



February 10, 2019

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

Re: Request for Comment on the proposed Policy on No-Action Letters and the BCFP Product Sandbox [Docket No. CFPB-2018-0042]

Dear Assistant Director Watkins:

Consumer Reports¹ appreciates the opportunity to comment on the proposed Policy on No-Action Letters and the BCFP Product Sandbox.

We urge the Bureau to withdraw this proposal, and to continue with its 2016 No-Action Letter policy in which No-Action Letters (NALs) are issued only in instances where novel questions of law or regulation exist as particular to a product or service from an individual provider. If the CFPB is to change its approach to financial technology companies, we urge it to make improvements to the NAL, rather than adopting a Product Sandbox. The proposed Product Sandbox and NAL proposal opens the door to far broader exemptions from enforcement of and compliance with federal law and policy than is necessary for innovation to flourish, and runs the risk of turning consumers into guinea pigs on whom unsafe financial products are tested in the name of innovation by unaccountable providers.

Consumer financial products should not be exempt from oversight simply because they rely on whiz-bang technology or gather (and often share) large amounts of consumer data. A scan of the products touted as “fintech” quickly reveals that few, if any of these products are truly novel.

¹ Consumer Reports is an expert, independent, non-profit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. Consumer Reports works for pro-consumer policies in the areas of financial services and marketplace practices, antitrust and competition policy, privacy and data security, food and product safety, telecommunications and technology, travel, and other consumer issues, in Washington, DC, in the states, and in the marketplace. Consumer Reports is the world’s largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 6 million members and publishes its magazine, website, and other publications.

Headquarters
101 Truman Avenue
Yonkers, New York 10703
(914) 378-2000

Southwest Office
11801 Domain Blvd, 3rd Floor
Austin, TX 78701
(512) 477-4431

Washington D.C. Office
1101 17th Street, NW, Suite 500
Washington, DC 20036
(202) 462-6262

West Coast Office
1535 Mission Street
San Francisco, CA 94103
(415) 431-6747

Most “fintech” offerings fall within established legal definitions of products and services for deposit-taking, money transmission or lending. It is rare to find a product that does not have a clear analogy to a well-established, appropriately regulated financial product. Few technologies lead to products where the way a well established law or regulation should apply is in question. Where these questions exist, a limited NAL -- like that established in 2016 by the Consumer Financial Protection Bureau² -- is appropriate for ensuring compliance where the means of doing so is unclear. As noted in the 2016 policy, an NAL is “to enhance compliance with applicable federal consumer financial laws.”³

Instead of focusing on narrow questions of law or policy as with the 2016 NAL policy, the proposed Product Sandbox carves out wide areas where providers could operate without having to meet well-established obligations to consumers. The proposed Product Sandbox “safe harbors” would allow providers to evade established laws protecting consumers, including Regulation B (governing fair lending), Regulation E (electronic transactions and payments), and Regulation Z (governing credit disclosures). These exemptions are inappropriate given that there are few if any instances where there are open questions whether these regulations apply. In sum, we urge the Bureau’s Office of Innovation to focus on grappling with questions of applicable law or policy to novel technologies through a strong No Action Letter policy, rather than creating conditions for companies to avoid their consumer obligations through a Product Sandbox.

Revised No Action Letter (NAL)

In 2016, after two years of notice and comment, the Bureau issued its final policy statement on No Action Letters (NAL).⁴ The 2016 NAL Policy limits NALs to providers who demonstrate that their product or service poses substantial legal or regulatory uncertainty.⁵ An NAL issued under the 2016 Policy assured providers that Bureau staff had “no present intention to recommend initiation of an enforcement or supervisory action against the requester with respect to a specified matter.”⁶ In addition to providing assurances to service providers, the 2016 NAL Policy included important consumer safeguards: recipients must share information about the consumer impact of their offering with the Bureau;⁷ and instances where NALs would be issued were to be ‘rare,’ and the Bureau would ‘presumptively not issue NALs for unfair and deceptive acts and practices.’⁸

² Final Policy Statement, Policy on No-Action Letters; Information Collection, 81 Fed. Reg. 8686 (Feb. 22, 2016), available at https://files.consumerfinance.gov/f/201602_cfpb_no-action-letter-policy.pdf.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 8692.

⁶ *Id.* at 8686.

⁷ *Id.* at 8694.

