



MORTGAGE BANKERS ASSOCIATION

February 11, 2019

Mr. Paul Watkins
Assistant Director, Office of Innovation
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

**Re: Policy on No-Action Letters and the BCFP Product Sandbox,
Docket No. CFPB-2018-0042**

Dear Mr. Watkins:

The Mortgage Bankers Association (“MBA”)¹ appreciates the opportunity to comment on the Bureau of Consumer Financial Protection’s (“CFPB” or the “Bureau”) *Policy on No-Action Letters and the BCFP Product Sandbox* (“Policy Guidance”).² The Bureau’s efforts to revise its No-Action Letter (“NAL”) Policy and establish the first-of-its-kind federal “Product Sandbox” are welcomed by our members. These steps will encourage innovation, resulting in greater consumer access to beneficial products and services.³

MBA continues to advocate for the modernization of the regulatory framework.⁴ Removing regulatory barriers to the development and adoption of technology has the potential to lower costs, improve efficiency and enhance the customer experience.⁵ To this end, MBA responded to the Bureau’s Request for Information (“RFI”) on Guidance and Implementation Support with recommendations for enhancing the NAL Policy.⁶ Additionally, MBA commented on the Bureau’s recent proposed revisions to its Trial

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation’s residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,300 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage lending field. For additional information, visit MBA’s Web site: www.mba.org.

² 83 Fed. Reg. 64036 (Dec. 13, 2018). (“2018 Policy”).

³ 12 U.S.C. § 5511(a).

⁴ See *CFPB 2.0: Advancing Consumer Protection* (August 2017), available at <https://www.mba.org/issues/cfpb-20-advancing-consumer-protection>.

⁵ See MBA, “Re: FinTech Regulation of Non-Depository Institutions.” Comment letter to Treasury (March 26, 2018), available at <https://www.mba.org/Documents/Comment%20Letters/MBA-Letter-Treasury-FinTech.pdf>.

⁶ MBA, “Re: Request for Information Regarding Bureau Guidance and Implementation Support, Docket No. CFPB-2018-0013.” Comment letter to CFPB (July 2, 2018), available at <https://www.mba.org/Documents/Comment%20Letters/MBA%20Comment%20Letter%20on%20Guidance%20RFI%207%20202018.pdf>.

Disclosure Programs, applauding the CFPB's efforts in addressing the deficiencies of the original program.⁷

In this RFI, the Bureau acknowledges the ineffectiveness of the 2016 NAL Policy under which only one NAL has been issued.⁸ To address concerns with the initial policy, the policies currently under consideration by the Bureau incorporate aspects of successful NAL policies employed by other regulators.⁹ The resulting proposed Product Sandbox and revised NAL Policy appear much more likely to encourage participation. The Bureau's efforts to enable innovation through these initiatives are consistent with its statutory mandate to ensure all consumers have access to fair, transparent, and competitive markets for consumer financial products and services.¹⁰

I. Reliability and scope of the Bureau's NAL Policy and Product Sandbox.

As the Bureau notes, "both the process required to obtain a No-Action Letter and the relief available under the 2016 Policy have not provided firms with sufficient incentives to seek No-Action Letters from Bureau staff."¹¹ Multiple issues contributed to the lack of interest in the 2016 Policy.¹² Most significantly, the protections offered under a NAL were inadequate. The 2016 Policy provided letters that lacked reliability and the relief was too narrow. Applicants were provided with no assurances that their participation in the program wouldn't result in adverse Bureau action. The effect of an NAL on other federal or state regulators remained in doubt. The review process was very prescriptive in its assessment and in the types of products and services that qualified for review. These issues and others diminished the value of a program meant to encourage beneficial innovations. The Bureau's 2018 Policy, however, shows promise as an effort to assuage the concerns raised in response to the 2016 Policy.

With two avenues of encouraging innovation, the revised NAL Policy and the new Product Sandbox provide binding relief duly administered by an authorized Bureau agent.¹³ In

⁷ See MBA, "Re: Policy to Encourage Trial Disclosure Programs, Docket No. CFPB-2018-0023." Comment letter to CFPB (October 10, 2018), available at

https://www.mba.org/Documents/NPPG%20TDP%20Comment%20Letter_Final%20on%20Letterhead.pdf.

⁸ See CFPB, *CFPB Announces First No-Action Letter to Upstart Network* (Sept. 14, 2017), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-first-no-action-letter-upstartnetwork/>.

⁹ 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 Interpretative 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 Fed. Reg. 71487 (Nov. 29, 2005). (All preceding policies provide limited application elements, no temporal limitations, and no data-sharing requirements.)

¹⁰ 12 U.S.C. § 5511(a).

¹¹ 2018 Policy, at 64036.

¹² See generally, 81 Fed. Reg. 8686 (Feb. 22, 2016). ("2016 Policy").

