

**BUREAU OF CONSUMER FINANCIAL PROTECTION**

**[Docket No. CFPB-2018-0013]**

**Request for Information Regarding Bureau Guidance and Implementation Support**

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Notice and request for information.

**SUMMARY:** The Bureau of Consumer Financial Protection (Bureau) is seeking comments and information from interested parties to assist the Bureau in assessing the overall effectiveness and accessibility of its guidance materials and activities (including implementation support) to members of the general public, including regulated entities. The Bureau is also considering whether it would be appropriate to make changes, consistent with law, to the formats, processes, and delivery methods for providing such guidance.

**DATES:** Comments must be received by **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may submit responsive information and other comments, identified by Docket No. CFPB-2018-0013, by any of the following methods:

- *Electronic:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* [FederalRegisterComments@cfpb.gov](mailto:FederalRegisterComments@cfpb.gov). Include Docket No. CFPB-2018-0013 in the subject line of the message.
- *Mail:* Comment Intake, Consumer Financial Protection Bureau, 1700 G Street, NW, Washington DC 20552.

- *Hand Delivery/Courier:* Comment Intake, Consumer Financial Protection Bureau, 1700 G Street, NW, Washington DC 20552.

*Instructions:* The Bureau encourages the early submission of comments. All submissions must include the document title and docket number. Please note the number of the topic on which you are commenting at the top of each response (you do not need to address all topics). Because paper mail in the Washington DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to <http://www.regulations.gov>. In addition, comments will be available for public inspection and copying at 1700 G Street, NW, Washington DC 20552, on official business days between the hours of 10:00 a.m. and 5:00 p.m. eastern time. You can make an appointment to inspect the documents by telephoning 202–435–7275.

All submissions in response to this request for information, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Submissions will not be edited to remove any identifying or contact information.

**FOR FURTHER INFORMATION CONTACT:** Kristin Switzer, Regulatory Implementation Program Manager; Angela Fox and Elliott C. Ponte, Attorneys (Regulatory Guidance and Implementation); and Brian Shearer, Counsel, at 202–435–7700. If you require this document in an alternative electronic format, please contact [CFPB\\_Accessibility@cfpb.gov](mailto:CFPB_Accessibility@cfpb.gov).

#### **SUPPLEMENTARY INFORMATION:**

The Dodd-Frank Act transferred to the Bureau rulemaking authority that previously had been exercised by seven other Federal agencies. Those agencies used a variety of methods for

providing guidance to industry on interpretive questions arising under the statutes and regulations they administered. Such guidance is “widely understood to be an essential instrument of [F]ederal administration”<sup>1</sup> and facilitates compliance with Federal law. In particular, it allows agencies to articulate their positions in a “relatively low cost and flexible”<sup>2</sup> way and facilitates stakeholders’ knowledge of agency positions and intentions ahead of enforcement or similar actions.<sup>3</sup>

For example, the Board of Governors of the Federal Reserve System (“Board”) primarily relied upon what it denominated as “Official Staff Interpretations,” which were published in the Code of Federal Regulations (CFR) as an appendix to the Board’s rules, typically following a notice-and-comment process.<sup>4</sup> Board staff also provided informal guidance orally in response to individual inquiries. Other agencies, such as the Department of Housing and Urban Development and the Federal Trade Commission, used various other forms of written guidance (such as standalone interpretive rules, letters or advisory opinions, and frequently asked questions), while also providing some informal oral guidance in response to individual inquiries.

As described further below, the Bureau, since its inception, has provided guidance through a variety of means, and its guidance and implementation support functions are continuing to evolve in response to feedback from industry and other stakeholders. This Request

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<sup>1</sup> Nicholas R. Parrillo, “Federal Agency Guidance: An Institutional Perspective,” at 28 (Oct. 12, 2017) (Yale L. Sch.), available at <https://www.acus.gov/report/agency-guidance-final-report> (report on guidance submitted to the Admin. Conf. of the U.S.) [hereinafter ACUS Guidance Report].

<sup>2</sup> John F. Manning, “Nonlegislative Rules,” 72 Geo. Wash. L. Rev. 893, at 914–15 (2004).

<sup>3</sup> See, e.g., *Hector v. USDA*, 82 F.3d 165, 167 (7th Cir. 1996) (“It would be no favor to the public to discourage the announcement of agencies’ interpretations by burdening the interpretive process with cumbersome formalities.”); *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 949 (D.C. Cir. 1987) (“We recognize that such guidelines have the not inconsiderable benefits of apprising the regulated community of the agency’s intentions as well as informing the exercise of discretion by agents and officers in the field.”).

<sup>4</sup> The Board’s practice has evolved over time. For example, before the Truth in Lending Simplification and Reform Act of 1980, the Board generally issued three different kinds of guidance under the Truth in Lending Act and its implementing rules, known as Regulation Z: Official Board Interpretations; Official Staff Interpretations; and Public Information Letters. Official Board Interpretations had the most weight of these guidance documents; Official Staff Interpretations had less weight but did provide a safe harbor from private liability under Regulation Z; and Public Information Letters were unofficial staff interpretations and therefore did not provide a safe harbor from private liability. In doing so, the Board noted that the volume of the varying interpretations and letters published by the Board (over 1,500, of which only 60 were Official Board Interpretations) complicated rather than facilitated compliance. See *Truth in Lending; Proposed Official Staff Commentary*, 46 FR 28560 (May 27, 1981).

for Information (RFI) seeks input on a number of aspects of the Bureau’s guidance activities to date and suggestions for future improvements.