⁸ *Id.* at 8669 (“As noted in the Proposed Policy and elsewhere in this Final Policy Statement, the Bureau anticipates that NALs will be provided rarely because they require a thorough and persuasive demonstration of the appropriateness of NAL treatment. The considerations referred to above are likely to mean that UDAAP-focused NALs will be particularly uncommon.”).

In contrast, the revised NAL Policy proposed in late 2018 is not focused on narrow questions of applicable law,⁹ does not require NAL recipients to share data with the Bureau¹⁰, and explicitly states that the Office of Innovation hopes to issue many NALs and that waivers for unfair and deceptive practices waivers can be expected.¹¹ That only one No Action Letter was granted under the 2016 policy should not be viewed as a policy failure. On the contrary, it underscores that most “fintech” offerings in that year were appropriately governed by existing laws and regulations, and that it is in fact the rare product that presents a novel question about how existing rules apply.

We strongly urge the Bureau to keep the 2016 Final Policy on No Action Letters in place; however, in the event that the Bureau moves forward with this proposal, we ask the Bureau to continue to approve applications only where there are open questions about the applicability of laws or regulations. We further suggest that the Bureau adopt the following improvements to its revised NAL Policy:

- Applications must be limited to individual service providers and exclude applications by trade groups, as the proposed revised NAL Policy would allow;¹²
- Applications must be subject to rigorous vetting by Bureau staff, with time and staff resources allocated according to the scale and complexity of the product, and not subject to artificially short timelines such as the 60 day approval timeline in the proposed revised NAL Policy;¹³
- Approved participants must be required to keep track of consumer experiences and outcomes, and share these data with the Bureau; where problems are discovered, the Bureau should be prepared to act swiftly to ensure consumer financial safety, including by revoking the NAL;
- Participants must have plans in place to ensure consumers are not inconvenienced or harmed when the no action period ends for any reason; and
- The Bureau must maintain its authority to hold any provider within its jurisdiction responsible for unfair, deceptive or abusive practices if discovered.

⁹ Policy on No-Action Letters and the BCFP Product Sandbox, 83 Fed. Reg. 64036, 64037 (proposed Dec. 18, 2018) (“Similarly, the Bureau’s review of applications for a No-Action Letter would be streamlined to focus on the quality and persuasiveness of the application, with particular emphasis on the potential benefits of the product or service in question for consumers, the extent to which the applicant identifies and controls for potential risks to consumers, and the extent to which no-action relief is needed.”).

¹⁰ *Id.* (“In contrast to the 2016 Policy, which requires applicants to commit to sharing data about the product or service in question, no such data sharing would be expected...”).

¹¹ *Id.* (“Whereas UDAAP-focused No-Action Letters were expected to be particularly uncommon under the 2016 Policy, there would be no such expectation under Part I of the proposed Policy.”).

¹² *Id.* at 64039.

¹³ *Id.* at 64037.

Sandbox Proposal

The Bureau is not alone in proposing a sandbox as a way for companies to test financial products and services on consumers in the open market without having to comply with all applicable laws. For example, in 2018, Arizona stood-up sandbox for financial products and services.¹⁴ The Wyoming legislature is currently considering such a program.¹⁵ The need for such a policy is not clear. As noted, most of the products and services called “fintech” are not in fact new. For example, the first company admitted to Arizona’s sandbox is offering a mobile wallet;¹⁶ however, consumer risks of mobile payments are well-understood,¹⁷ and there is clarity about how the law applies to mobile wallets, making providers’ responsibilities clear.¹⁸ There is simply no need to exempt a mobile wallet company from any consumer protection laws or regulations.

The proposed Product Sandbox goes further than the revised No Action Letter policy. It not only provides assurances that the Bureau will not take enforcement or supervisory action, but also gives companies a green light to ignore their legal obligations to consumers. The laws that approved Product Sandbox participants would be able to evade under Regulation B (governing fair lending), Regulation E (electronic transactions and payments), and Regulation Z (governing credit disclosures) are well-established legal frameworks that - even at their inception - codified well-established consumer rights.¹⁹ There are, as noted, few truly new products. The Forbes Fintech 50 for 2019 puts fintechs into seven categories: crypto and blockchain, investing, lending, payments, personal finance, real estate and Wall Street. Of these, only one is a product category created in the last ten years: “Crypto & Blockchain.”²⁰ While blockchain does pose novel questions of law and policy, even cryptocurrency exchanges fall well-within established parameters of money services businesses.²¹

¹⁴ Arizona House Bill 2434, available at <https://www.azleg.gov/legtext/53leg/2R/bills/HB2434H.pdf>.

