



MORTGAGE BANKERS ASSOCIATION

May 24, 2018

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

Re: Request for Information Regarding the Bureau External Engagements, Docket No. CFPB-2018-0005

Dear Ms. Jackson,

The Mortgage Bankers Association (“MBA”) 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 external engagements, 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 to best orient the BCFP’s future direction to ensure it serves consumers and creates access to financial opportunity. MBA applauds this effort and the additional RFIs to the extent that they are the beginning of this important conversation.

The BCFP’s external engagements are an important component of the Bureau’s oversight of the mortgage market. External engagement is an essential and mutually beneficial strategic function that results in better-informed and more effective policies, projects, programs and services. Effective stakeholder engagement provides Bureau decision makers with access to critical industry information and expertise. As a “data-driven agency,” access to this information is essential. Given the complexities of the mortgage lending market and the challenging issues it faces, the BCFP must strive to ensure that it receives input from diverse and varied viewpoints.

In this letter, we provide two important suggestions on how to improve the Bureau’s external engagements with the mortgage industry: (1) that the Bureau create an advisory council focused

on the mortgage industry and (2) that external engagements account for technology-driven developments in the mortgage lending space.

I. Create a Housing Finance Advisory Council

MBA urges the Bureau to establish an advisory council focused on housing finance (“Housing Finance Advisory Council”). A Housing Finance Advisory Council would advise and consult with the Bureau in the exercise of its functions under the Federal consumer financial laws as well as provide information on emerging practices in the housing finance industry, including regional trends, emerging concerns, and other relevant information. The Council would function solely as an advisory body, and in compliance with the provisions of the Federal Advisory Committee Act. Members of the Council would be selected to represent mortgage lenders of various sizes, geographical profiles, and business types including depository and non-depository institutions as well as loan servicers and subservicers, consumer groups and industry trade associations.

CFPB has in the past formed its advisory councils under the Federal Advisory Committee Act (FACA) and is now required by statute to do so. Under FACA, an agency may form an advisory committee when doing so is “in the public interest in connection with the performance of duties imposed on that agency by law.”¹ FACA recognizes that such committees “are frequently a useful and beneficial means of furnishing expert advice, ideas, and *diverse* opinions.”² FACA’s implementing rules provide clarity on the public interest requirement stating that an agency may create a discretionary advisory committee only when the agency concludes that doing so “is essential to the conduct of agency business and when the information to be obtained is not already available through another . . . source”³ Reasons supporting the establishment of an advisory committee include the occurrence of “deliberations [that] will result in the creation . . . of policies, or guidelines affecting agency business” or “[t]he advisory committee’s recommendations will provide an important additional perspective or viewpoint affecting agency operations.”⁴ The proposed role for a Housing Finance Advisory Council meets these criteria.

An Advisory Committee Focused on the Mortgage Industry is Essential to the Conduct of BCFP Business

The Dodd-Frank Act focused heavily on the mortgage industry and the Bureau’s actions to date have continued that emphasis. It is difficult to identify a consumer financial service that has been more impacted by Bureau actions than the housing finance sector. Through regulations such as the Ability-to-Repay/Qualified Mortgage rules, Mortgage Servicing rules, Loan Originator Compensation rules and the TILA-RESPA Integrated Disclosure rules, the Bureau drastically altered the regulatory framework which governs all facets of the mortgage lending industry.

The Bureau’s impact on the industry extends well beyond rulemaking. The Dodd-Frank Act gives the Bureau supervisory authority over insured depository institutions and credit unions with total assets over \$10 billion and their affiliates, as well as mortgage companies (originators, brokers,

¹ 5 U.S.C. App. 2 § 9(a)(2).

² 5 U.S.C. App. 2 § 2(a), emphasis added.

³ 41 C.F.R. § 102-3.30(a).

⁴ 41 C.F.R. § 102-3.30(a)(1)-(3).

servicers, and offerors of loan modifications or foreclosure relief services).⁵ Finally, the Bureau has the ability to enforce consumer protection statutes against most housing finance companies.

An advisory committee focused on the mortgage industry would thus improve the Bureau's policy-making processes by broadening the evidence base, and providing valuable perspective. A review of the most recent annual report of one of the Bureau's current advisory groups, the Consumer Advisory Board (CAB), illustrates the importance of mortgage-related issues. The report includes a list of topics that were examined and discussed by CAB during the prior fiscal year, October 1, 2016 to September 30, 2017. Of the 21 topics and issues listed, eight are exclusively related to the mortgage industry.⁶ Of the remaining 13 topics and issues, six are closely but not exclusively related to the mortgage industry.⁷ A mortgage-focused advisory group would provide a more appropriate and targeted avenue to address these issues.

