Response Regarding Bureau Guidance and Implementation Support (Docket No. CFPB-2018-0013)

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Financial Regulation and Consumer Protection Scholars and Former Regulators

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Comment Intake
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C.  20552

Dear Sir or Madam:

Please see the submission below in response to the Consumer Financial Protection Bureau’s Request for Information (“RFI”) Bureau Guidance and Implementation Support (Docket No. CFPB-2018-0013).

We are scholars specializing in financial regulation and consumer financial protection. Each signatory’s affiliation is indicated below his/her signature to provide institutional affiliation, but this comment does not represent the views of the various institutions.

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We are pleased to provide a response to the Consumer Financial Protection Bureau’s Request for Information ("RFI") Bureau Guidance and Implementation Support. Regulatory guidance comes in many forms. Our comments distinguish between what we term “Formal Guidance”—that is Official Interpretations, standalone Interpretive Rules, and Advisory Opinions issued through the Administrative Procedures Act’s notice and comment process, and all other forms of guidance, which we term “Informal Guidance.”

As a general matter, we believe that the CFPB is best served by preserving flexibility in its guidance process because the optimal form of guidance depends on the circumstances at hand. Guidance serves many different purposes ranging from clarifying rules to announcing policy positions to assisting regulated entities with the technical operations involved in data submissions. A one-size-fits-all approach is simply inappropriate given the range of purposes and forms of guidance necessary for the Bureau to effectively administer federal consumer financial law.

That said, we believe that certain aspects of the CFPB’s guidance process would benefit from greater standardization and formality. In particular, we believe that the Bureau should provide guidance only in written form and in response to written requests and that all guidance provided—including requests for guidance—should be publicly available and readily searchable on the web without redaction. This is important for increasing the transparency and fairness of the guidance process so that no firms have special “insider” knowledge and so that the Bureau’s policy positions as expressed in guidance may come under appropriate scrutiny of all stakeholders.

We also believe that regulated firms should solely be entitled to rely upon Formal Guidance and not on Informal Guidance. Such a position is not only consistent with statutory provisions that create safe harbors from civil liability for good faith reliance on such Formal Guidance—and by implication not for Informal Guidance—but also reflects the reality that the CFPB is not the sole agency with enforcement authority under the federal consumer financial laws. The CFPB shares jurisdiction in most instances with state attorneys general, and for smaller depositories and credit unions, enforcement authority lies with the prudential regulators, while the FTC has enforcement authority over certain enumerated consumer laws. This means that CFPB guidance cannot bind other regulators, except in some circumstances when the CFPB issues an Official Interpretation or an Interpretive Rule under the Administrative Procedure Act. Recognition of the limitation on CFPB guidance binding other regulatory agencies points to the unreasonableness of any regulated entity relying on such less formal guidance, including against subsequent CFPB action.

Distinguishing between Formal and Informal Guidance creates a clear bright line that will avoid any confusion and prevents the Bureau from finding itself bound when it has not fully considered an issue or meant to bind itself, and encourages the Bureau to issue Informal Guidance more freely because it will not be irrevocably bound. Nonetheless, we would expect that in most instances the Bureau could be reasonably expected to conform enforcement policy to prior guidance and to take the existence of contrary guidance into account in deciding whether to initiate enforcement and as a mitigating factor in any enforcement decision.

We also believe that the CFPB should make clear that the Bureau will not rely upon Informal Guidance in enforcement actions, but that it expects that regulated entities, accordingly, not rely on it either. What is good for the goose is good for the gander. Informal Guidance is meant to facilitate a more casual line of communication between the Bureau and regulated entities and should not be conflated with formal positions of the Bureau.

Lastly, before turning to the Bureau’s specific inquiries in the Request for Information, we wish to emphasize the need to consider the cumulative effect of guidance, particularly when guidance is issued based on previous guidance. We believe that guidance should always be based on the Bureau’s interpretation of the applicable statutes and regulations themselves, not on the Bureau’s prior guidance. When guidance relies on previous guidance, the effect over several bootstrap iterations can be policy positions that are substantially divorced from the strictures enacted by Congress.²

We now turn to the Bureau’s six areas of specific inquiry.

