



## Action on CFPB's No-Action Letter Policy\*

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On Friday, October 10, 2014, the CFPB released a proposed No-Action Letter Policy (“Policy”) for comment. The Policy outlines a process for financial services providers to request a no-action letter (NAL), the factors CFPB staff will consider in determining whether to issue a NAL, the possible responses the CFPB staff may give in response to the request, and what will be included in a NAL. While this is a step forward and may help many in the financial services industry in determining whether to offer new consumer financial products or services, the proposed Policy raises some concerns.

### Summary of Policy

The focus of the Policy is on new financial products or services where there may be uncertainty about how existing statutes and regulations apply. These new products or services must promise substantial consumer benefit.

To request a NAL, an entity must submit several pieces of information, including: (1) a description of the product; (2) whether the request is limited to a particular time period, volume of transactions or other limitations; (3) how the product is likely to provide substantial benefits to consumers and metrics that will be used to evaluate such benefits; (4) explanation of potential consumer risks, ways the entity will address those risks, and what consumer safeguards the entity will employ, above and beyond what is required by existing statutes and regulations; (5) a showing of why the NAL is necessary and appropriate to remove substantial regulatory uncertainty; and (6) a description of data that the entity possesses or intends to develop and share with the CFPB.<sup>1</sup> If confidential treatment is requested, that request must be made in a separate letter.

In response to a request for a NAL, the CFPB will take one of four actions: (i) grant the request, which may be subject to limitations or conditions; (ii) deny the request; (iii) specifically decline to either grant or deny the request, with an explanation; or (iv) specifically decline to either grant

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<sup>1</sup>*Policy of No-Action Letters, 9-13.*

or deny the request without explanation.<sup>2</sup> The staff may communicate with the requester before making a decision and may permit the requester to modify its request. The issuance of a NAL is at the sole discretion of the CFPB staff.

The Policy includes some examples of circumstances under which the staff will not answer the request or will provide, at most, a type (iii) or (iv) response. These examples include requests concerning: (1) an area in which the CFPB is engaged in ongoing or anticipated rulemaking, supervisory, enforcement, or other initiatives; or (2) a legal or product environment “which the staff considers to be inappropriate for no-action treatment. At the present time, for example, the staff does not anticipate no-action treatment of UDAAP [unfair, deceptive or abusive acts or practices] matters.”<sup>3</sup>

In determining whether to issue a NAL, CFPB staff will consider several factors, including the extent to which: (1) the product may provide substantial benefits to consumers and whether those benefits are available from other products; (2) the requester controls for and effectively addresses and mitigates consumer risks; (3) a NAL is necessary to reduce regulatory uncertainty or whether another regulatory avenue to address the uncertainty is more appropriate; (4) the request is limited in scope; and (5) any data the entity will provide will further consumer protection and whether public disclosure of the data is permitted.<sup>4</sup>

A NAL will include a statement that, subject to the limitations and conditions set forth, the CFPB staff has “no present intention to recommend initiation of an enforcement or supervisory action against the requester with respect to particular aspects of its product, under specified identified provisions of statutes or regulations.”<sup>5</sup> The CFPB may still initiate supervision or investigation to evaluate the requester’s compliance with the terms of the NAL.

The NAL does not bind any other government agency, court or individual. The issuance of a NAL does not indicate an official interpretation of a statute or regulation by the CFPB.

The NAL may include conditions or limitations, such as the requester’s commitment to provide additional consumer safeguards or provide the CFPB with certain data. The NAL also may be limited in time or scope, and an entity may be able to request renewal. A NAL is subject to immediate revocation or modification upon notice. If the requester materially misrepresented facts or fails to satisfy the conditions in the NAL, the NAL is inapplicable and the CFPB may initiate a retrospective enforcement or supervisory action.

### **Areas of Concerns**

There are several issues and questions that come to mind in reviewing the Policy. This policy seems to be more similar to the CFPB’s Policy to Encourage Trial Disclosure Programs rather than the no-action letter policies at other regulatory agencies. For example, a NAL may be limited in scope, either in time or volume of transactions and may not be subject to renewal. It also may be contingent on the financial services provider sharing data with the CFPB. There are several other concerns as well.

