Via electronic mail

August 21, 2020

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

RE: Proposed AO Program [Docket No. CFPB-2020-0019]

Dear Sir or Madam:

The Independent Community Bankers of America ("ICBA")[1] welcomes the opportunity to comment on the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") proposal to create a new advisory opinion program ("Proposed AO Program" or "Program") that would provide opportunities for community banks to seek and receive guidance to resolve certain uncertainties. So long as additional safeguards and administrative law procedural requirements are concurrently adopted with the Program, ICBA believes that the Program will provide community banks with a useful new tool to engage the Bureau when seeking tailored guidance.

Background

Currently, the Bureau provides guidance through several formats and channels, including publications, programs and policies, interpretive rules,[2] general statements of policy, compliance aids,[3] and individualized "implementation support" through the Regulatory

[1]The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ nearly 750,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than $5 trillion in assets, more than $4 trillion in deposits, and more than $3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. ICBA is dedicated *exclusively* to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.

[2] For example, the Bureau routinely issues Official Interpretations, which are normally issued through the notice-and-comment process.

[3] *See* Policy Statement on Compliance Aids, 85 FR 4579 (Jan. 27, 2020).

Inquiries Function ("RIF").[4] The Bureau also recently finalized several programs that support the Bureau's innovation policies, including the Compliance Assistance Sandbox, the No-Action Letter, and the Trial Disclosure Sandbox,[5] each providing additional guidance and clarity to participants in those programs. The Proposed AO Program is a natural evolution of these efforts.

The goal of the Proposed AO Program is to allow for parties to request interpretive guidance, in the form of an AO, to resolve regulatory uncertainty, and for the Bureau to provide that guidance in a manner that resolves outstanding regulatory uncertainty. Unless otherwise stated, each AO will be applicable to the requestor and to similarly situated parties to the extent that their situations conform to the Bureau's summary of material facts in the AO.

The Proposed AO Program would focus primarily on clarifying ambiguities in the Bureau's regulations, although AOs may also clarify statutory ambiguities. In assessing and responding to AO requests, the CFPB will consider issues that have been identified during examinations as benefiting from additional clarity, issues of substantive import or impact, and matters that have not previously been clarified through an interpretive rule or other authoritative source. The Bureau will also determine whether an AO is an appropriate tool relative to other Bureau tools that are available and whether the AO poses an open question within the Bureau's purview that can legally be addressed through an interpretive rule.

In contrast to factors that would weigh in favor of the Bureau issuing an AO, there are several factors that would indicate that an AO is not an appropriate tool. These include AO requests where the interpretive issue is the subject of an ongoing Bureau investigation or enforcement action; the interpretive issue is the subject of an ongoing or planned rulemaking; or the issue is better suited for the notice-and-comment process. Additionally, if the issue could be addressed effectively through a Compliance Aid or if there is clear Bureau or court precedent that is available to the public on the issue, then the Bureau is unlikely to publish an AO on the matter.

Similarly, where a regulation or statute establishes a general standard that can only be applied through highly fact-intensive analysis, the Bureau does not intend to replace it with a bright-line standard that eliminates all of the required analysis.

In establishing the requirements for requestors, the Bureau proposes that requestors include actual facts, circumstances, or a course of action that the requestor is considering engaging in. The requestor must provide a statement of whether the issue on which the AO is being requested is the subject of any active litigation or federal or state agency investigations. The

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[4] *See* Bureau of Consumer Financial Protection Request for Information Regarding Bureau Guidance and Implementation Support (Guidance RFI), 83 FR 13959, 13961-62 (Apr. 2, 2018).
[5] *See* CFPB Office of Innovation, "Innovation at the Bureau," at https://www.consumerfinance.gov/policy-compliance/innovation/.

requestor would also have to identify the potential uncertainty or ambiguity that such interpretation would address, an explanation of why the requested interpretation is an appropriate resolution of that uncertainty or ambiguity, and a proposed interpretation, if possible. Finally, the requestor would have to identify itself, regardless of whether it is submitting a request on its own behalf or submitting a request on behalf of a third party.

ICBA Recommendations

Guidance documents can provide helpful assistance to interpret existing law through an interpretive rule or to clarify how agencies will tentatively treat or enforce a governing legal norm through a policy statement. [6] While the Proposed AO Program holds promise to provide clarity on practices or activities that may not be addressed through the various guidance currently provided, ICBA recommends that the CFPB consider and adopt several recommended improvements.

