

**BUREAU OF CONSUMER FINANCIAL PROTECTION**

**12 CFR Chapter X**

**[Docket No. CFPB-2018-0042]**

**Policy on No-Action Letters**

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Policy guidance.

**SUMMARY:** The Bureau of Consumer Financial Protection (Bureau) is issuing its revised Policy on No-Action Letters (Policy), which is intended to carry out certain of the Bureau's authorities under Federal consumer financial law.

**DATES:** This Policy is applicable on September 10, 2019.

**FOR FURTHER INFORMATION CONTACT:** For additional information about the Policy, contact Paul Watkins, Assistant Director; Edward Blatnik, Deputy Counsel; Albert Chang, Counsel; Thomas L. Devlin, Senior Counsel; Will Wade-Gery, Senior Advisor; Office of Innovation, at [officeofinnovation@cfpb.gov](mailto:officeofinnovation@cfpb.gov) or 202-435-7000. If you require this document in an alternative electronic format, please contact [CFPB\\_Accessibility@cfpb.gov](mailto:CFPB_Accessibility@cfpb.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

In section 1021(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Congress established the Bureau's statutory purpose as 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.<sup>1</sup> Relatedly, the Bureau’s objectives include exercising its authorities under Federal consumer financial law<sup>2</sup> for the purposes of ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation, and that outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens.<sup>3</sup>

As these provisions make clear, the Bureau’s statutory mission of protecting consumers is not limited to vigorously enforcing the law. It includes facilitating innovation in markets for consumer financial products and services, as innovation drives competition, which in turn lowers prices and promotes access to more and better products and services. Innovation holds the promise of benefitting consumers in numerous ways, including by creating or expanding access to products and services; increasing the range of products and services; improving the functionality of existing products and services; reducing prices; increasing consumer understanding and control; and enhancing safety and security.<sup>4</sup>

A primary means of facilitating innovation is removing barriers to innovation. This can be accomplished in a variety of ways. As noted, Congress expressly identified one of these: reducing unwarranted regulatory burdens. Another consists in reducing uncertainty regarding the meaning or application of statutory and regulatory provisions. Faced with such regulatory

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<sup>1</sup> 12 U.S.C. 5511(a).

<sup>2</sup> 12 U.S.C. 5481(14).

<sup>3</sup> 12 U.S.C. 5511(b)(3), (5).

<sup>4</sup> See, e.g., United Nations Secretary-General’s Special Advocate for Inclusive Finance for Development and Cambridge Centre for Alternative Finance, *Early Lessons on Regulatory Innovations to Enable Inclusive FinTech: Innovation Offices, Regulatory Sandboxes, and RegTech* (2019), available at <https://www.unsgsa.org/resources/publications> (“Innovation offices decrease barriers to entry by reducing regulatory uncertainty, which promotes the entry, capitalization, and growth of new firms in financial services markets. New entrants, in turn, promote innovation and competition. Increased competition can result in lower prices for consumers, a greater range of products, and better services, all of which promote financial inclusion.”) (citation omitted).

uncertainty, some companies may hesitate to develop and offer potentially beneficial products and services, not wishing to run the risk of supervisory findings, enforcement actions, or private lawsuits. Reducing this uncertainty may encourage these companies to offer these products and thereby benefit consumers.

Such regulatory uncertainty may be particularly acute in the case of innovative products and services, as such products and services may not have existed, or even been contemplated, at the time potentially applicable statutes and regulations were promulgated. In such circumstances, companies with innovative financial products or services may find it difficult to attract sufficient investment, business partners, or other support, and bring innovative ideas to market in a timely fashion.

Given that there are a variety of different impediments to innovation, a variety of different regulatory tools are needed to reduce such impediments. Congress has given the Bureau a variety of authorities under title X of the Dodd-Frank Act and the enumerated consumer laws<sup>5</sup> that it can exercise to promote its purpose and objectives, including facilitating innovation. These authorities include supervision and enforcement authority, and the authority to issue orders and guidance.<sup>6</sup> These authorities provide the basis for the Policy on No-Action Letters (Policy) and the No-Action Letters issued pursuant to the Policy. Issuing such No-Action Letters is also a means through which the Bureau can further its understanding of the legal and

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<sup>5</sup> 12 U.S.C. 5481(12).

<sup>6</sup> See 12 U.S.C. 5561 *et seq.* (enforcement authority); 12 U.S.C. 5531(a) (Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) enforcement authority); 12 U.S.C. 5514, 5515 (supervision authority); 12 U.S.C. 5511(a) (“The Bureau shall seek to implement and, *where applicable*, enforce Federal consumer financial law . . .”) (emphasis added); 12 U.S.C. 5512(b)(1). See also *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Board of Trade v. SEC*, 883 F.2d 525, 530-31 (7<sup>th</sup> Cir. 1989) (SEC no-action letter).

policy implications of innovative products and services to help support official interpretations and rulemakings.

The Bureau proposed the original version of its Policy on No-Action Letters in October 2014<sup>7</sup> and finalized it in February 2016 (2016 Policy).<sup>8</sup> In the preamble of the 2016 Policy, the Bureau anticipated that No-Action Letters would be provided rarely and on the basis of exceptional circumstances, and estimated that the Bureau would on average receive one to three actionable applications per year. This estimate was based on the features built into the 2016 Policy; *i.e.*, the 2016 Policy was *designed* to result in no more than three No-Action Letters per year. The Bureau issued only one No-Action Letter under the 2016 Policy in the nearly three-year period between its issuance and publication of the proposed Policy in December 2018.<sup>9</sup>

The Bureau has determined that the approach to facilitating consumer-beneficial innovation through No-Action Letters built into the 2016 Policy is not an adequate response to the extent of innovation occurring in markets for consumer financial products and services. Given that the 2016 Policy was designed to result in a small number of No-Action Letters per year, the Bureau determined that the 2016 Policy required modification. Accordingly, in December 2018, the Bureau proposed to revise the 2016 Policy in order to more effectively carry out the Bureau's statutory purpose and objectives.<sup>10</sup>

## II. Overview of Comments

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<sup>7</sup> 79 FR 62118 (Oct. 16, 2014).

<sup>8</sup> 81 FR 8686 (Feb. 22, 2016).

<sup>9</sup> See Bureau of Consumer Financial Protection, CFPB Announces First No-Action Letter to Upstart Network (Sept. 14, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-first-no-action-letter-upstart-network/>.

<sup>10</sup> Policy on No-Action Letters and the BCFP Product Sandbox, 83 FR 64036 (Dec. 13, 2018). As indicated by the title of that proposal, it consisted of two parts. The first part, concerning No-Action Letters exclusively, is being finalized in the instant document. The second part, concerning the creation of the Product Sandbox, is being finalized simultaneously in a separate document as the Compliance Assistance Sandbox Policy. The Bureau has determined that finalizing the two policies in separate documents will be less confusing for potential applicants, and better serve the public interest.

The Bureau received 31 unique comments in response to the December 2018 proposal. Industry trade associations and other industry groups submitted 12 comments. Individual financial services providers submitted three comments. Four comments were submitted by consumer groups and civil rights organizations. There were six comments from research and advocacy organizations, two from groups of State Attorneys General, one from a group of State regulators, one from an academic, one from a law firm, and one from an individual.<sup>11</sup>

Industry commenters uniformly supported the proposed Policy, and stated that it is more likely to incent companies to apply for a No-Action Letter than the 2016 Policy. One of the two groups of State Attorneys General likewise supported the proposed Policy. Although generally supportive of the proposed Policy, industry commenters recommended discrete changes to certain provisions of the proposed Policy.

In contrast, all but one of the consumer group commenters opposed the proposed Policy on numerous grounds, and stated that it marks a step backwards vis-à-vis the 2016 Policy. The second group of State Attorneys General were of the same opinion. One consumer group stated that provision of compliance assistance<sup>12</sup> by the Bureau is not really needed because (i) few technologies lead to products where the application of a well-established law or regulation is in

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<sup>11</sup> One of the four consumer group and civil rights organization comment letters was a lengthy, detailed letter by a consortium of nine consumer groups. Many of the comments in that letter were echoed in four shorter letters: one from a consortium of 80 other consumer groups and civil rights organizations; one from an individual consumer group; one from an individual civil rights organization; and one from a law firm. In light of this overlap, and for the sake of brevity, the term “consumer groups” is used in the discussion of comments in section III to refer to comments included in the lengthy letter, as well as the same comments included in the four shorter letters.

<sup>12</sup> As did the 2016 Policy, the proposed Policy used the concept of statutory/regulatory “relief” as a generic term for describing agency mechanisms for addressing regulatory uncertainty and barriers. The CFTC uses the same term for this purpose in its procedures governing various such mechanisms. *See* 17 CFR 140.99. However, a number of commenters that generally opposed the proposed Policy read the term “relief” as signaling an intention by the Bureau to assist applicants in evading the law. That was not the Bureau’s intention. Rather, the relief intended was relief from statutory/regulatory uncertainty, not relief from statutory or regulatory requirements. To clarify this point, the final Policy uses “compliance assistance” as the generic term for such mechanisms.

question, and (ii) the vast majority of fintech innovation falls within known product categories and rarely raises novel questions of law and policy. The Bureau disagrees with this assessment.

The other consumer groups and the group of State Attorneys General appear to agree with the Bureau's view that innovative products and services face regulatory uncertainty, but disagreed with the Bureau's approach in the proposed Policy to address it. Instead, these commenters generally supported the approach taken in the 2016 Policy, and thus opposed virtually every revision of the 2016 Policy proposed by the Bureau.

This disagreement between the Bureau and these commenters regarding the optimal level of facilitation of consumer-beneficial innovation may be based, in turn, on a disagreement about the Bureau's consumer protection mission under title X of the Dodd-Frank Act. As these commenters emphasized, Congress gave the Bureau supervisory and enforcement authority to protect consumers from unfair, deceptive, and abusive acts and practices, as well as other violations of Federal consumer financial law.<sup>13</sup> As noted above, however, the Bureau reads the purpose and objectives Congress set for the Bureau as clearly signaling that the Bureau should *also* exercise its numerous authorities to facilitate access and innovation in markets for consumer financial products and services. These commenters, in contrast, appear to diminish this aspect of the Bureau's consumer protection mission. For example, one consumer group letter states that facilitating consumer-beneficial innovation falls outside the Bureau's "core mission."

Many comments from stakeholders across the spectrum requested greater specificity or detail regarding various provisions of the proposed Policy. The Bureau notes in this regard that the Securities and Exchange Commission's (SEC) procedures regarding no-action letters are

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<sup>13</sup>12 U.S.C. 5511(b)(2); 5536(a).

significantly shorter and less detailed than the proposed Policy.<sup>14</sup> Nonetheless, the SEC has managed to provide scores of no-action letters per year over the course of many decades in a manner that is widely viewed as promoting the interests of regulated entities, shareholders, and the public more generally.<sup>15</sup> Indeed, a number of the streamlining revisions in the proposed Policy were designed to move the Policy in the direction of the SEC model.

The Policy is designed to apprise potential applicants and other stakeholders of one way in which the Bureau plans to exercise its supervision and enforcement discretion, namely, through the issuance of No-Action Letters under the Policy. The Policy is necessarily relatively general as compared to particular No-Action Letters issued under it. Moreover, given that the Policy is being issued based on relatively little practical experience in issuing No-Action Letters, the Bureau is concerned that an attempt to provide significantly more detail and specificity at this time would be counterproductive. Nevertheless, the Bureau has provided additional specificity and detail in a number of instances, as explained below. As the Bureau gains experience implementing the Policy and engages in additional stakeholder outreach, it will consider the extent to which additional clarifications or adjustments are necessary or appropriate.

Finally, the Bureau voluntarily sought public comment on the proposed Policy because it recognizes that facilitating consumer-beneficial innovation is a topic in which many stakeholders have a keen interest, and because it anticipated receiving comments that would enable it to improve the proposed Policy. The Bureau appreciates all of the comments received and has given each of them careful consideration. In the proposal, the Bureau strove to facilitate consumer-beneficial innovation, while minimizing the risk of consumer harm. Based on the

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<sup>14</sup> Securities and Exchange Commission, Procedures Applicable to Requests for No-Action and Interpretive Letters, Securities Act Release No. 6269 (Dec. 23, 1980) (*available at*: <http://www.sec.gov/rules/other/33-6269.pdf>).

<sup>15</sup> See, e.g., Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 Cornell L. Rev. 921, 934 n.45 (1998).

many constructive, and instructive, comments received, the Bureau has further revised the Final Policy in line with these goals.

### **III. Summary of Comments, Bureau Responses, and Resulting Policy Changes**

This section provides a summary of the significant comments received by subject matter. It also summarizes the Bureau's assessment of such comments by subject matter and, where applicable, describes the resulting changes that the Bureau is making in the final Policy.<sup>16</sup>

#### **A. Compliance with Administrative Law**

The Bureau received a number of comments claiming that the proposed Policy violates applicable rulemaking requirements as well as other requirements of administrative law. Relatedly, some commenters argued that individual No-Action Letters could violate applicable rulemaking requirements.

