



INDEPENDENT COMMUNITY
BANKERS *of* AMERICA®
www.icba.org

ICBA Summary of CFPB Proposed Rule on No-Action Letters and Product Sandboxes

January 2019

Contact Information:

Michael Emancipator
Vice President & Regulatory Counsel
Michael.Emancipator@icba.org

BACKGROUND & OVERVIEW

To further incentivize industry utilization of No-Action Letters (“NALs”), the Consumer Financial Protection Bureau (“Bureau”) is proposing to amend its current NAL policy. A NAL is a document through which the Bureau exercises its discretionary supervision and enforcement authority by providing no-action relief. Although the current NAL policy was recently finalized in 2016, the Bureau believes that current policy’s revocability and non-binding nature of NALs has discouraged their utilization, evidenced by the fact that only one NAL has been issued.

In general, the proposed amendments are intended to provide firms with sufficient incentives to apply for NALs and bring certain aspects of the policy more into alignment with NAL-like programs offered by other federal regulators. Concurrently, the Bureau is proposing the creation of a new policy to administer a new concept, Product Sandboxes (“Sandboxes”). The Sandboxes would include the same relief provided in the proposed NAL policy, along with approval relief, statutory exemptions, and regulatory exemptions.

The Bureau seeks stakeholder feedback on the proposals, including whether the proposals are in-line with other, similar federal agency policies, and whether the policies would incentivize increased utilization. **Comments are due to the Bureau by February 11, 2019.**

Highlights

- The Bureau is proposing to amend its NAL policy and create a new Sandbox policy to incentivize industry innovation.
- The relief proposed in the policies would be binding on the Bureau, as well as other regulators and private parties, unlike the current policy.
- The Bureau proposes to eliminate language that discourages applications for Unfair, Deceptive, or Abusive Acts and Practices (“UDAAP”) focused relief.
- The proposed NAL policy would not require applicants to share data about the product or service in question.
- Third-parties, such as trade associations, would be able to apply for relief on behalf of their members.
- The revised policy would not presumptively limit the NAL’s duration, as the current policy does.

Link to the Rule: <https://www.federalregister.gov/documents/2018/12/13/2018-26873/policy-on-no-action-letters-and-the-bcfp-product-sandbox>

NO-ACTION LETTERS

As described above, a NAL is a document provided to an entity, based on particular facts and circumstances, through which the Bureau exercises its discretionary authority by providing no-action relief. The proposed policy establishes the procedure NAL applications, Bureau assessments, and management of the program.

Applications for Relief

The revised NAL policy would eliminate several elements of the application that the Bureau believes are redundant or unduly burdensome, such as a commitment to data sharing. Applications for a NAL should include the following:

1. **identity of the entity(ies)** applying for the NAL;
2. **a description of the consumer financial product/service**, including (a) how the product/service functions and its terms and (b) the manner in which it is offered, including any consumer disclosures;
3. **an explanation of the consumer benefits** of the product/service and/or the manner in which it is offered;
4. **an explanation of potential consumer risks** and how the applicant(s) intend to mitigate risks;
5. **an identification of the statutory and/or regulatory provisions** from which the applicant(s) seek no-action relief and an identification of the uncertainty, ambiguity, or barrier that such relief would address;
6. if an applicant wishes to receive **confidential treatment**, requested in a separate letter; and
7. which regulators the applicant wishes the Bureau to **coordinate** with, if any.

The proposal notes that the Bureau invites applications from trade associations, service providers, and other third-parties, on behalf of members and/or existing or prospective clients. Additional entities described by the third-party applicant may receive the letter at the same or later time by informing the Bureau that they wish to receive the letter and providing the necessary information.

Bureau Assessment of Applications

The revised NAL policy would also rework the existing evaluation framework to focus on the quality and persuasiveness of the application such as an emphasis on the potential benefits for consumers, the extent to which the applicant identifies and controls for consumer harm, and the extent to which no-action relief is needed.

