



MORTGAGE BANKERS ASSOCIATION

June 25, 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 Inherited Regulations and Inherited Rulemaking Authorities, Docket No. CFPB-2018-0012

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 inherited regulations and rulemaking authority for inherited rules. 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 begins 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 best to 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.

¹ 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.

I. General Recommendations For Reforming the Bureau's Approach to Inherited Regulations and Inherited Rulemakings

A. Utilize the Rulemaking Process Rather Than the Enforcement Process to Develop Clear Regulations That Put Industry Participants on Notice of the Bureau's Rules and Expectations

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—or “regulation by enforcement.” For example, the Bureau's attempt to apply its reinterpretation of Section 8 of the Real Estate Settlement Procedures Act (“RESPA”) through enforcement led to a protracted legal battle in which the United States Court of Appeals for the District of Columbia concluded that the Bureau's retroactive application of its reinterpretation violated the constitutional due process rights of regulated entities:²

Retroactivity—in particular, a new agency interpretation that is retroactively applied to proscribe past conduct—contravenes the bedrock due process principle that the people should have fair notice of what conduct is prohibited. As the Supreme Court has emphasized, individuals should have an opportunity to know what the law is and to conform their conduct accordingly.... Due process therefore requires agencies to provide regulated parties fair warning of the conduct a regulation prohibits or requires.³

The “regulation by enforcement” strategy is both unsuccessful and inconsistent with the Bureau's statutory mandate to ensure that “markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.”⁴ When a competitive and heavily regulated industry does not have clear lines defining permissible and impermissible conduct, the resulting confusion can lead to a market in which participants compete based on their willingness to accept compliance risk rather than on their ability to provide consumers with the best products and services.

The Bureau's interests—and those of the consumers it is empowered to protect—would be much better served by significantly expanding the canon of official interpretations. This form of contemporaneous guidance is often found in the preamble section of the final rule. It includes statements detailing the background and purpose of the regulation which provide valuable insight on the rule's application. Official interpretations should be subjected to the public notice and comment rulemaking process. The rulemaking process is orderly and informed by stakeholders representing the viewpoints of both industry and consumers. When concluded, the results set forth requirements applicable to all regulated entities. Those seeking to comply with the rules can look to the regulatory history of the rules for additional guidance.

The Bureau also has authority to provide guidance on its rules through advisory opinions, bulletins, statements of policy, written answers to frequently asked questions, and other means where appropriate. Significant changes and revisions should be open for public comment to allow stakeholder input to ensure the Bureau's guidance comports with the realities experienced by consumers and industry participants.

² *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016).

³ *Id.* at 46 (internal citations and quotation marks omitted).

⁴ 12 U.S.C. § 5511(b)(5).

The Bureau should use this authority following the promulgation of regulations to provide additional direction on acceptable, but not exclusive, methods of compliance.

While we applaud the Bureau's decision to end regulation by enforcement, it is not enough to stop applying new interpretations to past practices without adequate warning. The Bureau has an affirmative obligation to regularly re-examine its regulations to ensure industry has clear standards for complying with consumer protection laws.⁵ This is particularly important for inherited rules. The industry has undergone significant changes in the decades since these rules were first conceived. Recent advances in technology have only quickened the pace of change. The Bureau must ensure its regulations and regulatory guidance reflect these changes. In the past, the Bureau billed itself as a 21st century agency. In accordance with its mandate, the Bureau should endeavor to create 21st century rules.

B. Conduct a Comprehensive Review to Identify Regulatory Requirements That Should Be Refreshed to Reflect Technological Advances in the Mortgage Market

Although Congress and the responsible agencies vastly expanded federal consumer protection laws and regulations over the years, the general regulatory framework was established in the 1970s. While the regulations have been updated in some respects (most notably due to the Electronic Signatures in Global and National Commerce Act of 2000 ("E-Sign Act"), they remain fundamentally tied to the assumption that disclosures are printed and physically transported. Mortgage lenders and other consumer financial service providers must balance the legal necessity to comply with these rules against the business necessity to meet consumer demand for fast and efficient products and services. Mortgage lenders and servicers are also increasingly required to manage not only these federal requirements, but also state-law overlays.

The regulatory framework should be updated to reflect the impact of technology on the mortgage market. The need to modernize is particularly acute in the areas of marketing and disclosure practices, the loan application process, and data privacy and information sharing.

