

July 2, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2018-0013 -- Request for Information Regarding Bureau Guidance and Implementation Support, 83 Fed. Reg. 13959 (Apr. 2, 2018)

Dear Acting Director Mulvaney,

The undersigned consumer, civil rights and community groups submit this comment on the CFPB's guidance and implementation support program. In summary, our views are as follows:

- We support steps that maximize industry compliance with consumer protection statutes and regulations. As a whole, the agency's guidances have promoted this result, so we encourage the CFPB to continue to issue guidances and compliance aids.
- Another benefit of the CFPB's program is that it has provided guidance while formal rulemaking is planned or underway but not yet completed. The guidance program gives the agency some nimbleness and enables it to point industry in the right direction while formal rulemaking is being completed.
- Guidance documents such as FAQs and quick reference summaries are likely to help businesses comply with the laws and regulations that the CFPB administers. This is particularly true for small businesses, but even if a business has a large compliance staff, FAQs and quick reference summaries can help that staff gain an overview of a rule's requirements and find relevant parts of a rule. FAQs, quick reference summaries, and the like are helpful to consumers, consumer advocates, and the general public for the same reasons.
- All guidances of all types, whether an official interpretation, an FAQ, a webinar, or something else, should be readily accessible to the public in an easily searchable form.
- The CFPB should not issue advice to individual companies, whether informally or by way of advisory opinions, and whether written or oral. But the CFPB may answer simple inquiries that merely involve directing companies to existing laws or documents or restating settled law without offering new interpretations or application to specific company facts.

These views are spelled out in more detail below.

1. Objections to the CFPB's Request for Information Process

We must first note our objections to the burdensome RFI process. The amount of time and attention required to adequately address the CFPB's numerous RFIs on a multitude of subjects in a very short amount of time has diverted valuable consumer advocacy and third party resources to respond to these requests. The very structure of these RFIs, the nature of many of the questions, and the fact that many focus on processes known mostly to industry actors and their lawyers, favor financial institutions with greater resources at their disposal, and we are gravely concerned about any attempts to weaken consumer protection through this process.

The CFPB ignored our request for an extension of time to respond to the particularly burdensome RFIs regarding adopted and inherited regulations, which were due on June 19, 2018 and June 25, 2018, respectively. The current RFI comment is due less than a week after those comments, which required us

to comment on dozens of regulations on many different subjects running many hundreds if not thousands of pages in length.

These problems have prevented us from responding in more detail, identifying and commenting on more issues, seeking more input or signatories, or publicizing the comment opportunity more widely. The CFPB must not take the failure to comment on a particular issue, or a limited number of comments from the public, as indicative of a lack of broad objections to changes the CFPB might make that would weaken its role in effectively protecting the consumer public.

2. We Support the CFPB's Issuance of Guidances and Compliance Aids.

In the seven years of its existence, the CFPB has done an exemplary job of crafting rules that protect consumers from marketplace abuses while impinging as little as possible on legitimate business operations. However, rules will benefit consumers only if industry understands and complies with them. Guidances and compliance aids promote compliance with the consumer protection laws and rules that fall within the CFPB's jurisdiction. We support the CFPB's program of issuing these guides because they promote compliance with the laws and rules that benefit consumers.

Consumers, responsible companies, and government agencies all benefit when there is widespread compliance and full implementation of a law. For example, the Credit CARD Act abolished tricks and traps that were commonplace among credit cards and were creating a race to the bottom that made it hard for companies with transparent up-front pricing to compete. If there had not been broad abandonment of the tricks and traps that the Credit CARD Act abolished, consumers might not have realized these benefits, companies that complied with the law would have been at a competitive disadvantage, and government agencies would have had to expend substantial resources to enforce the law.

Guidances are especially helpful with respect to the statutes that fall within the CFPB's jurisdiction because these statutes and the rules under them can be complex. Some deal with topics--such as disclosure of consumer credit terms-- that are inherently complex. Others are complex because the CFPB has taken such pains to minimize the number of entities that must comply with the rule. For example, the CFPB crafted a series of eight exemptions from the Dodd-Frank Act's requirement that a creditor obtain an appraisal before extending a higher-cost loan.¹ The rule would have been much simpler if it applied to every mortgage lender, but the CFPB made the judgment that the gains that would come from fine-tuning the rule outweighed the additional complexity that would cause.

Guidances and other compliance aids help businesses comply with CFPB rules. Even for large businesses, these aids can help their legal departments get an initial grasp of the scope of a rule and its relevance for the business. Guidance documents that provide a roadmap for creating forms and setting up systems to comply with a new rule enhance the efficiency of businesses large and small, by making it unnecessary for each one to tread the same ground. And they are particularly helpful for small businesses that may not have in-house legal staff. Guidances can deal with practical questions that a business faces when implementing a new rule in a way that a formal rule or an official interpretation cannot.