Going forward, the Bureau will continue to alter the regulatory framework governing the housing finance industry. Changes will hopefully result from mandatory assessments of significant rules under section 1022(d) of the Dodd-Frank Act, from the issuance of guidance, and from future rulemakings. In addition, the Bureau will continue to exercise its supervisory authority over mortgage industry participants. Given the BCFP's significant and persistent influence on the housing finance industry, it is crucial for the Bureau to meaningfully and consistently engage industry stakeholders. With a formal avenue for regular engagement, a mortgage industry-focused advisory committee would conduct "deliberations [that] will result in the creation . . . of policies, or guidelines affecting agency business."⁸

It is difficult to overstate the scale and overall significance of the mortgage lending industry. In macroeconomic terms, it represents a large portion of the economy. As of year-end 2017, the Federal Reserve's Flow of Funds report placed the total value of the domestic housing market at \$25.8 trillion.⁹ The Bureau's initial focus on mortgage lending and servicing also reflects the industry's direct impact on the lives of individual consumers. Whether taking out a first-time mortgage or refinancing, a home mortgage transaction represents the most significant and consequential financial decision most people will ever make. It follows that the Bureau's effects on industry, positive and negative, have significant clear and direct consequences for consumers.

⁵ See 12 U.S.C. §§ 5514-5516 and 12 C.F.R. §§ 1090-1091

⁶ These topics include: "Home Mortgage Disclosure Act database and rulemaking; Seen and heard in the housing market; Access to credit and foreclosure issues; Future of loss mitigation; Housing Counseling; Reverse mortgages; Mortgage servicing; [and] Alternative mortgages products. *See* Annual report of the Consumer Advisory Board, Consumer Financial Protection Bureau (https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_cab-annual-report_fy2017.pdf).

⁷ These topics include: "Trends and themes in financial services and technology; Alternative data; Arbitration; Consumer complaints; Data aggregators; CFPB's debt collection SBREFA proposals; [and] Consumer reporting." *See Id.*

⁸ 41 C.F.R. § 102-3.30(a)(1).

⁹ Housing Finance At A Glance: A Monthly Chartbook, The Urban Institute, April 2018, (https://www.urban.org/research/publication/housing-finance-glance-monthly-chartbook-april-2018/view/full_report).

It is therefore vital for the BCFP to ensure its decision-making is appropriately informed. A mortgage focused advisory group would go far in furthering this objective.

A Mortgage Industry Focused Advisory Group Would Provide an Important Viewpoint That's Absent from the Bureau's Current Advisory Groups

There are currently four formal advisory groups. There is the CAB—required by the Dodd-Frank Act — and three discretionary advisory groups formed by the Bureau: the Community Bank Advisory Council, the Credit Union Advisory Council, and the Academic Research Council. Under FACA's implementing rules, “[a]n advisory committee must be fairly balanced in its membership in terms of the points of view represented.”¹⁰ The rules explain that to be fairly balanced, members of the committee should represent the various interests affected by the issues considered by the committee.¹¹

The four current groups are not adequately representative of today's housing finance landscape and therefore fail to provide a balanced view of the mortgage industry. The Community Bank Advisory Council (formed “specifically to share unique perspectives of community banks”), the Credit Union Advisory Council (formed “specifically to share unique perspectives of credit unions”), and the Academic Research Council (advises “on research methodologies, data collection, and analytic strategies and provides feedback about research and strategic planning”) are unable to capture and communicate the totality of the industry's viewpoint.¹² While each of the groups frequently addresses mortgage-related issues, they do so with an understandably limited perspective (i.e. from the perspective of credit unions or community banks).¹³ In addition, these groups exclude crucial industry stakeholders such as non-depository mortgage lenders (“independent mortgage lenders”) and independent mortgage loan servicers. An understanding of the role played by these stakeholders' illustrates that this is not a small oversight.

Non-depository mortgage lenders were responsible for 56 percent of mortgage loan originations during 2017.¹⁴ Moreover, these non-depository lenders are increasingly the lender of choice for low- and moderate-income (LMI) borrowers. During 2017, non-depository lenders originated nearly 75 percent of mortgages through the government guaranteed housing programs.¹⁵ These

¹⁰ 41 C.F.R. § 102-3.30(c)

¹¹ 41 C.F.R. § 102-3.30(a).

¹² Advisory Board and Councils, Frequently Asked Questions, Consumer Financial Protection Bureau, (https://files.consumerfinance.gov/f/201401_cfpb_advisory-board-councils-faqs.pdf)

¹³ The effort by CAB through its “Mortgages and Small Business Lending Subcommittee”, one of three such policy subcommittees, also falls short of what's necessary. Given the industry's overall importance, the Bureau's impact on the industry, as well as the industry's overall complexity, a subcommittee tasked with representing both mortgage and small business lending is insufficient.