### *Legal Background*

Unless specified otherwise by statute, agency rulemaking activities and many guidance activities are governed by the Administrative Procedure Act (APA). 5 U.S.C. § 551 *et seq.* The APA distinguishes among several types of agency issuances, including rules.<sup>5</sup> The most authoritative type of rulemaking that the Bureau and most other agencies engage in creates what are known as “substantive” or “legislative” rules under the APA.<sup>6</sup> When adopted as authorized by law, legislative rules have the “force and effect of law” in that, among other things, they can affect individual rights and obligations, such as those of consumers and financial services providers.<sup>7</sup> Legislative rules also bind “members of the public, the agency, and even the courts, in the sense that courts must affirm a legislative rule as long as it represents a valid exercise of agency authority.”<sup>8</sup> Such rules are promulgated, amended, and repealed through notice-and-comment procedures, unless an exception applies, and published in the *Federal Register*.<sup>9</sup>

The APA also designates “interpretive rules,” which advise the public of an agency’s construction of the statutes and rules which it administers, and “general statements of policy,” which articulate the agency’s prospective plans to exercise discretionary authorities.<sup>10</sup>

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<sup>5</sup> 5 U.S.C. 551(4) (defining “rule” in relevant part as “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency”).

<sup>6</sup> See 5 U.S.C. 552(a)(1)(D) (referring to “substantive rules of general applicability”); *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1203 (2015) (noting that “rules issued through the notice-and-comment process are often referred to as ‘legislative rules’”).

<sup>7</sup> U.S. Dep’t of Justice, Attorney General’s Manual on the Administrative Procedure Act, at 30 n.3 (1947) (hereinafter “Attorney General Manual”) (describing substantive rules as “rules, other than organizational or procedural, issued by an agency pursuant to statutory authority and which implement the statute” and noting that “[s]uch rules have the force and effect of law”); see *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (advising that legislative rules that carry the force of law “affect individual rights and obligations”) (quoting *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)).

<sup>8</sup> Richard J. Pierce, *Administrative Law Treatise*, at § 6.4 (5th ed. 2017).

<sup>9</sup> See 5 U.S.C. 551(5) (defining rulemaking as “agency process for formulating, amending, or repealing a rule”); 5 U.S.C. 552(a)(1)(D) (requiring legislative rules “adopted as authorized by law” to be published in the *Federal Register*); 5 U.S.C. 553(b)(B) (requiring notices of proposed rulemaking to be published in the *Federal Register*).

<sup>10</sup> See 5 U.S.C. 553(b)(A) (referring to “interpretive rules” and “general statements of policy”); see also Attorney General Manual, *supra* note 7, at 30 n.3.

Interpretive rules can be binding in some respects; for example, agencies may be subject to a duty to provide appropriate notice prior to changing an interpretation in certain circumstances.<sup>11</sup> However, neither an interpretive rule nor a general statement of policy can create new rights and obligations for regulated entities.<sup>12</sup> The level of deference that interpretive rules and general statements of policy receive from the courts is more variable,<sup>13</sup> and interpretive rules and general statements of policy can be issued and changed through less formal procedures than legislative rules.<sup>14</sup> They are to be published in the *Federal Register* but do not need to go through notice-and-comment procedures, although the Bureau and other agencies sometimes seek comment to gather input before issuance or revision to refine their thinking about certain factual and policy issues.<sup>15</sup>

Interpretive rules and general statements of policy are frequently referred to as “guidance.”<sup>16</sup> However, the Bureau also uses the term guidance more broadly to refer to compliance guides and other materials and activities that it does not believe are rules within the meaning under the APA (hereinafter “non-rule guidance”). These non-rule guidance materials and activities generally reiterate requirements, positions, or priorities that previously have been announced in a regulation or elsewhere, and include such documents as rule summaries,

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<sup>11</sup> See generally *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253–54 (2012) (*Fox II*) (describing need for “fair notice” of change from previous agency interpretation). In contrast, general statements of policy do not bind the public or the agency. See, e.g., *Syncor Int’l v. Shalala*, 127 F.3d 90 (D.C. Cir. 1997) (“The agency retains the discretion and the authority to change its position—even abruptly—in any specific case because a change in its policy does not affect the legal norm.”).

<sup>12</sup> See *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1208 (2015) (noting the “longstanding recognition that interpretive rules do not have the force and effect of law”); see also *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979) (citing Attorney General Manual, at 30 n.3); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>13</sup> See *Metro Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997) (stating that reasonable agency interpretations carry “at least some added persuasive force”); *Reno v. Koray*, 515 U.S. 50, 61 (1995) (accordng “some deference” to an interpretive rule that “do[es] not require notice and comment”); *Martin v. Occupational Safety and Health Review Comm’n*, 499 U.S. 144, 157 (1991) (indicating that “some weight” is due to informal interpretations though not “the same deference as norms that derive from the exercise of … delegated lawmaking powers”). Courts give “substantial deference” to agency interpretations of ambiguous agency regulations, including interpretations issued without notice and comment. See *Halo v. Yale Health Plan, Dir. of Benefits & Records Yale U.*, 819 F.3d 42, 53 (2d Cir. 2016) (citing *Auer v. Robbins*, 519 U.S. 452 (1997)); see also *Shalala v. Guernsey Meml. Hosp.*, 514 U.S. 87, 94–95 (1995) (deferring to “a reasonable regulatory interpretation” contained in an interpretive rule).