##### **1. Legal Status of the Policy**

In section III of the document published in the *Federal Register* on December 13, 2018, the Bureau stated that, if finalized, the two-part proposed Policy would constitute an agency general statement of policy and a rule of agency organization, procedure, or practice exempt from the notice and comment rulemaking requirements under the Administrative Procedure Act (APA). Due to the types of compliance assistance that would be available under Part II of the two-part proposed Policy, the Bureau deemed it appropriate to treat Part II as both a general statement of policy and a procedural rule. It was largely for this reason that section III stated that the entire proposal (*i.e.*, both parts), if finalized, would constitute a general statement of policy and a procedural rule. Now that the Bureau is separately finalizing the No-Action Letter Policy,

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<sup>16</sup> The Bureau has also made a number of technical changes to the final Policy to accommodate the revisions described below and to increase clarity.



it has determined that the Policy is more appropriately characterized solely as a general statement of policy.

Consumer groups disagreed with the Bureau’s characterization of the proposed Policy as a general statement of policy, arguing that the proposed Policy, if finalized, would be a *de facto* legislative rule because (i) it would limit the Bureau’s discretion to take a supervision or enforcement action once it issues a No-Action Letter; and (ii) it would replace staff-issued No-Action Letters with Bureau-issued No-Action Letters.<sup>17</sup> Each of these claims concerns the binding nature of particular No-Action Letters, rather than the proposed Policy – a topic addressed in section III.A.2 below.

As finalized, the Policy is a non-binding general statement of policy under applicable law.<sup>18</sup> As stated in section IV below, the Policy is intended to provide information to interested parties regarding the Bureau’s plans to exercise its enforcement and supervisory discretion to provide No-Action Letters.<sup>19</sup> The Bureau retains the discretion to change these plans as it gains experience in operating the Policy – just as it had done in the 2016 Policy.<sup>20</sup>

## **2. Legal Status of No-Action Letters**

As noted above, and in the proposal, a particular No-Action Letter would constitute an exercise of the Bureau’s supervisory and enforcement discretion. Consumer groups appeared to

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<sup>17</sup> The same commenters also took issue with the Bureau’s characterization of the proposed Policy as a procedural rule. In light of the Bureau’s determination that it is more appropriate to characterize the Policy as a general statement of policy only – and not also a procedural rule – the Bureau is not responding to this line of comment in the instant document. Rather, the Bureau is responding to this line of comment in the document finalizing Part II of the proposed Policy as the Compliance Assistance Sandbox Policy.

<sup>18</sup> *See, e.g., Syncor Int’l v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (“By issuing a policy statement, an agency simply lets the public know its current . . . approach. The agency retains the discretion and the authority to change its position—even abruptly—in any specific case because a change in its policy does not affect the legal norm.”).

<sup>19</sup> *See, e.g., Attorney General’s Manual on the Administrative Procedure Act* 30 n.3 (1947) (providing that policy statements are issued “to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”)

<sup>20</sup> 81 FR 8686, 8687 (Feb. 22, 2016).

accept this characterization as to some No-Action Letters, but argued that other No-Action Letters could be *de facto* legislative rules issued in contravention of applicable law because they could change, in a binding manner, and broadly, whether and how consumer protection laws apply in the future. The claim that such No-Action Letters would be binding and have future effect is based on their claim that No-Action Letters would restrict the Bureau's ability to take enforcement or supervision action in the future. That claim was based, in turn, on two features of the proposal: (1) the Bureau's statement that, whereas a No-Action Letter under the 2016 Policy was a staff recommendation of no-action, a No-Action Letter under the proposed Policy would be issued by duly authorized officials of the Bureau in order to provide recipients greater assurance that the Bureau itself stands behind the No-Action Letters; and (2) the Bureau's proposal to omit from No-Action Letters a statement that the letter is subject to modification or revocation at any time at the discretion of the staff for any reason.

As regards the first feature, the shift from staff-issued No-Action Letters to Bureau-issued No-Action Letters was proposed to address concerns that a no-action recommendation by some Bureau staff would be reversed sometime later by other Bureau staff with a different view of the matter, and to provide applicants with a reasonable basis for believing that this "whiplash" scenario would not occur under the proposed Policy. The commenters' apparent argument that a no-action position issued by an agency, as opposed to a staff recommendation of no-action, transforms an exercise of enforcement discretion into a legislative rule is without basis. It is well-settled that agency-level exercise of enforcement discretion, even if stated in binding terms, does not constitute legislative rulemaking.<sup>21</sup>

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<sup>21</sup> See, e.g., *Ass'n of Irrigated Residents v. E.P.A.*, 494 F.3d 1027 (D.C. Cir. 2007); *Schering Corp. v. Heckler*, 779 F.2d 683 (D.C. Cir. 1985); *New York State Dept. of Law v. F.C.C.*, 984 F.2d 1209 (D.C. Cir. 1993).

As regards the second feature, the Bureau proposed omitting the “any time/any reason” statement because it was concerned that this statement may create a false impression about the Bureau’s intent regarding revocation, and thus may deter entities with potentially beneficial products and services from applying for a No-Action Letter. It could mistakenly be understood to suggest that the Bureau plans to modify or revoke No-Action Letters *ad libitum*. As the Bureau noted in the proposal, other Federal agencies with no-action letter programs have terminated no-action letters very rarely. The Bureau anticipates that revocations would be equally rare under the Policy. Accordingly, section C.7 of the final Policy replaces the “any time/any reason” statement with the more accurate statement that the Bureau may terminate<sup>22</sup> a No-Action Letter if it determines that doing so is necessary or appropriate to promote the primary purposes of the Policy as stated therein, and gives three examples of such circumstances.

As noted, the consumer groups also identified effecting a change in existing law or regulations as an element of No-Action Letters that could be legislative rules. *Prima facie*, an exercise of discretion not to enforce a particular statutory or regulatory provision against a particular entity does not effect a change in the agency’s substantive interpretation or implementation of the provision. The provision remains unchanged, and the agency may decide to bring an enforcement action against another entity based on a violation of the provision.

Finally, as noted, the consumer groups also identified breadth or generality as a feature of No-Action Letters that could be legislative rules. They identified several types of generality: (i) No-Action Letters that would apply generally to all consumers that might use a given company’s product or service; (ii) No-Action Letters that would apply to all members of an industry association; and (iii) No-Action Letters that would apply to all customers of a software provider.

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<sup>22</sup> As explained below, the Bureau is replacing the term “revocation,” which was used in the proposed Policy, with the term “termination” in the final Policy.

These commenters indicated that No-Action Letters of the second two types could result from the proposed alternative process for applications by third parties, under which an industry association or service provider could apply for a provisional No-Action Letter on behalf of their member or customers, and additional members or customers could be added to the letter over time.

The Bureau proposed this alternative process to address circumstances in which the standard process of applying for a No-Action Letter might not work for one reason or another. As explained in section III.F below, the Bureau is finalizing this aspect of the proposal by adding a new section E to the Policy, which provides greater detail and clarity regarding alternative application, assessment, and issuance procedures. Like the standard process described in sections A through C, these alternative procedures are necessarily somewhat general and open-ended. Not only is the Policy a general statement of policy, but, as noted in section II above, the Bureau has relatively little experience in implementing this type of policy. And this is *a fortiori* the case as regards the alternative application procedures, which were not a feature of the 2016 Policy. The Bureau is mindful of the concerns raised by commenters and intends to implement these procedures in a manner consistent with the APA's procedural and substantive requirements.

### **3. Arbitrary and Capricious**

The proposed Policy stated that its main purpose is to provide a mechanism through which the Bureau may more effectively carry out its statutory 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; and its statutory objectives, which include exercising its authorities under Federal consumer financial

law for the purposes of ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation. In the preamble of the proposed Policy, the Bureau described various changes it was proposing to make to the 2016 Policy and explained that those changes were designed, *inter alia*, to streamline the application and review process and to bring the Policy more in line with certain aspects of no-action letter programs operated by other Federal agencies.

Consumer groups claimed that the proposed Policy, if finalized, would be arbitrary and capricious for several reasons. The Bureau notes that a determination of whether the Policy is arbitrary or capricious would be based on the content of the final Policy, not the proposed Policy. Accordingly, the discussion below references the final Policy as well as the proposed Policy.

First, consumer groups contended that the proposed Policy entirely fails to consider an important aspect of the problem the proposed Policy was intended to address by making no mention of its impact on consumers. The Bureau disagrees. As noted in the proposed Policy and in section II above, the main purpose of the Policy is to more effectively carry out the Bureau's consumer-focused purpose and objectives. In addition, the Bureau expects that (i) applications for a No-Action Letter under the Policy will include a discussion of both consumer benefit and consumer risk, and (ii) the Bureau's assessment of applications will place particular emphasis on these aspects of the application.

Second, consumer groups claimed that the Bureau failed to give adequate reasons for the proposed revisions of the 2016 Policy. More specifically, they stated that the only rationale the Bureau provided was that more incentives need to be provided to companies to apply for a No-Action Letter in light of the fact that the Bureau issued only one No-Action Letter under the 2016 Policy. As noted above, however, the Bureau provided other rationales, including

streamlining the application and review processes and bringing the Policy more in line with certain features of no-action letter programs operated by other Federal agencies.

Third, these commenters asserted that the proposed Policy offers “virtually no explanation” of the proposed revisions to the 2016 Policy. As noted above, however, such explanations were provided in the proposed Policy. Moreover, additional explanations of the revisions are provided throughout the instant preamble.

### **B. Scope of the Proposed Policy**

A number of comments from stakeholders across the spectrum addressed the subject matter scope of the proposed Policy, *i.e.*, the types of products or services that could be included in an application. Section A.3 of the 2016 Policy provided that No-Action Letters were not intended for either well-established products or purely hypothetical products that are not close to being able to be offered. And in response to comments on the proposed 2016 Policy regarding the types of products or services within its scope, the Bureau noted that the 2016 Policy was limited to emerging products. The proposed Policy omitted the statement regarding well-established products and hypothetical products, and likewise did not state that No-Action Letters would be limited to emerging products and services.

Consumer groups opposed these proposed changes, and interpreted them as signaling the Bureau’s intention to provide No-Action Letters for well-established products that do not need a No-Action Letter, and to give companies a “back-door channel” to obtain outcomes they failed to obtain through the notice-and-comment process. This was not the Bureau’s intent in proposing these changes. As noted above, one of the primary bases of the Policy is to more effectively implement the Bureau’s statutory objective of facilitating innovation. Innovation is a broad concept, and not limited to new or emerging products and services. As regards the

concern that the Bureau intends to grant No-Action Letters in cases where they are not needed, it is unclear why an entity would take the trouble to apply for a No-Action Letter in such a case. In any event, the Bureau has no intention to issue No-Action Letters in such circumstances.

The Bureau proposed to omit the statement about hypothetical products because it was concerned that the statement might discourage applications regarding products and services under development that could benefit consumers. Indeed, it is for this reason that the Bureau proposed accepting applications from service providers and is including a process for such applications in section E.1 of the final Policy (as discussed in section III.F below).

Industry commenters generally understood the Bureau's intent in proposing to omit the above statements, but asked the Bureau to state more expressly in the final Policy that the Policy is not intended to be limited to new or emerging products. That is indeed the case, and the text of the final Policy is consistent with that position.

### **C. Application Elements**

In finalizing the 2016 Policy, the Bureau addressed two types of comments on the application section of the proposed 2016 Policy: (i) comments that the proposal would have required applicants to submit an unduly burdensome volume of information; and (ii) comments that the information requirements be minimized specifically for smaller organizations that may have relatively fewer resources to devote to the No-Action Letter process. The Bureau declined to reduce the volume of information to be included in applications for a No-Action Letter based on its belief that the volume was not unduly burdensome. The Bureau's main rationale in this regard was its expectation that any conscientious firm intending to launch a consumer financial product or service that would raise substantial regulatory questions would compile the same information on its own, apart from an application for a No-Action Letter.

In addition, the Bureau stated that it planned to monitor the effectiveness of the 2016 Policy and to assess periodically whether changes to the Policy would better effectuate the purposes of facilitating innovation and otherwise substantially enhancing consumer benefit. In the proposed Policy, the Bureau explained that it was proposing to revise the 2016 Policy in various respects for a number of reasons. Most generally, the Bureau explained the proposed changes were designed to increase utilization of the Policy, thereby enabling the Bureau to more effectively carry out its statutory purpose and objectives. More specifically, the Bureau explained that certain proposed changes were designed to (i) streamline the application and review process by eliminating redundant and unduly burdensome elements; and (ii) more closely align the Policy with certain elements of no-action letter programs operated by other Federal agencies.

