

Client Alert

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CFPB Publishes No-Action Letter Policy Statement

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On February 22, 2016, the Consumer Financial Protection Bureau (“CFPB” or the “Bureau”) published its Final Policy Statement (“Final Policy”) on No-Action Letters (“NALs”). The Final Policy follows a Proposed Policy on No-Action Letters (“Proposed Policy”) that the Bureau published in October 2014. The Bureau received 28 comment letters on the Proposed Policy; however, as discussed below, the Final Policy reflects only minor changes from the Proposed Policy.

Under the Final Policy, the CFPB staff may issue NALs that state that the CFPB staff has no present intention to recommend initiation of an enforcement or supervisory action with respect to particular aspects of a proposed product. The Bureau’s stated purpose for issuing the Final Policy is to “reduce regulatory uncertainty for a new product or service that offers the potential for significant consumer-friendly innovation.”¹ Although the Bureau offers NALs as a means of regulatory relief, the Bureau indicates in the Final Policy that NALs “will be provided rarely and on the basis of exceptional circumstances and a thorough and persuasive demonstration of the appropriateness of such treatment.”²

As discussed in our alert analyzing the Proposed Policy, while certainly commendable in theory, the practical value of a NAL may be limited. Financial institutions and start-ups will have to balance the qualified assurance of a NAL with the relatively burdensome application process, the limited value of a NAL, the Bureau’s express policy of granting NALs only in rare circumstances, and the Bureau’s ability to modify or revoke a NAL at any time and for any reason.

REQUESTS FOR NALs

To obtain a NAL, an individual or organization must submit a request explaining why a NAL is appropriate. The Final Policy outlines the following key requirements to include in a request:

- A description of the proposed product, including how it functions, the terms (including related disclosures) on which it will be offered, and the roles and relationships of the parties involved in the product;
- An explanation of how the proposed product is likely to provide substantial benefits to consumers and how such benefits differ from those in the present marketplace, as well as proposed metrics for evaluating whether those benefits are realized;
- A candid explanation of the risks posed by the product; and
- An explanation of why a NAL is necessary and appropriate to remove substantial regulatory uncertainty. This explanation should include identification of the specific provisions of the statutes and regulations for which a NAL is being requested, as well as an explanation of how the application of the statutes and regulations to the

¹ CFPB Press Release, *CFPB Finalizes Policy to Facilitate Consumer-Friendly Innovation* (Feb. 18, 2016), available at <http://www.consumerfinance.gov/newsroom/cfpb-finalizes-policy-to-facilitate-consumer-friendly-innovation/>.

² Policy on No-Action Letters; Information Collection, 81 Fed. Reg. 8,686, 8,694 (Feb. 22, 2016).

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proposed product is uncertain. The requester should also explain the reasons why the regulatory uncertainty cannot be effectively addressed through another means.

The CFPB staff will have sole discretion to grant requests for NALs. If the CFPB staff chooses to grant a request, they may grant the request either wholly or partially and may make the grant subject to limitations or conditions, including those regarding product usage or data-sharing with the Bureau.

When a NAL is granted, the CFPB staff will publish the letter, as well as a version or summary of the request, on the CFPB website. NALs will state that the CFPB staff has no present intention of recommending the initiation of an enforcement or supervisory action against the requester with respect to the particular aspects of the product and with regard to the specific provisions of the statutes and regulations that are the subject of the NAL. NALs are nonbinding on the CFPB and would not bind courts or others, including other regulators or litigants.

PROCEDURAL CHANGES FROM THE PROPOSED POLICY

The process set forth in the Final Policy for obtaining a NAL remains substantively unchanged from the Proposed Policy. For example, while several commenters told the CFPB that a NAL request under the Proposed Policy required an unduly burdensome amount of information, especially for smaller organizations with limited resources, the Final Policy was not modified to address the amount of information required.³

It is noteworthy that the Bureau modified its standard procedure for modification or revocation of a NAL. Specifically, the Final Policy states the Bureau's intention to provide advance notice to an applicant, advising the applicant that the Bureau intends to revoke or modify the NAL and permitting the applicant to respond.⁴ However, these procedural safeguards may be of little value, given that the Bureau has retained the right not to provide advance notice, in which case any revocation or modification may be immediate upon notice.

The Bureau also declined to add a timetable for approval or denial of a NAL once an application has been submitted to the Bureau. Such a timetable could have provided assurances that the NAL process could keep up with the rapid pace of industry development. Instead, the CFPB suggested that an applicant can withdraw its application if the CFPB is moving too slowly.⁵

Consistent with the Proposed Policy, the Final Policy provides that NALs generally would be publicly disclosed, denials would typically not be made public, and applications that the Bureau specifically declines to grant or deny, with or without explanation, could be made public if the CFPB staff believes that the information would be in the public interest.⁶ The Bureau did, however, address the confidentiality of materials included in a NAL request, as discussed further below.

OTHER CHANGES FROM THE PROPOSED POLICY

Critically, the effect and nonbinding nature of the NAL remains unchanged from the Proposed Policy. Despite the fact that several commenters advocated for binding—or, at least, more reliable—NALs, the CFPB stated that it has other “tools,” including the publication of guidance and official Bureau interpretations of regulations, as well as unofficial oral staff guidance provided in response to regulatory interpretive questions that can be submitted on an

³ *Id.* at 8,689-8,690.

⁴ *Id.* at 8,695.

⁵ *Id.* at 8,689.

⁶ *Id.* at 8,694.

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ongoing basis via email, which, according to the Bureau, adequately serve the goal of providing clarity in matters of potential regulatory uncertainty and facilitating compliance.

Additionally, the Bureau removed from the Proposed Policy the language categorically stating that it would not give no-action treatment to UDAAP matters.⁷ While the Bureau removed this categorical restriction from the Final Policy, the Bureau cautioned that it did not expect to commit significant resources to UDAAP-focused NAL requests.

Finally, as mentioned above, the Bureau attempted to address commenters' concerns regarding the publication of proprietary business information or trade secrets when a NAL becomes public.⁸ The CFPB stated that it plans to confer with the applicant with respect to what information is necessary to include in the application, what information would be redacted in publicly released documents, the timing of publication, and the application of the Bureau's rule concerning Disclosure of Records and Information (12 C.F.R. Part 1070) to NAL requests. The CFPB also added a statement to the Final Policy advising applicants to specifically identify confidential supervisory information that should be shielded from public disclosure.⁹

IMPORTANT CONSIDERATIONS

Although the Final Policy is aimed at providing greater regulatory certainty and facilitating the introduction of innovative consumer products to the financial marketplace, companies should approach the decision of requesting a NAL with deliberation and care. Requests for NALs require the production of a significant amount of information, and although the CFPB has stated that it will work with applicants to protect proprietary information, the CFPB makes no promises of confidentiality. In addition, the Final Policy emphasizes that NALs "will not be routinely available,"¹⁰ so companies should consider carefully whether their products meet the requirements set forth in the Final Policy. Finally, companies should remember that even if a NAL is granted, that letter may be limited in scope and may be modified or revoked by the CFPB at any time.

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⁷ *Id.* at 8,689.

⁸ *Id.* at 8,690.

⁹ *Id.* at 8,694.

¹⁰ *Id.*

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