<sup>14</sup> See 5 U.S.C. 553(b), (d) (exempting interpretive rules and general statements of policy from notice-and-comment procedures).

<sup>15</sup> 5 U.S.C. 552(a)(1)(D) (providing that, among other things, “statements of general policy or interpretations of general applicability” formulated and adopted by an agency must be published in the *Federal Register*).

<sup>16</sup> See, e.g., ACUS Guidance Report, *supra* note 1, at 4 (defining “guidance” as “general statements of policy” and “interpretive rules”).

compliance guides, checklists, institutional and transactional coverage charts, webinars, and other compliance aids directed to regulated entities, the general public, or agency staff (*e.g.*, staff manuals). Such materials do not go through notice-and-comment procedures, are typically not published in the *Federal Register*, do not have the force and effect of law, and are not binding under the APA.<sup>17</sup>

The type of guidance issued also can have legal and practical significance under certain Federal consumer financial laws that provide industry a safe harbor for good faith reliance on legislative rules and certain interpretations issued by the Bureau or duly authorized staff. *See e.g.*, 15 U.S.C. 1640(f); 12 CFR part 1026, Supp. I, Part 1 (“Good faith compliance with this commentary affords protection from liability under section 130(f) of the Truth in Lending Act.”).

Consistent with the practice of many Federal agencies, including its predecessor agencies, the Bureau has released an array of guidance. These documents and activities have included interpretive rules,<sup>18</sup> general statements of policy or “policy guidance,”<sup>19</sup> and non-rule guidance, such as implementation support materials and activities.<sup>20</sup> However, each Bureau

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<sup>17</sup> For example, some courts have held that such documents are not “general statements of policy” or “rules” under the APA because these documents do not “implement, interpret, or prescribe law or policy.” *See Indep. Equip. Dealers Ass’n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (Roberts, J.) (finding that EPA letter declining to concur in entity-requested interpretation was not a rule, because the letter merely restated EPA longstanding interpretation; because it tread no new ground, it did not “implement, interpret, or prescribe law or policy”); *see also Golden and Zimmerman, LLC v. Domenech*, 599 F.3d 426, 431–32 (4th Cir. 2010) (finding that ATF Reference Guide restating statutes and regulations and providing FAQs reiterating interpretations was not a rule).

<sup>18</sup> *See, e.g.*, Application of Regulation Z’s Ability-To-Repay Rule to Certain Situations Involving Successors-in-Interest, 79 FR 41631 (July 17, 2014); Safe Harbors From Liability Under the Fair Debt Collection Practices Act for Certain Actions Taken in Compliance With Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 FR 71977 (Oct. 19, 2016).

<sup>19</sup> The Bureau’s policy guidance has included forward-looking, first-time announcements of Bureau positions or priorities regarding the Bureau’s discretionary supervisory, enforcement, or other powers, as well as statements reminding entities of its legal obligations in these areas, identifying potential risk areas, and providing general compliance management suggestions. *See, e.g.*, Policy Guidance on Supervisory and Enforcement Priorities Regarding Early Compliance With the 2016 Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 82 FR 29713 (June 30, 2017); Compliance Bulletin and Policy Guidance; 2016–02, Service Providers, 81 FR 74410 (Oct. 26, 2016).

<sup>20</sup> This category includes implementation support provided in response to individual inquiries through the Bureau’s Regulatory Inquiries Function. Additional examples include: Bureau of Consumer Fin. Prot., “Home Mortgage Disclosure (Regulation C) Small Entity Compliance Guide,” (Oct. 2017), available at [https://www.consumerfinance.gov/documents/5692/cfpb\\_hmda\\_small-entity-compliance-guide.pdf](https://www.consumerfinance.gov/documents/5692/cfpb_hmda_small-entity-compliance-guide.pdf); Bureau of Consumer Fin. Prot., “Preparing the Short Form Disclosure for Prepaid Accounts,” (Apr. 20, 2017), available at [https://www.consumerfinance.gov/documents/4528/201704\\_cfpb\\_PreparingtheShortFormDisclosure\\_v2.pdf](https://www.consumerfinance.gov/documents/4528/201704_cfpb_PreparingtheShortFormDisclosure_v2.pdf). The Bureau has also issued other types of non-rule guidance relating principally to the Bureau’s supervisory processes (rather than support of regulatory implementation), including the Bureau’s Supervision and Examination Manuals. Such other non-rule guidance is outside the scope of this RFI.

guidance material and activity has not or may not necessarily fit neatly within a single category, as some may include elements from multiple categories.<sup>21</sup>

Like other agencies, the Bureau faces tradeoffs that it must consider when issuing guidance. Where the Bureau does not use notice-and-comment procedures, it can act more quickly to issue or update guidance materials to address industry interpretive questions and respond to developments in the marketplace. However, the more expedited the process is in developing guidance, the more likely that an agency may find a need over time to revise or adjust its initial guidance statements and address related legal, factual, and policy issues, even though revisiting such materials can impose additional costs on both the agency and regulated entities. Materials issued through less formal processes also may, depending on the circumstances, receive less deference from courts in litigation.<sup>22</sup> Also, diversifying the number of channels through which the Bureau provides guidance can create more flexibility for the Bureau to respond to different circumstances and stakeholder needs, but also can make it more challenging for stakeholders to identify all relevant forms of information. On the other hand, legislative rules and Official Interpretations (otherwise known as commentary and discussed further below) collected in appendices to particular rules in the CFR after notice and comment provide the greatest amount of certainty, reliability, and ease of access, but take a considerable amount of time and agency resources to promulgate.

