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The Honorable Mick Mulvaney
Acting Director
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, D.C. 20552

Re: Request for Information Regarding Bureau Guidance and Implementation Support;
Docket No. CFPB-2018-0013 submitted electronically via:
<https://www.regulations.gov/comment?D=CFPB-2018-0013-0001>.

Dear Acting Director Mulvaney,

On behalf of over 1.3 million members of the National Association of REALTORS®, I appreciate the opportunity to comment on the Request for Information (RFI) Regarding Bureau Guidance and Implementation Support. With the Bureau of Consumer Financial Protection (the Bureau) having jurisdiction over many consumer financial protection laws, it is imperative that necessary guidance, including interpretive rules and non-rule guidance, be provided to regulated entities to ensure compliance across the industry. Such support in turn, helps to protect consumers' financial interests and bolster life goals such as buying a home.

The National Association of REALTORS® (NAR) is America's largest trade association, including NAR's five commercial real estate institutes and its societies and councils. REALTORS® are involved in all aspects of residential and commercial real estate transactions and belong to one or more of the approximately 1,200 local associations and boards, and 54 state and territory associations. The real estate industry is diverse – ranging from sophisticated large mortgage lenders with extensive compliance departments to self-employed real estate professionals with limited compliance support. When the Bureau is issuing regulations and subsequent guidance, it must therefore recognize what type of guidance is needed for varying entities, when it is appropriate to provide such guidance, and how that guidance should best be conveyed.

For a majority of the industry, guidance that can be relied upon – that is both written and authoritative – provides the most certainty and clarity. While formal rulemaking procedures are essential when it comes to legal liability concerns, the Bureau should ensure that any supplementary non-rule guidance does not conflict with the existing rules and provides necessary flexibility to adjust to changing circumstances. In some instances, time is of the essence, so quick responses with Bureau insights are also a factor that should be considered depending upon the regulatory need. In determining which regulatory issues merit additional guidance, the Bureau should assess the topics being brought up consistently through the RFIs, including those outlined below.

There are specific areas where Bureau guidance has been helpful in the past, but more could be done to provide additional clarity. This is especially the case as marketplace practices change in response to new judicial interpretations and changing technology. Of priority to NAR members are regulations and guidance related to the Know Before You owe mortgage disclosure rule and the *Real Estate Settlement Procedures Act*.



Know Before You Owe

The “Know Before You Owe” (KBYO) mortgage disclosure rule that harmonized the *Truth in Lending Act* (Regulation Z) and the *Real Estate Settlement Procedures Act* (Regulation X) radically altered the settlement process the real estate industry. While implemented for the benefit of consumers, the overhaul of the mortgage disclosures was, and continues to be to a certain extent, an uphill battle for settlement service providers. As a result, the Bureau released several updates to the original 2015 rule, in addition to webinars, rule summaries, and compliance guides to support the regulatory changes.

With the KBYO rule being so complex, the first set of guidance issued in an attempt to clarify the rule raised additional questions and concerns, creating confusion rather than understanding for the industry. For example, the KBYO webinars were helpful, but could not be reasonably relied upon for compliance certainty due to the ambiguous non-authoritative disclaimers. As a result, NAR recommends that future guidance, especially on complex regulations, be in line with the underlying rule and offer an authoritative basis for reliance. Such authoritative guidance, along with delayed enforcement, will provide the support sought by industry when undergoing an intensive regulatory shift and ultimately result in more attainable compliance.

As some industry uncertainty remains and another rule clarifying the “black hole” issue was finalized earlier this year, the Bureau should continue assess whether any additional guidance is needed. Such assessment will likely reveal a continued need to fix the timeframe in which minor KBYO errors can be corrected to remedy any investor loan salability issues. While such a fix may be more appropriate through a formal rulemaking, the Bureau could consider expedited procedures through guidance to address the outstanding concerns. In any case, clarity on the ability to cure errors should be provided in writing to minimize any cost increases associated with loan production that could be passed on to consumers.

Real Estate Settlement Procedures Act

The *Real Estate Settlement Procedures Act* (RESPA) provides consumers with improved disclosures of settlement charges and reduces the costs of closing by the elimination of referral fees and kickbacks. Since the jurisdiction over RESPA was transferred from the U.S. Department of Housing and Urban Development to the Bureau, there have been a number of enforcement actions and interpretations issued by the Bureau that have not delivered the compliance clarity needed by industry but rather have resulted in ongoing confusion and uncertainty.

According to the RFI, interpretative guidance often comes in the form of compliance bulletins, which may offer settlement services providers’ protection from civil liability for acts committed in good faith when relying on those interpretations. While such bulletins are often useful due to the expedited timeframe for issuance without formal notice and comment procedures, there must be a consistency check to ensure the underlying information does not contradict prior interpretations of the law. If the Bureau is adopting a novel interpretation through the official guidance, then a more thorough formal feedback process is warranted. For example, if the Bureau had taken a more thoughtful and deliberate approach when constructing Compliance Bulletin 2015-05, “RESPA Compliance and Marketing Services Agreements,” public feedback would have revealed the inconsistencies of the interpretation, as the courts have found more recently on these issues.

In light of recent judicial decisions, including in the case of PHH Corp. and Borders & Borders, the Bureau has an opportunity to provide insightful guidance on the scope of permissible activities under RESPA including marketing service agreements, co-marketing relationships, and affiliated business arrangements. In the past, the Bureau has taken the position that various marketing activities are in violation of RESPA to certain degrees, but judicial interpretations have struck down such views, paving the way for new guidance to be provided.

As held by the U.S. Court of Appeals for the District of Columbia in the PHH case, payments for bona fide services provided and made at fair market value do not violate RESPA. This recent decision restored clarity on RESPA Section 8, but additional actions by the Bureau are needed to support this ruling, with special attention given to marketing on technology platforms. Guidance explaining acceptable ways in which settlement service providers can enter into agreements to provide marketing


services under RESPA would endorse the court's decision and serve as an important compliance aid to direct industry practices.

While the Bureau has failed to provide such guidance, in 2014, NAR worked with leading RESPA experts to construct "Dos and Don'ts" for marketing services agreements that represent more than a decade's worth of industry best practices. Last year, NAR also issued best practices for online co-marketing as digital technology platforms develop unique advertising opportunities for the real estate industry. The Bureau's adoption of well-researched and unambiguous references would offer indispensable insight to industry, especially as online marketing platforms continue to evolve.

Conclusion

The Bureau's implementation of guidance such as the Small Entity Compliance guides and quick reference materials, even when not legally required to do so, have been helpful for regulated entities, especially those lacking teams of compliance personnel. The Bureau should continue to offer such helpful resources through new methods like Frequently Asked Questions and advisory opinions, and continue to provide oral and email responses when questions arise, as there is always a need for multiple communications to effectively reach all audiences. Such support through an array of broadly available resources will provide much needed guidance for industry practitioners and ensure the financial interests of consumers are protected. NAR looks forward to continuing to work with the Bureau to provide the necessary regulatory insights to further their administrative goals while assisting homebuyers with their homeownership dreams.

Sincerely,

A handwritten signature in black ink that reads "Elizabeth G. Mendenhall". The signature is written in a cursive, flowing style.

Elizabeth Mendenhall
2018 President, National Association of REALTORS®