Rod J. Alba
Senior Vice President
Real Estate Finance, Mortgage
ralba@aba.com

February 12, 2024

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Dear Director Chopra:

The American Bankers Association (ABA)[1] appreciates your acknowledgment that financial service providers and the consumers they serve benefit from clear rules. As you noted in your written testimony to Congress in April 2022, "Laws work best when they are easy to understand, easy to follow, and easy to enforce."[2] You also promised that the Consumer Financial Protection Bureau (CFPB) would "[D]ramatically increase its issuance of guidance documents, such as advisory opinions, compliance bulletins, policy statements, and other publications."[3]

You have followed through on this commitment, overseeing the agency's issuance of a steady stream of guidance documents, which have had a significant impact on industry—and the products and services available in the consumer financial marketplace. However, this impact has not always been positive, and the guidance issuances have not always provided legal clarity or useful advice and information to regulated entities.

As discussed in ABA's white paper, *Effective Agency Guidance*,[4] this is sometimes the result of a failure to follow either the mandatory process of the Administrative Procedure Act (APA),[5] which is required for guidance that is a binding "legislative rule." In other cases, the guidance may in fact be an "interpretive rule" or "general statement of policy" that is not subject to the APA, but the failure to confer with regulated entities to understand their interpretive questions, operational impacts, and system constraints limits the utility of the guidance, undermines its acceptance, and may limit its durability as administrations change.

Because ABA and its members welcome guidance that complies with legal requirements while providing useful information and advice, we are offering industry feedback on certain recently published guidance documents. Our goal is to provide constructive feedback on the legal and operational issues presented, the benefits and costs, and to identify interpretive questions that

[1] The American Bankers Association is the voice of the nation's $23.4 trillion banking industry, which is composed of small, regional and large banks that together employ approximately 2.1 million people, safeguard $18.6 trillion in deposits and extend $12.3 trillion in loans.
[2] https://www.consumerfinance.gov/about-us/newsroom/written-testimony-director-rohit-chopra-before-the-senate-committee-on-banking-housing-and-urban-affairs/
[3] Id.
[4] Am. Bankers Ass'n, Effective Agency Guidance (Feb. 6, 2024), https://www.aba.com/advocacy/policy-analysis/wp-effective-agency-guidance.
[5] *See* 5 U.S.C. § 553.

remain—in other words, to provide the comments industry would have offered had the CFPB sought public comment prior to issuing the guidance. Our intent is for the Bureau to issue guidance documents that are transparent, consistent with the law, and focused on promoting the interests of consumers in a strong, vibrant, and innovative market for consumer financial products and services.

Summary of the Comment

On February 13, 2023, without consultation with stakeholders, the Bureau released an Advisory Opinion (AO)[6] to address the applicability of the Real Estate Settlement Procedures Act (RESPA) section 8 provisions[7] to operators of certain digital technology platforms that enable consumers to comparison shop for mortgages and other real estate settlement services, or Digital Mortgage Comparison-Shopping Platforms (DMCSP). Prior to this advisory opinion, the only guidance on which platform operators and the lenders that use them could rely was a 1996 Statement of Policy by the U.S. Department of Housing and Urban Development (HUD) on computer loan origination systems (CLOs).[8] And until publication of the AO, it was unclear whether the CFPB would defer to HUD's 1996 interpretation or to the informal advisory opinions issued by HUD in the 1980s and 1990s related to lead generation.

The AO affirms the relevancy of HUD's 1996 Statement of Policy but seeks to clarify provisions applicable to operators of digital mortgage comparison platforms with regard to specific practices that the Bureau believes violate RESPA's prohibitions against the payment of fees for the referral of real estate settlement services.

ABA appreciates the CFPB's efforts to clarify some of the risks arising from digital mortgage shopping platforms, which have become increasingly important lead generation tools for mortgage originators. ABA applauds the Bureau's intent, as expressed in press releases accompanying the AO's release, to protect Americans from "double dealing on digital mortgage comparison-shopping platforms," and to guard against digital platforms that appear to be objective lender comparisons but in practice may illegally refer consumers via referral fees.[9]

We caution, however, that parts of the advisory opinion are inconsistent with RESPA and Regulation X. Our comments describe these inconsistencies and urge the CFPB to solicit additional public feedback to ensure that stakeholders have adequate opportunity to raise additional issues or questions about the AO. This letter advances the following main issues raised by the AO:

[6] 88 FR 9162 (February 13, 2023)
[7] 12 U.S.C. 2607(a). Regulation X, 12 CFR 1024.14, generally implements RESPA section 8 prohibitions.
[8] HUD, Statement of Policy 1996-1: Computer Loan Origination Systems (CLOs), 61 Fed. Reg. 29,255 (June 7, 1996).
[9] See Press Release: *CFPB Issues Guidance to Protect Mortgage Borrowers from Pay-to-Play Digital Comparison-Shopping Platforms* at https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-to-protect-mortgage-borrowers-from-pay-to-play-digital-comparison-shopping-platforms/, February 7, 2023.