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<sup>21</sup> For example, some contemporaneous guidance documents, such as preambles of rules, may, among other things, contain both interpretive rules and general statements of policy. See Admin. Conf. of the U.S., “Administrative Conference Recommendation 2014–3: Guidance in the Rulemaking Process,” (June 6, 2014), available at <https://www.acus.gov/recommendation/guidance-rulemaking-process> (describing “guidance that agencies provide about the meaning and purpose of their rules at the time those rules are issued”).

<sup>22</sup> See *U.S. v. Mead Corp.*, 533 U.S. 218, 229–31 (2001) (recognizing “a very good indicator of delegation meriting [deference] in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings,” but also noting that “we have sometimes found reasons for [deference] even when no such administrative formality was required and none was afforded”).

## **Overview of This Request for Information**

The Bureau is using this request for information (RFI) to seek public input regarding the overall effectiveness and accessibility of the Bureau’s guidance as well as changes that it may make, consistent with applicable law, to the formats, processes, and delivery methods for providing such guidance. Additionally, the Bureau is seeking comment on potential new forms of guidance that could support regulatory implementation and compliance, as well as on the disclaimers used for its non-rule guidance.

In this RFI, the Bureau is not seeking comments on the following topics, as these have been addressed or will be addressed in other Bureau RFIs: 1) educational materials on its regulations developed for consumers or in response to consumer inquiries; 2) the substance of any particular proposed or final rule (for both rules the Bureau adopted and those it inherited), including a proposed or final rule’s Official Interpretations that are published with the regulations; or 3) the guidance provided in the Bureau’s Supervision and Examination Manuals or Supervisory Highlights.<sup>23</sup>

The Bureau encourages comments from all interested members of the public. The Bureau anticipates that the responding public may include entities subject to Bureau rules, trade associations and professional services organizations that represent these entities, individual consumers, consumer advocates, regulators, and researchers or members of academia.

## **Suggested Topics for Commenters**

To allow the Bureau to evaluate suggestions more effectively, the Bureau requests that, where possible, comments include:

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<sup>23</sup> For commenters interested in addressing guidance provided in the Official Interpretations of Bureau-issued rules, see the RFI on that topic, Docket No. CFPB-2018-0011, 83 FR 12286 (Mar. 21, 2018). For commenters interested in addressing guidance provided in the Official Interpretations of rules the Bureau inherited, see the RFI on that topic, Docket No. CFPB-2018-0012, 83 FR 12881 (Mar. 26, 2018). For commenters interested in addressing the Bureau’s Supervision and Examination Manual or Supervisory Highlights publications, see the RFI on the Bureau’s Supervision Program, Docket No. CFPB-2018-0004, 83 FR 7168 (Feb. 20, 2018).

- Specific discussions of the positive and negative aspects of the Bureau’s guidance materials and activities (including implementation support).
- Specific suggestions regarding any potential updates or modifications to the Bureau’s approach to providing guidance (including implementation support), and including, in as much detail as possible, supporting data or other information on impacts and costs, or information concerning alignment with the processes of other agencies.
- Specific identification of any aspects of the Bureau’s approach to guidance (including implementation support) provided by the Bureau that should not be modified, and including, in as much detail as possible, supporting data or other information on impacts and costs, or information concerning alignment with the processes of other agencies.

The following sections list areas of interest on which commenters may want to focus input. This non-exhaustive list is meant to assist in the formulation of comments and is not intended to restrict what may be addressed by the public. Commenters may comment on matters that are related to the Bureau’s guidance (including implementation support), but do not appear in the list below. The Bureau requests that, in addressing these questions, commenters identify with specificity the Bureau guidance material or activity, format, process, or delivery platform at issue, providing specific examples where appropriate. In discussing Bureau guidance provided to date, the Bureau also requests that commenters provide examples and supporting information where possible, as well as relevant information about the frequency with which particular types of guidance have been used within an institution, by which parties, and in what ways. Commenters should feel free to comment on some or all of the questions below, but are encouraged to indicate in which area their comments are focused.

From all of the suggestions, the Bureau requests that commenters offer their highest priorities, where possible, along with an explanation of how or why certain suggestions have been prioritized. Commenters are asked to single out their top priority where possible.

Suggestions will be most helpful if they focus on revisions that the Bureau could implement without changes in the law, consistent with the Bureau's authorities and in light of tradeoffs under the APA framework described above.

#### *Regulatory Inquiries Function*

The Bureau's Regulatory Inquiries Function assists individual inquirers who have specific questions about the Bureau's statutes and regulations. At times, the Bureau has received several thousand inquiries per year, largely focused on implementation by industry of new or revised regulations. The Regulatory Inquiries Function is an example of an implementation support activity that falls within the category of non-rule guidance. Similar to the regulatory inquiries functions of many of its predecessor agencies, the Bureau's function is designed to provide inquirers with relatively quick, informal assistance concerning the statutes and regulations that the Bureau administers. However, in part because of the APA constraints discussed above, the function is limited in scope. Responses are not intended to be interpretations of the regulations or general statements of policy, as described earlier, but rather to assist in the application and implementation by industry of the Bureau's regulations and Official Interpretations. For example, the Bureau emphasizes on its website that the informal assistance provided through this function does not constitute an official interpretation of the Bureau and is not a substitute for formal legal counsel or other compliance advice. The Bureau also does not moderate disputes between parties, provide guidance on matters that are under

examination or investigation by the Bureau or another State or Federal agency, or answer questions about specific business plans.

