

June 18, 2018

By electronic delivery to:
www.regulations.gov

The Honorable J. Michael Mulvaney
Acting Director
Bureau of Consumer Financial Protection
1700 G Street, N.W.
Washington, D.C. 20552

Re: Request for Information Regarding the Bureau's Adopted Regulations and New
Rulemaking Authorities; Docket No. CFPB-2018-0011

Dear Acting Director Mulvaney:

The American Bankers Association (ABA)¹ appreciates the opportunity to comment on the Bureau of Consumer Financial Protection's (Bureau) Request for Information Regarding the Bureau's Adopted Regulations and New Rulemaking Authorities (RFI).² This RFI, the eighth in a series of twelve "calls for evidence," seeks feedback from interested parties to inform the Bureau's review and possible amendment of the rules it has promulgated since it was created (Adopted Regulations). The RFI also requests input on whether it should exercise new rulemaking authorities granted by the Dodd-Frank Wall Street Reform and Consumer Protection Act (New Authorities).³

ABA supports the Bureau's decision to review the Adopted Regulations. Since opening its doors on July 21, 2011, the Bureau has published sweeping new rules governing remittance transfers, mortgage origination and servicing, prepaid cards, and small dollar lending. Given the breadth and complexity of this new body of regulation, it is important to ensure that each rule is working as intended, and it is inevitable that they can be improved, especially with the benefit of experience and hindsight.

In undertaking this assessment, we encourage the Bureau to consider whether the Adopted Rules are consistent with the law, clear, and whether they promote the financial interests of consumers in a strong, vibrant, and innovative market that offers the variety of financial products and services that consumers want and value. In addition, we believe that the evaluation of the

¹ The American Bankers Association is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits, and extend nearly \$10 trillion in loans.

² 83 Fed. Reg. 12,286 (Mar. 21, 2018).

³ The RFI notes that the Bureau is not requesting comment on the 2015 Home Mortgage Disclosure Act (HMDA) rule or the 2017 Payday, Vehicle Title, and Certain High Cost Installment Loan rule because the Bureau has announced its intent to reopen and reconsider those rules. *Id.* at 12,288. ABA supports the decision to reconsider both rules, and we look forward to providing information regarding those rules.

Adopted Regulations should seek to quantify costs and benefits where possible, amending those provisions that increase costs that are not outweighed by demonstrable benefits to consumers. As requested in the RFI, we have not sought to identify every possible regulatory change the Bureau should make. Rather, we have focused on some of the banking industry's key priorities, suggesting changes we believe will promote the Dodd-Frank Act's statutory objectives as well as the Bureau's specific goals for the particular Adopted Regulation.

I. Pending Rulemakings Pursuant to New Rulemaking Authorities

The RFI states that the Bureau does not request comment on “any pending rulemaking for which the Bureau has issued a Notice of Proposed Rulemaking or otherwise solicited public comment.”⁴ This would include the 2013 Advance Notice of Proposed Rulemaking on Debt Collection,⁵ the 2016 Notice of Proposed Rulemaking Regarding Amendments to Disclosure of Records and Information,⁶ and the 2017 Request for Information Regarding the Small Business Lending Market.⁷ While we understand that these pending rulemakings are being addressed in separate work streams, we identify below some of the banking industry's primary concerns about each.

a. Notice of Proposed Rulemaking Regarding Amendments to Disclosure of Records and Information

In August 2016, the Bureau published a Notice of Proposed Rulemaking Regarding Amendments to Disclosure of Records and Information, which among other things proposed amendments to Bureau rules regarding the confidential treatment of information obtained from companies subject to its supervisory authority.⁸ The Bureau's Spring 2018 Regulatory Agenda anticipates that the rule will be finalized in March 2019.⁹

ABA opposes the proposed amendments to the Bureau's rules governing the sharing of confidential supervisory information (CSI).¹⁰ These amendments would permit the Bureau to share CSI not only with Federal and state agencies “having jurisdiction over the supervised financial institution” as permitted by the unambiguous text of the Dodd-Frank Act, but with *any* agency if it would be “*relevant to the exercise of the Agency's statutory or regulatory authority*”

⁴ 83 Fed. Reg. at 12,287.

⁵ 78 Fed. Reg. 67,848 (Nov. 12, 2013).

⁶ 81 Fed. Reg. 58,310 (Aug. 24, 2016).

⁷ 82 Fed. Reg. 22,318 (May 15, 2017).

⁸ 81 Fed. Reg. 58,310 (Aug. 24, 2016).

⁹ See Bureau of Consumer Fin. Protection (“Bureau”), Semi-annual Report of the Bureau of Consumer Financial Protection, 19 (Apr. 2018) [hereinafter *Semi-annual Report*] (available at https://files.consumerfinance.gov/f/documents/cfpb_semi-annual-report_spring-2018.pdf).

¹⁰ Am. Bankers Ass'n (ABA), Consumer Bankers Ass'n (CBA), Fin. Servs. Roundtable, Hous. Policy Council, & U.S. Chamber of Commerce, Comments in Response to the Notice of Proposed Rulemaking – Amendments Relating to Disclosures of Records and Information (Oct. 24, 2016), <https://www.aba.com/Advocacy/commentletters/Documents/cl-Joint-Privacy-2016.pdf>.

(emphasis added). In addition, the Bureau’s proposed introduction of an exceedingly broad and ambiguous definition of the term “agency” would further expand the universe of entities with which the Bureau may share CSI—contrary to the language and design of the statute and congressional intent. By inappropriately expanding the universe of entities that may receive CSI from the Bureau, the proposal would create meaningful and unnecessary disincentives for banks and other parties to communicate openly with the Bureau, a critical element of effective bank supervision, while providing no corresponding benefit to the Bureau’s supervision and enforcement efforts.

In addition, we disagree with the Bureau’s assertion that it has the authority to transfer CSI, which may include privileged information submitted under Section 1828(x) of the Federal Deposit Insurance Act, to other agencies (including law enforcement agencies) without “destroying” or “breaching” the submitter’s privilege. Section 1828(x) provides that the disclosure of privileged materials, such as those subject to the attorney-client privilege, to *certain* regulators does not constitute a waiver of such privilege vis-à-vis third parties. If the Bureau shares such information with an agency outside the scope of the statute, it may undermine or endanger the submitting institution’s privilege, exposing the institution to increased safety and soundness, litigation, and reputational risks.

We urge the Bureau to withdraw these proposed changes to the sharing of CSI under the Disclosure of Records and Information rule.

b. Request for Information Regarding the Small Business Lending Market

Issued in May 2017, the Request for Information Regarding the Small Business Lending Market (RFI on 1071),¹¹ was the first step in the process to implement section 1071 of the Dodd-Frank Act to require banks to collect and report information regarding credit applications by women and minority-owned small businesses.¹² The purpose of the data collection, as stated by Congress, is to facilitate the enforcement of fair lending laws and community development efforts through the collection and reporting of data on lending to women and minority-owned small businesses.

While the banking industry supports both goals, we have strong concerns that section 1071 will achieve neither objective. Rather than motivating financial institutions to increase their lending to meet the credit needs of small businesses and their communities, the data collection and the anticipated reliance on statistical manipulation in fair lending supervision and enforcement may discourage lending to small business, particularly by community banks that may lack the resources to engage in a statistical duel with regulators to defend against allegations of discrimination.

¹¹ 82 Fed. Reg. 22,318 (May 15, 2017).

¹² 15 U.S.C. § 1691(c)(2) (2012).

