

February 11, 2019

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

Re: Comments on no-action letters and product sandbox, Docket No. CFPB-2018-0042-001

Dear Assistant Director Watkins:

The 80 undersigned consumer, civil rights, legal services, labor and community groups and environmental groups write in strong opposition to the proposed changes to the Consumer Financial Protection Bureau's (CFPB or Bureau) no-action letter policy and to the new proposed product sandbox.

The proposal, if finalized, would be an arbitrary and capricious and unlawful measure that could, in effect, give entire industries relief from complying with aspects of consumer protection laws. Under the proposal, Bureau staff could quickly churn out no-action letters that, unlike those of other agencies, give a binding commitment that the Bureau "will not" take enforcement action or issue supervisory findings. The sandbox could enable staff to issue approvals or exemptions that apply to all members of an industry association, effectively change the law, and amount to substantive, legislative rules without following rulemaking requirements. **The CFPB's proposed no-action letter and product sandbox proposal is actually a Sahara desert parched of consumer protections.**

The CFPB's mandate is to enforce the law, not help companies evade it. The Bureau has narrow authority to provide exemptions from legal requirements without using the rulemaking process. Though some federal statutes permit companies to rely in good faith on approvals, the Bureau has no authority to issue "approvals" of conduct designed to violate the law.

The proposed "relief" could violate the Administrative Procedures Act, among other laws. The Bureau fails to give adequate reasons for its proposal and contemplates issuing relief that amounts to substantive, legislative rules without engaging in public notice and comment rulemaking, among other requirements.

The Bureau has enforcement discretion, but it does not have broad authority to use the proposed secretive process to bind states, consumers, or other federal agencies. The CFPB has claimed that it can issue approvals or exemptions that, "to the fullest extent permitted," would give companies a safe harbor making them "immune from enforcement actions by any Federal or State authorities, as well as from lawsuits brought by private parties." While the CFPB can choose where to focus its own enforcement powers, the Dodd-Frank Wall Street and Consumer Protection Act very carefully retained the authority of the Federal Trade Commission and expanded the authority of states and state regulators in order to ensure that there is a cop on the beat if the CFPB chooses to shirk its duties.

The CFPB's proposal would expose consumers to risk of harm and shirks the Bureau's duty to protect consumers. Several aspects of the Bureau's proposals betray the Bureau's obligation to protect consumers:

- ***Individual Bureau employees making far-reaching decisions without public input.*** The proposal allows designated members of the Office of Innovation to grant no-action letters or sandbox applications with no public input on whether a product or service is risky, whether an approval of a creative interpretation of the law or exemption would cause consumer harm, or whether granting relief to one company would harm competitors. There are no procedures for approval by the Director or anyone else at the Bureau.
- ***Rubber-stamp approvals with only 60 days' review.*** The Bureau expects to act on applications within 60 days, which is not enough time to evaluate the legal issues and consumer risks of a new product or service, as well as to obtain and evaluate data and consult with other offices within the Bureau to identify the ramifications for other products, services, or Bureau actions.
- ***Lack of protection against unknown unfair, deceptive or abusive acts or practices.*** The Bureau is recklessly proposing to issue no-action letters of unlimited duration that promise the Bureau will not act against unfair, deceptive or abusive practices. The Bureau has also proposed irresponsible hurdles to terminating a no-action letter or sandbox if significant consumer harm emerges.
- ***Applications from trade associations and service providers covering entire markets.*** The problems noted above are compounded by the fact that the Bureau is encouraging applications from trade associations and service providers that may have thousands of members or clients, with the potential to erase consumer protections for millions of consumers. The wide number of entities that may offer a product in a different manner amplifies the impossibility of evaluating the risks and ramifications without going through public notice and comment rulemaking.
- ***Little protection from consumer harm.*** The CFPB proposal takes away consumers' rights and, in exchange, requires companies to commit only to addressing "material, quantifiable, economic harm," without taking into account intangible harms to consumers such as damage to a credit score or harassment by a debt collector.
- ***Accepting applications from companies facing litigation or enforcement.*** The CFPB has proposed to delete the current requirement that an applicant affirm that it is not presently facing threatened or actual government enforcement or civil litigation. A company in that situation is potentially violating the law and causing consumer harm. It is absolutely inappropriate for the CFPB to attempt to use a no-action letter or product sandbox to provide the company with a defense.
- ***A secretive, one-sided process shielded from public scrutiny.*** The Bureau appears intent on trying to shield from the public a significant amount of information in the no-action letter and sandbox process to insulate communications from lobbyists for regulated companies.
- ***Potential evasion of federal law based on a state's decision regarding state laws.*** The policy states that the Bureau is interested in entering into agreements with state authorities that would provide for an alternative means of receiving a no-action letter or admission to the product sandbox. The Bureau has no authority to give states control over whether companies must comply with federal law, and the Bureau cannot abdicate its responsibility to protect consumers by relying on review by a state authority.

