



February 11, 2019

Via Regulations.gov

Comment Intake
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Policy on No-Action Letters and the CFPB Product Sandbox (Docket No. CFPB-2018-0042)

Ladies and Gentlemen:

The Bank Policy Institute¹ appreciates the opportunity to comment on the proposed Policy on No-Action Letters and the Product Sandbox issued by the Consumer Financial Protection Bureau.²

We applaud the CFPB's efforts to streamline and clarify its existing No-Action Letter ("NAL") policy in a manner designed to tailor the application process and to provide further certainty to applicants regarding the benefits of an NAL, as well as the relief afforded by the CFPB.³ We also note that the CFPB's proposal incorporates several recommendations previously provided through one of BPI's predecessor organizations, The Clearing House Association, on the current NAL policy, including that the data requested by the CFPB during the application process be narrowed, that the CFPB offer meaningful, substantive legal relief for institutions that receive an NAL and that the CFPB provide a determination for unfair, deceptive and abusive acts or practices.⁴ By adopting several of these recommendations, the proposal more clearly articulates the benefits of receiving an NAL and further encourages its potential use by firms.

While the proposal is a step toward providing meaningful regulatory guidance for firms offering innovative consumer financial products and services, several key aspects of the proposal still would result in legal uncertainty for organizations seeking a determination from the CFPB. A significant benefit of the NAL and Product Sandbox

¹ The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

² Policy on No-Action Letters and the BCFP Product Sandbox, 83 Fed. Reg. 64036 (Dec. 13, 2018).

³ Policy on No-Action Letters, 81 Fed. Reg. 8686 (Feb. 22, 2016).

⁴ Letter from Gregg Rozansky, Managing Director & Senior Associate General Counsel, The Clearing House Association L.L.C., to Monica Jackson, Office of the Executive Secretary, CFPB (May 14, 2018).

processes is that they would afford institutions the ability to engage in new, innovative consumer financial products and services with the comfort that the CFPB (and potentially other agencies) would not undertake any supervisory or enforcement action resulting from the firm engaging in that activity. As such, without certain modifications being made in any final policy, the unintended result of the proposal may be to disincentivize institutions from seeking a determination, even in situations where it would be useful or necessary.

This letter describes and recommends four key ways in which the proposal could be modified so as to provide additional regulatory certainty for institutions applying for a determination either through an NAL or the Product Sandbox. Each of these suggested changes would support and further the proposal's intended goal of enhancing regulatory certainty and compliance with Federal consumer financial laws, while also benefitting consumers by making it easier for responsible, innovative consumer financial products and services to enter and flourish in the marketplace. These recommendations fall within the following areas:

- First, the CFPB should include more affirmative and concrete steps by which a determination (whether under the NAL or Product Sandbox processes) will be coordinated with other regulators;
- Second, the CFPB should clarify that the issuance of an NAL affirms that, under the given facts and circumstances, the consumer financial product or service offered by the applicant is consistent with the applicable statutory or regulatory framework as determined by the CFPB, and the CFPB, as an agency, should consider implementing a separate legal opinion process to provide more definitive clarity to market participants;
- Third, to assist in further compliance with the conditions outlined under the NAL or Product Sandbox, the CFPB should provide clearly articulated guideposts for those conditions and the requisite compliance needed to ensure the no-action position or product determination; and
- Fourth, revocation procedures should be harmonized between the NAL and Product Sandbox processes, and the CFPB should clarify its proposed revocation procedures to demonstrate how they would apply to recipients of an NAL or Product Sandbox determination.

Finally, we note that the NAL and Product Sandbox processes, albeit useful for areas of regulatory uncertainty, should not become the default avenue for institutions to engage in new or innovative consumer financial products or services. Rather, as is current practice, a bank's own internal compliance management systems should function as the process by which an initial determination is made as to whether a new product or service complies with relevant statutory or regulatory requirements. Further, as a practical matter, either process should not supersede any formal or informal relationships developed between CFPB supervisory staff and an institution.

I. The proposal should provide a more meaningful and concrete method by which regulatory coordination will occur between the CFPB and other state and federal regulatory authorities, so as to allow for consistent application of a determination accorded to applicants.

