



By Email: FederalRegisterComments@cfpb.gov

February 11, 2019

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

Re: Proposed Policy Guidance and Procedural Rule; Proposed Information Collection; Request for Comment; Docket No. CFPB–2018–0042

Dear Sir or Madam:

The Chamber of Digital Commerce (the “Chamber”) welcomes the opportunity to submit these comments in response to the Consumer Financial Protection Bureau’s (“CFPB” or the “Bureau”) request for comment, dated December 13, 2018 (the “Request for Comment”),¹ regarding the Bureau’s proposed policy on no-action letters and the product sandbox (the “Proposed Policy”).

The Chamber is the world’s largest blockchain trade association. Our mission is to promote the acceptance and use of digital assets and blockchain technology and we are supported by a diverse membership that represents the blockchain industry globally. Our goal is to develop a pro-growth legal environment through education, advocacy, and close coordination across various jurisdictions with policymakers, regulatory agencies, and industry to foster innovation, job creation, and investment. We represent the world’s leading stakeholders in the blockchain ecosystem, including leading edge start-ups, software companies, global IT consultancies, financial institutions, insurance companies, law firms, and investment firms.

The Chamber and its members have a significant interest in promoting regulatory support for innovation across all sectors and agencies, including the practical application of available regulatory tools such as no-action letters and sandboxes. No-action letters and regulatory sandboxes can help bridge the gap between the deliberate pace of regulation and the rapid pace of innovation, while upholding the principle to first do no harm. The Chamber strongly supports regulatory efforts in the United States that: (i) eliminate unnecessary burden to apply for access to these tools; (ii) enhance the

¹ 83 Fed. Reg. 64,036 (Dec. 13, 2018).

reliability of these tools; and (iii) promote coordination among regulators. The Chamber broadly supports the Proposed Policy for these reasons.

Eliminate Unnecessary Burden

Despite the rapid pace of innovation and the availability of no-action letter relief under the Bureau's 2016 no-action letter policy (the "2016 Policy"),² Bureau staff approved only one such no-action letter. The Chamber believes that innovators' reluctance to seek no-action relief under the 2016 Policy can be explained by both the unnecessary burden the 2016 Policy imposed on applicants for and recipients of no-action relief and the insufficient benefits that accrued to recipients of no-action relief.

The Proposed Policy would make meaningful improvements to the 2016 Policy to eliminate unnecessary burden from the no-action letter application process. For example, while the 2016 Policy did not include a timetable for approval or denial of a no-action letter application, the Proposed Policy includes a 60-day evaluation timeframe for no-action letter and product sandbox applications. This is a marked improvement; however, the Chamber encourages the Bureau to go further.

Specifically, the Chamber encourages the Bureau to commit to promptly evaluating applications for no-action or other relief and endeavor to complete its evaluation within 30 days, unless circumstances or the particular application require an additional 30 days. Innovation occurs at a rapid rate, and startups and other firms that operate in this fast-paced arena cannot park resources for months while the Bureau evaluates an application for no-action relief or participation in the product sandbox. Long wait times—even 60 days in some cases—may discourage innovators from seeking the type of regulatory relief that would enable them to advance products or proposals that would benefit consumers.

The Proposed Policy also would make meaningful improvements to the 2016 Policy with respect to the data-sharing burden for no-action letters. Specifically, the Proposed Policy would eliminate the expectation that a no-action letter recipient would "commit to sharing data about the product or service in question."³ However, applicants for the product sandbox would be required to commit to sharing data with the Bureau concerning the products or services offered or provided in the product sandbox, including "information about the effects of offering or providing the described aspects of the product or service on complaint patterns, default rates, or similar metrics that will enable the Bureau to determine if doing so is causing material, tangible harm to consumers."⁴

Ongoing data-sharing requirements could impose a significant burden on sandbox participants. The Chamber acknowledges that monitoring consumer harm is

² 81 Fed. Reg. 8,686 (Feb. 22, 2016).

³ 83 Fed. Reg. at 64,037.

⁴ *Id.* at 64,043.

necessary in a regulatory sandbox and recognizes the value of providing the Bureau with certain data, such as the information participants share with their customers. However, imposing a burdensome data-sharing requirement would serve as a disincentive to participation in the product sandbox. The Chamber, therefore, encourages the Bureau to limit required reporting to those metrics necessary for the Bureau to determine whether the product or service is causing material, tangible harm to consumers so as to preserve the tool as a viable alternative for innovators.

Enhance Reliability

The Chamber encourages the Bureau to clarify the extent to which a no-action letter is an official interpretation by the Bureau. The Proposed Policy states that “[a] No-Action Letter...is a document provided to a particular entity or entities, based on particular facts and circumstances, through which the Bureau exercises its discretionary supervision and enforcement authority by providing no-action relief.”⁵ Moreover, the Bureau intends that “No-Action Letters would be issued by duly authorized officials of the Bureau to provide recipients greater assurance that the Bureau itself stands behind the no-action relief provided by the letters.”⁶ However, the Proposed Policy does not address, for example, whether a no-action letter constitutes “agency action” under the Administrative Procedure Act (“APA”),⁷ the degree to which there is an expectation of judicial deference,⁸ or the extent to which a third party could rely on the no-action letter.⁹ The Chamber believes these issues warrant further clarification.