The Bureau believes that the low level of interest in applying for a No-Action Letter under the 2016 Policy indicates that the application elements included in the 2016 Policy were in fact unduly burdensome, particularly when viewed as a total package. In addition, the Bureau believes that a more streamlined set of application elements will ensure that smaller entities are not disadvantaged relative to larger entities in being able to take advantage of the Policy. The Bureau also believes that the rationale provided in the 2016 Policy for why the package of application information was not unduly burdensome is inapplicable or overstated as regards certain application elements in the 2016 Policy, as explained below.

Industry commenters generally supported the proposed revisions of the application section of the 2016 Policy. Consumer groups opposed each proposed revision, and in some cases urged the Bureau to request more information from applicants than is specified in the 2016 Policy.



## 1. Explanation of Consumer Risk

Section A.5 of the 2016 Policy instructed applicants to include a candid explanation of potential consumer risks posed by the product – particularly as compared to other products available in the marketplace – and undertakings by the applicant to address and minimize such risks. Section A.14 of the 2016 Policy instructed applicants to include a description of any particular consumer safeguards the applicant will employ, although they may not be required by law, if a No-Action Letter is issued, including any mitigation of potential for or consequences of consumer injury. It went on to say that the description should specify the requester’s basis for asserting and considering that such safeguards are effective, and should also address any future study the requester will undertake to further evaluate the effectiveness of such safeguards.

The Bureau proposed replacing section A.5 with a similar instruction to include an explanation of the potential consumer risks posed by the product or service and/or the manner in which it is offered or provided, and how the applicant(s) intends to mitigate such risks. The Bureau proposed omitting section A.14 altogether. Consumer groups asserted that these proposed revisions would lead to the Bureau granting No-Action Letters without any reliable assessment of risks to consumers, and urged the Bureau not to finalize the proposed revisions. The Bureau believes that proposed revisions to section A.5, as finalized, retain the core information needed for the Bureau to assess consumer risk. The information to be provided in applications for no-action letters provided by other Federal agencies typically does not include a comparison to risks posed by competitors’ offerings.<sup>23</sup> Nor does the Bureau believe that

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<sup>23</sup> See, e.g., Securities and Exchange Commission, Procedures Applicable to Requests for No-Action and Interpretive Letters, Securities Act Release No. 6269 (Dec. 5, 1980) (available at: <http://www.sec.gov/rules/other/33-6269.pdf>); Commodity Futures Trading Commission, Requests for Exemptive, No-Action and Interpretive Letters, 17 CFR 140.99; Federal Housing Finance Agency, 12 CFR 1211.1, 1211.4, 1211.6; Federal Energy Regulatory Commission, Informal Staff Advice on Regulatory Requirements; Interpretive Order Regarding No-Action Letter Process, 70 FR 71487 (Nov. 29, 2005).

potential applicants typically have such information ready to hand, including especially smaller entities. The same is true of the “future study” portion of section A.14. The Bureau thus remains of the view that these elements of the 2016 Policy are unduly burdensome.

The Bureau likewise continues to believe that the remainder of section A.14 of the 2016 Policy is largely redundant vis-à-vis section A.5. A description of any particular consumer safeguards the requester will employ, including any mitigation of potential for or consequences of consumer injury, and a specification of the requester’s basis for asserting and considering that such safeguards are effective (per section A.14) is substantially similar to a candid explanation of potential consumer risks posed by the product and undertakings by the requester to address and minimize such risks (per section A.5).

More generally, section B of the final Policy specifies that the Bureau intends to base its assessment of applications, *inter alia*, on the quality and persuasiveness of the application, with particular emphasis on the consumer risk element. This should incent applicants to ensure that the information they submit regarding consumer risk is of high quality and persuasive.

## **2. Substantial Consumer Benefit and Substantial Legal Uncertainty**

The 2016 Policy instructed applicants to explain how the product in question is likely to provide “substantial” consumer benefit to consumers, and to identify the “substantial” regulatory uncertainty on which the request for a No-Action Letter is based. These were key features of a policy designed to result in one to three actionable No-Action Letter applications per year. The Bureau thus proposed to eliminate these limitations as part of its general policy shift toward increasing the level of support for consumer-beneficial innovation. Industry commenters and advisory/research organizations supported these proposed changes. Consumer groups opposed them.

Regarding the proposed elimination of “substantial” as to consumer benefit, consumer groups’ opposition appears to be based on their general support of the approach to innovation-facilitation taken in the 2016 Policy. The Bureau is finalizing the revised application element as proposed, *i.e.*, as instructing applicants to include an explanation of the potential consumer benefits of the product or service and/or the manner in which it is offered or provided, because it continues to believe this change vis-à-vis the 2016 Policy is needed to increase use of the Policy.

The Bureau is finalizing the proposed elimination of “substantial” as to legal uncertainty for the same reason. Consumer groups noted that the proposed Policy instructs applicants instead to identify “potential” uncertainty for which a No-Action Letter is needed. The Bureau acknowledges that use of the term “potential” in this context can be improved. The Bureau’s use of this term was driven by its recognition that the full extent of uncertainty may not be apparent at the time an application is submitted. To allow for this circumstance, the proposed Policy includes a footnote explaining that the Bureau recognizes that in some cases it may be difficult to determine precisely which provisions would apply, in the normal course, to the product or service in question; that, in other cases, the applicant may lack the legal resources to make a fully precise determination; and that, in such circumstances, the applicant should provide the maximum specification practicable under the circumstances and explain the limits on further specification. It is thus unnecessary to attempt to make the same point using the term “potential,” and that term is not included in section A.5 of the final Policy.

### **3. Compliance with Other Law**

The Bureau proposed eliminating three elements of section A of the 2016 Policy that concerned compliance with other law in some manner. Section A.6.c required a showing of the product’s compliance with other relevant Federal and State regulatory requirements. Section

A.10 required an affirmation that, to the requester’s knowledge (except as specifically disclosed in the request), neither the requester nor any other party with substantial ties to transactions involving the product is the subject of an ongoing, imminent, or threatened governmental investigation, supervisory review, enforcement action, or private civil action respecting the product, or any related or similar product. Section A.11 required an affirmation that (except as specifically disclosed in the request) the principals of the requester have not 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. Relatedly, section C.7 of the 2016 Policy – which the Bureau also proposed eliminating – provided that one of the considerations Bureau staff would use in assessing applications was whether the applicant is demonstrably in compliance with other relevant Federal and State regulatory requirements.

Industry commenters were generally supportive of these proposed revisions. Consumer groups worried that these proposed revisions signaled the Bureau’s intent to short-circuit enforcement of the law by other government agencies or consumers and to interfere in ongoing disputes, and urged the Bureau to reinstate them. The Bureau declines to do so for a number of reasons. First, the Bureau is concerned that these elements of section A of the 2016 Policy, in combination with section C.7 of the 2016 Policy, unnecessarily discouraged viable applications. Potential applicants could have interpreted these provisions to mean that No-Action Letters would only be provided to entities, individuals, and products/services that had never been so much as threatened with some type of governmental action or private lawsuit. Indeed, potential applicants could have interpreted section A.10 to mean that there would be no point in submitting an application for a No-Action Letter if other entities with “substantial ties” to

transactions involving the product or service, or even “related or similar” products or services, had been threatened with such action or suits.

Second, the Bureau is concerned that these provisions are unduly burdensome – as suggested by commenters on the proposed 2016 Policy. An applicant would have to “show” or “demonstrate” that the product or service was compliant with all relevant law. An applicant would have to list not only ongoing investigations or lawsuits, but also “threatened” investigations and suits. And the list would have to contain not only actions and suits targeted at the applicant, but also those targeted at any entity with “substantial ties” to “related or similar” products or services. An application would have to list all types of adverse actions against the principals of the applicant during the prior ten years. Finally, the applicant effectively would have to attest that these lists are full and complete.<sup>24</sup>

Third, the Bureau believes that the more effective and efficient means of handling the concerns raised by consumer groups is to clarify that the Bureau expects its assessment of applications (described in section B of the final Policy) to include due diligence regarding the applicant, its principals, and the product or service in question. Despite not including sections A.7, A.10, and A.11 of the 2016 Policy in the final Policy for the reasons set forth above, the Bureau does not intend to allow the Policy to be used – or rather abused – by entities seeking to evade investigations or actions by other regulators. On the contrary, the Bureau intends to conduct necessary and appropriate due diligence on applicants – including consulting with other regulators – to ensure that the Policy is used for its intended purposes.

#### **4. Duration and Data Sharing**

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<sup>24</sup> The Bureau notes that procedures governing applications for no-action letters issued by other Federal regulators typically do not include this type of listing of ongoing or threatened actions by other regulators and private litigants. *See* n.22, *supra*.

The 2016 Policy did not expressly provide that No-Action Letters would be of limited duration. But section A.13 instructed applicants to specify whether the request is limited to a particular time period. And section C.8 provided that the Bureau would base its assessment of applications, in part, on the extent to which the application is sufficiently limited in time, volume of transactions, or otherwise, to allow the Bureau to learn about the product and the aspects in question while minimizing any consumer risk. There was thus a suggestion that applications for No-Action Letters of unlimited duration might be disfavored.

Section A.9 of the 2016 Policy instructed applicants to include an undertaking, if the request is granted, to share appropriate data regarding the product with the Bureau, including data regarding the impact of the product on consumers, and its plans for development of additional data. Section C.9 provided that the Bureau's assessment of applications would be based, in part, on the extent to which any data that the entity has provided and agrees to provide to the Bureau regarding the operation of the product's aspects in question will be expected to further consumer protection.

In the proposed Policy, the Bureau stated that the default assumption under the proposed Policy would be that No-Action Letters would be of unlimited duration and that there would be no expectation of data sharing. The Bureau explained that it was proposing these changes in order to bring the Policy more in line with certain elements of the no-action letter programs of other agencies.

Industry commenters generally supported these proposed shifts, while consumer groups opposed them. In consumer groups' view, the duration of No-Action Letters should be determined on a case-by-case basis. If a No-Action Letter addresses a narrow technical issue there may be no reason for an end date. But UDAAP-focused No-Action Letters, for example,

should be of short duration. Similarly, consumer groups advised the Bureau to at least require No-Action Letter recipients to submit data on the consumer impact of the products or services in question.

The Bureau believes there is some merit to the consumer groups' point that a one-size-fits-all approach to the duration of No-Action Letters is inadvisable. In certain cases, it may be appropriate to limit the duration of a No-Action Letter. Indeed, in some cases an applicant itself might wish the No-Action Letter to be of limited duration. However, the Bureau believes that, to account for such variation, it is not necessary to change the Policy as proposed. Nothing in the final Policy prevents No-Action Letters of limited duration. In a given case, if the Bureau and/or the applicant believes that a temporal limitation is appropriate, such a limitation can be included in the No-Action Letter.

The Bureau declines the specific request to require recipients of a No-Action Letter under the Policy to routinely submit data regarding consumer impact. However, the Bureau agrees with the general concern behind this specific request: if the product or service covered by a No-Action Letter is not performing as anticipated in the application – including especially by injuring consumers – it is important for the Bureau to become aware of that fact as soon as reasonably possible. To address this general concern, a No-Action Letters under the proposed Policy would have required recipients to inform the Bureau of material changes to information included in the application that would materially increase the risk of material, tangible harm to consumers. As noted below in section III.H.1, commenters found this “material, tangible harm” standard to be vague and subjective. To address this issue, and to increase the likelihood that the Bureau will learn of any consumer injury caused by the product or service covered by a No-Action Letter in a timely manner, the Bureau is revising this provision (section C.4 in the final

Policy) to include the Bureau’s expectation that a No-Action Letter will require recipients “to apprise the Bureau of (a) material changes to information included in the application and (b) material information indicating that the described aspects of the product or service are not performing as anticipated in the application.” In addition, the Bureau is adding a footnote to section C.4 explaining that “not performing as anticipated” includes the materialization of consumer risks identified in the application, and the materialization of other consumer risks not identified in the application.

## **5. Non-Endorsement**

Section A.10 of the 2016 Policy advised applicants to include a commitment that, if the application is granted, the recipient will not represent that the Bureau or its staff has licensed, authorized or endorsed the product, or its permissibility or appropriateness, in any way. In the proposed Policy, the Bureau proposed deleting this element as part of its general streamlining effort.

Consumer groups urged the Bureau to retain this element. The Bureau declines to do so, but agrees with the commenters’ more general point that receipt of a No-Action Letter should not be misconstrued to be the Bureau’s endorsement of the product or service in question – which could potentially give the recipient an unfair advantage over its competitors or mislead consumers. Accordingly, the Bureau is adding to the list of statements that would be included in a No-Action Letter a statement that the No-Action Letter does not constitute an endorsement of the product or service that is the subject of the letter, or of any other product or service offered or provided by the recipient(s).<sup>25</sup>

## **D. Bureau Assessment of Applications**

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<sup>25</sup> See section C.3(e) of the final Policy.