¹⁵ Wyoming House Bill No. HB 0057, text available at <https://www.wyoleg.gov/Legislation/2019/HB0057>.

¹⁶ <https://www.azag.gov/press-release/arizona-accepts-first-participant-fintech-sandbox>

¹⁷ For example, Consumer Reports Advocacy published its first report on mobile payment risks, Mobile Pay or Mobile Mess, in 2011. Report available at <https://advocacy.consumerreports.org/wp-content/uploads/2013/02/Mobile-Pay-or-Mobile-Mess.pdf>.

¹⁸ The Bureau’s Rules Concerning Prepaid Accounts makes clear that the Electronic Fund Transfer Act (Regulation E) applies to mobile wallets

https://files.consumerfinance.gov/f/documents/cfbp_prepaid_final-rule_2018-amendments.pdf.

¹⁹ For example, in 1979, one year after the passage of the Electronic Funds Transfer Act, an observer wrote: “Although the [Electronic Funds Transfer] Act is new, it contains little that is conceptually original. Instead, the EFT Act borrows concepts and techniques for legal control from legislation governing transactions and relationships that were thought to be analogous -for example, the Truth in Lending Act, the Fair Credit Billing Act, the Fair Credit Reporting Act, and Articles 3 and 4 of the Uniform Commercial Code.” Roland E. Brandel & Eustace A. Oliff, *The Electronic Fund Transfer Act: A Primer*, 40 OHIO ST. L.J. 530, 537 (1979), available at https://kb.osu.edu/bitstream/handle/1811/65105/OSLJ_V40N3_0531.pdf.

²⁰ See Janet Novak et. al., *The Most Innovative Fintech Companies in 2019*, FORBES, Feb. 4, 2019, <https://www.forbes.com/fintech/2019/#234dd4462b4c> (searchable list of 50 companies; “Crypto & Fintech” is in “Search by Category” drop down menu).

²¹ For example, FinCEN concluded that cryptocurrency exchanges must register as money services businesses. See Application of FinCEN’s Regulations to Persons Administering, Exchanging, or Using Virtual Currencies (Mar. 18, 2013), available at <https://www.fincen.gov/news/news-releases/fincen-issues->

The vast majority of fintech innovation falls within known product categories, and rarely raises novel questions of law and policy. Providers should not be able to escape their legal obligations to consumers by joining a sandbox. We urge the Bureau not to pursue the proposed Product Sandbox.

Conclusion

We understand and value the Bureau's interest in encouraging innovation in consumer financial services and we see no necessary conflict between that interest and the regulatory structure put in place to protect consumers. New technology raises novel legal and regulatory questions on relatively rare occasions; most new products fit within the definitions that already exist in law. Where the rare open question of how a law or regulation applies arises, the Bureau's issuance of a No Action Letter under the 2016 Final NAL Policy is appropriate. The original NAL Policy contains important consumer safeguards while still offering service providers assurances that they can take their innovative products to market without fear of a Bureau enforcement action. A strong NAL Policy obviates the need for a Product Sandbox. We urge the Bureau to either continue with its 2016 Policy or adopt our improvements to the revised proposal, and not to pursue a Product Sandbox.

Thank you for the opportunity to comment. We look forward to working with the Bureau on these and other important issues affecting consumers in the 21st century marketplace.

Sincerely,



Christina Tetreault
Senior Policy Counsel



Anna Laitin
Director, Financial Policy

[guidance-virtual-currencies-and-regulatory-responsibilities](https://www.csbs.org/sites/default/files/2017-11/CSBS-Model-Regulatory-Framework%28September%2015%202015%29.pdf) (interpretive guidance). Likewise, the Conference of State Bank Supervisors has concluded that state money transmitter laws can, with modification, effectively cover cryptocurrency activities. See Conf. of St. Bank Supervisors, State Regulatory Requirements for Virtual Currency Activities, CSBS Model Regulatory Framework 1 (2015), available at <https://www.csbs.org/sites/default/files/2017-11/CSBS-Model-Regulatory-Framework%28September%2015%202015%29.pdf>.