I. Regulatory Inquiries Function

1. All Communications Regarding Guidance Should Be in Writing.

We strongly believe that all communications regarding guidance—both inquiries and responses—should be in writing and made publicly available without redaction. The Bureau should refuse to accept or respond to oral requests for guidance, and should never provide oral guidance. Similarly, the CFPB should decline any requests for private advice from regulated entities or consumers.

Having communications about guidance in writing has several benefits. First, it enhances the clarity of communications that ensures that the CFPB is responding to the actual request presented and that the regulated entity clearly understands the CFPB’s position.

Second, writings ensure that the CFPB is precise in terms of what it commits itself to. Moreover, a writing enables adequate internal controls at the Bureau about the guidance, because writings can be reviewed and commented upon up the CFPB’s chain of command.

Third, having all guidance communications in writing adds to the transparency of the guidance process. We believe that all communications regarding guidance should be public—and available in a readily searchable web database. This ensures that there is no “private” law that exists only between the CFPB and an individual entity and is in keeping with the CFPB’s objective of making sure that “Federal consumer financial law is enforced consistently ... in order to promote fair competition.”³ If information about the Bureau’s policy positions is known only to individual firms, those firms have an unfair advantage over their competitors in terms of adapting to regulations.

Finally, to the extent that guidance is invoked in litigation—public or private—a written record of communications eliminates evidentiary uncertainty.


2. The Bureau Should Not Commit Itself to Any Timeline in Regard to Responses to Regulatory Inquiries or Even to Responding to Any Particular Inquiry.

As far as the timing of responses, we do not believe that any particular timeline can be specified in advance. The appropriate timing depends on the nature of the inquiry. Some matters might be readily addressed in minutes; others might require extended consultation internally, and yet others might ultimately not be appropriate for a response. There are many situations where the Bureau may wish to see how markets develop or to have further information before providing guidance of any sort. How fast the Bureau might respond to an inquiry is not always going to be initially discernible—an issue might initially seem amenable to resolution, but upon further examination might not be readily resolvable. It is simply not possible for the Bureau to know in advance how fast it can respond to an inquiry or if a response is even appropriate.

We are not concerned about lack of timelines for responses because there is no right for any regulated entity (or consumer) to receive a response to a request for guidance. As we noted above, delayed guidance is not a matter of life or death.

If the Bureau were to commit itself to a timeline for responses, the result would be potentially hasty and ill-considered responses that might result in a subsequent reversal of position by the Bureau. Such reversals could be costly to covered persons and service providers. Moreover, depending on the volume of inquiries, the Bureau might have to commit substantial internal resources to addressing regulatory inquiries in order to comply with timelines.

In any event, CFPB guidance does not substitute for the advice of private counsel, particularly because the CFPB is not the sole agency tasked with enforcement of federal consumer financial law. The Bureau may help clarify issues with guidance, but it is not compliance counsel for regulated entities. The CFPB is in the regulation business, not the customer service business for regulated entities.

3. All Responses to Regulatory Inquiries Should Be Made Publicly Available

The Bureau should make all responses to regulatory inquiries publicly available and readily searchable on-line by text, topic, and date. This is consistent with what the OMB considers good guidance practices.\(^4\)

We also suggest that Bureau responses should not be issued to individual firms prior to being made publicly available. Instead, in keeping with the spirit of the SEC’s Regulation FD (Fair Disclosure), public disclosure should be simultaneous with notification of the firm requesting the guidance.

4. All Regulatory Inquiries Should be Made Publicly Available Without Redaction

The regulatory inquiries themselves should also be made publicly available without redaction. Firms seeking CFPB guidance are masters of their own request—if they are concerned about protecting trade secrets, etc., they may have to temper their requests for guidance accordingly; a firm cannot both voluntarily reveal secrets to the government as part of a request for the government to expend time and resources providing guidance and simultaneously seek to keep that information private. Indeed, any guidance issued by the Bureau has to be interpreted in light of the request for guidance and the factual representations made therein. To the extent that the Bureau does not comment on a particular issue or makes a particular assumption, that may be informative to market participants. Without seeing the original request for guidance, however, market participants are

deprived of this information, which gives an unfair advantage to the firm making the request for guidance. Likewise, there should not be any redactions to inquiries, as even information such as the name of the inquiring firm is potentially important market information.