## **1. Assessment Factors**

Consistent with the Bureau's proposed streamlining of the application elements of the 2016 Policy, the Bureau proposed streamlining section C of the 2016 Policy to focus the Bureau's assessment on the core application elements: the potential benefits of the product or service, its potential consumer risks, and the need for a No-Action Letter. Industry commenters generally supported these proposed changes. Consumer groups opposed these proposed changes, and asserted that they would result in vague assessment criteria and demand no accountability to the Bureau or to the public. They accordingly urged the Bureau to retain all of the assessment criteria in the 2016 Policy.

The Bureau emphasizes that it did not propose a wholesale replacement of the assessment elements of the 2016 Policy. Rather, as noted, the Bureau proposed retaining what it viewed as the core assessment elements, and discarding only those falling outside the core. More specifically, the proposal would have largely retained sections C.2 (consumer benefit); C.4 (consumer risk); and C.5 (regulatory uncertainty). The Bureau believes that section C.1, regarding consumer understanding, was largely redundant vis-à-vis sections C.2 and C.4; that section C.3, regarding the availability of benefits in the existing marketplace, was largely redundant vis-à-vis section C.2; and that section C.6, regarding whether the identified regulatory uncertainty may be better addressed by other means, was largely redundant vis-à-vis section C.5. As for section C.7, regarding compliance with other law, it is addressed above in section III.C.3. Similarly, sections C.8 and C.9, regarding temporal duration and data sharing, are addressed above in section III.C.4. The same is true to some extent of section C.10, regarding the applicant's amenability to public disclosure of relevant data. Since the default assumption under

the final Policy is that no data sharing will be required, the applicant's amenability to public disclosure of shared data is generally not a relevant assessment element.

More generally, the Bureau acknowledges that the assessment section of the proposal may have sketched an incomplete picture of the Bureau's intended assessment of applications. The Bureau intended to apprise potential applicants and other interested stakeholders that its assessment of applications would focus on the quality and persuasiveness of the applications, particularly the elements concerning consumer benefit, consumer risk, and regulatory uncertainty. The Bureau did not intend to suggest that other factors will not play a role in its decisions. To remove any such misimpression, the Bureau is revising section C of the final Policy to clarify that it expects its assessment of applications to involve a complicated balancing of many factors, including an assessment of the quality and persuasiveness of the application, with particular emphasis on the information specified in sections A.3, A.4, and A.5; as well as information about the applicant and the product or service in question derived through Bureau due diligence processes; the extent to which granting the application would be consistent with Bureau enforcement and supervision priorities; an assessment of litigation risk; and available Bureau resources.

## **2. Assessment Timeframe**

The proposed Policy stated the Bureau's intention to grant or deny an application within 60 days of notifying the applicant that the Bureau has deemed the application to be complete. The Bureau received a range of comments on this new provision. Consumer groups stated that a 60-day review period is unreasonably short and will encourage hasty and flawed reviews of applications, resulting in harm to consumers. They recommended that the Bureau not make any assurances regarding the time it will take to review an application, and that any specific time

period should be much longer and more flexible than 60 days. A trade association stated that 60 days is too long, and encouraged the Bureau to commit to completing its assessment of applications within 30 days. An advisory/research organization opined that while 60 days should generally be sufficient, the Bureau should afford itself the option of taking an additional 30 days, provided notice is given to the applicant.

The Bureau is finalizing the 60-day provision as proposed because it believes that this period strikes the optimal balance between permitting sufficient time for a thorough review of applications and encouraging entities to submit applications. Consumer groups' concerns may be based somewhat on a misunderstanding of the provision. Their comments appear to envision a scenario in which no more than 60 days will elapse between the Bureau first setting eyes on a potential application and the Bureau granting or denying a formal application. The proposed Policy encouraged potential applicants to contact the Bureau for informal, preliminary discussion of a proposal before submitting a formal application. The final Policy strongly encourages such informal, preliminary discussion. Thus, in a typical case, the Bureau's review of a proposal likely would take place over a period longer than 60 days. The new 60-day provision is designed to give an applicant reasonable assurance that, once an application is deemed to be complete, the Bureau intends to grant or deny it within 60 days. That said, the final Policy indicates that certain circumstances may lead to a longer processing time, such as a request that the Bureau coordinate with other regulators prior to granting or denying an application.

More generally, the Bureau has no intention of permitting the 60-day review goal to trump its goal of thoroughly assessing applications before granting them, as the latter is more integral to the long-term success of the Policy and the consumer benefit the Bureau expects the

Policy to yield. Moreover, if experience operating the Policy indicates that the 60-day review period is not working as intended, the Bureau intends to adjust it in an appropriate manner.

## **E. Issuance and Content of No-Action Letters**

The Bureau proposed a number of revisions to section D of the 2016 Policy, which concerned the Bureau's intended procedures for issuing No-Action Letters, including the expected content of such letters. Industry commenters generally supported these proposed revisions. Consumer groups opposed each proposed revision.

### **1. UDAAP**

As noted, in the preamble of the 2016 Policy, the Bureau estimated that only one to three actionable No-Action Letter applications would be received each year. The Bureau also stated that No-Action Letters focused on the UDAAP prohibition in the Dodd-Frank Act<sup>26</sup> are expected to be particularly uncommon. In the proposed Policy, the Bureau stated that there would be no such expectation under the proposed Policy.

Industry commenters uniformly supported this policy shift. For example, a group of trade associations stated that a No-Action Letter that does not include assurance against UDAAP liability has limited value due to the subjectivity of such claims. Similarly, a trade association commented that the fact that the majority of enforcement actions are brought under UDAAP authority makes clear that entities are in need of guidance in a gray area that is principle based rather than rule based.

In contrast, consumer groups opposed this policy shift. The consumer groups stated that, under the proposed Policy, the Bureau would give a stamp of approval that a company is not committing UDAAPs. This is not correct. Rather, the proposal provided that a No-Action letter

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<sup>26</sup> 12 U.S.C. 5531, 5536.

would include a statement that, subject to good faith, substantial compliance with the terms and conditions of the letter, and in the exercise of its discretion, 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 its authority to prevent unfair, deceptive, or abusive acts or practices. The proposal noted that this statement implies that the Bureau has not determined that the acts or practices in question are unfair, deceptive, or abusive. A statement that the Bureau has not made a UDAAP determination is different than a statement that the Bureau has determined that the acts or practices in question do not constitute a UDAAP. The final Policy retains this "implication" statement.

The consumer groups also opposed this policy shift on the more general ground that many aspects of the way a product or service works in practice or is implemented could be poorly understood or could change from the time an application is granted, and unfair, deceptive or abusive aspects of a product or service "might only become apparent in the future." A group of State Attorneys General made essentially the same point.

The Bureau is not persuaded that such considerations warrant placing a categorical limitation on UDAAP-focused No-Action Letters. The proposed Policy stated that No-Action Letters would be based on particular facts and circumstances and be limited to the recipient's offering or providing the "described aspects of the product or service." The proposal explained that the term "described aspects of the product or service" is a short-hand term used in the proposed Policy to encompass the subject matter scope of a No-Action Letter, including both the particular aspects of the product or service in question, and the particular manner in which it is offered or provided. These aspects of the proposal are being finalized as proposed. The Bureau intends that a particular No-Action Letter issued under the Policy will include a description of

this subject matter scope. Indeed, it is in the interest of both the Bureau and the recipient that the subject matter scope is described with as much precision as possible. To the extent the recipient significantly changes the “described aspects of the product or service” without seeking a modification of the No-Action Letter under section D.1 of the Policy, the recipient would risk exceeding the subject matter scope of the letter, and thus would expose itself to a potential Bureau supervisory or enforcement action. Relatedly, to the extent the recipient fails to apprise the Bureau of material changes to information included in the application, as required by section C.4 of the Policy, the recipient would risk failing to substantially comply in good faith with one of the terms of the letter – which could be a ground for termination or even a retroactive enforcement action under section D.2 of the Policy.

As regards consumer groups’ speculative scenario in which the recipient does not significantly change the described aspects of the product or service but a UDAAP “becomes apparent in the future,” the Bureau could terminate the No-Action Letter on the ground that the described aspects of the product or service failed to perform as anticipated in the Policy, as specified in sections C.7 and D.2 of the Policy.

## **2. Interpretations**

Under section D.4 of the 2016 Policy, No-Action Letters were expected to include a lengthy disclaimer that the letter does not constitute an interpretation, exception, waiver, or safe harbor. As part of the Bureau’s general streamlining effort, the proposed Policy would not have included this statement in No-Action Letters. Commenters interpreted the proposed omission of this statement to mean that the Bureau now intends to provide interpretations in No-Action Letters.

More specifically, consumer groups stated that the deletion suggests that the Bureau may include legal interpretations in No-Action Letters in the hope that they will be viewed as official interpretations to which courts will defer, and strongly opposed such a shift. In contrast, a group of trade associations urged the Bureau to include in a No-Action Letter an affirmation that its issuance represents the Bureau's conclusion that the product or service in question, implemented consistently with the terms and conditions of the letter, does not violate applicable Federal consumer financial law, including the prohibition on UDAAP. Relatedly, these commenters requested that the final Policy emphasize the deference assigned by Congress to the Bureau's interpretation of Federal consumer financial law in order to encourage courts, other regulators, and private litigants to defer to Bureau No-Action Letters. Similarly, an advisory/research organization recommended that No-Action Letters include an explanation of the Bureau's rationale for granting the application, and provide assurances that the Bureau views the conduct in question as being consistent with relevant statutory or regulatory requirements.

The proposed deletion of the "no interpretation" disclaimer was not intended to signal a shift to including official interpretations in No-Action Letters, or any lesser types of interpretation for that matter. To clarify this point, the Bureau is adding to the list of statements expected to be included in a No-Action Letter, a statement that the letter does not purport to express any legal conclusions regarding the meaning or application of the laws and/or regulations within the scope of the letter.

While the Bureau appreciates the desire for liability protection greater than that provided by No-Action Letters, it believes that the better means to this end is making available forms of compliance assistance that provide a high-degree of such protection. This is one reason why the Bureau proposed the Product Sandbox Policy and is finalizing certain aspects of it, as the

Compliance Assistance Sandbox Policy (CASP), contemporaneously with the finalization of the Policy. The Bureau also appreciates the need and desire for the type of compliance assistance provided by interpretations. Accordingly, the Bureau intends to separately propose an interpretive letter program as soon as practicable.

### **3. Limitation to the Application Information**

Section D.3 of the 2016 Policy provided that the expected contents of a No-Action Letter include a statement that the letter is based on the facts stated and factual representations made in the request, and is contingent on the correctness of such facts and factual representations. As part of its general effort to streamline the Policy, the Bureau did not include this statement in the proposed Policy. However, section I.A of the proposed Policy, which provided a general description of No-Action Letters, stated that such letters are based on particular facts and circumstances. To clarify this point, section C.3(c) of the final Policy provides that a No-Action Letter is expected to include a statement that the No-Action Letter is based on the factual representations made in the application, which may be incorporated by reference.

### **F. Alternative Procedures**

The proposed Policy would have permitted No-Action Letter applications from trade associations, service providers, and other third parties. The proposal recognized that third parties, which generally do not themselves provide consumer financial products or services, may face challenges when attempting to submit an application pursuant to the standard process contemplated in the proposal. Accordingly, the Bureau proposed an alternative process for third parties: the Bureau would issue a provisional No-Action Letter based on the information available to the third party at the time of application and then issue a non-provisional letter once



necessary information became available about the entities intending to use the product or service in question and how they intended to offer or provide it.

Comments from trade associations were generally supportive of the proposed third-party application procedures. Some of these comments noted that group applications by trade associations would equalize access to No-Action Letters and allow smaller financial institutions to participate in the program. Other trade association commenters explained that third-party applications would increase use of the Policy and thereby provide the Bureau with greater evidence of unnecessary regulatory barriers and potential methods to address those barriers. Another trade association stated that third-party applications would correctly focus on the product or service at issue rather than the entity or entities involved in the provision of the product or service. While supportive of the overall process, some trade associations sought greater clarity regarding the specific steps of the application and issuance process, including those related to provisional No-Action Letters.

Comments from consumer groups and a law firm expressed significant concerns about allowing trade associations and service providers to apply for No-Action Letters. These commenters stated that permitting such applications would mean that a No-Action Letter could cover entire markets or thousands of clients and potentially affect millions of consumers. These types of applications would also, according to the same commenters, afford the Bureau no ability to evaluate the practices of the company that provides the product or service in question. These commenters further asserted that allowing parties other than the applicant to come forward later and automatically join a No-Action Letter, without additional review or approval by the Bureau, would shirk the Bureau's duty to protect consumers.<sup>27</sup>

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<sup>27</sup> Some of the same commenters contended that such broad No-Action Letters would be legislative rules. These comments are addressed in section III.A.2, *supra*.

