

LITTLE ACTION IN CFPB'S NO-ACTION LETTER POLICY

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This past February, the Consumer Financial Protection Bureau (CFPB) finalized a policy on No-Action Letters (Policy).¹ In a press release accompanying the policy, CFPB Director Richard Cordray stated that the Policy “is designed to improve access to consumer financial products and services that promise substantial consumer benefits.” As issued, however, the Policy is subject to various conditions that will limit its utility. In fact, CFPB has acknowledged that No-Action Letters (NALs) will be issued “rarely,”² and that the agency estimates to receive only “one to three actionable applications per year.”³ This article explains the Policy and suggests several ways in which it

could be modified to make it a more useful tool for financial services firms and the consumers of financial services.

Background

The CFPB proposed the adoption of a No-Action Letter Policy in October 2014.⁴ In the notice accompanying the proposed Policy, the CFPB explained that the proposed Policy was based upon its general authority to ensure that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation. The CFPB also stated that the Policy would serve a dual purpose by facilitating innovation and discouraging harmful products:

The Proposed Policy is intended to facilitate consumer access to innovative financial products that promise substantial benefit to consumers, taking into account other marketplace offerings, and also to enhance compliance with applicable federal consumer financial laws. By furnishing a dedicated mechanism through which substantial regulatory uncertainty can be reduced, the Proposed Policy is also intended to discourage the offering of innovative consumer-harmful financial products in such circumstances.⁵

The CFPB’s focus on innovation as the basis for the Policy distinguishes CFPB’s Policy from other federal agencies. Several other federal agencies provide no-action letters or advisory opinions, but those letters or opinions apply more generally to questions regarding the laws administered by the agency, and are not



aimed at promoting or facilitating new products or innovation. For example, the Securities and Exchange Commission (SEC) issues no-action letters to individuals or entities who are “not certain whether a particular product, service, or action would constitute a violation of the federal securities law.”⁶ Similarly, the Federal Trade Commission’s (FTC) staff issues advisory opinions “to help clarify” FTC rules and decisions;⁷ the Financial Crimes Enforcement Network (FinCEN) issues administrative rulings, which may “express an opinion about a new issue, apply an established theory or analysis to a set of facts that differs materially from facts or circumstances that have been previously considered, or provide a new interpretation of law”;⁸ and the Office of the Comptroller of the Currency issues interpretive letters, which provide guidance on the application of the National Bank Act to the operations and activities of national banks.⁹ CFPB’s decision to focus the Policy on new products or services, not existing ones, regardless if there is regulatory uncertainty for an existing product, significantly narrows the use of the Policy.

Also, unlike other federal agencies, CFPB’s Policy requires that the product innovation produce a “substantial consumer benefit,” and that the NAL request address a “substantial” uncertainty regarding applicable law.

Given these conditions, CFPB is expected to produce far fewer NALs than other federal agencies. CFPB has estimated “that, realistically, it will on average receive one to three actionable applications per year.”¹⁰ Additionally, CFPB has noted that requests related to the agency’s authority to police unfair, deceptive, and abusive acts and practices (UDAAP) will be “particularly

uncommon.”¹¹ UDAAP is a new and evolving area of federal law. Thus, it is likely to generate many questions. However, in the notice accompanying the Policy, CFPB noted that UDAAP questions are intensely factual and complicated, and that the agency has “quite limited resources to devote to consideration and issuance of [no-action letters] at this time.”¹²

CFPB received 28 comments on its proposed Policy, and “virtually all commenters supported the stated goals of the Proposed Policy, to reduce regulatory uncertainty and facilitate innovation.”¹³ On the other hand, several commenters expressed general concerns that “the criteria in the Proposed Policy were unworkable or that entities were unlikely to receive NALs.”¹⁴

Information Required When Requesting a No-Action Letter

To request a NAL, a company must submit the following to CFPB:

- A description of the product and its terms;
- How the product is likely to provide “substantial benefit to consumers differently from the present marketplace;”
- Potential consumer risks posed by the product;
- A showing of why a no-action letter is necessary and appropriate, including an identification of specific provisions of statutes and regulations and a showing of how there is substantial uncertainty as to their application to the product;
- A commitment to provide information requested by CFPB staff as it evaluates the request;