As the primary regulator overseeing Federal consumer financial laws, the CFPB should lead coordination among other federal and state regulatory authorities for purposes of the NAL and Product Sandbox processes. While the proposal provides some comfort regarding the regulatory coordination efforts of the CFPB, to achieve greater

regulatory certainty for those applicants that are subject to oversight by multiple regulators, the CFPB should take concrete affirmative steps to facilitate regulatory coordination. Banks, unlike their non-bank counterparts, are subject to both a wider set of regulatory requirements and a broader set of federal and state regulators, which requires more certainty from the CFPB that regulatory coordination will occur and will result in consistent treatment of the CFPB's NAL or Product Sandbox determinations by all applicable regulators. Without coordination with and consistent treatment by other applicable regulators of an applicant, institutions subject to multiple regulatory frameworks would be less inclined to use the NAL or Product Sandbox processes. Thus, we recommend that the CFPB commit in any final policy to proactively engaging in regulatory coordination efforts, both during the approval process and after a determination has been made, to develop broad regulatory consensus with relevant federal and state regulatory authorities related to the consumer financial product or service subject to an NAL or Product Sandbox determination.

From a practical perspective, the CFPB should conduct proactive outreach with other relevant regulators to explain each of its NAL and Product Sandbox determinations; doing so would both further regulatory coordination in this area, and also mitigate and address potential concerns that other regulators may have regarding an applicant's activities under their own statutory authorities. In particular, in cases where a product or service is addressed by the CFPB under its authority, but also raises potential additional issues under another agency's authority, the CFPB should work with the relevant regulatory authorities (i) to determine, at the outset and throughout the application process, the scope and application of a determination under an NAL or the Product Sandbox, (ii) to facilitate, as necessary during the application process and thereafter, any discussion or assurances between the applicant and the other relevant regulatory agencies, and (iii) to outline, upon an approval, governance, compliance and risk management standards for an applicant that comprehensively address the requirements of the CFPB and the other relevant regulatory agencies, pursuant to an NAL or Product Sandbox determination. Further, in situations where an applicant may receive an exemption to a statutory or regulatory requirement under the Product Sandbox, the CFPB should coordinate with state regulatory authorities that may have authority to enforce that statute or regulation to clarify to an applicant whether the determination covers that authority. Most importantly, the CFPB should keep applicants apprised of its regulatory coordination efforts (including any resulting delays) throughout the application process, as well as thereafter, to ensure that the recipient has a clear understanding of any corresponding regulatory compliance issues. Implementing these protocols will help support broader regulatory clarity and consistency.

Regardless of how the CFPB ultimately achieves regulatory coordination, we believe that a coordinated regulatory sandbox would afford the most comprehensive solution allowing for simultaneous regulatory relief and cohesiveness for firms engaged in new, innovative consumer financial products and services. In particular, and as noted in the U.S. Department of Treasury's Report, *A Financial System that Creates Economic Opportunities - Nonbank Financials, Fintech and Innovation*, a unified solution among federal and state regulators is necessary and vital to supporting innovation in the banking space.⁵ Further, as part of moving toward a streamlined regulatory environment, the CFPB also should coordinate with the Conference of State Bank Supervisors as part of its Vision 2020 initiative.⁶ As many federal and state agencies continue to form offices for innovation and technological

⁵ U.S. DEPARTMENT OF TREASURY, *A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: NONBANK FINANCIALS, FINTECH, AND INNOVATION* (JULY 2018).

⁶ Conference of State Bank Supervisors, [Vision 2020 for Fintech and Non-Bank Regulation](#) (announced May 10, 2017).

development, this only heightens the importance of regulatory coordination to achieve a more viable environment for innovative banking services.

II. The NAL determination should provide further legal certainty for the requesting applicant, and the CFPB should implement a separate interpretive legal opinion process to allow for definitive clarity for other firms engaged in similar activities in the marketplace.

To offer meaningful legal certainty to institutions requesting an NAL, the CFPB should include in any approval or determination letter the rationale for, and the substantive analysis supporting, an NAL determination. As the CFPB is aware, state consumer protection regulations and enforcement markedly differ depending on the state's regime and may not be preempted by Federal law where state law affords greater protections to consumers.⁷ In order to provide applicants greater regulatory certainty under both Federal and state laws, the CFPB should explain its rationale for granting an NAL and its reasoning behind why it would not undertake supervisory or enforcement action. Further, as part of explaining its analysis under the given facts and circumstances, the letter should provide assurances that the issuance of an NAL demonstrates that the CFPB's views that activity as being consistent with relevant statutory or regulatory requirements.