- The AO sets forth compliance advice that that is inconsistent with longstanding legal interpretations. This raises uncertainty in compliance, existing contractual arrangements, and mortgage lending practices.
- The AO's scope of coverage is unclear, which introduces uncertainty in mortgage operations across all channels and media.
- The AO offers no implementation runway, and therefore poses immediate compliance and legal risk for mortgage stakeholders.
- The anti-kickback regulations are outdated. ABA recommends that the Bureau devote broader attention to reviewing and reforming the entirety of RESPA's Section 8 provisions. The regulations must be modernized to effectively function in the context of new technologies, and this must be done through an Administrative Procedures Act (APA) rulemaking, which invites comments from all interested stakeholders.

A. The Advisory Opinion Conflicts With Previous Legal Interpretations

Although the AO asserts that it builds on guidance previously issued by the Department of Housing and Urban Development (HUD), the AO alters accepted and long-standing tests used to determine whether a Section 8 violation exists. Under existing RESPA regulations, a person may not give or accept anything of value pursuant to an agreement or understanding for referral of real estate settlement service business involving covered mortgage loans.[10] In the new advisory opinion, the Bureau interprets the application of this provision by articulating a three-part test to determine whether digital mortgage platforms violate RESPA. Specifically, the CFPB indicates that an operator of a Digital Mortgage Comparison-Shopping Platform is deemed to receive a prohibited referral fee in violation of RESPA section 8 when:

(1) the Digital Mortgage Comparison Shopping Platform non-neutrally uses or presents information about one or more settlement service providers participating on the platform;
(2) that non-neutral use or presentation of information has the effect of steering the consumer to use, or otherwise affirmatively influences the selection of, those settlement service providers, thus constituting referral activity; and
(3) the Operator receives a payment or other thing of value that is, at least in part, for that referral activity.[11]

This description effectively re-casts the existing and well-established test for determining whether there is a violation of Section 8(a) of RESPA, and it does so in a way that confuses compliance calculations under RESPA. A comparison of the AO's test with existing articulations of the law underscores these changes. Longstanding HUD regulations and interpretations have described Section 8(a) as prohibiting any person from giving or accepting any fee, kickback, or thing of value for the referral of settlement service business involving a federally related

[10] See 12 CFR § 1024.14(a).
[11] 88 FR at 9164.

mortgage loan.[12] Agencies and legal experts parse this standard as requiring analysis of three well-established elements:[13]

a) First, there must be a referral of settlement service business, defined as "any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service…"[14]
b) Second, there must be a payment of a "thing of value" in return for the referral of business, meaning moneys, advances, funds, special loans, services, discounts, commissions, or other consideration.[15]
c) Finally, the payment must be made pursuant to an agreement or understanding, formal or informal, to provide a thing of value in exchange for the referral.[16] [17]

The new test set forth in the AO is noticeably different than HUD's legacy three-part test above—the two tests are articulated differently and emphasize different factors in the analysis. More importantly, the new articulation under the AO appears to give rise to legal presumptions that will vary outcomes in determinations of whether Section 8 violations exist. We discuss these points here—

Non-neutrality factor: The AO identifies "non-neutrality" of information as an explicit element in the determination of a RESPA violation. Note that this "non-neutral" standard is not in any way mentioned in HUD's legacy three-prong analysis. Under the previous HUD articulation, "non-neutrality" is an evidentiary factor only—regulators could, where appropriate and necessary, analyze "neutrality" to determine whether there was "affirmative influencing" of consumers that could amount to a "referral."[18] In the AO, however, "non-neutrality" is listed as

---

[12] *See* 12 U.S.C. 2607(a). HUD interpretive articulations of this standard appear in multiple statements of policy, including—*Statement of Policy 1996-3, Rental of Office Space, Lock-outs, and Retaliation* (61 F.R. 29264 at 29264 (June 7, 1996)); *Statement of Policy 2001–1: Clarification of Statement of Policy 1999–1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b)* (66 F.R. 53052 at 53055 (October 18, 2001)).

