

Comments on
Policy on No-Action Letters and the BCFP Product Sandbox
Docket No. [CFPB-2018-0042]

Submitted to the Consumer Financial Protection Bureau

by

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Center for Economic Integrity (Arizona)

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Consumer Federation of America

National Association of Consumer Advocates

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Americans For Financial Reform Education Fund, Center for Economic Integrity (of Arizona), Center for Responsible Lending, Consumer Action, Consumer Federation of America, National Association of Consumer Advocates, National Consumer Law Center (on behalf of its low income clients), Public Citizen and U.S. PIRG hereby submit these comments on the Consumer Financial Protection Bureau's Policy on No-Action Letters and the BCFP Product Sandbox (proposal). The proposal is unlawful, will allow companies to evade the law, and poses severe risks to consumers.

1. Executive summary

We strongly oppose the drastic proposed changes to the current no-action letter (NAL) policy and the reckless new proposed product sandbox program. The Bureau is proposing to offer companies "relief" that could include approvals of unlawful practices or exemptions from consumer protection statutes and regulations. That relief may amount to substantive, legislative rules issued without following required rulemaking procedures. The Bureau has proposed to remove numerous elements of the current NAL policy that ensure that consumers will be protected. Individual Bureau staff would be able to rubber-stamp applications for relief with little review based on one-sided presentations from regulated companies that may be seeking to evade the law or that are offering potentially risky new products or services. In short, the proposal utterly disregards the Bureau's duty to protect consumers.

The Consumer Financial Protection Bureau (CFPB or Bureau or agency) proposes to grant three categories of relief from statutory or regulatory provisions:

"No-action letters" stating that, subject to good faith and substantial compliance with the terms and conditions of the letter, "the Bureau will not make supervisory findings or bring a supervisory or enforcement action against the recipient predicated on the recipient's offering or providing the described aspects of the product or service" under the Bureau's unfair, deceptive, and abusive acts or practices (UDAAP) authority or any other identified statutory or regulatory authority.¹

"Approvals" under the good-faith reliance provisions of the Truth in Lending Act (TILA), Equal Credit Opportunity Act (ECOA) and Electronic Fund Transfer Act (EFTA),² which the CFPB refers to as "statutory safe harbor provisions;"

"Exemptions by order" in the form of:

- (a) **"statutory exemptions"** under provisions of ECOA, the Home Ownership Equity Protection Act (HOEPA), the Federal Deposit Insurance Act (FDIA)³ and possibly other statutes," or
- (b) **"regulatory exemptions"** from regulatory provisions that do not mirror statutory provisions under the CFPB's rulemaking authority or other general authority.

¹ Policy on No-Action Letters and the BCFP Product Sandbox, 83 Fed. Reg. 64036, 64039 (Dec. 13, 2018).

² 15 U.S.C. 1640(f) (TILA); 15 U.S.C. 1691e(e) (ECOA); 15 U.S.C. 1693m(d) (EFTA).

³ 15 U.S.C. 1691c-2(g)(2) (ECOA); 15 U.S.C. 1639(p)(2) (HOEPA); 12 U.S.C. 1831t(d) (FDIA). *See* Fed. Reg. at 64042 n.64.

The product sandbox allows an applicant to seek relief under any or all of the above types of relief. Relief that is granted under the product sandbox is time-limited and requires data sharing. No-action letters that are granted outside of the sandbox would be given for an indefinite period and require no commitment to data sharing. All types of relief would be provided by “duly authorized” Bureau officials or employees, typically within 60 days of notifying an applicant that the request is complete.

Beyond these bare-bones descriptions, the Bureau does not fully specify what type of relief it intends to grant. But it appears that these various forms of relief could include no-action or approval relief for practices that do not comply with the law, as well as exemptions from or substantive changes in the interpretations of statutes or regulations.

Our comments make the following points.

Approvals (Section 2.1). The Bureau proposes to authorize Bureau employees to issue approvals that give companies statutory or regulatory relief and immunity from liability under three statutes: the Truth in Lending Act (TILA), the Electronic Fund Transfer Act (EFTA) and the Equal Credit Opportunity Act (ECOA). But the good-faith reliance provisions of those statutes that the Bureau cites do not authorize the Bureau to approve products or services that do not comply with those statutes or the implementing regulations. If those approvals amount to exemptions, with rare exceptions, they must be adopted following traditional notice-and-comment rulemaking.

Statutory exemptions (Section 2.2). The Bureau proposes to grant “statutory exemptions” under the “exemption-by-order” provisions of ECOA, the HOEPA and the FDIA. The ECOA provision governs small business data collection requirements that have yet to be implemented under rules yet to be written. Any exemptions from those duties can and should be part of the rulemaking. The CFPB’s ability to use orders to create exemptions from HOEPA rules is exceedingly narrow and is only available to products that maintain and strengthen home ownership and equity protection. The FDIA provision, which permits an exemption from deposit insurance disclosures for banks that only take deposits over \$250,000, is already codified in the regulation. Thus, these three provisions offer little ability to use “orders” to create exemptions.

Regulatory exemptions (Section 2.3). The Bureau also claims that it has the authority to use a sandbox to grant “regulatory exemptions” from regulations that have provisions that do not mirror statutory requirements. It does not. The Bureau cites its rulemaking authority, which says nothing about what the Bureau can do outside of rulemaking. The enumerated consumer protection statutes and the Dodd-Frank Act invariably require that exemptions be adopted by rulemaking. Once a regulation is finalized, the Bureau cannot simply tell companies, by order, that they can ignore it.

Attempt to block state and federal enforcement (Section 2.4). The Bureau claims that companies granted sandbox relief would be immune from enforcement by federal or state authorities. This claim is in tension with the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) that deliberately preserve the ability of states, the Federal Trade Commission, and other federal authorities to act if the CFPB is unwilling.

No-Action Letters (Section 3). The Bureau proposes changes to its current NAL policy that depart radically from the policies of other agencies and pose a serious risk of encouraging consumer harm. The Bureau proposes to make a binding commitment that, except in limited circumstances, the Bureau “will not” bring an enforcement action, or even make supervisory findings. The Bureau irresponsibly indicates that letters promising no action under laws banning unfair, deceptive or abusive acts or practices may become more common. The Bureau proposes onerous procedures to cancel a NAL, including giving a company that has acted in bad faith an opportunity to cure. The Bureau also deletes provisions of the current NAL policy forbidding companies from using NALs to claim Bureau approval for their products or services and making clear that NALs are not official interpretations binding on others. The Bureau even proposes to delete the part of the NAL application stating that “the facts and representations in the request are true and accurate.”

Rulemaking requirements (Section 4). The Bureau’s various authorities do not give it authority to ignore the Administrative Procedures Act (APA) or other rulemaking requirements. The NAL and sandbox proposal, if finalized, would be a legislative rule that changes the rights, benefits and interests of companies and consumers and authorizes CFPB employees to give companies relief from otherwise applicable law. Thus, the proposal can only be issued through the APA’s notice-and-comment process, and in compliance with other requirements for rulemaking, including those stated in the Dodd-Frank Act and the Regulatory Flexibility Act. The CFPB has not complied with those requirements. Further, the proposal contemplates relief that will itself constitute substantive, legislative rules and yet will not be enacted in accordance with APA and other rulemaking requirements.

Impact on consumers, businesses, and the Bureau’s consumer protection mission (Section 5). The proposal could give relief to consumer products or services that are seeking to evade the law or that pose a serious risk of consumer harm. The Bureau’s encouragement of NAL and product sandbox applications will divert important resources from the Bureau’s core work of enforcing the law, supervising companies, improving regulations, and handling consumer complaints. While the intention is to offer companies “relief,” the proposal may backfire as NAL or sandbox admissions could get close and likely unwanted scrutiny from consumer advocates, state attorneys general, Congress, the media and others. The precedent of allowing individual Bureau employees to issue official approvals or interpretations could also lead to confusion and erratic policy swings.

Applications (Sections 6, 7, 8 and 9). There are numerous other objectionable aspects of the proposed process for applying for, considering, approving, monitoring or ending NAL or sandbox relief. The Bureau proposes to accept applications from trade associations and service providers on behalf of thousands of companies that impact millions of consumers with broad and varying implications that cannot possibly be adequately considered under the procedure the Bureau has outlined. The Bureau is using an unduly narrow definition of consumer harm in considering requests and providing for redress, requiring that harm be “material,” “economic” and “quantifiable.” The Bureau proposes unduly narrow conditions and procedures for ending NAL or sandbox relief that poses a risk to consumers or is not in the public interest.

State sandboxes and regulatory coordination (Section 10). The Bureau has made the outrageous suggestion that it might enter into agreements with states or other authorities that allow companies to obtain a CFPB NAL or sandbox relief by obtaining admission to a state sandbox or other state or federal effort. The Bureau has no authority to delegate its consumer protection duties to other agencies or to allow states to waive federal laws. The early experience with the Arizona sandbox also raises serious questions about the risks to consumers. The proposal also does not contain a mechanism for consultation with other regulators even if a given approval or exemption amounts to a rule for which consultation is required.

Public information (Section 11). Not only will the Bureau be acting on one-sided information, it suggests a focus on blocking the public from scrutinizing the Bureau's actions by asserting, with no basis, that much of the information that companies submit to the agency may be exempt from public records requests.

In short, the proposal is a shocking effort to give companies a vehicle for escaping consumer protection laws and to shirk the Bureau's legal responsibility to protect consumers from harm. The Bureau does have authority to assist companies in understanding and complying with the law, and may exercise discretion in its use of its enforcement and supervisory powers. But we reject the Bureau's suggestion that it can or should broadly issue binding, forward-looking and potentially industry-wide promises of no-action, approvals or exemptions that make substantive changes in the statutory or regulatory regime without complying with the APA, other rulemaking requirements, or the limits on the agency's authority. The proposal and much of the relief it contemplates are unlawful, arbitrary and capricious, and harmful to consumers, responsible businesses, and the Bureau itself.

2. The CFPB overstates its authority to provide “product sandbox” relief.

2.1. The CFPB does not have broad “approval” authority.

2.1.1. The CFPB may issue “approvals” under TILA, EFTA and ECOA only for conduct that complies with the law, not to approve relief from statutory or regulatory provisions.

The Bureau claims that the good-faith reliance provisions of TILA,⁴ ECOA,⁵ and the EFTA⁶ give it authority to authorize Bureau employees to grant relief to particular entities by giving safe harbor from liability under those statutes. The Bureau defines “relief” to mean “relief from statutory and/or regulatory provisions.”⁷ The Bureau claims that an entity to which it grants an approval “would be immune from enforcement actions by any Federal or State authorities, as well as from lawsuits brought by private parties.”⁸

⁴ 15 U.S.C. 1640(f) (TILA).

⁵ 15 U.S.C. 1691e(e) (ECOA).

⁶ 15 U.S.C. 1693m(d) (EFTA).

⁷ 83 Fed. Reg. at 64037.

⁸ 83 Fed. Reg. at 64042.

But the good-faith reliance provisions do not give the Bureau the authority to approve products, services or practices that do not comply with statutory or regulatory provisions. Companies may have protection from liability under certain circumstances if the Bureau mistakenly issues an interpretation or approval that rests on an erroneous application of the law. But the Bureau cannot deliberately issue approvals in order to provide relief from compliance with statutory or regulatory requirements that it knows are otherwise applicable.

The good-faith reliance provision of TILA states:

No provision of this section, section 1607(b) of this title, section 1607(c) of this title, section 1607(e) of this title, or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Bureau *or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System*⁹ *duly authorized by the Bureau to issue such interpretations or approvals under such procedures as the Bureau may prescribe therefor*, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.¹⁰

It is the italicized language, added in a 1976 amendment, on which the Bureau relies. The provisions of the EFTA and ECOA are the same.

The 1976 TILA amendment, like the original good-faith reliance provision, was focused on helping companies that were attempting to comply with the law. Representative Frank Annunzio explained:

Creditors are often hit with costly lawsuits for unintentional technical violations because, even though they *attempt to comply*, the laws and regulations are too complicated and ambiguous.... With formal advisory opinions, creditors will at last have a reliable way to know *how to comply* with truth in lending. Consumers should benefit because creditors will no longer be able to explain away violations by claiming they could not find out *how to comply*.¹¹

At the time, the Federal Reserve Board (FRB) implemented TILA and other consumer protection statutes. The new language did not provide *any* authority to the FRB or FRB employees to grant relief from the law or to prospectively approve products, services, acts or practices that did not comply with the statute or implementing regulation. As Representative Annunzio specifically noted:

What we are trying to accomplish here is *not to dilute consumer remedies* which come under the various aspects of the Consumer Credit Protection Act, but rather to *eliminate thoughtless violations*.... Passage of this amendment *will in no way reduce consumer protection under any consumer laws* which are now on the books.¹²

⁹ The Bureau is technically a bureau of the Federal Reserve System and Bureau employees are employees of that system.

¹⁰ 15 U.S.C. § 1640 (emphasis added).

¹¹ 121 Cong. Rec. 36927 (1975) (emphasis added).

¹² 121 Cong. Rec. 2852 (1976) (emphasis added).

In 1981, the FRB proposed the first Official Staff Commentary (OSC) to TILA as the official vehicle for interpretations on which companies may rely to take advantage of the good-faith reliance safe harbor. The purpose of the OSC was to help companies to comply with the law and to improve the previous chaotic system of unofficial staff letters.¹³ As the FRB explained:

The final commentary will be issued as an official staff interpretation, providing creditors with protection under § 130(f) of the Truth in Lending Act. Under that section, creditors acting in conformity with an official staff interpretation have no liability for violations arising from those actions.

The commentary will significantly alter the staff's approach to providing interpretations of the regulation. Under the prior regulation, staff opinions were issued in response to individual inquiries regarding specific fact situations, and were normally limited to those facts. Subsequent variations in those facts were similarly addressed in individual responses tailored to the variations. More than 1500 letters interpreting and applying the prior regulation were issued on this basis.

The commentary is expected to replace Board and staff interpretations as *the sole vehicle for interpreting the regulation*. The commentary will, however, be more general than the interpretations issued under the prior regulation. Unlike the earlier interpretations, the commentary will not attempt to address and resolve every question regarding the application of the regulation to specific sets of facts. Although originally designed to aid creditors in *complying*, the longstanding practice of trying to respond in writing to each and every special circumstance has instead created an enormous amount of regulatory material. *The cumulative effect of the interpretations has been to complicate, rather than facilitate, compliance by layering one set of distinctions on top of another. Rather than resolving questions, this material in the aggregate has served to generate further questions.*¹⁴

Appendices to TILA, the EFTA and ECOA confirm that, to this day, the OSCs remain, with rare exceptions, the vehicle for official interpretations on which companies may rely in order to take advantage of the good-faith reliance safe harbors. For example, Appendix C to TILA states:

Official Interpretations

Interpretations of this part issued by officials of the Bureau provide the protection afforded under section 130(f) of the Act. *Except in unusual circumstances, such interpretations will not be issued separately but will be incorporated in an official commentary to the regulation which will be amended periodically.*

¹³ The introduction to the first proposed Official Staff Interpretations stated: “The commentary applies and interprets the requirements of Truth in Lending to open-end and closed-end consumer credit, *and is intended to substitute for individual Board and staff interpretations* of the regulation.” 46 Fed. Reg. 28560 (May 27, 1981) (emphasis added).

¹⁴ *Id.*

Requests for Issuance of Official Interpretations

A request for an official interpretation shall be in writing and addressed to the Assistant Director, Office of Regulations, Division of Research, Markets, and Regulations, Bureau of Consumer Financial Protection, 1700 G Street, NW., Washington, DC 20006. The request shall contain a complete statement of all relevant facts concerning the issue, including copies of all pertinent documents.

Scope of Interpretations

No interpretations will be issued *approving* creditors' forms, statements, or calculation tools or methods. This restriction does not apply to forms, statements, tools, or methods whose use is required or sanctioned by a government agency.¹⁵

Regulation B, the implementing regulation for ECOA, contains an identical appendix.¹⁶ Appendix C to Regulation E under the EFTA is similarly worded.¹⁷

Nor has the Bureau proposed to change the introductions to the OSCs. The Regulation Z OSC states:

This commentary is the vehicle by which the Bureau of Consumer Financial Protection issues official interpretations of Regulation Z. Good faith compliance with this commentary affords protection from liability under section 130(f) of the Truth in Lending Act. Section 130(f) (15 U.S.C. 1640) protects creditors from civil liability for any act done or omitted in good faith in conformity with any interpretation issued by a duly authorized official or employee of the Bureau of Consumer Financial Protection.

*...No official interpretations are expected to be issued other than by means of this commentary.*¹⁸

The introduction to the OSC to Regulation B contains similar language.¹⁹ There is no introduction to the OSC to Regulation E, though the Comment to Appendix A governing model disclosure clauses states that the Bureau will not review or approve certain forms or statements.²⁰

¹⁵ Appendix C to Part 1026 – Issuance of Official Interpretations.

¹⁶ Appendix D to Part 1002 – Issuance of Official Interpretations.

¹⁷ Appendix C to Part 1005 – Issuance of Official Interpretations (“Pursuant to section 916(d) of the Act, the Bureau has designated the Associate Director and other officials of the Division of Research, Markets, and Regulations as officials “duly authorized” to issue, at their discretion, official interpretations of this part. *Except in unusual circumstances, such interpretations will not be issued separately but will be incorporated in an official commentary to this part, which will be amended periodically.*”) (emphasis added).

¹⁸ Supplement I to Part 1026 – Official Interpretations, Introduction.

¹⁹ Supplement to 1 to Part 1002 – Official Interpretations, Introduction (“This commentary is the means by which the Bureau of Consumer Financial Protection issues official interpretations of Regulation B. Good-faith compliance with this commentary affords a creditor protection under section 706(e) of the Act.... Except in unusual circumstances, official interpretations will be issued only by means of this commentary.”).