Guidances and other compliance aids are also useful to consumers and other members of the public. A guidance document can be more concise, and more in the form of a summary, and it can avoid highly technical language and arcane legal or economic terms. Consumers who are trying to understand their rights or determine what the standards are for businesses they are dealing with are far more likely to find useful basic information if a guidance, a summary, or a FAQ document is available than if they have

¹ 12 C.F.R. § 1026.35(c).

to locate and read the relevant rules. A CFPB guidance document is unlikely to be sufficient to enable a consumer to litigate the issue, but it is very likely to help the consumer frame the question and find the right entity to which to make a complaint.

Even though attorneys are trained to be able to read and analyze complex regulations, guidances are helpful to them, too. First, not all attorneys are familiar with consumer law. Guidances, summaries, and FAQs can be particularly helpful to non-specialist attorneys who are seeking to determine whether there is a law or regulation on a particular topic. Even for attorneys who focus on consumer law, these documents can make it easier to find relevant provisions of regulations and confirm the attorney's understanding of a regulation. Giving a big-picture summary of a regulation in a guidance or summary document can make it easier for a consumer law specialist to absorb and understand the regulation.

The CFPB's guidances have also proven helpful in filling in the gap between the time a statute becomes effective and the time rulemaking is complete. Businesses may have to comply with the statute even before the rules are finalized. Guidances can help businesses do so. In addition, a guidance can help a business chart a path that will make it easier for it to comply with regulations once they are finalized.

Guidances can also serve the purpose of putting businesses on notice of the practices that the agency's enforcement and supervision divisions consider to be violations. This information is, of course, invaluable to businesses. Businesses also benefit when an agency puts this guidance into a publicly-available document, because then a business that disagrees with the agency's position knows about it and has the opportunity to persuade the agency to revise it. When the agency informs businesses that it will consider certain practices that are harmful to consumers to be violations, consumers also benefit because then businesses are likely to avoid those practices.

3. Any responses the CFPB provides to individual inquiries should be limited and surrounded by safeguards.

The RFI asks a number of questions about how the CFPB should handle individual inquiries. To what extent should CFPB employees provide oral responses? What balance should the CFPB strike between responding to individual inquiries and preparing more systematic written guidance? Should the CFPB institute a program of advisory opinions?

We have serious concerns about any program of responding to individual inquiries. As noted above and discussed further below, we strongly oppose a program of advisory opinions. But even with less formal responses, there are dangers that agency staff might give quick responses that are not fully thought out or that conflict with other responses to the same or related questions. Providing a response without having received input from other stakeholders could easily lead to ill-informed decisions and bad policy choices. We have seen many occasions when a company seeks a waiver or a favorable ruling from an agency, and spins the facts in a way that will mislead the agency unless it affirmatively seeks the perspective of the other side. There are particularly grave concerns when a business seeks an advisory opinion as a way of co-opting ongoing or threatened litigation.

On the other hand, we understand that the CFPB does not want to be perceived as, and should not be, an impenetrable, non-responsive bureaucracy. The CFPB also benefits from hearing questions from the entities that are affected by the statutes it administers and the rules it adopts. By clearing up confusion on the part of businesses, the CFPB can foster compliance with statutes and rules that benefit consumers.

Given these competing concerns, we recommend that the CFPB limit its responses to individual inquiries and maintain the following safeguards:

No advice. The CFPB should not be providing legal advice to companies that it regulates. Responses to inquiries should, at most, be limited to pointing companies to existing laws, regulations and

public documents, not providing private advice to interpret them. The CFPB can do companies a service simply by helping them identify existing resources. But it is inappropriate for the CFPB to engage in an informal process to interpret the law or to do so in a private exchange in the context of just one company's concerns.

Tracking and review. The CFPB should have a system for tracking and reviewing the types of inquiries it receives about its rules and policies, other than very routine requests that can be resolved merely by explaining agency procedures or referring the caller to written materials. If the CFPB is getting a significant number of questions about the same issue, it should flag that issue and determine whether it should issue a more formal, publicly-available guidance document.

Level of input from stakeholders. Whenever the agency decides to address an issue that is not clearly answered in existing laws, interpretations or materials, it should obtain input from other stakeholders. Otherwise, it makes itself susceptible to a one-sided process that could be tainted by slanted portrayal of the facts, an exaggeration of the problem, or failure to appreciate concerns on the other side. Obtaining input also makes it far less likely that the agency will overlook some key issues that will require it to revoke and redo its guidance.

There are many ways that the agency can obtain input from stakeholders, including in-person or telephonic roundtables, published requests for information, and surveys. The agency should not adopt a one-size-fits-all approach to obtaining responses from stakeholders, but should tailor the approach to the importance of the issue, its novelty and complexity, the potential for varying views, and any timing considerations.

4. The CFPB Should Not Issue Advisory Opinions.

While we support the issuance of guidances, we oppose the institution of an advisory opinion program. Agency advisory opinions pose numerous problems, including the dangers of providing advice on an individual situation without considering all ramifications and the broader context; the risks of one-sided information and input; a nontransparent process; and the burden of responding to numerous requests.

Advisory opinions typically address an issue in a particular context rather than looking at it in a more systematic way. Because they are often tied to a specific context, they can raise more questions than they answer. The agency will serve the public better if it avoids issuing advisory opinions in response to individual issues, but instead looks at the bigger picture and addresses issues in a more general and comprehensive way.