- A description of data that the requester possesses or intends to develop and a statement “of any undertaking by the requester, if the request is granted, to share appropriate data regarding the product” with the CFPB;
- An affirmation that, to the requester’s knowledge, except as disclosed in the request, neither the requester nor any other party with substantial ties to transactions involving the product is the subject of an ongoing governmental investigation or private civil action related to the product or any related or similar product;
- An affirmation that, except as specifically disclosed, the principals of the requester have not been subject to an adverse supervisory action or enforcement action with respect to any financial product, license or transaction within the past ten years;
- A statement specifying whether the request is limited to a particular time period or volume of transactions;
- A description of consumer safeguards the requester will use, although they may not be required by law; and
- A request for confidential treatment, if seeking such treatment and the basis for such treatment.¹⁵

In comment letters on the proposed Policy, some industry representatives requested that these information requirements be reduced. The CFPB concluded, however, that the Policy will not involve additional information burdens, beyond what a company otherwise would undergo when planning to offer a new product.¹⁶ The final Policy does allow potential applicants to initiate

preliminary discussions with CFPB staff prior to filing a request.

Factors CFPB will consider in acting on a request

The Policy provides that CFPB staff will consider a number of factors in determining whether to issue a NAL. Those factors include:

- The extent to which the product’s structure, terms and conditions, disclosures and agreements enable consumers to meaningfully understand the terms and effectively protect themselves from unnecessary cost and risk;
- The extent to which evidence indicates the product may provide substantial benefits to consumers and whether those benefits are available from other products;
- The extent to which risks to consumers are addressed and mitigated;
- The extent to which granting the request is necessary to reduce substantial regulatory uncertainty or whether that uncertainty may be addressed through other regulatory means;
- Whether the applicant is in compliance with other regulatory requirements;
- The extent to which the request is sufficiently limited in time, volume of transactions or otherwise;
- The extent to which any data the applicant has provided or promised to provide will further consumer protection; and
- The extent to which public disclosure of relevant data may be permitted.¹⁷

As noted above, the requirement that a proposed product or service provide “substantial” benefits to consumers is expected to limit applications for NALs. Other factors that could deter applicants include the requirement that applicants promise to share data with the CFPB, and that NALs may be subject to time, volume, or other limitations. Additionally, the fact that CFPB may make data about a product public could reduce an applicant’s interest in the process since that publication may have a negative competitive impact.

CFPB’s options for responding to a request

Under the Policy, CFPB has four options in responding to a request for a NAL. First, the CFPB may grant the request. Second, the CFPB may deny the request. Third, the CFPB may specifically decline to either grant or deny the request, with an explanation. Finally, the CFPB may specifically decline to either grant or deny the request, without an explanation.

If the CFPB grants a request for a NAL, the letter, along with a version or summary of the request, will be made public. If a request is denied, that denial “generally would not be published on the Bureau’s website,” but may be published if the CFPB “believes that doing so is in the public interest.”¹⁸

If the CFPB declines to either grant or deny a request, that response may be published on the CFPB’s website, if the staff believes that information about the request is in the public interest. CFPB has provided some examples of circumstances when it may decline to either grant or deny a request. Those examples include: (1) instances in which the applicant is the subject of an

ongoing government investigation related to the product or similar product; (2) the area is one in which the CFPB is engaged in an ongoing or anticipated rulemaking, supervisory, enforcement, or other initiatives; (3) CFPB staff considers the matter to be inappropriate for no-action treatment; and (4) CFPB staff decides not to invest resources necessary to consider the request.¹⁹ The Policy does not detail or provide examples of matters the CFPB considers inappropriate for a NAL or what factors would be weighed in devoting resources.

Parameters of NAL

If issued, a NAL will not be binding on any state or federal regulator and would not prevent private rights of actions. Moreover, under the Policy, a no-action letter is not particularly binding on the CFPB since, as noted above, the scope and duration of the letter may be subject to limitations imposed as part of the letter.²⁰ Furthermore, the Policy provides that NALs are subject to modification or revocation by CFPB staff. CFPB staff has signaled, however, that if it finds grounds for revoking or modifying a letter, it will give an entity an opportunity to respond. A revocation or modification will be made public.

Some Proposed Revisions

While the Policy is designed to encourage innovation in the face of regulatory uncertainty, the various conditions CFPB has placed on the application and scope of the Policy will limit its use. We recommend that CFPB reconsider some of these conditions so the Policy can be a more useful tool for the providers and consumers of financial services. Our recommended revisions are as follows:

- Expand the scope of the Policy beyond

“new” products. The current limitation of the Policy to only apply to new products ignores the regulatory uncertainty many providers face with their existing consumer financial products and services. The CFPB’s interpretations of existing statutes that do not always align with how other agencies interpreted the statutes prior to the CFPB’s existence has created some uncertainty. One example is the CFPB’s interpretation of the Real Estate Settlement Procedures Act (RESPA) application to re-insurance arrangements.²¹ The Policy would be an opportunity to remove that uncertainty.