²⁰ Comment for Appendix A - Model Disclosure Clauses and Forms.

The OSCs explain the regulations and give examples of conduct that are or are not in compliance. Notably, the FRB and CFPB have nearly always engaged in notice-and-comment procedures when they have amended the official interpretations in the staff commentaries. Indeed, only in very rare and limited circumstances have the FRB or the Bureau issued official interpretations or approvals that triggered the good-faith reliance provisions outside of the official staff commentary and without following notice and comment procedures.

The new system of “approvals” that the Bureau now proposes is entirely distinct. Rather than aiming to help companies comply with the law, the Bureau appears to be attempting to use the good-faith reliance provisions to encourage companies to affirmatively seek “relief” from the “burden” of the law. And it proposes to do so without using the Bureau’s vehicle for official interpretations, without notice-and-comment, and without other procedures that would be required if, as explained in Section 4 below, an approval operates as a substantive, legislative rule.

As noted above and discussed in Section 5.2 below, the FRB abandoned the chaotic system of individual staff letters nearly 40 years ago for good reasons that are even more valid now. Notably, the Bureau’s NAL and sandbox proposal does not mention the agency’s practice of issuing Official Staff Commentary as the mechanism to trigger the good-faith reliance provisions of TILA, EFTA, and ECOA, or explain any attempt to change that system. But whatever mechanism the Bureau uses, approvals, like the OSC, must be aimed at helping companies comply with the law. The TILA, EFTA, and ECOA good-faith reliance provisions do not give the Bureau authority to issue approvals in order to help companies escape from the law.

2.1.2. Sandbox approvals that amount to exemptions from TILA, EFTA or ECOA must be made through rulemaking.

The good-faith reliance provisions do not override the specific provisions of TILA, EFTA and ECOA – or the Dodd-Frank Act²¹ -- governing the Bureau’s authority to adopt exemptions. If the Bureau issues an approval that allows a company to escape compliance with statutory or regulatory provisions, then such approval operates as an exemption from those requirements. Regardless of the name the Bureau applies, approvals that amount to exemptions must follow the requirements for exemptions.

TILA, the EFTA and ECOA are careful to specify that exemptions must be made “by rule” or “by regulation.” For example, the Bureau’s general TILA rulemaking authority states:

The Bureau shall prescribe *regulations* to carry out the purposes of this subchapter. Except with respect to the provisions of section 1639 of this title that apply to a mortgage referred to in section 1602(aa) [1] of this title, *such regulations* may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such *adjustments and exceptions* for all or any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.²²

²¹ The Dodd-Frank Act limitations on the Bureau’s exemption powers are discussed in Section 2.3.2 below.

²² 15 U.S.C. § 1604(a) (emphasis added).

As this provision makes clear, the authority to adopt exemptions is through its TILA rulemaking authority.²³ TILA's good-faith reliance provision does nothing to override this specific provision governing the Bureau's authority to adopt exemptions from the statute. Moreover, even when adopted through a regulation, the Bureau may use this authority *only if* the action meets the standard set out by the statute: that such a change is "necessary or proper to effectuate the purposes" of TILA, "to prevent circumvention or evasion" of the statute, or to "facilitate compliance" with it.²⁴

Section 1604(f) of TILA specifically governs "Exemption authority." It expressly provides that the Bureau "may exempt, *by regulation*," all or any class of transactions.²⁵ The Bureau must consider several factors if it wishes to propose an exemption.²⁶

The general exemption authority under the EFTA and ECOA is virtually identical. The EFTA provides:

Regulations prescribed hereunder may contain such classifications, differentiations, or other provisions, and may provide for such *adjustments and exceptions* for any class of electronic fund transfers or remittance transfers, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. The Bureau shall *by regulation* modify the requirements imposed by this subchapter on small financial institutions if the Bureau determines that such modifications are necessary to alleviate any undue compliance burden on small financial institutions and such modifications are consistent with the purpose and objective of this subchapter.²⁷

Similarly, ECOA provides:

The Bureau shall prescribe *regulations* to carry out the purposes of this subchapter. These regulations may contain but are not limited to such classifications, differentiation, or other provision, and may provide for such *adjustments and exceptions* for any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.²⁸

Here again, adjustments, exceptions or modifications under ECOA and the EFTA must be adopted by regulation, and must meet the criteria listed in the provisions authorizing regulations.

²³ The exceedingly narrow HOEPA exemption authority under section 1639 is discussed in Section 2.2.2 below.

²⁴ 15 U.S.C. § 1604(a).

²⁵ 15 U.S.C. § 1604(f)(1) (emphasis added).

²⁶ 15 U.S.C. § 1604(f)(2).

²⁷ 15 U.S.C. § 1693b(c).

²⁸ 15 U.S.C. § 1691b(a).

TILA also contains several more specific provisions that allow the Bureau to create exemptions in certain circumstances. These provisions assiduously require the exemptions to be done by “rule”²⁹ or by “regulation.”³⁰

The EFTA and ECOA have only a couple of other provisions governing exemptions beyond the authority in the rulemaking authority, but those, too, with one narrow exception, must be done “by regulation.”³¹

The only provisions in TILA, the EFTA or ECOA that allow exemptions to be created another way are the narrow HOEPA and ECOA small business data collection provision discussed in Section 2.2 below.

The Dodd-Frank Act also limits the Bureau’s authority to create exemptions. Those limitations are discussed in Section 2.3 below explaining why the Bureau has no general authority outside of rulemaking to grant “regulatory exemptions.”

2.1.3 Approvals will not automatically make companies immune from consumer litigation or public enforcement.

The CFPB claims that a recipient of an approval, to the fullest extent possible, “would be immune from enforcement actions by any Federal or State authorities, as well as from lawsuits brought by private parties.”³² That statement vastly overstates the impact of an approval. (It also conflicts with the Dodd-Frank Act’s preservation of state and FTC authority, discussed in Section 2.4 below.)

The safe harbor provisions of TILA, the EFTA, and ECOA require a company both to have relied on the approval or interpretation, and to have done so “in good faith.” Both issues are likely questions of fact for a trial court and will not automatically apply merely because the CFPB has issued an approval.³³

Just because the CFPB has issued an approval does not automatically mean that a company can rely on it unthinkingly.³⁴ If Bureau employees begin to hand out approvals purporting to authorize companies to

²⁹ 15 U.S.C. § 1639b(c)(2)(B) (mortgage origination fees and charges). *See also* 15 U.S.C. § 1603(5) (listing exemptions to TILA, including those exempted by “rule”).

³⁰ 15 U.S.C. §§ 1604(g) (high-income consumers who provide a waiver), 1633 (transactions protected by equivalent state law), 1635(d) (waiving rescission rights in emergency situation), 1637(c)(5) (modifications to disclosures for credit cards), 1639c(b)(3)(B)(i) (qualified mortgages), 1639d (escrow or impound accounts).

³¹ Both involve transactions that are protected by equivalent state laws. 15 U.S.C. § 1693r (EFTA), § 1691d (ECOA).

³² 83 Fed. Reg. at 64042.

³³ *See, e.g., Lewis v. Walker-Thomas Furniture Co.*, 416 F. Supp. 514 (D.D.C. 1976) (“More importantly, the questions of whether defendant actually relied on that material and whether such reliance was in good faith raise issues of fact that cannot yet be resolved. It is doubtful that such matters, on which defendant bears the burden of proof under the Act, can ever be decided on papers”); *Leon v. Washington Mut. Bank*, 164 F. Supp. 2d 1034 (N.D. Ill. 2001).

³⁴ *See, e.g., Basham v. Fin. Am. Corp.*, 583 F.2d 918 (7th Cir. 1978) (finding Reg. Z provision conflicting with TILA, and noting that reliance on this Reg. Z provision after the court’s opinion might no longer be “good faith”); *Daigneault v. Pub. Fin. Corp. of Rhode Island*, 562 F. Supp. 194 (D.R.I. 1983) (lender not entitled to § 1640(f) good faith defense where lender had been a defendant in a prior TILA case that had been decided against it on exactly the

ignore or change the requirements of statutes or regulations in ways that are “demonstrably irrational,” reliance will not be in good faith.³⁵

Likewise, a court must affirmatively find that the interpretation or approval was issued prior to the time of the company’s action.³⁶ A company must point to the specific ruling or interpretation with which it claims conformity, and must show that it *relied upon* that ruling or interpretation in order to show good faith.³⁷ Thus, a Bureau approval would not protect a company from liability for a product or service that was on the market prior to the Bureau’s approval because the company would not have acted in reliance on an approval.

Further, if a court finds that an approval is invalid, the company is not protected from liability for future acts in conformance with the approval.

Moreover, the good-faith reliance provisions only protect companies from “liability.”³⁸ They do not prevent a plaintiff (i.e., consumer or attorney general) from obtaining declaratory or injunctive relief.

Thus, an approval does not automatically make a company “immune” from suit.

2.2. The CFPB has extremely limited authority to grant “statutory exemptions” by order.

In addition to the “approvals” discussed in the preceding sections, the CFPB asserts that it can provide sandbox relief through “statutory exemptions” pursuant to statutes that give it exemption-by-order authority. The CFPB cites ECOA, HOEPA, and FDIA.³⁹

same disclosure issue). *See also Smith v. No. 2 Galesburg Crown Fin. Corp.*, 615 F.2d 407 (7th Cir. 1980) (disclosures were improper but creditor was protected by reliance on Reg. Z for a “reasonable time” after the published court opinion finding the disclosure improper).

³⁵ *Boksa v. Keystone Chevrolet Co.*, 553 F. Supp. 958, 961 (N.D. Ill. 1982) (where the defense is based on an Official Staff Interpretation, and that interpretation is not “demonstrably irrational,” it will apply to protect the defendant from liability).

³⁶ *Jones v. Bill Heard Chevrolet*, 212 F.3d 1356 (11th Cir. 2000), *overruled in part on other grounds by Turner v. Beneficial Corp.*, 242 F.3d 1023 (11th Cir. 2001); *Jones v. Cmty. Loan & Inv. Corp.*, 544 F.2d 1228 (5th Cir. 1977); *cf. Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 567 n.11, 100 S. Ct. 799, 63 L. Ed. 2d 22 (1980) (finding it unnecessary to decide “whether conformity with a subsequently issued official staff interpretation constitutes ‘compliance’ within the terms of [the good faith conformity defense]”).

³⁷ *Fabricant v. Sears Roebuck*, 2002 WL 34477592 (S.D. Fla. Mar. 6, 2002) (“Defendants may not rest on a conclusory allegation that they acted in conformity with Board interpretations.”); *Belmont v. Assocs. Nat’l Bank*, 119 F. Supp. 2d 149 (E.D.N.Y. 2000).

³⁸ 15 U.S.C. § 1640(f); 15 U.S.C. § 1691e(e); 15 U.S.C. § 1693m(d).

³⁹ *See* 83 Fed. Reg. at 64042 n.64 (citing 15 U.S.C. §1691c-2(g)(1) of ECOA, governing small business data collection); 15 U.S.C. 1639(p)(2) (HOEPA, regarding an exemption that is “(A) is in the interest of the borrowing public; and (B) will apply only to products that maintain and strengthen home ownership and equity protection”); 12 U.S.C. 1831t(d) (FDIA, governing disclosures by depository institutions that lack deposit insurance).

2.2.1. The ECOA exemption-by-order authority is limited to exemptions for as yet unwritten rules concerning data on loans to small businesses.

The ECOA exemption-by-order provision, 15 U.S.C. § 1691c-2(g)(2), is found within § 1691c-2 on “Small business loan data collection.” That provision requires financial institutions to collect and maintain data on whether business loan applicants are women-owned, minority-owned, or small businesses. The statute also requires records of such information to be compiled, maintained, and submitted to the Bureau.

Subsection 1691c-2(g)(1) gives the Bureau the authority to prescribe rules and issue guidance to carry out the data collection provision. Subsection -2(g)(2) provides:

(2) Exceptions

The Bureau, by rule or order, may adopt exceptions to any requirement *of this section* and may, conditionally or unconditionally, exempt any financial institution or class of financial institutions from the requirements *of this section*, as the Bureau deems necessary or appropriate to carry out the purposes *of this section*.⁴⁰

The reference to “this section” is to § 1691c-2, the data collection requirements.

The CFPB has not yet promulgated regulations to implement the small business data collection provision. When it does so, it has the authority to create exemptions from those regulations. This is not broad exemption authority extending beyond that narrow context.

2.2.2. HOEPA requires any exemptions by order to be in the interests of the borrowing public and to apply only to products that maintain and strengthen home ownership and equity protection.

The second statutory “exemption-by-order” provision that the Bureau cites is 15 U.S.C. 1639(p)(2) of HOEPA. It appears that the Bureau intended to cite subsection (p)(1). Section 1639(p) reads in full:

(p) Discretionary regulatory authority of Bureau

(1) Exemptions

The Bureau may, by regulation *or order*, exempt specific mortgage products or categories of mortgages from any or all of the prohibitions specified in subsections (c) through (i), if the Bureau finds that the exemption--

(A) is in the interest of the borrowing public; and

(B) will apply only to products that maintain and strengthen home ownership and equity protection.

(2) Prohibitions

The Bureau, by regulation *or order*, shall prohibit acts or practices in connection with—

(A) mortgage loans that the Bureau finds to be unfair, deceptive, or designed to evade the provisions of this section; and

⁴⁰ 15 U.S.C. § 1691c-2(g)(2) (emphasis added).

(B) refinancing of mortgage loans that the Bureau finds to be associated with abusive lending practices, or that are otherwise not in the interest of the borrower.⁴¹

Subsections (c) through (i) of HOEPA limit prepayment penalties, post-default interest rates, balloon payments, negative amortization, prepaid payments, credit without regard to ability-to-repay, and payments to home improvement contractors without the consent of the homeowner. These prohibitions (which apply only to high-cost mortgages) were adopted in light of extensive evidence of the abusive use of these devices to strip homeowners' equity and to push refinancings that did not benefit the borrower.

The Bureau does not have unfettered discretion to exempt companies from these critical protections. We need not address here the procedures under which the Bureau may issue an exemption order under HOEPA, because it is highly unlikely that, whatever procedure is employed, the Bureau could meet the high substantive hurdle of finding that the exemptions – for mortgages that are already concerning in light of their high cost – are in the interest of the borrowing public *and* will apply only to products that maintain and strengthen home ownership and equity protection. It is difficult to fathom how prepayment penalties, post-default increases in interest rates, balloon payments, negative amortization, prepaid payments, credit without regard to ability-to-repay, and payments to home improvement contractors without the consent of the homeowner – in the context of high-cost mortgages – could meet those standards.

2.2.3 Depositories that only accept deposits over \$250,000 are already exempt from the FDIA disclosure rules for lack of deposit insurance.

The third statutory “exemption-by-order” provision is 12 U.S.C. 1831t(d) of FDIA. Section 1831t governs “Depository institutions lacking Federal deposit insurance.” It requires depository institutions that do not have federal deposit insurance to disclose to depositors on periodic statements and in advertising that their deposits do not carry insurance. The provision also requires new depositors to acknowledge the lack of deposit insurance.

Subsection (d) states:

(d) Exceptions for institutions not receiving retail deposits

The Bureau may, by regulation *or order*, make exceptions to subsection (b) of this section for any depository institution that, within the United States, *does not receive initial deposits of less than an amount equal to the standard maximum deposit insurance amount* from individuals who are citizens or residents of the United States, other than money received in connection with any draft or similar instrument issued to transmit money.

This exemption authority has already been exercised and codified in 12 C.F.R. §1009.6. Depositories that do not accept deposits under \$250,000 – the standard maximum deposit insurance amount – from U.S. citizens or residents are already exempt from the disclosure requirements for lack of deposit insurance.

⁴¹ 15 U.S.C. 1639(p) (emphasis added).

2.3. The CFPB cannot create “regulatory exemptions” outside of rulemaking.

The second category of exemptions that the CFPB proposes to make by “order” is “regulatory exemptions,” which the Bureau describes as exemptions “from regulatory provisions that do not mirror statutory provisions under rulemaking authority or other general authority.”⁴² Aside from the extremely limited statutory exemption-by-order provisions discussed above, the Bureau must create exemptions “by regulation,” not by order.

The Bureau cites a provision of the Dodd-Frank Act, 15 U.S.C. 5512(b)(1), to justify its authority to use orders to grant exemptions. That provision authorizes the Director of the Bureau to “prescribe rules and issue orders and guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.”

But there is nothing in this general authority that permits the Bureau to use orders to avoid the requirements of underlying statutes or the APA when creating exemptions from regulations. In its more specific provisions regarding exemptions, the Dodd-Frank Act makes clear that, with extremely limited exceptions, those can only be provided by regulation.

The subsection cited by the Bureau is qualified by another subsection in the same section governing “Exemptions,” which states:

The Bureau, *by rule*, may conditionally or unconditionally exempt any class of covered persons, service providers, or consumer financial products or services, from any provision of this title, or from any rule issued under this title, as the Bureau determines necessary or appropriate to carry out the purposes and objectives of this title, taking into consideration the factors in Subparagraph (B).⁴³

The Bureau may exempt products and companies only “by rule.” In making exemptions, “by rule,” the Bureau “shall, as appropriate, take into consideration” several factors, including the company’s size, volume of business, and “existing provisions of law which are applicable to the consumer financial product or service and *the extent to which such provisions provide consumers with adequate protections*.”⁴⁴ The Bureau has not incorporated that standard into the proposal, let alone required a rulemaking.

The Bureau’s proposal for granting exemptions makes an end run around this statutory mandate for rulemaking. Congress was careful to specify when and how the Bureau could create exemptions. There is no authority for blanket staff approvals.

