June 19, 2018

Comment Intake
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: ***Request for Information Regarding the Bureau's Adopted Regulations and New Rulemaking Authorities (Docket No. CFPB-2018-00011)***

To Whom It May Concern:

The American Financial Services Association (AFSA)[1] appreciates the Bureau of Consumer Financial Protection's request for comment and information on whether to amend those rules it has promulgated since its creation or issue certain new rules. AFSA recommends that the Bureau:

(1) **Review and reconsider all its previous larger participant rules.** The Bureau should implement a defined set of criteria to evaluate consumer financial services markets and determine which markets necessitate supervision.

(2) **Revise the mortgage ability to repay (ATR) rule and its qualified mortgage (QM) standards.** The ATR rule and QM standards must be improved to ensure more qualified borrowers can access appropriate and sustainable credit.

(3) **Simplify and modify the TILA-RESPA Integrated Disclosure (TRID) rule.** Specifically, the Bureau should simplify and clarify disclosure requirements for certain transactions and allow for more waivers of mandatory waiting periods.

(4) **Revise the mortgage servicing rules.** The specificity of requirements in the current rule stifle effectiveness, prevent innovation, and increase costs to servicers without providing attendant benefits to borrowers.

(5) **Encourage the Department of Defense (DoD) to revise its regulations implementing the Military Lending Act (MLA).** The current regulations limit the availability of small-dollar credit to service members and their families.

Revising these five regulations will improve the credit market for both consumers and financial institutions.

[1] Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

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I. Larger Participant Rules

As AFSA outlined in its May 21, 2018 comment letter responding to the Bureau's request for information on its supervision procedures, the Bureau should reconsider the markets over which it has asserted supervisory authority through the issuance of larger participant rules.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) grants the Bureau supervisory authority in a variety of contexts. For instance, the Bureau has supervisory authority over banks, thrifts, and credit unions with assets over $10 billion, as well as their affiliates. The Bureau also has supervisory authority over certain markets, including the residential mortgage, private education lending, and payday lending markets. Beyond that, the Dodd-Frank Act gives the Bureau supervisory authority over financial institutions engaged in conduct that poses risks to consumers and larger participants of consumer financial markets as defined by Bureau rules.

Currently, the Bureau has defined larger participants in the following markets: consumer reporting, consumer debt collection, student loan servicing, international money transfer, and automobile financing. The Bureau did not select these markets based on a set of criteria explained ahead of time, nor did it explain why such markets required federal supervision, even where it explained why it selected the threshold it did for larger participants.[2]

The time is ripe for the Bureau to review and reconsider whether the markets currently subject to larger participant rules should in fact be subject to federal supervision. Each market should be evaluated based on a defined set of criteria. The criteria considered by the Bureau should cut across all markets and should include the risks presented to consumers by each market, as well as the presence of effective state regulation and supervision of the market.

Finally, when issuing larger participant rules, it would seem appropriate that the sum of the supervised entities in a market constitute a small subset of the market rather than the substantial majority of participants in a market. After all, it is clear from the language of the Dodd-Frank Act ("larger" rather than "majority") that Congress intended only the larger players being supervised—not all or substantially all players.

This is an important distinction for at least two reasons. One, supervision is an expensive process for a player in a market. Forcing costly supervision on an entity ought to bear some relationship to the size of the entity and its ability, or not, to absorb such costs. Two, when only the larger participants are supervised, the information, practices, and procedures that the Bureau learns about and which are considered problematic, can then be addressed in a market-wide Administrative Procedures Act (APA) rulemaking. That APA rulemaking then informs and corrects all players in that market. In this way, costly intrusion of the federal government into the marketplace is lessened, reducing costs for lenders and borrowers, while the Bureau concurrently enforces Congress' intent to ensure that all market participants not harm borrowers. This obviously-intended scheme reduces the cost to industry (and thus to borrowers) and corrects market-wide practices that it believes, after appropriate APA rulemaking, require governmental regulation.