Adopt procedural safeguards to increase industry reliance on guidance

Given that general statements of policy and interpretive opinions are not generally binding, but are issued to advise the public about the manner in which the agency intends to exercise its discretionary authority, the reliance upon and level of deference accorded to these interpretations are not as robust as those interpretations that undergo more formal processes.[7] While the Proposal explains that certain statutes can provide protections from liability for acts or omissions done in good faith in conformity with an interpretation by the Bureau, an entity's reliance on that safe harbor will depend on whether a court or subsequent administrations will uphold that interpretation.

Because AOs are exempt from the notice-and-comment process, and because interpretations reached through informal processes are neither binding nor precedential, they are unlikely to be eligible for *Chevron* deference and there is an increased risk that such interpretations will be overturned.[8]

For example, in *Christensen v. Harris County*, the Court ruled that non-binding interpretations issued informally in agency opinion letters, "like [those] contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law," do not receive

[6] *See* 72 FR 3432 (Jan. 25, 2007).

[7] Jared P. Cole & Todd Garvey, "General Policy Statements: Legal Overview," Congressional Research Service, Apr. 14, 2016, at 21.

[8] *Id.* (discussing Chevron v. Natural Resources Defense Council (467 U.S. 837 (1984)), the *Chevron* doctrine is a judicial doctrine under which courts will defer to reasonable agency interpretations of ambiguous statutes.

deference under *Chevron*."[9] Further, unless certain administrative procedures are followed, courts may be unwilling to grant *Auer* deference to the Bureau's AOs on regulations.[10]

To increase the likelihood of surviving an Administrative Procedure Act ("APA") challenge and, thus, increase the amount of certainty that can be placed on AOs, ICBA recommends that the AO undergo the test established in *Kisor v. Wilkie*.[11] Specifically, ICBA recommends the Bureau should:

- Conduct its own analysis to confirm the requestors assertion that the regulation at issue "is genuinely ambiguous;"
- Establish an evidentiary record that demonstrates why its interpretation is "reasonable;"
- Assess "whether the character and context of the agency interpretation entitles it to controlling weight;"
- Duly confirm that the AO is the official or authoritative position of the agency;
- Implicate the agency's "substantive expertise," and
- Include a discussion that provides an analysis of how the Bureau came to its determination that represents a "fair and considered judgment."[12]

These measures would increase the robustness of Bureau decision-making, enshrine procedural safeguards, and increase the amount of deference that courts would grant the Bureau, all allowing covered entities to place greater reliance and certainty on Bureau interpretations.

<u>Publish threshold criteria used in determining whether an issue is better suited for an AO or more formal process</u>

Though the Bureau states that it would tend not to issue an AO for issues that lend themselves better to notice-and-comment procedures, the proposal does not state what threshold standard or criteria it would use to determine whether an issue is better suited for the notice-and-comment process. That distinction is sometimes hard to discern, especially for complex or controversial issues.

As a possible aid to that determination, ICBA recommends that the Bureau expand upon and clarify the procedures that it will use to determine whether an issue lends itself better to an AO or to a separate notice-and-comment process. ICBA recommends that the Bureau implement

[9] Valerie C. Brannon & Jared P. Cole, "Chevron Deference: A Primer," Congressional Research Service, Sept. 19, 2017, at 5 (citing Christensen v. Harris County, 529 U.S. 576 (2000)).
[10] *See* Auer v. Robbins, 519 U.S. 452, 461 (1997) (instructing courts to defer to an agency's interpretation of its own regulation "unless 'plainly erroneous or inconsistent with the regulation.'")
[11] Kisor v. Wilkie, 588 U.S. __ (2019).
[12] Daniel J. Sheffner, "*Kisor v. Wilkie*: Supreme Court Upholds the *Auer* Doctrine but Clarifies Its Limitations," Congressional Research Service, Jul. 3, 2019, at 2.

these policies that are developed with appropriate review and public participation, accessible and transparent to the public.[13]

Opportunity for public comment or request for rescission, modification or waiver

Even with the publication of standards that distinguishes between AO and separate notice-and-comment process, the ultimate determination to issue the AO may still be challenged or prove to be controversial. As such, ICBA recommends that the Bureau provide notice-and-comment opportunities before issuing all AOs.

Alternatively, ICBA supports recommendations made by others that encourage the CFPB to afford fair opportunity to the public to "seek modification, rescission, or waiver" of the AO and to "afford members of the public a fair opportunity to argue for lawful approaches or analyses other than those set forth in an interpretive rule… ."[14] Such opportunities to persuade the Bureau would be beneficial even if they are afforded after the issuance of the AO. Specifically, ICBA recommends that the Bureau formally adopt a mechanism for affected parties to seek modification or rescission of AOs.