[13] CFPB describes this three-part test in recent on-line guidance entitled *"Real Estate Settlement Procedures Act FAQs."* The Bureau's FAQ analysis lists the three elements and adds that the transaction must be "incident to or part of a real estate settlement service." *CFPB Real Estate Settlement Procedures Act FAQs,* RESPA Section 8(a) – Question 1, posted at https://files.consumerfinance.gov/f/documents/cfpb_respa_frequently_asked_questions.pdf. *See also* Federal Deposit Insurance Corporation, (March 2021). Consumer Compliance Supervisory HIGHLIGHTS, Page 6. https://www.fdic.gov/regulations/examinations/consumer-compliance-supervisory-highlights/documents/ccs-highlights-march2021.pdf ("In general, a RESPA Section 8(a) violation would occur if: 1) there is the payment or acceptance of a fee, kickback, or thing of value; 2) there is an agreement to refer settlement services; and 3) there is an actual referral."); Spencer Bunting, Holly, "The Rules of the RESPA Road: Compliant Strategic Alliances, *The Review of Banking & Financial Services,* Vol. 36, No. 5 (May 2020), page 53-54.

[14] 12 C.F.R. § 1024.14(f)

[15] 12 C.F.R. § 1024.14(d).

[16] 12 C.F.R. § 1024.14(e).

[17] For a very succinct articulation of this legal test, see FDIC's summary in compliance training materials stating that the "elements of a violation" are—"1. Payment or transfer of a thing of value, 2. Pursuant to an agreement or understanding to refer settlement service business, 3. Resulting in an actual referral. See *Understanding and Mitigating RESPA Section 8(a) Risks*, FDIC, posted at www.fdic.gov/news/events/otherevents/2019-11-19-ny-respa-industry-call.pdf.

[18] HUD's 1996 statement of policy, formally adopted as guidance by the Bureau on September 1, 2023 (chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_RESPA_Other_Applicable_Documents-HUD.pdf), states that "HUD *may* scrutinize non-neutral displays of

an actual element, not mere evidence of that factor. Under this new standard, the first step in determining whether a Section 8 violation exists in DMCSPs hinges on affirmatively identifying factors such as variations in the order of institutions listed in the platform, the hue or color of the lettering, prominence and different text sizes, or discrepancies in the completeness of information provided on the participants. This change is material, particularly considering its interaction with the second factor, steering, described below.

Steering Effect: The second element of the three-part test set forth in the AO asserts that the non-neutral presentation must be found to have a "steering effect." This too differs from the HUD-articulated legal test under Section 8. The newly articulated test sets a much lower bar because a steering "effect" is not the same as actual steering. Under the AO, an "effect" can be very slight and still qualify as steering; on the other hand, HUD's longstanding interpretations define "referral" as "affirmatively influencing" the selection of a settlement service.[19] The apparent softening of this standard means that under the AO, *any* difference in the appearance or listing order of a comparison-shopping platform can qualify as a "referral." The new test can sweep in even slight "influence" factors that can be easily or inadvertently triggered. ABA believes that this change effectively shifts the burden of proof in RESPA investigations, with significant repercussions on how the law will apply, particularly in the context of digital comparison-shopping platforms. As further discussed below, lenders and operators will bear the burden of *actually demonstrating* "neutrality" for purposes of assuring compliance.

Payment: The final element of the AO's test states that to violate RESPA, there must be a payment that is "at least in part" for the referral activity. This articulation again varies from previous HUD guidance. Under this new articulation, any payment over levels considered "reasonable" or "fair" will be deemed to be an illegal referral fee. Importantly, this new iteration under the AO's three-part test lacks a crucial balancing element that is present in HUD's three-prong test, which requires that the payment be made pursuant to an *agreement or understanding* to exchange money (or anything of value) for the referral. The "legal analysis" section of the AO touches on this element, but completely omits any meaningful discussion of it, offering only scant explanations that an express agreement can just be presumed if "enhanced non-neutral" placements are received.[20] The legal analysis section also offers, without explanation, that an agreement or understanding can just be established through a "pattern and practice" of conduct. How a pattern or practice should be demonstrated on a DMCSP is not described. The AO's explanations regarding agreement or understanding to refer are simply lacking and insufficient and raise the specter that plaintiffs and examiners are no longer required to demonstrate the existence of an actual contract or agreement to engage in a referral fee scheme. If this is what the Bureau intended to achieve, the change would constitute more than mere interpretive guidance; it constitutes an alteration of RESPA—which only Congress, not the CFPB, can make.