Nevertheless, we recognize that the Bureau has been charged with implementing section 1071, and we offer the following recommendations:

- The Bureau should initiate a small scale pilot, perhaps working with the Small Business Administration (SBA) and using existing SBA data, to evaluate whether the data collection exercise can yield useful information. We also encourage the Bureau to report to Congress on the lessons learned from the pilot and to suggest changes in the law that would more effectively and efficiently realize the statutory goals.
- Concurrently, we urge the Bureau to begin estimating the costs of a new reporting regime so that the public can more accurately weigh how these costs will affect small businesses.
- The data collection should be limited to the statutorily-mandated data points.
- To minimize the disruption of small business lending and the costs of the data collection, the Bureau's rules governing the collection and reporting of the data should not be prescriptive; lenders should be permitted to identify such things as to when they have a *bona fide* application (rather than just an expression of interest, for example) and when and how to collect the data so that the data genuinely and accurately represent the transaction.
- The data collection should be limited to women-owned and minority-owned "small business," and the definition of "small business" must be clear and easy to apply at time of application.
- A rule should permit the use of a model disclosure when a firewall is not feasible.
- The Bureau should limit or curtail the public disclosure of certain information to mitigate customer privacy concerns.¹³

c. Advance Notice of Proposed Rulemaking on Debt Collection

In its Semi-annual Report to Congress, the Bureau expressed its intent to promulgate regulations under the Fair Debt Collection Practices Act (FDCPA) to update and modernize its communication provisions and to enhance consumer protection through improved disclosures.¹⁴ ABA supports this rulemaking. Today, there is approximately \$13.21 trillion of consumer debt outstanding.¹⁵ Collection of this debt is important to the functioning of the consumer credit market, a key stimulus of the U.S. economy, as it promotes the availability and affordability of consumer credit. Moreover, there is widespread recognition that the communications and disclosure rules of the 41-year old FDCPA are out of touch with modern technology and consumer communication practices and preferences. Promulgating regulations that modernize the FDCPA's communication provisions, enhance consumers' understanding of FDCPA

¹³ See Barry Mills, ABA, Response to Request for Information Regarding the Small Business Lending Market (Sept. 14, 2017), <https://www.aba.com/Advocacy/commentletters/Documents/rfi-small-business-lending-market-091417.pdf>.

¹⁴ *Semi-annual Report*, *supra* note 9 ("Debt Collection Rule: the Bureau will work towards releasing a proposed rule concerning FDCPA collectors' communications practices and consumer disclosures.").

¹⁵ Federal Reserve Bank of N.Y., Center for Microeconomic Data, *Quarterly Report on Household Debt and Credit* (May 2018), <https://www.newyorkfed.org/microeconomics/hhdc>.

protections, and minimize the risk of frivolous litigation will benefit borrowers and creditors, both of whom the new Bureau leadership has committed to serve.

ABA also supports the Bureau's recent statement that it will "enforce the FDCPA as written"¹⁶ and remain within the original statutory bounds as it exercises its FDCPA rulemaking authority. As discussed in our comment to the ANPR on Debt Collection, the FDCPA is strictly limited to third-party debt collectors and was not intended or designed to apply to the collection practices of first-party creditors, and nothing in Dodd-Frank suggests that Congress intended to reverse its original judgment.¹⁷

We look forward to commenting on a notice of proposed rulemaking for the FDCPA, anticipated in March 2019,¹⁸ and recommend that it address the following priorities:

1. Facilitate communication. Borrowers who are in financial distress benefit from more contact with their creditors and their creditors' representatives, not less,¹⁹ and today there are a variety of communication channels that can foster communication privately and at the borrower's convenience. However, uncertainty about how to comply with FDCPA disclosure requirements discourages many creditors and debt collectors from using these channels. To facilitate communication, both via these customer-preferred new channels, as well as the traditional postal mail and voice call channels, the Bureau should (1) avoid imposing arbitrary limitations on communications; (2) take steps to facilitate communication by creating a presumption against third-party disclosure for customer-provided contact information, including email addresses and mobile phone numbers; and (3) expressly limit any FDCPA rules it promulgates to existing forms of communication, preventing plaintiffs' attorneys from asserting that the FDCPA applies to future forms of communication not contemplated by the final rules.
2. Standardize disclosures. Creditors, debt collectors, and consumers would benefit from clear disclosures, accompanied by legal safe harbors for their usage, to reduce the risk of litigation. ABA recommends that the Bureau work with both industry and consumer groups to develop standardized disclosures regarding fee and interest

¹⁶ *Semi-annual Report*, *supra* note 9, at 2.

¹⁷ ABA, CBA, and Fin. Servs. Roundtable, Response to Advance Notice of Proposed Rulemaking on Debt Collection Practices, 36-38 (Feb. 29, 2014), <https://www.aba.com/Advocacy/commentletters/Documents/clDebtCollection2014Feb.pdf>.

¹⁸ Office of Mgmt. & Budget, Exec. Office of the President, CFPB Debt Collection Rule (Spring 2018), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=3170-AA41>.

¹⁹ Creditors are very willing to work with borrowers experiencing financial difficulties and can offer mitigation plans and settlement arrangements if able to communicate with the consumer in a timely manner. These alternatives can help avert serious consequences such as auto repossession or foreclosure, events that might have cascading negative effects on personal and financial well-being.

calculations, potential tax liability, and time-barred and obsolete debts, all of which have generated significant FDCPA litigation.²⁰

3. Clarify FDCPA definitions, including—

- “Dispute”: define what constitutes a dispute under section 809(b) of the FDCPA,²¹ establish standards for what is required to investigate a dispute, and define what constitutes “verification of the debt.”
- “Default”: create standards for “default” in accordance with differing credit types. Default standards will distinguish actions between creditors and collectors for the purposes of FDCPA enforcement, in alignment with Congress’ decision to exempt first-party creditors.
- “Personal representative”: adopt the Federal Trade Commission (FTC) definition for “personal representative” as set forth by the FTC’s 2011 policy statement on collecting debts of the deceased.²²

II. Adopted Regulations Currently Under Assessment as Required by Dodd-Frank Act Section 1022(d)

Section 1022(d) of the Dodd-Frank Act requires the Bureau to conduct an assessment of each significant rule adopted by the Bureau and publish a report of its assessment within five years of the effective date of the rule.²³ As noted in the RFI, the Bureau has initiated assessments of its final rules on remittance transfers, mortgage servicing, and ability-to-repay and qualified mortgage standards. The RFI also states that comment letters submitted in connection with those assessments will be considered as part of this RFI, so we have endeavored not to repeat suggestions or observations made in our previous filings. However, as requested, in the sections below we identify the banking industry’s priorities for reform of each.

a. Priorities for Reform of the Remittance Transfer Rule

In May 2017, in response to the Bureau’s request for comment on its assessment of the impact that the final rule has had on remittance transfers, ABA submitted two comment letters. One letter recommended steps that the Bureau should take to engage in an evidence-based assessment

²⁰ See generally *Taylor v. Fin. Recovery Servs., Inc.*, 252 F. Supp. 3d 344 (S.D.N.Y. 2017), *aff’d*, 886 F.3d 212 (2d Cir. 2018) (plaintiff alleged FDCPA violation because collector’s letter did not specifically state that interest or fees had stopped accruing on the account); *Foster v. Allianceone Receivables Mgmt., Inc.*, No. 15-CV-11108, 2016 WL 1719824 (N.D. Ill. Apr. 28, 2016) (finding that “[i]t is plausible that mention of the IRS in a situation where there is no set of circumstances in which the IRS would be involved could mislead ‘a person of modest education and limited commercial savvy.’”); *Bereket v. Portfolio Recovery Assocs., LLC*, No. C17-0812RSMRSM, 2017 WL 4409480 (W.D. Wash. Oct. 4, 2017) (plaintiff alleged that disclosure not to sue was misleading because partial payment could restart statute of limitations).

²¹ 12 U.S.C. § 5512 (2012).

²² Statement of Policy Regarding Communications in Connection with the Collection of Decedents’ Debts, 76 Fed. Reg. 44,915 (July 27, 2011).

