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Via electronic submission

July 2, 2018

The Honorable J. Michael Mulvaney
Acting Director
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]

Dear Acting Director Mulvaney:

The Independent Community Bankers of America (“ICBA”)¹ welcomes this opportunity to provide comments on the Bureau of Consumer Financial Protection’s (“BCFP” or “Bureau”) request for information (“RFI”) regarding guidance and implementation support.

Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) transferred to the Bureau rulemaking authority that was previously vested in seven other Federal agencies. These

¹The Independent Community Bankers of America®, the nation’s voice for nearly 5,700 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services. With nearly 52,000 locations nationwide, community banks employ 760,000 Americans, hold \$4.9 trillion in assets, \$3.9 trillion in deposits, and \$3.3 trillion in loans to consumers, small businesses, and the agricultural community. For more information, visit ICBA’s website at www.icba.org.

agencies employed various methods for providing guidance to industry stakeholders on regulations under their charge. The Bureau is now seeking comments to assist in assessing its guidance materials and activities, including implementation support. The Bureau also seeks comments on whether it would be appropriate to make changes, consistent with the applicable law and regulation, to formats, processes, and delivery methods for providing such guidance.

ICBA Comments

Executive Summary

ICBA offers recommendations noted below for the Bureau's consideration as it assesses the effectiveness of its guidance materials and implementation support.

- Cease the issuance of stand-alone interpretive rule guidance without opportunities for public notice and comment as required by the Administrative Procedures Act ("APA").
- Submit all existing and future interpretive guidance to Congress for review.
- Create a comprehensive and centralized implementation and compliance portal organized by financial service and/or regulation.
- Establish and maintain a formal and comprehensive FAQ guide that covers all regulations under the Bureau's jurisdiction.
- Make webinars a standard practice for final rulemakings as an implementation assistance tool.
- Streamline the length of final rules and implement other actions described in the final rule section.
- Enhance compliance guidance by drafting in plain language, discontinuing the use of disclaimers and updating on a timely basis to ensure accuracy.

Interpretive Guidance

Apart from the Bureau's small entity compliance guides, which attempt to set forth plain language summaries of recently finalized rules, ICBA recommends the Bureau cease its practice of issuing stand-alone interpretive rule guidance without opportunities for public notice and comment under the APA. Examiners reference this guidance when examining banks and expect compliance even though the guidance is not a formal rule or requirement. Further, the judiciary might rely on Bureau guidance when interpreting a bank's liability under federal law. Both scenarios dictate that banks and other stakeholders should have the opportunity to provide feedback on guidance documents and share ways that the Bureau can achieve its regulatory goals in the least burdensome way possible.

ICBA also recommends the Bureau submit all existing and future interpretive guidance to Congress for review. This recommendation comports with the U.S. Government Accountability Office ("GAO")

recent determination that all federal agencies, including independent agencies such as the Bureau, submit all rules to Congress before taking effect, including general statements of policy such as interpretive guidance.² In examining the Bureau’s Interpretive Guidance on Indirect Auto Lending, the GAO found that Bulletins that merely describe general statements of policy and advise the public prospectively are deemed rules under the Congressional Review Act (“CRA”) and the APA.³ Moving forward, the Bureau should adhere to this finding and initiate the public notice and comment process under the APA and submit such guidance to Congress under the CRA. Similarly, ICBA recommends that the Bureau do the same for all guidance previously published without notice, comment, and congressional review and recognize that such guidance has no force or effect until such publication and review.

Compliance and Implementation Support Portal

ICBA recommends the creation of a communications system or portal to provide expedient compliance guidance and implementation tips. The system should be equipped to receive phone calls, emails, or web submissions. All Bureau responses should be in writing and response times could vary from immediate to no more than five business days depending on the complexity of the inquiry. All queries received through the system – by telephone, email and web – should be transcribed, chronicled by regulations, and monitored to determine trends and areas of concern. ICBA further recommends that Bureau responses be provided without any disclaimers (discussed below).

The Bureau would also benefit from this mechanism as it will allow rule writers, policy professionals, and examiners a window into how the industry responds to regulations. Additionally, this information would assist the Bureau in making determinations on the need for additional outreach and should be incorporated into future and existing guidance.

Formal Frequently-Asked-Questions Guide

The Small Business Regulatory Enforcement Fairness Act (SBREFA) panels, notices of proposed rulemaking, stakeholder engagements, and our recommendations presented in this RFI response, are all designed to encourage ongoing dialogue between the Bureau and industry stakeholders, obtain feedback and clarification, raise concerns, and present solutions. Each of these mechanisms is ripe for

² “OCC, Federal Reserve System, FDIC--Applicability of the Congressional Review Act to Interagency Guidance on Leveraged Lending,” Government Accountability Office, B-329272: Oct 19, 2017.

³ “Bureau of Consumer Financial Protection: Applicability of the Congressional Review Act to Bulletin on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act,” Government Accountability Office, B-329129: Dec 5, 2017.

the development of FAQs. ICBA encourages the Bureau to establish and maintain a comprehensive FAQ guide that covers all regulations under its jurisdiction and is organized by financial product and service. Additionally, questions should be monitored and used to determine additional outreach needs and incorporated into guidance as appropriate.