[2] For example, in the larger participant rule for student loan servicing, the Bureau held that it, "is not required to determine the level of compliance risk in a market before issuing a larger participant rule." (78 FR 73386) And, the larger participant rule for the vehicle finance market also seemed to be issued without consideration of whether such a market demands federal supervision. Instead, the Bureau's rationale for supervision appears focused on the fact that most consumers obtain and finance vehicles, not whether federal regulation of the market that provides such financing is warranted.

II. ATR / QM Rules

AFSA's second request is that the Bureau revise the ATR rule and its QM standard. We have four specific suggestions. We recommend that the Bureau revise the general requirements for QM loans by increasing flexibility and clarity in the ATR rule's Appendix Q, make the "QM patch" permanent, create an ATR cure mechanism, and revise the points and fees cap for QM loans.

A. Revise the General Requirements for QM loans by Increasing Flexibility and Clarity in Appendix Q

The ATR rule requires lenders to determine that a borrower has a reasonable ability to repay a mortgage before the loan is consummated. The rule then sets up two "classes" of loans—QM loans and non-QM loans. Loans that meet the QM requirements are insulated from liability on a presumption that the loan was originated based upon the borrower's ability to repay the loan. Lenders who fail to meet the QM requirement (non-QM loans) face significant potential penalties and liability.

Section 1026.43 (e)(2) of Regulation Z sets forth general requirements for QM loans. In order for a mortgage loan to qualify as a QM, the loan may not contain certain so-called "risky" features, such as interest-only or negative amortization terms. Additionally, it must meet specified underwriting standards. These standards include a debt-to-income (DTI) ratio cap of no more than 43 percent.[3]

The Bureau should engage in a review of the ATR rule and work to align the general requirements for QM loans with GSE eligibility requirements (*e.g.*, raise the DTI threshold). These requirements should make ample accommodation for compensating factors that would allow a loan to be a QM loan, even if one particular criterion is deemed to fall outside the bounds of the existing framework, *e.g.*, a higher DTI loan with compensating factors.

Lenders making QM loans must follow guidance in Appendix Q on how to document and verify income and assets. The rigidity in Appendix Q has made it difficult for lenders to originate loans above a 43 percent DTI. While Appendix Q focuses on borrower cash flow, it largely ignores borrower assets. This has contributed to a tighter lending environment, particularly for the self-employed, small business owners, seasonal workers, retirees, and other non-traditional income earners.

Appendix Q requirements are complicated, opaque, and offer inadequate guidance. The consequences for not meeting the ATR Rule/QM threshold have led lenders to be overly conservative and to limit their residential lending to loans that fit well within the QM definition.

Additionally, the need to take advantage of Appendix Q forces lenders to use a manual review process resulting in an increased potential for errors and rework. Any rework adds a substantial amount of time to the process of originating a mortgage loan and cost to the originator. These delays and costs are particularly felt with the non-traditional income earners listed above.

Appendix Q is outdated and not as useful as alternative standards, such as the government-sponsored entities (GSEs), Federal Housing Administration (FHA), and Department of Veterans Affairs (VA) underwriting standards for determining a borrower's DTI (including under the default QM). AFSA urges the Bureau to either explicitly permit alternative underwriting standards to be used by lenders instead of Appendix Q or to simplify

[3] The Bureau also correctly allows defined small servicers to benefit from the QM protection without having to comply with the very burdensome QM requirements.

Appendix Q. The Bureau should review Appendix Q standards and eliminate overly prescriptive and rigid requirements and provide greater latitude to offset debts with readily available liquid assets. Review of these requirements should be particularly sensitive to considerations for self-employed and non-traditional borrowers who do not ordinarily prepare quarterly profit and loss or balance sheet statements.

B. Make the "QM Patch" Permanent

The ATR rule creates another type of QM loan: loans that are eligible for purchase by the GSEs, the FHA, or are eligible for other government programs (often referred to as the "QM patch"). AFSA recommends that the QM patch be made permanent. A large portion of current mortgage lending is dependent upon the QM patch. Sunsetting the QM patch could cause significant reductions in the availability of credit.