¹³ 2018 Policy, at 64037.

contrast, the 2016 Policy indicated that NALs would be provided by Bureau staff.¹⁴ Most significantly, NALs under the previous policy would include a statement indicating that any relief purported to be offered by the NAL did not constitute an official expression of the Bureau's views.¹⁵ Without a reliable assurance that a Bureau staff member was authorized to provide an NAL, the letter was essentially provided without concrete effect. An NAL recipient could not rely upon a staff member's statement because that staff member was not clearly authorized to make such statements on behalf of the Bureau. This qualifier, combined with the statement that an NAL reflected that the staff had no "present intention" to recommend enforcement or supervisory action, diminishes any "assurance."¹⁶ The Bureau's proposed commitments in the 2018 Policy are greatly encouraging. The proposed changes to the relief in the Policy Guidance are welcome, although greater clarity on the nature and effect of these assurances would provide even greater incentive for entities to participate.

A. Relief available under NAL Policy

The Bureau's 2018 Policy states:

"...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; or (b) any other identified statutory or regulatory authority within the Bureau's jurisdictions."¹⁷

The relief available under the proposed 2018 Policy appropriately goes much further than the 2016 Policy. NAL recipients operating in good faith and substantial compliance with the terms of the NAL are protected from Bureau supervisory or enforcement actions under any of the Bureau's statutory or regulatory authorities, including its UDAAP authority.

While these positive enhancements may succeed in encouraging greater participation, more can be done to protect the NAL recipient from actions brought by private litigants. In the rare instance that a third-party files suit under a consumer financial law within the Bureau's jurisdiction for activity covered by an NAL, the Bureau should commit to intervene with an amicus brief on behalf of the recipient citing the Bureau's reasoning behind the grant. Detailing the Bureau's review of the NAL in question and the rationale behind its statutorily authorized grant of an exemption would provide a helpful, on the record protection that reflects the goals of this program.

¹⁴ 2016 Policy, at 8692.

¹⁵ *Id.* at 8695.

¹⁶ *Id.* at 8692.

¹⁷ *See* 2018 Policy, at 64039.

B. Relief available under the Product Sandbox

The Product Sandbox provides three types of relief to participants: approvals, exemptions, and no-action relief. An “approval” qualifies the specific product or service for the “safe harbor” provisions of the Truth-in-Lending Act, the Equal Credit Opportunity Act, and the Electronic Funds Transfer Act.¹⁸ Good faith compliance with the terms and conditions of the approval would immunize participating entities from enforcement actions by any Federal or State authorities, as well as from lawsuits brought by private parties.¹⁹

Next, the Product Sandbox offers “exemptions” through which the Bureau exempts the recipient from complying with, or deems it in compliance with, certain specified statutory or regulatory provisions.²⁰ Like approvals, a “recipient would be immune from enforcement actions by any Federal or State authorities, as well as from lawsuits brought by private parties.”²¹

Finally, the Bureau may provide “no-action relief” similar to relief available under the NAL Policy, although no-action relief provided under the Product Sandbox would require data sharing.²²

In conjunction, the three types of relief proposed effectively leverage the Bureau’s statutory authorities to provide more meaningful protection than that available under the 2016 NAL Policy, which is a significant positive step in ensuring transparency for potential applicants. Entities will be capable of making investments with the assurance the Bureau has provided a statutorily derived safe harbor. As mentioned above, the Bureau should provide a commitment to intervene during the rare instances that a third party seeks to litigate against a Product Sandbox participant. Whether directly, or through an amicus brief, the Bureau should take a clear position on the products and services it has deemed appropriate and valuable to consumers.

II. The NAL Policy should be open to any product, service, or action.

To increase alignment with similar NAL policies at other federal agencies, the Bureau should clarify that products, services, and actions are eligible for NAL relief. The 2016 Policy was clear in restricting NALs to “emerging products involving substantial regulatory uncertainty.”²³ By restricting eligibility for an NAL in this way, the 2016 Policy unnecessarily limited the value of the no-action letter program. Other regulators use no-action letters to provide clarity on the regulatory implications of any product, service, or

¹⁸ *Id.* at 64041, 64042.

¹⁹ *Id.*

²⁰ *See* 2018 Policy, at 64042.

²¹ *Id.*

²² *Id.*

²³ *See* 2016 Policy, at 8690-91.

action, regardless of whether it is new or established. While the 2018 Policy does not limit eligibility to emerging products or services, it does not specifically state it is open to any product, service, or action. We recommend the Bureau amend the proposed policy to explicitly state that entities may seek NALs for any instance where regulatory clarity is needed with respect to a product or service.

III. The Bureau should extend relief to similarly situated companies with those under the NAL Policy and Product Sandbox.