²³ 12 U.S.C. § 5512(d).

of the rule's effectiveness. That letter also shared data from a survey of ABA members which show that the rule has affected consumers by restricting access to remittance services, increased fees for using the service, and unnecessarily caused delays in transfer at a time when every effort is to make funds transfers more efficient.²⁴ In addition, ABA joined a letter that identified specific provisions of the rule that should be eliminated, modified, or clarified so that the rule achieves its goal of protecting consumer-senders of remittance transfers while reducing compliance burdens on providers of those services.²⁵ In response to this RFI, ABA has joined with other trades to submit a letter that updates these recommendations and identifies the following banking industry priorities:

- Modify the scope of the rule to exclude transfers outside the traditional definition of remittances.
- Preserve the ability of depository institutions to disclose estimates of third-party fees and exchange rates when precise information is unavailable.
- Modify disclosure requirements to allow providers to use alternate delivery channels that better meet consumer needs.
- Eliminate the need for redundant disclosures.
- Reduce the amount of time for claiming error to be consistent with other provisions of the regulation.
- Let providers resolve errors without completely redoing a transaction.²⁶

b. Data on the Cumulative Impact of the Mortgage Rules

In the 10 years since enactment of the Dodd Frank Act, the Bureau has issued at least 31 major rulemakings affecting mortgage origination and servicing, a staggering rate of regulatory change. Unsurprisingly, in 2016, mortgage-related compliance burdens accounted for one-third of all regulatory costs reported by surveyed bankers.²⁷ By way of comparison, bankers reported that BSA/AML compliance, typically reported as banks' leading compliance challenge, accounted for one-fifth of regulatory costs during the same period.²⁸ The massive volume of regulatory change occurring over a short time is destabilizing business models and risk calculations across all markets and inhibiting banks' ability to serve their customers.

²⁴ Robert G. Rowe, ABA, Response to Notice of Assessment of Remittance Rule and Request for Public Comment (May 23, 2017), <https://www.aba.com/Advocacy/commentletters/Documents/cl-Remittance2017May.pdf>.

²⁵ The Clearing House Ass'n L.L.C., CBA, Bankers Ass'n for Fin. & Trade & ABA, Response to Request for Information Regarding Remittance Rule Assessment (May 23, 2017), <https://www.aba.com/Advocacy/commentletters/Documents/JointLtr-Remittance2017May.pdf>.

²⁶ Letter from Alaina Gimbert, Sr. Vice President & Assoc. General Counsel, The Clearing House Ass'n L.L.C., to Comment Intake, Bureau of Consumer Financial Protection (June 19, 2018) (on file with The Bureau).

²⁷ See Fed. Reserve Bank of St. Louis, Compliance Costs, Economies of Scale and Compliance Performance: Evidence from a Survey of Community Banks (April 2018) (available at: <https://www.communitybanking.org/~media/files/compliance%20costs%20economies%20of%20scale%20and%20compliance%20performance.pdf>). These compliance costs were found to reduce bank profitability by eight basis points for the same period. *Id.* at 14.

²⁸ *Id.* at 4.

The extraordinary complexity of the rules inevitably leads to conflicting *reasonable* interpretations regarding how to implement them. In many areas the Bureau has not issued official guidance or updated its examination procedures,²⁹ leaving banks in a continuous state of uncertainty despite their diligent work to understand, implement, and test the new requirements before their effective dates. Some rules conflict with other laws or regulations in a manner that makes it particularly burdensome for institutions to comply.³⁰

As a result, mortgages have become the most labor-intensive products banks offer. The cost to originate a mortgage loan has *nearly doubled* over the past decade, from approximately \$4,500 in 2008 to approximately \$8,957 in the first quarter of 2018.³¹ Servicing costs have also increased. From 2008 to 2015, the annual cost of servicing a performing loan nearly tripled, increasing from \$59 to \$163, and the annual cost of servicing a nonperforming loan *more than quadrupled*, increasing from \$482 to \$2,113.³²

These costs weigh especially heavily on community banks that cannot leverage the economies of scale that are available to larger banks and may operate in geographic areas with shortages of qualified compliance professionals. Further, although intended to protect consumers, the highly prescriptive nature of these rules has the unintended consequence of impeding many banks in their efforts to provide borrowers in their communities with mortgage products and services that best meet their borrowers' needs.

Data from ABA's 2017 Real Estate Lending Survey demonstrate the adverse impact of increased layering of regulatory requirements on banks. The data show –

- 77% of responding banks report a “moderate to extreme” negative impact stemming from mortgage regulation, with 22% reporting “extreme” impact;
- 96% of responding banks report higher mortgage-specific compliance costs as a result of Dodd-Frank Act regulations;
- 83% of responding banks report needing to hire additional staff as a direct result of new regulations;

²⁹ For example, the Bureau's Mortgage Servicing Examination Guide has not been updated since June 2016, despite the fact that the mortgage servicing rules were substantially changed by the October 2016 Amendments to the Mortgage Servicing Rules under RESPA (Regulation X) and TILA (Regulation Z), which became effective in October 2017 and April 2018.

³⁰ For example, the Servicing Rules relating to early intervention and periodic statements as they relate to borrowers in bankruptcy may conflict with the Bankruptcy Code and/or interpretations of U.S. Trustees.

³¹ See Mortg. Bankers Ass'n, Independent Mortgage Bankers Report Net Production Losses in the First Quarter of 2018 (June 6, 2018), <https://www.mba.org/2018-press-releases/june/independent-mortgage-bankers-report-net-production-losses-in-the-first-quarter-of-2018>.

³² See Mortg. Bankers Ass'n, MBA Chart of the Week: Servicing Costs Per Loan (Single-Family)—Performing v. Non-Performing (July 25, 2017), [https://www.mba.org/servicing-newslink/2017/july/servicing-newslink-tuesday-7-25-17/news-and-trends/mba-chart-of-the-week-servicing-costs-per-loan-\(single-family\)-performing-v-non-performing](https://www.mba.org/servicing-newslink/2017/july/servicing-newslink-tuesday-7-25-17/news-and-trends/mba-chart-of-the-week-servicing-costs-per-loan-(single-family)-performing-v-non-performing). Importantly, these servicing costs do *not* reflect additional costs resulting from implementation of the Bureau's October 2016 Amendments to the Mortgage Servicing Rules, which became effective in October 2017 and April 2018.

- 97% report increased legal/regulatory consulting costs;
- Nearly three in four said that Qualified Mortgage rules in particular have reduced credit availability;
- 5% report selling mortgage servicing rights in the past year due to regulatory requirements and/or capital treatment of mortgage servicing assets (more than a two-fold increase from 2% in 2016).

The current regulatory regimen is restricting choice, eliminating financial options, and forcing a standardization of products, consequences that do not serve consumers well.

c. Priorities for Reform of the Mortgage Servicing Rules

On February 14, 2013, the Bureau issued comprehensive mortgage servicing rules under Regulation X, implementing the Real Estate Settlement Procedures Act (RESPA), and Regulation Z, implementing the Truth in Lending Act (TILA) (collectively, the 2013 Servicing Rules). Since 2013, the Bureau has issued numerous amendments and interpretive rules to the 2013 Servicing Rules, most recently, the sweeping revisions issued on October 16, 2016 (2016 Amendments), which went into effect in October 2017 and April 2018.³³

ABA commented on the proposed 2016 Amendments during the rulemaking process,³⁴ and we appreciate the Bureau's responsiveness to many industry concerns. Significant concerns remain, however. Because the RFI requests that commenters prioritize their concerns and recommendations, we have limited our discussion to the 2016 Amendments relating to successors in interest³⁵ and communications with mortgage borrowers who are debtors in bankruptcy.³⁶ We would, however, be pleased to discuss related issues and concerns in greater detail with the Bureau.