⁴² 83 Fed. Reg. at 64042.

⁴³ 12 U.S.C. § 5512(b)(3) (emphasis added).

⁴⁴ 12 U.S.C. § 5512(b)(3)(B) (emphasis added).

This Dodd-Frank provision requiring exemptions by rule is consistent with the authority in the enumerated statutes. As discussed in sections 2.1 and 2.2 above, TILA, the EFTA and ECOA, with exceedingly narrow exceptions, require that any exemptions be conferred through rulemaking.

Other enumerated consumer protection statutes also require exemptions to be enacted by regulation. For example, the Consumer Leasing Act (CLA),⁴⁵ the Fair Credit Billing Act (FCBA),⁴⁶ the Gramm-Leach-Bliley Act,⁴⁷ the Home Mortgage Disclosure Act (HMDA),⁴⁸ the Interstate Land Sales Full Disclosure Act,⁴⁹ and the Truth in Savings Act⁵⁰ all require exemptions to be adopted by regulation. In many of these cases, even the authority to grant exemptions by rule is narrowly constrained.

The two cases cited by the Bureau⁵¹ to support authority to enact regulatory exemptions do nothing to override these specific provisions of Dodd-Frank and the enumerated statutes governing the Bureau's exemption authority. The cases involve different agencies and specific circumstances and do not support a

⁴⁵ 15 U.S.C. § 1667f(a)(2) (“Any regulations prescribed under paragraph (1) may contain classifications and differentiations, and may provide for adjustments and exceptions for any class of transactions, as the Bureau considers appropriate”); 15 U.S.C. § 1667e(b) (granting the Bureau the authority to exempt “by regulation” any class of lease transactions within any state if it determines that the state’s law subjects that class of transactions to requirements substantially similar to those of the CLA or gives greater protection and benefit to the consumer, and if it provides adequate provision for enforcement).

⁴⁶ 15 U.S.C. § 1666j(b) (granting the Bureau the authority to exempt “by regulation” any class of credit transactions within any state if it determines that the state’s law subjects that class of transactions to requirements substantially similar to those of the FCBA or gives greater protection to the consumer, and if it provides adequate provision for enforcement).

⁴⁷ 15 U.S.C. § 6804(b) (“*The regulations* prescribed under subsection (a) may include such additional exceptions to subsections (a) through (d) of section 6802 of this title as are deemed consistent with the purposes of this subchapter.”) (emphasis added).

⁴⁸ 12 U.S.C. § 2804(a) (“These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Bureau are necessary and proper to effectuate the purposes of this chapter, and prevent circumvention or evasion thereof, or to facilitate compliance therewith.”); 12 U.S.C. § 2805(b) (“The Bureau may, *by regulation*, exempt from the requirements of this chapter any State-chartered depository institution within any State or subdivision thereof, if the agency determines that, under the law of such State or subdivision, that institution is subject to requirements that are substantially similar to those imposed under this chapter, and that such law contains adequate provisions for enforcement.”).

⁴⁹ 15 U.S.C. § 1702(c) (granting the Director authority “from time to time, pursuant to rules and regulations issued by him” to exempt any subdivision or any lots in a subdivision if the Director finds that enforcement with respect to such subdivision or lots “is not necessary in the public interest and for the protection of purchasers by reason of the small amount involved or the limited character of the public offering.”).

⁵⁰ 12 U.S.C. § 4302(b) (Bureau has authority to exempt “by regulation” advertisements, announcements, or solicitations made by any broadcast or electronic medium or outdoor advertising display not on the premises of the depository institution from certain disclosure requirements, but only “if the Bureau finds that any such disclosure would be unnecessarily burdensome”).

⁵¹ 83 Fed. Reg. at 64042 n.65.

claim of general authority to create exemptions by order from an regulatory provision that does not mirror the statute.⁵²

Finally, in the introduction to the discussion of the Product Sandbox, the CFPB notes that one of the Bureau’s statutory objectives is:

“to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services—

...

(3) outdated, unnecessary, or unduly burdensome regulations are regulatory identified and addressed in order to reduce unwarranted regulatory burdens”⁵³

But this provision also does not give the CFPB authority to grant relief or exemptions from regulations outside of rulemaking. The Dodd-Frank Act’s recitation of purposes is not an independent grant of authority; it merely informs the CFPB’s exercise of authorities granted “under Federal consumer financial law.”⁵⁴

2.4. The Dodd-Frank Act gives states and the FTC power to act when the CFPB will not.

Congress anticipated that there might come a time when there was a lack of will at the CFPB to enforce the law. The Dodd-Frank Act was passed in response to deficient enforcement by federal prudential regulators that preceded the 2008 financial crash.⁵⁵ The statute explicitly creates a second line of defense, in the form of states and other federal agencies, in contemplation of the possibility that additional efforts may complement the CFPB’s efforts to pursue its mission or that the CFPB might neglect its duties. Thus, efforts by the CFPB to grant a company immunity from an enforcement action by a state attorney general, state regulator or the FTC are in severe tension with the Dodd-Frank Act.

⁵² The passage quoted from *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972), a case involving the Interstate Commerce Commission, is not only dicta, with no discussion of the validity of provisions for exceptions “about which [the Court] could only speculate at present”; the exemptions were also adopted after a result of notice-and-comment rulemaking, extensive public outreach and 50 days of hearings.

The second case cited by the CFPB, *Brodsky v. U.S. Nuclear Regulatory Commission*, 783 F. Supp. 2d 448, 450 (S.D.N.Y. 2011), also involves an exemption procedure adopted through a rulemaking and an agency, the Atomic Energy Act, that is “virtually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.”

⁵³ 12 U.S.C. § 5511(b)(3).

⁵⁴ *Id.*

⁵⁵ U.S. Financial Crisis Inquiry Commission, *Financial Crisis Inquiry Commission Report*, at xviii (2011) (“[T]he government permitted financial firms to pick their preferred regulators in what became a race to the weakest supervisor.”); *see also, e.g.*, Testimony of Lauren Saunders Before the Subcommittee on Monetary Policy Committee on Financial Services, U.S. House of Representatives, Hearing on Regulatory Restructuring: Safeguarding Consumer Protection and the Role of the Federal Reserve (July 16, 2009), http://archives-financialservices.house.gov/media/file/hearings/111/saunders_testimony.pdf.

First, the statute explicitly preserves and enhances the enforcement powers of the states, with a narrow exception for actions against financial institutions under UDAAP claims that have not been implemented by regulation.⁵⁶ States must give prior notice to the CFPB, which may intervene, remove the action to federal court, or appeal,⁵⁷ but the Bureau may not unilaterally dismiss the action.

The Dodd-Frank Act also preserved much of the powers of other federal agencies. The bank regulators retain their supervision and enforcement powers over financial institutions of any size regarding safety and soundness concerns, which can result from consumer protection violations. The bank regulators also have full consumer protection authority over institutions with less than \$10 billion in assets.

Similarly, the FTC retains its full authority to bring enforcement actions against nonbank companies that commit unfair or deceptive acts or practices or violate other laws under which the FTC has enforcement power, subject only to an agreement with the CFPB to coordinate such actions.⁵⁸

While the Bureau has a duty to coordinate with FTC and other federal agencies and state regulators to promote consistent regulatory treatment of consumer financial and investment products and services,⁵⁹ the Dodd-Frank Act does not give the Bureau unilateral power to dictate or block the activities of other agencies. The Bureau's assertion that it has sweeping powers, beyond its power to create exceptions by rule, to give companies immunity from state or federal enforcement flies in the face of the clear intent of the Bureau's enabling statute.

3. The proposed NAL changes are reckless.

3.1. Overview of the NAL proposal

Through its proposed revisions to the current NAL policy, the CFPB is proposing to allow “duly authorized officials”⁶⁰ to provide a letter “to a particular entity or entities, based on particular facts and circumstances, through which the Bureau exercises its discretionary supervision and enforcement authority by providing no-action relief.” The letter will include a statement that, subject to good faith, substantial compliance with the terms and conditions of the letter, “the Bureau will not make supervisory findings or bring a supervisory or enforcement action against the recipient predicated on the recipient's offering or providing the described aspects of the product or service” under the Bureau's UDAAP authority or any other identified statutory or regulatory authority.⁶¹

The proposed NALs will differ from those under the current policy in that they will be binding on the Bureau and may commonly include relief from potential UDAAP claims.⁶² Under the current policy, a NAL is a staff recommendation that the Bureau will not bring an enforcement action. Under the proposal,

⁵⁶ 12 U.S.C. §§ 5552(a)(1), 5552(a)(2).

⁵⁷ 12 U.S.C. § 5552(b).

⁵⁸ 12 U.S.C. § 5514(c)(1), (3).

⁵⁹ 12 U.S.C. § 5495.

⁶⁰ 83 Fed. Reg. at 64037.

⁶¹ *Id.*

⁶² 81 Fed. Reg. at 8688.

the letters instead will state that “*the Bureau will not*” bring an action,⁶³ and the letters will be issued by “duly authorized officials of the Bureau to provide recipients greater assurance that the Bureau itself stands behind the no-action relief provide by the letters.”⁶⁴

In 2016, the Bureau emphasized that UDAAP-focused NALs were expected to be uncommon. There would be no such expectation under the proposal.⁶⁵

The Bureau has proposed to remove provisions of the current NAL policy that make clear that the letters are not official statements of the law.⁶⁶ The Bureau does not explicitly state that NALs will include interpretations but it appears likely that they will. The proposal requires the applicant to identify the “statutory and/or regulatory provisions from which the applicant(s) seeks no-action relief and an identification of the potential uncertainty, ambiguity, or barrier that such relief would address.”⁶⁷ The Bureau also notes: “Implicit in the statement [that the Bureau will not take action under its UDAAP authority] is that the Bureau has not determined that the acts or practices in question are unfair, deceptive, or abusive.”⁶⁸

In the following sections, we discuss why the Bureau should not issue NALs that are binding on the agency or ones that provide UDAAP relief. Other differences from the current policy, and other problems with the NAL proposal, are described in Sections 6, 7, 8 and 9 below.

3.2. The CFPB’s irresponsible NAL proposal departs from those of other agencies.

While the CFPB claims that “many of the proposed revisions are designed to more closely align Part I with no-action letter programs offered by other Federal agencies,”⁶⁹ there are major differences between the CFPB’s reckless proposal and the more restrained policies at the agencies the CFPB cites: the Securities and Exchange Commission (SEC),⁷⁰ Commodity Futures Trading Commission (CFTC),⁷¹ Federal Energy Regulatory Commission (FERC),⁷² and the Federal Housing Finance Agency (FHFA).⁷³

Most importantly, the NALs at those four agencies are not binding on the agency and do not limit the agency’s ability to act or to rescind the NAL. As under the CFPB’s current NAL policy, the NALs are

⁶³ 83 Fed. Reg. at 64037 (emphasis added).

⁶⁴ 83 Fed. Reg. at 64037.

⁶⁵ *Id.*

⁶⁶ See Section 8.1 below.

⁶⁷ *Id.*

⁶⁸ 83 Fed. Reg. at 64040 n.44.

⁶⁹ 83 Fed. Reg. at 64037 n.12.

⁷⁰ SEC, Procedures Utilized by the Division of Corporation Finance for Rendering Informal Advice, 45 Fed. Reg. 72644 (Nov. 3, 1980); 17 C.F.R. § 202.1. More details on the SEC’s policy and practice are found on its website and in other documents.

⁷¹ CFTC, Requests for exemptive, no-action and interpretative letters, 17 C.F.R. § 140.99.

<https://www.govinfo.gov/content/pkg/CFR-2018-title17-vol2/xml/CFR-2018-title17-vol2-sec140-99.xml>.

⁷² FERC, Informal Staff Advice on Regulatory Requirements; Interpretive Order Regarding No-Action Letter Process 70 Fed. Reg. 71487 (Nov. 29, 2005), <https://www.federalregister.gov/documents/2005/11/29/05-23406/informal-staff-advice-on-regulatory-requirements-interpretive-order-regarding-no-action-letter>.

⁷³ <https://www.federalregister.gov/documents/2014/10/31/2014-25973/procedures-and-general-definitions>.

merely an opinion issued by agency staff not to recommend enforcement action regarding the proposed transaction or activity as described in the application. At the SEC, “opinions expressed by members of the staff do not constitute an official expression of the Commission's views”⁷⁴ and “the SEC staff reserves the right to change the positions reflected in prior no-action letters.”⁷⁵ The CFTC’s policy specifically states that a “no-action letter represents the position only of the Division that issued it, or the Office of the General Counsel if issued thereby. A no-action letter binds only the issuing Division or the Office of General Counsel, as applicable, and not the Commission or other Commission staff.”⁷⁶ Similarly, FERC’s policy indicates that “responses for no-action letters will not bind the Commission and will not operate as agency action that would be subject to rehearing or judicial review.”⁷⁷ At FHFA, the “director reserves the right to modify, rescind, or supersede a Non-Objection Letter.”⁷⁸

NALs issued by these other agencies typically make clear that the letters are not official interpretations.⁷⁹ As the SEC has stated:

It is important to note that the staff’s no-action responses to Rule 14a-8(j) submissions reflect only informal views. The determinations reached in these no-action letters do not and cannot adjudicate the merits of a company’s position with respect to the proposal. Only a court such as a U.S. District Court can decide whether a company is obligated to include shareholder proposals in its proxy materials. Accordingly, a discretionary determination not to recommend or take Commission enforcement action does not preclude a proponent, or any shareholder of a company, from pursuing any rights he or she may have against the company in court, should the company’s management omit the proposal from the company’s proxy materials.⁸⁰

Importantly, none of the four agencies has a NAL policy that restricts the agency’s ability to issue supervisory findings. The only other NAL policy that mentions supervision is the FHFA’s, which states that a non-objection letter is a statement that “FHFA does not object to a proposed transaction or activity for supervisory, regulatory, or policy reasons.”⁸¹ But the FHFA letter does not including a binding commitment not to issue supervisory findings in the future.

⁷⁴ 17 C.F.R. § 202.1(d).

⁷⁵ SEC, Fast Answers, No Action Letters, <https://www.sec.gov/fast-answers/answersnoactionhtm.html>.

⁷⁶ 17 C.F.R. § 140.99(a)(2).

⁷⁷ 70 Fed. Reg. at 71489 .

⁷⁸ 12 C.F.R. § 1211.4(a).

⁷⁹ See, e.g., CFTC Letter No. 18-33 at (Dec. 21, 2018),

<https://www.cftc.gov/sites/default/files/idc/groups/public/%40lrlettergeneral/documents/letter/2019-01/18-33.pdf> (stating that “this letter and the position taken herein represent the views of DMO only and do not necessarily represent the views of the Commission.”); FERC No Action Letter, Docket No. NL16-1-000 at 2 (Oct. 26, 2015), available at <https://elibrary.ferc.gov/idmws/search/results.asp> (“Further, this response only expresses staff’s position on enforcement action and does not express any legal conclusions on the questions presented.”).

⁸⁰ <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8-informal-procedures.htm>.

⁸¹ 12 C.F.R. § 1211.4(a).

The policies of the CFTC, SEC, FHFA and FERC do not specifically offer relief from prohibitions on unfair, deceptive or abusive conduct,⁸² do not tout the benefit of such relief, and do not indicate that such relief might be common.

Other agencies require a NAL application to contain a certification of the type that the CFPB has proposed to delete stating that the information in the NAL is true and complete.⁸³

None of the four agencies sets forth a time frame for approving or denying applications, let alone expresses an expectation that the agency will make a decision in such a short time that there can be no adequate review. FERC's policy specifically states that "the timing of a response to a no-action letter request is also within the discretion of the General Counsel or designee."⁸⁴

All four other agencies require applicants to identify the applicant and do not provide for unnamed applicants or for hypothetical situations. FERC requires the application to identify "to the extent possible each of the corporate entities, counterparties or other persons that would be involved" and the CFTC specifically states that "Commission staff will not respond to a request for a Letter that is made by or on behalf of an unidentified person."⁸⁵ Similarly, the SEC's policy states that "Letters relating to unnamed companies or persons... will not be answered."⁸⁶ None of the other four agencies invites trade associations, service providers, or other third-party applicants to submit applications or allows provisional NALs for incomplete applications.

In short, the NAL policies of the SEC, CFTC, FERC and FHFA do not support the CFPB's proposal. To the contrary, they illustrate how irresponsible it is.

3.3. NALs should not include binding commitments that prevent the Bureau from taking action in the face of consumer harm.

As noted above, one of the most significant changes that the CFPB proposes to the current NAL policy and a notable difference from those of other agencies is that a NAL would not merely be a staff recommendation but rather would be a binding commitment that the Bureau will not bring an enforcement action or make supervisory findings. The proposal also imposes hurdles to revoking or modifying a NAL even if doing so is in the public interest.⁸⁷ The Bureau should not provide such a rigid commitment to stay its hand if new information or developments warrant action to protect the public.

⁸² While those agencies are not covered by the Dodd-Frank UDAAP ban that the CFPB administers or the provisions of the FTC Act, their own enabling statutes include similar prohibitions. *See, e.g.*, 7 U.S.C. § 6b (provision of Commodity Exchange Act outlawing attempts to "cheat or defraud"); 15 U.S.C. § 78(b) (provision of Securities and Exchange Act prohibiting "manipulative or deceptive device or contrivance").

⁸³ *See, e.g.*, 17 C.F.R. § 140.99(c)(3)(i) (CFTC); 70 Fed. Reg. 71489 (Nov. 29, 2005) (FERC); 12 C.F.R. § 1211.6(10);

⁸⁴ 70 Fed. Reg. at 71489.

⁸⁵ 17 C.F.R. §140.99(b)(4).

⁸⁶ 45 Fed. Reg. 72644.

⁸⁷ See Section 9.3 below.