Bureau Procedures for Issuing and Administering NALs

If the Bureau approves an application for a NAL, the letter will:

1. **identify the recipient(s);**
2. **specify the described aspects** of the approved product/service;

3. **limit scope** to recipient's offering of products/services described in the approved application, and not to all aspects of the recipient's offerings;
4. state that the letter is **limited to the recipient(s)** and does not apply to any other person/entities;
5. require the recipient(s) to **inform the Bureau of any material changes** to information included in the application that would materially increase risk of material, tangible harm to consumers;
6. **specify any other limitations or conditions**, and to what extent the Bureau intends to publicly disclose information about the NAL;
7. state that the Bureau **will not make supervisory findings** or bring a supervisory or enforcement action against the recipient(s); and
8. state that the Bureau **would not pursue an action to impose retroactive liability** in circumstances where a NAL is revoked for a reason other than a recipient's failure to substantially comply with the NAL terms and conditions.

Revocation of a NAL

The proposed policy states that the Bureau reserves the right to revoke NALs if (1) the recipient fails to comply in good faith with the terms and conditions; (2) the Bureau determines that the product/service is causing material, tangible harm; or (3) the Bureau determines that the legal uncertainty, ambiguity, or barrier that was the basis for the NAL has changed as a result of a statutory change or Supreme Court decision.

The Bureau's proposal would provide recipients a reasonable opportunity to respond to, or cure, the Bureau's grounds for revocation. However, if a NAL is ultimately revoked, the policy notes the Bureau's intention to allow the recipient(s) to wind-down the product/services during an appropriate period after revocation.

Regulatory Coordination

The Bureau's proposed policy would include a new section concerning Bureau coordination with other regulators that offer no-action relief. The policy expresses the Bureau's intention to enter into agreements whenever practicable to coordinate relief with state, federal, or international regulators. The proposal also states that the Bureau would be interested in entering into agreements with state authorities that issue similar forms of no-action relief, as an alternative to the Bureau's NAL program.

Disclosure of Information

The proposal indicates that the Bureau intends to publish NAL information on its website, including NAL applications, both approved and denied. However, the Bureau's proposed policy notes that much of the information in the application will be considered confidential supervisory and/or business information, and thus, not published.

PRODUCT SANDBOX

Applications for Product Sandbox

An application for admission to the Sandbox should include the following:

1. the **identity** of the entity or entities applying for admission to the Sandbox;
2. a **description of the product/service** within the Sandbox, including (a) how the product/service functions and the terms on which it will be offered; and (b) the manner in which it is offered/provided, including any consumer disclosures;
3. the **required duration of participation** in the Sandbox, and a description of any other limitations on participation, such as limits on the volume of transactions, the number of consumers to which the product/service is offered, or geographic scope;
4. an **explanation of the potential consumer benefits** of the product/service and suggested metrics for evaluating whether such benefits are realized, such as consumer utilization numbers;
5. an **explanation of the potential consumer risks** posed by the product/service and how the applicant intends to mitigate such risks;
6. an **identification of statutory/regulatory provisions** from which the applicant(s) seeks relief, the type of relief sought (approval, exemption, and/or no-action), and an identification of the potential uncertainty, ambiguity or barrier that such relief would address;
7. a **description of data** the applicant(s) possesses and/or intends to develop pertaining to the impact of the product/service that will be shared with the Bureau if the application is granted;
8. if an applicant wishes to **request confidential treatment**, such request and the basis therefor should be included in a separate letter; and
9. the **identification of other regulators** that the applicant wishes the Bureau to coordinate with.

The proposal notes that the Bureau invites applications from trade associations, service providers, and other third-parties, on behalf of members and/or existing or prospective clients. Additional entities described by the third-party applicant may receive the letter at the same or later time by informing the Bureau that they wish to receive the letter and providing the necessary information.

Bureau Assessment of Applications

The proposed policy states that the Bureau will consider the quality and persuasiveness of the applications with particular emphasis on the potential consumer benefits of the product/service, the potential consumer risks posed by the product/service, and the identification of statutory/regulatory provisions from which the applicant(s) seeks relief. The proposal indicates that the Bureau intends to approve or deny applications within 60 days of receipt of a complete application.