As we have noted in previous comments to the Bureau, the 2013 Servicing Rules exceed the mandate of the Dodd Frank Act, which authorized the Bureau to prescribe rules "as may be necessary or appropriate" to carry out the objectives of RESPA and TILA and other consumer financial laws.³⁷ Importantly, the Dodd-Frank Act also provides that in prescribing such rules, the Bureau "shall consider ... the potential benefits and costs to consumers *and* covered persons, including the potential reduction of access by consumers to consumer financial products or

³³ Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 72,160 (Oct. 16, 2016) [hereinafter *2013 Mortgage Rules*].

³⁴ See Krista Shonk, ABA, Response to Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedure Act (Regulation X) and the Truth in Lending Act (Regulation Z) (Mar. 16, 2015) [hereinafter *2015 ABA Letter*],

<https://www.aba.com/Advocacy/commentletters/Documents/ABACommentLetterDec2015ServicingProposal.pdf>.

³⁵ 12 C.F.R. §§ 1024.17, 1024.30-1024.41; 12 C.F.R. §§ 1026.2(a)(11), 1026.27, 1026.20(c)(e), 1026.36(c), 1026.39(f), 1026.41(g).

³⁶ 12 C.F.R. § 1024.39 (early intervention); 12 C.F.R. § 1026.41 (periodic statements).

³⁷ 12 U.S.C. § 5512; 12 C.F.R. § 1022(b)(1).

services resulting from such rule; and the impact of proposed rules on covered persons ...”³⁸ We believe that this statutory mandate has been insufficiently weighted by the Bureau.

i. Successors in Interest

The 2016 Amendments significantly expanded the Bureau’s previous successor in interest rules, most significantly by broadening the categories of covered property transfers, and also by deeming that confirmed successors in interest are generally to be considered “borrowers” for purposes of the RESPA Servicing Rules and “consumers” for purposes of the TILA Servicing Rules. ABA supports the Bureau’s goal of preventing unnecessary foreclosure in situations involving successors in interest. We believe, however, that these broadly expanded provisions are not appropriate or necessary to carry out this objective, and they do not properly balance the potential benefits to consumers against the costs to all servicers and consumers.

First, ABA does not believe that it is appropriate for the Bureau, by rule, to expand the protections of RESPA and TILA – including private rights of action – to successors in interest who are not liable on the debt. Although RESPA does not define “borrower” and TILA does not define “consumer,” both RESPA and TILA clearly contemplate that the “borrower” or “consumer” whom the statute is intended to protect is (or has applied to become) an obligor on that debt. The Bureau also asserts that the successor in interest provisions carry out the consumer protection purposes of RESPA, which according to the Bureau include “ensuring that servicers respond to borrower requests and complaints in a timely manner and maintain and provide accurate information, helping borrowers avoid unwarranted or unnecessary costs and fees, and facilitating review for foreclosure avoidance options.”³⁹ We note that these objectives were identified by the Bureau in the 2013 Servicing Rules, but they do not appear in the text of RESPA.

Second, we do not believe that the provisions are necessary. Servicers have substantial financial, reputational, and relationship incentives to communicate with a successor in a clear, timely, and responsive manner and to take other steps to ensure that a loan remains performing, to negotiate a new loan, or to arrange a loss mitigation plan.⁴⁰ However, we believe that the successor in interest provisions will impede, rather than advance, the statutory objectives of RESPA and TILA to ensure consumers receive relevant, timely, and understandable disclosures about their mortgage loans. The requirement to send information designed for an obligor to a non-obligor successor introduces the potential for confusion, especially when there is a living obligor on the loan. Although the Bureau has tried to address these concerns by requiring or permitting additional clarifying language on the disclosures, our members report that the additional language only further complicates the disclosures.

³⁸ 12 U.S.C. § 5512; 12 C.F.R. § 1022(b)(2)(A)(i)-(b)(2)(A)(ii) (emphasis added).

³⁹ 2013 *Mortgage Rules*, *supra* note 33, at 72,164.

⁴⁰ See 2015 *ABA Letter*, *supra* note 34, at 5-6, 6 n.7.

Third, these rules do not properly balance the potential benefits to successors against the expected costs to servicers. The Bureau has not demonstrated that successor in interest problems were sufficiently prevalent to warrant the issuance of such expansive and burdensome rules.

In the preamble to the 2016 Amendments, the Bureau stated that the expanded provisions were necessary in light of reports from consumer advocacy groups that successor in interest problems were “widespread” and “likely to grow given demographic trends,” and that servicers were “routinely” and “persistently” refusing to provide information to successors or work with them on assumptions, loan modifications, and loss mitigation options.⁴¹ The data the Bureau cites, however, fail to support these assertions of prevalence, either in pure numbers or as a percentage of the number of serviced mortgage loans. The Bureau relies heavily on a report from a consumer advocacy group containing *five* anecdotal accounts of successor problems, and on surveys of foreclosure counselors and attorneys.⁴² These surveys do not demonstrate that successor in interest problems are so prevalent that the benefits of the expanded rules will outweigh the costs. Rather, the surveys reflect the rate at which surveyed housing counselors and advocates *who have had occasion to work with successors in interest* have experienced certain challenges—not the prevalence of successor in interest problems nationwide.⁴³

Despite these questionable data demonstrating the universe of consumers that could benefit, the 2016 Amendments significantly increase the burden and cost of mortgage servicing. They require all banks who service mortgage loans to be prepared to make legal determinations about property ownership. In the preamble, the Bureau dismissed this concern by stating that banks were already “routinely” making such determinations.⁴⁴ This observation fails to recognize that the additional transfer types covered by the 2016 Amendments are significantly more complicated. Expanding the scope of covered transfers also expands the areas of governing law, the variations in documentary evidence among jurisdictions, the likelihood of multiple successors to one property, and the possibility that banks will be placed in the middle of property disputes (e.g., a divorce or contested estate). The rules have exponentially increased complexity, cost, and uncertainty for servicers. Indeed, in the weeks since the April 19, 2019, effective date, our members have reported a greater proportion of cases involve conflicting claims to ownership than anticipated and that successor determinations are complex, time consuming, and dependent on legal expertise.

In addition to being overbroad, the requirement to treat successors as “borrowers” or “consumers” creates unwarranted complexity, especially when there is a living borrower, a bankruptcy case, or a cease communication request under the FDCPA. These provisions pose

⁴¹ See *2013 Mortgage Rules*, *supra* note 33, at 72,166.

⁴² See *id.* at 72,166 n.28.

⁴³ The Bureau also cites an issue of its own *Supervisory Highlights*, but this source also offers scant data, providing only general observations that “one or more servicers” did not have policies and procedures reasonably designed to identify and facilitate communications with a deceased borrower’s successor, or required probate for successors to establish themselves in states where probate was not required. See Bureau, *Supervisory Highlights Mortgage Servicing Special Edition*, Issue 11 (June 2016).

⁴⁴ *2013 Mortgage Rules*, *supra* note 33, at 72,189.

serious operational challenges for servicers, and the limited public guidance that the Bureau has issued has raised as many questions as it has answered. For example, the Bureau's Mortgage Servicing FAQs state that servicers have a responsibility to know that a confirmed successor in interest is in bankruptcy for purposes of the early intervention notice and modified statement requirements, and suggest that servicers include confirmed successors "in any normal checks they utilize to identify borrowers in bankruptcy."⁴⁵ While ABA supports the Bureau's issuance of publicly available guidance, this guidance does little to reduce burden. Our members tell us that, as a practical matter, conducting automated checks for bankruptcy filings would require the successor's social security number, which a servicer does not have express authority to collect from a non-obligor. Moreover, it seems unlikely that a successor who is not liable on the mortgage loan would include the mortgage or the property securing the mortgage in his or her bankruptcy filing.

The rules also burden servicers with unwarranted ongoing risk of legal and regulatory liability. The Bureau has declined to shield servicers from RESPA or UDAAP liability with respect to successor confirmation decisions and has stated that non-obligor successors have the same private right of action under RESPA as obligors.

