MORTGAGE BANKERS ASSOCIATION

May 14, 2018

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Request for Information Regarding Enforcement Processes, Docket No. CFPB-2018-0003

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"). In addition to offering comments below on the Bureau's enforcement process, 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 or rules 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 we appreciate that they have been addressed in all 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 BCFP's future direction to ensure it serves consumers and creates access to financial opportunity. MBA applauds this and the additional RFIs to the extent that they are the beginning of this important conversation.

[1] The 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.

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To that end, MBA acknowledges that enforcement powers are an important tool for any effective regulator. However, it is critical that the Bureau's enforcement function be used as a tool for remedying true—as opposed to speculative—consumer harm stemming from a legal violation. Enforcement should not be used as an instrument to press an industry to adopt "best practices" or other standards the BCFP would like the industry to adopt but are not required by law or regulation. In MBA's view, especially for a heavily regulated industry like mortgage lending and servicing, the adoption of "rules" through the one-off enforcement process turns compliance into a guessing game. It unfairly asks companies to compare their facts with those stated in an enforcement order; or, even more unfairly, it requires compliance professionals to speculate as to what the next enforcement action may bring. It also turns compliance into a competitive agent in the market, providing companies with a high tolerance for enforcement risk with advantages over those with more conservative views. A more traditional rulemaking processes is better adapted to ensure that the BCFP understands the costs as well as the benefits of a possible new rule, and that industry has effective notice and time to comply with new requirements. In this letter, MBA sets forth general recommendations regarding the Bureau's use of its enforcement authority, and then comments on each of the specific items set forth in the RFI.

I. General Recommendations For Reforming the CFPB's Enforcement Process

A. The BCFP should interpret the laws over which it has authority through rulemaking and guidance rather than public enforcement action.

The BCFP has made no secret about the fact that, over the course of its short existence, it has relied on its public enforcement actions to establish novel interpretations of the laws it administers. Although the BCFP has actively utilized its rulemaking authorities, particularly where mandated by the Dodd-Frank Act, it also has attempted to create law through enforcement. This method of making public policy creates significant uncertainty in the mortgage industry, which ultimately negatively impacts those the Bureau sets out to protect—the consumers. The MBA respectfully requests that the Bureau redouble its efforts to set forth industry expectations for complying with consumer protection laws by issuing clear rules, and effectively supporting those rules with publicly available guidance.

As contemplated by Congress when it enacted the Administrative Procedures Act, agencies should set forth their interpretations and implementation of law through a participatory rulemaking process. The rulemaking process is orderly; stakeholders representing various viewpoints inform it, and when concluded, it sets forth requirements applicable to all regulated entities. The Bureau also has authority to expound on its rules through advisory opinions, bulletins, statements of policy, and written answers to frequently asked questions. Orderly rulemaking provides the public with fair notice about what rules say, mean, and require.

By contrast, public consent orders are applicable to a single set of facts—ones that are often contested. While the public settlement documents may indicate some of the facts that led to the alleged violation, other industry participants must speculate as to what facts were omitted from the consent order, or what facts were critical in distinguishing the settling entity's practices from the practices of others in the industry. Consent orders also govern conduct that may have occurred well before the date of public disclosure. Years can go by before the industry discovers via consent order that a particular practice has fallen out of favor with the Bureau. A policy of rulemaking by enforcement forces industry participants to read significance into the tea leaves offered by fact sections of consent orders rather than abide by guidance that offers a clearer path toward compliance.

The D.C. Circuit's decision in *PHH Corp. v. CFPB* makes clear the downside of engaging in regulation through enforcement. In that case, the Bureau filed a notice of charges against PHH regarding practices that had long been accepted as consistent with HUD's interpretation of RESPA. The D.C. Circuit found that the BCFP's enforcement-driven departure from HUD guidance, which the industry had relied on for decades, amounted to an unlawful retroactive reversal of the government's prior position. As the court noted in finding that the change in policy interfered with PHH's due process rights, "[r]etroactivity – in particular, a new agency interpretation that is retroactively applied to proscribe past conduct – contravenes the bedrock due process principle that people should have fair notice of what conduct is prohibited."[2]

These due process concerns are also present with regard to the Bureau's exercise of its enforcement authority to prohibit unfair, deceptive, or abusive acts or practices ("UDAAP"). There remains a great deal of uncertainty regarding what acts or practices the Bureau considers UDAAP, and in particular what constitutes an "abusive" act or practice. MBA recommends that the Bureau address this uncertainty by describing in rulemaking or public guidance the circumstances under which the Bureau will bring "abusive" cases under its UDAAP authority.

