Via electronic submission

February 11, 2019

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

Re: Proposed Policy on No-Action Letters and Product Sandboxes [Docket No. CFPB-2018-0042]

Dear Mr. Watkins:

The Independent Community Bankers of America ("ICBA")[1] is pleased to respond to the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") proposals to amend its no-action letter policy ("NAL Policy") and to adopt a policy for a sandbox ("Product Sandbox Policy").[2] ICBA strongly supports the Bureau's proposed policies and is eager to encourage community bank participation.

ICBA is encouraged by the CFPB's leadership on this issue and encourages other federal and state regulators to similarly place themselves at the forefront of changes in technology by actively monitoring new developments and providing a forum where community banks can share what they see in their respective markets and seek regulator feedback. ICBA has long supported a legal and regulatory framework that fosters innovation while still requiring all financial service providers be subject to the same oversight and adhere to the same regulatory standards as banks.[3]

---

[1] The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 52,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 760,000 Americans and are the only physical banking presence in one in five U.S. counties. Holding more than $4.9 trillion in assets, $3.9 trillion in deposits, and $3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.
[2] 83 Fed. Reg. 64036 (Dec. 13, 2018).
[3] ICBA has insisted, for instance, that any fintech company that is granted a special purpose national bank charter at a minimum be subject to the same regulations as community banks and, we have advocated that industrial loan

WASHINGTON, DC
1615 L Street NW
Suite 900
Washington, DC 20036

SAUK CENTRE, MN
518 Lincoln Road
PO Box 267
Sauk Centre, MN 56378

866-843-4222
www.icba.org

Background

To further incentivize industry utilization of NALs, the Bureau is proposing to amend its current NAL Policy. 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, a Product Sandbox. The Product Sandbox would include the same relief provided in the proposed NAL policy, along with approval relief, statutory exemptions, and regulatory exemptions.

The proposed policies have five goals: (1) streamlining the application process; (2) streamlining the Bureau's processing of applications; (3) expanding the types of statutory and/or regulatory relief available; (4) specifying procedures for an extension where the relief initially provided is of limited duration; and (5) providing for coordination with existing or future programs offered by other regulators designed to facilitate innovation.

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.

ICBA Comments

Executive Summary

The community bank model of relationship banking is key to providing high quality products and services that improve consumers' financial health. ICBA believes that innovative technology will not only help community banks establish more meaningful relationships with their existing customers, but will also provide avenues to develop new relationships with the 70 percent of Americans that lack financial health.[4]

companies be subject to the Bank Holding Company Act, which prohibits commercial entities from owning banks, and provides for supervision and oversight of a bank's parent company, just as any other full-service bank.

[4] Thea Garon, "U.S. Financial Health Pulse: 2018 Baseline Survey Results," Center for Financial Services Innovation, (Oct. 2018), *available at* https://s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2018/11/01021056/Pulse-2018BenchmarkingStudy-Final-web.pdf., finding that nearly 20 percent of Americans are struggling with all or nearly all aspects of their financial lives, and over 50 percent with at least some aspects. Only 30 percent of the country is spending, saving, and borrowing as part of a plan to lead financially healthy lives.

WASHINGTON, DC
1615 L Street NW
Suite 900
Washington, DC 20036

SAUK CENTRE, MN
518 Lincoln Road
PO Box 267
Sauk Centre, MN 56378

866-843-4222
www.icba.org

Financial innovation can also greatly expand bank access for millions of consumers that are either un- or under-banked.[5] For example, advancements in mobile banking have provided enormous benefits to households that might have otherwise not had access to bank services. According to a recent Federal Deposit Insurance Corporation ("FDIC") survey, the percentage of banked households that use mobile banking to access their accounts increased from under 25 percent in 2013 to 40 percent in 2017.[6] Further, new modeling techniques through the use of alternative data hold the promise to expand access to credit for consumers that have no conventional banking relationship.