ABA urges the Bureau to limit the scope of the successor in interest requirements to cases involving the death of the borrower. We also recommend that the Bureau –

- Shield servicers from RESPA and UDAAP liability with respect to successor determinations;
- Provide that successors in interest do not have the same private right of action under RESPA as borrowers who are obligors;
- Specify a limited scope of RESPA and TILA communications that must be provided to successors, rather than broadly requiring servicers to treat successors as "borrowers" or "consumers;" and
- Reconsider the position that servicers must also apply the bankruptcy provisions to confirmed successors.

ii. Borrowers in Bankruptcy

ABA supports the Bureau's objective to ensure access to information, including repayment information, for borrowers who are debtors in bankruptcy and intend to retain the property.⁴⁶

⁴⁵ Bureau, Mortgage Servicing FAQs, 6, https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_mortgage-servicing_frequently-asked-questions.pdf (last updated Mar. 20, 2018) [*hereinafter Mortgage Servicing FAQ*] (Bankruptcy Successors in Interest, Questions 1 and 2).

⁴⁶ The Bureau also asserts that the provisions support the statutory objectives because, "Congress mandated in the Dodd-Frank Act that consumers receive periodic statements and did not provide a bankruptcy exemption." ABA disagrees. Congress is not expected to specify every reasonable exception to a law. We also note that the Dodd-Frank Act provisions requiring periodic statements for mortgage loans require the Bureau to "develop and prescribe

However, the 2016 Amendments will not meet the objectives of TILA as amended by Dodd-Frank, because they overlap or conflict with federal bankruptcy law (and potentially state law). These potential conflicts, combined with the extreme complexity of the rules, introduce burden and legal risk that outweigh any potential benefit.

The rules subject servicers to risk of being sued by a bankruptcy trustee or debtor's attorney for a violation of the automatic stay. While the Bureau asserts that it "does not *believe* that a servicer is likely to violate the automatic stay" for complying with the rules, the Bureau also states that it cannot protect servicers who comply with the rules in good faith against the "unlikely" risk of a violation, because the Bureau "does not have authority to create safe harbors under the Bankruptcy Code."⁴⁷ By this logic, the Bureau also must concede that it does not have the authority to interpret bankruptcy law. Moreover, the Bureau's lengthy discussion of case law underscores the complexity in this area and demonstrates that the question of whether communicating with a borrower in bankruptcy (such as by sending a written early intervention notice or a periodic statement) violates the automatic stay is subject to conflicting interpretations by expert judges. For the Bureau's rules to be "appropriate" to carry out the objectives of Dodd-Frank, and to work fairly and efficiently for consumers and servicers, they must be based on more than a "belief" that a servicer is "not likely" to be charged with violating another law because it followed the Bureau's rules.⁴⁸

The rules are also unnecessary. The Bureau asserts that "a consumer's status in bankruptcy should not act as a bar to information about the mortgage loan account."⁴⁹ However, the Bureau has not demonstrated that such a bar exists. When the Dodd-Frank Act was enacted, there was a long-established, comprehensive process under the Bankruptcy Code through which mortgage borrowers who are debtors in bankruptcy may receive information about their loans. Indeed, in Chapter 13 cases, the trustees' records are the official records of Chapter 13 plan payments, and as such are the best source for customers to receive repayment information.

Moreover, the rules do not advance TILA's statutory mandate to provide full, accurate, and effective disclosures to consumers. For reasons outside of a servicer's control, the servicer may be forced to send statements that the Bureau recognizes may not be accurate, such as when payments are made to a trustee. To correct this self-inflicted problem, the Bureau requires servicers to add language explaining that the statements may not match the trustee's records. In short, the Bureau has crafted TILA rules that require servicers to provide disclosures that disclaim their own accuracy and are likely to confuse the consumers they are intended to protect.

a standard form for *the* disclosure specified under [TILA section 128(f)]. This language indicates that Congress contemplated a single type of mortgage statement, not the complex modified statements required for debtors in bankruptcy.

⁴⁷ *Mortgage Servicing FAQs*, *supra* note 45, at 2 (Bankruptcy Periodic Statements, Question 2).

⁴⁸ If the Bureau intends to retain and enforce these provisions, it is imperative that the Bureau work with the National Conference of Bankruptcy Judges to harmonize the requirements with bankruptcy law (including local rules permitting or requiring a servicer to provide a periodic statement in certain circumstances), and to establish safe harbors under the Bankruptcy Code for servicers who comply in good faith with the Bureau's rules.

⁴⁹ *2013 Mortgage Rules*, *supra* note 33, at 72,318.

In addition, the rules fail to balance the benefits and costs to consumers and servicers. ABA members report that the percentage of borrowers who file for bankruptcy is generally low—some banks report only a handful of cases. As discussed above, because the bankruptcy process affords borrowers who are debtors in bankruptcy with access to information about their mortgage loans, including repayment information, the provisions are not necessary to serve the Bureau’s stated objective.

The rules are unduly burdensome. The highly prescriptive rules governing the content, format, and timing of the modified statements present significant and continuing operational challenges. Bankruptcy cases are complex and varied. When a borrower is in bankruptcy, information relating to the account is not entirely within the servicer’s control and may not be provided in a way that aligns with the servicer’s systems or the technology on which it relies. Our members describe the need to “force” certain information into their systems and to devise “workarounds” with their technology vendors to produce statements that comply with these rules.

For these reasons, ABA urges the Bureau to exempt borrowers who are debtors in bankruptcy from the live contact and written early intervention notice requirements in Regulation X and to restore the general exemption from the requirement in Regulation Z to provide modified periodic statements for closed-end mortgage loans for consumers who are debtors in bankruptcy.⁵⁰ We would also be pleased to discuss related issues and concerns identified by our members in greater detail with the Bureau.

d. Priorities for Reform of the Ability-to-Repay Rule

On June 1, 2017, the Bureau published a Notice of Assessment and Request for comment on the Ability to Repay Rule (ATR Rule) as required by Section 1022(d) of the Dodd-Frank Act.⁵¹ ABA filed comments, which we understand will be considered in connection with this RFI;⁵² therefore, we identify here current banking industry priorities for reform on this topic.

- Identify an acceptable replacement for the “GSE Patch.” The Bureau’s assessment of the ATR Rule should prioritize the identification of uniform standards that can replace the Temporary Government Sponsored Enterprise Qualified Mortgage (GSE QM) provision (GSE Patch), applicable to loans eligible for purchase or guarantee by either the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the GSEs) while they operate under Federal conservatorship or receivership, or January 10, 2021, whichever occurs first. Although ABA believes that the GSE Patch is essential for purposes of sustaining current market

⁵⁰ RESPA and TILA authorize the Bureau to exempt any class of transactions from all or part of the applicable regulation if the Bureau determines that compliance would not provide consumers useful information or protection.

⁵¹ 82 Fed. Reg. 25,246 (June 1, 2017).

⁵² Rod J. Alba, ABA, Response to Request for Information Regarding Ability-to-Repay/Qualified Mortgage Rule Assessment (July 31, 2017), <https://www.aba.com/Advocacy/commentletters/Documents/ATRReviewComments-ABA-R.Alba.pdf>.

activities, the GSE QM must eventually sunset. Therefore, it is critical that the Bureau adopt a uniform and transparent set of guidelines, criteria, and compensating factors that are objective and policy-based – and independent of any institutional market player – that identify a QM loan.

