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CFPB No-Action Letters – No Good Deed Goes Unpunished

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The ***Consumer Financial Protection Bureau (CFPB)*** has finalized a Policy on *No-Action Letters* that would establish a process, aimed at reducing regulatory uncertainty that may exist for certain emerging products or services, allowing CFPB staff to advise financial services companies about the compliance of a new product or service in the development stage. In its accompanying press release, the CFPB notes that the "the policy could be appropriate in a case where an innovative product is being developed that involves technology that did not exist and may not have been contemplated at the time existing regulations were adopted." Nonetheless, while the Policy sounds like a promising development, it likely will be of limited value to financial services companies and others looking for reliable, concrete guidance regarding compliance with laws and regulations enforced by the CFPB.

Path to Adoption of the Policy on No-Action Letters

On October 16, 2014, the CFPB issued a public notice seeking comment on a proposed policy for interested parties creating a new financial product or service, to seek guidance from CFPB in an effort to reduce regulatory uncertainty, particularly where existing laws and regulations have an unclear application to such a product or service. The CFPB received 28 formal responses to its proposed rule, mainly from trade associations. After a full year of review, on February 18, 2016, the CFPB issued its final policy statement, noting that "[t]he Bureau believes the Policy will facilitate innovation and otherwise substantially enhance consumer benefits." The CFPB candidly notes that this Policy on No-Action Letters is just one tool by which it provides interpretive guidance to industry and consumers, the primary source being official interpretations that accompany various regulations published in the Code of Federal Regulations. Other tools include compliance guides, formal bulletins, oral guidance in response to submitted questions, and enforcement actions.

Elements of the Policy on No-Action Letters

In managing the expectations of its audiences, the CFPB notes that the Policy on No-Action Letters "is intended to make efficient use of Bureau resources by focusing on matters of significant uncertainty, *e.g.,* where technological developments have given rise to novel products not envisioned at the time existing statutes and regulations were issued, and substantial regulatory uncertainty poses a barrier to marketplace innovation." To facilitate a practical understanding of its terms, the CFPB has divided the Policy into five sections:

- Section A describes information that should be included in requests for a No-Action Letter.

- Section B describes the types of responses the CFPB may provide in response to requests for a No-Action Letter.

- Section C lists factors the CFPB may consider in deciding whether to provide a No-Action Letter.

- Section D describes the general content and limitations of No-Action Letters.

- Section E describes disclosure of data received from entities which have requested No-Action Letters.

CFPB No-Action Letters – Less Than Meets the Eye

Even if industry participants are able to comply with the rather onerous request process outlined in the Policy, it is likely that No-Action Letters will not be frequently issued. As a preliminary matter, the CFPB cautions that it "has quite limited resources to devote to consideration and issuance of [No-Action Letters] at this time," later noting that it contemplates issuing only 1-to-3 No-Action Letters per year. Perhaps instructive by comparison, the Staff No-Objection Letter procedure adopted by the Office of the Comptroller of the Currency in 1985 largely fell out of use not long after its initial launch.

Whatever the expectations of the CFPB, industry participants have a number of important reasons to think carefully and consult expert counsel before filing No-Action Letter requests.

- First, No-Action Letters will not provide concrete assurances to interested parties, as they *"would be subject to modification or revocation at any time at the discretion of the staff* and may be conditioned on particular undertakings by the applicant with respect to product or service usage and data-sharing with the Bureau." (Emphasis added.)

- Second, No-Action Letters will be publicly disclosed together with underlying materials submitted with the request. While the Policy does provide a mechanism for seeking confidential treatment, it relies on the CFPB's rules regarding Disclosure of Records and Information (12 CFR Part 1070), which have been a matter of serious industry concern since their promulgation.

- Third, every request must "provide a candid explanation of potential consumer risks," which could expose products or services to third-party challenges, such as in class action litigation or other regulatory enforcement actions.

- Fourth, the natural reluctance of industry participants to approach regulatory agencies, believing that the potential benefits often are outweighed by the risks of increased visibility to the regulator, is heightened by the perception by some that the CFPB has seldom worked collaboratively with industry since its inception, preferring to concentrate on enforcement actions.

- Finally, the CFPB's concept of No-Action Letters falls short of the traditional reliability of SEC No-Action Letters after which it appears to be fashioned.

Accordingly, while the Policy on No-Action Letters may sound promising, it is likely to have limited

value to financial services companies and others looking for safe passage in navigating the regulatory shoals of the CFPB.

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