A comment from a group of State Attorneys General likewise raised the possibility that third-party applications could lead to blanket coverage of entire industries while making it difficult for the Bureau to enforce No-Action Letter conditions. The comment also questioned how the Bureau could ensure the veracity and accuracy of an application submitted by a party other than the party that would ultimately be the recipient of a No-Action Letter.

Finally, an academic commenter noted that, while No-Action Letter applications should not be granted without particularized analysis, trade association applications could help ensure that similarly situated competitors receive consistent treatment and that no single No-Action Letter recipient receives an undue competitive advantage. Comments by some trade associations also encouraged the Bureau to implement application processes that would help ensure consistent treatment of competitors providing a product or service similar to one that is already the subject of a No-Action Letter.

As regards the proposed procedures for third-party applications, the Bureau was not proposing to issue a No-Action Letter to a company without knowing *who* is requesting it and without conducting a particularized analysis of *how* the company intends to offer or provide the product or service. This is the reason why the proposed Policy limited third-party applicants to *provisional* No-Action Letters until information necessary for a complete application is submitted. Nor would there be an “automatic” process under the proposed Policy that would allow a non-applicant to subsequently join a No-Action Letter without additional individualized assessment by the Bureau.

The final Policy seeks to clarify the alternative application process that service providers, trade associations, consumer groups, and other third parties may use. This clarification includes adding a separate section to the Policy on this topic and providing greater detail and specificity

regarding the various steps of the process. In particular, under new section E.1 of the final Policy, a service provider or facilitator (e.g., a trade association, consumer group, or other third party) could provide the application information specified in section A with appropriate adjustments given that the applicant itself will not be offering or providing the consumer financial product or service in question. The section also describes the manner in which the Bureau intends to assess the application information provided and the type of document successful applicants should expect to receive from the Bureau. The final Policy refers to this type of document as a “No-Action Letter Template” instead of a “provisional” No-Action Letter in order to more accurately describe the intended purpose of this document and clarify that it would be non-operative and non-binding on the Bureau. New section E.1 also describes the Bureau’s anticipated application, assessment, and issuance procedures for applications for a standard No-Action Letter based on a No-Action Template.

New section E.2 addresses comments regarding applications involving products or services that are substantially similar to those that are the subject of an existing No-Action Letter. The Bureau believes applications involving a product or service that is substantially similar to the product or service that is the subject of an existing No-Action Letter warrant an alternative application procedure that focuses on similarities in the product or service itself and the manner in which it is offered or provided. While the Bureau intends to assess this applicant-specific information in a particularized manner, it anticipates being able to process such applications in a timeframe shorter than that specified in section B given that the underlying No-Action Letter has already been granted.

Finally, consistent with the fact that the Policy is a general statement of policy under the APA, new section E includes a final footnote explaining that, in circumstances where neither the

Standard Process nor the alternative procedures described in section E (Alternative Process) are appropriate, the Bureau may utilize other procedures that diverge in one or more respects from the Standard Process or the Alternative Process, consistent with the purposes of the Policy.

#### **G. Compliance with No-Action Letter Terms and Conditions**

Section D.1 of the 2016 Policy provided that the no-action statement included in a No-Action Letter 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. Consumer groups opposed this change, arguing that the Policy should include, at the very least, a statement that the Bureau retains this investigation and supervision authority. It appears that these commenters did not notice that the proposed Policy included a proviso that the Bureau maintains the right to obtain information relating to the consumer financial product or service subject to a No-Action Letter under its applicable supervision and enforcement authorities. The final Policy modifies this proviso somewhat, as explained below.

Several industry commenters expressed concern that the Bureau's reliance on its supervisory authority to evaluate compliance with a No-Action Letter would create an unlevel playing field between recipients that are supervised by the Bureau and recipients that are not. To address this circumstance, an industry policy organization suggested that No-Action Letters issued to firms not subject to the Bureau's supervisory authority include a term requiring affirmative consent to the submission of data to and review by the Bureau with respect to compliance with the other terms and conditions of the letter.

The Bureau declines to make the recommended change to the Policy. Although the Bureau maintains the right to obtain information about the product or service subject to a No-

Action Letter using its supervisory authority, it does not follow that the Bureau intends to routinely do so. Moreover, the Bureau has authorities other than supervisory authority that can be used for this purpose. To clarify this issue, the Bureau is amending the proviso that was included in the proposal to state that the Bureau maintains the authority to obtain information relating to the consumer financial product or service subject to a No-Action Letter under its applicable supervision, enforcement, and other authorities in the same manner and frequency that it obtains information relating to consumer financial products or services not subject to a No-Action Letter.

Furthermore, under section C.4 of the final Policy, all recipients of a No-Action Letter – regardless of their supervisory status – are required to apprise the Bureau of (a) material changes to information included in the application and (b) material information indicating that the described aspects of the product or service are not performing as anticipated in the application.

#### **H. Modification and Termination**

The 2016 Policy provided that a No-Action Letter would include a statement that the letter is subject to modification or revocation at any time at the discretion of Bureau staff for any reason. The 2016 Policy also stated that a No-Action Letter would include a statement that, to the extent that the facts and representations in the request are materially inaccurate, or the requester fails to satisfy conditions or violates limitations specified in the No-Action Letter, and in other similar circumstances, the No-Action Letter is by its own terms inapplicable (even without modification or revocation); and the staff may recommend initiating a retrospective enforcement or supervisory action if appropriate. The 2016 Policy also anticipated that No-Action Letter recipients would be given the grounds for a potential modification or revocation and an opportunity to respond.

The Bureau proposed revising this aspect of the 2016 Policy in various respects. The proposed Policy stated that the Bureau might revoke a No-Action Letter in whole or in part, in certain circumstances – but that the Bureau expected revocation to be quite rare. The proposal also stated that the Bureau expects a No-Action Letter to specify the grounds for revocation, and that the Bureau anticipates specifying three such grounds. A No-Action Letter under the proposed Policy would also include a statement that, if the letter is revoked for a reason other than the recipient’s (or recipients’) failure to substantially comply in good faith with the terms and conditions of the letter, the revocation is prospective only; *i.e.*, that the Bureau would not pursue an action to impose retroactive liability in such circumstances. In addition, the proposed Policy described the steps the Bureau intended to take prior to revoking a No-Action Letter. These steps included providing recipients with notice of the ground(s) for revocation, an opportunity to respond (including an opportunity to cure a failure to substantially comply in good-faith with the terms and conditions of the No-Action Letter), and a period for winding down the offering or providing of the product or service in question in most circumstances.

While generally supportive of these proposed changes, trade association commenters and a research/advisory organization requested greater clarity on the anticipated grounds for revocation and certain portions of the proposed revocation procedures. Consumer group commenters urged the Bureau to provide additional grounds for revocation and retroactive liability, and had concerns about certain steps of the proposed revocation procedures.

### **1. Grounds for Termination and Retroactive Liability**

The Bureau received a number of comments regarding the three anticipated grounds for revocation identified in the proposal. The first such ground was failure to substantially comply in good faith with the terms and conditions of the No-Action Letter. A research/advisory

organization urged the Bureau to clarify this standard, particularly regarding its application to technical deficiencies, harmless compliance failures, and the like. The same commenter also requested more clarity on the second ground for revocation identified in the proposal: a determination by the Bureau that the recipient's offering or providing the described aspects of the product or service is causing material, tangible, harm to consumers. A group of trade associations asserted that the second ground is undefined and subjective, and expressed concern that revocation based on this ground would constitute a finding of fault against the recipient. These commenters recommended that the second ground be replaced with a determination by the Bureau that the product or service did not perform as intended.

The Bureau also received a comment on the third ground for revocation identified in the proposal: a change in the legal context within which the letter was granted as a result of statutory amendments or Supreme Court opinions. Consumer groups asserted that this ground is too narrow because the Supreme Court weighs in on fewer than 100 cases a year – most of which do not involve consumer financial products or services, and lower courts create binding law that should guide the Bureau's revocation decisions.

More generally, consumer groups found the three anticipated grounds for revocation to be too narrow individually and, taken together, too limiting on the Bureau. These groups contended that the inclusion of these anticipated grounds in the Policy would place a high burden on the Bureau to revoke a No-Action Letter in order to protect consumers.

Finally, comments were submitted on the statement regarding retroactive liability in the proposed Policy. Industry commenters generally supported this statement. Consumer groups urged the Bureau to retain material inaccuracy of facts and representations in an application as an additional ground for retroactive liability. A research/advisory group recommended that the

Bureau list consumer harm caused by the product or service in question as an additional basis for retroactive liability.

Based on these comments and other considerations, the Bureau is revising the discussion of revocation in the final Policy in certain respects (and locating these changes in a new section (section D) concerning Modification and Termination). First, in the proposal, the Bureau stated that it expected revocation of a No-Action Letter to be quite rare. To clarify this point, the Bureau is adding an express statement that the Bureau intends that the recipient of a No-Action Letter should be able to reasonably rely on the No-Action Letter, including especially the no-action statement.

Second, the Bureau agrees that the proposed “material, tangible harm” ground may not be sufficiently clear and objective and accordingly is replacing it with the ground recommended by commenters: failure to perform as anticipated in the application. The Bureau is also adding a footnote explaining that this ground includes the materialization of consumer risks identified in the application, or the materialization of other consumer risks not identified in the application.

Third, as noted, the proposed Policy simply identified three anticipated grounds for revocation, but failed to identify a more general standard or principle underlying them. To clarify this point, the final Policy states that a No-Action Letter will include a statement that the Bureau may terminate the letter if it determines that it is necessary or appropriate to do so to advance the primary purposes of the Policy, such as where the recipient fails to substantially comply in good faith with the terms and conditions of the letter; the described aspects of the product or service do not perform as anticipated in the application; or controlling law changes as a result of a statutory change or a Supreme Court decision that clearly permits or clearly prohibits conduct covered by the letter.



Fourth, as recommended by a group of trade associations, the Bureau is replacing the term “revocation” with the term “termination” because it is concerned that “revocation” misleadingly suggests that any termination would involve a Bureau determination of wrongdoing on the part of the recipient.

Fifth, the Bureau is revising the retroactive liability statement to provide that a failure to substantially comply in good faith with the terms and conditions of the No-Action Letter that causes “Dodd-Frank Act actionable substantial injury,” under 12 U.S.C. 5531(c), would provide the basis for termination and an action to impose retroactive liability.<sup>28</sup>

The Bureau declines to adopt the recommendation to identify material inaccuracy of facts and representations in an application as a separate potential basis for a retroactive action because it believes doing so is unnecessary. As noted above, the Bureau expects that a No-Action Letter issued under the final Policy will include a statement that the letter is based on factual representations made in the application. Relatedly, pursuant to section C.4 of the Policy, a No-Action Letter is expected to include a requirement to apprise the Bureau of material (a) changes to information included in the application and (b) information indicating that the described aspects of the product or service are not performing as anticipated in the application. A recipient’s failure to substantially comply in good faith with this requirement would provide a necessary condition for retroactive liability under the Policy.

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<sup>28</sup> The Bureau expects that termination on this ground will be especially rare. The Bureau believes that bad actors intent on evading the law, and the terms and conditions of a No-Action Letter, are the least likely type of entity to apply for a letter. To the extent such entities express interest in a No-Action Letter or apply for one, they are likely to be weeded out through the Bureau’s anticipated due diligence process and thus not receive a letter in the first place.

The Bureau also declines to provide additional clarity regarding the “good-faith substantial compliance” standard because it believes these terms have a sufficiently established meaning in the law.

## **2. Termination Procedures**

The Bureau received a number of comments about the revocation procedures described in the proposed Policy. Consumer groups raised concerns about the statement that, if the Bureau determines that the recipient failed to substantially comply in good faith with the terms and conditions of the No-Action Letter, it will offer the recipient an opportunity to cure the failure within a reasonable period of time before revoking the No-Action Letter. In their view, companies that act in bad faith or violate the terms of a No-Action Letter should have no second chance at complying with those terms. The Bureau is persuaded by this comment. Although the Bureau anticipates that there will be few, if any, cases in which a recipient fails to comply in good-faith with the terms and conditions of the No-Action Letter, in such cases an opportunity to cure would be inappropriate. However, there may be cases in which an opportunity to cure may be appropriate, such as when the recipient attempts to comply in good faith, but fails to comply with relatively technical terms and conditions. Accordingly, in the final Policy, this statement has been revised to provide that the Bureau intends to offer an opportunity to cure in appropriate circumstances. In addition, the Bureau notes that a request for modification under section D.1 of the final Policy may be more appropriate in some cases than providing an opportunity to cure.