ICBA believes that the Bureau's proposed policies will facilitate greater innovation. As the Bureau considers stakeholder feedback on these important proposals, ICBA makes the observations and recommendations noted below that would further enhance innovation.

- ICBA strongly supports both the NAL and Product Sandbox Policies, as they will better empower community banks to innovate, establish partnerships with fintech firms, and strengthen their community bonds. ICBA specifically supports the following benefits of the proposals:
    - The Bureau's proposal to focus on the potential benefit of the product or service.
    - The Bureau's proposed timeline of an "approval" or "denial" within 60 days of a complete application.
    - Providing a NAL recipient with greater assurance by proposing to have the Bureau stand behind a NAL. Similarly, ICBA appreciates the Bureau's proposed "approval" and "exemption" provisions of the Product Sandbox, which will give much greater assurances of relief.
    - The proposed consideration of no-action relief for Unfair, Deceptive, or Abusive Acts or Practices ("UDAAP")-focused matters.
- Partnering with bank-enabling fintechs holds the promise for community banks to engage their customers on a level that has heretofore been limited to multi-billion-dollar financial institutions with multi-million-dollar research and development budgets.
- ICBA advocates that the CFPB and other federal financial regulators respond timely to bank and fintech partner requests to provide feedback and assessments of proposed activity so that the industry may have more regulatory certainty when they undertake innovative endeavors – ICBA believes that the NAL and Product Sandbox Policies will help achieve that goal.

---

[5] *See* Lucy Gorham & Jess Dorrance, "Catalyzing Inclusion: Financial Technology & the Underserved," University of North Carolina at Chapel Hill's Centre for Community Capital, Aug. 2017, stating, "…technology innovations… have enormous potential to expand financial health and inclusion. This important opportunity can lower costs, improve transparency and convenience, and give low- and moderate-income (LMI) consumers greater control over their finances," available at https://communitycapital.unc.edu/files/2017/10/CCC-FinTech-Report-2017-1.pdf.

[6] FDIC National Survey of Unbanked and Underbanked Households, Executive Summary, Oct. 2018, at 5, *available at* https://www.fdic.gov/householdsurvey/2017/2017execsumm.pdf.

WASHINGTON, DC
1615 L Street NW
Suite 900
Washington, DC 20036

SAUK CENTRE, MN
518 Lincoln Road
PO Box 267
Sauk Centre, MN 56378

866-843-4222
www.icba.org

- ICBA recommends that the Bureau's policies expand upon the differences between no-action relief under the two policies, and it what circumstances an entity should seek one or the other.
- ICBA recommends that the Bureau develop a framework that allows for slight and graduated deviations from the product or service described in the NAL or Product Sandbox application.
- ICBA recommends that the Bureau explore additional avenues that encourage innovation, such as proofs of concept.
- The Bureau should consider how it could broaden its policies to allow other, unaffiliated parties to benefit from NAL or Product Sandbox relief.

Financial Services Innovation Empowers Community Banks to Better Serve Consumers

ICBA supports and encourages community banks as they innovate, both organically and through partnerships with other innovators, such as financial technology companies. To facilitate this innovation, ICBA launched the ThinkTECH Accelerator, a bank-enabling fintech accelerator designed to nurture bank-fintech partnerships.[7] The ICBA ThinkTECH Accelerator ("Accelerator") is focused on identifying and accelerating the development and growth of early-stage financial technology ventures that will spur the most innovative and beneficial community bank-fintech partnerships.

Partnering with bank-enabling fintechs holds the promise for community banks to engage their customers on a level that has heretofore been limited to multi-billion-dollar financial institutions with multi-million-dollar research and development budgets. The Accelerator creates a favorable environment from which community banks and financial technology companies can cooperatively create products, cultivate solutions, and address barriers to delivering superior service.