B. Official public communications made by the Bureau after a settlement, including press releases and consumer-facing remediation materials, should accurately reflect the terms of the settlement and nothing more.

Consent orders are negotiated documents agreed to by the BCFP and the settling party. Contents or materials the BCFP publishes regarding consent orders should be carefully crafted to accurately and objectively reflect the terms of those consent orders. The BCFP Ombudsman studied this issue after receiving complaints concerning the Bureau's practice of embellishing details in press releases announcing its consent orders. The Ombudsman's 2015 report found that, among other things, (i) there were "some words used with legal meanings or interpretations in the press releases that were not in the consent orders" and (ii) there was "some summarization in the press releases that resulted in certain factual elements seeming more important than they otherwise might, even if factually correct."[3] Given that the Bureau will not negotiate the terms of the press release that

[2] *See PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc ruling)
[3] CFPB Ombudsman Annual Report to the Director (December 2, 2015).
https://files.consumerfinance.gov/f/201512_cfpb_report_ombudsman-office.pdf

accompanies a consent order, and that the press release may be the only document quoted in news stories about a particular settlement, it is critical that the Bureau's press releases accurately reflect the content and meaning of consent orders. Press releases that deviate from the exact content set forth in the consent order sow confusion for those seeking to understand the consent order, and can unfairly sully the settling company's reputation.

Another important post-settlement communication is the letter that accompanies a remediation check to a customer. Where the Bureau administers the settlement remediation, it should take care that the communication to the consumer squares exactly with the terms of the settlement agreement. For instance, if the terms of the settlement indicate that the settling entity did not admit that it violated the law, it would be inappropriate for a remediation letter to indicate or imply that the entity violated the law. In addition, where a series of violations are alleged, the Bureau should ensure that the cover letter for the refund check clearly explains why the check is being provided. Verbiage that deviates from the terms of the consent order often leads to consumer confusion, which in turn generates unwarranted complaints or reputational harm for the institution.

C. Remediation requests should be tied more directly to the nature of any injury to the consumer.

Technical consumer protection laws and regulations, which often set forth procedural and disclosure requirements for regulated institutions, can be critical for helping consumers understand the financial products they purchase and make informed financial decisions. However, the harm to consumers associated with violations of these laws and regulations can be small, difficult to quantify, or even nonexistent. Courts are wrestling with this issue right now, as they interpret the boundaries of the U.S. Supreme Court's decision in *Robbins v. Spokeo*, which supports the notion that not all violations of consumer financial protection laws result in harm to consumers.[4] While enforcement of these laws is importsant, penalties must be reasonable. The CFPB should refrain from seeking remediation amounts divorced from the actual harm related to the particular violation, which results in a windfall award to consumers.

In addition to concerns voiced by industry stakeholders, two recent court decisions take issue with the Bureau's excessive remediation requests. In *CFPB v. CashCall*, the Bureau sued an installment lender for deceptively originating loans void under state law and sought a restitution award of over $235 million. The Bureau argued that the $235 million was equal to the total interest and fees collected on the void loans.[5] The court struck down the entirety of the BCFP's request because the Bureau failed to support any claims for the defendant's unjust gains or determine whether the settlement would result in a windfall to the borrower. In another recent case, *CFPB v. Nationwide Biweekly Administration*, the court found that the company engaged in a deceptive act but struck down the entirety of the BCFP's request for $73.9 million in restitution. The Bureau claimed the

[4] *Robbins v. Spokeo, Inc.*, 136 S. Ct. 1540 (2016).
[5] *See* Minutes Findings of Fact and Conclusions of Law, *CFPB v. CashCall, Inc.*, No. 2:15-cv-7522 (C.D. Cal Jan. 19, 2018).

amount sought represented the sum of the fees collected by the defendant in connection with the program in question. The court was unmoved and found that the restitution requested was not tailored to only those consumers who may have been deceived, and did not account for the truthfulness of the company's disclosures. The court ultimately concluded that the "CFPB has not offered a basis for any restitution that might be limited in some way so as to make it a just result."[6]