The proposed Policy also stated that, in most cases, the Bureau expects to allow the recipient of a No-Action Letter to wind-down the offering or providing of the described aspects of the product or service during an appropriate period after revocation. Consumer groups contended that the proposed Policy provided the Bureau too little flexibility to revoke a No-

Action Letter *without* a wind-down period. The Bureau disagrees. While the Bureau expects a wind-down period to be afforded in the rare instance that a No-Action Letter is terminated, the proposed Policy does not *guarantee* a wind-down period. Thus, in appropriate cases, the Bureau has the flexibility to terminate without providing a wind-down period.

A group of trade associations noted that the proposed Policy’s provision regarding a wind-down period, which stated that the wind-down period would be an appropriate period after revocation, differed from the parallel provision in the proposed Product Sandbox Policy, which stated that the wind-down period would be six months. A nonpartisan public policy organization likewise identified this discrepancy. This discrepancy was inadvertent. The Bureau believes that a six-month period is equally appropriate for No-Action Letters and has accordingly specified such a six month period in the final Policy.

A research/advisory group urged the Bureau to provide greater detail and a more formalized process respecting how the Bureau will (i) determine a reasonable time frame for a recipient to cure a failure to comply with the terms of a No-Action Letter, (ii) offer an opportunity to respond to a revocation, as well as the period of time provided for a response, and (iii) issue a revocation and whether such a revocation would be made public. The Bureau generally declines to provide additional detail regarding the termination process for the reasons set forth in section II above. However, the Bureau is including in the final Policy a statement that termination information will be published on the Bureau’s website.

### **3. Modification**

As indicated above, the “any time/any reason” statement in the 2016 Policy covered modification of a No-Action Letter as well as revocation. The Bureau proposed omitting this statement, and did not propose alternative language concerning modification. Consumer groups

noted this silence about modification, and suggested that the final Policy should provide for modification. A trade association suggested that modification procedures should be included in the final Policy because some innovative consumer financial products and services depend on machine learning and artificial intelligence and will therefore evolve through continuous “learning” and routine re-evaluation of data and models. The commenter recommended that the Bureau develop a framework that allows for slight and graduated deviations from the product or service described in the application, rather than require the recipient to submit an entirely new application each time there is a change.

The Bureau generally agrees that the Policy should include anticipated procedures for modifying No-Action Letters. Accordingly, the final Policy includes a new section (D.1) that specifies the Bureau’s anticipated procedures regarding requests for modification of a No-Action Letter.

## **I. Coordination with Other Regulators**

Section G of the proposed Policy stated that the Bureau is interested in entering into agreements with State authorities that issue similar forms of no-action relief that would provide for an alternative means of receiving a No-Action Letter from the Bureau. Consumer groups read this statement as implying that a company that obtained a no-action letter from a State would “automatically” receive one from the Bureau. That is not the Bureau’s intent. Rather, the Bureau anticipates that such agreements would include provisions designed to ensure that the Bureau’s issuance of a No-Action Letter in such circumstances would be consistent with its statutory authority and duties, as well as applicable law more generally. The Bureau has no intention of issuing a No-Action Letter through this type of alternative means if it believes that consumers would be injured.

The proposed Policy also would have permitted applicants to request that the Bureau coordinate with other regulators with respect to the application. A group of trade associations commented that the Bureau should not put the onus on the applicant to identify other governmental authorities with which the Bureau may coordinate. Rather, the Bureau should lead the coordination effort among Federal and State regulators, as it is better positioned to do so than the applicant. More broadly, these commenters urged the Bureau to ensure that other regulators understand the Policy and to request that other regulators defer to the Bureau's No-Action Letters. These comments were seconded by an industry policy organization.

As evidenced by the inclusion in the Policy of a separate section headed Regulatory Coordination, the Bureau very much appreciates the need for coordination with other regulators for purposes of operating the Policy. However, such coordination must be balanced against other considerations. For example, as the Policy notes, if an applicant wishes the Bureau to coordinate with other regulators, the Bureau may need more time to process the application, depending on the degree of coordination requested. Moreover, the degree of coordination needed likely will vary from case to case. The Bureau intends to use its best efforts to find the optimal balance between coordination and other considerations for each No-Action Letter issued under the Policy. For the reasons discussed above, the Bureau is finalizing the section on regulatory coordination largely as proposed.

## **J. Confidentiality and Disclosure**

Section E of the 2016 Policy, headed Bureau Disclosure of Entity Data, was quite brief. The primary statement made was that the Bureau's disclosure of a version or summary of the application and any data received from the applicant in connection with a request for a No-Action Letter is governed by the Bureau's Rule on Disclosure of Records and Information

(Disclosure Rule). The Bureau subsequently received requests that the Bureau provide a more detailed explanation of its plans relating to disclosure of information received from applicants for and recipients of No-Action Letters. In response, the Bureau proposed expanding this section to include the Bureau's expectations regarding which types of data and information submitted by applicants and recipients would qualify as business information and confidential supervisory information under the Disclosure Rule.

Industry commenters generally supported the proposed expansion. Consumer groups stated that the revised section is in tension with the requirements of the Freedom of Information Act (FOIA), and questioned how the Bureau can forecast that certain aspects of applications will satisfy applicable FOIA exemption requirements. The Bureau is basing its expectations, in part, on the nature of the information requested from applicants and recipients, and the final Policy notes that information submitted that is not actually responsive to a particular request may not be protected from disclosure.

The Bureau is not finalizing the proposed language regarding confidential supervisory information because it has determined it to be unnecessary. The Bureau believes that potential applicants' main concern is that trade secrets and proprietary business information submitted to the Bureau by applicants and recipients not be publicly disclosed. This concern can be adequately addressed by the statements in section G of the final Policy that the Bureau anticipates that much of this information will qualify as confidential information, and, more specifically, business information exempt from public disclosure.

In addition, in light of a recent Supreme Court opinion concerning FOIA Exemption 4,<sup>29</sup> the Bureau is adding to section G a statement making clear that where information submitted to

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<sup>29</sup> See *Food Mktg. Inst. v. Argus Leader Media*, 139 S.Ct. 2356 (June 24, 2019).

the Bureau is both customarily and actually treated as private by the submitter, the Bureau intends to treat it as confidential in accordance with the Disclosure Rule.

The proposed Policy stated that the Bureau may publish denials of applications for a No-Action Letter on its website, including an explanation of why the application was denied, particularly if it determined that doing so would be in the public interest. The Bureau received divergent comments on this aspect of the proposal. A group of trade associations supported the publication of denials on the ground that such transparency will inform market participants about the types of proposals that are more or less likely to receive approval, and the accompanying reasons for approval or denial will promote agency accountability for the No-Action Letter Policy. In contrast, a trade association stated that it sees no utility in publishing denials. The Bureau is finalizing the statement about denials as proposed. The Bureau notes that the final Policy, as did the proposal, includes two related statements about denials: (1) the Bureau intends to publish denials only after the applicant is given an opportunity to request reconsideration of the denial, and (2) upon request, and if disclosure is not required by 5 U.S.C. 552(a)(2) or other applicable law, the Bureau does not intend to release identifying information from published denials, and intends to redact such information from the denials published on its website.

More generally, the Bureau expects denials to be quite rare, for at least two reasons. First, the Policy strongly encourages potential applicants to contact the Office of Innovation for informal, preliminary discussion of a contemplated proposal prior to submitting a formal application. If it appears during such discussions that an application is not likely to be granted, the potential applicant may choose not to submit an application in the first place. Second, the Policy provides that an application may be withdrawn at any time. If the applicant has reason to believe its application may not be granted, it can withdraw the application prior to a denial.

## **K. Relation to Other Bureau Innovation Policies**

A group of trade associations requested clarity on which of the Bureau's three proposed innovation policies to apply under in a given case. The same commenter requested that, during the preliminary, informal discussions, which the proposed Policy would have encouraged potential applicants to have with the Bureau, the Bureau discuss with the potential applicant which process will be best suited for the product or service in question. Given the necessarily general nature of the three policies and the necessarily particular nature of a given proposal, the answer to the first request is provided by a positive answer to the second request. That is, the Bureau does intend to discuss with potential applicants during the preliminary, informal discussion phase which of the policies is best suited for the product or service in question.

## **L. Public Input**

In comments on the proposed 2016 Policy, certain consumer group commenters requested that the Bureau modify the proposed 2016 Policy to provide that any No-Action Letter would be subject to a 30-day notice-and-comment period, preferably in advance of No-Action Letter issuance. These commenters asserted that such a process is advisable to balance an applicant's self-interested submissions by bringing to bear other viewpoints through a public process. The Bureau declined to adopt the comment period suggestion because (i) comment periods are not typical of other agencies' no-action letter programs; and (ii) the Bureau believed that imposing such a comment period requirement in advance of issuance would unnecessarily discourage No-Action Letter applications, delay the process of granting or denying applications, and thus inhibit the intended benefits of the proposed 2016 Policy.

The comments on the proposed Policy did not include such an express comment for a notice-and-comment process for No-Action Letters issued under the proposed Policy. Rather,



consumer groups noted the lack of public input on particular No-Action Letters in the course of expressing other concerns about the proposed Policy. In response to this implied request for public input, the Bureau reiterates the points it made in its response to the express request for public input in the comments on the proposed 2016 Policy.

#### **IV. Regulatory Requirements**

The Bureau has concluded that this Policy Guidance constitutes an agency general statement of policy exempt from the notice and comment rulemaking requirements under the Administrative Procedure Act, pursuant to 5 U.S.C. 553(b). The Policy is intended to provide information regarding the Bureau's plans to exercise its enforcement and supervisory discretion to provide No-Action Letters. The Policy does not impose any legal requirements on external parties, nor does it create or confer any substantive rights on external parties that could be enforceable in any administrative or civil proceeding. Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.<sup>30</sup>

#### **V. Congressional Review Act**

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Bureau plans to submit a report containing this Policy and other required information to each House of Congress and the Comptroller General prior to the Policy's applicability date. The Office of Information and Regulatory Affairs has designated this Policy as not a "major rule" as defined by 5 U.S.C. 804(2).

#### **VI. Paperwork Reduction Act**

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<sup>30</sup> 5 U.S.C. 603(a), 604(a).

The Paperwork Reduction Act of 1995 (PRA)(44 U.S.C 3501 et seq.) requires that federal agencies may not conduct or sponsor, and notwithstanding any other provision of law, a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The information collection requirements as contained in this final Policy and identified below have been approved by OMB and assigned the OMB control number 3170-0059 OMB's approval will expire on September 30, 2022.

The information collections contained in this Policy include Application for a No Action Letter.

The Bureau's proposed Policy, published December 13, 2018, 83 FR 64036, sought comment on these information collection requirements. While the Bureau received numerous comments on the Proposed Policy, which are addressed above, the Bureau received no comments specifically regarding the burden estimates for these information collections, utility or appropriateness. Additional details on comments received can be found in the Supporting Statement for the related 30-day notice published as required under the PRA.<sup>31</sup>

A complete description of the information collection requirements, including the burden estimate methods, is provided in the information collection request (ICR) that the Bureau submitted to OMB under the requirements of the PRA. The ICR submitted to OMB requesting approval under the PRA for the information collection requirements contained herein is available at OMB's public-facing docket at [www.reginfo.gov](http://www.reginfo.gov).

## **VII. Final Policy**

The text of the final Policy is as follows:

### **POLICY ON NO-ACTION LETTERS**

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<sup>31</sup> See <https://www.regulations.gov/docket?D=CFPB-2019-0043>.

In section 1021(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Congress established the Bureau of Consumer Financial Protection's (Bureau's) statutory purpose as 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.<sup>32</sup> Relatedly, the Bureau's objectives include exercising its authorities under Federal consumer financial law for the purposes of ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation, and that outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens.<sup>33</sup>

Congress has given the Bureau a variety of authorities under title X of the Dodd-Frank Act and the enumerated consumer laws<sup>34</sup> that it can exercise to promote this purpose and these objectives. These authorities include supervision and enforcement authority, and the authority to issue orders and guidance.<sup>35</sup> These authorities provide the basis for the Policy on No-Action Letters (Policy) and the No-Action Letters issued pursuant to the Policy.

The primary purposes of the Policy are to provide a mechanism through which the Bureau may more effectively carry out its statutory purpose and objectives and to facilitate compliance with applicable Federal consumer financial laws. The Bureau believes that the No-Action Letters issued pursuant to the Policy will benefit consumers, entities that offer or provide consumer financial products and services, and the public interest more generally. The Bureau

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<sup>32</sup> 12 U.S.C. 5511(a).

<sup>33</sup> 12 U.S.C. 5511(b)(3), (5).

<sup>34</sup> 12 U.S.C. 5481(12).

