

July 2, 2018

Comment Intake
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: *Request for Information Regarding Bureau Guidance and Implementation Support*
(Docket No. CFPB-2018-0013)

To Whom It May Concern:

The American Financial Services Association (AFSA)¹ appreciates the Bureau of Consumer Financial Protection's (Bureau) request for comments and information (RFI) to assist the Bureau in assessing the overall effectiveness and accessibility of its guidance materials and activities. After seven years of operation, it is appropriate to review the Bureau's approach to guidance. The Bureau uses the term "guidance" to apply to a variety of materials and activities including: interpretive rules, general statements of policy, rule summaries, compliance guides, checklists, institutional and transactional coverage charts, webinars, and staff manuals.

AFSA's position is twofold. First, any substantive policy statements or standards issued by the Bureau should go through the Administrative Procedure Act's (APA) notice and comment process. Second, the Bureau should issue explanatory guidance to help financial institutions comply with regulations issued by the Bureau.

I. Substantive policy statements must go through the APA's notice and comment process.

Substantive policy statements should not be issued without notice and comment. All policy changes should be implemented through the APA's rulemaking process. In addition, neither policy nor regulation should be made through enforcement actions. Without clear rules, confusion ensues, which has the potential to harm both financial institutions and the consumers they serve.

A. APA Rulemaking Process

The Bureau should not issue substantive policy guidance that carries a practical, binding regulatory effect without going through the notice and comment procedure mandated by the APA. The volume and proliferation of guidance has created a significant degree of regulatory burden and uncertainty. The Competitive Enterprise Institute explains:

"Congress passes and the President signs several dozen laws every year. Meanwhile, federal departments and agencies issue well over 3,000 regulations of varying significance. A

¹ Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

weekday never passes without new regulations being issued or proposed. Yet beyond those rules, Congress lacks a clear grasp of the amount and cost of the thousands of executive branch and federal agency proclamations and issuances, including guidance documents, memoranda, bulletins, circulars, and letters that carry practical (if not always technically legally) binding regulatory effect. There are hundreds of “significant” agency guidance documents now in effect, plus many thousands of other such documents that are subject to little scrutiny or democratic accountability.

“It has long been the case that there are far more regulations than laws. That is troublesome enough. But with tens of thousands of agency proclamations annually, agencies may articulate interpretations and pressure regulated parties to comply without an actual formal regulation or understanding of costs, generally with judicial deference to what agencies contend, an issue of increasing concern to Congress. The result is that no one knows how much the regulatory state “weighs,” or even the number of agencies.”²

A prime example of guidance that should have been issued through the APA rulemaking process is CFPB Bulletin 2013-02 on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act (ECOA). The five-page bulletin had a dramatic impact on the vehicle finance industry, attempting to change the way that auto dealers are compensated. The industry struggled to comply with the limited guidance, all the while facing the prospect of large penalties and settlements. Did this benefit consumers? According to the House Financial Services Committee:

“The Bureau’s assault on the auto finance market is a textbook example of how regulators that don’t understand business and economics can harm the very consumers they intend to protect. According to a recent analysis of the Bureau’s settlements with Honda and BB&T by the Wall Street Journal, the end result of the Bureau’s actions could be higher interest rates for some borrowers that over the life of a four-year \$25,000 credit contract would add \$586 in interest payments.”³

Congress and the President agreed, repealing the bulletin in the spring of 2018.

To ensure that guidance is properly issued, the Bureau would do well to follow the advice that Rep. Blaine Luetkemeyer (R-MO) gave to the Federal Reserve. Rep. Luetkemeyer wrote, “First, the Federal Reserve should issue and publish a clear statement affirming that agency statements—for example, guidance documents, supervisory letters or examination manuals—that have not gone through notice and comment rulemaking do not establish binding legal standards, and thus shall not be the basis of enforcement actions or supervisory directives”⁴ Luetkemeyer added, “The statement should also clarify that any failure to adhere to guidance shall not, directly or indirectly, form the basis of any other supervisory

² Crews, Clyde Wayne Jr., *Mapping Washington’s Lawlessness: An Inventory of “Regulatory Dark Matter.”* Competitive Enterprise Institute. Issue Analysis 2017, No. 4. March 2017. p. 1. Available at: <https://cei.org/sites/default/files/Wayne%20Crews%20-%20Mapping%20Washington%27s%20Lawlessness%202017.pdf>

³ Republican Staff of the Committee on Financial Services, U.S. House of Representatives, *Unsafe at Any Bureaucracy: CFPB Junk Science and Indirect Auto Lending.* 114th Congress, First Session. Nov. 24, 2015. Available at: https://financialservices.house.gov/uploadedfiles/11-24-15_cfpb_indirect_auto_staff_report.pdf