We recognize that making inquiries themselves public might have a chilling effect on some requests for guidance, but the nature of the guidance process is that it should be fully transparent in order to maintain a level playing field among competitors and to ensure adequate oversight of the Bureau. Publicness is the price of guidance.

II. Regulatory Implementation and Compliance Aids

We are supportive of the Bureau’s efforts to reduce regulatory compliance burdens on smaller institutions, and we believe that the Bureau’s statutorily required Small Entity Compliance Guides are an important part of that process. The Bureau speaks to many audiences, and the simplified materials prepared for small entities are also often useful for other constituencies, such as consumers, consumer attorneys, consumer advocates, consumer counselors (such as housing counselors), and law students. We believe that with appropriate standardized disclaimers, the Bureau should continue producing regulatory implementation guides, as well as rule summaries and quick reference materials.

III. Official Interpretations and Standalone Interpretive Rules

As far as we understand, there is no formal legal distinction between an “Official Interpretation” and a “standalone interpretive rule.” Statutory provisions creating safe harbors from liability for good faith compliance with an interpretation do not distinguish between these categories of interpretations.\(^5\)

Our understanding is that the main distinction between Official Interpretations and standalone interpretive rules is codification, which is an administrative, rather than legal issue. Official Interpretations are codified and therefore easy to search, including on the Bureau’s own website. For example, if one looks up a particular TILA or EFTA provision on the Bureau’s website, there is an immediate and handy link below the provision to the Official Interpretation. The same is true for commercial websites like Lexis and Westlaw.

Standalone interpretive rules, in contrast, are not codified and are therefore often not connected with TILA or EFTA provisions on governmental or commercial websites. This means that to find such a standalone interpretive rule, one has to know of the standalone interpretive rule’s existence or do a special search to see if such a rule exists.

Accordingly, we believe that all CFPB interpretations of regulations should be codified as Official Interpretations. This does not mean that the interpretations must be issued as such, but that if not they should periodically (at least annually, and perhaps quarterly) be converted into Official Interpretations so they may be readily searched by the public and regulated entities. Given that we are unaware of any legal distinction regarding the categories of interpretation, we believe that the Bureau could undertake such conversions as a ministerial matter without notice or comment.

In situations where there is no implementing regulation, such as with the Fair Debt Collection Practices Act, an Official Interpretation is obviously not possible, and standalone interpretive rules will have to suffice.

IV. SEFL Guidance Materials

We believe that the CFPB should continue to issue Supervision, Enforcement, and Fair Lending (SEFL) guidance materials. These materials serve a valuable purpose of communicating the Bureau’s priorities for supervision and enforcement to both regulated entities and the public. This helps in creating greater predictability for regulated entities. We do not have opinions regarding the timing, frequency, or scope or form of SEFL guidance materials; we believe that the appropriate format and timing of SEFL guidance is entirely case specific and cannot be set in advance.

We do not believe that the Bureau should be issuing general statements about its enforcement priorities, however. The Bureau has limited resources and to the extent that it indicates a prioritization of one area, it also signals that it will not be concentrating its enforcement resources in other areas, which may give a green light to regulated firms to “push the envelope” in those areas.

Likewise, enforcement actions are generally the product of lengthy non-public investigations. To the extent that the Bureau indicates enforcement priorities for a coming year or quarter, it is effectively signaling the areas in which the Bureau may have non-public investigatory activity, which may be unfair to regulated entities and cause undue market concern about all firms active in an area without regard to individual firms’ actual practices, effectively stigmatizing particular areas of consumer finance.

Lastly, it is important that the Bureau manage expectations. If the Bureau signals enforcement priorities for a particular area, there will be an expectation of enforcement actions. But such actions may turn out not to be appropriate. The effect will be the Bureau crying wolf, which will cost it credibility.