In the marketing and disclosure context, today's regulatory requirements and standards reflect a time when businesses mailed advertisements or published them in newspapers. These practices differ greatly from those of the modern world where the Internet dominates. Advertisements have become ubiquitous in email, online, and smartphone applications. The contrast between the practices contemplated by the rules and modern realities will only increase as the trend toward digital continues. It is therefore crucial for the Bureau to begin the process of modernizing the regulatory framework. Comprehensive updates must cover Regulations B, V, X, and Z so as to clarify that a link from a 'trigger term' (e.g. "only 20% down") to the required language can satisfy the "clear and conspicuous" standard set forth in Regulation Z. The BCFP also should consider permitting electronic disclosure of privacy notices, disclosures required under the Homeowners Protection Act, and the requirement to display the Equal Housing Lender logo.

The Bureau should also revisit the "prominence" and "proximate" standards. These standards should reflect the manner in which today's consumers receive information. Language should satisfy the

⁵ 12 U.S.C. § 5511(b)(3) (noting that one of the objectives of the Bureau's rulemaking authority is to ensure that "outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens").

“prominence” standard (i.e. be considered prominent) when it is at least the same size as a trigger term or, where it is provided through a separate link to another website, when the link is as prominent as the trigger term. Instructions should satisfy the proximity standard when a link to the website containing the full disclosure is located in close proximity to the trigger term, or is hyperlinked to the trigger term. Such updates are consistent with consumer expectations and the growing use of smartphones, tablets, and computers.

In light of society's evolving expectations on privacy and information sharing, the Bureau should update the rules regarding which parties must receive certain disclosures. For instance, Regulations V requires that, if a consumer's credit score is used in a credit decision and more than one consumer applies for credit, each consumer must receive separate risk-based pricing notices separately.⁶ When customers apply for credit on a mobile or web platform and consent to electronic disclosures, the lender still must mail paper versions to ensure each co-applicant can privately view their individual notice. Despite the borrower's choosing to submit an electronic application, the rule prevents the lender from providing the disclosures electronically. This results in a poor consumer experience and needlessly adds to the lender's regulatory burden. The Bureau should revisit these requirements and adopt a rule such as that applicable to adverse action notices under Regulation B. For multiple applicants, Regulation B states, “notification need only be given to one of them but must be given to the primary applicant where one is readily apparent.”⁷

Along these same lines, the Bureau should revisit guidance on the secondary use of account review data for marketing purposes, which allows credit data to be used only to offer an improvement or upgrade to an existing account. The Bureau should provide flexibility in defining an improvement or upgrade to allow financial institutions to offer customers a full array of options. For FCRA purposes, a refinance or a home equity line of credit should qualify as an improvement or upgrade to an existing mortgage loan, which will help lenders better tailor product offers to their customers.

In short, the regulatory framework was established at a time when lenders advertised on paper, took applications in person (or via telephone), maintained paper files, and communicated with customers via snail mail. Refreshing this framework to reflect the immense technological advances in communication over the past 40 years—while maintaining the core protection principles set forth by Congress in the 1970s—will enable the mortgage market to continue to best serve customers and expand access to credit. When the Bureau conducts this review, it should also consider the importance of maintaining a strong unified federal standard to avoid duplicative and sometimes state law conflicting obligations.

As the Bureau adopts new processes for overseeing regulatory compliance, it must be cognizant of the regulatory burden associated with requiring, or even encouraging, regulated parties to use new Bureau software or portals to facilitate compliance. To the extent new software is required to achieve compliance with a future regulatory regime, that software should be treated as part of the broader regulatory regime. Software requirements should receive thorough testing and be subjected to notice and comment rulemaking under the Administrative Procedures Act.

⁶ See 12 C.F.R. § 2255.75(c) which requires separate notices except in circumstances where the notice does not include the applicant's credit score and the applicants have the same address.

⁷ 12 C.F.R. § 1002.9(f).

II. Specific Recommendations for Modifications to the Inherited Regulations

A. RESPA Section 8

The weaknesses of “rulemaking through enforcement” can be found in the Bureau’s efforts to administer the prohibition on kickbacks found in Section 8 of RESPA. While intended to improve compliance within the mortgage industry, the Bureau’s enforcement actions caused uncertainty for participants who wished to comply and created a competitive advantage for those willing to take compliance risk. The industry needs clear rules of the road so that participants can compete on a level playing field.