C. Create an ATR Cure Mechanism

The ATR rule, unlike the high-cost mortgage rule, does not provide a cure provision for any threshold breaches. AFSA supports amending the ATR rule to permit the cure or correction of errors where the three percent points and fees limit is exceeded. This would encourage additional lending. AFSA also urges that the right to cure or correct errors be extended to DTI miscalculations and other technical errors.

D. Revise the Points and Fees Cap for QM Loans

The definition of a small loan should be updated. The current limit for a "small loan" under the ATR rule—a loan where points and fees may exceed three percent and still qualify as a QM—is approximately $103,000. This is too low, especially considering that the average loan size nationally is approximately $260,000. As a result, many small loans do not qualify as QMs. The loan size threshold for the three percent points and fees cap should be increased to $200,000, with a sliding scale that permits progressively higher points and fees caps. This adjustment would increase QM lending to moderate-income borrowers who have smaller loan balances.

III. TRID Rule

AFSA's third recommendation is that the Bureau simplify and modify the TRID rule. Specifically, the Bureau should: (1) simplify the disclosure for "no closing cost" loans; (2) clarify the TRID dynamic disclosures; (3) allow for a more flexible and streamlined manner of waiver for the mandatory TRID waiting periods; and (4) provide greater flexibility and clarity for the "best information reasonably available" standards.

A. Simplify the Disclosures for "No Closing Cost" Loans

AFSA recommends that for "no closing cost" transactions, the Bureau simplify the disclosure of the non-escrow fees and expenses on the Loan Estimate and Closing Disclosure forms. In other words, when a borrower has chosen a no closing cost loan, the lender should not be required to disclose fees other than the fees that go into the escrow account. Because the borrower does not need to pay the fees, the disclosure is not beneficial and does not provide relevant information to the borrower. At the same time, ensuring accurate disclosure of non-escrow fees amounts on Loan Estimate and Closing Disclosure forms places considerable operational and compliance expenses upon lenders, including considerable manual review and frequent re-disclosure.

B. Clarify the TRID Dynamic Disclosures

All dynamic (or transaction-specific) TRID disclosures necessitate complex operational and compliance measures, such as repeat testing. While these disclosures create operational, compliance, and liability burdens for lenders, they do not provide much, if any, benefit to the borrower. As such, AFSA recommends that they be modified and the dynamic fields be replaced with static text. Traditional disclosures (*e.g.*, APR, total of payments, payment schedule, etc.,) already provide borrowers the tools they require to compare transactions in a clear and consistent manner when shopping for a mortgage loan and comparing options.

C. Allow for a More Flexible and Streamlined Manner of Waiver for the Mandatory TRID Waiting Periods

Certain mandatory waiting periods create artificial hold periods during the mortgage application process. These waiting periods should be reduced, eliminated, and/or more easily waived. Borrowers often do not want to delay the closing process. Waiting periods provide virtually no real benefit. Instead, waiting periods can cause hardships and increase the cost to the borrower. Without these mandatory waiting periods, the mortgage process could move forward more quickly—benefiting both the borrower and the lender. Unfortunately, in many instances these waiting periods cannot be waived by the borrower. The waiting periods may be waived only in very narrow "bona fide" emergencies. The definition of a "bona fide" emergency is narrow and rarely applicable. There are simply not options for many prudent borrowers who are attempting to avoid financially unfavorable delays.

D. Provide Greater Flexibility and Clarity for the "Best Information Reasonably Available" Standards

TRID requires that certain disclosures be based on the best information reasonably available to the lender at the time the disclosures are provided to the borrower. Meeting the current "best information reasonably available" standard for escrow disclosures (*e.g.* Home Owner Association or HOA fees) results in considerable operations and compliance review. Meeting these standards may necessitate the re-disclosure of the Loan Estimate and Closing Disclosure and result in transaction delays for what are often small amounts.

A lender should be deemed to have the best information reasonably available if the lender either relied on information that is less than a year old or requested the information once after application. Lenders should not have to hound HOAs to verify fees.