- Liberalize Debt-to-Income ATR/QM Standards. Current law requires QM loans to have Debt-To-Income (DTI) levels no greater than 43%. This rigid DTI threshold is arbitrary and imposes inflexible underwriting requirements that result in the rejection of creditworthy applicants. ABA believes that the QM rules should not prescribe inflexible underwriting criteria, and the Bureau should increase DTI thresholds to allow creditors more discretion to set their own appropriate standards.⁵³ The law should also recognize, and define, acceptable residual income analysis in lieu of DTI.
- Revisit and expand Appendix Q. Appendix Q sets forth the definitions and standards for calculating “debt” and “income” for purposes of calculating DTI required for attaining safe harbor. These guidelines were derived from the FHA Insurance program, and as such constitute only one option among many market standards for safe underwriting. Other guidelines currently exist—including those of Freddie Mac, Fannie Mae, or the Federal Home Loan Banks—that are as safe and established as the FHA guidelines. We urge the Bureau to permit banks to use these other guidelines to underwrite a loan that qualifies for QM status.
- Eliminate the Points and Fees Test. In order to qualify as a QM loan, the points and fees cannot exceed certain thresholds. This points-and-fees test is extremely complex, with definitions that are unclear and often inconsistent in their application. ABA recommends reconsideration of the points-and-fees thresholds, as this item is among the most convoluted elements of the regulations and it introduces significant risk of liability. More importantly, this test often disqualifies consumers for a mortgage, yet it is a redundant consumer protection provision, as price-based thresholds that achieve the same end are found elsewhere in mortgage regulations.
- Enact cure provisions for the ATR Rule. ABA recommends regulators expand the availability of cure provisions across all regulations. Cures under current mortgage regulations are, however, most vital, as these rules are highly technical, demanding prescriptive computations and disclosures. Unsurprisingly, technical mistakes occur that do not affect consumer choice or understanding. Moreover, when mistakes occur lenders often have ample opportunity to fix them so that consumers are not harmed or misled. ABA urges the Bureau to permit banks to correct such technical and clerical oversights

⁵³ We note that the GSEs are easing DTI requirements, regardless of any QM conditions imposed by law. In May 2017, *Fannie Mae* announced that it raised DTI ceilings from current 45 percent to 50 percent as of July 29. ABA supports this effort to expand credit availability, but we believe that the ability to design products that meet community needs must be available to all players, not just some. See Fannie Mae, Selling Guide: Sec. B3-6-02 (June 5, 2018) (available at: <https://www.fanniemae.com/content/guide/selling/b3/6/02.html>).

without triggering penalty provisions or forcing the process to begin anew. The ATR rule must expressly permit lenders to correct errors and deal directly with consumers to resolve harmless or clerical errors or omissions.

III. Priorities for Reform of the TILA/RESPA Integrated Disclosure Rule (TRID)

The new integrated disclosure regime is extremely prescriptive; the regulation delineates how every cost must be calculated, reflected in the disclosure forms, and apportioned in mandated comparison boxes and/or fee tables. Any fee variance that may occur in the course of a loan origination must be revised or corrected pursuant to detailed and prescriptive disclosure procedures. Although ABA supports accuracy in disclosures, there is much room to improve the process and reduce compliance burden while also promoting simplicity and clarity and serving the principle of accuracy in the mortgage process. ABA recommends the following:

- Respond to legal and compliance questions regarding TRID with clear and authoritative guidance. ABA urges the Bureau to provide regular, periodic, and authoritative formal guidance regarding the application, scope, requirements, and liabilities of TRID. This could be accomplished through regular amendments to the Commentary or, following notice and comment, to the regulation, to address questions and issues that arise. To this end, ABA recommends that the Bureau form an internal Task Force dedicated to mortgage regulatory matters that will engage with industry to identify compliance and legal problems with TRID (and other mortgage rules, as appropriate). Issues and questions should be analyzed promptly by the Task Force to determine whether rulemaking and/or guidance should be used to address the issue. Staffing the Task Force will ensure that the Bureau maintains legal, market research, and implementation support staff that are knowledgeable about the mortgage rules and that there is continuing attention to housing finance issues and market developments. The goal is to create a process that quickly and effectively addresses legal and compliance issues so that mortgage lending can continue to evolve to meet changing consumer and community needs.
- Revise TRID tolerances. Current TRID regulations impose cost tolerances that restrict fees from increasing beyond initial disclosures by specific amounts. These cost tolerances are convoluted and operate under a three-prong tolerance system that contains uncertain exemptions and complicated rules for subsequent corrections. ABA believes that this system can be greatly simplified without sacrificing consumer protection. Current tolerances should be replaced with a “single tolerance” standard of 10%, which would apply to all lender fees and fees charged by providers that are specifically required by the lender. Tolerances should not extend to fees for services that are not credit-related (e.g. recording fees, government taxes) or for settlement costs, where a specific provider is not required by the lender. This approach removes

compliance uncertainty and retains the key consumer safety guards that Congress intended.⁵⁴

- Exempt construction financing from TRID. Temporary financing transactions that generally encompass construction lending should be excluded from TRID coverage. Construction-to-permanent loans are generally structured as a single loan with two distinct phases. The second, or permanent phase, of the transaction will be fully subject to TRID disclosures, and the consumer will be well protected on the long-term financing of the overall project. The initial phase, or pure construction phase – which typically is impacted by contractor negotiations, disbursements of funds at times and in amounts that are unascertainable at the start, and interest-only payments to the lender by the consumer – is temporary financing that should be exempt from TRID.⁵⁵
- Clarify TRID liabilities. A significant source of uncertainty under the current regulatory regime continues to be the scope and effect of RESPA and TILA’s liability provisions. ABA requests more precise description of the statutory authority for each disclosure element so that bankers and regulators can clearly identify potential liability risk and applicable penalties under the law. We recommend that the Bureau create formalized matrices that explicitly address how liability might attach to any specific compliance requirement to ameliorate current uncertainty. Any matrix should include (1) each regulatory provision that requires a disclosure or imposes another requirement; (2) a description of the statutory provision relied upon for each disclosure item or requirement; (3) if errors or violations are curable, how they may be cured (e.g., as a tolerance refund, as a non-numeric clerical error, or under Section 130(b) of TILA); and (4) clarifying comments, where needed.⁵⁶ Additionally, the Bureau should, consistent with statements from the Acting Director, adopt a permanent tiered-liability structure that balances severity of harm to the consumer when considering assessment of the penalty.
- Expand opportunities to cure inadvertent errors. The cure provisions under TRID are extremely limited. Only two cure provisions exist: one for tolerance violations and the other for non-numeric clerical errors. There is no provision for lenders to fix other inadvertent mistakes that do not present the risk of harm to a borrower. In a December 29, 2015, letter to the financial industry, Former Director Cordray stated, “[C]onsistent with existing [TILA] principles, liability for statutory and class action damages would be assessed with reference to the final closing disclosure issued, not to the loan estimate, meaning that a corrected closing disclosure could, in many cases,

⁵⁴ For additional detail, *see* Rod J. Alba, ABA, with Steven I. Zeisel, CBA, Response to Request for Comment on Proposed Amendments to Federal Mortgage Disclosure Requirement Under Truth in Lending Act (Reg. Z) (Oct. 18, 2016), <https://www.aba.com/Advocacy/commentletters/Documents/cl-KBYO-2016Oct.pdf>.

⁵⁵ *Id.*

⁵⁶ *Id.*

forestall any such private liability.” This statement suggests that a broader class of technical mistakes or oversights on the Loan Estimate or Closing Disclosure may be “curable” with corrected final closing disclosures. We urge the Bureau to formalize this interpretation through amendment of TRID’s regulatory text or commentary.⁵⁷

- Fix Rules Regarding Title-Related Disclosures: ABA supports the Bureau’s reconsideration of the rules governing title insurance disclosures under TRID. Under current rules, title insurance companies are not permitted to disclose available discounts for title insurance on TRID’s required disclosure forms.⁵⁸ The full cost of the lender’s title insurance policy must be listed on the Loan Estimate and Closing Disclosure forms. However, homebuyers often receive a discount when simultaneously purchasing a homeowner’s title insurance policy in addition to the lender’s policy. The inability to reflect this discount in the TRID forms leads to inaccurate disclosures, which confuse consumers. We urge reconsideration of TRID rules that prevent disclosure of discounted rates in these circumstances.