In its enforcement actions, the Bureau consistently disregarded RESPA’s express statement that Section 8 does not prohibit “the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.”⁸ For example, in its enforcement action against PHH Corporation, the Bureau took the position that payments for services as a quid pro quo for referrals violate RESPA even if the payments are equal to the reasonable market value for the services.⁹ The D.C. Circuit did not agree. In emphatically rejecting the Bureau’s interpretation, the court concluded “Section 8(c) specifically bars the aggressive interpretation of Section 8(a) advanced by the CFPB in this case” and was “designed to provide certainty to businesses in the mortgage lending process.”¹⁰

The court stated that “[t]he CFPB’s interpretation flouts that statutory goal and upends the entire system of unpaid referrals that has been part of the market for real estate settlement services.”¹¹ The court further explained:

[T]he answer is commonsensical: If the payment to the lender-affiliated reinsurer is more than the reasonable market value of the reinsurance, then we may presume that the excess payment above reasonable market value was not a bona fide payment for the reinsurance but was a disguised payment for a referral. Otherwise, there is no basis to treat payment of reasonable market value for the reinsurance as a prohibited payment for the referral—assuming, of course, that the reinsurance was actually provided. In other words, in the text and context of this statute, a bona fide payment means a payment of reasonable market value.¹²

Consistent with the D.C. Circuit’s decision, the Bureau should amend Regulation X and its official interpretations to provide clear guidance on the permissibility of the following common industry business arrangements. While the Bureau cannot address every factual scenario, guidance on the most prevalent will significantly reduce uncertainty. The majority of industry participants will seek to operate within the safe harbors created by the Bureau’s guidance. This additional clarity will protect consumers and create a more level playing field for industry.

⁸ 12 U.S.C. § 2607(c)(2).

⁹ *PHH Corp. v. Consumer Fin. Prot. Bureau*, 2015 WL 6774568, at 32 (D.C. Cir.) (Respondent’s Brief).

¹⁰ *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 42 (D.C. Cir. 2016), *reh’g en banc granted, order vacated* (Feb. 16, 2017), *on reh’g en banc*, 881 F.3d 75 (D.C. Cir. 2018).

¹¹ *Id.*

¹² *Id.* at 41.

1. *Marketing Services Agreements*

In its October 8, 2015 Compliance Bulletin, the Bureau noted that it had “grave concerns” that the industry’s use of Marketing Services Agreements (“MSAs”) evaded Section 8 of RESPA.¹³ Rather than responding to these “grave concerns” by providing guidance on what types of marketing arrangements were permissible, the Bureau simply stated that “a more careful consideration of legal and compliance risk arising from MSAs would be in order for mortgage industry participants generally.”¹⁴ Adding to the confusion, the same bulletin states that there may be significant risk of a RESPA violation “even where the terms of the MSA have been carefully drafted to be technically compliant with the provisions of RESPA.”¹⁵ The bulletin also ominously warned that “[t]he Bureau encourages all mortgage industry participants to consider carefully RESPA’s requirements and restrictions and the adverse consequences that can follow from non-compliance.”¹⁶

Instead of issuing vague statements of policy accompanied by the threat of adverse consequences, the Bureau should amend Regulation X and its official interpretations to address MSAs, provide clear illustrations of what is and is not permitted, and provide a safe harbor for companies that comply with such guidance.

2. *Joint Advertising Agreements*

Prior to the BCFP inheriting rulemaking authority for RESPA, the U.S. Department of Housing and Urban Development (“HUD”)—which previously had authority over the statute—issued interpretive rules that addressed advertising and marketing activities. One of these rules established that payments for advertising related to settlement services were permissible provided they satisfy certain standards.¹⁷ Much of HUD’s RESPA guidance came through informal channels such as answers to frequently asked questions.

As with MSAs, the Bureau’s treatment of joint marketing agreements undermined the plain language of the statute and, without a formal rulemaking, called into question the permissibility of joint marketing agreements, a practice that was common in the industry.¹⁸ The Bureau should amend Regulation X and its official interpretations to address joint advertising agreements, provide clear illustrations of what is and is not permissible, and provide a safe harbor for companies that comply with such guidance. In particular, the Bureau should revive HUD’s informal guidance through formal amendments to Regulation X, and provide specific examples of permitted and prohibited activities that address online advertising.