Establish a standard for AOs that are "significant," "complex," or "general"

If providing opportunity for public feedback on every AO proves to be infeasible or too cumbersome, then ICBA recommends that the Bureau create categories of AOs that allow for public comment. For example, the CFPB could establish parameters for "significant AOs" that require public comment, versus "general AOs," which could summarily be issued.

Issues that are significant, complex, novel, consequential, or controversial stand to benefit from public comment. Further, undergoing a public comment period would likely increase the quality and resiliency of the AO.[15]

Publish issues that are ambiguous and leverage the Office of the Ombudsman

The Bureau's proposal stated that it will favorably weigh AO requests that involve issues identified during examinations as benefiting from added clarity. However, the public might not be aware of all ambiguous issues identified during an examination, and therefore, would not necessarily know that those issues would benefit from additional clarity. To add transparency and equitable treatment to the process, ICBA recommends that the Bureau develop a system

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[13] *Supra* note 6.

[14] https://www.acus.gov/sites/default/files/documents/CFPB%20Advisory%20Opinion%20Comment%20Letter.pdf

[15] *See* Todd Phillips, Administrative Conference of the United States Comment Letter regarding Docket No. CFPB-2020-0019), available at https://www.acus.gov/sites/default/files/documents/CFPB%20Advisory%20Opinion%20Comment%20Letter.pdf (noting, "providing pre-adoption opportunity for comment on significant guidance documents can increase the quality of the guidance and provide for greater public confidence in and acceptance of the ultimate agency judgments.").

that compiles and publishes all issues that the Bureau has identified during examinations that would benefit from additional clarity. The publication could be revised on an annual basis, giving the public and all covered parties a better understanding of those priorities.

ICBA recommends that the CFPB Ombudsman help identify these issues, as they may have a holistic view of the common issues and ambiguities that covered entities face during the exam. The Ombudsman could also identify potential issues of inconsistency among examination teams, further demonstrating the need for an AO. Through its inclusion, the Office of the Ombudsman could proactively identify areas or issues that could benefit from additional clarity.

Issues that would benefit from AOs

Apart from the procedural safeguards recommended above, ICBA is optimistic about the Bureau's proposed AO Program as it relates to providing more issue-specific compliance guidance for novel issues that might not be addressed by existing regulation or guidance. Rather than waiting until the guidance is reviewed *en masse* to address novel issues, ICBA believes the Proposed AO Program would allow the Bureau to opine on novel issues as they present themselves. This would more rapidly provide the industry with reliable guidance, relevant to more timely issues.

For example, laws such as the Equal Credit Opportunity Act, the Fair Credit Reporting Act, and many other consumer protection laws, were enacted well before advancements in financial technology, and have not adequately been amended to reflect these advancements. As a result, many technologies or methods present novel questions that cannot neatly fit within existing statute, regulation or guidance. There is a litany of issues that could benefit from additional guidance, including, but not limited to:

- artificial intelligence and machine learning,
- use of alternative data,
- data aggregation and consumer access to data,
- fourth-party liability, and
- data security liability standards.

AOs should comply with the Congressional Review Act

Under the APA, "interpretative rules" and "general statements of policy" are not required to undergo the notice-and-comment procedures applicable to legislative rules.[16] However, interpretative rules and general statements of policy are still considered "rules" under the APA.[17] As such, ICBA also recommends the Bureau submit AOs to Congress for review. This

[16] *Id.*

[17] *See* 5 U.S.C. §§ 551(4), 553 *and* "Bureau of Consumer Financial Protection: Applicability of the Congressional Review Act to Bulletin on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act," Government Accountability Office, B-329129: Dec 5, 2017.

suggestion comports with the U.S. Government Accountability Office's ("GAO") finding that general statements of policy, which AOs presumably will be, are rules under the Congressional Review Act and should be reported to both Houses of Congress and to the Comptroller General before they can take effect.[18]

ICBA supports the use of third parties to request AOs

ICBA supports that outside counsel or a trade association, for example, could submit a request for AOs on behalf of one or more clients or members, and those entities would not need to be named. Community banks should be able to partner with third parties or to jointly submit AO requests. Allowing similarly situated entities to rely upon AOs will provide impartial guidance to the entire industry, and not just the requestor.

In conclusion, the Proposed AO Program can increase the speed and responsiveness of Bureau guidance, which would improve the ability of community banks to better understand and comply with rules or statutes that might benefit from additional guidance in response to fact-specific cases. As the Bureau considers comments in response to its proposal, ICBA hopes that these comments will be informative. Should you like to discuss any of these recommendations further, please do not hesitate to contact me at Michael.emancipator@icba.org or 202-821-4469.

Sincerely,

/s/

Michael Emancipator
Vice President & Regulatory Counsel

[18] *Id.*