Bureau Procedures for Issuing and Administering Admission into Sandbox

If the Bureau accepts an application for admission into the Sandbox program, the proposed policy indicates that the recipient(s) will receive a Terms and Conditions document, which sets forth the parameters for the recipient's participation in the Sandbox. The Terms and Conditions would set forth the types and scope of relief provided to the recipient(s) during participation in the Sandbox.

Among other provisions, the Terms and Conditions document would:

1. **identify** the recipient entity or entities;
2. **specify the described aspects** of the product/services;
3. State that the document is **limited to the recipient's offering** of products/services described in the approved application, and not to all aspects of the recipient's offerings;
4. state that the document is **limited to the recipient(s)** and does not apply to any other person or entity;
5. require the recipient to **report information** about the effects of the product/service on complaint patterns, default rates, or other similar metrics that will help the Bureau determine consumer harm;
6. include a commitment by the recipient to **compensate consumers** for material, quantifiable, economic harm caused by the recipient's product/service;
7. **specify other limitations or conditions**, such as the duration of the recipient's participant in the Sandbox;
8. state that the **Bureau approves** the recipient's product/service or the Bureau exempts the recipient from complying with specified statutory/regulatory provisions. The document would also **specify the legal authority** and rational basis for the Bureau's issuance of the approval or exemption;
9. state that the Bureau will **not make supervisory findings** or bring a supervisory or enforcement action against the recipient(s) predicated on the recipient's product/service described in the Sandbox application under the Bureau's UDAAP authority or any other statutory/regulatory authority within the Bureau's jurisdiction; and
10. state that the Bureau would **not pursue retroactive liability** if relief is revoked for a reason other than the recipient's failure to comply in good faith with the Terms and Conditions.

Revocation of Admittance into Sandbox

Similar to the Bureau's proposed procedure for revoking NALs, the new policy states that the Bureau reserves the right to revoke Sandbox admission if (1) the recipient fails to comply in good faith with the terms and conditions of the document; (2) the Bureau determines that the product/service is causing material, tangible harm; or (3) the Bureau determines that the legal uncertainty, ambiguity, or barrier that was the basis for the Sandbox admission has changed as a result of a statutory change or Supreme Court decision.

The Bureau's proposal would provide recipients a reasonable opportunity to respond to, or cure, the Bureau's grounds for revocation. However, if admission to the Sandbox is ultimately revoked, the policy notes the Bureau's intention to allow the recipient(s) to wind-down the product/services during a period of six months after revocation, unless the product/service causes material, tangible harm to consumers and a wind-down period would increase such harm.

Extension of Participation in the Sandbox

The proposed policy would allow Sandbox participants to extend their time in the program based on the quality and persuasiveness of an extension request. The proposal notes that the Bureau would place particular weight on the extent to which the data shows that the product/service are benefitting consumers and not causing material harm. Alternatively, the proposal would allow participants to submit an entirely new Sandbox application to extend their participation.

The Bureau's policy anticipates that extensions would be for a period of time that is at least as long as the applicant's original participation. However, the Bureau would permit longer extensions when it is considering amending the applicable regulatory requirements.

Regulatory Coordination

Similar to the NAL program, the Bureau would publish information on its website about the Sandbox participants, including (1) the identity of entity admitted to the Sandbox; (2) the subject matter scope of the participant's participation; (3) the duration of the entity's participation; (4) the types of relief provided to the participants; (5) the legal authority and rational basis for approval/exemption; and (6) a version or summary of the application. The Bureau's proposed policy explains that it might publish denials of applications submitted, including an explanation of why the application was denied.

The Bureau anticipates that much of the information submitted by applicants in their applications will qualify as confidential information. Additionally, information solicited and received from participants will likely be classified as confidential supervisory information since it is obtained for the purpose of monitoring risks to consumers.