Ultimately, however, the NAL (as well as the Product Sandbox) process stops short of providing further legal certainty to institutions. To this end, the CFPB, as an agency, should implement a process—separate and distinct from the NAL and Product Sandbox processes—to issue interpretive legal opinions consistent with its rulemaking, supervisory and enforcement authorities, which would offer firms a meaningful mechanism apart from the NAL and Product Sandbox processes in circumstances that warrant further legal clarity on a particular practice or activity. Several other regulatory agencies, including the Office of the Comptroller of the Currency, Federal Trade Commission, Securities and Exchange Commission, and the Commodity Futures Trading Commission, provide for legal or advisory opinions intended to offer a legal interpretation of relevant statutory or regulatory requirements by the agency's staff with respect to a given activity or practice.⁸ As the agency primarily responsible for enforcing Federal consumer financial laws, interpretive legal opinions would further compliance efforts for institutions providing similar consumer financial products and services in the marketplace.

While the CFPB may have concerns in providing for a distinct interpretive legal opinion process, including with respect to the potential administrative and procedural obligations that may be imposed on the agency, we stress the need for such legal clarity, in addition to the NAL and Product Sandbox processes. Accordingly, at minimum, the agency should find a method by which to offer additional interpretive legal clarity for particular activities or practices through its existing public-facing channels, such as by issuing materials on frequently asked questions for particular issues that may arise. Regardless of the process implemented, the CFPB should work across its relevant offices,

⁷ 12 U.S.C. § 5551(a)(2).

⁸ See 12 C.F.R. 16.30 (OCC) (permitting persons the ability to request interpretive advice or a legal opinion); 16 C.F.R. 1.1 (FTC) (granting advisory opinions both on behalf of the Commission and by the staff, where the matter is "substantial or novel" or where the advice is of "significant interest"); 17 C.F.R. 140.99 (CFTC) (providing a process for exemption, no-action, as well as interpretive determinations); Procedures Utilized by the Division of Corporation Finance for Rendering Informal Advice, 45 Fed. Reg. 89621 (Oct. 28, 1980).

including the Offices of Supervision and Enforcement, to ensure that any interpretive legal insights are consistent for an activity or practice and that the process is viable and reliably used.

III. Any final policy should further clarify the respective terms and conditions of the NAL and the Product Sandbox to allow applicants an understanding of the necessary compliance measures and should provide for consistent application of a determination made by the CFPB across the marketplace.

- A.** *The CFPB should define certain terms in the proposal in greater detail to allow institutions to understand how it will monitor compliance with the determination requested under the NAL and Product Sandbox processes.*

Since the NAL and Product Sandbox processes outline two differing standards for compliance with the respective terms and conditions, the CFPB should further describe how it will monitor and assess compliance by applicants that receive an NAL or Product Sandbox determination.

- **NAL.** In the proposal, the CFPB articulates a standard of “good faith, substantial compliance,” which generally is understood to mean that an applicant, in good faith, shall attempt performance of the requirements of the NAL terms, even where that performance does not precisely meet those terms. Greater specificity is needed to avoid any ambiguity in practice, and therefore the CFPB should articulate its definition of the standard in any final policy. At minimum, the definition should address the following categories: (i) technical deficiencies related to providing the particular consumer financial product or service should not be viewed as non-compliance, (ii) harmless compliance failures also should not count towards a determination of non-compliance, and (iii) reasonable due diligence, mitigation and remediation efforts, once an issue is found, should favorably factor against a determination of non-compliance.⁹
- **Product Sandbox.** The proposal defines the compliance standard for “approval relief” or “exemption relief” as “good faith compliance,” which should be modified to align with the standard proposed for an NAL. While the contemplated limited duration of a program operating under the Product Sandbox may warrant a lower standard of compliance, because the applicant would receive “approval relief” or “exemption relief” providing a safe harbor or immunity from liability under relevant statutes or regulations, a more prescriptive standard such as “substantial compliance” should be imposed.