The Bureau proposes to authorize Bureau employees to bind the Bureau not to take action except under very limited circumstances. Subject to the recipient's good faith, substantial compliance with the terms of the NAL, "the Bureau *will not* make supervisory findings or bring a supervisory or enforcement action" against the recipient regarding the described aspects of the product or service. This constraint on Bureau authority lasts indefinitely unless it is revoked, except when the NAL is granted through a product sandbox admission that has a time limit (which is extendable).

It is reckless and an abdication of the Bureau's duty to protect consumers to allow an employee to make such a broad, binding commitment, especially after such a cursory, secretive, one-sided review. An approval of a NAL application is based on information that is currently available and should not prevent the Bureau from acting if the Bureau discovers that it did not understand the application correctly, that the product or service operates differently than the Bureau understood, that it is harming consumers, or that it has changed.

It is also inappropriate to include a promise not to make supervisory findings. Supervisory findings can be a more cooperative and less drastic action against a company than an enforcement action. Supervision may uncover problems or potential legal violations that were not addressed in the NAL, but that need to be corrected, even if they are arguably within the ambit of the product or service as described in the NAL.

The proposal would make a NAL "subject to good faith, substantial compliance with the terms and conditions of the letter."⁸⁸ Certainly, the Bureau should not and would be highly unlikely to take an enforcement action if the approval was granted in the face of full information, nothing has changed, and the company relies in good faith on an approval.

But the terms and conditions of the NAL will not cover every situation, and compliance with those stated conditions is not sufficient to protect consumers or to warrant such a broad restriction on the Bureau's authority. The application could have omitted information about the way a product or service operated or the potential for harm. The Bureau could become aware of information about harm to consumers from sources other than the applicant, such as consumer complaints, investigations by other government entities, and private litigation. The way in which the product or service is implemented could harm consumers even if the company does not violate minimal terms and conditions specified.

If consumers are being injured and the law is being violated in ways the Bureau did not contemplate, the Bureau should not have to litigate whether a company has acted in "good faith" or in "substantial compliance" with the limited conditions specified in the NAL admission document. The Bureau must retain the flexibility to make supervisory findings or to resume investigation and enforcement based on information about consumer harm that becomes known, regardless of the source and without consideration of whether the harm was envisioned when the Bureau employee granted the approval.

The fact that NALs outside of a sandbox would last indefinitely and that UDAAP relief may be granted make it especially inappropriate for the Bureau to commit not to act against a particular company.

⁸⁸ 83 Fed. Reg. at 64039.

While the proposal allows the Bureau to revoke NALs, the conditions for doing so are too limited and do not protect consumers, as discussed in Section 9.3 and 9.4 below.

3.4. The CFPB should not use no-action letters to provide relief from UDAAP uncertainty.

The difficulties of evaluating a product or service are compounded if that relief includes a commitment not to bring enforcement or supervisory action based on unfair, deceptive or abusive acts or practices (UDAAPs). The Bureau's 2016 discussion of the final NAL policy appropriately states that UDAAP relief will be "particularly uncommon."⁸⁹ In the current proposal, however, the Bureau states that there would be no such expectation.⁹⁰ The Bureau has also noted that commenters in 2016 urged that no-action relief "is particularly valuable for UDAAP matters."⁹¹

In 2016, the Bureau persuasively explained why UDAAP relief is risky:

First, evaluation of whether an act or practice constitutes a UDAAP is typically an intensively factual question that requires detailed consideration of a wide range of potentially relevant circumstances. Such evaluations can be more complicated, and uncertain, than evaluation of an act or practice with respect to a regulatory or statutory provision that is drawn more narrowly and precisely than the statutory UDAAP prohibitions. This complexity may be especially pertinent in the context of requests for NAL treatment under the Policy, which are limited to instances in which there is substantial uncertainty regarding whether the particular aspects of the product identified in the request are unfair, deceptive, or abusive. Second, as noted in the Proposed Policy, the Bureau has quite limited resources to devote to consideration and issuance of NALs at this time. The Bureau is concerned that devoting attention to UDAAP-focused NAL requests could misallocate its resources away from more narrowly-focused cases that are more likely to be workable NAL candidates.....⁹²

Many aspects of the way a product or service works in practice or is implemented could implicate UDAAP concerns. These could be poorly understood or could change from the time an application is granted. The short review period and lack of public input compound these problems. Even a more extensive review and in-depth supervision of the company may not reveal unfair, deceptive or abusive aspects of a product that might become apparent in the future. Yet, the Bureau recklessly proposes to give a stamp of approval that a company is not committing UDAAPs and to block itself from taking action.

An example is illustrative. A trade association could seek a NAL based on the claim that consumers would benefit by avoiding the "embarrassment" of having bank account debit cards declined at the point of sale and by being able to access overdraft services to address necessities. If the CFPB granted the application and stated that there were no UDAAPs associated with overdraft services, it could have overlooked the many ways in which those services are implemented that courts have found to be unfair or

⁸⁹ 81 Fed. Reg. at 8689.

⁹⁰ 83 Fed. Reg. at 64037.

⁹¹ 83 Fed. Reg. at 64037 n.13.

⁹² 81 Fed. Reg. at 8689.

deceptive. Banks might attempt to use a broadly worded letter by the CFPB promising no UDAAP action against overdraft programs to block even claims involving details on which the CFPB did not focus while reviewing the application.

Especially with the “streamlined” application process that the Bureau is now proposing, it is simply impossible for the Bureau to be confident that a product or service does not now, or will not in the future, pose UDAAP issues. The CFPB should not grant UDAAP relief, especially as a binding commitment.

3.5. NALs cannot be used to promulgate official interpretations that will receive deference.

The Bureau describes a NAL as means “through which the Bureau exercises its discretionary supervision and enforcement authority ...”⁹³ The Bureau does have discretion in its exercise of that authority. But the Bureau also appears to be attempting to use NALs to issue official interpretations that will receive deference.

Under the Bureau’s current policy, each NAL must include a statement confirming that the letter does not represent the official view of the agency.⁹⁴ The letter itself states that it does not grant an exception, waiver, safe harbor, or similar exemption from any statutory requirement.⁹⁵ Under current policy, the NAL “is not intended to be honored or deferred to in any way, by any court or any other government agency or person.”⁹⁶ The existing policy could not be clearer: the NAL is about the Bureau’s own exercise of its enforcement discretion, not about an interpretation of the law.

The new proposal would delete every one of the express qualifications about the official status of interpretations contained within NALs or their impact on other parties. This deletion suggests that the Bureau may include legal interpretations in the NALs and hope that they will be viewed as official interpretations to which courts will defer.

But this effort will fail. A no-action letter “does not bind the courts.”⁹⁷ And as explained in the next section, if the Bureau attempts to use a NAL to effect a substantive change in the law, the NAL itself may constitute a substantive, legislative rule requiring notice-and-comment procedures.

4. The proposal violates, and contemplates violation of, rulemaking requirements.

In issuing the proposal, the CFPB has ignored multiple regulatory requirements. The proposal is a substantive, legislative rule that fails to comply with the Dodd-Frank Act’s and other rulemaking requirements. The proposal also contemplates that the CFPB could issue NALs and sandbox admissions that would themselves be substantive, legislative rules under procedures that would also fail to comply with rulemaking requirements.

⁹³ 83 Fed. Reg. at 64039.

⁹⁴ 81 Fed. Reg. at 8695.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *New York City Employees Retirement System v. S.E.C.*, 45 F.3d 7, 12-13 (2d Cir. 1995) (stating that letter recommending no action against Cracker Barrel for refusal to permit vote on investor petition was not a legislative rule requiring notice and comment).

4.1. The proposal is a substantive, legislative rule.

The CFPB asserts that it can ignore certain rulemaking requirements because the proposal is a procedural rule and a policy statement within the meaning of the exceptions to the APA's notice-and-comment rulemaking.⁹⁸ To the contrary, the proposal is a substantive, legislative rule that requires compliance with the APA notice-and-comment and other rulemaking requirements.

The APA's "narrowly construed" exception for procedural rules does not apply "where the agency action trenches on substantial private rights and interests."⁹⁹ The proposal would do so by specifying types of regulatory relief that entities may seek (a new type of no-action letter and new forms of "sandbox" relief); allowing that such relief can limit the rights of consumers, other regulators, and the CFPB; identifying the types of entities that may seek such relief (not only regulated entities but also third parties such as industry associations and service providers); establishing the requirements for doing so; and specifying the rights and procedures required before the Bureau can revoke NALs or sandbox relief.¹⁰⁰

More generally, the proposal is a substantive, legislative rule because by giving "duly authorized" Bureau officials authority to give entities binding relief from otherwise applicable law, it would up-end the current legal framework on which the markets for consumer financial products and services currently rest. Under current law, regulated entities generally must comply with the letter of the applicable statutes and regulations; consumers can trust that the law applies as written and can be enforced; competitors can trust that they are generally on equal legal footing with each other; a company's legal obligations or enforcement risk do not depend on its membership in certain associations; and, where applicable, the Bureau, other federal regulators, state attorneys general, or consumers with private rights of action can make their own decisions about whether to sue for violations of the law.

The Bureau's proposal would change these rights, benefits, and interests by converting generally applicable consumer protection laws into those that apply to some, but not all of, the entities that those laws expressly address. Under the Bureau's proposal, consumers' rights to the legal protections enshrined in statutes and rules would depend on the products they use; companies could no longer count on similarly situated competitors being subject to the same law that applies to them; the Bureau would be able to limit its own and other regulators' rights to prosecute entities that are violating the law; and regulatory relief requests could become currency for industry associations and service providers racing to gain members and customers.

The Bureau's suggestion that the proposal is a non-binding policy statement falls short. The proposal would establish "approvals" and "exemptions" as agency actions with definitive legal effect: limiting regulators' and consumers' legal rights by immunizing companies from lawsuits.¹⁰¹ The preamble also shows that the Bureau intends the no-action provisions to bind the Bureau by limiting its discretion to

⁹⁸ See 83 Fed. Reg. at 64038 & n.20 (citing 5 U.S.C. § 553(b) and RFA provisions).

⁹⁹ *Mendoza v. Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014) (citations omitted).

¹⁰⁰ See *id.* at 1024 (stating that action is substantive, not procedural, when it "alters the standards imposed" on employers seeking a certain certification from the government).

¹⁰¹ 83 Fed. Reg. at 64042 (stating that recipients of approvals or exemptions "would be immune from enforcement actions ... as well as from lawsuits").

take supervision or enforcement action once it issues a NAL¹⁰² and to provide “greater assurance that the Bureau itself stands behind the no-action relief.”¹⁰³

Consequently, the proposal is a substantive, legislative rule covered by rulemaking requirements.

4.2. The proposal does not comply with the Dodd-Frank Act and other rulemaking requirements.

The Bureau has failed to comply with the requirement of the Dodd-Frank Act that it consider the proposal’s potential benefits and costs to consumers and covered persons and consult with other regulators.¹⁰⁴ Additionally, by mischaracterizing its proposal as exempt from APA notice-and-comment requirements, the Bureau has also disregarded the Regulatory Flexibility Act, which includes requirements for seeking input from small entities and analyzing the impact of rules on small entities.¹⁰⁵ Because that statute applies to substantive, legislative rules requiring notice-and-comment rulemaking, it applies here.¹⁰⁶ Moreover, the Bureau proposal mentions, but does not fully comply with, the Paperwork Reduction Act. It fails, for example, to mention the likely respondents,¹⁰⁷ or direct comments to the Office of Management and Budget.¹⁰⁸

4.3. The CFPB’s proposal is arbitrary and capricious.

Strikingly, although the Bureau is proposing a program for creating binding and potentially industry-wide gaps in the coverage of existing consumer protection law, the proposal makes no mention of its impact on consumers. The agency has thus “entirely failed to consider an important aspect of the problem”—a flaw that alone would render the agency’s proposal, if finalized, arbitrary and capricious.¹⁰⁹

Moreover, the Bureau’s proposal fails to satisfy “[o]ne of the basic procedural requirements of administrative rulemaking”: that it “give adequate reasons for its decisions.”¹¹⁰ Although the sandbox program that the Bureau proposes is extraordinary in its potential breadth and impact on consumer

¹⁰² See generally *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988) (explaining that limitations on agency discretion and binding norms are substantive rules, not policy statements).

¹⁰³ 83 Fed. Reg. at 64037.

¹⁰⁴ See 12 U.S.C. § 5512(b)(2) (also requiring consideration of the impact on small depository institutions and rural consumers). The text of 12 U.S.C. § 5512(b)(2) refers to “a rule under the Federal consumer financial laws.” Here, the proposal is intended to implement, at least in part, such laws. See 83 Fed. Reg. at 64,041-42 nn.61, 63-65 (citing authorities that constitute Federal consumer financial laws); see generally 12 U.S.C. § 5481(14) (defining “Federal consumer financial law”).

¹⁰⁵ See 5 U.S.C. §§ 603(a), (d) (regarding analysis in proposed rules), 604 (regarding analysis in final rules), 609(b) (requirements for seeking input from small entities).

¹⁰⁶ See 5 U.S.C. §§ 603(a), 609(b).

¹⁰⁷ See 5 C.F.R. § 1320.5(a)(1)(iv)(B)(4).

¹⁰⁸ See 5 C.F.R. § 1320.11(a).

¹⁰⁹ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹¹⁰ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); see also *Nat’l Lifeline Ass’n v. FCC*, No. 18-1026, ___ F.3d ___, 2019 WL 405020, at *8 (D.C. Cir. Feb. 1, 2019) (recognizing that under the APA’s notice-and-comment procedures, agencies must “provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully” (citation omitted)).

protection law, the Bureau offers just one argument to support its approach: that because the Bureau previously issued only one no-action letter, companies may not have adequate incentives to apply for such letters.¹¹¹ The Bureau does not explain, however, why more incentives for companies to apply for no-action letters would serve its mission, whether or how the proposed program is necessary to address any lack of incentives to apply, or why the Bureau should grant different forms of what CFPB terms “relief.” Notably, the proposal cites the agency’s statutory purpose and some of its statutory objectives but makes no attempt to explain how its proposal allows it to “more effectively carry out” that purpose and those objectives.¹¹²

The Bureau also does not provide a “rational connection between” its single fact—that the Bureau has issued only one no-action letter—and “the choice[s] made” regarding either the proposed no-action provisions or the proposed product sandbox provisions.¹¹³ The Bureau now asserts that the agency’s rare issuance of no-action letters “strongly suggests that both the process required to obtain a No-Action Letter and the relief available under the 2016 Policy have not provided firms with sufficient incentive to seek” such a letter.¹¹⁴ But that assertion does not follow from the cited fact. When its no-action letter program began in 2016, the Bureau intended issuances to be rare and noted the resource implications of issuing more letters.¹¹⁵ That the Bureau carried out this goal does not mean that companies failed to apply or lacked incentives to do so. And more importantly, there is nothing to suggest that encouraging more applications or streamlining the process for approving them would fulfill the Bureau’s statutory mandate or promote consumer protection.

The proposal also offers virtually no explanation for changing the Bureau’s positions on key aspects of its no-action letter provisions, such as (a) acceptance of applications from trade associations and service providers; (b) whether no-action recipients need to submit data, (c) the default duration of a no-action letter, (d) the legal implications of a letter, (e) whether no-action letters can apply to potential UDAAPs, (f) limitations on using a letter to claim official Bureau approval of a product or service, (g) lack of attestation to the truth and accuracy of statements in applications, and (h) coordination with other regulators, among other changes. The preamble does not even mention some of the proposed changes.¹¹⁶ For some others, the Bureau notes that interested parties asked for these changes—both during the development of the policy in 2016 policy and after.¹¹⁷ And it states that some proposed revisions would make the CFPB program more similar to other agencies’ programs.¹¹⁸ But the Bureau makes no attempt to explain *why* it has now decided to revise its approach based on stakeholder concerns or other agencies’ practices, when it decided otherwise less than three years ago. Again, the agency’s recognition that it previously issued only one no-action letter does not suffice for explanation.

¹¹¹ See 83 Fed. Reg. at 64037.

¹¹² 83 Fed. Reg. at 64036 (citing 12 U.S.C. § 5511(a), (b)(3), (5)).

¹¹³ *Encino Motorcars*, 136 S. Ct. at 2125 (quoting *State Farm*, 463 U.S. at 43).

¹¹⁴ 83 Fed. Reg. at 64036.

¹¹⁵ 81 Fed. Reg. at 8694.

¹¹⁶ See 83 Fed. Reg. at 64037 (listing only some of the differences between the 2016 policy and this proposal).

¹¹⁷ See 83 Fed. Reg. at 64037 & nn.10, 11, 13.

¹¹⁸ See 83 Fed. Reg. at 64037 & n.12.

4.4. NALs or sandbox relief that are substantive rules must follow rulemaking procedures.

Under the Bureau’s proposal, individual NALs or sandbox relief could themselves constitute substantive rules because they could change, in a binding manner, and broadly, whether or how consumer protection laws apply in the future.¹¹⁹

It appears that the agency seeks to issue no-action letters and sandbox relief that could apply generally to all consumers that might use a given company’s product. They also could involve implementations or applications of a statute that apply virtually across the market, to all members of an industry association or all customers of a software provider. Moreover, the Bureau makes clear that the proposed relief would have “future effect,” perhaps even without retroactive effect.¹²⁰ The proposed no-action letters would restrict the Bureau’s ability to take enforcement or supervision action *in the future*, while the proposed forms of sandbox relief would restrict the *future* action and *future* rights of consumers and other state and federal agencies, as well as the Bureau.¹²¹ Further, the proposed types of relief could address not only the practices of companies that apply for relief, but also those of other entities; the proposal contemplates that third-parties can seek relief for their members or customers, and that the Bureau will later allow additional members or customers to be brought within the scope of an earlier grant of relief.¹²²

Thus, though the Bureau suggests that no-action letters are simply exercises of enforcement discretion,¹²³ and that exemptions are orders,¹²⁴ the proposal contemplates forms of relief that would be substantive, legislative rules because they would “adopt[] a new position inconsistent with existing regulations, or otherwise effect[] a substantive change in existing law or policy.”¹²⁵ The relief could restrict the agency’s own enforcement discretion across a market.¹²⁶ And especially when agency actions with binding effect apply only in the future and generally, they would be rules, not orders.¹²⁷

As discussed above, substantive, legislative rules require notice-and-comment procedures under the APA, as well as compliance with the Dodd-Frank Act’s rulemaking requirements, the Regulatory Flexibility Act, and other rulemaking procedures. The procedures proposed for issuing NALs or sandbox relief fail to comply with those requirements.