¹⁴ Data Point: 2017 Mortgage Market Activity and Trends, A First Look at the 2017 HMDA Data, Consumer Financial Protection Bureau (May 2018), (https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/bcfp_hmda_2017-mortgage-market-activity-trends_report.pdf).

¹⁵ Housing Finance At A Glance: A Monthly Chartbook, The Urban Institute, March 2018, (https://www.urban.org/research/publication/housing-finance-glance-monthly-chartbook-march-2018/view/full_report).

government-backed FHA, VA and USDA loans were created to assist lower income, rural or veteran borrowers achieve home ownership.

These lenders are impacted as heavily by Bureau regulations and oversight as are depository lenders. Non-depository mortgage lenders are also subject to state regulations and oversight. The largest non-depository mortgage lenders must operate within 50 different regulatory environments. Given their large and crucial role in the market, and the complicated regulatory ecosystem in which they operate, non-depository lenders offer an expertise and perspective that is essential for effective Bureau policymaking and regulatory coordination. Their voice must be included as part of the Bureau's formal external engagement strategy through the creation of a Housing Finance Advisory Council.

Similarly, independent mortgage loan servicers also play a critical role in today's mortgage lending industry. Non-depository mortgage loan servicers are responsible for an increasingly large percentage of mortgage loan servicing. "[T]he share of mortgages serviced by non-banks increased from 6.8 percent in 2012 to 24.2 percent in 2015."¹⁶ This trend has continued, with recent MBA National Delinquency Survey data showing that IMBs now account for 33% of the residential servicing market.

Much like mortgage lenders, mortgage servicers are directly regulated by the BCFP. The Bureau's impact on the servicing industry has been profound. According to recent MBA Servicing Operations Study data, the cost to service a performing loan has increased from \$59 to \$163 per loan per year from 2008 to 2016, while the cost to service a non-performing loan has risen from \$482 to \$2,884 per loan per year over the same time period. Further, as servicers engage with borrowers throughout the life of the loan, they're well-positioned to speak to the borrower experience or spot potentially noteworthy trends and thus offer an essential perspective for Bureau policy making.

A formal advisory group comprised of all mortgage industry stakeholders, including large and small non-depository and depository mortgage lenders, servicers, consumers, and industry trade associations, is essential. Such a group would offer a perspective that's missing from the current advisory groups. A mortgage industry-focused advisory group would ensure the Bureau receives balanced views from a more inclusive and representative group of industry stakeholders.

II. The Bureau Must Regularly Evaluate its External Engagement Efforts to Ensure that It Accounts for Technology-Driven Changes to the Mortgage Lending Industry

Technological innovations in the financial services space, commonly referred to as "fintech," are transforming the housing finance industry. The pace of this change is accelerating as the successful deployment of fintech fuels further investment in innovation. Developments such as the ubiquity of smartphones, artificial intelligence, and "big data" analytics have drastically impacted the mortgage lending process, fundamentally changing the experience for consumer and lender alike.

¹⁶ Expect a Change to Regulation of Non-bank Mortgage Servicers, Baker Donelson, (March 17, 2017), (<https://www.bakerdonelson.com/expect-a-change-to-regulation-of-non-bank-mortgage-servicers>).

These process innovations are likely to accelerate. In addition to these changes, technology has encouraged new market participants with technology-driven business models.

Given the vast scale and rapid pace of change, the Bureau must endeavor to maintain an understanding of relevant fintech developments and understand both their potential and current deployment in the marketplace. Failure to do so risks inhibiting the adoption of technology that could further important Bureau objectives such as promoting a well-functioning market for consumer financial services and ensuring a level playing field for market participants. Further, without an adequate understanding the Bureau is unable to identify, assess and mitigate the risks associated with fintech innovations.

In order to maintain a sufficient knowledge base, the Bureau must regularly evaluate the external engagement function to ensure that these efforts extend to those in industry with the experience, expertise and perspective needed to effectively represent the issues associated with fintech. Frequent outreach—through formal meetings and more informally — to knowledgeable vendors as well as to nascent innovators is crucial in ensuring that market innovations are appropriately grounded in the regulatory structure.

MBA appreciates the Bureau's willingness to evaluate its external engagement processes through this RFI. We welcome the opportunity to continue to meet with you and your staff to discuss these proposals to help inform the Bureau in ways 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,

A handwritten signature in black ink, appearing to read "D.H. Stevens". The signature is fluid and cursive, with a large initial "D" and "S".

David H. Stevens, CMB
President and Chief Executive Officer
Mortgage Bankers Association