As reported by our members, recent CFPB examination and enforcement approaches seem to reflect this unauthorized change in the law. Our members inform that examiners often begin

---

information on settlement service providers and their products because favoring one settlement service provider over others *may* be affirmatively influencing the selection of a settlement service provider" (emphasis added).61 F.R. 29255 at 29258.

[19] See 12 CFR § 1024.14(f)

[20] 88 FR at 9166.

compliance examinations with a “fair market value” assessment of mortgage-related charges, including the cost of leads purchased from third parties. In these examinations, often outside of the context of any referral activity, banks are expected to affirmatively demonstrate that mortgage-related fees and charges actually meet “fair market” standards and that charges are “reasonably related” to the value of those services. Examiner inquiries generally disregard the fact that certain services may fluctuate in value depending upon the circumstances, market, and needs of an individual bank. This emerging regulatory expectation, which forces banks to prove “pricing reasonableness,” is far from the intent or objective of the RESPA statute. As clearly stated in RESPA’s legislative history:

> [T]here should be no question that [Section 8] does not in any way authorize a civil suit nor subject … anyone who provides settlement services to civil or criminal penalties if the homebuyer believes that the charge made to him is in excess of the reasonable value of the services rendered. What is subject to civil and criminal penalties is if the person rendering the settlement service gives or splits a portion of the fee he receives with someone else and the person receiving the payment provides no legitimate service in return.[21]

Notwithstanding this clear Congressional intent confirming that RESPA is not a rate-setting statute, customary fees charged or paid by a bank are today commonly subject to a *de-facto* requirement that the institution produce evidence and analysis of reasonable value or otherwise be subject to the hazy civil and criminal standards under these provisions.

Conclusion: Putting all this together, if a listing is deemed to be “non-neutral,” it constitutes a “referral” that could then be tied to an excessive charge, regardless how slight the excess may be, and therefore be considered a violation. Stated differently, the AO changes existing interpretations and effectively transforms “non-neutrality” in product presentations into referrals, and via regulatory presumptions, will be deemed violations of Section 8. The legal and compliance risks imposed by the legal inferences created in this AO are significant. We predict that lenders increasingly will fall into breach inadvertently, incurring civil penalties from unintentional blunders arising from innocuous behavior such as platform operators informally tweaking programs or altering certain details in listings and presentation pages. In light of the lack of clarity presented by the AO, member banks are now reporting significantly increased burdens in compliance reviews because every arrangement they currently have with any digital platform has to be paused and re-assessed under the novel and hazy factors defined in the AO.

We offer two illustrative examples—

- Bank ZZ enters into an arrangement with a digital platform to list and advertise loan products in 10 states. Some states are rural and others have metro areas of significant proportions. The platform will select lenders pursuant to a few consumer preference points, and will rotate lender names on the listing so as not to always list any one lender first. The platform will list institutions in different colors depending on the logos and

[21] 120 Cong. Rec. 29442-43 (Aug. 20, 1974).

other considerations. These simple facts present compliance risks under RESPA. Note that a "non-neutral" presentation is a per-se "referral" under the AO, so the "listing order" or the lettering hues will raise the risk of an affirmative influence that can steer a consumer. This means, therefore, that the price paid for the services across each of the 10 regions where the platform advertises can trigger a RESPA violation. The bank will have to assure that prices it pays for this service vary across all regions because fair market values will differ, and the bank will not want to be considered to have "over-paid" the going market rate. Since the bank must, in this situation, assume that a referral of business exists, then any inaccurate pricing variation across any of the regions becomes the element that completes the RESPA violation.

- YYY National Bank enters an online mortgage platform that charges $2,500 to join and lists all service providers equally and neutrally. For the Memorial Day holiday each year, the platform makes donations to national charities for veterans. The platform also allows institutions to donate to these charities. YYY National Bank makes a $2,000 donation and in appreciation, the mortgage platform places the bank into a "Gold Circle" of supporters. Gold Circle donors receive a special "thank you" on the website in gold letters. Despite the fact that the bank's contributions to veterans are not for "referral" activities, the contribution has the effect of giving the bank to an "enhanced placement" (i.e., a "gold" display), which could constitute a non-neutral listing that could, in turn, have a steering effect.