Although the assistance provided through the Regulatory Inquiries Function is limited and individualized, the Bureau believes that the assistance is valuable to those receiving it. In addition, the inquiries received through this channel provide an important information source, which helps the Bureau prioritize provision of the various other types of guidance described in this RFI by providing a window (supplementing the Bureau’s general market monitoring and outreach activities) into the implementation and compliance challenges faced by regulated entities. Thus, when the Bureau receives multiple individual inquiries about the same topic, as described below, the Bureau often prioritizes that topic for webinars and various forms of written guidance, potentially culminating in revisions to the Official Interpretations to the particular rule after a notice-and-comment process.

Generally, individual inquiries are submitted to the Bureau through a phone message or a form accessed on the Bureau’s website. However, inquiries related specifically to the Home Mortgage Disclosure Act (HMDA) and its implementing Regulation C are also submitted through a separate channel—the Bureau’s HMDA Help function—via phone, email, or a form accessed on a specific Bureau website dedicated to HMDA operational support.

Historically, responses to regulatory inquiries have been provided orally via phone conversations with Bureau staff. However, the Bureau has been providing an increasing number of responses to regulatory inquiries through emails, most extensively with the responses provided through its HMDA Help function.

The Bureau is seeking feedback on all aspects of its Regulatory Inquiries Function, including the following areas of interest:

1. The preferred vehicle(s) for submitting inquiries (*i.e.*, phone message, email, web form, or other specific vehicle).
2. Preferences regarding the responses to regulatory inquiries; the format and delivery method for the responses provided (*i.e.*, oral response, email, or other format or delivery method); and the desired timing of the responses provided.
3. The relative value of responses to regulatory inquiries. In particular, the Bureau is interested in the tradeoffs between providing quick guidance orally to individuals through the Regulatory Inquiries Function and providing written guidance, which is generic and takes more time, but generally is more broadly accessible.
4. Whether the Bureau should, as a matter of practice, publish written responses to regulatory inquiries and, if so, consistent with law, the appropriate vehicle or platform for such publications, the desired frequency for publishing such responses, and the appropriate disclaimers to accompany such publications.
5. Additional ways that the Bureau can improve the Regulatory Inquiries Function, including improvements to the process for submitting inquiries, the process for receiving responses, the substance of responses, or the timing of responses.

#### *Regulatory Implementation and Compliance Aids*

The Bureau creates and releases on its website several categories of regulatory implementation and compliance aids, including: 1) compliance guides; 2) rule summaries and other quick reference materials; and 3) webinars. These regulatory implementation and compliance aids are examples of implementation support materials categorized as non-rule guidance. These materials provide relatively brief, informal summaries of Federal consumer financial laws and regulations, generally focusing on summarizing statutes and interpretations

and positions previously announced in Bureau legislative or non-legislative rules using language and formats that may be particularly useful to compliance professionals. As noted above, both the content and format of regulatory implementation and compliance aids are informed by what the Bureau learns as it administers its Regulatory Inquiries Function and general market monitoring and outreach activities.

Compliance guides are plain language summaries of a Bureau rule and, like other examples of non-rule guidance in this section, are not intended to be interpretations of that rule or general statements of policy. Compliance guides include Small Entity Compliance Guides as well as instructional guides for disclosure forms. The Bureau is statutorily required to provide Small Entity Compliance Guides for rules it issues that meet certain criteria, although it also provides them for certain rules for which they are not required.<sup>24</sup>

Quick reference materials are additional plain language summaries of a rule or portions of a rule, but are shorter than compliance guides. These include, but are not limited to, executive summaries, summaries of changes, factsheets, flow charts, decision trees, and summary tables. Executive summaries are posted at the same time that the underlying rule is released, and other quick reference materials are posted as they are completed.<sup>25</sup>

Webinars are recorded presentations in which the Bureau (either independently or in collaboration with other Federal agencies or trade associations) provides information to facilitate further understanding of a rule, either in a question-and-answer or topic-based explanation

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<sup>24</sup> Section 212(a) of the Small Business Administration Regulatory Enforcement Act (SBREFA) requires, among other things, that with respect to certain rules, an agency “publish[es] 1 or more guides to assist small entities in complying with the rule and shall entitle such publications ‘small entity compliance guides.’” The Bureau’s Small Entity Compliance Guides fulfill the Bureau’s requirements under Section 212(a), although the Bureau occasionally provides these guides even when not required under the SBREFA statute, as in the case of the Prepaid Rule Small Entity Compliance Guide. The Bureau also understands that these guides are used by all entity types, not just those defined as “small entities” under the SBREFA statute. Compliance guides are provided in PDF format on the Bureau’s Regulatory Implementation and Guidance webpage. See Bureau of Consumer Fin. Prot., “Implementation and Guidance,” <https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/> (last visited Mar. 16, 2018).

