MORTGAGE BANKERS ASSOCIATION

April 6, 2016

The Honorable Richard Shelby
Chairman
Committee on Banking, Housing, and Urban Affairs
534 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Sherrod Brown
Ranking Member
Committee on Banking, Housing, & Urban Affairs
534 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Shelby and Ranking Member Brown:

We are writing in advance of testimony that Consumer Financial Protection Bureau (CFPB) Director Richard Cordray is scheduled to deliver before the Senate Banking Committee on Thursday, April 7. Since its inception, MBA and its members have worked closely with the Bureau to ensure its rules governing the mortgage finance industry effectively protect consumers, but do not unduly restrict credit availability to qualified borrowers. In fact, the industry has a history of productive collaboration with the CFPB that has resulted in better outcomes for both consumers and the housing finance market. For example, the Ability to Repay/Qualified Mortgage implementation is an excellent model for the implementation of new and complex regulations.

However, recently the CFPB has taken a number of actions that we believe will have an adverse impact on consumers. Specifically, we wish to highlight two key concerns that we have raised with the Bureau over the past year:

1) The use of consent decrees and administrative decisions to make changes in existing rules or guidance, rather than using rulemaking or published written guidance that is prospectively applied, and

2) The issuing of major new rules and then failing to provide additional written guidance to aid consistent implementation by the industry.

Regulation by Enforcement

Five years after the enactment of Dodd-Frank, enforcement actions present very significant challenges to the residential mortgage industry. Unfortunately, the CFPB has recently appeared to take a “regulation by enforcement” approach, offering industry participants little guidance and simply instituting claims against them — often using new interpretations of old rules.

Enforcement without guidance exposes industry participants to “regulation by enforcement action” and opens up activities not previously believed prohibited to potential challenge by state regulators, plaintiffs’ attorneys, as well as the government.

In particular, two concerning themes have emerged since the CFPB became the primary regulator of the mortgage market: 1) the CFPB is reluctant to issue written authoritative guidance even to clarify its own rules; and 2) the CFPB utilizes an enforcement-driven approach to redirect behavior in the marketplace.

With respect to the first theme, it is critically important that consumers and lenders have a clear understanding of the CFPB's rules and interpretations of those rules. Unfortunately, despite lenders' good faith efforts to comply with the CFPB's rules—including using compliance management systems, seeking advice from outside counsel, and seeking clarity directly from the CFPB—ambiguities remain and answers, even among CFPB employees, are inconsistent. Oral guidance, whether provided privately in response to individual inquiries or on CFPB's webinars does not address the need for authoritative written guidance issued broadly to industry.

With respect to the second theme of changing prior interpretations of existing rules through enforcement actions, CFPB's current practice provides no constructive notice (much less an opportunity to comment) when the CFPB's view of market behavior has changed. Industry is left to parse through every enforcement action to determine if it contains new views or enforcement theories. This is particularly burdensome for small lenders that do not have an army of lawyers on staff to conduct these reviews. Should the CFPB wish to redirect market behavior, lenders need clear rules or official supervisory guidance that puts market participants on notice of new interpretations, and affords firms an opportunity to adapt without having to guess about the standards set forth in a CFPB order. Moreover, lenders would rather have a complete understanding of the CFPB's expectations in a rule or guidance than wait for a series of costly enforcement actions, especially if there is a possibility that they will be the subject of such enforcement.

This lack of guidance from the CFPB is now straining firms with exemplary compliance records, driving up costs, and forcing some to consider closing their doors. It also results in an inconsistent application of the rules of the road in the marketplace, as some companies must revise business arrangements while others await further guidance.

There are two specific examples where the Bureau's approach is resulting in inconsistent application of the rules, slowing adoption, and raising costs of compliance – all of which results in higher consumer costs and unevenly applied consumer protections.

Marketing Services Agreements (MSAs)

Last July, MBA formally requested that the CFPB issue clear rules regarding the use of MSAs under the Real Estate Settlement Procedures Act (RESPA). MSAs are agreements between settlement service providers. Under such agreements, one party markets the services available from the other to its customers for fair compensation. Based upon decades of Department of Housing and Urban Development (HUD) guidance concerning key sections of RESPA, many lenders have entered into marketing arrangements with other settlement service providers that closely follow the guidance provided by HUD to ensure compliance with these standards.

However, since the Dodd-Frank Act transferred responsibility for RESPA from HUD to CFPB, the CFPB has published key consent orders and decisions under RESPA that diverge from prior

HUD rules and interpretations. The CFPB has argued that HUD's interpretations were erroneous, and that the prior written guidance was not authoritative. These cases have in turn raised questions on whether a host of other arrangements — including brokering of loans and arrangements with third parties to allow consumers to shop for settlement services — are still permissible under the CFPB's evolving views of RESPA.

As a result, it is entirely unclear whether the RESPA cases, for example, are specific to their facts or whether they embody a new approach altogether. In some cases, lenders have unwound previously compliant arrangements out of fear of enforcement, and have lost business as a result. Other lenders believe that their arrangements are compliant based on the prior guidance and the opinions of counsel. The environment is forcing lenders to choose between market risk (losing business as a result of shuttering an effective business arrangement) and compliance risk, simply for lack of clear guidance.

Although CFPB responded to industry requests for guidance via a bulletin, it stopped short of opining on whether MSAs are permissible, provided only a laundry list of risks and concerns, and offered no guidance on what measures could be taken to mitigate those concerns. Moreover, the guidance contained a disclaimer that it was a "nonbinding general statement of policy articulating considerations relevant to the Bureau's exercise of its supervisory and enforcement authority."

Because RESPA is a criminal statute, the uncertainty caused by the change in position needs a clear, authoritative and prospective resolution. Accordingly, we continue to request that the CFPB propose new rules to clarify the applicability of RESPA to MSAs through notice and comment rulemaking.

Know Before You Owe/TILA RESPA Integrated Disclosure

In addition to its divergence from prior interpretation of law, CFPB has also refused to provide timely written guidance on new rules, such as its "Know Before You Owe" rule (i.e., TRID).

The TRID rule became effective on October 3, 2015. At its core, TRID represents the largest restructuring of the residential mortgage application-to-closing process in nearly 40 years. Implementing this new rule required major changes to industry systems and business processes as well as thousands of hours of training. In light of this complexity, the CFPB announced prior to the October 3 effective date that it would take into account "good faith efforts" by industry to comply with the rule. Unfortunately, the CFPB did not provide a timeline for this good faith window, nor did it define the scope of good faith compliance.

While industry appreciates the establishment of a diagnostic "good faith" period for implementation of the rule, it is clear that many questions – some of which could not have been anticipated – still need be addressed. Since the TRID rule's implementation, a significant number of issues have emerged — mostly due to lingering misperceptions, differing interpretations, and technical ambiguities in the regulation. These are not matters with important policy or consumer protection implications; they are technical issues arising out of an incredibly complex rule. However, because the rule contains significant penalties for failure to comply, lenders and investors need clear written guidance. Such guidance will speed uniform adoption of the rule, ensure a consistent consumer experience and eliminate impediments to the sale of loans in the secondary market.

Conclusion

MBA believes that the CFPB, when implementing new rules or changing the interpretation of existing rules, should adopt clear "rules of the road" through the issuance of official, written interpretative rules, supervisory guidance and/or compliance bulletins. This clarity will facilitate efficient compliance, reduce implementation costs and ensure consistent consumer treatment across the market.

Sincerely,

Bill Killmer
Senior Vice President, Legislative and Political Affairs