This issue has been particularly acute for mortgage servicers, a group that has frequently been subject to restitution requests that lack a basis in the actual harm incurred. For instance, in the default-servicing context, the BCFP claimed that technical violations of its mortgage servicing rules constitute wrongful foreclosure. According to the Bureau, this justified per-violation remediation amounts of up to $150,000. While it is important that consumers receive timely loss mitigation assistance, a servicer that has evaluated a seriously delinquent consumer for an alternative to foreclosure—even where that evaluation is slightly delayed—has met the spirit of the protections set forth in Regulation X and has certainly not improperly taken a consumer's house. In MBA members' experience, the BCFP's remediation requests are often both unrelated to the technical violation of Regulation X at issue, and unsupported by RESPA jurisprudence pertaining to the calculation of damages under the statute.

Other aspects of the Bureau's process for calculating remediation amounts are equally problematic. MBA is concerned with the Bureau's selective use of institutional data to inflate the number of violations identified to justify public consent orders and generate larger remediation amounts. In addition, settlement amounts are often augmented by the Bureau's strategy of bootstrapping UDAAP violations to practices directly governed by provisions of other laws. Alleging UDAAP where there is already a more specific black-letter regulation undermines the clarity and uniformity of such a framework.

Given that the BCFP has sought to ensure lenders provide consumers with complete remediation in its enforcement investigations, it ought to change its policy of not allowing the settling entity to require that consumers release related claims as part of accepting government-directed remediation. By failing to do so, the Bureau encourages follow-on private litigation on claims that have been fully remediated by the BCFP's enforcement division. Conversely, where private litigation or other enforcement authorities have already addressed claims, the Bureau should not use its enforcement authority to extract additional settlement amounts.

MBA supports remediation where it is appropriate and tied to the harm identified. However, MBA disagrees with extracting excessive remediation amounts, which bear little resemblance to actual harm, and are intended to deter other industry participants. This is a particularly capricious practice when, as has been the case in the past, the Bureau seeks to use these consent orders and associated remediation amounts to set the rules of the road rather than use the rulemaking process.

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[6] *See* Opinion and Order, *CFPB v. Nationwide Biweekly Admin. Inc.*, No. 3:15-cv-2106, at 21 (N.D. Cal. Sept. 8, 2017).

II. Recommendations on the Specific Items Raised by the Bureau in the RFI

1. *Communication between the Bureau and the subjects of investigations, including the timing and frequency of those communications, and information provided by the Bureau on the status of its investigation;*

Consistent and meaningful communication between Bureau Enforcement counsel and institution counsel is essential for helping institutions provide Bureau investigators with necessary information. While it is difficult to ensure absolute consistency in communication practices across enforcement attorneys, maintaining internal guidelines regarding transparency is critical. The MBA encourages the Bureau to set forth clearer expectations regarding what can be disclosed to institutions with regard to (1) the substance of the investigation and (2) the status of the investigation. As a general principle, the Bureau should provide the target institution with as much information as possible. The following recommendations will make the enforcement process more efficient, and help save resources for both the Bureau and the institutions that are subject to investigations:

- <u>Clarify the nature and scope of the investigation earlier in the investigation</u>: Our members have found that some enforcement attorneys are open to explaining the Bureau's concerns driving a particular investigation, but some are less open as to the nature of the inquiry. This leaves targets with the need to speculate about the Bureau's theories, including the potential causes of action and timing of an investigation. As a result, targets must spend even more time and money to assess the severity of the inquiry and figure out what information to provide the Bureau. No one benefits from such guessing games. They draw out investigations and delay remediation to consumers impacted by the practice in question.

- <u>Enhance communication regarding the status of an action</u>: Enforcement attorneys provide very little communication regarding the status of an action. While MBA understands that it takes time to gather materials and develop enforcement theories, the Bureau should recognize that pending enforcement matters create significant disruption at the target institution. Once production is complete, the Bureau often goes silent for months, without any indication as to whether the documents provided were appropriate, helpful, raise concerns, or satisfy the request. These open-ended inquiries create significant problems for the target institution, and make it hard for the institution to develop future business plans.