<sup>35</sup> See 12 U.S.C. 5561 *et seq.* (enforcement authority); 12 U.S.C. 5531(a) (Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) enforcement authority); 12 U.S.C. 5514, 5515 (supervision authority); 12 U.S.C. 5511(a) ("The Bureau shall seek to implement and, *where applicable*, enforce Federal consumer financial law . . .") (emphasis added); 12 U.S.C. 5512(b)(1). See also *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Board of Trade v. SEC*, 883 F.2d 525, 530-31 (7<sup>th</sup> Cir. 1989) (SEC no-action letter).

expects that implementation of the Policy will also inform the exercise of its other authorities, including rulemaking.<sup>36</sup>

The Policy consists of seven sections:

- Section A describes information to be included in an application for a No-Action Letter.
- Section B describes the factors the Bureau intends to consider in assessing applications for a No-Action Letter.
- Section C describes the standard procedures the Bureau intends to use in issuing No-Action Letters.
- Section D describes the procedures the Bureau intends to use for modification and termination of No-Action Letters.
- Section E describes alternative application, assessment, and issuing procedures that the Bureau may use for certain circumstances.
- Section F describes how the Bureau intends to coordinate with other regulators with respect to No-Action Letters.
- Section G describes the Bureau’s intentions relating to disclosure of information relating to No-Action Letters.

#### **A. Submitting Applications for No-Action Letters**

Potential applicants are strongly encouraged to contact the Office of Innovation at [officeofinnovation@cfpb.gov](mailto:officeofinnovation@cfpb.gov) for informal, preliminary discussion of a contemplated proposal prior to submitting a formal application.<sup>37</sup>

Applications for a No-Action Letter should include the following:

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<sup>36</sup> The Policy is not intended to, nor should it be construed to: (1) restrict or limit in any way the Bureau’s discretion in exercising its authorities, including the provision of no-action or similar compliance assistance other than pursuant to the Policy; (2) constitute an interpretation of law; or (3) create or confer upon any covered person, consumer, or other external party any substantive or procedural rights, obligations, or defenses that are enforceable in any manner. In contrast, a particular No-Action Letter involves the Bureau’s exercise of its supervision and enforcement discretion in a particular manner.

<sup>37</sup> The email subject line should include: “No-Action Letter.”

1. The identity of the applicant;<sup>38</sup>
2. A description of the consumer financial product or service in question, including (a) how the product or service functions; (b) the terms on which it will be offered; and (c) the manner in which it is offered or provided, including any consumer disclosures;
3. An explanation of the potential consumer benefits associated with the product or service;
4. An explanation of the potential consumer risks associated with the product or service, and how the applicant intends to mitigate such risks;
5. An identification of the statutory and/or regulatory provisions as to which the applicant seeks a No-Action Letter and an explanation of why a No-Action Letter is needed, such as uncertainty or ambiguity regarding the application of the identified statutory and/or regulatory provisions to the product or service in question;<sup>39</sup>
6. If the applicant wishes to request confidential treatment under the Freedom of Information Act (FOIA),<sup>40</sup> the Bureau's rule on Disclosure of Records and Information (Disclosure Rule),<sup>41</sup> or other applicable law, this request and the basis therefor should be included in a separate letter and submitted with the application.<sup>42</sup>

The applicant should specifically identify the information for which confidential

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<sup>38</sup> For convenience, the term "applicant" is used in the Policy to refer both to single applicants and joint applicants.

<sup>39</sup> Applicants should describe the relevant provisions with as much specificity as practicable, in part to enable the Bureau to respond expeditiously to the application. The Bureau recognizes that in some cases it may be difficult 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.

<sup>40</sup> 5 U.S.C. 552.

<sup>41</sup> 12 CFR part 1070.

<sup>42</sup> Applicants should describe the relevant legal bases for confidentiality with as much specificity as practicable. The Bureau recognizes that some applicants may lack the legal resources to provide a detailed and complete showing. In such circumstances, the applicant should provide the maximum specification practicable under the circumstances and explain the limits on further specification.

treatment is requested, and may reference the Bureau's intentions regarding confidentiality under section G of the Policy; and

7. If the applicant wishes the Bureau to coordinate with other regulators, the applicant should identify those regulators, including but not limited to those the applicant has contacted about offering or providing the product or service in question.<sup>43</sup>

Applications may be submitted via email to: *officeofinnovation@cfpb.gov* or through other means designated by the Office of Innovation.<sup>44</sup> Submitted applications may be withdrawn at any time.

## **B. Bureau Assessment of Applications for No-Action Letters**

In deciding whether to grant an application for a No-Action Letter, the Bureau intends to balance a variety of factors, including an assessment of the quality and persuasiveness of the application, with particular emphasis on the information specified in sections A.3, A.4, and A.5; information about the applicant and the product or service in question derived through Bureau due diligence processes; the extent to which granting the application would be consistent with Bureau enforcement and supervision priorities; an assessment of litigation risk; and available Bureau resources.<sup>45</sup>

The Bureau intends to grant or deny an application within 60 days of notifying the applicant that the Bureau deems the application to be complete.

## **C. Bureau Procedures for Issuing No-Action Letters**

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<sup>43</sup> When requested by an applicant, the Bureau intends to coordinate with other Federal and State regulators identified by the applicant, as appropriate. However, depending on the extent of coordination requested, the Bureau may not be able to respond to the application within the time frame specified in section B.

<sup>44</sup> Except as provided in section A.1 and A.7, applications should not include any personally identifiable information (PII).

<sup>45</sup> The decision whether to grant an application for a No-Action Letter will be within the Bureau's sole discretion.

When the Bureau decides to grant an application for a No-Action Letter, it intends to provide the recipient(s) with a No-Action Letter signed by the Assistant Director of the Office of Innovation (pursuant to authority delegated by the Director of the Bureau) that sets forth the specific terms and conditions of the No-Action Letter provided.<sup>46</sup> The Bureau expects a No-Action Letter will:

1. Identify the recipient;<sup>47</sup>
2. Specify the subject matter scope of the letter, *i.e.*, the described aspects of the product or service;<sup>48</sup>
3. State that the letter:
  - (a) is limited to the recipient, and does not apply to any other persons or entities;
  - (b) is limited to the recipient's offering or providing the described aspects of the product or service, and does not apply to the recipient's offering or providing different aspects of the product or service;
  - (c) is based on the factual representations made in the application, which may be incorporated by reference;
  - (d) does not purport to express any legal conclusions regarding the meaning or application of the laws and/or regulations within the scope of the letter; and

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<sup>46</sup> If the Bureau decides to deny an application, it intends to inform the applicant of its decision. The Bureau intends to respond to reasonable requests to reconsider its denial of an application within 30 days of such requests. Applicants may also withdraw, modify, and/or re-submit applications at any time.

<sup>47</sup> For convenience, the term "recipient" is used in the Policy to refer both to an individual recipient and joint recipients.

<sup>48</sup> For convenience, "described aspects of the product or service" is used in the Policy to capture the subject matter scope of a No-Action Letter, including both the particular aspects of the product or service in question, and the particular manner in which it is offered or provided.

- (e) does not constitute the Bureau’s endorsement of the product or service that is the subject of the letter, or any other product or service offered or provided by the recipient;
4. Require the recipient to apprise the Bureau of (a) material changes to information included in the application and (b) material information indicating that the described aspects of the product or service are not performing as anticipated in the application;<sup>49</sup>
  5. Specify any other limitations or conditions, and the extent to which the Bureau intends to publicly disclose information about the No-Action Letter;<sup>50</sup>
  6. State that, unless or until terminated by the Bureau as described in section C.7, 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 (a) its authority to prevent unfair, deceptive, or abusive acts or practices;<sup>51</sup> or (b) any other described statutory or regulatory authority within the Bureau’s jurisdiction.<sup>52</sup>
  7. State that, (i) the recipient may reasonably rely on any Bureau commitments made in the letter; (ii) the Bureau may terminate the letter if it determines that it is necessary

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<sup>49</sup> “Not performing as anticipated” includes the materialization of consumer risks identified in the application, and the materialization of other consumer risks not identified in the application.

<sup>50</sup> If an applicant objects to the disclosure of certain information and the Bureau insists that the information must be publicly disclosed if a No-Action Letter is issued, the applicant may withdraw the application and the Bureau intends to treat all information related to the application as confidential to the full extent permitted by law.

<sup>51</sup> Implicit in the statement under clause (a) is that the Bureau has not determined that the acts or practices in question are unfair, deceptive, or abusive.

<sup>52</sup> The Bureau maintains the authority to obtain information relating to the consumer financial product or service subject to a No-Action Letter under its applicable supervision, enforcement, and other authorities in the same manner and frequency that it obtains information relating to consumer financial products or services not subject to a No-Action Letter.



or appropriate to do so to advance the primary purposes of the Policy, such as where the recipient fails to substantially comply in good faith with the terms and conditions of the letter; the described aspects of the product or service do not perform as anticipated in the application;<sup>53</sup> or controlling law changes as a result of a statutory change or a Supreme Court decision that clearly permits or clearly prohibits conduct covered by the letter;<sup>54</sup> and (iii) upon termination, the Bureau will not bring an action to impose retroactive liability with respect to conduct covered by the letter, except where a failure to substantially comply in good faith with the terms and conditions of the letter caused Dodd-Frank Act actionable substantial injury.<sup>55</sup>

#### **D. Procedures for Modification and Termination of No-Action Letters**

##### *1. Modification Procedures*

A recipient of a No-Action Letter may apply for a modification of the letter. The recipient may seek modification to address an anticipated or unanticipated change in circumstances, such as iterations of the underlying product or service or changes to the information included in the No-Action Letter application. Applications for a modification should include the following:

- a. Any material changes to the information included in the original application;

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<sup>53</sup> Such ground includes the materialization of consumer risks identified in the application, and the materialization of other consumer risks not identified in the application.

<sup>54</sup> If a Circuit Court of Appeals decision clearly prohibits conduct covered by the letter, the Bureau may consider modifying the letter so that it is inoperative within that Circuit.

<sup>55</sup> “Dodd-Frank Act actionable substantial injury” means substantial injury that is not reasonably avoidable by the consumer, where such substantial injury is not outweighed by countervailing benefits to consumers or to competition. *See* 12 U.S.C. 5531(c); *see also* 12 U.S.C. 5536(a)(1)(B). Such a retroactive action would be particularly likely where conduct covered by the letter caused Dodd-Frank Act actionable substantial injury without the Bureau’s knowledge due to the recipient’s failure to substantially comply in good faith with the requirement under section C.4 to apprise the Bureau of (a) material changes to information included in the application and (b) material information indicating that the described aspects of the product or service are not performing as anticipated in the application.

- b. The specific requested modification(s) to the No-Action Letter;
- c. The ground(s) for modifying the No-Action Letter; and
- d. Any other information the recipient wishes to provide in support of the modification application.

In deciding whether to grant an application for modification of a No-Action Letter, the Bureau intends to balance a variety of factors, including the quality and persuasiveness of the application. The Bureau expects to grant or deny such applications within 30 days of notifying the applicant that the Bureau has deemed the application to be complete. When the Bureau grants an application for modification, it intends to provide the recipient with a modified No-Action Letter in accordance with the procedures specified in section C.

## *2. Termination Procedures*

The Bureau intends that the recipient of a No-Action Letter should be able to reasonably rely on any Bureau commitments made in the letter. The Bureau expects termination of a No-Action Letter to be quite rare based, in part, on its knowledge of no-action letter programs operated by other Federal agencies. Such agencies appear to terminate no-action letters very infrequently.<sup>56</sup> The Bureau expects that its practice with respect to termination will be in line with the practices of these agencies.

The Bureau expects a No-Action Letter will state that, (i) the recipient may reasonably rely on any Bureau commitments made in the letter; (ii) the Bureau may terminate the letter if it

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<sup>56</sup> The SEC's website indicates that SEC staff has issued over 2,500 no-action letters since 1971. *See* <https://www.sec.gov/corpfin/corpfin-no-action-letters#chron>; <https://www.sec.gov/divisions/investment/im-noaction.shtml>; <https://www.sec.gov/divisions/marketreg/mr-noaction.shtml>. It appears that less than 1% of these letters have been terminated, withdrawn, or revoked. The CFTC's website indicates that CFTC staff has issued over 1,500 no-action letters since 1975. *See* <https://www.cftc.gov/LawRegulation/CFTCStaffLetters/letters.htm>; <https://www.cftc.gov/LawRegulation/CFTCStaffLetters/archive.htm>. It appears that less than 1% of these letters have been terminated, withdrawn, or revoked.

determines that it is necessary or appropriate to do so to advance the primary purposes of the Policy, such as where the recipient fails to substantially comply in good faith with the terms and conditions of the letter; the described aspects of the product or service do not perform as anticipated in the application;<sup>57</sup> or controlling law changes as a result of a statutory change or a Supreme Court decision that clearly permits or clearly prohibits conduct covered by the letter;<sup>58</sup> and (iii) upon termination, the Bureau will not bring an action to impose retroactive liability with respect to conduct covered by the letter, except where a failure to substantially comply in good faith with the terms and conditions of the letter caused Dodd-Frank Act actionable substantial injury.<sup>59</sup>

The Bureau anticipates that such retroactive actions will be exceedingly rare based, in part, on its knowledge of the practices of other Federal agencies that operate no-action letters programs. It appears that, in the very small percentage of cases in which such agencies have terminated no-action letters, they have not initiated actions to impose retroactive liability.<sup>60</sup> The Bureau expects its practice regarding such retroactive actions to be in line with the practices of these agencies.