For purchase transactions, the lender should not be subject to tolerance for the transfer tax. For any loan where there is a transfer tax on the mortgage, it should be assumed it will be paid by the borrower, unless the borrower says otherwise.

IV. Mortgage Servicing Rules

AFSA's fourth request is for the Bureau to revise the mortgage servicing rules. The specificity of many of the requirements in the current rule stifles effectiveness, prevents innovation, and increases costs to servicers without providing attendant benefits. Below, we outline a number of the rule's requirements, particularly regarding loss mitigation, and our suggestions for improving each of them.

- *Loss Mitigation Appeals Timeline*. Servicers must make a decision regarding a loss mitigation appeal within 30 days of initial receipt of the appeal. If a servicer needs additional information from the borrower or a third-party to evaluate the appeal, the servicer may be unable to meet the 30 day timeline. We ask that the Bureau clarify that the 30-day timeframe should start from receipt of all borrower and third-party information necessary to evaluate the appeal. Otherwise, servicers may be forced to deny an appeal simply because they are missing information.

- *Incomplete applications.* Servicers are permitted to evaluate loss mitigation applications that have remained incomplete for "a significant period of time under the circumstances" and offer a loss mitigation option. Due to the lack of clarity in what would be considered such a period of time, many servicers are not using the carve-out, to the potential detriment of borrowers. AFSA recommends that the Bureau provide an interpretation of "a significant period of time under the circumstances," assuming the servicer has exercised reasonable diligence to complete the application.

- *Applicability of Certain Requirements After the Credit Decision / Solicitation Requirement*. There should not be a regulatory obligation to solicit borrowers to apply for loss mitigation in situations where the servicer would have no regulatory obligation to review the application. Such solicitations likely cause confusion and frustration for borrowers (and, at worst, could be seen as misleading). We recommend that the Bureau clarify that a servicer is not required to continually solicit a borrower who has already received a denial on a loss mitigation application (and who has not brought the loan current in the interim) every 180 days.

- *Expedited Reviews for Borrowers Who Do Not Wish to Retain Their Homes*. Sometimes, borrowers decide they want to leave their homes. The mortgage servicing rule, especially the preamble of the rule, could be interpreted to require borrowers with no intention of keeping their home to still submit all of the documents required for a retention review. AFSA recommends that the Bureau clarify that servicers are not required to conduct a review of borrowers for retention options if they do not wish to keep their property.

- *Foreclosure Holds*. Servicers need time to review documents submitted by a borrower to determine if the borrower's loss mitigation application is complete, and, if so, implement a foreclosure hold. The current mortgage servicing rule does not provide any period of time for this process, even though the Bureau has acknowledged in other parts of the rule that a servicer may need up to five days to evaluate documents submitted by a borrowers. The Bureau should interpret 12 C.F.R. § 1024.41(g) to require a servicer to halt progress towards foreclosure within five business days of receipt of a complete loss mitigation application.

- *Modification Denial Reasons*. Servicers must provide borrowers with the denial reasons for all loan modification options not offered. However, the mortgage servicing rule does not define what a modification option is, resulting in different interpretations across industry. The Bureau should permit servicers to use investor definitions of what constitutes a modification option when determining whether they need to provide denial reasons.

- *Successor in Interest Rules (SII).* Under the new SII provisions, unless there is a specific request for information, a servicer is not required to provide a confirmed SII with certain specified regulatory notices or disclosures, as long as the same notice is provided to another customer on the account. Similarly, a servicer is not required to comply with the live contact requirements for a confirmed SII if the servicer is complying with respect to other customers on the account. These requirements have raised several questions about when information can (or must) be shared with consumers other than the confirmed SII and when it cannot. We urge the Bureau to provide clarification to the SSII rules.

- *Error Resolution/Evaluation Timeline*. The mortgage servicing rules require servicers to completely respond to notices of error within a maximum of 45 days. In some instances, though, resolving a borrower's issue within 45 days is impossible. For instance, the resolution may require the action of a third-party that is beyond the servicer's ability to influence or control, *e.g.,* a court, a county recorder's office, or another loan servicer. We recommend that the Bureau clarify that a servicer is in compliance if the servicer has taken all actions within its control during the required timeframe, or specify that a servicer may issue multiple 15-day extension letters in such cases.