¹³ CFPB Compliance Bulletin 2015-05 (Oct. 8, 2015).

¹⁴ *Id.* at 5.

¹⁵ *Id.* at 4-5.

¹⁶ *Id.* at 4.

¹⁷ *See, e.g.*, 75 Fed. Reg. 36271, 36272-3 (June 25, 2010). We note that the Bureau has confirmed that it will continue to follow and apply such policy statements until it takes further action, and it has not yet taken any action to repeal or replace the June 25, 2010 interpretive rule. *See* 76 Fed. Reg. 43569, 43570 (July 21, 2011) (“[F]or laws with respect to which rulemaking authority will transfer to the CFPB, the official commentary, guidance, and policy statements issued prior to July 21, 2011, by a transferor agency with exclusive rulemaking authority for the law in question (or similar documents that were jointly agreed to by all relevant agencies in the case of shared rulemaking authority) will be applied by the CFPB pending further CFPB action.”).

¹⁸ Consent Order, *In the Matter of Prospect Mortgage LLC*, File No. 2017-CFPB0006, at 13 (Jan. 31, 2017) (stating that Respondent’s use of co-marketing agreements provided a means for it to be paid for referrals).

3. *Desk Rentals*

Similar to joint advertising agreements, the Bureau's enforcement actions have called into question the permissibility of desk rental arrangements, another formerly common industry practice.¹⁹ Currently, it is unclear how to structure a permissible desk rental arrangement. The Bureau should amend Regulation X and its official interpretations to address desk rentals, provide clear illustrations of what is and is not permitted, and provide a safe harbor for companies that comply with such guidance.

4. *Lead Generators*

Bureau enforcement actions have also called into question the permissibility of the practice of purchasing lists of leads from lead generation companies. As above, the Bureau should amend Regulation X and its official interpretations to address lead generation activities, provide clear illustrations of what is and is not permitted, and provide a safe harbor for companies that comply with such guidance.

B. Equal Credit Opportunity Act

Regulation B, which implements the Equal Credit Opportunity Act ("ECOA"), should be updated to reflect the immense changes that have occurred in lending since its enactment in 1974. The manner in which mortgage loans are marketed—as well as the manner in which applications are taken and evaluated—is completely different from the business practices in place when ECOA and Regulation B were adopted. The Bureau should modernize Regulation B in a way that reflects modern business realities while also ensuring faithful adherence to the underlying statute.

1. *BCFP Should Review its Use of Disparate Impact in Light of the Supreme Court's Inclusive Communities Decision*

MBA supports regulatory efforts to root out illegal discrimination. Consistent with its statutory authority, the Bureau should ensure its oversight of the mortgage industry focuses on preventing illegal discrimination and ensuring equal treatment for all credit applicants.

There are a number of issues with the Bureau's use of disparate impact theory to pursue fair lending enforcement matters under ECOA. ECOA prohibits intentional discrimination on a protected basis.²⁰ By contrast, the Supreme Court's recent ruling in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* found that the Fair Housing Act's statutory language indicates that disparate impact liability could be derived from the language due to statutory text that focuses on both intent and effects:

“Together, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose... Congress' use of the phrase “otherwise make unavailable” [in the Fair

¹⁹ *Id.* at 8.

²⁰ See 15 U.S.C. § 1691.

Housing Act] refers to the consequences of an action rather than the actor's intent. This results-oriented language counsels in favor of recognizing disparate-impact liability.²¹

ECOA does not contain such "effects" based language.²² Moreover, the decision provides further support to this conclusion in light of the strong consideration the Court gave to the report of the Kerner Commission, which was closely connected to the enactment of the Fair Housing Act but was not related to the enactment or amendment of ECOA.²³ In the 1990's, in order to provide for an additional level of consistency among the banking regulators with respect to whether ECOA allowed for a disparate impact theory, but without a textual analysis that would appropriately support the creation of a cause of action, the Federal Reserve Board adopted guidance in the Official Staff Commentary to Regulation B that found that the disparate impact theory was applicable under ECOA. However, the statutory language had not changed and it had not previously, nor does it now, support the use of disparate impact to prove a violation of ECOA. As a result, the Bureau should amend the existing Official Staff Commentary to state that disparate impact is not available under ECOA.