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<sup>57</sup> Such ground includes the materialization of consumer risks identified in the application, or the materialization of other consumer risks not identified in the application.

<sup>58</sup> If a Circuit Court of Appeals decision clearly prohibits conduct covered by the letter, the Bureau may consider modifying the letter so that it is inoperative within that Circuit.

<sup>59</sup> “Dodd-Frank Act actionable substantial injury” means substantial injury that is not reasonably avoidable by the consumer, where such substantial injury is not outweighed by countervailing benefits to consumers or to competition. *See* 12 U.S.C. 5531(c); *see also* 12 U.S.C. 5536(a)(1)(B). Such a retroactive action would be particularly likely where conduct covered by the letter caused Dodd-Frank Act actionable substantial injury without the Bureau’s knowledge due to the recipient’s failure to substantially comply in good faith with the requirement under section C.4 to apprise the Bureau of (a) material changes to information included in the application and (b) material information indicating that the described aspects of the product or service are not performing as anticipated in the application.

<sup>60</sup> *See* n.56, *supra*; Nicholas R. Parillo, Admin. Conf. of the U.S., *Federal Agency Guidance: An Institutional Perspective* 134 (2017), available at <https://www.acus.gov/report/agency-guidance-final-report> (“regulated parties highly value [SEC] no-action letters, undoubtedly because the Commission appears to have *never* proceeded against the recipient of a no-action letter who acted in good faith on the letter’s advice”) (citations omitted) (emphasis in the original).

In accordance with principles of fair notice, before terminating a No-Action Letter, the Bureau intends to notify the recipient of the possible grounds for termination, and permit an opportunity to respond within a reasonable period of time. In appropriate cases, the Bureau intends to offer the recipient an opportunity to modify its conduct to avoid termination. The Bureau intends to allow the recipient to wind-down the offering or providing of the described aspects of the product or service during a period of six months before termination, unless the described aspects of the product or service are causing Dodd-Frank Act actionable substantial injury to consumers, and a wind-down period would permit such injury to continue. If the Bureau terminates a No-Action Letter, it intends to do so in writing and specify the reasons for its decision. The Bureau intends to publish termination decisions on its website.

#### **E. Alternative Application, Assessment, and Issuing Procedures**

The Bureau recognizes that the process described in sections A, B, and C (Standard Process) may not be appropriate in certain circumstances. These include applications by service providers that develop products or services for use by covered persons that offer or provide consumer financial products or services; applications facilitated by trade associations, consumer groups, or other third parties that are not themselves covered persons that offer or provide consumer financial products or services; and applications involving a consumer financial product or service that is substantially similar to one that is the subject of an existing No-Action Letter.

##### *1. Service Provider and Facilitator Applications*

Service providers that develop products or services for use by covered persons that offer or provide consumer financial products or services may use the Standard Process if they have secured an applicant that intends to use the service provider's product or service in connection with offering or providing a consumer financial product or service. Similarly, No-Action Letter

applications facilitated by trade associations, consumer groups, or other third parties that are not covered persons that offer or provide consumer financial products or services may use the Standard Process if the third party has secured an applicant that intends to offer or provide the consumer financial product or service in question.

a. No-Action Letter Template. As an alternative to using the Standard Process, a service provider or facilitator may apply for a No-Action Letter Template. A No-Action Letter Template is (i) non-operative, *i.e.*, it itself is not a No-Action Letter, and (ii) non-binding on the Bureau.<sup>61</sup>

i. Application Information. Such applications should include the information specified in section A, as applicable and with appropriate adjustments given that the applicant itself will not be offering or providing the consumer financial product or service in question. In particular, a service provider applicant should describe how it anticipates its product or service will be used by a provider of consumer financial products or services.

ii. Assessment. In deciding whether to grant an application for a No-Action Letter Template, the Bureau intends to balance a variety of factors, as described in section B, with appropriate adjustments given the alternative nature of the application. The Bureau intends to grant or deny an application within 60 days of notifying the applicant that the Bureau has deemed the application to be complete.

iii. Issuance. The Bureau expects that a No-Action Letter Template will include many of the elements specified in section C, with appropriate adjustments based, in part, on the non-operative, non-binding nature of a No-Action Letter Template. In addition, a No-Action Letter

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<sup>61</sup> In particular, the Bureau may modify a No-Action Letter Template in light of the additional information provided in an application for a No-Action Letter under section E.1.b of the final Policy based on a No-Action Letter Template.

Template will include a statement that the Bureau intends to grant applications for a No-Action Letter based on the No-Action Letter Template, under section E.1.b, in appropriate cases.

b. No-Action Letter Based on a No-Action Letter Template. A covered person that intends to offer or provide a consumer financial product or service covered by a No-Action Letter Template (whether using a service provider product or service, or otherwise) may apply for a No-Action Letter based on the No-Action Letter Template.

i. Application Information. Such applications should include the information specified in section A, with appropriate adjustments. In particular, the applicant should include (i) a statement that the application is based on a No-Action Letter Template and an identification of the No-Action Letter Template on which it is based; and (ii) a statement describing how the applicant's offering or providing its product or service is consistent with the framework described in the No-Action Letter Template. The application may cross reference any relevant information contained in the application for the No-Action Letter Template or the No-Action Letter Template itself.

ii. Assessment. In deciding whether to grant an application for a No-Action Letter under section E.1.b, the Bureau intends to balance a variety of factors, as described in section B, with appropriate adjustments. In particular, the Bureau intends to include in its assessment the additional factor of the degree to which the applicant's offering or providing its product or service is consistent with the framework described in the No-Action Letter Template. The Bureau anticipates being able to process such applications in a timeframe shorter than that specified in section B given that the underlying No-Action Letter Template has already been granted.

iii. Issuance. When the Bureau grants an application for a No-Action Letter under section E.1.b, it intends to provide the recipient with a No-Action Letter in accordance with the procedures specified in section C.

## *2. Applications for Substantially Similar Products or Services*

If an applicant offers or provides a consumer financial product or service that it believes is substantially similar to the consumer financial product or service that is the subject of an existing No-Action Letter, it may apply for a No-Action Letter based on the existing No-Action Letter.

a. Application Information. Such applications should include the information specified in section A, with appropriate adjustments. In particular, the applicant should include (i) a statement that the application is based on an existing No-Action Letter and an identification of the No-Action Letter on which it is based; and (ii) a statement describing how the consumer financial product or service in question and the manner in which it is offered or provided is substantially similar to the consumer financial product or service that is the subject of the existing No-Action Letter and the manner in which it is offered or provided. The application may cross reference any relevant information contained in the application for the existing No-Action Letter or the existing No-Action Letter itself.

b. Assessment. In deciding whether to grant an application for such a No-Action Letter, the Bureau intends to balance a variety of factors, as described in section B, with appropriate adjustments. In particular, the Bureau intends to include in its assessment the additional factor of the degree to which the consumer financial product or service in question, and the manner in which it is offered or provided, is substantially similar to these aspects of the existing No-Action Letter. The Bureau anticipates being able to process such applications in a timeframe shorter

than that specified in section B given that the underlying No-Action Letter has already been granted.

c. Issuance. When the Bureau grants an application for such a No-Action Letter, it intends to provide the recipient with a No-Action Letter in accordance with the procedures specified in section C.<sup>62</sup>

## **F. Regulatory Coordination**

Section 1015 of the Dodd-Frank Act instructs the Bureau to coordinate with Federal agencies and State regulators, as appropriate, to promote consistent regulatory treatment of consumer financial and investment products and services.<sup>63</sup> Similarly, section 1042(c) of the Dodd-Frank Act instructs the Bureau to provide guidance in order to further coordinate actions with the State attorneys general and other regulators.<sup>64</sup> Such coordination includes coordinating in circumstances where other regulators have chosen to limit their enforcement or other regulatory authority. The Bureau is interested in entering into agreements with State authorities that issue similar forms of no-action compliance assistance that would provide for an alternative means of receiving a No-Action Letter from the Bureau, *i.e.*, alternative to the process described in sections A through D.

Furthermore, the Bureau is interested in coordinating with other regulators more generally. To this end, the Bureau intends to enter into agreements whenever practicable to coordinate No-Action Letters issued under the Policy with similar forms of compliance assistance offered by State, Federal, or international regulators.

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<sup>62</sup> In circumstances where neither the Standard Process nor the alternative procedures described in section E (Alternative Process) are appropriate, the Bureau may utilize other procedures that diverge in one or more respects from the Standard Process or the Alternative Process, consistent with the purposes of the Policy.

<sup>63</sup> 12 U.S.C. 5495.

<sup>64</sup> 12 U.S.C. 5552(c).



## **G. Bureau Disclosure of Information Regarding No-Action Letters**

Public disclosure of information regarding No-Action Letters is governed by applicable law, including the Dodd-Frank Act,<sup>65</sup> the FOIA, and the Disclosure Rule. The Disclosure Rule generally prohibits the Bureau from disclosing confidential information,<sup>66</sup> and defines confidential information to include information that may be exempt from disclosure under the FOIA<sup>67</sup> – including FOIA Exemption 4 regarding trade secrets and confidential commercial or financial information that is privileged or confidential.<sup>68</sup> Relatedly, the Disclosure Rule defines business information as commercial or financial information obtained by the Bureau from a submitter that may be protected from disclosure under FOIA Exemption 4, and generally provides that such business information shall not be disclosed pursuant to a FOIA request except in accordance with section 1070.20 of the rule.<sup>69</sup>

Consistent with applicable law, the Bureau intends to publish No-Action Letters and No-Action Letter Templates on its website, as well as a version or summary of the application. The Bureau also may publish denials of applications on its website, including an explanation of why the application was denied, particularly if it determines that doing so would be in the public interest.<sup>70</sup>

Where information submitted to the Bureau is both customarily and actually treated as private by the submitter, the Bureau intends to treat it as confidential in accordance with the

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<sup>65</sup> *See, e.g.*, 12 U.S.C. 5512(c)(8).

<sup>66</sup> 12 CFR 1070.41.

<sup>67</sup> 12 CFR 1070.2(f).

<sup>68</sup> 5 U.S.C. 552(b)(4).

<sup>69</sup> 12 CFR 1070.20(a), (b).

<sup>70</sup> The Bureau intends to publish denials only after the applicant is given an opportunity to request reconsideration of the denial. Upon request, and if disclosure is not required by 5 U.S.C. 552(a)(2) or other applicable law, the Bureau does not intend to release identifying information from published denials, and to instead redact such information from denials published on its website.

Disclosure Rule.<sup>71</sup> The Bureau anticipates that much of the information submitted by applicants in their applications, and by recipients during the pendency of the No-Action Letter, will qualify as confidential information under the Disclosure Rule.<sup>72</sup> In particular, the Bureau expects that information submitted that is responsive to sections A.2, A.3, A.4, C.4, and parallel information under sections E.1.a and E.2.a, will qualify as business information under the Disclosure Rule.<sup>73</sup> Other information submitted by applicants or recipients may also qualify as confidential information.

Disclosure of information or data provided to the Bureau under the Policy to other Federal and State agencies is governed by applicable law, including the Dodd-Frank Act<sup>74</sup> and the Disclosure Rule.

To the extent the Bureau wishes to publicly disclose non-confidential information regarding a No-Action Letter, the Bureau intends to include the terms of such disclosure in the letter. The Bureau intends to draft the No-Action Letter in a manner such that confidential information is not disclosed. Consistent with applicable law and its own rules, the Bureau does not intend to publicly disclose any information that would conflict with consumers' privacy interests.

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<sup>71</sup> See *Food Mktg. Inst. v. Argus Leader Media*, 139 S.Ct. 2356 (June 24, 2019).

<sup>72</sup> To the extent associated communications include the same information, that information would have the same status. But other information in associated communications may be subject to disclosure.

<sup>73</sup> To the extent an applicant or recipient submits information in connection with any of the identified sections that is not actually responsive to these sections, such information may be subject to disclosure.

<sup>74</sup> See, e.g., 12 U.S.C. 5512(c)(8).

**[THIS SIGNATURE PAGE PERTAINS TO THE DOCUMENT TITLED "POLICY ON  
NO-ACTION LETTERS"]**

Dated: September 6, 2019.



**Kathleen L. Kraninger**

*Director, Bureau of Consumer Financial Protection.*