After several weeks of participation in the Accelerator, a common theme has emerged among participating fintechs - legal and regulatory uncertainty poses a barrier to the innovations being developed in the marketplace. While properly designed and tailored regulations certainly help consumers, overly broad or outmoded regulations create uncertainty and, do not protect consumers but serves as a barrier to innovation. Ideas and programs like the Bureau's NAL and Product Sandbox Policies will help lessen that barrier to innovation.

[7] *See* https://www.icba.org/solutions/thinktech

WASHINGTON, DC
1615 L Street NW
Suite 900
Washington, DC 20036

SAUK CENTRE, MN
518 Lincoln Road
PO Box 267
Sauk Centre, MN 56378

866-843-4222
www.icba.org

ICBA Supports a Legal and Regulatory Framework that Fosters Innovation

The Bureau's proposals address and adopt many of the recommendations made by policy makers and experts that have studied how regulators can keep pace with technological developments in financial services. For example, the Treasury Report on fintechs recommended that financial regulators increase their efforts to respond to new technology by, as one means, forming regulatory sandboxes.[8] The Treasury report also recommended that the federal banking agencies provide greater clarity around third-party vendors, which a sandbox could help provide.

While community banks continue to meet the needs of their customers in local communities, they understand that continued success is dependent upon the adaptation of banking products and services to meet the evolving needs of the market. Fintech companies offer possible partnerships and collaborative relationships that can help community banks enhance the customer experience and promote mutually beneficial relationships.

To quickly and efficiently embrace new technology, community banks need to be able to collaborate with fintech firms. The obvious challenge with collaboration is the introduction of new risks requiring aggressive identification and mitigation. In order to identify, manage and minimize these risks, community banks need to identify and collaborate with partners who are in a strong position to assist in prudent risk management in real time. However, regulatory review should not be a barrier to allowing community banks to innovate at the speed necessary to remain competitive and operate on a level playing field. Instead, ICBA advocates that the CFPB and other federal financial regulators respond timely to bank and fintech partner requests to provide feedback and assessments of proposed activity so that the industry may have more regulatory certainty when they undertake innovative endeavors. ICBA believes that the NAL and Product Sandbox Policies will help achieve that goal.

[8] Department of the Treasury, A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation (Washington, D.C.: July 2018).

WASHINGTON, DC
1615 L Street NW
Suite 900
Washington, DC 20036

SAUK CENTRE, MN
518 Lincoln Road
PO Box 267
Sauk Centre, MN 56378

866-843-4222
www.icba.org

NAL and Product Sandbox Will Remove or Reduce Regulatory Uncertainty

Intended to remove or reduce the regulatory uncertainty identified by the Accelerator participants, a NAL is a document through which the Bureau exercises its discretionary supervision and enforcement authority by providing no-action relief. First finalized in 2016, the NAL Policy is intended to spur the innovation of financial products and services by removing or reducing regulatory uncertainty. However, the current policy falls short on a number of fronts.

The NALs issued under the current policy state that the Bureau “has no present intention” to recommend initiation of an enforcement or supervisory action against a NAL recipient. Additionally, the current policy explains that NALs are subject to modification or revocation at any time at staff’s discretion and that issuance of NALs may be conditioned on the mandatory sharing of data. Finally, the current policy is non-binding, meaning the Bureau, other regulators, courts, private parties, or others, are not required to adhere to “no-action” accommodation set out in the letter. The Bureau has only issued one NAL since the policy’s adoption in 2016.

ICBA strongly supports both these policies as they will better empower community banks to innovate, establish partnerships with fintech firms, and strengthen their community bonds. Innovation plays a key part in increasing quality of service for consumers. Technological developments in the financial services industry can provide a better or more cost-effective product or service.