<sup>25</sup> Quick reference materials are also provided in PDF format on the Bureau’s Regulatory Implementation and Guidance webpage. *Id.*

format. The Bureau has created webinars for production on trade association websites, other regulatory agency websites, and most recently its own public YouTube™ channel. Each webinar is accompanied by the presentation slides used for the discussion, and some have hyperlinked video section breaks, either in a separate document or in the video description.

The Bureau is seeking feedback on all aspects of its regulatory implementation and compliance aids, including the following areas of interest:<sup>26</sup>

6. The utility of the Bureau’s compliance guides and quick reference materials as well as potential areas for improvement, including:

- a. The scope of topics addressed and the format in which they are presented;
- b. The ease of navigation to materials on the Bureau’s website and to sections within the compliance guides or quick reference materials;
- c. The effectiveness of the Bureau’s use of the plain language writing style in the Small Entity Compliance Guides and quick reference materials to help make the rules more easily understandable; and
- d. The usefulness of the Bureau providing Small Entity Compliance Guides and quick reference materials when not legally required to do so (particularly for entities that do not meet the Small Business Administration’s definition of “small business.”).<sup>27</sup>

7. The utility of the Bureau’s webinars as well as potential areas for improvement, including issues related to the website utilized for viewing; the format of the webinar guidance (*i.e.*, question and answer format, explanatory format, or other formats); the supplemental

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<sup>26</sup> The Bureau understands that industry has expressed concerns regarding its use of disclaimers for non-rule guidance such as regulatory implementation and compliance aids. See below for a discussion and questions on the Bureau’s use of disclaimers.

<sup>27</sup> See 13 CFR 121.201; U.S. Small Bus. Admin., “Small Business Compliance Guide Size and Affiliation,” (Mar. 2014), available at [https://www.sba.gov/sites/default/files/articles/affiliation\\_ver\\_03.pdf](https://www.sba.gov/sites/default/files/articles/affiliation_ver_03.pdf).

materials (*e.g.*, hyperlinked navigation tools, presentation slides, or other materials); and the ease with which topics of interest may be located within webinar materials.

8. For the identified types of regulatory implementation and compliance aids in questions six and seven, feedback on the delivery methods (*e.g.*, provision on the Bureau’s website and email notifications to the appropriate email listserv), and the delivery method and timing for notifying stakeholders of the availability of new or amended materials.

#### *Official Interpretations and Standalone Interpretive Rules*

Many regulations issued under the Bureau’s rulemaking authority contain Official Interpretations within the supplement or appendix to the regulatory text in the CFR. The Bureau, as a matter of practice, has published Official Interpretations in the *Federal Register* after notice and comment. Among other purposes, the Bureau uses Official Interpretations to clarify regulatory text and provide examples of practices that comply with regulatory provisions. The Bureau also uses Official Interpretations to memorialize the Bureau’s responses to recurring questions on particular legislative rules over time. For example, after issuing a new regulation, during the implementation period for that rule, the Bureau frequently has amended the Official Interpretations (and sometimes the regulatory text) in response to questions posed during the implementation process.<sup>28</sup> As discussed earlier, under certain enumerated consumer financial laws, such as the Truth in Lending Act,<sup>29</sup> Official Interpretations also provide financial services providers protection from civil liability for acts committed in good faith reliance on those interpretations.

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<sup>28</sup> By including this implementation guidance in the Official Interpretations on routine basis during the implementation period, the Bureau has expanded on the practice of the Federal Reserve Board described above of incorporating guidance into the Official Interpretations in an effort to make such guidance more readily accessible and to clarify its legal effect.

<sup>29</sup> See 15 U.S.C. 1640(f).

Although the Bureau has generally used Official Interpretations as a cumulative repository of the Bureau’s interpretations issued over time, the Bureau also occasionally has issued standalone interpretive rules without notice and comment when rapid issuance of interpretive clarification will assist industry with regulatory implementation or compliance.<sup>30</sup> The Bureau identifies regulatory areas that would benefit from these types of clarifications from a variety of sources, including inquiries received through the Regulatory Inquiries Function and feedback obtained through industry outreach or market monitoring activities. The Bureau generally expects that it will periodically amend the relevant Official Interpretations in the CFR to reflect the positions taken in these materials, after notice and comment to assess whether further refinement is warranted.<sup>31</sup>

Consistent with applicable law, the Bureau is seeking feedback on all aspects of the process by which it issues interpretive rules and Official Interpretations, including the following areas of interest:

9. The efficiency and effectiveness of providing guidance through the Bureau’s Official Interpretations.
10. Which types of standalone interpretive rules are most efficient and effective and, if any, with what frequency and through what processes the Bureau should amend the Official Interpretations to incorporate standalone interpretive guidance into the CFR.
11. Whether there are circumstances in which the Bureau should use the notice-and-comment process (even though not legally required) for standalone interpretive rules.

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<sup>30</sup> See 79 FR 41631 (July 17, 2014) and 81 FR 71977 (Oct. 19, 2016), *supra* note 18. In the past, the Bureau has used labels for interpretive guidance that are different than what is used in this RFI. For example, interpretive guidance may have been issued in other documents, such as bulletins. *See, e.g.*, CFPB Bulletin 2013–12, Implementation Guidance for Certain Mortgage Servicing Rules (Oct. 15, 2013).