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<sup>2</sup>Policy of No-Action Letters, 13.

<sup>3</sup>Policy of No-Action Letters, 14 (emphasis added).

<sup>4</sup>Policy of No-Action Letters, 15-16

<sup>5</sup>Policy of No-Action Letters, 16.

## UDAAP

As noted above, one of the areas that the CFPB staff will presumptively not issue a NAL is UDAAP. This is concerning as the CFPB's UDAAP authority is, arguably, the area of the CFPB's jurisdiction with the most substantial uncertainty. While the CFPB has been reticent to providing general guidance on what it deems "abusive," it seems that the NAL process would be a good opportunity for the CFPB to show how it may apply the "abusive" standard to a specific set of facts. As the CFPB stated in the Policy, a NAL is not an official interpretation of the CFPB, but it could provide some much needed guidance to the entity requesting a NAL as well as others in the industry.

### Focus on new, not existing products

Importantly, the Policy expressly states that NALs "are not intended for either well-established products or purely hypothetical products that are not close to being able to be offered."<sup>6</sup> The CFPB has issued several new regulations, especially related to mortgage products and remittance transfers, and the application of these new regulations to existing products is causing uncertainty in the marketplace. The CFPB also has issued several enforcement actions related to certain products, such as add-on products, which has caused some confusion as to the regulatory standards that the CFPB applies to those products. This regulatory and supervisory uncertainty has caused some in the industry to stop offering or limiting products. Where a new regulation has been issued or an enforcement action has raised questions on what requirements apply to an existing product, it seems that a request for a NAL would be appropriate. A NAL could provide an opportunity for the CFPB to provide clarifications on the applications of its rules to existing products.

### Sharing data with the CFPB

The CFPB indicated that a factor it will consider in determining whether to issue a NAL is "the extent to which any data that the entity has provided and agrees to provide to the Bureau regarding the operation of the product's aspects in question will be expected to further consumer protection."<sup>7</sup> In requesting a NAL, the entity must include a description of the data it possesses and intends to develop to share with the Bureau, "including data regarding the impact of the product on consumers. This description should also address the requester's intentions regarding consultation with the Bureau in its plans for development of additional data."<sup>8</sup>

The CFPB indicated that this data will inform its market monitoring and rulemaking authorities,<sup>9</sup> although exactly how the data will be used is unclear. Specifically what data the CFPB will request, how it will use the data, and whether that data will be made public likely are all issues of serious concern to those that may consider requesting a NAL.

### Public response to NAL request

Under the Policy, many of the CFPB's responses to requests for NALs will be made public. If the CFPB grants the request, the request, or a summary of it, and the NAL will be made public. If the CFPB denies the request, that will be conveyed to the requester but "generally will not be

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<sup>6</sup>Policy of No-Action Letters, 10.

<sup>7</sup>Policy of No-Action Letters, 16.

<sup>8</sup>Policy of No-Action Letters, 11.

<sup>9</sup>Policy of No-Action Letters, 8-9.

published.”<sup>10</sup> It is not clear under what circumstances that the CFPB would publish that denial. Additionally, if the CFPB specifically declines to either grant or deny the request, the CFPB may publish that response on the CFPB’s website, “particularly if the staff believes that the information will be in the public interest.”<sup>11</sup> This potential for publication may deter some financial services providers from submitting a request. It would be helpful if there were more details about exactly what will be published and under what circumstances. For example, where the CFPB denies a request, how much detail about the request will be made public? The entity’s name? The details of the product? This could cause competitive harm to the requester, especially if confidential treatment of materials is not granted.

This Policy is a step in the right direction and has the potential to help financial services providers introduce new products and services that benefit consumers. However, it seems that the CFPB, industry and consumers would benefit if this Policy was expanded in scope.

### **Comments Accepted**

This Policy is not subject to the Administrative Procedure Act, but, gratefully, the CFPB is nonetheless accepting comments. Comments are due December 15. Those interested in potentially utilizing this Policy should provide comments to the CFPB.

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<sup>10</sup>Policy of No-Action Letters, 13.

<sup>11</sup>Policy of No-Action Letters, 13.