¹¹⁹ See generally 5 U.S.C. § 551(4) (defining the term “rule” to include statements of either “general or particular applicability,” “with future effect designed to implement, interpret, or prescribe law or policy”); *Mendoza*, 754 F.3d at 1021-24 (distinguishing substantive rules from other types of rules).

¹²⁰ 5 U.S.C. § 551(4).

¹²¹ See 83 Fed. Reg. at 64040 (regarding no-action letters), 64042 (regarding product-sandbox relief).

¹²² See *id.* at 64039-40, 64043.

¹²³ See *id.* at 63038 n.25.

¹²⁴ *Id.* at 64042.

¹²⁵ *Mendoza*, 754 F.3d at 1021 (explaining when a rule is a legislative rule).

¹²⁶ See generally *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987) (cabining of an agency’s prosecutorial discretion can in fact rise to the level of a substantive, legislative rule.)

¹²⁷ See *Safari Club Int’l v. Zinke*, 878 F.3d 316, 332–33 (D.C. Cir. 2017) (distinguishing adjudications, which result in orders, from rulemaking).

5. The NAL and product sandbox proposal is bad policy.

There are numerous aspects of the NAL and product sandbox proposal that are bad policy. Many of these are discussed below in the sections covering the mechanics of NALs and sandboxes. In this section, we highlight some of the more significant and overarching reasons that the proposal would neglect and hamper the Bureau's mission to protect consumers.

5.1. The Bureau's approach could lead to approval of risky new products or services without full information and without understanding the risks of the broader picture.

When the CFPB receives information from only one party, it necessarily cannot see the full picture. Similarly, if the Bureau considers a request in the narrow context of one company's product or services, it could end up making a series of small decisions that lead to big consequences. Especially with such a fast turn-around time and no public input, the Bureau is likely to grant no-action, approval or exemption relief for risky products that will harm consumers.

The history of the devastating spread of risky practices in the mortgage market is illustrative. In the years leading up to the mortgage crisis, the Office of the Comptroller of the Currency (OCC) issued a series of interpretive letters to national banks interpreting the ambiguous phrase "business of banking" in the National Bank Act to give banks legal authority to trade and deal in an increasingly complex set of derivative transactions. In the course of issuing these individual interpretations, the OCC gradually formulated an excessively broad definition that had profound impacts on a systemic level and led to the growth of entire markets that turned out to be extremely risky.¹²⁸

Proposals that seem new and innovative on their surface may have hidden dark sides that may not be apparent without listening to all sides. Among the many "innovations" that have caused serious harm to consumers, yet might have been able to make a persuasive case for no-action or product sandbox relief, are:

- ***Pick-a-payment and exploding rate mortgages.*** The reckless mortgages that led to the foreclosure crisis were an "innovation" with risks that were largely ignored by regulators, even though the problems were apparent to many consumer advocates. It took years before defaults exploded to the level that they were viewed with concern and by then it was too late. Giving a stamp of approval to dangerous "innovations" could magnify the harm to consumers.
- ***"Courtesy" overdraft programs.*** Banks now take billions of dollars from consumers by deliberately approving overdrawn debit and ATM card transactions that, in many cases, consumers would rather have denied. Through private litigation and CFPB and bank regulator actions, banks have been forced to repay \$1 billion or more to consumers and to reform unfair and deceptive practices that deliberately tricked people into incurring more overdraft fees than

¹²⁸ See Saule T. Omarova, "The Quiet Metamorphosis: How Derivatives Changed the 'Business of Banking,'" 63 Univ. Miami L. Rev. 1041 (2009), (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1491767).

they would have.¹²⁹ In an attempt to prevent courts from addressing abuses, the service providers that promote and administer these overdraft services for their bank clients could have sought a NAL or sandbox admission document stating that overdraft services do not create UDAAPs or violate other laws.

- ***Credit card add-on products.*** After Congress passed the Credit CARD Act of 2009 to rein in a number of credit card abuses, credit card companies began finding other ways, not limited by the CARD Act, to increase the cost of credit cards. They began promoting credit insurance and other useless add-on products that were deceptively sold to consumers. Eventually, both the federal bank regulators and the CFPB brought a number of enforcement actions against these practices. These actions could have been blocked or at least slowed down if the CFPB had issued a no-action letter or sandbox approval blessing the purported benefits of these add-ons.

It may be easy for a company making a one-sided presentation to draw sympathy with calls for relief from “burdensome” regulations or uncertainty that the company argues could hinder its “new” approaches. But just because an approach is “innovative” does not mean that it will be a positive experience for the consumer or that older regulations and the critical protections they contain should not apply.

Handing out relief or exemptions to companies without the opportunity for public input will expose consumers to the very risks and harms that the CFPB is charged with preventing. Here are just a few examples:

- ***PACE loans.*** The promoters of Property Assessed Clean Energy (PACE) loans tout the benefits of a quick mechanism to encourage homeowners to improve the energy efficiency of their homes, generating energy savings that are supposedly a win-win for the homeowner and the environment. They could seek NAL relief to bless their practice of not complying with mortgage rules. Yet the evasion of those rules, including ability-to-repay rules and protections against contractor scams, has predictably led to fraud and deception that is jeopardizing the homes of seniors and others.¹³⁰
- ***Student income share agreements.*** Income share agreements claim not to be loans and to help students finance college without the risk of debt. Purveyors could seek approval of this product and endorsement of the claim that it is not a loan and is not unfair, deceptive or abusive. Yet with a cursory review and no public input, the CFPB may not fully appreciate that income share agreements could be riskier than traditional student loans and operate much like the debt they claim they are not.¹³¹
- ***Algorithms or alternative data that lead to discrimination.*** A company could seek approval for use of alternative underwriting models that are later discovered to discriminate against equally

¹²⁹ Halah Touryalai, Forbes, “Shady Overdraft Fees Could Cost Banks Over \$1 Billion” (July 2, 2012), <https://www.forbes.com/sites/halahtouryalai/2012/07/02/shady-overdraft-fees-could-cost-banks-over-1-billion/#7babd2dd72c7>.

¹³⁰ National Consumer Law Center, Issue brief: Residential Property Assessed Clean Energy (PACE) Loans: The Perils of Easy Money for Clean Energy Improvements (Sept. 2017), https://www.nclc.org/images/pdf/energy_utility_telecom/pace/ib-pace-stories.pdf.

¹³¹ Brittany Farr et al., Roosevelt Institution, Income Share Agreements: A Student Debt Promise Falling Short of Reality (Jan. 10, 2019), <http://rooseveltinstitute.org/income-share-agreements-student-debt-promise-falling-short-reality/>.

qualified borrowers of color – as digital mortgages have been shown to do.¹³² The CFPB cannot possibly know if the use of complicated big data or algorithms complies with fair lending laws after a review of only 60 days, and the Bureau should not bless untested models.

- ***Payday loans designed to evade credit laws.*** Predatory lenders are regularly trying to find ways to evade consumer protections. The payday loan trade association could apply for a no-action letter or sandbox admission, incorrectly claiming that a new type of loan is not subject to the Truth in Lending Act, and thus risk depriving consumers of protections without even allowing the public to weigh in.

Responsible regulators must take a cautious approach when approaching new products or services. It is important to understand those products, but rushing in to excuse them from complying with consumer laws will invariably lead to consumer harm.

5.2. Responsible review of applications will consume immense Bureau resources and distract the agency from enforcement of the law and consumer protection.

When proposing the original NAL policy, the agency stated: “the Bureau anticipates that NALs will be provided rarely”¹³³ and “would be provided only on the basis of exceptional circumstances and a thorough and persuasive demonstration of the appropriateness of such treatment.”¹³⁴ The Bureau anticipated “receiving one to three actionable applications per year.”¹³⁵

The Bureau now proposes to “streamline” the process for both applying for and approving a NAL. The Bureau is seeking to create “incentives”¹³⁶ for firms to seek NALs and to establish procedures that enable the Bureau to quickly crank out more NALs. The Bureau points to the lack of no-action letters under the prior Director as justification for changing the process. Yet the lack of NALs reflects the consumer risks of those letters, not a compelling reason to weaken the protections under the current policy.

In order to comply with its consumer protection mandate and to act responsibly, the Bureau cannot issue no-action letters or grant sandbox admissions without sufficient, time-consuming due diligence. Anything less than thorough and thoughtful consideration about the ramifications for a NAL or sandbox approval is merely a rubber-stamp that violates the Bureau’s duties. If the Bureau performs a careful review of each application, a policy of encouraging applications for NALs or a sandbox will create high opportunity costs for the Bureau’s core missions of law enforcement, supervision, rulemaking, complaint resolution, education and other functions.

To properly review an application, the Bureau must investigate both the applicant and the ramifications of the relief sought. This was true even under the current NAL policy, and would be especially crucial if the Bureau chooses to go forward with its proposal to make NALs and sandbox admissions binding, to provide UDAAP relief, or to attempt to confer “immunity” from other federal, state or private enforcement. If the Bureau fails to conduct adequate due diligence, it will inevitably expose consumers to

¹³² Prof. Robert Bartlett, School of Law, UC Berkeley et al, “Consumer-Lending Discrimination in the Era of FinTech” (October 2018), <https://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf>.

¹³³ 81 Fed. Reg. at 8689.

¹³⁴ 81 Fed. Reg. at 8691.

¹³⁵ *Id.*

¹³⁶ 83 Fed. Reg. at 64036.

harm from illegal practices and the United States government and its staff to reputational harm that erode public confidence. In short, the CFPB must not allow its NAL and regulatory sandbox program to create a rubber stamp that could send a false message of approval to industry or the public.

To avoid this “rubber stamp” risk, Bureau staff must investigate the company and its business model. Due diligence should include, for example, an inquiry into compliance management systems; product-based terms, conditions and procedures; and a review of statutory compliance for all federal consumer financial laws. With respect to compliance management systems, Bureau staff will need to verify that the company involved has a satisfactory compliance management system that is integrated into the overall framework for the design, delivery, and administration of the institution’s relevant financial products. Bureau staff should verify that no-action letter and sandbox applicants have a compliance program that includes policies and procedures, training for all relevant staff, monitoring or audits, and a reliable system for responding to consumer complaints. Reasonable due diligence on compliance management should also include an inquiry into whether the executive management and/or board of directors of the covered person is engaging in compliance oversight, understands the risks arising from the institution’s services, and is committed to the institution’s compliance management program. It will also require the Bureau’s staff to discover whether the applicant will rely on service providers to design, administer, or deliver the applicant’s financial service. If so, the Bureau’s staff will need to engage in due diligence exploring whether the applicant’s compliance management policies, systems, training, and personnel policies satisfactorily extend to any relevant service provider relationships.

With respect to product-based terms, conditions, and procedures, the Bureau’s staff would need to carefully develop an understanding of each applicant’s practices and operations. Such an understanding would necessitate obtaining and reviewing documents such as process flowcharts, organizational charts, annual reports, board meeting minutes, or the equivalent substitute documents relevant to the applicant. Due diligence would also need to include obtaining aggregate data on relevant products or services including price structure and the sources of the institution’s revenue. Staff would need to consider reviewing random samples of telephone recordings, notes, account documentation, disclosures, operating checklists, worksheets, and training materials. Understanding a product’s potential risk to consumers would also require reviewing computer program and system details, past examination or audit reports, service provider contracts, advertisements, marketing research, website information, and complaints.

This is a significant undertaking even for one company, and would be impossible if the Bureau accepts applications from trade associations or service providers in connection with products or services offered through thousands of companies.

In addition to investigating the company and its product, the Bureau must also fully consider the ramifications of the statutory or regulatory relief granted. The Bureau must fully understand not only how a specific company’s product or service is implemented but also how the underlying interpretation of the statute or regulation might play out in different contexts. For example, if the Bureau is considering granting a no-action letter or issuing an approval based on the view that certain charges by a company are not “finance charges” triggering TILA requirements, the Bureau must consider how similar charges are or could be used by other companies. An interpretation that might seem harmless in one context could undercut enforcement theories the Bureau is pursuing in another context, or could encourage other practices that would result in significant consumer harm. Any NAL or sandbox admission that provides a means for avoiding the statutory or regulatory requirements will be eagerly exploited by companies looking to evade consumer protections.

Before taking a position on the legality of a particular product or service, the Bureau must understand whether staff members are hearing complaints from consumers or the public, are seeing problems in supervision exams, or are pursuing enforcement cases that risk inconsistent positions. Staff throughout the Bureau should be involved.

Moreover, because applicants may be engaged in unusual, unexplored, or risky practices, due diligence review could be particularly complex and potentially contentious. Issuing no-action letters covering novel products, services, or business models without engaging in a Bureau-wide clearance process will create a risk of inconsistent Bureau positions and communications. And if the Bureau uses shortcuts to minimize these internal coordination efforts, the government risks backing itself into policy positions without mindful attention to the consequences of those decisions for the American public.

Inevitably, the Bureau employees qualified to engage in reasonable due diligence review of no-action letter or sandbox applications will be drawn from staff that could otherwise effectively serve in enforcement, supervisory, or regulatory roles. If done responsibly, review of NAL or sandbox applications will distract Bureau staff from completing the law enforcement cases, examinations, rulemakings and other important tasks critical to protecting public in order to benefit for-profit businesses and special interests.

5.3. The proposal could have the opposite effect intended, immersing companies in controversy and litigation.

The Bureau hopes that the proposed NAL and sandbox program will reduce regulatory burdens, uncertainty and ambiguities, leading to increased innovation and access to financial products and services. But if the Bureau uses the proposal to create exemptions or “relief” from important consumer protection regulations, or to enact significant new interpretations of existing statutes and regulations, the result for participants will be anything but certainty or relief from scrutiny.

Every NAL and sandbox admission that the Bureau grants will draw close scrutiny, both of the relief that the Bureau is purporting to grant and of the applicant and its underlying product or service. The attention of advocates, and likely regulators, states, Congress and the public at large, will focus on what consumer protections the company, trade association or service provider is trying to avoid and why. The NAL or sandbox subjects may find themselves the target of news articles, op-eds, conference discussions, advocacy reports and maybe even congressional hearings and more – and not necessarily in a positive light. This scrutiny will impact not only the NAL or sandbox participant but also other companies that are considering adopting similar products or services.

If the CFPB has overstepped its legal authority, such as by effectively changing regulations or implementing statutes without following the APA, the validity of the relief it grants – and any ability of a company to rely on it– could be tied up in litigation for years.

The litigation also could be a vehicle for discovery about the operation of the product or service, the representations made to the Bureau that are the basis for its action, and the data or facts that purportedly support (or contradict) those representations. Unfavorable information about the company could surface, notwithstanding the Bureau’s efforts to cloak information from public scrutiny.

The spotlight on a company trying to evade the law could also lead to direct legal challenges against the company by private litigators or state enforcement agencies. Legal challenges may also focus on state laws or other issues not directly addressed by the NAL or product sandbox.

Of course, these scenarios may not come to pass if the CFPB rejects applications that pose significant consumer risks and does not attempt to grant exemptions from consumer protection laws or to adopt far-reaching new interpretations. But that seems unlikely to be the Bureau's focus in light of the current bold, reckless proposal, with its brash assertion of the power to create exemptions and gut consumer protections.

5.4. Aggressive use of NALs and sandbox admissions that reflect staff interpretations will create confusion that could harm businesses as well as consumers.

As discussed above, in 1981 the Federal Reserve abandoned the old system of informal staff interpretation letters interpreting TILA because it was unworkable. More than 1500 one-off letters had been issued in about a decade since TILA went into effect, and the “cumulative effect of the interpretations ha[d] been to complicate, rather than facilitate, compliance by layering one set of distinctions on top of another. Rather than resolving questions, this material in the aggregate ha[d] served to generate further questions.”¹³⁷

The impact of NAL letters and sandbox admissions would be even worse today. The number of entities that are potentially subject to TILA alone is vastly larger than 50 years ago, and the Bureau has proposed that the NAL and sandbox process be used to grant relief under a number of statutes, not just TILA. It is far easier to write up and send off a request for an interpretation when it can be done on a computer and through email rather than on a typewriter and through the U.S. mail. Law firms will undoubtedly have templates that they promote to all of their clients. Over time, the result could be an enormous body of letters or sandbox approvals with unclear relationships to each other, an unclear impact on the Bureau's approach to entities other than the recipients, and an unclear connection to the Official Staff Commentary or the regulations.

Even with the overly narrow constraints that the Bureau has proposed before relief is revoked, discussed in Sections 9.3 and 9.4, a new Director could apply the revocation procedures to revoke NALs or product sandbox applications based on that director's view of the harm the relevant product causes consumers. Companies could be left to speculate on the impact of these revocations.

Moreover, the power that the Bureau seeks to vest at the staff level without notice-and-comment could also be employed, under different Bureau leadership, to increase regulatory burdens, not lift them. The TILA, EFTA and ECOA good-faith reliance provisions reference “an interpretation or approval” by duly authorized staff. While the current proposal is limited to approvals, a new director could authorize staff to promulgate interpretations that tighten, not loosen, regulatory standards.