For similar reasons, any final policy statement should define “material, tangible harm” for agency assessments underlying each of the NAL and Product Sandbox processes. Given that the NAL and Product Sandbox processes have differing scopes of application (albeit, depending on the circumstances, overlapping

⁹ See e.g., *Gilbertson v. Allied Signal, Inc.*, 328 F.3d 625 (10th Cir. 2003) (noting that, in the ERISA context, that the failure to meet certain procedural requirements may be overlooked where the process as a whole fulfills the broader purpose of the relevant regulations); *McAlpine v. Commissioner*, 968 F.2d 459 (5th Cir. 1992) (stating that, in the tax context, that “substantial compliance is achieved where the regulatory requirement at issue is unclear” and where the actor in good faith exercised due diligence but nevertheless failed to meet that regulatory standard); *Mayo v. Wells Fargo Bank, N.A.*, Civ. No. 4: 13cv163 (E.D. Va. Mar. 4, 2015) (stating that, in the mortgage servicing context, “substantial compliance exists where the rights of the parties have not been affected in any material way”).

determinations), how material, tangible harm is viewed may differ based upon, for example, the size of the activity, the volume of transactions and the duration of the activities. Thus, it is important for the CFPB to provide further clarification on (i) how it will assess material, tangible harm based on the particular facts and circumstances of the activity in which the applicant is engaged and pursuant to the particular statutory or regulatory authority under which the CFPB is making a determination, and (ii) how the assessment of material, tangible harm may differ between the NAL and Product Sandbox processes.

B. *The CFPB should establish a consistent process across participants to monitor and assess compliance with an NAL or Product Sandbox determination.*

The proposal intends for firms seeking an NAL or Product Sandbox determination to submit information and inform the CFPB if there are material changes affecting compliance and indicates that the CFPB would retain its supervisory and enforcement authorities to assess a firm's compliance with the terms of a determination. However, in practice, this ability may depend on the type of applicant. For example, while the CFPB could use its supervisory authority to appropriately monitor compliance with an NAL for a supervised institution, it may have fewer options with respect to non-supervised firms, other than to rely on the applicant submitting information or to take the step of enforcement. To allow for a similar and consistent framework for assessing compliance across participants, particularly where the CFPB intends to use its supervisory authority over supervised institutions, the CFPB should incorporate a commitment in the relevant terms and conditions requiring firms outside the CFPB's normal supervisory authority to affirmatively consent to the submission of data to and review by the CFPB with respect to compliance with the terms and conditions of an NAL or Product Sandbox determination.

C. *The CFPB should take additional concrete and affirmative steps to protect the confidentiality of data submitted through the NAL and Product Sandbox processes.*

Although more limited than the existing NAL policy, the proposal would continue to require the submission of confidential information and, in the case of the Product Sandbox, confidential data as part of the application process. To appropriately protect that information, any final policy should provide greater prospective assurance that the information submitted to the CFPB appropriately will be maintained and protected, including pursuant to the Freedom of Information Act ("FOIA") and the CFPB's rules on confidential supervisory information ("CSI"), where relevant.¹⁰ In particular, it would be helpful for the CFPB to specifically and prospectively identify the types and categories of information submitted in connection with a determination request to which it would afford protection under Exemption 4 of FOIA and/or as CSI. Although applicants may, of course, request confidential treatment in the application, taking this step would afford applicants greater certainty *ex ante* regarding how the CFPB will limit disclosure of information for categories of submitted information throughout the duration applicable to a determination. Further, if the CFPB determines that it would view certain information submitted by the institution as falling outside the scope of Exemption 4 of FOIA and/or CSI, those categories of information should be made clear in any final policy. Finally, to facilitate consistent information sharing across firms, the CFPB should clarify how its approach to confidential treatment may vary with respect to firms outside the scope of its supervisory authority.

¹⁰ 5 U.S.C. § 552(b)(4); 12 C.F.R. pt. 1070; *see also* CFPB, Bulletin 2015-01, *Treatment of Confidential Supervisory Information* (Jan. 27, 2015).

- D. *The CFPB should establish parameters for the Product Sandbox process to minimize potential market disruptions, and also engage in a process to assess whether modifications to relevant, existing regulations are warranted based on findings from the Product Sandbox.*

As conceived by the CFPB, the Product Sandbox would operate as a testing ground for new consumer financial products or services for those institutions seeking a time-specific release from relevant statutory or regulatory requirements. Given that the Product Sandbox would operate as a CFPB-sanctioned pilot program, we believe that material limitations should be set to demonstrate that it functions as such. In particular, we are concerned that, absent such limitations, a firm with a Product Sandbox determination may receive a material competitive advantage over institutions that do not request or are not granted a determination.