While the Bureau anticipates multiple entities to develop or procure similar products and services, under the 2018 Policy, the CFPB provides that relief granted under the NAL Policy extends only to the entity or entities specified in the approved application.²⁴ To accommodate instances where multiple entities seek to adopt a particular product or service, the policy allows trade associations to apply on behalf of third parties.²⁵ This is a welcome development. By creating an avenue for relief through trade associations, the Bureau acknowledges that qualifying for an NAL depends on the risk associated with product or service, rather than that of the applicant or applicants. For similar reasons, the Bureau should allow third party entities to rely upon a public NAL provided to another entity for substantially the same product or service. This process would provide more companies, and thus more consumers, with the benefit of the Bureau's NAL determination.²⁶

There is an additional benefit to tracking similar requests. When multiple entities are making use of an approved product or service that requires the reconsideration of an outdated regulation, the Bureau will have ample evidence arguing for the amendment of the unnecessary regulatory barrier. A benefit of an active NAL program and a well-subscribed Product Sandbox is the identification of overly burdensome and outdated regulations. The Bureau's 2018 Policy should anticipate such outcomes and state clearly that the Bureau will affirmatively seek appropriate regulatory changes indicated by the successful adoption of approved products and services.

IV. The Bureau should consider a few additional changes to their proposed guidance to ensure a safe, secure, and incentivized environment for innovation.

Clarifying the evocation process provided by the Bureau is an important development. It is also important that the Bureau explicitly limit the bases of revocation articulated in the

²⁴ *Id.*

²⁵ *Id.* at 64039, 64043.

²⁶ Additionally, consumers will be assured that a specific product or service, rather than the entity itself, was vetted by the Bureau. In the instance of an innovative product or service, consumers would receive greater benefits from an assurance on the innovation itself because consumers are capable of vetting the offeror themselves.

policy. The Bureau should also consider providing more structure around its use of “reasonable” for response times in regards to a notification of revocation or opportunity to cure. Interpreting “reasonable” is necessarily a subjective exercise. Additionally, the Bureau should provide greater clarity on what constitutes “material, tangible, harm to consumers.”²⁷ Similarly to “reasonable,” this is a subjective criteria that would benefit from greater explanation and objective criteria. Laying an objective foundation, such as requiring specific identified harm, would be very helpful to provide an appropriate level of clarity.

The Bureau should allow for provisional responses or an iterative process in specific instances where an entity is unsure of when and how they need to respond during a potential revocation. An open-dialogue between both the Bureau and a participating entity is necessary, and maintaining an avenue of discussion that allows entities to respond to the Bureau with a provisional response will facilitate greater cooperation and collaboration.

Under the proposed 2018 Policy, relief provided under a NAL will be of unlimited duration.²⁸ The period of protection under the Product Sandbox is less clear, with the proposal indicating a two-year period would be appropriate “in most cases.”²⁹ We recommend the Bureau establish clear duration guidelines for the Product Sandbox. This step would provide participants with some certainty to justify the significant costs often associated with innovation as well as aid participants in selecting which path of innovation would be appropriate. Additionally, the purpose of a sandbox can be achieved if the Bureau endeavors to use this defined duration as an assessment period. A clearly defined duration can provide adequate time for the Bureau to determine an entrants’ success and what steps to take next. Specifically, a successful entrant should have a clear path to exit the sandbox, whether it is through approval of an indefinite NAL, public guidance, or regulatory change.

The Bureau states that the data-sharing requirement of the 2016 Policy will no longer be “expected under Part I of the proposed Policy.”³⁰ This indicates, and is confirmed in the 2018 Policy, that participants of the Product Sandbox will be subject to data-sharing requirements.³¹ However, the 2018 Policy does not indicate what this data-sharing requirement will entail, nor does it explain the intended purpose behind data-sharing. To promote better understanding of the burdens and benefits of the Product Sandbox, details on data-sharing should be made explicit. The Bureau should clearly explain their rationale

²⁷ *Id.* at 64040.

²⁸ *Id.* at 64037.

²⁹ *Id.* at 64042, n. 68.

³⁰ *Id.* at 64037.

³¹ *Id.*

behind the data-sharing requirements, the process for data-sharing and the intended purpose of data-sharing, including how an entity can expect its data to be analyzed.

Lastly, a lack of regulatory coordination can be a barrier to innovation. This is particularly true in the United States, where a patchwork of federal and state regulators sometimes create overlapping or duplicative regulations or supervisory burdens. The Bureau's stated efforts to promote coordination throughout the 2018 Policy are a welcome addition,³² though the Bureau should continue to inform stakeholders of steps taken to achieving such coordination.

MBA appreciates consideration of these comments and the Bureau's willingness to engage with stakeholders on its 2018 No-Action Letter Policy and Product Sandbox. MBA strongly supports the proposed revisions, which incentivize participation in these innovation facilitating programs. Should you have any questions or wish to discuss any aspect of these comments, please contact Justin Wiseman, Associate Vice President and Managing Regulatory Counsel (jwiseman@mba.org), or Sheraz Syed, Regulatory Associate (ssyed@mba.org).

Sincerely,

A handwritten signature in black ink that reads "Stephen A. O'Connor". The signature is written in a cursive, slightly slanted style.

Stephen A. O'Connor
Senior Vice President
Public Policy and Industry Relations
Mortgage Bankers Association

³² *Id.* at 64037-40, 64044-45.