<sup>31</sup> For example, the Bureau addressed in the Official Interpretations some of the guidance previously provided in CFPB Bulletin 2013–12, *supra* note 30. *See* Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 FR 72160, 72236–38 (Oct. 19, 2016). In some cases, for example, there is no existing implementing regulation for some or all of the statute and, thus, no Official Interpretations that may be used to incorporate guidance about that portion of the statute. *See, e.g.*, Fair Debt Collection Practices Act, 15 U.S.C. 1692–1692p.

## *SEFL Guidance Materials*

The Bureau’s Division of Supervision, Enforcement, and Fair Lending (SEFL) issues a number of documents meant to provide industry and the public with insight into the Bureau’s enforcement and supervision priorities, perspectives regarding compliance with Federal consumer financial law, and supervisory expectations. For example, SEFL guidance materials have helped to identify compliance risks, made recommendations to strengthen compliance management systems, and provided options for reducing compliance risks. Those materials include, for example, compliance bulletins, policy statements, and statements on supervisory practices. They generally are examples of policy guidance as described above, and, for example, do not have the force and effect of law.<sup>32</sup> Examples include the Bureau’s policy guidance on supervisory and enforcement priorities regarding early compliance with the 2016 amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z),<sup>33</sup> and the Bureau’s compliance bulletin on detecting and preventing consumer harm from production incentives.<sup>34</sup>

The Bureau is seeking feedback on all aspects of these SEFL guidance materials, including but not limited to:

12. The timing, frequency, scope, and delivery method of SEFL guidance materials.
13. The benefits or drawbacks associated with the Bureau’s use of each particular type of SEFL guidance vehicle.
14. Other feedback or suggestions related to SEFL guidance materials.

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<sup>32</sup> As noted above, the guidance provided in the Bureau’s Supervision and Examination Manuals or Supervisory Highlights publications is outside the scope of this RFI.

<sup>33</sup> 2016 Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 82 FR 29713 (June 30, 2017).

<sup>34</sup> Bureau of Consumer Fin. Prot., “CFPB Compliance Bulletin 2016–03, Detecting and Preventing Consumer Harm from Production Incentives,” (Nov. 28, 2016), available at [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201611\\_cfpb\\_Production\\_Incentives\\_Bulletin.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201611_cfpb_Production_Incentives_Bulletin.pdf).

## *Recommendations for New Forms of Written Guidance*

The Bureau has received feedback from industry and other external stakeholders encouraging the use of forms of written guidance that have been used frequently by some other agencies, such as Frequently Asked Questions (FAQs) and advisory opinions. In response to this feedback, the Bureau has begun to explore new and enhanced methods for delivering direct, easy-to-understand written guidance that can be delivered via a public-facing platform on a shorter timeline than might be required for interpretive rules.<sup>35</sup>

For example, the Bureau recently published on its website FAQs on bankruptcy issues related to mortgage servicing,<sup>36</sup> and issued FAQs on HMDA operational and regulatory requirements.<sup>37</sup> These FAQs have historically been non-rule guidance—written responses to questions received from regulated entities and other stakeholders that do not constitute an interpretive rule under the APA, consistent with the kinds of information that the Bureau has provided orally or by email through the Regulatory Inquiries Function described above. However, the Bureau could choose to change its approach in the future to issue interpretive rules in the form of FAQs.

The Bureau has also begun exploring the use of advisory opinions and similar types of focused guidance to assist industry in better understanding its legal and regulatory obligations.<sup>38</sup>

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<sup>35</sup> Earlier iterations of the Bureau’s Small Entity Compliance Guides utilized a question and answer format. See, e.g., Bureau of Consumer Fin. Prot., “Ability-to-Repay and Qualified Mortgage Rule: Small Entity Compliance Guide,” (Mar. 2016), available at [https://files.consumerfinance.gov/f/201603\\_cfpb\\_atr-qm\\_small-entity-compliance-guide.pdf](https://files.consumerfinance.gov/f/201603_cfpb_atr-qm_small-entity-compliance-guide.pdf); Bureau of Consumer Fin. Prot., “Remittance Transfers: Small Entity Compliance Guide,” (Jan. 31, 2017), available at [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201701\\_cfpb\\_Intl\\_Money\\_Transfer\\_Small\\_Entity\\_Compliance\\_Guide.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201701_cfpb_Intl_Money_Transfer_Small_Entity_Compliance_Guide.pdf).

<sup>36</sup> Bureau of Consumer Fin. Prot., “Mortgage Servicing FAQs,” [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_mortgage-servicing\\_frequently-asked-questions.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_mortgage-servicing_frequently-asked-questions.pdf) (last updated Mar. 20, 2018).

<sup>37</sup> The HMDA FAQs may be accessed using a searchable web portal located on the Federal Financial Institutions Examination Council HMDA Help webpage, which may be accessed from the Bureau’s website. See Bureau of Consumer Fin. Prot., “Frequently Asked Questions: HMDA Filing, FFIEC,” <https://www.consumerfinance.gov/data-research/hmda/faq> (last visited Mar. 16, 2018); Bureau of Consumer Fin. Prot., FFIEC: HMDA Platform,” <https://hmdahelp.consumerfinance.gov/knowledgebase/s/> (last visited Mar. 23, 2018).