Webinars

The Bureau's HMDA Platform webinar facilitated at ICBA's office in November 2017 provided valuable information to community banks and was well received. ICBA encourages the Bureau to make webinars a standard practice for final rulemakings as an implementation assistance tool. The webinars should be interactive and facilitated by subject matter experts who can answer practical, operational, and nuanced questions. Webinars should be structured to review regulatory requirements, compliance expectations, operational or real-time examples, and allow ample time for questions and answers. Additionally, webinars should be conducted within 30 days of a rule's release, followed by three or more additional opportunities for stakeholder participation, depending on the rule's complexity and industry stakeholder needs. Questions and answers presented during the webinar should be posted under the relevant regulation, disseminated to participants, and, when appropriate, incorporated into to FAQs in accordance with ICBA's recommendations.

Final Rules

The Bureau's final rules are unreasonably long. For example, the last five final rules released by the Bureau average 1,145 pages.⁴ Those responsible for analyzing, determining applicability, implementing, and ensuring compliance need a user-friendly mechanism that allows them to manage the document as well as the overall implementation and compliance process. To enhance an institution's ability to successfully implement a final rule and help prepare entities for a smooth compliance and implementation experience, ICBA recommends:

- streamlining the number of pages in the final rule by limiting content to the summary, background, section-by-section analysis and legal authority,
- adding a table of contents that includes links to all applicable sections or documents,
- removing all supplementary content to a separate document,
- including a separate red-lined final rule to allow for the speedy identification of changes to existing regulations,
- including both detailed and high-level summaries of the final rules,
- releasing all guidance, compliance guides, toolkits, FAQs acquired during the rulemaking process, and all other supporting materials simultaneously with the final rule,

⁴ TRID Rule, 560 pages; Arbitration Rule, 775 pages; Prepaid Rule, 1890 pages; Pay Day Rule, 1700 pages; HMDA Rule, 800 pages.

- working in conjunction with the prudential regulators to release examination procedures six to nine months before a final rule becomes effective,
- designating subject matter Bureau experts to staff a hotline specifically related to the final rule to receive real-time questions and provide timely and responsive answers,
- chronicling all supplemental materials to allow for easy access, and
- granting industry delay requests if after the release of all supplemental documents, stakeholders believe, based on their practical and operational assessment, additional time is needed to meet the compliance deadline.

Compliance Guides

ICBA urges Bureau staff to make a concerted effort to draft compliance guides in plain language. Legalese and regulatory language should be housed in the rules, laws, and other governing documents. Stakeholders have varying levels of understanding and limited time to assess requirements and should not feel forced to hire counsel or consultants to help them understand and implement rules. Compliance guides consistent with these recommendations will benefit all audiences affected by the applicable rule.

Guidance materials should also come with protections by the removal of disclaimers. The Bureau uses disclaimers on non-rule guidance⁵ materials to essentially describe the purpose of the material, communicate that it is only intended to aid understanding and implementation, note the legal limitations, and to emphasize that the rule and its Official Interpretations are the definitive sources on a rule's requirements in the event of a perceived conflict. By its own admission, the Bureau acknowledges stakeholder confusion over the usefulness, reliability, and credibility of the guidance "intended to aid understanding and implementation" when it is accompanied by disclaimers.⁶ Many stakeholders believe written and oral disclaimers (attached to rule summaries, compliance guides, quick reference materials, webinars, industry calls and meetings, and other compliance aids) undermine the value of that guidance.

Since compliance guidance is based on laws and implementing rules, it stands to reason that disclaimers are pointless. Guidance materials are intended to create additional opportunities for understanding and to promote awareness through various mechanisms and forums. The use of disclaimers furthers the notion that Bureau staff is not knowledgeable enough and/or do not trust their own understanding enough to stand behind the same rules they write and require compliance. Guidance documents and aids are direct byproducts of, and completely based on BCFP regulations. The Bureau should have confidence in its materials and remove the regulatory uncertainty created by disclaimers. Therefore, ICBA strongly urges the Bureau to 1) update current guidance documents by

⁵ BCFP Request for Information Regarding Bureau Guidance and Implementation Support, p.20.

⁶ Ibid.

removing disclaimers, and 2) cease future use of disclaimers to allow users and entities the protections needed to fully utilize the resources as originally intended.

All guidance and supporting materials issued by the BCFP are living documents that should be revisited and updated. All guidance and supporting materials issued by the BCFP are living documents that should be revisited and updated. ICBA recommends an annual review of all guidance documents, updates within 30 days of a regulatory change, and updates within 30 days of receiving common questions from stakeholders. We further recommend that this review be conducted by subject matter experts within the Bureau. These recommendations would ensure that stakeholders always have the most recent information.

Conclusion

ICBA appreciates the opportunity to respond to the Bureau's comprehensive review of guidance and implementation support. We firmly believe that our recommendations will help the Bureau achieve efficiency, enhance implementation support, and demonstrate its intent to create an environment for implementation and compliance success among community banks.

If you have any questions or would like additional information, please contact Rhonda Thomas-Whitley, at Rhonda.Thomas-Whitley@icba.org or 202-659-8111.

Sincerely,

/s/

Rhonda Thomas-Whitley

Assistant Vice President & Regulatory Counsel