such loans should not be subject to HMDA reporting.

Multifamily loans are business-purpose, commercial real estate loans made on income-producing properties and are often non-recourse. Multifamily borrowers are often corporations, limited liability companies and partnerships, rather than natural persons. As a result, because HMDA is designed for single-family loan reporting, reporting on business-purpose multifamily lending transactions provides limited value, while at the same time, requiring reporting institutions to make significant investments -- without a commensurate policy benefit. Accordingly, we believe that business-purpose loans secured by multifamily properties should be exempt from HMDA reporting requirements.

Address the Consumer Complaint Database.

Finally, the public-facing Consumer Complaint Database (Database) remains a significant concern for our members. During the nearly six years since its inception, significant concerns have emerged about the veracity of the information published on the Database. Other than confirming a relationship with the accused business, the CFPB does not verify the information in the complaint. The inability to confirm complaint data can result in the same complaint filed multiple times and, based on lenders' experiences, complaints based on purely false information. More fundamentally, the Database presents mere allegations of misconduct at the same level as actual instances of misconduct.

The publication of inaccurate complaint information has consequences. It causes unfair reputational harm to businesses and the financial industry as a whole. Faulty complaint information is also problematic because it's used by the Bureau to determine enforcement and supervisory priorities. It therefore presents a real risk of misleading what's supposed to be a 'data-driven agency'.

MBA urges the CFPB to strongly consider removing the public-facing Database. In addition to the previously discussed concerns, the Bureau has yet to show how the benefit of publishing consumer complaints outweighs its cost. Such an analysis is particularly relevant given the success and widespread use of similar, private sector services offered by companies such as Yelp and Google reviews. Unlike the CFPB's Database, private providers show a more complete picture by offering consumers positive and negative comments. Moreover, these companies have a commercial incentive to promote accuracy. A similar incentive does not exist in a government run complaint database.

Conclusion

MBA appreciates the opportunity to provide our views on how to improve the regulatory and enforcement processes of the Bureau. The RFI process begun by the CFPB addresses many of the concerns outlined here, and MBA will be an actively engaged with our members to provide the CFPB 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,

David H. Stevens, CMB
President and Chief Executive Officer