<sup>38</sup> The Bureau has two other programs by which individual applicants can seek determinations from the Bureau, although the programs do not provide guidance on compliance with existing statutes and regulations. Rather, the Bureau’s Trial Disclosure Waiver Policy sets forth procedures for the Bureau to exercise its authority pursuant to section 1032(e) of the Dodd-Frank Act to waive disclosure requirements for a set period to allow applicants flexibility in field testing alternative disclosures. 12 U.S.C. 5532(e). The Bureau has also developed a program setting forth the

The Bureau understands that Federal agencies have described different types of guidance as advisory opinions. In the most formal cases, advisory opinions are interpretive rules—written opinions providing interpretations of a statute or regulation, often applying that interpretation to a particular situation. In other cases, advisory opinions are policy or non-rule guidance. The Bureau also understands that advisory opinions typically are focused on reducing uncertainty by providing a written response to a specific inquiry regarding the conformance of a specific transaction or activity with a particular statute or regulation subject to the agency’s jurisdiction.

The Bureau is seeking feedback on potential new methods or channels for providing guidance, including but not limited to:

15. The utility of FAQs. Specifically, comment is sought on the types of questions that are appropriately dealt with through FAQs rather than another instrument, and the mechanisms that the Bureau should use to identify and prioritize issues and topics that should be addressed using FAQs.
16. The potential utility of establishing an advisory opinion program that would provide interpretations, in addition to or instead of an FAQ program, including the particular scope and benefits of advisory opinions that would be distinct from generalized FAQs and the types of questions or issues that could or could not be appropriately dealt with by advisory opinions.
17. The potential benefits and costs of memorializing over time any interpretations reflected in advisory opinions or other standalone guidance documents in the Official Interpretations to the underlying regulations, after notice and comment.

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requirements and processes for the issuance of No Action Letters in cases in which Bureau staff do not intend to exercise their discretion to pursue supervision or enforcement activity concerning potentially consumer-friendly market innovations that involve significant regulatory uncertainty. These programs are not the focus of this RFI, which is focused on guidance to facilitate implementation of the Bureau’s regulations and compliance with Federal law.

18. The tradeoffs between issuing FAQs or advisory opinions quickly and issuing written guidance after notice and comment. With respect to FAQs or advisory opinions, commenters should include, where possible, suggestions on how best to mitigate risks to stakeholders (*e.g.*, industry confusion, increased compliance costs, potential legal concerns) where there is a heightened risk that the Bureau may change its approach at a later date.

19. Other approaches, methods, or practices not currently employed by the Bureau that would enhance external stakeholders' ability to comprehend, implement, or comply with statutes and regulations subject to the Bureau's purview.

#### *Disclaimers*

The Bureau uses disclaimers on non-rule guidance materials to, among other things, describe the purpose of the material, note the legal limitations of the guidance in light of the APA and underlying Federal consumer financial laws, and emphasize that the rule and its Official Interpretations are the definitive sources regarding a rule's requirements in the event of a perceived conflict. In other words, these disclaimers are often used to clarify when guidance materials are non-rule materials that are intended only to aid understanding and implementation.

The Bureau has received feedback from industry indicating that the Bureau's use of disclaimers on its materials causes confusion as to the utility and reliability of the guidance and otherwise diminishes the usefulness of the guidance provided. The Bureau has also received feedback urging the Bureau to modify existing disclaimers.

Bureau disclaimers are printed on, for example, rule summaries, compliance guides, quick reference materials, and other compliance aids. These disclaimers are given orally to industry stakeholders when Bureau staff present in webinars or at industry conferences or

respond to questions through the Regulatory Inquiries Function. The particular language used in disclaimers is tailored to the type of guidance being provided. For example, the disclaimers provided within the Bureau’s regulatory implementation and compliance aids generally indicate that the explanation or summary of a regulatory requirement does not apply to all possible circumstances and is not legal advice. Oral disclaimers given through the Bureau’s Regulatory Inquiries Function generally explain that Bureau staff only provide informal responses to regulatory inquiries and that the responses are not intended to serve as legal advice or considered to be an official interpretation of a regulation.

The Bureau has developed different disclaimers for different types of materials as its guidance function has evolved over time, and stakeholders have indicated that some historical formulations are particularly likely to cause confusion. For example, industry stakeholders point to language stating that webinar materials do not bind the Bureau, or create any rights, benefits, or defenses that are enforceable by other parties, as raising questions about whether material presented can be relied upon. They question whether the Bureau would change its interpretation without notice or take action against a party acting in conformity with an interpretation stated in a webinar.

The Bureau is seeking feedback on all aspects of its disclaimers, including the following areas of interest:

20. Taking into consideration the Bureau’s purposes for providing guidance as well as APA requirements discussed above, whether disclaimers are transparent, understandable, and appropriate to the type of guidance being provided.

21. Desired changes to the Bureau's disclaimer language or approach to disclaimers generally, and whether other Federal agencies have adopted disclaimer language or approaches to disclaimers that would be useful to the Bureau.
22. The variety of Bureau disclaimers currently provided, and whether the Bureau should adopt a single, more generic disclaimer to be used in most instances.
23. Other feedback or suggestions related to the Bureau's disclaimers.

**AUTHORITY:** 12 U.S.C. 5511(c).

[THIS SIGNATURE PAGE PERTAINS TO THE REQUEST FOR INFORMATION  
TITLED "REQUEST FOR INFORMATION REGARDING BUREAU GUIDANCE AND  
IMPLEMENTATION SUPPORT"]

Dated: March 27, 2018.

A handwritten signature in blue ink, appearing to read "Mick Mulvaney".

Mick Mulvaney,

*Acting Director, Bureau of Consumer Financial Protection*