⁴ Luetkemeyer, Blaine, *Letter the Hon. Randal K. Quarles, Vice Chairman for Supervision, Federal Reserve Board.* June 13, 2018. Available at: https://luetkemeyer.house.gov/uploadedfiles/061318_luetkemeyer_to_quarles.pdf.

determinations....”⁵ He concludes, “Greater clarity around the appropriate use and interpretation of such guidance is of the utmost importance.”⁶

B. Rulemaking by Enforcement

Any statement the Bureau issues should also emphasize that enforcement actions are not to be treated as guidance. The Bureau’s former policy of “regulation by enforcement” led to confusion among regulated entities. An example of the confusion resulting from such a policy can be found in the differences in two vehicle finance settlements.

In an article in the *American Banker* about the difference in the settlements, Isaac Boltansky, a policy analyst at Compass Point Research & Trading was quoted as saying, “This is what happens when using rulemaking through enforcement actions. There are disparities and loopholes which allow for incongruity of the law. The problem with managing a market through enforcement actions and not broader rulemaking is that you have a disparate regulatory impact predicated off of a disparate market impact. There’s definitely a degree of irony to it.”⁷

In another example, the Bureau found in an enforcement action that a longstanding policy was contrary to law. In its case against PHH, the Bureau dramatically disrupted long-settled understandings of what the Real Estate Settlement Procedures Act (RESPA) permits and prohibits, caused serious uncertainty, and chilled lawful, economically valuable transactions. As with its indirect auto lending bulleting, the Bureau did so without prior notice—or input from stakeholders. In consequence, a Court of Appeals found that the Bureau’s interpretation “is not a reasonable interpretation of the statute.”

We appreciate that Bureau Acting Director Mick Mulvaney has repeatedly stated that he is ending the Bureau’s policy of regulation by enforcement. We suggest that the Bureau build upon this progress by issuing a statement codifying the Bureau’s new policy and also explaining that the Bureau will not issue substantive policy guidance without notice-and-comment.

II. The Bureau should issue explanatory guidance to help financial institutions comply with regulations.

While AFSA believes that notice-and-comment rulemaking is essential when the Bureau is articulating new policy standards, there is a role for explanatory guidance to help financial institutions comply with complicated regulations. There is a clear need for guidance that is responsive to operational difficulties or unintended consequences resulting from new regulations.

Below, we address telephone inquiries and frequently-asked-questions (FAQs), written guidance, and compliance aids.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Witkowski, Rachel, *How CFPB’s Auto Enforcement Actions Are Disrupting the Industry*. *American Banker*. Feb. 19, 2016. Available at: <https://www.americanbanker.com/news/how-cfpbs-auto-enforcement-actions-are-disrupting-the-industry>.

A. *Telephone Inquiries and FAQs*

The Bureau should be committed to issuing timely, accurate, and helpful responses to inquiries submitted by financial institutions. This process can take two forms: telephone inquiries and published FAQs.

Regarding telephone inquiries, AFSA and its members appreciate the Bureau's willingness to answer regulatory inquiries on the telephone and encourage it to continue this process. Contrary to the Bureau's current practice, though, answers provided by the Bureau should be able to be relied so the process is more useful. The Bureau should also commit to acknowledging inquiries with two days of receipt.

Similar to the process followed by the Board of Governors of the Federal Reserve System (Federal Reserve Board), the Bureau should keep a record of all the telephone inquiries and issue cumulative FAQs on a regular and frequent basis reflecting the questions submitted by financial institutions and the Bureau's responses. As with the telephone inquiries, the FAQs should not be issued with a disclaimer limiting their use. Issuing FAQs will benefit financial institutions by providing clear and consistent answers to questions. It will also benefit the Bureau as it will reduce, or possibly eliminate, duplicative inquiries.

Subsequently, the Bureau should consider memorializing the FAQs and responses in a more formal guidance document. The Bureau's exam manuals should also be updated to reflect the responses to FAQs.

B. *Written Guidance – Staff Interpretations, Letters or Advisory Opinions, and Standalone Interpretive Rules*

There is undoubtedly a need for written, explanatory guidance. Written guidance can be a useful tool to help financial institutions obtain clarification on specific practices. With many regulations, particularly long and complex regulations, operational difficulties or unintended consequences arise. In these cases, clarifying guidance is needed quickly. Such guidance needs to provide some form of safe harbor to allow financial institutions to engage in practices that benefit the consumer, pending a formal rulemaking process to remediate the issue. It also must be published so that all financial institutions can obtain the benefit of the opinion expressed in the guidance.