- <u>Create a process to facilitate the transfer of matters that start in enforcement to supervision</u>: The Bureau should develop a process whereby enforcement attorneys can refer a matter back to the Bureau's supervision area (or for investigations initiated directly by the enforcement area, transfer to supervision for the first time). While the Advisory Review Committee process provides a mechanism for determining whether matters originating from supervisory examinations will be moved through the confidential supervisory process or through a public enforcement action, the Bureau lacks a similar process for determining whether enforcement matters are better dealt with through a confidential supervisory action. Such a process would allow investigations that uncover violations of law that do not justify public enforcement to be referred to supervision. Doing so would help end investigations in a timely manner while also ensuring that the issue is addressed.

2. *The length of Bureau investigations;*

MBA is aware that some Bureau investigations have taken years to resolve. While MBA understands the importance of a full investigation, it is also important for regulated entities to have timely resolution of investigations that have stalled or been abandoned by the Bureau. Managing and responding to an investigation is, in and of itself, a costly endeavor. The mere existence of an investigation—particularly one that is in a stalled and unclear status— has a significant economic impact on a mortgage market participant. Mortgage market participants are constantly undergoing due diligence, whether it is an acquiring entity looking to purchase a lender or servicer, a loan investor considering whether to do business with a lender or servicer, a warehouse lender considering whether to extend credit or even a vendor or counterparty assessing its own risk. It is impossible to assess risk when a counterparty does not know the status of an investigation, particularly whether the investigation has concluded. This uncertainty will likely prompt the counterparty to pass up business opportunities that may be beneficial to the mortgage market and consumers. With this in mind, MBA offers the following recommendations to enhance the process for closing investigations:

- <u>Require periodic internal reviews of investigations to determine whether to proceed, close, or handle through supervisory process</u>: As noted above, MBA understands that investigations can take time to develop; however, institutions are placed in a difficult and costly spot when investigations have stalled without explanation. MBA also expects that some investigations that begin in an enforcement posture may be better resolved through the non-public supervisory process. Creating a periodic internal review of open investigations will help ensure that only investigations with merit remain open, and will facilitate the timely resolution of investigations that lack merit or are better handled through supervision.

- <u>Create a more comprehensive investigation termination process</u>: The Bureau's Enforcement Policies and Procedures Manual states that enforcement staff should send a "Termination Letter" to a CID subject or NORA recipient as soon as it is decided that the underlying matter will not trigger an enforcement action. As a practical matter, it seems that Bureau staff tend to leave matters pending even when the investigation has ceased. When the Bureau does issue a Termination Letter, the institution may still not receive an explanation for why the matter was terminated. This information is important. At the very minimum, the Bureau should provide an explanation in connection with the Termination Letter.

3. ***The Bureau's Notice and Opportunity to Respond and Advise process, including:***
    a. ***CFPB Bulletin 2011-04, Notice and Opportunity to Respond and Advise (NORA), issued November 7, 2011 (updated January 18, 2012) and available at http://files.consumerfinance.gov/f/2012/01/Bulletin10.pdf, including whether invocation of the NORA process should be mandatory rather than discretionary; and***
    b. ***The information contained in the letters that the Bureau may send to subjects of potential enforcement actions pursuant to the NORA process, as exemplified by the sample letter available at http://www.consumerfinance.gov/wp-content/uploads/2012/01/NORA-Letter1.pdf;***

The current NORA process is seriously deficient and should be overhauled. The NORA process begins at the culmination of the Bureau's investigation—a critical juncture where both parties already have invested significant time, energy, and resources into the investigation. Given how important this juncture is to determining the resolution of the investigation, the Bureau should provide institutions with a clear picture of the legal basis for the Bureau's allegations as well as adequate time for institutions to develop a thoughtful response to those allegations. Unfortunately, that is not the case. Rather, institutions are forced to develop rushed responses to insufficiently articulated allegations. As such, MBA offers the following recommendations to enhance the NORA process:

- Mandate a consistently applied NORA process: CFPB Bulletin 2011-04, which describes the NORA process, indicates that the decision to provide an institution with a NORA is entirely discretionary. The Bulletin states that Enforcement can dispense with the NORA process where a case involves ongoing fraud or where Enforcement needs to act quickly, but does not provide any additional guidance. As such, Enforcement is free to work toward a settlement, or even litigation, before the institution receives notice of the issue at hand and an opportunity to provide the Bureau with its own arguments about the case. Institutions should not be forced into settlement discussions prior to receiving a full understanding regarding the nature of the alleged violations.