- Require a consumer benefit, but not a “substantial” consumer benefit. The standard to prove a “substantial” consumer benefit seems onerous and likely difficult for providers of new products and services to fulfill. Also, the lack of clear guidance as to what is considered a “substantial” consumer benefit creates a subjective standard for which providers would be unable to gauge that they can fulfill.
- Require regulatory uncertainty, but not “substantial” uncertainty. Much to the same as the standard for showing a “substantial” consumer benefit, the requirement of showing “substantial” regulatory uncertainty is unnecessarily subjective.
- Address more UDAAP questions. The CFPB’s originally proposed Policy would not have applied to UDAAP matters. While the final Policy does apply to UDAAP matters, the CFPB made it clear that it does not expect to issue No-Action Letters regarding UDAAP matters very often. The CF-

PB’s UDAAP authority is one of the largest unknowns for the consumer financial industry. In fact, CFPB enforcement actions under its UDAAP authority have created enough uncertainty in some areas to severely limit if not completely eliminate products (such as debt cancellation products). While UDAAP matters are fact-specific, NALs should be able to fully explain the fact-specific nature, while still providing more insight into what CFPB considers or does not consider a UDAAP violation.

- Duration. The limited scope in duration or total number of products for NALs likely will limit consumer financial services providers’ appetite to seek a NAL. Other agencies do not include such limitations. Given that the NAL may be modified or revoked at any time, it seems that there is no reason to otherwise limit the duration of a NAL. Instead, any possible limitations on scope or number of products should be an area of discussion for CFPB staff and the applicant.
- Data Disclosure. Considering whether an applicant will share data with the CFPB is not in line with other agencies’ no-action letter policies. Many in the consumer financial services industry are weary of the amount of data that the CFPB collects and the safeguards CFPB has in place to protect that data. A more reasonable approach would be for data disclosure to be voluntary and only discussed after a determination on whether to issue a NAL is made.

Conclusion

We found in our practice that financial services

firms prefer to understand the rules of the road so they can abide by them. In its relatively short tenure, the CFPB has generated some compliance uncertainty based on its reliance on informal advisories and enforcement actions, rather than formal rulemakings, to set policy. This concern has been recognized by both Democrats and Republicans.²² Expanding the scope and removing some of the limitations on the No-Action Letter Policy would provide opportunities to reduce regulatory uncertainty and help further innovation in consumer financial products and services.

ENDNOTES:

¹Policy on No-Action Letters; Information Collection, 81 Fed. Reg. 8686 (Feb. 22, 2016) (<https://www.gpo.gov/fdsys/pkg/FR-2016-02-22/pdf/2016-02390.pdf>).

²Policy at 8691.

³Policy at 8691.

⁴79 Fed. Reg. 62118 (Oct. 16, 2014).

⁵79 Fed. Reg. 62120 (Oct. 16, 2014). This statement subsequently was incorporated into the final Policy.

⁶ <https://www.sec.gov/answers/noaction.htm>.

⁷ <https://www.ftc.gov/policy/advisory-opinions>.

⁸ https://www.fincen.gov/statutes_regs/rules/.

⁹ <http://www.occ.gov/topics/licensing/interpretations-and-actions/index-interpretations-and-actions.html>.

¹⁰Policy at 8691.

¹¹Policy at 8689.

¹²Policy at 8689.

¹³Policy at 8687.

¹⁴Policy at 8687.

¹⁵Policy at 8693-4.

¹⁶Policy at 8690.

¹⁷Policy at 8694.

¹⁸Policy at 8694, fn 9.

¹⁹Policy at 8694.

²⁰Policy at 8695.

²¹In the Matter of PHH Corp., et al., CFPB Administrative Proceeding 2014-CFPB-0002 (June 4, 2015) (available at http://files.consumerfinance.gov/f/201506_cfpb_decision_by_director_cordray_redacted_226.pdf).

²²See, e.g., The Consumer Financial Protection Bureau: Measuring the Progress of a New Agency, Bipartisan Policy Center (Sept. 24, 2013) (available at <http://bipartisanpolicy.org/library/consumer-financial-protection-bureau/>).