Advisory opinions also pose a severe risk of a one-sided process. They tend to be available only to industry; the agency has not asked whether consumers, consumer advocates or consumer attorneys could obtain advisory opinion. Absent formal notice and comment, the process of considering and issuing an advisory opinion would also be inherently slanted. The facts would be shaped by the industry question and input, and it is unlikely that consumers, consumer advocates or the general public would have sufficient opportunity to provide another perspective or raise issues that would not be raised by industry.

Issuing advisory opinions can also complicate any effort to research the law. For many of the statutes that fall within the CFPB's jurisdiction, anyone who is trying to research a question must already look at the statute, the regulations, and a set of official interpretations. To add yet another body of opinions that would have to be searched would make determining the law that much more complex. This is particularly true since advisory opinions are unlikely to be codified in an organized, systematic way. They may not be indexed, and they may not be included in the on-line legal research databases that contain the statute, the regulation, and the official interpretations.

Advisory opinions are also problematic because they are often sought by companies facing, threatened, feared or pending litigation or as an after-the-fact blessing for illegal actions. If the CFPB wishes to make its views known regarding an issue that is in litigation, it should intervene in the litigation or file an amicus brief, rather than issue an advisory opinion at the behest of one party. If the agency wants to issue an official interpretation to prevent future litigation, it should do so through the formal notice and comment rulemaking process.

During the first twelve years after the Truth in Lending Act was passed, the Federal Reserve Board, which then had rulemaking authority under it, issued a welter of Official Board Interpretations, informal staff interpretations, and official staff interpretations. Some were published in the Federal Register, but others were available only through looseleaf legal publications. The result has been described as a “regulatory morass.”² Only after Congress enacted the Truth in Lending Simplification Act in 1980 did the FRB replace this mass of opinion letters with a single, organized, carefully-crafted set of Official Interpretations. We urge the CFPB not to start down a path that might lead to the same level of complexity.

Finally, the process of responding to individual inquiries with advisory opinions would take significant bureau resources, would encourage a flood of one-at-a-time questions, and would divert attention from more careful and systematic efforts to update regulations in light of the full context with full public input.

5. The CFPB should commit itself to seeking broad input from stakeholders when it issues guidances.

We urge the CFPB to adopt a broad program of seeking input from stakeholders whenever it issues a guidance document that is not subject to formal notice-and-comment rulemaking. Methods include surveys, roundtables, less formal meetings, and requests for information.

The CFPB should have a system in place to identify persons and entities who may be affected by proposed guidance documents. It should make sure to reach out to trade groups or other organizations that speak for persons who may be affected, but it should remember that there may be affected entities that are not part of any organization.

The agency should take particular care to obtain the perspective of consumers and consumer groups. The implications of a request from industry may not be clear, and the CFPB should always hear from both sides. The agency must take into account the fact that consumer groups have much lower budgets and staffing than industry members. The agency should reach out to consumers and consumer groups directly, and it may be necessary to take special steps to make it possible for consumers and consumer groups to provide their input. For example, it may be necessary for the CFPB to travel outside of Washington, DC.

6. All guidance documents should be made public in a form that is readily searchable.

A potential problem with guidance documents is that, even though they are intended to make the law clearer, they can have the counter-effect of making it more complicated to determine what the law is. Typically, guidance documents are not codified. Legal research databases may not include them. There may or may not be an overall index to them.

These potential problems are not reasons to stop issuing guidance documents. But the CFPB should take care to post all of its guidance documents in an organized, easily-searchable way. It should also have an internal system for reviewing guidance documents to make sure they are consistent with each

² National Consumer Law Center, Truth in Lending § 1.5.3.1 (9th ed. 2015), *updated at* www.nclc.org/library.

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other and consistent with the statute and rules and any amendments thereto. It should review its guidance documents regularly to delete any that are obsolete or duplicative.

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Thank you for considering these views.

Respectfully submitted,

Alabama Appleseed Center for Law & Justice
Allied Progress
Americans for Financial Reform
Arizona Community Action Association
Arkansans Against Abusive Payday Lending
Atlanta Legal Aid Society, Inc.
California Reinvestment Coalition
Center for Economic Integrity
Center for Responsible Lending
Connecticut Fair Housing Center
Consumer Action
Consumer Federation of America
Equal Voice Action
Florida Alliance for Consumer Protection
Heartland Alliance for Human Needs & Human Rights
Jacksonville Area Legal Aid, Inc.
Legal Services NYC
Main Street Alliance
Maryland Consumer Rights Coalition
Massachusetts Communities Action Network
Michigan Legal Services
Mississippi Center for Justice
NAACP
National Association of Consumer Advocates
National Community Reinvestment Coalition
National Consumer Law Center (on behalf of its low income clients)
National Fair Housing Alliance
New Yorkers for Responsible Lending (NYRL)
Public Citizen
Public Justice Center
Public Law Center
Tennessee Citizen Action
Texas Appleseed
Tzedek DC
U.S. PIRG
Virginia Citizens Consumer Council
West Virginia Center on Budget and Policy
Western New York Law Center