- Develop a NORA process that provides institutions an adequate notice of charges: CFPB Bulletin 2011-04 states that a NORA will describe the "nature of the subject's potential violations"; however, MBA understands that this is often not the case. Delivery of the NORA often begins with a phone call from enforcement staff that provides a high-level summary of the allegations. This oral presentation often contains few, if any, of the facts that enforcement staff are relying on to support those allegations. The written NORA often provides institutions with even fewer details, merely citing statutory language with no specific allegations about illegality. Company counsel must therefore summarize the content of the oral presentation to confirm whether there is a common understanding of the allegations at hand. This process stands in stark contrast with the practice at other prudential regulators of providing institutions with a detailed report on the conclusions of the investigation. It also undermines the goal of creating conditions to arrive at a fair and appropriate result in favor of tilting the scales in favor of an enforcement action.

- Provide additional flexibility regarding the time and length of responses: After months or even years spent handling an investigation, institutions are typically provided just fourteen days to respond to a NORA. This means that, after producing potentially millions of pages of documents, an institution has fourteen days to research legal arguments, draft a response, and ensure that all appropriate parties at the institution have reviewed and provided input on the response. Even where the Bureau is willing to provide a short extension, adequately developing a response in such a limited amount of time can be difficult. This time constraint unnecessarily creates a crisis mentality at the institution, thereby hindering the institution's ability to develop a carefully crafted and thoughtful response. Given the stakes involved, the Bureau should provide institutions with at least 30-45 days to respond. A nuanced approach, whereby the deadline varies based on the complexity and scope of the underlying allegations, would be more appropriate than an arbitrary across-the-board policy. The Bureau should also consider lifting the 40-page limit on NORA responses. The NORA response is often the last chance an institution has to present its story before going to court. The institution should not be constrained in making its case by an arbitrary page limit.

- Institutions should not be restricted from disclosing the existence of a NORA: As noted by the ACLU in its comment letter on the BCFP's proposal related to the disclosure of records and information, the Bureau's proposed limitation on public disclosure is a prior restraint on speech that violates the very core of the First Amendment.[7] While entities may decide to remain silent about their receipt of CIDs or NORA letters, they may also have good reasons—even contractual or

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[7] ACLU Comment Letter, Dkt. No. CFPB-2016-0039; RIN 3170-AA63 (October 20, 2016). https://www.regulations.gov/document?D=CFPB-2016-0039-0024.

ethical reasons—to share them with third parties such as investors, lenders, potential merger or acquisition partners, stockholders, or other third parties.

4. ***Whether the Bureau should afford subjects of potential enforcement actions the right to make an in-person presentation to Bureau personnel prior to the Bureau determining whether it should initiate legal proceedings;***

MBA recommends that the Bureau always afford subjects of potential enforcement actions the right to make an in-person presentation to Bureau personnel prior to the Bureau determining whether it should initiate legal proceedings. MBA also recommends that meeting attendees include senior Bureau officials and, as appropriate, employees of the institution.

Institutions under investigation currently have very limited rights to make presentations to the Bureau. Under current BCFP policy, it appears that the opportunity to present concerns to the Bureau is at the will of each Bureau investigator. When permitted, such presentations are often limited to only the line-level attorneys conducting the investigation. They do not involve Bureau attorneys with greater decision-making authority who might approach an investigation or enforcement action with fresher eyes and a broader view of the Bureau's priorities. On the other side, attendance at these meetings is limited to an institution's outside counsel. Employees are generally not welcome to participate.

Opening up meetings to more senior Bureau officials who have more insight into the Bureau's policy priorities will bring new perspectives to the investigation and ensure that a broader audience at the Bureau has access to the institution's arguments. Enabling employees from the institution to present to the Bureau will more effectively illuminate the institution's practices, and facilitate a dialogue with enforcement staff regarding the documents and information underpinning the Bureau's decision to initiate an investigation. MBA believes that requiring the Bureau to entertain in-person meetings attended by a broad range of participants will help facilitate timelier and more appropriate resolution of enforcement actions.