The precedent of encouraging official approvals or interpretations by staff without notice and comment could result in erratic policy changes and uncertainties that make business more difficult. Admittedly,

¹³⁷ 46 Fed. Reg. 28560.

rulemaking is tedious and slow. But the deliberation and input that result also slow down the pace of change that can be problematic for consumers and businesses alike.

6. The application requirements are insufficient.

As discussed above, the proposal extends beyond the Bureau's authority and is bad policy. But if the Bureau chooses to go ahead with it, we offer the following comments on the application process.

The proposal includes similar requirements for applications for both NALs and the product sandbox. Thus, our discussion below generally applies to both types of applications. The primary difference in the application requirements is that the product sandbox application, unlike a NAL application outside a sandbox, must also include the type of relief requested, the requested duration, suggested metrics, plans for addressing unanticipated consumer harm, and a description of the data that the applicant possesses or intends to develop.

The scope of relief is discussed in Sections 2 and 3 above, and the other elements of the sandbox application are discussed in Sections 7, 8 and 9 below.

6.1. The CFPB cannot and should not accept applications from trade associations or service providers.

The CFPB proposes to invite applications from “trade associations, service providers, and other third parties.”¹³⁸ A trade association could apply on behalf of thousands of members, potentially impacting millions of consumers. Similarly, a service provider that has thousands of clients could seek approval of a product or service impacting millions of consumers.

Under the procedure outlined, the CFPB cannot possibly evaluate the ramifications of approving an application that will have such broad implications and will be implemented in thousands of different ways. Different companies may have different business models, different compliance regimes, different approaches to interacting with consumers, and different customer bases.

With applications coming from trade associations or service providers and not the industry players that are actually providing a product or service, the CFPB also would have no ability to evaluate the practices, compliance history or capacity of the company to provide the product or service without harming consumers. Even if the applicant provides a list of the members or clients that would be covered, the Bureau clearly will not be evaluating them individually.

It is outrageous that the Bureau would commit itself in advance not to bring enforcement or supervisory actions against an entire industry, including action against potential unfair, deceptive or abusive practices that cannot be identified. Even though a NAL will be limited to the described aspects of a product or service, the Bureau cannot anticipate how those aspects will impact consumers in many different settings. Similarly, it would be irresponsible to issue a blanket “approval” of the way that thousands of companies are providing a product or service.

¹³⁸ 83 Fed. Reg. at 64039.

The secretive, one-sided process for NAL and sandbox applications essentially gives a lobbying group a one-stop shop where it can seek relief for the industry it represents without the Bureau hearing about the countervailing arguments and impacts on consumers. That would be a fundamental perversion of the democratic process and of the Bureau’s obligation to protect consumers.

The Bureau’s proposal would also allow it to provide a “provisional” NAL or provisional sandbox admission to a trade association or a service provider. The applicant would not have to identify the other party, merely “the type of other entity.”¹³⁹ The Bureau proposes that the unnamed party could later submit some unspecified additional information and receive its own “non-provisional” approval.¹⁴⁰

The identity and background of each covered entity must be the focus of any approval process, whether it is called “provisional” or something else. It is essential that all parties who seek to benefit be present before the Bureau and identified from the beginning of the application process. The purpose of the application process is to enable the Bureau to evaluate a proposal in a particular real-world context based on full disclosures of information from particular companies. In 2016, the CFPB expressly rejected a proposal to grant NAL treatment to trade associations or to unidentified applicants.¹⁴¹ The Bureau correctly decided it should not issue approvals that would cover third parties that are not identified in an application and have not agreed to comply with conditions, provide safeguards, and supply accurate information as required of the named applicant. Allowing third parties other than the applicant to benefit from a NAL or sandbox approval, or to come forward later and automatically join one, without additional review or approval by the Bureau would shirk the Bureau’s duty to protect consumers.

6.2. The CFPB should not consider applications for products already established in the marketplace or for ones that do not provide substantial benefits over existing products.

The Bureau’s current NAL policy requires companies to identify the timetable for offering the product or service, states that NALs “are not intended for ... well-established products,” and requires an “explanation of how the product is likely to provide substantial benefit to consumers differently from the present marketplace, and suggested metrics for evaluating whether such benefits are realized.”¹⁴²

These requirements are deleted in the proposal. A party may request relief from a regulatory or statutory provision merely by explaining “consumer benefits” and by asserting “potential uncertainty, ambiguity, or barrier.”¹⁴³ There is no requirement that the product be new or novel or an improvement over currently available products. The product could be one that other companies are offering in compliance with the law. The product or service could even have been well-established in the marketplace when the Bureau drafted the rule or interpretation that the company now claims creates uncertainty, ambiguity, or a barrier.

Companies should not be allowed to use a NAL or sandbox application to get a second bite of the apple. The proposal gives companies a back-door channel to obtain the relief they want regardless of what happens in the formal public process. The notice and comment rights available with rulemaking and the

¹³⁹ *Id.* at 64040 n. 38.

¹⁴⁰ *Id.* at 64039-40.

¹⁴¹ 81 Fed. Reg. at 8692-93.

¹⁴² 81 Fed. Reg. at 8693.

¹⁴³ 83 Fed. Reg. at 64039.

drafting of official agency interpretations allow companies to voice their concerns about uncertainties, ambiguities, and barriers before the agency formalizes a position. Companies with a known product in the marketplace that will be affected by a proposed rule or interpretation can submit comments and raise their concerns before the rule or interpretation becomes effective. The Bureau must consider these comments in a public forum and explain the reasoning behind the choices it makes. Allowing companies to apply in the future to obtain relief for a product that was in the marketplace when the Bureau developed the rule or interpretation in question undermines the crucial role that public notice and comment play in the regulatory system.

Similarly, if a product or service is well established in the marketplace, there is no compelling benefit to consumers or need for “relief.” Companies should not be able to get a leg up on their competitors, or to weaken consumer protections, by getting approval to evade laws or regulations.

Under the existing policy, NALs are only available for “[e]merging products involving substantial regulatory uncertainty”¹⁴⁴ and for “[i]nnovative financial products that promise substantial consumer benefit because, for example, existing laws and rules did not contemplate specific products.”¹⁴⁵ In formulating the current policy the CFPB noted, “[i]f a product is already established in the marketplace” then uncertainties can be addressed by other measures (advisory opinions, rulemaking).¹⁴⁶ NALs are appropriately limited to cases where “because of intervening technological developments, the application of statutes and regulations to a new product is novel and complicated.”¹⁴⁷

The Bureau proposes to delete those existing requirements.¹⁴⁸ The proposal will also allow relief for products or services that do not offer substantial new benefits to consumers. The Bureau should limit NALs and sandboxes to new and innovative products that have the potential to provide substantial benefits to consumers (under the other limits discussed below).

6.3. The Bureau should not accept applications from purely hypothetical products or ones that are not close to launch.

The current NAL policy requires the application to identify “The timetable on which the product is expected to be offered” and adds: “No-Action Letters are not intended for . . . purely hypothetical products that are not close to being able to be offered.”¹⁴⁹ These requirements are deleted in the proposal.

The Bureau should not be expending resources, or risking consumer harm, to promote products or services that are early in the development stage. The Bureau cannot responsibly evaluate such products or services without seeing them as they have fully developed after all of the testing and specifications that are necessary to launch a product. The products or services may change in ways that make the relief inapplicable, more risky, or less beneficial for consumers. The Bureau would also waste its own limited

¹⁴⁴ 81 Fed. Reg. at 8690.

¹⁴⁵ 81 Fed. Reg. at 8692.

¹⁴⁶ 81 Fed. Reg. at 8691.

¹⁴⁷ 81 Fed. Reg. at 8686.

¹⁴⁸ Compare 83 Fed. Reg. at 64039 with 81 Fed. Reg. at 8693-94

¹⁴⁹ 81 Fed. Reg. at 8693 (Item 3).

resources if it evaluated ideas that are only a glimmer in the eye and will never result in actual products or services.

6.4. The CFPB should not allow companies to seek relief from unspecified or insignificant uncertainty.

Under the current CFPB policy, an applicant must identify statutes and regulations and describe how “each of these specific provisions of the statute(s) and regulation(s) should be applied to the product is *substantially* uncertain, including analysis of the relevant legal authorities and policy considerations.”¹⁵⁰ An applicant also must explain in detail that it is “*necessary and appropriate* to remove *substantial* regulatory uncertainty *hindering* the development of the product.”¹⁵¹

The proposed revised application criteria, by contrast, would require the applicant to identify the statutory or regulatory provisions and only “the *potential* uncertainty, ambiguity, or barrier” that the relief would address.¹⁵²

As a result of this change, applicants could obtain relief based on potential rather than actual uncertainty and without any requirement that the uncertainty be substantial. A company could obtain relief based on a trivial or makeweight uncertainty or could even argue that consumer protection regulations themselves pose a “barrier” to development of a product. A company can always make an argument that consumer protection regulations pose a “barrier.” The proposed standard is so nebulous that it can be triggered by any existing regulatory or statutory provision.

The Bureau also notes that “in some cases it may be difficult [for applicants] to determine precisely which provisions would apply, in the normal course, to the product or service in question. In other cases, the applicant may lack the legal resources to make a fully precise determination. In such circumstances, the applicant should provide the maximum specification practicable under the circumstances and explain the limits on further specification.”¹⁵³

It is unclear if the Bureau intends to grant “relief” from provisions that remain unspecified, or to “approve” a product or service offering as a whole without specifying the particular legal requirements with which the product or service complies. But it would violate the Bureau’s obligation to protect consumers to grant such *carte blanche* approvals. The Bureau cannot determine if a company is complying with the law if it cannot even review the law in question.

6.5. Companies must provide more information on potential consumer risks.

The CFPB proposes to “streamline the process of applying for a No-Action Letter by eliminating several elements it believes to be redundant or unduly burdensome, such as a commitment to data-sharing.”¹⁵⁴ Applicants still must identify potential consumer risks and how the applicant intends to mitigate them. However, the proposal would eliminate the current policy’s requirements that the applications:

¹⁵⁰ 81 Fed. Reg. at 8693 (emphasis added).

¹⁵¹ 81 Fed. Reg. at 8693.

¹⁵² 83 Fed. Reg. at 64039, 64042 (emphasis added).

¹⁵³ 83 Fed. Reg. at 64039 n.32, 64042 n.69.

¹⁵⁴ 83 Fed. Reg. at 64037.

- include a “candid” explanation of the potential consumer risks posed by the product,
- compare the risks of the applicant’s product or services to those of others in the marketplace,
- include “a description of the particular consumer safeguards the requestor will employ” and “the requestor’s basis for asserting and considering that such safeguards are effective,” and
- “address any future study the requestor will undertake to further evaluate the effectiveness of such safeguards.”¹⁵⁵

These requirements should be restored.

The “streamlining” of application requirements will lead to approvals without any reliable assessment of risks to consumers. To the extent that the NAL and product sandbox program is used for new products or services that are not well understood or tested, it is essential that the Bureau have enough information to carefully evaluate the potential risks and not accept statements about the lack of risk at face value. Companies regularly underestimate or disregard the risks their products pose. The last thing that the Bureau should be “streamlining” is the assessment of consumer risk.

In adopting the current policy, the Bureau noted that companies should be evaluating data regarding regulatory compliance when they consider introducing any new product line. Therefore, the requirement to provide this data for a NAL application should not be burdensome.¹⁵⁶

The current policy also requires that applicants describe the data that they possess or intend to develop “pertaining to the factual basis cited in support of the request . . .” Companies should not be allowed to make bald representations without support. If the company has (or does not have) data to support its claims, it should provide the data to the Bureau or make clear that its statements are unsupported.

In particular, the CFPB especially must require companies to provide concrete information if new products or services pose higher or different risks than existing products. Applications must include a more robust description and justification of the risks and consumer safeguards to be employed if the application is approved.

6.6. The CFPB must require applicants to be in compliance with other applicable law and should not use NALs or sandboxes for products or services that are facing government enforcement or private litigation.

The current NAL application requirements include “a showing of the product’s compliance with other relevant federal and state regulatory requirements.”¹⁵⁷ Under that policy, the company must provide an affirmation that it is not subject to an ongoing or threatened state or federal regulatory investigation or enforcement action or private civil action related to the product.¹⁵⁸ Applications also must include “[a]n affirmation that (except as specifically disclosed in the request) the principals of the requester have not

¹⁵⁵ 81 Fed. Reg. at 8693 (items 5, 14).

¹⁵⁶ *Id.* at 8689.

¹⁵⁷ 81 Fed. Reg. at 8693 Item 8.

¹⁵⁸ *Id.* Item 11.

been subject to license discipline, adverse supervisory action, or enforcement action with respect to any financial product, license, or transaction within the past ten years.”¹⁵⁹

The CFPB proposes to delete these application requirements. Amazingly, the Bureau even proposes to delete the current application requirement that “the facts and representations in the request are true and accurate.”¹⁶⁰

If a company is potentially violating the law and posing consumer harm, the last thing that the CFPB should be doing is giving it an approval. Moreover, it would be totally inappropriate for the CFPB to use a rubber-stamped, one-sided and secretive process to short-circuit enforcement of the law by other government agencies or consumers.

The Bureau should not use the NAL or sandbox process to interfere in ongoing disputes. The Bureau always has the ability to file an amicus brief to explain its interpretation of the law, and in certain government enforcement actions, the Bureau has the ability to intervene. The Bureau can also use official interpretations or guidance to promulgate its view of the law. But NALs and product sandboxes should be used, at most, for new products where there are good faith efforts to comply with the law, not an effort to evade enforcement.

It is also unfathomable that the Bureau would not want information about actual or threatened government enforcement or private litigation, license discipline, or adverse supervisory actions against an applicant. The Bureau should not be committing itself not to take action against a company that has a history of legal violations or without an understanding of the full context in which the company is seeking relief.

Similarly, given the high reliance the Bureau is placing on the company’s application, the least the Bureau could do is require a statement that the facts and representations are true and accurate.

Elimination of these application requirements shows the Bureau’s utter disregard for its consumer protection mandate.

7. The Bureau’s proposal provides inadequate procedures and standards for assessment of applications.

7.1. A 60-day approval deadline is far too short, and will result in a rubber stamp review.

The proposal states that CPPB expects to grant or deny NAL and sandbox applications within 60 days of receipt of a complete application.¹⁶¹ The 60-day time frame is unreasonably short and will encourage hasty and flawed reviews of applications, resulting in harm to consumers.

As discussed in Section 5.2 above, a responsible review of applications that focuses on consumer protection and the ramifications of granting relief requires a thorough analysis and consultation with various parts of the Bureau. The Bureau’s assessment must include both the legal and policy implications

¹⁵⁹ 81 Fed. Reg. at 8693 (item 12).

¹⁶⁰ *Id.* Item 7.

¹⁶¹ 83 Fed. Reg. at 64040, 64043.

of the requested relief and research to verify the company's assessment of the facts and risks to consumers. Reviewing an application for relief related to uncertainty or ambiguity about even an established, well-understood product could be challenging to complete within 60 days if the ambiguity implicates other products as well. For newer products or services, an adequate review in 60 days may be virtually impossible. These problems will be compounded if the Bureau receives numerous applications or applications from trade associations or service providers covering multiple companies.

Even if 60 days were a reasonable goal, detailing the agency's firm intention to make decisions in that time frame for all applications is irresponsible. The current Bureau policy recognizes that the time frame for a review must be flexible. In their comments submitted when the Bureau adopted this policy, industry commentators were divided. Some preferred a fixed time, while others urged a flexible approach.¹⁶² The Bureau declined to include any strict timetable in the final policy.¹⁶³ As the Bureau recognized then, the NAL option was intended to address innovative and novel products with which staff did not have experience. The existing policy is correctly based on the assumption that a NAL should involve novel issues. In view of these considerations, the Bureau should not make any assurances regarding the time it will take to review an application. If it makes any reference to its likely schedule for ruling on applications it should be much longer and more flexible.

7.2. The vague assessment criteria demand no accountability to the Bureau or to the public.

The existing policy includes ten assessment criteria for a NAL application. These include: (1) consideration of a substantial regulatory uncertainty; (2) evaluation of why rulemaking could not address any uncertainty; (3) consideration of evidence-based data on risks and benefits of the product; (4) consideration of the entity's compliance with regulations of other agencies; (5) the extent to which the public will have access to data supporting the NAL. The Bureau proposes to omit these specific criteria, replacing them with vague generalities, largely leaving the applicant to describe the risks and benefits to consumers. This will undoubtedly leave companies with the discretion to submit the data most favorable to them. The agency has offered no adequate reason for removing these criteria. The Bureau should retain all current evaluation criteria.

8. The procedures for and content of NALs and product sandbox admissions

8.1. The CFPB should restore the statements that NALs and sandbox approvals are not an endorsement of a product and not an official interpretation of the law.

Under the current NAL policy, each NAL must contain a statement that it is *not* an expression of the Bureau's views about the product or service or an interpretation of the statutes or rules involved.¹⁶⁴ The applicant must commit that, if the request is granted, "the requester will not represent that the Bureau or its staff has: (i) Licensed, authorized or endorsed the product, or its permissibility or appropriateness, in any way; (ii) determined, or provided an interpretation, that the product is or is not in compliance with legal or other requirements, or has been granted an exception, waiver, safe harbor, or comparable

¹⁶² 81 Fed. Reg. at 8689.

¹⁶³ *Id.*

¹⁶⁴ 81 Fed. Reg. 8695.

treatment; or (iii) granted No-Action Letter treatment with respect to any aspect of the requester’s offerings or any provision of law other than those expressly addressed in the No-Action Letter.”