Thus, the CFPB should clarify that the Product Sandbox truly operates as a pilot program by undertaking the following measures. First, the CFPB should establish a maximum time period applicable to a Product Sandbox program. In the proposal, the CFPB states that it believes two years is an appropriate amount, as such we would recommend that the CFPB concurrently establish two years as the maximum time period for a program receiving a determination under the Product Sandbox. Implementing this limited time period would ensure an appropriate balancing of the needs of the applicant while minimizing any potential market disruptions resulting from an approval made under the Product Sandbox.

Second, the CFPB should tailor the scope of an applicant's program under the Product Sandbox to ensure that a determination would not have broader competitive effects on any given market for consumer financial products or services. Thus, where a foreseeable impact on the market would occur, the CFPB should consider imposing certain constraints on the scope of an applicant's program. By taking such steps, the CFPB would not markedly impact applicants requesting a determination, as pilot programs offered by firms typically operate with a more tailored scope and usually are only to assess the potential value of a given new product or service.

Third, the Product Sandbox (and, as applicable, NALs) should operate as a process through which the CFPB assesses whether modifications to relevant, existing regulations are warranted. The Product Sandbox offers the CFPB a real-time testing ground to determine whether its current regulations reasonably address the articulated concerns or whether they are outdated or unduly burdensome to market participants. Therefore, where the CFPB has gained a new understanding related to a certain practice or activity through the Product Sandbox, the CFPB should move to amend the relevant regulations to afford all firms the benefits of the CFPB's determination.

IV. Revocation procedures should be consistent across the NAL and Product Sandbox processes and the CFPB should clarify the practical application of the revocation procedures.

The proposal provides greater clarity than the current policy regarding the CFPB's approach to revocation and limiting retroactive supervisory or enforcement action; however, any final policy should provide a more formalized process demonstrating how these procedures would operate in practice.

- **Wind-down Period.** The proposal describes a wind-down period for recipients that have had an NAL or Product Sandbox determination revoked, where the wind-down under the Product Sandbox would be for a "period of six months," while the NAL wind-down would be for an "appropriate period after revocation." Given the different purposes of each process, we understand the rationale behind the varying wind-down periods. However, the CFPB should harmonize the NAL and

Product Sandbox processes by either (i) permitting a floor of six-months for a wind-down necessitated by a revocation under the NAL process, or (ii) committing, in any final policy, to work with the recipient of an NAL to determine the appropriate period of time for the wind-down based on the particular activities of the recipient.

- Opportunity to Cure and to Respond to Revocation. The proposal outlines the CFPB's contemplated process for revoking an NAL or Product Sandbox determination, but any final policy should provide concrete steps with respect to how the CFPB will (i) determine a reasonable time frame for a recipient to cure a failure to comply with the terms of an NAL or Product Sandbox determination, (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 CFPB should specifically articulate how these particular items will be implemented and provide for a more formalized process with respect to each of these aspects.
- Compensation. Under the proposal, when applying for the Product Sandbox, a recipient must commit to compensating consumers for "material, quantifiable, economic harm" resulting from a product or service offered within the Product Sandbox. However, the proposal does not offer how and when this commitment will be applied. Any final policy should provide greater detail and specificity about the scale and scope of the commitment, particularly in cases where the CFPB revokes a Product Sandbox determination or engages in supervisory or enforcement action.

Finally, the CFPB should provide formal assurances that the Offices of Supervision and Enforcement will sufficiently be involved prior to the issuance of a formal NAL or Product Sandbox determination. Although the NAL and Product Sandbox determinations are technically actions taken on behalf of the agency, such a determination still would be granted under the CFPB's discretionary authority, and retroactive supervisory or enforcement action may still occur at the CFPB's discretion. Thus, to promote greater certainty for applicants, particularly with respect to revocation and the potential for retroactive action, the CFPB should coordinate across all relevant parts of the agency, including by receiving buy-in from the Offices of Supervision and Enforcement, prior to issuing a formal NAL or Product Sandbox determination.

* * * * *

We appreciate the opportunity to comment on the proposal. If you have any questions, please contact the undersigned by phone at (202) 589-2429 or by email at Naeha.Prakash@bpi.com.

Respectfully submitted,



Naeha Prakash
Senior Vice President & Associate General Counsel for
Consumer Regulatory Affairs
Bank Policy Institute