If the Bureau decides not to clarify the unavailability of disparate impact under ECOA, it should ensure the official interpretation of ECOA reflects the disparate impact standard under the Fair Housing Act articulated in the Supreme Court's *Inclusive Communities* decision.²⁴

Under the first prong of the disparate impact framework, the plaintiff must prove a prima facie case of discrimination (i.e. that the challenged practice had a disparate impact on members of a protected class). This causality requirement is essential to satisfying the first prong of a disparate impact claim. The Court in *Inclusive Communities* engaged in a detailed discussion of the safeguards "necessary to protect potential defendants against abusive disparate-impact claims."²⁵ The Court stated that to "protect[] defendants from being held liable for racial disparities they did not create[,] the plaintiff must satisfy a "robust causality requirement" that shows a specific policy caused a statistical disparity.²⁶ The Court notes that "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity."²⁷

Under the second prong of the disparate impact framework, the burden shifts to the defendant to show the practice in question has a sufficient, non-discriminatory justification. The Supreme Court has noted (in a prior decision) that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the . . . business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet."²⁸ The Court explained that "[g]overnmental or private policies are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers[.]'"²⁹ This is because defendants "must not be prevented from achieving legitimate objectives."³⁰

²¹ 576 U.S. ___, 135 S. Ct. 2507, 2518, 2519 (2015). (Internal citations omitted).

²² See, e.g., Peter N. Cubita & Michelle Hartmann, *The ECOA Discrimination Proscription and Disparate Impact—Interpreting the Meaning of the Words That Actually Are There*, 61 BUS. LAW 829 (2006).

²³ 576 U.S. ___, 135 S. Ct. 2507, 2516 (2015).

²⁴ *Id.* at 2518.

²⁵ *Id.* at 2524.

²⁶ *Id.* at 2523.

²⁷ *Id.*

²⁸ 490 U.S. 642, 659 (1989).

²⁹ 135 S. Ct. at 2524, citing 401 U.S. 424, 431 (1971).

³⁰ *Id.*

Where the defendant meets the burden of demonstrating a business justification, the plaintiff can only prevail by showing there is a less discriminatory alternative to the practice in question. Under *Wards Cove Packing Co., Inc. v. Atonio*, the less discriminatory alternative must be “equally effective” as the challenged practice.³¹ The Court emphasized that before rejecting a “business justification,” a court “must determine that a plaintiff has shown that there is an available alternative practice that has less disparate impact and serves the entity’s legitimate needs.”³² Significantly, the Court clarified that the plaintiff bears the burden of showing a less discriminatory alternative in the third step of the burden-shifting framework.

The Bureau should reexamine the scope of ECOA’s anti-discrimination protections in light of Supreme Court precedent and faithfully implement the Supreme Court’s mandate that “disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system.”³³

2. *BCFP Should Exempt Mortgage Servicing Practices from the Scope of ECOA*

When the Bureau adopted its Regulation X mortgage servicing rules, it created an application and evaluation process for loss mitigation applications in 12 C.F.R. § 1024.41. In many ways, the process mirrors the requirements set forth in ECOA and Regulation B. Just as Regulation B does for extensions of credit, Regulation X now defines what constitutes an application for loss mitigation, sets forth requirements for the evaluation of an application, and creates specific procedures for application denial. In promulgating its mortgage servicing rules, the Bureau failed to clarify whether the requirements of Regulation B apply to the loss mitigation process. As a result, servicers must rely on guidance from a 2009 Federal Reserve letter describing the applicability of Regulation B to HAMP loan modifications.³⁴

The requirements of Regulation B, and in particular the notification requirements at 12 C.F.R. § 1002.9, further muddy the waters. Why they explicitly apply to the origination process, they may also apply to mortgage servicing practices. When the Bureau promulgated its ECOA valuation rule, 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 merely indicated that “questions on coverage of [loss mitigation] transactions are best addressed with reference to the existing provisions of Regulation B.”³⁵ The regulatory uncertainty created by the uncomfortable overlap between these two regulations causes unnecessary operational difficulties for servicers seeking to ensure compliance with all applicable requirements.

To address these concerns, the Bureau should simply exempt applications taken in the mortgage servicing context from the requirements of ECOA and Regulation B.

³¹ 490 U.S. at 661.

³² 135 S. Ct. at 2518 (internal quotations and alterations omitted).