Notwithstanding this opportunity to clarify the Proposed Policy, the Chamber commends the Bureau’s efforts to enhance the reliability of a no-action letter in the Proposed Policy, including by stating that under the Proposed Policy the no-action letter would be issued by duly-authorized Bureau officials. The Chamber agrees that this

⁵ *Id.* at 64,039.

⁶ *Id.* at 64,037.

⁷ 5 U.S.C. § 551(13) (agency action means “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act”).

⁸ See Letter from Christopher M. D’Angelo to Thomas P. Brown, dated September 14, 2017 (the “Upstart No-Action Letter”), available at: https://files.consumerfinance.gov/f/documents/201709_cfpb_upstart-no-action-letter.pdf (stating in the standard recitals, “This No-Action Letter...is not intended to be honored or deferred to in any way by any court or any other government agency or person.”)

⁹ See 83 Fed. Reg. at 64,042 (citing, for example, 15 U.S.C. § 1691e(e) as authority for issuing no-action letters concerning the Equal Credit Opportunity Act, which imposes no liability “to any act done or omitted in good faith in conformity with any...interpretation thereof by the Bureau or in conformity with any interpretation or approval by an official or employee of the Bureau of Consumer Financial Protection duly authorized by the Bureau to issue such interpretations or approvals” and 15 U.S.C. § 1640(f) as authority for issuing no-action letters concerning the Truth in Lending Act, which imposes no liability “to any act done or omitted in good faith in conformity with any...interpretation...by the Bureau...”. Compare 83 Fed. Reg. at 64,042, with the Upstart No-Action Letter (stating that “[t]his No-Action Letter is limited to Upstart’s automated model for underwriting applicants for unsecured non-revolving credit, as described in the Request and Compliance Plan, and it does not pertain to...any person other than Upstart.”).

improvement from the 2016 Policy, under which a no-action letter is only a staff recommendation, would provide recipients with greater assurances of no-action relief.

In addition, one of the greatest sources of uncertainty for innovators is the exercise of federal and state unfair, deceptive (or abusive) acts or practices (“UDAP/UDAAP”) authority. While the 2016 Policy includes no categorical restriction on UDAAP relief, the Bureau stated that it did not expect to commit significant resources to UDAAP-focused no-action letter requests. The Proposed Policy, on the other hand, would specifically commit no-action relief from the Bureau’s UDAAP enforcement authority to recipients of no-action letters, subject to good faith, substantial compliance, and the Bureau’s discretion.¹⁰ The Chamber supports the Bureau’s recognition that UDAP/UDAAP risk is particularly ripe for no-action relief.

The Chamber also supports the improvement to the no-action letter revocation process. Under the 2016 Policy, the Bureau stated its intention to provide advance notice to a recipient of the Bureau’s intention to revoke or modify the no-action letter and permit the recipient to respond; however, the Bureau retained the right not to provide advance notice and revoke relief immediately upon notice. Under the Proposed Policy, the Bureau would “notify the recipient(s) of the grounds for revocation, and permit an opportunity to respond within a reasonable period of time,”¹¹ and the Bureau would commit to providing a “wind-down” period, unless the revocation was based on material, tangible harm. The Chamber believes these safeguards—and, perhaps, the safeguards that would attach under the APA—improve the reliability, and thus, the value, of the no-action letter for recipients.

Promote Coordination

Finally, the Chamber strongly supports enhanced coordination among regulators, particularly in light of the byzantine structure of U.S. financial services regulation. Financial services regulation at the state and federal level creates significant challenges for innovators working with technologies, including blockchain technologies that, by nature, are not limited by geographic borders.

Under the Proposed Policy, the Bureau would commit to coordinating no-action and other relief with state, federal, and international regulators. The Bureau also expressed interest in entering into agreements with state authorities that issue similar forms of no-action relief or that operate or plan to operate regulatory sandboxes. The Chamber applauds the Bureau’s efforts in supporting nationwide and global regulatory collaboration, including its participation in the Global Financial Innovation Network’s efforts to create a global sandbox.

Fundamentally, the Chamber supports the creation of an environment that encourages regulatory harmony and comity on a global scale and engagement among

¹⁰ 83 Fed. Reg. at 64,039.

¹¹ *Id.* at 64,040.

regulators and industry on prevailing issues and challenges to facilitate innovation in, and adoption of, emerging technologies.

We appreciate the opportunity to provide the Chamber's views. We are available to meet and discuss our views on the Proposed Policy, as needed.

Respectfully Submitted,

A handwritten signature in black ink that reads "Perianne Boring". The signature is written in a cursive, flowing style.

Perianne Boring
Founder and President
Chamber of Digital Commerce