- *Payments to Transferor Servicer*.[4] If a borrower makes a payment to a transferor servicer after a servicing transfer, that servicer must return the payment to the person who made it and notify that person of the proper recipient of the payment. While the section just before this provision applies for the first 60 days after the transfer, this provision has no defined timeframe. A loan could be transferred more than once. After some time, the initial transferee servicer will not know who the proper recipient is. The Bureau should provide an interpretation that a 60-day time limit is applicable to this provision.

- *Time Limit for Servicing File Transfers of Large Files*. Servicers must have processes in place to create a servicing file within five days. Because most of the servicing file requirements are for information beginning in January 2014, servicers should currently be able to meet these requirements. However, the servicing file will expand to an extremely large size as times goes on. In testing, servicing files were found to be in the thousands of pages after only a few years, so the size after ten or twenty years would be enormous and burdensome to produce. The Bureau should revise this provision to provide a longer time limit to create a servicing file based upon the age of the servicing file.

V. Military Lending Act Regulations

AFSA's fifth request is quite different from the previous four. AFSA understands that the DoD, not the Bureau, has rulewriting authority for the MLA. At the same time, though, the Bureau provided technical assistance to the DoD as it drafted the 2015 MLA regulations. In fact, a Bureau staffer was assigned to the DoD. Therefore, we take this opportunity to ask the Bureau to encourage the DoD to revise its 2015 MLA regulations to increase the availability of small-dollar credit for members of the military and their families. The MLA regulations are cumbersome, needlessly complex, and harm the very borrowers they are intended to protect.

For instance, the MLA regulations prohibit nonbanks from making loans to services members that are secured by the service member's vehicle. Without being able to use the vehicle as security on a loan, service members may not be able to obtain credit from a finance company for auto repairs, consolidation of bills, medical procedures, and other expenses. In a specific example, because of the MLA, a service member was unable to obtain a loan that a civilian could have gotten to travel to visit his sick grandmother.

AFSA recommends that the DoD replace the 2015 regulations with the 2007 regulations to preserve access to beneficial credit, such as traditional installment loans, while addressing harmful products. If the DoD does not replace the current regulations with the previous ones, we recommend that the DoD make certain necessary changes to the current regulations, including: amending the MLA to eliminate the military APR in lieu of the conventional Truth-in-Lending Act APR to avoid confusion among borrowers; and expanding the exemptions

[4] Transferor servicer means a servicer, including a table funding mortgage broker or dealer on a first lien dealer loan, who transfers or will transfer the right to perform servicing functions pursuant to an agreement or understanding.

related to refinancing and secured credit provided to banks and credit unions to include state-licensed finance companies.

The beneficial features of traditional installment loans were recognized by the DoD in the conclusion of its report to Congress on the effectiveness of the 2007 regulations: "Isolating detrimental credit products without impeding the availability of favorable installment loans was of central concern in developing the regulation."[5] AFSA urges the Bureau to work with the DoD to revise the current MLA regulations.

VI. Conclusion

AFSA appreciates the opportunity to comment on the rules the Bureau has promulgated since its creation. We hope the Bureau reviews the larger participant rules, revises the ATR rule, simplifies the TRID rule, revises the mortgage servicing rules, and encourages the DoD to revisit its MLA rule. We believe that making these changes will promote additional lending and empower consumers to make better informed financial decisions. Revising these regulations will increase innovation, competition, and lead to a more transparent consumer finance marketplace.

Please contact me by phone, 202-466-8616, or email, bhimpler@afsamail.org, with any questions.

Sincerely,

Bill Himpler
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[5] Department of Defense Report on Implementation of Limitations on Terms of Consumer Credit Extended to Service Members and Dependents. July 22, 2008. http://www.dcuc.org/PDF%20Files/Senate%20Report%20Final.pdf