ALERTS

CFPB Proposes Revisions to Its Policy on No-Action Letters and Creation of New Product Sandbox to Spur Fintech Innovation

December 14, 2018

The Consumer Financial Protection Bureau ("CFPB")[1] recently issued a proposal[2] consisting of: (i) revisions to its Policy on No-Action Letters— which was finalized in February 2016 ("2016 Policy")[3] — designed to increase interest in applying for no-action letters ("NALs") under the 2016 Policy; and (ii) the creation of a CFPB Product Sandbox (collectively, the "Proposal"). The Proposal was issued by the CFPB, among other reasons, to spur innovation in the financial technology ("fintech") sector. Comments on the Proposal will be due 60 days after its publication in the Federal Register.

Under the 2016 Policy, which provides for the issuance of NALs consisting of non-binding staff-level no-action recommendations, the CFPB has issued only one such letter to date. The Proposal, which is intended to better incentivize firms — including fintech companies — to seek NALs from the CFPB, has the following overarching goals:

- Streamlining the application process;

- Streamlining the CFPB's processing of applications;[4]

- Expanding the types of statutory and regulatory relief available;

- Specifying procedures for an extension where the relief initially provided is of limited duration; and

- Providing for coordination with existing or future programs offered by other regulators designed to facilitate innovation.[5]

The Proposal was filed on Dec. 10, 2018 and signed by Mick Mulvaney on the last day of his tenure as acting director of the CFPB. Kathy Kraninger, who was sworn in as the director of the CFPB later that same day, has not publicly opined on her position on the Proposal.[6]

Below please find key highlights of the Proposal:

2016 Policy Revisions

Revisions to the 2016 Policy would include, among other things:

- Removing the 2016 Policy's statements that NALs will "not be routinely available" and that NALs "be provided rarely and on the basis of exceptional circumstances and a thorough and persuasive demonstration of the appropriateness of such treatment."

- Removing the 2016 Policy's provision that applicants be required to commit to data sharing about the relevant product or service.

- Removing the 2016 Policy's temporal limitation on NALs, which allowed the CFPB to set an expiration date on the NAL or volume limitation on the product or service.

- Reducing the number of required NAL application items.

- Adding a provision that NALs will be issued by duly authorized CFPB officials in order to provide recipients with greater assurance that the CFPB stands behind the relief provided.

- Adding a provision regarding the CFPB's coordination with other regulators, including State authorities, that offer NALs or similar forms of relief.

CFPB Product Sandbox

Below please find key features of the proposed CFPB Product Sandbox:

- *Application Requirements*. The CFPB Product Sandbox application requirements are similar to those for the NAL application. However, as part of its application, a CFPB Product Sandbox applicant will need to: (i)

request a duration of participation (the CFPB expects that two years will be appropriate in most cases, and admitted participants may apply for extensions) and (ii) identify the statutory and regulatory provisions from which the applicant seeks relief (and the type of relief sought).

- *Available Relief.* Along with providing no-action relief that would substantially be the same as the no-action relief offered by NALs, the CFPB Product Sandbox would provide two forms of additional relief: (i) approvals under safe harbor provisions of certain federal consumer protection laws and (ii) exemptions from certain statutory and regulatory provisions meeting the Proposal's conditions. In either case, an entity issued an approval or exemption would be subject to good faith compliance with specific terms and conditions set forth by the CFPB, and would be immune from enforcement actions by any federal or state authorities, as well as from lawsuits by private parties, based on the relevant statutory or regulatory provisions and on the participant's offering or providing the described aspects of the product or service.

- *Terms and Conditions of Participation.* When an applicant is granted admission to the CFPB Product Sandbox, it will be provided with a document setting forth the terms and conditions of its participation, which will be signed by the Assistant Director of the Office of Innovation or other member(s) of the Office of Innovation, duly authorized by the CFPB, and by an officer of the participant ("T&Cs"). The CFPB expects the T&Cs will include: (i) a requirement that the participant report information about the effects of offering or providing the product or service on "complaint patterns, default rates, or similar metrics" that will enable the CFPB to "determine if doing so is causing material, tangible harm to consumers"; (ii) a commitment by the participant "to compensate consumers for material, quantifiable, economic harm" caused by the recipient firm's offering or providing of the product or service within the CFPB Product Sandbox; and (iii) any other limitations or conditions, such as the nature and extent of the participant's data sharing, and the extent that the CFPB intends to publicly disclose information about the firm's participation in the CFPB Product Sandbox. [7]

- *Publication of Participation.* The CFPB intends to publish on its website the following information concerning firms admitted to the CFPB Product Sandbox: (i) the participant firm's identity; (ii) the subject matter scope of the firm's participation; (iii) the duration of the firm's

participation; (iv) the types of relief provided to the firm (including, where applicable, the legal authority and rationale basis for any approval or exemption); and (v) in appropriate cases, a version or summary of the firm's application.[8] The CFPB also intends to publish information about denials of applications, including explanations for such denials (such information would be published by the CFPB only after the applicant is given an opportunity to request reconsideration of the denial).[9]

Authored by Donald J. Mosher, Kara A. Kuchar and Adam J. Barazani.

If you have any questions concerning this *Alert* or would like assistance in engaging with the CFPB regarding the Proposal, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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[1] While the CFPB, under former acting director Mick Mulvaney, has sought to rebrand itself as the Bureau of Consumer Financial Protection or the BCFP, we understand the fate of such rebranding is uncertain. We also note that the CFPB refers to itself as such on its website and in previous press releases, among other forms.

[2] Full proposal available here.

[3] *See* 81 FR 8686 (Feb. 22, 2016), available here.

[4] The CFPB would expect to grant or deny an application within 60 days of notifying the applicant that the CFPB has deemed the application to be complete. The CFPB's determination regarding whether an application is deemed "complete" is within its sole discretion; thus application processing times will vary.

[5] Proposal at *4. The CFPB noted that the Proposal is intended to bring certain aspects of the 2016 Policy into alignment with other federal regulators' NAL programs.

[6] At a Dec. 11, 2018 press conference, Ms. Kraninger noted that she has not yet been fully briefed on the Proposal, available here.

[7] Proposal at *28-29.

[8] Proposal at *33.

[9] Proposal at *33.

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