Beneficial Changes to the Proposed No-Action Letter Policy
The revised NAL policy would eliminate several elements of the application that the Bureau believes are redundant or unduly burdensome. In regard to the NAL application and governance, ICBA supports the Bureau’s proposal to focus on the potential benefit of the product or service. ICBA also supports the Bureau’s proposed timeline of an “approval” or “denial” within 60 days of a complete application. ICBA applauds the Bureau’s removal of data sharing requirements, which aligns with similar programs offered by the Securities and Exchange Commission (“SEC”), the Commodity Futures Trading Commission (“CFTC”), and the Federal Housing Finance Agency (“FHFA”). ICBA also supports the Bureau’s proposal to remove the temporary nature of a NAL, as exists in the current policy. Perhaps most importantly, ICBA appreciates that the Bureau is providing a NAL recipient with greater assurance by proposing to have the Bureau stand behind a NAL, and not merely have staff “recommend” no-action relief, as is the current practice.

ICBA also supports the proposed elimination of language from the current policy, which indicates that the Bureau would not issue NALs for UDAAP-focused matters. Finally, ICBA appreciates that the Bureau’s proposed changes explicitly discuss coordination with other regulators that offer no-action letters or other forms of relief.

WASHINGTON, DC
1615 L Street NW
Suite 900
Washington, DC 20036

SAUK CENTRE, MN
518 Lincoln Road
PO Box 267
Sauk Centre, MN 56378

866-843-4222
www.icba.org

Beneficial Parameters of the Proposed Product Sandbox Policy
The proposed Sandbox Policy would set the parameters for entities that seek either explicit Bureau-binding approvals of, or waivers from, compliance with certain consumer financial protection laws and regulations. Unlike the NAL policy, relief provided by participation in the Sandbox would be of limited duration, and participants would be required to share data with the Bureau throughout the duration. ICBA believes that the proposed Product Sandbox will address several impediments to innovation.

First, the cost of researching applicable laws and regulations can be significant for fintechs and small community banks. This cost is at best an impediment to innovation, and at worst, an insurmountable barrier for community banks that are desirous to incorporate new technology. Fintechs and banks have reported that it is difficult for them to navigate the myriad regulations and agencies, particularly which laws and regulations might apply to the new technology and partnerships.[9]

Second, difficulty stems from the reality that laws and regulations do not keep pace with technological developments, having been developed before the existence of such technology. Because of this, banks and fintechs must conduct lengthy due diligence and legal review processes, which can lead to lengthy delays in establishing bank-fintech partnerships. Some banks have reported a delay of about 18-months to launch partnerships with fintech firms.[10]

An effective regulatory system should be flexible and forward looking, which allows regulators to quickly respond to and account for market innovations. Receipt of a NAL and participation in the Product Sandbox will reduce these difficulties. ICBA believes that these policies an appropriate approach to remedy the traditionally lagging nature of regulations.

Potential Innovations through Use of NAL or Product Sandbox

Alternative Data
CFPB studies have found that approximately 26 million Americans are credit invisible, and another 20 million do not have sufficient credit data to generate a credit score.[11] While using data that is not traditionally captured in mainstream credit reports could enable some of these consumers to access credit, use of this "alternative data" could expose entities to violations of fair lending laws such as the Equal Credit Opportunity Act ("ECOA"). Fortunately, the Bureau's

---

[9] U.S. Government Accountability Office, Financial Technology: Additional Steps by Regulators Could Better Protect Consumers and Aid Regulatory Oversight (Mar. 2018) at 41, available at: https://www.gao.gov/assets/700/690803.pdf ("GAO Fintech Report").
[10] GAO Fintech Report at page 59.
[11] CFPB, Data Point: Credit Invisibles, at 6, available at: https://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf

WASHINGTON, DC
1615 L Street NW
Suite 900
Washington, DC 20036

SAUK CENTRE, MN
518 Lincoln Road
PO Box 267
Sauk Centre, MN 56378

866-843-4222
www.icba.org

Product Sandbox could alleviate this risk by allowing the use of alternative data to the betterment of consumers, but under the watchful eye of the Bureau's program that requires ongoing communication and sharing of information that otherwise wouldn't be provided.