5. ***The calculation of civil money penalties, consistent with the penalty amounts and mitigating factors set out in 12 U.S.C. 5565(c), including whether the Bureau should adopt a civil money penalty matrix, and, if it does adopt such a matrix, what that matrix should include;***

When it created the Bureau, Congress established a list of mitigating factors that the Bureau must consider when making determinations for assessing civil money penalties;[8] however, the Bureau has not adopted public guidance indicating how it implements this Congressional directive. The Bureau should adopt a publicly available civil money penalty matrix consistent with that of the prudential banking regulators and should incorporate recent developments in case law into its consideration when setting civil money penalties. The matrices maintained by prudential

[8] 12 U.S.C. § 5565(c).

regulators include specific factors to consider when determining the appropriate level of a penalty. These matrices help ensure civil money penalties are imposed in a consistent and equitable manner.

The Bureau should also take into consideration recent court decisions that have challenged the Bureau's penalty calculation. In *CFPB v. Cashcall*, the Bureau sought to impose a second tier penalty for each day of the violation. The court disagreed with the Bureau's assessment and instead assigned a first tier penalty.[9] The court held that the defendant did not recklessly violate the Consumer Financial Protection Act because it sought legal counsel in structuring a loan program that complied with applicable law, even if the ultimate judgment indicated that defendants did not comply with the law. Higher-tier penalties should not be assessed against target institutions that do not know their conduct is impermissible—either on the basis of legal advice or because the conduct was only found to be impermissible in the context of "regulation by enforcement."

Providing clearer guidance and transparency regarding the manner in which civil money penalties are calculated will result in a more efficient allocation of resources for both the Bureau and the institution. An institution presented with a huge proposed civil money penalty will be more likely to negotiate or litigate the issue if the penalty calculation process is unclear. This needlessly draws out the process or leads to unnecessary litigation. Cash Call, a payday lender, saved $40 million in civil penalties alone by requesting that the court assess the manner in which the Bureau arrived at its civil money penalty assessment.

6. ***The standard provisions in Bureau consent orders, including conduct, compliance, monetary relief, and administrative provisions;***

Bureau enforcement staff should be given more flexibility to craft and negotiate the specific terms of consent orders. This is particularly true with respect to standard injunctive relief provisions. Because of the length of investigations, institutions often take the remedial action requested by the Bureau well before a consent order is published. Despite being highly relevant information, this fact is not often expressly acknowledged in the consent order, which instead relies on standard injunctive relief provisions. The Bureau should recognize that each situation is unique and allow staff to tailor injunctive relief provisions to take into account enhancements an institution has already made to its processes.

The Bureau frequently requires settling entities to employ third party monitors and independent consultants. Unfortunately, such monitors and consultants, hired by the institution but acting at the behest of the agency, have substantial financial incentives to run up their bill. This results in enormous additional costs for the entities that hire them. These entities lack a means to keep costs in check or bring the independent review to an end. In most cases, either the entity's compliance and internal audit team, or the Bureau's supervision and enforcement staff, are best suited to oversee compliance with the Bureau's orders. The use of independent monitors should be an option of last resort, reserved for the few instances where the entity and the Bureau truly do not have the knowledge or expertise needed to ensure compliance.

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[9] *See* Minutes Findings of Fact and Conclusions of Law, *CFPB v. CashCall, Inc.*, No. 2:15-cv-7522 (C.D. Cal Jan. 19, 2018).

Along these lines, consent orders often require an institution's board of directors to review and approve actions taken by the institution to satisfy requirements of the consent order. Bureau staff should be empowered to amend these provisions and expectations so that a board's consent order obligations align with the board's periodic meetings.

7. ***The manner and extent to which the Bureau can and should coordinate its enforcement activity with other Federal and/or State agencies that may have overlapping jurisdiction.***

Where multiple agencies—federal or state—are investigating an institution's conduct, it is helpful for those agencies to coordinate their activities. However, there is a significant difference between a multi-agency investigation and a multi-agency coordinated investigation. If multiple agencies are investigating an entity, they should truly coordinate their enforcement activity. This means having a single point of contact to lead the investigation, submitting consistent requests for documents and information, coordinating contacts with the institution's outside counsel, and aligning investigational priorities. Multi-agency investigations where there is only limited coordination makes responding to agency requests significantly more complicated, costly and burdensome.

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MBA appreciates the opportunity to provide our views on how to improve the enforcement processes of the Bureau. The RFI process begun by the CFPB addresses many of the concerns outlined here, and MBA will continue to be 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
Mortgage Bankers Association