Similarly, under the current policy, a NAL must contain a statement “(a) disclaiming any intention that the No-Action Letter constitutes a determination by the Bureau or its staff about, or is an interpretation of, or grants any exception, waiver, safe harbor, or similar treatment respecting the statutes and rules identified in the request, or their application to the product’s aspects in question, or otherwise constitutes an official expression of the Bureau’s views, and that any explanatory discussion should not be interpreted as such an interpretation, waiver, safe harbor, or the like, that is binding on the Bureau, and (b) that the staff is not necessarily in agreement with any legal or policy analysis, any interpretation of data, or any other matter, set forth in the request.”¹⁶⁵

Under the Bureau’s current policy, a NAL must also contain a statement that it is “not intended to be honored or deferred to in any way by a court or other government agency or person.”¹⁶⁶ When it created this requirement, the Bureau rejected comments urging that NALs be binding on other regulators. “Other agencies will remain free to make independent determinations concerning their respective authorities and concerns.”¹⁶⁷

The CFPB should restore these provisions. As discussed above, the Bureau does not have general authority to and should not deputize officials to issue NALs or sandbox admissions that may serve as rules, without following rulemaking requirements. Similarly, the Bureau should not authorize individual Bureau staff to issue *ad hoc* official agency commentary and make private, binding determinations just at the request of a regulated company.

It is similarly dangerous to delete the current requirement that applicants not construe a NAL or sandbox admission as Bureau endorsement of the product or service. The fact that the Bureau chooses not to bring an enforcement action, or does not see a legal violation, does not mean that the Bureau endorses a product.

Any NAL or product sandbox admission should be narrowly limited to a particular regulatory issue and should not be an approval of the entire product or service itself. The Bureau has no basis for favoring particular companies or products or allowing itself to be used in advertising or fundraising campaigns.

This is especially true for new products or services. For example, the Bureau might provide admission to the product sandbox because it has open questions about how a product works that it wishes to study. The Bureau must ensure that these experiments are not misconstrued when it is uncertain whether a product will benefit or harm consumers.

8.2. The limited commitment from sandbox participants to compensate consumers does not protect consumers from harm.

The proposal would require sandbox participants to commit to “compensate consumers for material, quantifiable, economic harm caused by the recipient’s (or recipients’) offering or providing the described

¹⁶⁵ *Id.* at 8695.

¹⁶⁶ 81 Fed. Reg. at 8695.

¹⁶⁷ *Id.* at 8688.

aspects of the product or service within the BCFP Product Sandbox.”¹⁶⁸ Especially when tied to such a narrow view of consumer harm, such post-hoc compensation is a weak substitute for the consumer rights that sandbox relief can eliminate (including consumers’ rights to seek remedies in court).

The enumerated consumer laws that the CFPB is charged with enforcing do not limit liability to “quantifiable” or “economic” harm. Consumer harm is not always quantifiable or economic. Sometimes harm is intangible, and sometimes Congress has authorized statutory damages because of the difficulty of quantifying some types of harm that are nonetheless very real.

For example, damage to a credit score or incorrect information in a credit report can injure a consumer by resulting in lost credit opportunities or lost jobs—results that are harmful but potentially unquantifiable, especially because the harm can continue for several years into the future. Similarly, abusive and illegal threats and harassment by debt collectors, or by creditors collecting their own debts, may cause emotional and even physical harm even if not quantifiable economic harm.

Whether harm is “material” or is “caused by” the described aspect of the product or service may also be in the eye of the beholder. If a borrower defaults on a loan with resulting impacts, if consumers incur overdraft or other fees as a result of use of a product, if the product costs more than they realized it would or does not give them the benefits they expected, is there “material” harm that was “caused by” the product or service? The company would say that the consumer is at fault and this was not harm caused by the product.

The proposal also has no mechanism to enforce the compensation requirement – no procedures for consumers to seek compensation and no explanation of who makes the determination. These are further reasons why the proposal is inadequate to protect consumers from harm and does not justify depriving consumers of their right to pursue private litigation if they are injured.

9. Monitoring, modification, time limits and revocation of NALs and product sandbox approvals

9.1. The Bureau should include robust data sharing requirements, especially about consumer benefit and harm.

The proposal has only vague data sharing requirements for sandbox participants, largely allowing them to propose what data to share. The Bureau must take an active role in determining what data would be necessary to assess the benefits and risks of a particular product or service.

The Bureau does state that it expects to require the applicant to report information on “metrics that will enable to the Bureau to determine if [offering the product] is causing material, tangible harm to consumers.”¹⁶⁹ As discussed above, this narrow definition of harm leaves out other types of or indicators of harm. The Bureau should require applicants to report on any harm.

¹⁶⁸ 83 Fed. Reg. at 64043 (Item 8).

¹⁶⁹ 83 Fed. Reg. at 64043.

The proposal is also notably silent on information about the fees, charges, and other costs that consumers will pay for products covered by a no-action letter or sandbox relief. To fully understand how these products—and the relief provided—are affecting consumers, the Bureau should expressly require companies sandbox participants to report on what consumers pay to receive for the product or service in question, including any penalty fees.

9.2. The Bureau must maintain close oversight over companies receiving NAL or sandbox relief.

Under current policy, the Bureau may conduct ongoing investigation and supervision of the recipient’s compliance with the terms of the NAL.¹⁷⁰ In addition, NALs contain a statement that the NAL “does not mean that the Bureau will not conduct supervisory activities or engage in enforcement investigation to evaluate the requester’s compliance with the terms of the No-Action Letter or to evaluate other matters.”¹⁷¹ Under its proposal, the Bureau would delete from the current policy any statement that it retains even this limited investigation and supervision authority.

The Bureau should restore the omitted statements. The Bureau should maintain close oversight over the offering of any product or service that receives relief to ensure compliance with the terms of such admission and to ensure that the relief is not being used to insulate practices, including unfair, deceptive or abusive acts or practices, that pose consumer harm. Close oversight is especially important over new and untested products and services. Oversight will give the Bureau important information not only to prevent consumer harm but also to learn from the sandbox process.

If a NAL is written narrowly and merely reflects a minor legal interpretation about what the law already requires for a specific practice, not involving a new or experimental approach, close oversight may not be critical. But for NALs involving more unusual or innovative approaches, or those involving UDAAP relief, the Bureau should monitor its implementation (and approval should be time-limited, as discussed below).

9.3. The CFPB should be able to modify or revoke a NAL or sandbox admission at any time for any reason.

Under the current NAL policy, a NAL “is subject to modification or revocation at any time at the discretion of the staff for any reason, including that: the facts and representations in the request appear to be materially inaccurate or uncertain; the requester fails to satisfy conditions or violates limitations specified in the No-Action Letter; the product or any of its material features, terms, or conditions, is altered; or the staff determines that such modification or revocation is appropriate to protect consumers or is otherwise in the public interest.”¹⁷²

The Bureau’s ability to revoke a NAL or sandbox admission under the proposal is far narrower and there are no provisions for modification. The Bureau anticipates that NALs – which presumptively have no time limit – and sandbox admission may be revoked only for: (1) failure to “substantially comply in good

¹⁷⁰ 81 FR 8694 Item D. 1.

¹⁷¹ 81 Fed. Reg. at 8694 (Item D(1)).

¹⁷² 81 Fed. Reg. at 8695.

faith”¹⁷³ with the conditions of acceptance; (2) a Bureau determination that the product offering is causing “material, tangible, harm to consumers;” or (3) a finding by the Bureau that the legal uncertainty, ambiguity, or barrier that was the basis of the NAL has changed as a result of a Supreme Court decision or statutory change.¹⁷⁴ The Bureau anticipates that revocation under these standards will be “quite rare.”¹⁷⁵

These limited grounds for revocation put a high burden on the Bureau if it concludes that it needs to take such action to protect consumers and enforce the law. If, in the Bureau’s view, revocation of a NAL or sandbox admission is appropriate to protect consumers or is otherwise in the public interest, the Bureau should have no limits on its ability to proceed with the revocation. The problems with the proposed revocation standard are substantial and numerous.

First, the proposed revocation standard ties continuation of the NAL or sandbox relief to the terms of the original approval and to facts known at that time. If the applicant failed to disclose important information when it applied, the information will remain off the Bureau’s radar and does not appear to be grounds for revocation. If other information about companies’ practices, market conditions, or other regulators’ actions comes to light or unforeseen developments later reveal even non-tangible harm or threatened harm to consumers, the Bureau should be able to revoke the approval.

Second, the Bureau should not have to make a determination of harm in order to revoke a NAL or sandbox admission. If it has serious concerns, or even if promised benefits are failing to materialize, that should be enough.

For NALs, the proposal assumes that companies will conduct their own investigations to determine what harm they are causing so that they can report themselves to the Bureau. Instead, the companies have every incentive not to investigate and to hide behind a subjective “good faith” belief when confronted with evidence of harm. Even for sandbox participants, they can simply argue that any harm to consumers was immaterial, intangible, or simply not “harm.” Significantly, the standard precludes revocation based on the threat of harm, regardless of how clear, imminent, or dangerous the risk.

Third, as discussed in Section 8.4 above, the standard of “material, tangible, harm to consumers” is far too narrow.

Fourth, the reasons for revocation do not include a conclusion that providing relief to a particular company or service provider has caused inconsistent enforcement or has led to a financial service market that is not competitive with resulting harms to consumers.¹⁷⁶

Fifth, the suggestion that only Congress or the Supreme Court of the United States can clear up uncertainty about a relevant law is preposterous. The Supreme Court weighs in on fewer than 100 cases a

¹⁷³ The discussion of revocation of sandbox admissions omits the word “substantially.” 83 Fed. Reg. at 64044.

¹⁷⁴ 83 Fed. Reg. at 64040.

¹⁷⁵ *Id.*

¹⁷⁶ *See* 15 U.S.C. § 5511(a) (“The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.”).

year and most do not involve consumer financial products or services. Lower courts create binding law that should guide the CFPB's revocation decisions. More importantly, it is the Bureau's job to issue official interpretations and promulgate rules in order to minimize legal uncertainties. NALs and product sandboxes should be at most an interim measure taken to enable the Bureau to study an issue. Uncertainty is best resolved through formal notice and comment rulemaking, which should replace NAL and sandbox relief in order to give all parties the ability to weigh in and the Bureau to develop rules that treat an entire market fairly.

9.4. There should be no right to cure, and should be more leeway for retroactive liability, for companies that act in bad faith.

Shockingly, the Bureau's proposal would give a company that has failed to comply in good faith with the terms of the NAL or sandbox relief a right to cure and imposes a concomitant duty on the Bureau to explain why a cure was inadequate.¹⁷⁷ Companies that act in bad faith or violate the terms of their approval should have no second bites at the apple and the Bureau should not have to justify why it is ending the NAL or sandbox relief. While the current policy gives companies the opportunity to respond after the Bureau communicates its intention to revoke a NAL, that opportunity merely enables the Bureau to ensure that it has accurate information. A company cannot violate the agreement or act in bad faith and then expect a right to reinstate a NAL with no consequences. Similarly, the Bureau should retain the provision in its current NAL policy that makes a NAL automatically inapplicable, even without modification or revocation, if the facts and representations in the request are materially inaccurate, or the requester fails to satisfy conditions or violates limitations.¹⁷⁸

The Bureau should also have discretion to impose retroactive enforcement when a company fails to adhere to the commitments it made in its application. The existing Bureau policy appropriately provides for retroactive enforcement if a company misrepresented facts in its application.¹⁷⁹ The proposal, by contrast, does not require publication of a revocation and restricts retroactive enforcement to cases where the recipient failed to "substantially comply in good faith" with the NAL's terms and conditions.¹⁸⁰ This would be an extremely difficult standard to enforce. It provides no real incentive for a company to be candid and complete in the representations or promises it knowingly and voluntarily makes in order to get a NAL or sandbox relief.

The six-month wind-down period that the Bureau proposes after a NAL or sandbox ends may also be inappropriate in some circumstances. While an immediate end would be possible, under the policy, if there is "material, tangible harm to consumers and a wind-down period would increase such harm," that standard is too narrow and the Bureau should not be required to prove that allowing a harmful product to continue would increase harm. The Bureau may have other reasons for wishing to end the protection provided by the NAL or sandbox admission. The Bureau may believe that it is appropriate to make supervisory findings. The NAL or sandbox admission may have misstated the law, have been issued without full facts, be having unintended impacts beyond tangible consumer harm, or have been overturned by a court.

¹⁷⁷ 83 Fed. Reg. at 64040, 64044.

¹⁷⁸ 81 Fed. Reg. at 8695.

¹⁷⁹ 81 Fed. Reg. at 8695.

¹⁸⁰ 83 Red. Reg. at 64040

9.5. Participants should be required to report enforcement actions or litigation.

Under the current policy, a NAL applicant must promise “promptly to notify the Bureau (unless the request for a No-Action Letter has been withdrawn or denied) of any ... governmental investigation, supervisory review, enforcement action, or private civil action that is initiated or threatened.”¹⁸¹ The Bureau should restore this requirement. As discussed above, this is critical information, and it may reveal that new circumstances have arisen, or new information has surfaced, that make the NAL or sandbox relief inappropriate.

9.6. Sandboxes should have a shorter time limit, with few extensions, and some NALs should have an expiration date.

The two-year period that the Bureau expects will apply for most sandbox admissions is far too long.¹⁸² In addition, the Bureau anticipates granting extensions that are “at least as long” as the original period, and potentially far longer, if “the Bureau is considering amending applicable regulatory requirements.”¹⁸³ Thus, many sandboxes could last several years and some could last a decade or longer. For example, it will be seven years between the formal start to the prepaid accounts rule and the effective date of the regulation, and there were years of preparatory work before then when the Bureau was considering amendments.

The purpose of a sandbox should be to enable companies to conduct limited pilots of new approaches under close Bureau supervision in a manner that provides data that the Bureau would not otherwise receive. Six months should be long enough for such a controlled experiment. Notably, the United Kingdom sandbox trials are generally six months in length.¹⁸⁴

A sandbox that goes on for years is not really a sandbox; it is a vehicle for lifting consumer protection rules and giving favored companies a leg up on the market and an advantage over competitors that have to comply with the law. That is not an appropriate purpose for the Bureau.

The Bureau has also proposed that NALs would be indefinite, whereas they are time-limited under the current policy. Whether a time limit is appropriate for NALs depends on how they are used. If a NAL merely addresses a narrow technical issue and nothing has changed, then there may be no reason for an end date.

However, given that the Bureau has proposed to give a binding commitment not to bring an enforcement action or supervisory findings, that commitment should not be endless. As discussed above, it is reckless of the Bureau to make such a commitment in any event, but if it does, it should do so only for a short period of time, such as six months, while it tests out a new approach and gathers data on the product or service. Most companies do not have binding commitments that they will not face enforcement actions.

¹⁸¹ 81 Fed. Reg. at 8693 (Item 11).

¹⁸² 83 Fed. Reg. at 64042 n.68.

¹⁸³ 83 Fed. Reg. at 64044.

¹⁸⁴ Financial Conduct Authority, Regulatory sandbox lessons learned report at 4 (Oct. 2017), <https://www.fca.org.uk/publication/research-and-data/regulatory-sandbox-lessons-learned-report.pdf>.

Instead, they must have compliance departments that actively work to ensure they are not violating the law. The same should be true of sandbox participants.

Moreover, if a NAL offers UDAAP relief, provides “relief” or acts as an exemption from the law (which, as discussed above, we do not believe the Bureau has the authority to do in all the cases contemplated by the proposal), that relief should be time limited. It should be for a short period of time to enable a test of a new approach and should not provide endless permission to ignore the law.

10. Regulatory coordination

10.1. States and other federal agencies cannot waive federal consumer protections.

The CFPB explains that it is interested in entering into agreements with state authorities that issue similar forms of no-action relief, or that operate or plan to operate a sandbox, which “would provide for an alternative means of receiving a No-Action Letter from the Bureau”¹⁸⁵ or “an alternative means of admission to the BCFP Product Sandbox”¹⁸⁶ The Bureau also notes that it intends to enter into agreements whenever practicable to coordinate relief with similar forms of relief offered by state, federal or international regulators.¹⁸⁷

The Bureau does not explain what it means by an “alternative means” of receiving NAL or sandbox relief. But the implication is that admission into a state sandbox, such as Arizona’s, could serve as admission into the CFPB sandbox or that a company that obtained a no-action letter from a state would automatically receive one from the CFPB.

That is a shocking proposal if that is what the CFPB intends. States have no responsibility over federal law. Whatever decisions they make about their own licensing or other laws has absolutely no bearing on whether a company is in compliance with federal consumer protection laws. States certainly have no authority to waive federal laws. The considerations that might lead states to waive licensing or other state laws are entirely different from questions about whether completely different federal laws should apply to a company.

The CFPB also has a duty to carry out its consumer protection responsibilities under the Dodd-Frank Act and cannot neglect them or hand them off to a state. It would violate the CFPB’s duty to protect consumers for it to commit to not taking enforcement or supervisory action just because a state decided to forego such action. Similarly, the CFPB may not defer to a state’s interpretation of the law, even in an area such as unfair and deceptive acts and practices where state law and federal law may overlap.

The same is true of decisions that might be made by other federal regulators. While the CFPB has a duty to coordinate, and should attempt to arrive at consistent treatment wherever possible, the CFPB still has a duty to make its own determinations. The CFPB cannot abdicate its duties by handing them over to other regulators, such as the banking regulators whose neglect led to the creation of the CFPB in the first place.

¹⁸⁵ 83 Fed. Reg. at 64040.

¹⁸⁶ 83 Fed. Reg. at 64044.

¹⁸⁷ 83 Fed. Reg. at 64041, 6404.4

It is unclear what kind of agreements the Bureau has in mind that would coordinate relief with similar forms of relief offered by international regulators. But using the actions of another country as an excuse to loosen American consumer protections would be preposterous.