IV. Recommendations for Other Mortgage Rule Amendments

Loan Officer Compensation Rule

- Eliminate inequity in the proxy provisions. There is considerable market inequality in the Loan Originator Compensation rules⁵⁹ pertaining to the application of the “proxy” provisions in profit-sharing arrangements that are not in the nature of “Qualified Plans.” Current rules provide that Loan Officers (LOs) may not receive bonus compensation in excess of 10% when the compensation is paid from profits derived from mortgage-related business. This is inherently unfair to Mortgage Loan Officers (MLOs) employed by financial institutions with larger mortgage portfolios who elect to retain and service their customer’s mortgages either voluntarily or to meet QM requirements. ABA recommends elimination of the proxy test altogether. While it remains in existence all employee participants in enterprise-wide, non-qualified plans *regardless of MLO status*, should be accorded equal treatment. Although these profit-sharing plans may not be “qualified” under IRS rules, distributions are based upon pre-determined criteria and typically include a variety of factors other than just profitability. For example, most plans include a combination of other criteria such as growth, continuing asset quality, operating efficiency, and satisfactory regulatory/audit findings. The Bureau should also explore whether to exempt entirely other significant compensation – for example, reimbursement for continuing education and similar employee incurred expenses.

⁵⁷ *Id.*

⁵⁸ *See* 12 C.F.R. § 1026.37(f)(2).

⁵⁹ *See id.* § 1026.36.

- Expand the permissible circumstances for adjusting LO compensation. There is lingering confusion regarding circumstances in which it is permissible to adjust LO compensation to account for transactional errors or mistakes. We understand that the rule does not prohibit a loan originator from decreasing his or her compensation to defray the cost, in whole or part, of an *unforeseen* increase in an actual settlement cost over an estimated settlement cost disclosed to the consumer, or an *unforeseen* actual settlement cost not disclosed to the consumer.⁶⁰ However, in many instances, the cost elements that loan originators want to cover from their own “pocket”—which would benefit the consumer—relate to oversights, not unforeseen transactional events. For example, a loan originator may let a rate lock expire without informing the borrower, and in that instance, the lender would end up absorbing that expense. Under the LO Compensation rules, however, lenders cannot adjust their compensation, because doing so would be deemed as varying compensation based upon the terms of the loan. ABA urges the Bureau to permit lenders to adjust loan officer compensation in these circumstances, from which the borrower benefits.

Equal Credit Opportunity Act Valuation Disclosure Rule

- Clarify that only “final” appraisals must be delivered to consumers. Our member banks have long advised that consumers are not well served by receiving valuation-related materials that are informal or preliminary in nature. Restricting disclosure requirements to final valuation materials would spare consumers much confusion and “disclosure fatigue.”
- Clarify that there is no obligation to disclose valuations when a loan application is denied and the consumer has not paid for the appraisal. In these circumstances, ABA believes that the lender may still be required to provide a copy of the appraisal, but under a relaxed time schedule. In addition, the Bureau should permit creditors to require reimbursement for the appraisal before it is obligated to deliver the copy of the appraisal to the consumer.
- Clarify that the ECOA Appraisal Rule does not require lenders to provide appraisal reports to applicants when the applicant is a developer and the loans are secured by *inventories of one-to-four unit dwellings*. We understand this to be the rule today, but the interpretation needs to be formalized. In short, under Section 1002.14(b)(2), ECOA’s appraisal rule applies to any credit facility involving “a dwelling” which effectively means “a residential structure that contains one to four units whether or not that structure is attached to real property.” This language is specifically crafted in the singular and is specifically intended to exclude applications involving multifamily dwellings or inventories of homes. If more than one dwelling secures a credit facility, the credit facility is exempt from the rule.

⁶⁰ See *id.* § 1026.36(d)(1).

V. Revise the Prepaid Rule's Definition of a Prepaid Account

ABA recommends that the Bureau revise the definition of a prepaid account in Regulation E (Electronic Fund Transfer Act) to make clear the distinction between checking accounts and prepaid accounts. The current vague definition presents a trap for banks, which cannot know whether they comply with the regulation. Clarifying the definition will not diminish consumer protections, promotes choices for consumers, and encourages simplified checking accounts that regulators have encouraged banks to offer.

On October 5, 2016, the Bureau amended Regulation E to apply that regulation to prepaid accounts.⁶¹ In addition, it amended Regulation Z (the Truth in Lending Act) to define and treat as credit cards “hybrid prepaid-credit cards.” Amended Regulation E –

- defines prepaid account;
- subjects prepaid accounts to the requirements of Regulation E;
- requires special “pre-acquisition” disclosures in addition to the initial disclosures;
- prohibits imposition of overdraft fees on prepaid accounts;
- allows alternatives to the periodic statement requirement that include related procedures for resolving errors; and
- requires agreements to be provided to the Bureau and posted on websites.

Amended Regulation Z treats a prepaid card with overdraft or another credit features as a credit card.

Anticipating a straightforward, simple regulation, ABA supported the application of Regulation E to prepaid cards, including the provisions protecting consumers from unauthorized transactions. However, the final rule, which was published in November 2016, is shockingly complex and lengthy, spanning 452 pages in the *Federal Register*. This complexity, combined with the product restrictions, has led many banks to exit or avoid the prepaid card market.

Nevertheless, even banks that do not offer prepaid cards must review and understand the two regulations because Regulation E's definition of “prepaid account” is so vague that it can be interpreted to embrace checking accounts. Thus, banks, offering what they believe in good faith to be a checking account, could be accused of violating Regulations E and Z should an examiner assert that the bank's checking account is a “prepaid account,” subjecting the bank to substantial penalties for failure to provide prepaid disclosures and for charging overdraft fees, even though they would not have known they were violating either regulation.

⁶¹ Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z), 81 Fed. Reg. 83,974 (Nov. 22, 2016).

Specifically, under §1005.2(b)(3)(i), the definition of a prepaid account includes accounts –

- issued on a prepaid basis for a specific amount and accounts not issued on a prepaid basis but capable of being funded after issuance;
- whose *primary function* is to conduct transactions with multiple, unaffiliated merchants for goods or services or at ATMs or to conduct person-to-person transfers; *and*
- that are not a checking account, share draft account, or negotiable order of withdrawal account.⁶²

While Regulation E excludes from the definition of general purpose prepaid account “checking accounts,” it does not define them other than to explain that they are demand deposit accounts. It does not otherwise distinguish them from prepaid accounts. However, the definition of a prepaid account includes accounts “whose primary function is to conduct transactions with multiple, unaffiliated merchants for goods or services or at ATMs or to conduct person-to-person transfers.” The Commentary makes clear that brokerage accounts and savings accounts are not prepaid cards, because their primary function is not “to conduct transactions with multiple unaffiliated merchants for goods or services or at ATMs or to conduct person-to-person transfers,” but it offers no guidance on what the primary function of a checking account is.⁶³ It could be argued that a checking account’s primary function is “to conduct transactions with multiple, unaffiliated merchants for goods or services or at ATMs or to conduct person-to-person transfers,” thus bringing it under the rule’s definition of a prepaid account.

Adding to the confusion are statements about whether a check feature is a distinguishing factor for purposes of determining whether an account is a checking account or a prepaid account. The Supplementary Information specifically provides that “the Bureau does not consider the capability to issue ‘preauthorized checks’ to qualify an account as a checking, share draft, or NOW account,”⁶⁴ which suggests that a check feature does not necessarily qualify the account as a checking account. Conversely, the Bureau’s “Prepaid Rule: Small Entity Compliance Guide” states that “checking accounts...are not prepaid accounts even if they do not offer check-writing capabilities (e.g., a ‘checkless’ checking account).”⁶⁵ Thus, an account may be a “checking account,” even if it does not offer checks.