Depository institutions place a very high priority on RESPA compliance and devote considerable resources to assure adherence to all applicable laws and interpretive rulings. As noted in ABA's white paper, banks are under pressure to comply with agency guidance that articulates the agency's view of statutory and regulatory requirements, particularly when violations carry significant civil and criminal penalties.[22] As described above, the AO appears to reflect considerable change in the test for determining whether a Section 8 violation has occurred. Therefore, we call on the Bureau to rescind and revise the AO and reissue it for comment from all segments, including lenders, borrowers and settlement service providers.

B. The Scope of the Advisory Opinion is Unclear.

It is difficult to determine how broadly this AO is intended to apply. The Bureau states that this "Advisory Opinion *focuses* on digital platforms that include information or features that enable consumers to comparison shop for mortgages and other settlement services… ."[23] On the other hand, the AO also states broadly that the AO "applies to any 'person' to which RESPA section 8's prohibitions apply."[24]

The preamble to the AO devotes some discussion to the intended coverage of the advisory, and unfortunately, the broadly worded statement cited above conflicts with the preamble description

---

[22] Section 8 breaches are punishable by fines and possible prison terms of up to one year, or both. RESPA imposes civil damages up to three times the amount of the improper charges paid, and plaintiffs are entitled to reasonable attorney's fees and costs if they prevail. Class actions are available. 12 USC 2607(d)(1) and (2).
[23] 88 FR 9162, 9163 (emphasis added).
[24] *Id.* at 9164.

and obscures its precise coverage. ABA is concerned that the over-inclusive language quoted above could be interpreted by some examiners to make the AO applicable *to all* mortgage transaction settings, even if the Bureau did not contemplate this result. Such over-inclusions will lead to considerable confusion. For instance, if a local business distributes *paper flyers* listing mortgage and settlement companies available in that neighborhood, would such non-digital communication be subject to this AO as well? We fear that extending the AO to all real estate finance settings will have a negative impact on the marketplace as the definitions for "steering," "referring" or "compensating" will vary depending on the setting in which they occur.

We urge the Bureau to clarify, via re-issuance and solicitation for comments, that the AO applies only to DMCSP settings.

C. The Bureau Should Specify and Amplify Implementation Timeframes

The AO was published in the *Federal Register* on February 13, 2023 with an effective date of the same day, February 13, 2023.[25] When the Bureau proposes a new revised AO for comment, we ask that the Bureau propose an effective date that provides industry with a reasonable opportunity to comply. We recommend that the Bureau propose a minimum 12-month compliance timeframe to allow institutions to analyze business relationships and internal operations, and make appropriate changes.

While we anticipate that the comment process will bring about certain changes and clarifications to the AO, any final product advancing interpretive change is likely to require review of internal practices and revisions to existing and future contractual agreements with third parties. The range of tasks affected cannot be achieved overnight, and will require thorough consultations with legal experts, consultants and other industry partners. In fact, the AO cautions that matters covered by the opinion "may implicate other Federal and State laws and regulations."[26] The AO lists such important provisions as UDAAP, Truth in Lending Act, Equal Credit Opportunity Act, Telemarketing Sales Rule, Federal Trade Commission Act, among others. In instances such as this, where the Bureau admonishes the industry on the application of an array of laws to particular market activities, our banks view it as an absolute responsibility to thoroughly analyze all such provisions in accordance with the advice contained in the advisory. These reviews require extended periods for analysis and, where needed, program accommodations.

To fully illustrate the tasks and burdens posed by this new interpretation, we point to a very recent FDIC *Consumer Compliance Supervisory HIGHLIGHTS,* dated March 2023.[27] This article lists indicators of risk in mortgage-related third-party arrangements and advises the industry on risk-mitigating activities to help in complying with RESPA Section 8 requirements, including:

---

[25] *Id.* at 9162.
[26] *Id*. at 9169.
[27] See U.S. Federal Deposit Insurance Corporation, *Consumer Compliance Supervisory HIGHLIGHTS* (March 2023) (available at [Consumer Compliance Supervisory HIGHLIGHTS March 2023 (fdic.gov)])

- Training staff on RESPA Section 8, including the differences between a permitted lead and an illegal referral (including a warm transfer).
- Understanding the programs that lenders are involved with, how the programs function, and how the cost structure works.
- Developing policies and procedures that provide guidance to comply with regulatory requirements and management's expectations with regard to lead generation programs.
- Requiring loan officers to annually certify applicable relationships to ensure that the bank is aware of the arrangements used by loan officers to generate loans and that these arrangements have been vetted and controls put in place for associated risks.
- Monitoring lead generation activities regularly to ensure compliance with the bank's policies and procedures, and regulatory requirements.