10.2. The proposal could lead to inconsistencies, not coordination, across regulators.

Despite the nod the proposal gives to coordination with other regulators, it could have the opposite effect. It could lead to inconsistent treatment of companies depending on who their primary regulator is and whether or not they have obtained relief from statutory or regulatory provisions through a NAL or sandbox approval. The proposal also does not contain any mechanism for consultation with other regulators even if a given approval or exemption amounts to a rule for which consultation is required under Dodd-Frank.¹⁸⁸

10.3. The Arizona sandbox experience is not encouraging about the need for or wisdom of a sandbox.

10.3.1 Overview of the Arizona sandbox

The Bureau's proposed sandbox program seems partly modeled on Arizona's. As noted above, the Bureau also appears to be preparing to give states such as Arizona a say in whether a company will receive a CFPB NAL or sandbox relief. Thus, a look at the operation of the Arizona sandbox to date is useful.

Arizona became the first state to enact a fintech regulatory sandbox in 2018 by passing HB 2434, codified as A.R.S. § 41-5601, at the urging of the Arizona Attorney General and despite the opposition of consumer and community advocates and faith leaders.¹⁸⁹ The "Regulatory Sandbox Program" (RSP) in the Office of Attorney General (OAG) opened on August 3, 2018.

Applicants submit an application form, supporting documentation, and a check for \$500. The OAG has ninety days to review the application and admit or deny admission to the sandbox.¹⁹⁰

Applicants must have an "innovation" under a broad and vague definition that has little teeth: it must involve a product or service "that is not known by the Attorney General to have a comparable widespread offering in this state."

The Arizona Regulatory Sandbox Program does not require that "innovations" actually benefit consumers. The enabling law requires applicants to state how their product or service benefits consumers,¹⁹¹ but the Attorney General's application form does not ask for that specific information. In fact, the only "benefit" requested on the application form asks the applicant to the sandbox to explain

¹⁸⁸ 12 U.S.C. § 5512(b)(2)(B).

¹⁸⁹ For detail on the Arizona sandbox law, see the CEI Brief at <https://www.nomoreloansharksaz.org/gallery/brief-on-arizona-regulatory-sandbox-program.pdf>.

¹⁹⁰ The application is posted at www.azag.gov/fintech.

¹⁹¹ A.R.S. 41-5603.F(3.b).

“why Your Product or Service would benefit from being introduced into the Sandbox.”¹⁹²

In a memorandum of understanding that Arizona signed with Taiwan, the Attorney General states that “innovations” in the RSP should “benefit the consumer, investor and/or industry...” The Legislature’s implied intention that innovations worthy of sandbox admission must benefit consumers is apparently not the Attorney General’s interpretation of the law.

Admission to the Arizona sandbox program relieves companies of regular supervision by the Arizona Department of Financial Institutions, which has the expertise to oversee products and services that require an Arizona license. The AG may request records if desired but it does not appear that companies have any ongoing reporting requirements. There is no requirement in the legislation for tests or reports that generate actionable information nor any mechanism to ensure that consumer concerns voiced are addressed. The proposal contains only vaguely-worded consumer protection assurances.

Sandbox participants do not need licenses, and need not comply with license conditions, that would otherwise be required under A.R.S. Title 6 and/or Title 44 (Chapters 2.1 and 13). At the urging of consumer advocates, the sandbox bill in 2018 was amended to require that sandbox participants comply with some of the product-specific consumer protections that licensees must implement. For example, the Arizona Consumer Lender Law’s ban on balloon payment loans now also applies to any sandbox participant offering loans that would otherwise require a Consumer Lender license.

On the other hand, despite their high risk to consumers, money transmitters, including cryptocurrency exchanges, that are admitted to the Arizona sandbox program are not subject to the requirements for an Arizona license. Thus, they do not need to comply with Arizona’s money transmitter safety and soundness laws, which, for licensed entities, require a surety bond, set net worth requirements, and restrict permissible investments, among other requirements. While the AG may consider such issues, there are no fixed requirements to protect consumers who entrust money to these transmitters that the money will be safe.

The “sandbox” in Arizona operates as a “black box” with complete authority vested in the Attorney General to admit or deny applications without a public process or findings on eligibility. The RSP law cloaks the entire process in secrecy with no public transparency. It provides that “records that are submitted to or obtained by the Attorney General in administering this chapter are not public records or open for inspection by the public.”¹⁹³

The OAG has refused to respond to public records requests and has provided little more than one-sentence descriptions about the three applicants approved to date, with no information about what relief they have been granted. The OAG has even denied public records requests for information as basic as the name, address, and contact information for the companies, which would otherwise have been available on the public licensee roster of the Arizona Department of Financial Institutions.

¹⁹² Arizona Fintech Sandbox, Application at 7 (“About Your Testing Plan”), https://www.azag.gov/sites/default/files/docs/fintech/Sandbox_Application_FINAL_2018.pdf.

¹⁹³ A.R.S. § 41-5610.A.

10.3.2 Three companies are now playing in the Arizona sandbox.

Three companies have been admitted to the Arizona sandbox: Omni Mobile Inc.,¹⁹⁴ Grain Technology,¹⁹⁵ and Sweetbridge.¹⁹⁶ It is not clear what if any data about their operations the OAG considered when admitting them into the sandbox program. The Omni and Grain websites list their sandbox products as in “beta test” and the Sweetbridge product that has been admitted does not yet appear to be in the market at all.

From the brief information posted on the Attorney General’s website roster of RSP participants and the press releases issued, there is insufficient information to determine if there is anything especially innovative about the Omni and Grain products, or whether they offer benefits to consumers that are significantly different from other companies that operate in Arizona with a license and under the supervision by the Department of Financial Institutions. But like other money transmitter and lending products, the Omni and Grain products do pose some consumer risks. The Sweetbridge product, incorporating blockchain and virtual currencies into auto title lending, is quite unusual but also poses especially significant risks.

If these three companies were to apply for sandbox or NAL relief, they might seek exemptions from or approvals under the CFPB prepaid accounts rule or from Truth in Lending rules, or a promise of no-action from enforcement of the ban on unfair, deceptive or abusive practices. All of those laws provide critical consumer protections that are especially important when consumers’ money is at risk and when they are guinea pigs in experimental programs. There is no reason why companies such as this should be given special treatment or promises of no action under federal law, be relieved of consumer protection rules that the CFPB is charged with enforcing that apply to others, or escape CFPB oversight.

Omni Mobile

According to the OAG’s press release, Omni Mobile Inc. offers a wallet for guest payments for services and products at a resort in Tucson.¹⁹⁷ It is a “financial service platform implementing an array of avante garde technologies to improve today’s payment systems through the utilization of direct ACH payments through OM’s centralized wallet infrastructure.”¹⁹⁸ Apparently this is a wallet funded from a consumer’s bank account or credit card and used to earn discounted resort rates when paying at check-out. There may be a discount on resort fees when paying via the OM card.

Funds stored on the OM card are not secured or insured by the FDIC.¹⁹⁹ Money sent from the OM account is transferred out of the account on the date of payment instructions but OM can hold those funds in its account up to 15 days before completing the payment.²⁰⁰

¹⁹⁴ <https://om.cash/>

¹⁹⁵ <https://trygrain.com/>.

¹⁹⁶ <https://sweetbridge.com/>

¹⁹⁷ Arizona Attorney General, Press Release, “Arizona Accepts First Participant into FinTech Sandbox,” <https://www.azag.gov/press-release/arizona-accepts-first-participant-fintech-sandbox>.

¹⁹⁸ <https://www.azag.gov/fintech/participants>.

¹⁹⁹ <https://om.cash/terms-and-conditions/>.

Omni is a money transmitter that would have otherwise been required to obtain an Arizona Money Transmitter license, including review of company leadership and bonding to protect consumers. The Attorney General has refused to disclose whether Omni Mobile is required to meet any of the requirements for licensed money transmitters.

The description of the Omni mobile wallet does not appear to be particularly innovative or different from many other mobile wallet or prepaid products on the market. The idea of processing payments from a funded account has been done by Disney and other resorts for years. Other wallet services such as Square and PayPal also offer wallets and are licensed as money transmitters by the Arizona Department of Financial Institutions.

The Omni wallet will be covered by the CFPB's prepaid rule when it goes into effect in April. But that rule does not protect the funds in the wallet if the company fails. Consumers' funds may be at risk as they will not have FDIC insurance and are being held by a company that will escape the safety and soundness oversight or bonding required of money transmitter licensees.

Grain Technology

Grain Technology is an "application that offers consumers personalized savings plans and credit opportunities through their existing bank account."²⁰¹ The company's website proclaims: "Build credit without a credit card."²⁰² It explains that people should have "easier access" to credit and it should be "simple so that when you need that second cup of artisanal coffee, you'll be able to enjoy it."²⁰³ The website claims "Low APR" but does not say what it is. The account is FDIC insured.

Consumers must give Grain their bank account login credentials.²⁰⁴ Consumers give blanket authorization for Grain to electronically debit or credit the consumer's bank account up to \$5000 per day and must waive their right under federal law to prior notice of the amount and date of each debit or credit.²⁰⁵ It is unclear if Grain will be complying with Arizona's interest rate caps or if it is using a bank partnership to avoid those limits. It appears that funds stored in the Grain account will be a prepaid account governed by the CFPB's prepaid rules once they go into effect.

²⁰⁰ *Id.*

²⁰¹ <https://www.azag.gov/fintech/participants>.

²⁰² <https://trygrain.com/>

²⁰³ *Id.*

²⁰⁴ <https://trygrain.com/tos.html>.

²⁰⁵ *Id.* The EFTA and Regulation E require 10-days written notice to a consumer if a preauthorized electronic fund transfer will vary in amount from the previous transfer under the same authorization or from the preauthorized amount. 15 U.S.C. § 1693e(b); 12 C.F.R. § 1005.10(d). Alternatively, the designated payee or the financial institution can give the consumer the choice of receiving notice only when a transfer falls outside of a specified range of amounts or only when a transfer differs from the most recent transfer by more than an agreed upon amount, but the range must be one that the consumer could have anticipated. 12 C.F.R. § 1005.10(d)(2).

It appears that Grain will be moving money in and out of the consumer's preexisting bank account, holding funds in a prepaid account, and offering credit that will be repaid (probably automatically) from that account. It is unclear what is innovative about Grain and how it is significantly different from other credit, savings or personal financial management services on the market.

The fact that Grain is taking consumers' online banking credentials, broad authorization to move money in and out of their accounts, and also offering credit, poses substantial risks. It is unclear why Grain is unable to obtain a license in order to have safety and soundness and other oversight from the Arizona Department of Financial Institutions like other money transmitters and lenders.

Sweetbridge

Sweetbridge is "a blockchain-enabled product designed to purchase financing without a credit check and offer affordable, consumer-friendly vehicle title loans with an APR cap of 20%."²⁰⁶ The company's website is business-facing, focusing on a "real-time financial system" that "continuously assures that information and commitments can be trusted between parties."²⁰⁷ The website notes benefits including "asset-based finance." "Rather than your credit history determining your trustworthiness, we can determine your creditworthiness based on the value of your asset itself."

The website further explains: "Sweetbridge is developing a lending protocol for locking a digitized title or representation of an asset in a blockchain-based smart contract. Once locked, the protocol releases a portion of that asset's value in the form of a virtual currency called BRC (Bridgecoin), which can then be either used as currency within the Sweetbridge economy or redeemed for fiat currency. This particular service enables a Sweetbridge member to use their vehicle title as collateral to access liquidity or purchase vehicles in niches where traditional financing is often too costly."²⁰⁸

Unlike the other two Arizona sandbox participants, Sweetbridge certainly appears to be offering an unusual product unlike others widely on the market. But it also appears to hold very substantial risks for consumers. Sweetbridge combines several features that alone are very risky, and in combination are especially troubling:

- **Auto-title lending.** Consumers risk their car (and potentially their job) if they cannot afford to repay the loan.
- **Asset-based lending with no credit check.** Regulators have widely condemned asset-based lending, which may protect the creditor but can lead consumers into trouble with unaffordable loans.
- **Virtual currencies.** It is unclear how the virtual currency aspect of this service works, but virtual currencies have no deposit insurance, no protection against errors or unauthorized charges, and can widely fluctuate in value. It is possible that the residual value of the consumer's car, beyond the amount of the loan, could disappear through devaluation of the virtual currency. It is unclear

²⁰⁶ <https://www.azag.gov/fintech/participants>.

²⁰⁷ <https://sweetbridge.com/>.

²⁰⁸ <https://sweetbridge.com/asset-finance/>.

what the “Sweetbridge economy” is or why consumers would want to spend a virtual currency there. Virtual currencies have been rife with deception and abuses.

The 20% APR cap is within Arizona’s interest rate limit and is not unreasonable for a small loan, though it could be somewhat high if loans run into the thousands of dollars. It is not clear if there are fees on top of interest, or if there are other hidden costs through the use of virtual currencies or other features. More importantly, even if the APR were 0%, consumers who are attracted by “no credit check” may be unable to afford the payments and risk losing their cars.

A risky new product such as this one especially requires an evaluation of the bona fides, safety and soundness of the company and the oversight of a financial regulator. But by entering the sandbox and escaping Arizona’s licensing and related requirements, it appears that Sweetbridge will have little oversight.

11. The CFPB should emphasize transparency, not shielding information from the public.

The CFPB’s proposed information disclosure provisions are in tension with the requirements of the Freedom of Information Act (FOIA). The Bureau appears committed to doing everything it can to block the public from understanding the intentions and impact of companies that are submitting applications, the representations they have made, and the risks they pose for consumer harm.

Some of the information that companies submit may be protected from FOIA disclosure, but the proposal asserts far too broadly that the CFPB “expects” that much of the information submitted in response to certain application requirements will fall under the agency’s regulatory definition of “business information.”²⁰⁹ The CFPB defines that term in its rule on Disclosure of Records and Information as certain information that “may be protected from disclosure under Exemption 4 of the FOIA.”²¹⁰ FOIA requires, however, that to withhold information, an agency must not only determine that an exemption applies, but also conclude that disclosure would foreseeably harm an exemption-protected interest.²¹¹ The CFPB does not explain how or why it can forecast now that certain aspects of companies’ applications will (or even “may”) consistently satisfy both requirements.

Indeed, even under the less “streamlined” application requirements of the current NAL policy, the CFPB was able to make the full application of the Upstart NAL that was approved available to the public on the CFPB website.²¹² There appears to be little reason to anticipate that future applications could not also be made public. Moreover, the information that companies would submit under the proposal, and that the CFPB expects could be exempt, includes, in large part, information that companies likely make (or will make) public for marketing or investment purposes or in their terms of service: descriptions about how their products function and their terms,²¹³ as well companies’ commitments to reimburse consumers for

²⁰⁹ 83 Fed. Reg. at 64041, 64045.

²¹⁰ 12 C.F.R. § 1070.20(b)(1).

²¹¹ See 5 U.S.C. § 552(a)(8)(A)(i)(I).

²¹² See http://files.consumerfinance.gov/f/documents/201709_cfpb_upstart-no-action-letter-request.pdf.

²¹³ See 83 Fed. Reg. at 64,041 (referencing information submitted under I.B.2 of the no-action letter proposal), 64,045 (referencing information submitted under II.B.2 of the product-sandbox proposal).

harm caused by their sandbox offerings.²¹⁴ Exemption 4 does not protect “information [that] is already in the public domain.”²¹⁵ Thus, the CFPB should not presume that such information is exempt from public records requests.

The Bureau also claims that much of the information that companies will submit will be “confidential supervisory information,” protected under the Bureau’s Disclosure Rule, that is provided “to enable the Bureau to monitor for risks to consumers. . . .”²¹⁶ Notably, the CFPB’s definition of “confidential supervisory information,” for the purposes of its internal practices, is different from the determination of whether information would be exempt from disclosure in response to public records requests.²¹⁷ Still, the broad sweep of the CFPB’s statement about confidential supervisory information is ironic because the entire point of the NAL and sandbox applications will be *to stop* the Bureau from issuing supervisory findings or taking enforcement actions to address risks to consumers.

At bottom, the proposal’s information disclosure provisions appear designed to assure companies that the CFPB will not disclose (or likely will not disclose) some of the most important information about the products that it could exempt from regulatory requirements: the details of the covered products as well as their purported benefits and risks for consumers.²¹⁸ Rather than encouraging secrecy on matters that impact consumer protection, the Bureau should stand on the side of the public and promote transparency.

12. Conclusion

For the foregoing reasons, the proposal is unlawful and unwise and will result in harm to consumers. The Bureau should reject the proposed changes to the current NAL policy and should abandon the proposal to create a product sandbox.

Respectfully submitted,

Americans for Financial Reform Education Fund
Center for Economic Integrity (Arizona)
Center for Responsible Lending
Consumer Action
Consumer Federation of America
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low income clients)
Public Citizen
U.S. PIRG

²¹⁴ See *id.* at 64,045 (referencing II.D.6 of the sandbox proposal).

²¹⁵ *Niagara Mohawk Power Corp. v. U.S. Dep’t of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999).

²¹⁶ 83 Fed. Reg. at 64041.

²¹⁷ Certain information exempt from disclosure under FOIA is just one type of information that CFPB defines as “confidential supervisory information” for its own information-handling requirements. See 12 C.F.R. § 1070.2(i)(1). When it comes to FOIA, the CFPB does not have authority to broaden or narrow the scope of that statute’s exemptions. Courts do not “accord deference to agency interpretations of” FOIA. *Al-Fayed v. CIA*, 254 F.3d 300, 307 (D.C. Cir. 2001).

²¹⁸ See 83 Fed. Reg. at 64,041 (referencing information submitted under I.B.2, I.B.3, I.B.4, I.B.5, and I.D.5 of the proposed no-action provisions).