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CFPB Proposes Issuing No-Action Letters: Innovation at Too Much Cost and Uncertainty?

By Donald Lampe and Michael Raines

On October 10, 2014, the CFPB issued notice of and requested public comment on [a proposed policy](#) allowing CFPB staff to issue no-action letters (NALs) for “innovative financial products or services that substantially benefit consumers.” The proposal is specifically designed for new financial products or services as to which the application of statutory or regulatory provisions is uncertain. The CFPB believes that such uncertainty may discourage market innovations by preventing development of or investment in consumer-friendly products because of the potential threat of enforcement or supervisory actions. To reduce the regulatory uncertainty around such emerging financial products or services, the CFPB is proposing a process by which an entity may submit a request for a NAL from the agency’s staff.

At first blush, the proposal appears to be a welcome development, but the policy as written sets forth quite a narrow set of circumstances in which NALs can be requested and imposes significant burdens on requesters. Moreover, as is the case with other federal agency NAL practices, a resulting CFPB NAL, as a staff determination directed only at the requesting party, would create no legal precedent for the marketplace as a whole. Further, the CFPB seeks to reserve the power to revoke a NAL at any time, meaning a NAL may be of limited value even to the requesting party.

According to the proposal, requests for CFPB NALs would involve a substantial undertaking by the requesting party. Requests seeking a CFPB NAL must:

- Be submitted in writing via email and identify the names of the entity or individual making the request;
- Provide a description of the subject financial product that specifically covers how the product functions, the terms on which it will be offered, the roles of all involved parties, and the manner in which the product will be offered and used by consumers, including any applicable disclosures;
- Incorporate an explanation of how the product will substantially benefit consumers, including proposed methods of testing such benefits, and an explanation of the potential consumer risks compared to other products available in the market. In effect, this would require the requester to design a consumer-benefit testing framework even before the product or service is ready for the marketplace and to identify “consumer risks” even though that term is not defined in any statute or regulation; and
- Contain an explanation of why the NAL is necessary by showing how the application of a specific statutory or regulatory provision is uncertain, why the statutory or regulatory provision should not be applied to the financial product or service, and why the uncertainty surrounding the financial product or service cannot be remedied other than through the NAL process.

The CFPB’s proposal provides agency staff with the sole discretion to decide how to respond to requests for NALs. In reaching a decision, CFPB staff members are to consider whether a product’s structure, terms and conditions are understandable and permit consumers to protect themselves against unnecessary cost or risk. CFPB staff will also review

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evidence concerning the actual benefits the financial product or service may provide to consumers, whether such benefits are available to consumers through other products in the marketplace, and take into account whether controls are in place to mitigate consumer risks. The decision to grant a NAL also is to be based on whether the issuance will actually reduce regulatory uncertainty concerning the product and whether the uncertainty could be reduced by other regulatory action, such as rulemaking or issuance of other guidance.

The proposal states that a request for a NAL may be granted in whole, in part, or subject to conditions. If granted, the NAL would be published on the CFPB's website. The NAL would contain a statement that the CFPB has no present intention to initiate an enforcement or supervisory action against the requestor with respect to the specific financial product or service under the identified statutory or regulatory provisions. The NAL may be limited in time, volume of transactions, or conditioned on the provision of additional consumer safeguards. It is important to understand that the NAL is not binding on the CFPB. The NAL may be modified or revoked at any time and without prior notice. Further, the NAL does not mean that the CFPB will refrain from initiating enforcement or supervisory investigations regarding compliance with the terms of the NAL. Questions arise concerning the precedential value, if any, of NALs to other industry participants or even to the requesting entity given the limited scope and non-binding nature of NALs under the proposal.

The CFPB does not anticipate providing NALs often. Rather, the proposal states that CFPB staff would only issue NALs for exceptional circumstances, when the appropriateness of staff action has been clearly demonstrated by the requester. If the request does not meet the subjective requirements outlined by the proposal, CFPB staff may deny the request or decline to either grant or deny the request with or without explanation. Requests would most likely not receive a response if there is an ongoing regulatory action concerning the product or a similar product, the Bureau is engaged in current or anticipated rulemaking, supervisory, enforcement, or other regulatory action, or the request relates to a product or service that is inappropriate for NAL treatment, such as UDAAP issues. The CFPB would not necessarily publish NAL requests that are denied, but the CFPB would have the discretion to publish any request that contains information that may "benefit the public interest." It is important to note that CFPB NALs in all likelihood would not cover compliance with state laws or federal laws not administered by the CFPB.

The CFPB proposal sets forth a framework that differs in important respects from other federal agency practices. For example, the SEC is empowered at the agency level to review no-action letters involving matters of substantial importance when novel and unique issues are presented. In its current form, the CFPB proposal does not provide for this level of review by the agency. Additionally, the CFPB's proposal does not specifically discuss whether requests can be withdrawn to avoid the issuance of a denial or publication if the agency staff has already reached a decision. In the similar SEC no-action letter process, requests typically are allowed to be withdrawn prior to the issuance of a formal denial. The proposal permits communication between staff members and the requester before a decision is made by agency staff and states that requests may be withdrawn at any time. The proposal is not clear as to whether agency staff would permit or facilitate withdrawal under these circumstances.

The impetus behind the proposal is laudable - facilitating the introduction of consumer financial products and services that benefit consumers. The CFPB, by putting out the proposal for comment clearly is interested in input from market participants and others. Issues that commenters on the proposal may wish to consider, other than those outlined above, include:

- The extent to which proprietary or trade secret information would be protected, since the required product-level information that would need to be submitted is very detailed;

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- How any requester that went to the effort of submitting a request could know whether the product or practices surrounding the product are the subject of confidential investigations by the CFPB into other parties or are the subject of “anticipated” CFPB action;
- The extent to which a NAL would have sufficient reliance value if the CFPB is able to revoke it at any time or initiate, in its discretion, enforcement proceedings if the agency later determines that the NAL is not being followed;
- Whether the CFPB is staffed to analyze complex business processes and potential consumer outcomes as to novel or untested consumer financial products;
- Whether the parameters for CFPB staff decisioning are too subjective (and thus unpredictable), calling into question whether financial services providers would undertake the substantial effort of submitting a CFPB NAL request if there can be no reasonable forecast of outcome.

Comments on the proposed NAL policy can be submitted by mail or online at www.regulations.gov.

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