³³ *Id.*

³⁴ Federal Reserve Board Consumer Affairs Letter 09-13 (December 4, 2009), available at <https://www.federalreserve.gov/boarddocs/caletters/2009/0913/caltr0913.htm>.

³⁵ Disclosure and Delivery Requirements for Copies of Appraisals and Other Written Valuations Under the Equal Credit Opportunity Act (Regulation B), Consumer Financial Protection Bureau, 78 Fed. Reg. 7215, 7223 (Jan. 31, 2013).

3. *Make the Following Additional Technical Changes to ECOA and Regulation B*

- Definition of “application”: The Bureau should harmonize the definitions of “application” contained in the various mortgage lending regulations, and provide additional guidance regarding what communications qualify as an “application.” While the text of Regulation B provides discretion to the lender to define an “application,” the commentary seemingly strips lenders of this discretion by inferring that any written or oral request or inquiry pertaining to credit may constitute an application. MBA expects that many lenders are overly cautious and likely send adverse action notices that are not required under the rule. Providing additional clarity would eliminate unnecessary regulatory burden and reduce the likelihood of consumer confusion.
- Limit e-consent: The Bureau should remove the current requirement in Regulation B that lenders must obtain e-consent under the E-Sign Act prior to providing an adverse action notice under 12 C.F.R. § 1002.9 electronically. This amendment would align the Regulation B requirements with the FCRA’s adverse action requirements that permit electronic delivery of adverse action notices without e-consent.
- Reasons for denial: The Bureau should clarify that it is not a regulatory violation to provide the consumer with more than four reasons for the adverse action on their application. As the use of alternative data becomes more common, it may become difficult to distinguish the “primary” reason for denial from other relevant reasons for denial. Therefore, providing more than four reasons for denial may be helpful to the consumer.

C. Mortgage Loan Originator Transitional Authority

The recently enacted Economic Growth, Regulatory Relief, and Consumer Protection Act (S. 2155) includes an important amendment to the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (the “SAFE Act”).³⁶ The amendment provides authority for an individual to act as a mortgage loan originator (“MLO”) for 120 days if (1) the individual is a registered MLO who becomes employed by a state-licensed mortgage company, or (2) the individual is a state-licensed MLO who becomes employed in a different state.

By way of background, it is important to note that the Bureau, in Bulletin 2012-05, responded to inquiries from state regulators regarding whether states may, consistent with the SAFE Act, permit MLO transitions.³⁷ While the 2012 Bulletin clarified that a state may provide a transitional license to an MLO with a valid out-of-state license, a state could not provide a transitional license for a bank employed registered MLO who leaves a federally regulated depository to act as a loan originator while they are obtaining a state license.³⁸

The new law resolves this difference, which created unfair impediments to job seekers wishing to work for a state-licensed company. Specifically, the SAFE Act now states that to obtain transitional authority these registered MLOs must maintain good standing and meet the following requirements:

³⁶ 12 U.S.C. § 5101 *et seq.*

³⁷ CFPB Compliance Bulletin 2012-05 (Apr. 19, 2012).

³⁸ *Id.* at 2-3.

1. Has not had an application for an MLO license denied, or had an MLO license revoked or suspended in any governmental jurisdiction;
2. Has not been subject to, or served with, a cease and desist order in any government jurisdiction or under 12 U.S.C. § 5113(c), which provides cease and desist authority to the BCFP Director;
3. Has not been convicted of a misdemeanor or felony that would preclude licensure under the applicable state law;
4. Has submitted an application to be a state-licensed MLO in the application state; and
5. Was registered in the Nationwide Mortgage Licensing System and Registry ("NMLS") as an MLO during the one-year period preceding the date on which the application is submitted.

The law also provides states with 18 months following enactment to implement these provisions. At the end of this period, all states must allow transitional authority for all MLOs regardless of employer. Some states, however, will be ready to implement the new federal law much sooner and there should be an implementation path available to those states. For example, Ohio, Virginia, and North Carolina enacted laws to allow state-to-state transitions. These states' laws also include provisions to permit, once the federal SAFE Act was amended, transitions from federally regulated to state-regulated companies. Additionally, other states have enacted laws permitting state-to-state transitions (*e.g.* New Hampshire and South Carolina). Other states are likely to follow given the change in federal law.