Simply put, these tasks cannot be achieved overnight.

In light of the above, and in addition to our request that the CFPB propose an AO that includes a 12-month compliance timeframe, ABA further recommends adequate interagency communication and coordination on these important consumer protection initiatives. Agencies must achieve better synchronizations between interpretive guidance and examination expectations pertaining to RESPA Section 8 provisions. Well-coordinated implementation expectations and proper timeframes will benefit industry and consumers alike.

D. ABA Requests Broader Rulemaking on Section 8 Provisions

Neither the RESPA statute nor the regulations have been updated to reflect the migration of the mortgage business to today's new technologies and the Internet. Moreover, RESPA's anti-referral fee provisions do not take into account the extensive regulatory changes implemented pursuant to the Dodd-Frank Act that prescribed amplified consumer protections. Today, there are considerable risks and challenges in applying RESPA's Section 8 provisions to new modes of business and communication in the electronic world. We call on the Bureau to initiate a broader rulemaking process that modernizes Regulation X, even beyond the "comparison-shopping platforms" identified in this AO.

ABA believes that our request to streamline and clarify Regulation X will affirmatively spur innovation and encourage the adoption of new technology, to the clear benefit of consumers. RESPA rules contain complex exemptions, unclear provisions, and inadequate definitions that have created a regulatory structure that fails to accommodate or anticipate business and technological advancements. As a result, virtually every payment connected to a mortgage settlement must be closely examined for legality under RESPA Section 8 —with no assurance of achieving full compliance. Every new bank mortgage product, every measure taken to augment mortgage-related digital capabilities, and every relationship with third-party partners become entangled in the vague and uncertain requirements of RESPA's Section 8.

An example that illustrates the lingering confusion that disincentivizes innovation involves determining whether "hyperlinks" or "click-throughs" constitute "referrals." Typically, hyperlinks connect readers to an outside page or resource. The link may include a reference to

images or words on the page, which the consumer accesses by clicking, tapping, or hovering on the item. It is, however, the consumer who chooses to be "transported" via the hyperlink, and often, it is not clear whether that electronic 'transportation" constitutes a referral or whether the presence of the hyperlink on a page, *in se*, constitutes an action directed to a person that affirmatively influences the selection of a service. This type of interpretive uncertainty discourages highly regulated banks from offering the digital marketing and delivery services consumers increasingly want and seek.

ABA calls on the Bureau to initiate consultation and research on the impact of RESPA's anti-kickback provisions on consumers, market innovation, and real estate finance operations, and based on those results, to initiate notice-and-comment rulemaking to broadly update Regulation X.

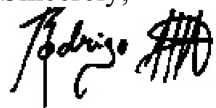
Conclusion

ABA supports the CFPB's focus on harm to consumers involving digital platforms that feign the appearance of objectivity or that illegally refer customers to lenders based on kickbacks. Depository institutions are negatively affected by these uncompetitive practices, and we believe all market players must be as closely regulated as banks. As described above, however, the apparent reconfiguration of long-standing regulatory guidance, and the absence of clarity in certain aspects of the new AO, will create a regulatory environment where banks are likely to exit digital platforms to avoid the legal risks. This exit would be a very negative outcome, as market competition will dwindle, and consumers will be denied the benefit of products offered by well-regulated institutions.

In addition, the Bureau must recognize that the optimal outcome of this regulatory endeavor is to create clear and durable rules that promote consumer protection while accommodating demands of efficient mortgage loan production and economic growth. To achieve these goals, regulators must confer with mortgage lenders and settlement service providers and understand operational burdens, impacts, and constraints. We look forward to working together towards the objective of achieving well-regulated markets that function and provide capital at peak levels.

For more information on these comments and recommendations, please contact Rod J. Alba, Vice President and Senior Regulatory Counsel, at Ralba@aba.com.

Sincerely,



Rod J. Alba
Senior Vice President
Real Estate Finance, Mortgage
Regulatory Compliance & Policy