Plenty of examples from past history and the present show how the proposal could harm consumers. Here are just a few.

- ***Pick-a-payment and exploding rate mortgages.*** The reckless mortgages that led to the foreclosure crisis were an “innovation” whose risks were largely ignored by regulators, even though they were apparent to many consumer advocates. It took years before defaults exploded to the level that they were viewed with concern and by then it was too late. Giving a stamp of approval to dangerous “innovations” could magnify the harm to consumers.
- ***Algorithms or alternative data that lead to discrimination.*** A company could seek approval for use of alternative underwriting models even though it may later become clear that the model discriminates against equally qualified borrowers of color, as digital mortgages as have been shown to do. The CFPB cannot possibly give the complicated use of big data a gold star after a review of only 60 days and should not bless untested models.
- ***Payday loans designed to evade credit laws.*** Predatory lenders are regularly trying to find ways to evade consumer protections. The payday loan trade association could apply for a no-action letter or sandbox admission approving a type of payday loan that claims not to be subject to the Truth in Lending Act, depriving consumers of protections without even allowing the public to weigh in.

Rather than providing consistency and certainty in the market, the Bureau’s proposal could ironically have the opposite effect by immersing companies in controversy and leading to erratic policy swings.

If the Bureau begins relieving companies from complying with important consumer protections, each action -- and the business practices underlying it -- could draw intense scrutiny from consumer advocates, the media, Congress, state attorneys general, and the broader public. The precedent of deputizing Bureau employees to regularly promulgate what amount to new legal interpretations, with such an informal process, could also be used by subsequent leadership at the Bureau to adopt wildly different interpretations or ones that increase the compliance burden for companies.

The CFPB’s proposal has little to do with encouraging responsible innovation and instead sidelines important consumer protection laws that the Bureau is mandated to enforce. There are plenty of ways to encourage innovation without abdicating the Bureau’s fundamental statutory duties to enforce the law and protect consumers.

Thank you for the opportunity to submit these comments.

Yours very truly,

Alaska Public Interest Research Group
Alliance for Justice
Allied Progress
Americans for Financial Reform Education Fund
Arkansans Against Abusive Payday Lending
Atlanta Legal Aid Society, Inc.
California Reinvestment Coalition
Center For Digital Democracy
Center for Economic Integrity
Center for Economic Justice
Center for Justice & Democracy

Center for NYC Neighborhoods
Center for Responsible Lending
Central Alabama Fair Housing Center
Citizen Works
Community Economic Development Association of Michigan (CEDAM)
Community Legal Services of Philadelphia
Connecticut Fair Housing Center
Connecticut Legal Services, Inc.
Consumer Action
Consumer Federation of America
Consumers for Auto Reliability and Safety
D.C. Consumer Rights Coalition
Demos
Disability Rights Education and Defense Fund (DREDF)
Earthjustice
Empire Justice Center
Florida Alliance for Consumer Protection
Georgia Watch
Greater Boston Legal Services, on behalf of its low-income clients
Heartland Alliance
Housing and Economic Rights Advocates
Indiana Institute for Working Families
Interfaith Center on Corporate Responsibility
Jacksonville Area Legal Aid, Inc.
Legal Aid Society of the District of Columbia
Legal Services NYC
Legal Services of New Jersey
MA Affordable Housing Alliance
Maryland Consumer Rights Coalition
Michigan Community Action
Michigan Poverty Law Program
Mississippi Center for Justice
Mobilization for Justice Inc.
NAACP
National Association of Consumer Advocates
National Center for Law and Economic Justice
National Center for Transgender Equality
National Consumer Law Center (on behalf of its low income clients)
National Consumers League
National Fair Housing Alliance
New Economy Project
New Jersey Appleseed Public Interest Law Center
New Jersey Citizen Action
New Mexico Center on Law and Poverty
North Carolina Justice Center
Oklahoma Policy Institute
People's Action Institute
Privacy Rights Clearinghouse

Prosperity Works
Public Citizen
Public Counsel
Public Good Law Center
Public Justice Center
Public Law Center
Reinvestment Partners
SC Appleseed Legal Justice Center
Southern Poverty Law Center
Texas Appleseed
The National Council of Asian Pacific Americans (NCAPA)
Tzedek DC
U.S. PIRG
United Policyholders
Virginia Citizens Consumer Council
Virginia Poverty Law Center
VOICE - OKC
West Virginia Center on Budget and Policy
Wildfire: Igniting Community Action to End Poverty in Arizona
Woodstock Institute
Workplace Fairness