V. Recommendations for New Forms of Written Guidance

1. FAQs Should Not Be Used to Issue Interpretive Rules

FAQs are a useful tool for the Bureau to communicate with a wide range of constituencies. They can be useful both for providing general explanation of the application regulations in particular situations (e.g., bankruptcy issues in mortgage servicing) or for administrative information, as a supplement to instructional guides, such as “How can I sign up for a user account to access the HMDA platform?” or “How do I know if my data has been processed and received by the Consumer Financial Protection Bureau?”

FAQs, however, are not an appropriate medium for issuing interpretive rules. FAQs are necessarily a more informal format for which technical language is not appropriate, yet such technical language may be necessary for an interpretive rule. Moreover, the phrasing of the question is itself a necessary limitation on any interpretation provided in response. Traditional forms of interpretive rules are less likely to cause confusion as to what the rule actually is.

2. The Bureau Should Not Adopt an Advisory Opinion Program

We oppose the Bureau adopting an advisory opinion program. We believe that such a program would be duplicative and that the Bureau can communicate its policy positions and interpretations better through other means. The Bureau already operates a No Action Letter program and has a Trial Disclosure Waiver Policy. Both allow for individual exemptions from supervisory or enforcement actions. These programs, combined with Supervision, Enforcement, and Fair Lending (SEFL) guidance materials such as compliance bulletins, policy statements, and statements on supervisory practices are more than adequate to address questions of CFPB supervision and enforcement policy. General legal interpretations are best addressed through formal interpretive rules that go through the notice-and-comment process. Accordingly, we do not see a space or a need for an advisory opinion program that would opine on the application of existing statutes and regulations in generic terms. Expanding the types of guidance issued by the Bureau will only create confusion as to the significance of different types of guidance without providing the public or regulated entities with meaningful additional assistance in understanding legal obligations.

If the Bureau were to embark on an advisory opinion program, however, we would urge the Bureau to put any advisory opinions it issues through the a notice-and-comment process. This will ensure that the Bureau is able to receive input from all stakeholders when articulating policy positions and will be fully informed of the consequences of its policy choices. We recognize that a notice-and-comment process imposes delay on the issuance of advisory opinions, but we are of the belief that time is rarely of the essence in the case of guidance, and that in those rare occasions when it might be, the Bureau will find a way to clarify policy as necessary.

3. Interpretive Rules of All Sorts, including Advisory Opinions Should be Limited to Interpretations of the Enumerated Consumer Laws and Not UDAAP Liability

We believe there should be a very limited role for interpretive rules, including advisory opinions. Interpretive rules should be restricted to interpretations of the enumerated consumer laws, and good faith compliance with an advisory opinion regarding an enumerated consumer law should not be a per se defense against UDAAP liability, although it should be a factor for the Bureau to consider in the enforcement process. UDAAP violations are inherently fact- and circumstance-specific, and the limited information the Bureau has when issuing an interpretive rule is not sufficient for making a UDAAP determination. All guidance materials should contain language clearly noting this limitation and preserving the Bureau’s ability to bring a UDAAP action if the facts and circumstances indicate it to be appropriate.

VI. Disclaimers

For all forms of guidance other than Official Interpretations and Standalone Interpretive Rules the CFPB should have standardized generic disclaimer language. Standardized and generic language will avoid any confusion about what exactly is meant by variations in disclaimer language and will indicate a bright line between what we have termed Formal Guidance and Informal Guidance.

The disclaimers should clearly state that the guidance does not bind the Bureau in enforcement matters and should not be relied upon as precedent but is merely being provided as a courtesy to facilitate regulated entities and the public’s notice of the line between permissible and impermissible conduct. Such disclaimers should also specifically note that any Bureau guidance regarding an enumerated consumer law and the regulations thereunder does not address potential
UDAAP issues. As we disfavor any oral guidance, we would anticipate standardized disclaimer language always being in print. A possible model for the Bureau in this regard is the language adopted by the Internal Revenue Service in response to a GAO recommendation that it should communicate more clearly the limitations of informal guidance, particularly whether the item can be used or cited as precedent.\textsuperscript{7} The Bureau should also consider adopting a rule about the effect of its disclaimer language as a means of standardizing the legal effect of such disclaimers.