This confusing, contradictory definition of a key term means that banks cannot be sure that they comply with the regulation – though undoubtedly a plaintiff’s lawyer or examiner will have firm opinions on that point.

In addition to creating compliance risk, the vague definition and overly complex regulations chill innovation, especially with regard to products designed for those without bank accounts.

⁶² 12 C.F.R. § 1005.2(b)(3)(i) (2013) (emphasis added).

⁶³ The Commentary provides that the primary function is not based on how customers use the account, but its “general transaction capability. *See id.* § 1005.2(b)(3)(i) cmt. 8(i)(v).

⁶⁴ 81 Fed. Reg. at 89,374.

⁶⁵ Bureau, Prepaid Rule: Small Entity Compliance Guide (Mar. 2018), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_prepaid_small-entity-compliance-guide.pdf.

Regulators, including the Bureau, encourage banks to offer accounts, such as those based on the FDIC’s Safe Account model (demand deposit accounts without checks or overdraft fees). However, offering such accounts without complying with the complicated prepaid rule is risky, because, though marketed differently, these accounts are often functionally indistinguishable from many general purpose prepaid accounts. The associated costs and risks discourage developing and offering such a product, especially given the limited audience.

Even though there are few, if any practical, functional distinctions between many general purpose prepaid accounts and checking accounts, the prepaid rule is not appropriate for checking accounts nor is its application useful to consumers. The Bureau designed the prepaid disclosures based on research and consumer testing specifically focused on prepaid cards sold in retail stores, packaged in a manner that limits the length of visible disclosures, and displayed on a j-hook in a retail setting where consumers may be distracted by other merchandise and shopping priorities. Thus, the prepaid “short” form, which displays key terms on the limited space of the package, and the prepaid “long” form, which provides additional information after purchase, are appropriate for those cards.

However, neither the content nor formatting is suitable or necessary for bank accounts opened directly or indirectly with the bank. In contrast to their experience shopping for a prepaid account in the retail setting, when consumers open an account with the bank, whether online or at the bank branch, they receive complete “clear and conspicuous” disclosures about all the features and fees of bank accounts as Regulations E, DD (Truth in Savings), and CC (Expedited Funds Availability Act) require. These disclosures are provided *prior to account opening*. In contrast, complete information about the fees and features of prepaid accounts sold in retail stores are not required to be provided until *after a prepaid account is opened*. Thus, the prepaid disclosures are redundant and unnecessary in the bank setting. Moreover, because customers’ attention is focused when they shop for or open an account with the bank, they are more likely to review the information disclosed. They are also better able to compare other bank account options when inquiring directly with the bank, because banks will often highlight the variations and similarities of the account options to help consumers compare and choose.

For these reasons, as emphasized in ABA’s comment letter to the original proposal,⁶⁶ the Bureau should amend the definition of prepaid account to make an unambiguous and meaningful distinction between prepaid accounts and checking accounts. An account should be considered a checking account and not a prepaid account if it (1) is opened directly or indirectly with a bank, (2) is subject to Bank Secrecy Act/Anti-money Laundering customer identification procedures, (3) is Federally insured, and (4) is otherwise not a prepaid account under the definition (e.g., account marketed as prepaid accounts, payroll account). Not only will such clarification give compliance certainty – and eliminate a compliance trap – it will promote consumer choice and “safe” accounts without diminishing consumer protections.

⁶⁶ 2015 ABA Letter, *supra* note 34.

VI. Amend the No-Action Letter Process to Encourage Innovation

In 2016, the Bureau finalized a No-Action Letter (NAL Policy) as part of its “Project Catalyst,” which it characterized as an effort to reduce regulatory uncertainty and foster innovation.⁶⁷ The NAL Policy, however, has failed in that mission. In two years only one no-action letter has been issued, clearly demonstrating that the Bureau’s interest in innovation could not overcome its suspicion of the financial services industry. We welcome reports of the establishment of an Office of Innovation within the Director’s office and recommend significant reform of the NAL Policy.

Fundamentally, the NAL Policy should be amended to encourage, not discourage, applications, and staff should proceed on the assumption that an applicant is proceeding in good faith to bring a compliant new product to market. Applicants should not be required to provide information about their supervisory history or to show “substantial” consumer benefit. Indeed, the Bureau staff should never pre-judge what products consumers may find useful, a responsibility beyond their capability; markets should determine consumer interest and product success.⁶⁸ Nor should the Bureau require open-ended commitments to provide data to the Bureau; the Bureau has ample authority through its supervision and market monitoring authority⁶⁹ to request information and data where there is a need.

Applicants should not be required either to describe any liability that might attach to its innovation or articulate its rebuttal to all such theories—being careful to demonstrate in the end why the outcome of such analysis remains sufficiently uncertain as to merit the No-Action letter. Rather than requiring an applicant to spend time hypothesizing a series of imagined theories of liability, the application process should be re-cast to emphasize how the new product’s features vary from products described by the existing rules and why the new product’s features (and the expected manner of delivery) *achieve* the consumer protections being pursued by the existing rules (e.g., informed consent, timely notice, etc.).

Moreover, the Bureau should permit companies to seek a no-action letter during the product design phase. The current policy of excluding “hypothetical products that are not close to being offered” constrains its usefulness. Regulatory uncertainty is also a barrier to *design* initiatives, not just the *final launch* of an innovative product.

The Bureau should commit to respond within an established timetable. Moreover, to reduce regulatory uncertainty and promote innovation across the market by more providers, the Bureau should explain in writing its decision to grant or deny a no-action letter.

⁶⁷ Policy on No-Action Letters; Information Collection, 81 Fed. Reg. 8686 (Feb. 22, 2016).

⁶⁸ See Eric Mogilnicki & Michael Nonaka, *No-Action Action: Steps Toward a Better CFPB Policy*, LAW360, Mar. 8, 2018.

⁶⁹ 12 U.S.C. § 5512(c)(4).

In addition, the Bureau should increase the value of a no action letter by expanding the scope of its protection. Currently, a no-action letter expresses no *present* intention to recommend enforcement by the Bureau. It applies to no other agency or to courts ruling on private litigation. When coupled with the reservation that the letter “is subject to modification or revocation at any time at the discretion of the staff for any reason...,” it becomes clear that the letter affords no reliable reduction of the regulatory uncertainty that was the ostensible motivation for the NAL Policy. The changes we recommend to this part include an expansion of the No-Action scope to assure against not only Bureau enforcement or supervisory criticism, but to preclude enforcement or supervisory criticism by any agency authorized to conduct such activities under the Dodd-Frank Act with respect to institutions in its respective jurisdiction. We believe that all actions derivative of the federal consumer financial protection laws should be covered by the scope of the No-Action Letter so that it is given deference by all other agencies and courts. In addition, the assurance of No-Action should preclude any rescission with retroactive effect.

Making these changes, which would remove the chilling effect of legal uncertainty, would encourage innovative companies and banks to consult with the Office of Innovation. This in turn, would be more likely to assure that the Bureau achieves its statutory mandate of fostering innovation, while consumers would be the ultimate beneficiaries of the reformed policy as they would have access to a variety of innovative and consumer-friendly financial products and services.

VII. Conclusion

ABA appreciates the opportunity to participate in this public review of the Adopted Rules and New Authorities, and we look forward to working with the Bureau to find ways to reduce regulatory burden consistent with our shared goal of enhancing the ability of banks to serve their customers and grow the economy. If you have any questions, please contact Virginia O’Neill at 202-663-5073 or voneill@aba.com.

Sincerely,

A handwritten signature in black ink that reads "Virginia O'Neill". The signature is written in a cursive, flowing style.

Virginia O’Neill
Senior Vice President, Center for Regulatory Compliance