The U.S. Government Accountability Office ("GAO") GAO has found that the lack of clarity and coordination on fair lending and use of alternative data and modeling creates uncertainty for bank-enabling fintechs. According to GAO's report, some fintechs forgo the use of alternative data for underwriting purposes because they do not know if it will produce outcomes that violate fair lending laws.[12]

Aggregated Data

The use of artificial intelligence ("AI") and machine learning ("ML") could greatly increase bank productivity while simultaneously serving customers better. For example, AI and ML could increase access to or lower the cost of credit for certain consumers by utilizing new data modeling. Additionally, these models could be updated much more frequently than current practice and based on new data that is available in an on-going basis. However, AI and ML could run afoul of consumer protection laws if negative credit decisions had a disparate impact on protected classes of consumers.

Recommendations for Further Improvements to the Policies

Further Distinction between NAL Relief and Product Sandbox No-Action Relief

It does not appear to be clear when an applicant would seek no-action relief under the NAL Policy or under the Product Sandbox Policy, nor is it clear what the differing benefits or requirements would be. ICBA recommends that the Bureau's policies expand upon the differences between no-action relief under the two policies, and it what circumstances an entity should seek one or the other.

Provisional Approvals for Iterations Would be Useful

Given that ML and AI depends on continuous "learning" and routine re-evaluation of data and models, ICBA recommends that the Bureau develop a framework that allows for slight and graduated deviations from the product or service described in the NAL or Product Sandbox application. It is reasonable to assume that an initial model described in a NAL or Sandbox application could be substantially different as ML and AI continue to analyze data and change models, in response.[13] However, such changes should not require new applications or rescind legal protections and safe-harbors.

---

[12] GAO Fintech Report at 48.

[13] *See* Carlton E. Sapp, "Preparing and Architecting for Machine Learning," Gartner, Jan. 2017, at 6, *available at* https://www.gartner.com/binaries/content/assets/events/keywords/catalyst/catus8/preparing_and_architecting_for_machine_learning.pdf, *stating*, "Once data is acquired and prepared for ML, and algorithms are selected, modeled and

WASHINGTON, DC
1615 L Street NW
Suite 900
Washington, DC 20036

SAUK CENTRE, MN
518 Lincoln Road
PO Box 267
Sauk Centre, MN 56378

866-843-4222
www.icba.org

Implementation of Proofs of Concept
ICBA recommends that the Bureau explore additional avenues that encourage innovation, such as proofs of concept that have been championed in other countries. A proof of concept model is similar to a sandbox, but includes a specific request or questions raised by regulators that seek proposals that address specific problems.[14] This model would marry a sandbox model with more traditional rulemaking tools, such as an advance notice of proposed rulemaking ("ANPR") or request for information ("RFI").

An "Open" NAL or Product Sandbox - Wider Adoption of Products and Services that Receive NALs and Acceptance into the Sandbox
While ICBA understands that the Bureau allows third-parties, such as trade associations, to receive provisional approvals for its affiliates, members, or customers, the Bureau should consider how it could broaden its policies to allow other, unaffiliated parties to benefit from NAL or Product Sandbox relief.

For example, once a product or service is accepted into the Product Sandbox, other entities should be able to also offer that product or service with the Product Sandbox protections, so long as the entity identifies itself to the Bureau and agrees to transmit data and adhere to the requirements set forth by the Bureau. This would shift the Bureau's focus to emphasize the product or service rather than the entity offering the product or service.

ICBA is optimistic that the Bureau's proposed policies are designed to address many regulatory uncertainties and will ultimately usher in an era where regulators can quickly adapt to new technologies and changing marketplaces. If you have any questions or would like additional information, please do not hesitate to contact me at (202) 659-8111 or michael.emancipator@icba.org.

Sincerely,

/s/

Michael Emancipator
Vice President, Regulatory Counsel

---

evaluated, the learning system proceeds through learning iterations on its own to uncover latent business value from data."

[14] GAO Fintech Report at 63, discussing other federal regulators use proofs of concept, such as the CFTC's LabCFTC and the Federal Reserve Bank of Boston's participation in Hyperledger.