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June 27, 2016

The Honorable Ron Johnson
Chairman
Senate Committee on Homeland Security
and Governmental Affairs
328 Hart Senate Office Building
Washington, DC 20510

The Honorable Tom Carper
Ranking Member
Senate Committee on Homeland Security
and Governmental Affairs
513 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Johnson and Ranking Member Carper:

The National Association of REALTORS® (NAR) is pleased that the Senate Committee on Homeland Security and Governmental Affairs is holding a hearing entitled “Examining the Use of Agency Regulatory Guidance, Part II” on Thursday, June 30, 2016. NAR supports the Committee’s oversight activities into all aspects of the rulemaking process to help ensure regulations are transparent, accountable and cost-effective.

From NAR’s perspective, the practice of issuing regulatory guidance by federal regulatory agencies can be a double-edged sword. Guidance can serve to clarify certain aspects of a complex rule, illuminate an agency’s thinking behind a particular regulatory provision or help regulated stakeholders comply with a rule. For example, NAR has worked successfully with the Environmental Protection Agency to develop guidance that helps NAR members understand and comply with the Lead-Based Paint Disclosure Rule.

When rulemaking is ongoing, guidance can be a useful tool for providing certainty on an issue within a complicated regulatory framework. For instance, last year, the Consumer Financial Protection Bureau (CFPB) began implementation of the “Know Before You Owe” mortgage initiative with a comprehensive regulation and is scheduled to propose an additional regulation this summer. The confusion generated by the initial rule has resulted in NAR’s continued engagement with CFPB to provide clarity on a number of issues – primarily, the ability of lenders to share Closing Disclosures (CD) with third parties when a consent form is present. In this case, guidance would be beneficial because the issue involves multiple complex regulations and does not require formal rulemaking as there is already existing authority addressing the issue.¹ Such guidance would reiterate the practice of sharing the CD remains permissible under the recent and forthcoming rules, benefiting consumers seeking support from NAR members during settlement while CFPB’s rulemaking continues.

At the same time, however, regulatory guidance can also be an imperfect alternative to effective rulemaking. Because agencies are not required to follow the Administrative Procedures Act (APA) when developing and issuing guidance, this information may be developed without any of the transparency or public input that regulations receive. Guidance may also go well beyond merely clarifying specific regulatory provisions and move into the realm of rulemaking itself, without any of the safeguards and checks provided under APA. For example, when the U.S. Army Corps of Engineers issued guidance to clarify certain definitions of Waters of the U.S. in 2010, it went well beyond guidance and actually made changes to the statutory definition of U.S. waters under the Clean Water Act.



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¹ A lender is permitted to share the Closing Disclosure with third parties if the lender receives a consent form from the consumer as allowable under Regulation P, Privacy of Consumer Financial Information (12 CFR Part 216).

The APA allows agencies to produce guidance documents to clarify issues in an existing regulation. Importantly, these guidance documents cannot bind regulated parties. Unfortunately, this APA exception leaves open the possibility that agencies improperly issue guidance in lieu of rulemaking, in order to take advantage of the APA's exceptions and relaxed procedures. This exception may blur the distinction between congressional statute, regulations and guidance and diminish the principles of transparency and accountability built into the APA.

NAR urges the Committee to push federal agencies to, adhere to previous Office of Management and Budget directives on regulatory guidance, develop written policies on when and how regulatory guidance is appropriate, and apply stronger internal controls for regulatory guidance procedures. Following these recommendations will help preserve the credibility of the rulemaking process and improve compliance rates by regulated stakeholders.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Salomone", with a long horizontal flourish extending to the right.

Tom Salomone
2016 President, National Association of REALTORS®

cc: Senate Committee on Homeland Security and Governmental Affairs