The 18-month implementation period was requested by state regulators to ensure sufficient time to make the necessary changes to the NMLS system as well as to enable all states to be ready to implement the law. MBA urges the Bureau to meet as expeditiously as possible with the Conference of State Bank Supervisors, which maintains the NMLS system, to discuss making the system available more quickly for those states that are already prepared and for those states that will soon be ready. The BCFP should promptly withdraw Bulletin 2012-05 and also issue expedited written guidance to make clear that while all states must implement transitional authority in 18 months, states may implement the law sooner if they are able to do so.

D. Truth in Lending Act

The CFPB Should Create Ability to Repay Regulations for PACE.

The CFPB should implement the ability-to-repay provisions of the recently passed banking bill that apply to Property Assessed Clean Energy (PACE) loans and clarify that PACE loans must generally comply with the regulations governing all mortgages. The harm caused by a PACE loan that a borrower cannot repay is the same as with an unaffordable mortgage loan — loss of the property. For this reason, homeowners should have the right to pursue TILA remedies for any violations.

Serious problems have emerged in the rapidly growing market for PACE loans. These loans become part of the property tax assessment and are repaid through the tax process when property taxes are due and paid. PACE providers rely on this loophole to claim that these loans are not covered by Regulation Z or TILA. This has the effect of depriving homeowners of critical protections for large loans that are often unaffordable. Homes are threatened due to the ability of a taxing authority to foreclose for non-payment. PACE loans often have little connection to significant energy savings and are aggressively marketed by door-to-door contractors targeting seniors. These salespeople frequently make false or deceptive claims

about free government programs or promise savings that do not materialize. Given these questionable sales tactics and the potential for foreclosure upon default, door-to-door contractors should not be able to satisfy consumer notification requirements by providing disclosures through an electronic tablet while concurrently having the homeowner sign the contract and waiver. PACE contracts should provide for full amortization and homeowners should receive monthly statements.

PACE loans should only be deemed to satisfy the ability to repay standard where they have subordinate lien status or, where not provided for under state law, other measures that result in a similar outcome. First lien holders must not lose priority status to a subsequent PACE loan. They must receive protection and be held harmless, including having no reduction in their proceeds, such as a reduced sales price in the event of foreclosure. Subordinating the PACE lien is crucial to enforcing the ability-to-repay requirement as it gives the creditor an incentive to ensure the consumer can afford to repay the PACE loan as well as the existing mortgage.

CFPB Should Address Issues with the 404 and Rescission Notices.

Although most of MBA's comments regarding TILA were made in the "adopted regulations" comment letter (Docket No. CFPB-2018-0011), MBA wishes to submit an additional comment pertaining to the "404 Notice." When a mortgage loan is sold, transferred or assigned to a third party, the new creditor-owner must provide written notification of the transfer to the borrower.³⁹ This requirement was mandated by Congress's Helping Families Save Their Homes Act of 2009. While well intentioned, the notice does not accurately communicate the difference between loan ownership and loan servicing. Consumers who receive the notice may not understand that the party performing loan servicing (e.g. collecting payments) may not be the owner of the loan. This causes confusion when the borrower contacts the loan owner to discuss issues related to loan servicing. Given the disclosure's limited use, the Bureau should reduce the regulatory burden of providing this letter by creating a very basic model form that contains standardized language that is easy to implement. The form should also underscore the fact that the owner of the loan likely will not be in a position to have substantive conversations with the borrower regarding the account and that the servicer will maintain this information.

The Bureau also should adopt a single rescission form for mortgage loans. This would help eliminate system challenges with identifying cash out refinancings from the same creditor. Modifying model form H-8 to reflect the alternative language in model form H-9, or revamping model form H-8 entirely, will result in more useful information being provided to consumers.

³⁹ 12 C.F.R. § 1026.39

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MBA appreciates the opportunity to provide our views on how to modernize or improve the rules inherited by the Bureau from other agencies. The RFI process begun by the Bureau addresses many of the concerns outlined here, and MBA will continue to actively engage with our members to provide the BCFP 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 Justin Wiseman, Managing Regulatory Counsel (jwiseman@mba.org).

Sincerely,

A handwritten signature in black ink that reads "Stephen A. O'Connor". The signature is written in a cursive, slightly slanted style.

Stephen A. O'Connor
Senior Vice President
Public Policy and Industry Relations
Mortgage Bankers Association