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VOLUME 2019-1

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CFPB Proposes Updates to its No-Action Letter Policy and a New BCFP Product Sandbox

Overview: On December 13, 2018, the Bureau of Consumer Financial Protection (“BCFP”) published its [proposed Policy on No-Action Letters and the BCFP Product Sandbox](#) (the “Proposal”). Part I of the Proposal aims to update the Bureau’s 2016 Policy on No-Action Letters (“NALs”) in an effort to further incent companies to seek and take advantage of NALs from the Bureau. The rebooted policy would provide stronger assurances that the Bureau won’t bring enforcement actions against companies who have obtained an NAL for a product or service they offer. To date, the Bureau has issued only one NAL under the 2016 Policy, which the agency blames on an onerous application process and the insufficient statutory and/or regulatory relief provided under the terms of NALs.

In turn, Part II of the Proposal sets forth a new CFPB Product Sandbox that would provide additional forms of relief to financial services providers, above and beyond what is offered by NALs. This is the first such sandbox offered by federal financial regulators after years of discussion and may lead to the Bureau coordinating with state and international regulators, as well as its fellow federal regulators, on regulatory sandbox initiatives.

Part I: No-Action Letters

The updates to the 2016 Policy are intended to:

Expand and solidify statutory and/or regulatory relief by:

- Eliminating the default assumptions that NALs will be of limited duration, and that UDAAP-focused NALs will be rare.
- Providing greater assurance that the Bureau will stand behind the no-action relief in an NAL, rather than treating the letter as merely a “staff recommendation.”
- Specifying that the no-action relief effectively bars supervisory or enforcement actions under the Bureau’s UDAAP and other regulatory authorities that are based on the company offering or providing the described aspects of a product or service.
- Inviting trade associations, service providers, and other third parties to apply for NALs on behalf of their members or their existing or prospective clients. Where these applicants are unable to fully describe all the other entities that are jointly interested in applying, the Bureau may issue a provisional NAL subject to the submission of additional information.

Streamline the application process by:

- Eliminating redundant or burdensome application elements, including a requirement that applicants commit to sharing data with the Bureau.
- Focusing on the quality and persuasiveness of an application, particularly regarding (a) the potential benefits to consumers of the product or service; (b) the extent of consumer risk that is identified and controlled; and (c) the necessity of no-action relief.
- Shortening the review timeline through use of the above measures, with an expected decision on granting or denying an application for an NAL within 60 days of the Bureau notifying the applicant that the application is deemed complete.

Detail its framework for public disclosure of certain NAL information by:

- Providing that the following may be published on the Bureau’s website: (a) NALs themselves, and, as appropriate, a version or summary of the NAL application; and (b) NAL application denials, along with the reason for the denial, especially when it would be in the public interest.
- Clarifying the categories of information based on Dodd-Frank, FOIA, and the Bureau’s Disclosure Rule that cannot be publicly disclosed, including: (a) trade secrets and confidential commercial or financial information that is privileged or confidential; and (b) information a financial institution provides to the Bureau to monitor risks to consumers from consumer financial products or services.
- Specifying the type of NAL information that the Bureau anticipates will qualify as confidential information, including certain information required on NAL applications or that recipients must otherwise provide to the Bureau, and information that would conflict with consumers’ privacy interests.
- Explaining that the Bureau will draft NALs to avoid disclosing confidential information and to state what non-confidential information the Bureau wishes to publicly disclose.

Provide additional clarity around NAL revocation by:

- Specifying the grounds for revocation, which will likely be: (a) failure to substantially comply with an NAL in good faith; (b) a determination that the product or service is causing material, tangible harm to consumers; and (c) a determination that the basis for granting the NAL changed due to a statutory change or Supreme Court decision.
- Before revoking an NAL, notifying the recipient of the grounds for revocation and offering an opportunity to cure in certain instances.

Part II: BCFP Product Sandbox

There are many similarities between the NAL revisions from Part I and the new BCFP Product Sandbox policy articulated in Part II. Under the Product Sandbox, a company would have a safe harbor from liability under which it would be “immune from enforcement actions by any Federal or State authorities, as well as from lawsuits brought by private parties.” Key elements of the Product Sandbox include:

Several different forms of relief:

- NAL-style no-action relief.
- Pursuant to approval issued by the Bureau, immunity from enforcement actions or private lawsuits as provided under the safe harbor provisions of TILA, ECOA, or EFTA, as applicable (“approval relief”).
- Exemptions from statutory or regulatory provisions granted by Bureau order under (a) statutory exemption-by-order provisions; or (b) its rulemaking or general authority (“exemption relief”).
- Permitting participants to apply for extensions, which will be evaluated based upon the quality and persuasiveness of data provided by the participant that shows evidence of consumer benefits without consumer harm.

Additional requirements and limitations on Sandbox participants:

- Two-year limits on approval and exemption relief in most cases (although like Part I, no-action relief would not have limited duration).
- The submittal of additional information with an application, including a description of data the applicant already has or will develop about the impact of the product or service on consumers.
- A requirement that the participant report information to the Bureau about the effects of the product or service on complaint patterns, default rates, or similar metrics about whether it is causing material, tangible harm to consumers.
- A requirement that participants commit to (a) sharing data about the products or services with the Bureau; and (b) compensating consumers for material, quantifiable, economic harm that is caused by the product or service.

Outlook: The Bureau requests comments on any aspect of the Proposal by February 11, 2019, but it is particularly interested in comments on “the scope of the grounds for revocation, including whether there are additional changes in law that should be included as grounds for revocation.” Interestingly, the Proposal does not mention two of the Bureau’s other related initiatives announced this year, including a new disclosure sandbox—which similarly provides safe harbor to companies testing their own trial disclosures—and new Global Financial Innovation Network—which ultimately aims to create a global sandbox for testing innovative ideas.

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