In the RFI, the Bureau describes how the Federal Reserve Board provides guidance. The Federal Reserve Board primarily relies on what it describes as "Official Staff Interpretations," which are published in the Code of Federal Regulations as an appendix to the Federal Reserve Board's rules, typically following a notice-and-comment process. (Federal Reserve Board staff also provide informal guidance orally in response to individual inquiries.)

The RFI also explains that other agencies, such as the Department of Housing and Urban Development and the Federal Trade Commission (FTC), used various other forms of written guidance (such as standalone interpretive rules, letters or advisory opinions, and FAQs), while also providing some informal oral guidance in response to individual inquiries.

Written guidance would have been helpful to financial institutions as they struggled to comply with the TILA-RESPA Integrated Disclosure (TRID) rule and the "Know Before You Owe" rule. These rules required the use of new disclosure forms. They affected a large number of financial institutions and service providers. While AFSA appreciates the number of webinars, conferences, and forums the Bureau set up to

help with compliance, many questions remained unanswered for too long. Even when some staff did answer questions, staff emphasized that without getting the answers in writing (which staff refused to provide), and getting sign off from all Bureau offices (rulewriting, supervision, and enforcement), financial institutions and service providers could not rely on the answers.

In a specific example, the TRID rule as originally written did not permit accurate disclosure of Veterans Affairs mortgages, better known as VA loans with a sale price in excess of the loan amount. The industry had to choose between accurate disclosure (which is beneficial to the consumer) and compliance with the law for several years.

In another example, under the mortgage servicing rule, servicers are required to contact consumers based on delinquency, even if that delinquency occurs as part of a forbearance plan. This is especially common for disaster forbearances, where a consumer might be current before the disaster struck. The letters can cause consumer anxiety and confusion because the consumer may interpret the solicitation to mean that she was not on the forbearance agreement as she believed she was. Yet, such letters are required by current Bureau rules.

Written guidance could address these and other similar issues. However, we stress that the guidance must: (1) actually be interpretative and not establish new policy, (2) be able to be relied on and not hampered by a disclaimer, and (3) not conflict with guidance issued by other agencies.

Specifically regarding the first point, a standalone interpretative rule should be subject to a notice-and-comment period, even though not required by law. Although intended to be interpretive, such rules have a history of setting new policy. For example, the Department of Defense issued an interpretive rule in December 2017 under the Military Lending Act. The “interpretive” rule actually articulated a new standard for determining the scope of the motor vehicle financing exclusion. As such, a number of auto dealers and financial institutions, who had been excluded from the rule, now had to come into compliance with the rule.

On the second point, if the Bureau does issue written guidance, it defeats the whole purpose of issuing the opinion if the Bureau also includes a disclaimer stating that the guidance is not an official interpretation of the regulation. The Bureau’s current use of disclaimers on its materials causes confusion as to the utility and reliability of the guidance and so diminishes the usefulness of the guidance provided.

And lastly, financial institutions often rely on advisory opinions issued by agencies other than the Bureau, such as the FTC’s advisory opinion on first-party collections. The Bureau should give deference to such advisory opinions and should not proceed in a manner that conflicts with the other opinions without appropriate notice and then only on a prospective basis.

C. Compliance Aids

The Bureau’s compliance webinars and other implementation aids can be helpful and we appreciate the Bureau’s effort in this area. However, they should do more than restate the rule and its applicable commentary.

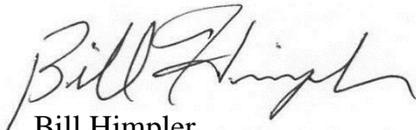
Written transcription of previous webinars by trade associations and law firms has proven useful for regulated entities in the past. We would like to see that practice continue on an official basis, sanctioned by the Bureau and published on the Bureau's website.

III. Conclusion

AFSA appreciates the opportunity to comment on the overall effectiveness and accessibility of the Bureau's guidance materials and activities. AFSA emphasizes that any substantive policy statements or standards issued by the Bureau should go through a notice-and-comment process. In addition, the Bureau should help financial institutions comply with the regulations it promulgates by issuing appropriate guidance.

Please contact me by phone, 202-466-8616, or email, bhimpler@afsamail.org, with any questions.

Sincerely,

A handwritten signature in black ink that reads "Bill Himpler". The signature is written in a cursive, flowing style.

Bill Himpler
Executive Vice President
American Financial Services Association