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CFPB No-Action Letters: Is There a Benefit?

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The Consumer Financial Protection Bureau (“CFPB” or “Bureau”) recently finalized a policy to permit its staff to issue No-Action Letters to determine whether or how specific CFPB regulations would apply to new and innovative financial products or services. A CFPB No-Action Letter, if issued, would advise whether CFPB staff has a present intent to recommend an enforcement or supervisory action with respect to the product or service in question. CFPB’s policy is similar to, but not precisely like the No-Action-Letter standard of the Securities and Exchange Commission (“SEC”)¹ and the private letter ruling issued by the Internal Revenue Service (“IRS”).² A number of other agencies and organizations, including the Department of the Treasury Financial Crimes Enforcement Network (“FinCEN”) and the Financial Industry Regulatory Authority (“FINRA”) offer similar interpretative services as well.³

The CFPB anticipates that the Bureau will only issue a No-Action Letter for exceptional circumstances, and that it will provide only one to three letters a year. While the CFPB believes that No-Action Letters will facilitate access to financial products, the fact that CFPB No-Action Letters are “subject to modification or revocation at any time at the discretion of the staff,”⁴ allows the Bureau to provide some regulatory certainty with the ability to take action should the agreed upon terms in the No-Action Letter be modified by the recipient of the letter. While not perfect, the CFPB No-Action Letter is a step in the right direction of minimizing regulatory uncertainty and working with the industry the Bureau regulates.

CFPB No-Action Letter Process

The CFPB has set some basic parameters for obtaining a No-Action Letter. The process will be limited in scope and the CFPB will only issue No-Action Letters for unreleased financial products or services; not for “well-established products or purely hypothetical products.” The process to obtain a No-Action Letter requires that a requestor provide a substantial amount information to the CFPB both initially and throughout the covered period, including:

- A description of the product or service, including any consumer disclosures or safeguards.
- A description of how the product will benefit consumers and any potential consumer risks the product poses.
- A timetable for release of the product.
- A substantial showing of why the applicant believes the No-Action Letter is necessary, including identification of specific statutes and regulations and how each should be applied to the financial product.



- A description of why the regulatory uncertainty cannot be addressed without a No-Action Letter.
- A showing of the product's compliance with other federal and state statutes and regulations.
- An affirmation that the facts and representations are accurate, that the applicant is not the subject of an imminent or ongoing government investigation or enforcement action.
- A commitment to provide additional information to CFPB staff upon request.
- A description of the data possessed by the applicant and data that it will obtain about the product, and a commitment to share the data with CFPB staff upon request.
- A commitment that the applicant will not state that the CFPB has authorized or endorsed the product.

The CFPB staff has significant discretion in granting the request for a No-Action Letter. The staff can grant the request with or without an explanation; moreover, the Bureau can deny the request with or without public detail of a denial. When the CFPB issues a No-Action Letter, the No-Action Letter and a summary of the incoming request for such letter will be made public. Accordingly, one of the many factors applicants must consider is whether the upside of minimizing regulatory uncertainty is worth their information becoming public.

While the CFPB reserves the ability to modify or revoke the No-Action Letter, we believe that it is unlikely that the Bureau will do so provided the terms of the No-Action Letter are strictly adhered to by the recipient of the letter and no material facts have changed. The Bureau's *caveat* policy differs from the SEC and IRS policies. However, the goals appear to be similar—providing some regulatory certainty to allow marketplace innovation. In comparison to SEC No-Action Letters or IRS Private Letter Rulings, which are necessary before a person undertakes any action, the CFPB No-Action Letters are not necessary, but may be advisable and provide some regulatory certainty.⁵ In essence, a CFPB No-Action Letter is akin to a “safe harbor” for the agreed upon consumer financial product or service.

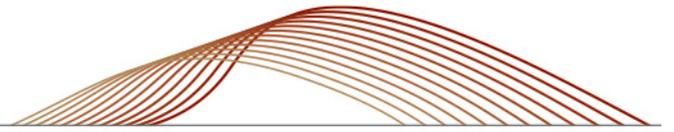
The CFPB policy provides a new mechanism for companies to receive potential clarification on the applicability of CFPB statutes and regulations to their activity. While there are still costs and risks associated with petitioning the CFPB for a No-Action Letter, this process opens an avenue of dialogue with the Bureau and is something that may be worthwhile under the right factual scenario.

Action Items

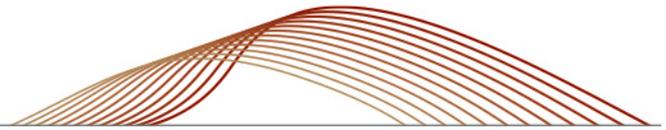
Financial services providers considering seeking a No-Action Letter should review the pertinent guidelines for eligibility for a CFPB No-Action Letter to determine if its benefits may be useful for their business. The CFPB will engage in discussions with those entities under its jurisdiction, which frequently can provide more clarity or minimize regulatory uncertainty before seeking a formal No-Action Letter. Moreover, consideration of seeking a formal response under CFPB's No-Action requires consideration of the following:

- Is your product an unreleased financial product or service – *e.g.* new to the market?

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- Do you have a “proof of concept” or something greater than a hypothetical, but less than a fully developed already in use consumer financial product or service?
- Are you willing to disclose your “proof of concept” to the public?
- Are you willing to provide substantial information to the CFPB regarding the sale and use of your product or service?
- Can you strictly adhere to conduct parameters agreed upon or the terms of the letter?



COMPARISON CHART OF NO-ACTION POLICIES

| | CFPB | SEC | IRS |
|------------------------|---|---|---|
| Issuance Frequency | <ul style="list-style-type: none"> 1 to 3 No-Action Letters per Year. | <ul style="list-style-type: none"> 104 No-Action Letters Issued in 2015. | <ul style="list-style-type: none"> Several hundred private letter rulings issued each year. |
| Standards for Issuance | <ul style="list-style-type: none"> Exceptional Circumstances. Unreleased, but forthcoming financial product or service. Substantial regulatory uncertainty. | <ul style="list-style-type: none"> Uncertainty with respect to whether a product violates securities laws. | <ul style="list-style-type: none"> The IRS will issue a PLR in the interest of sound tax administration. Standards for issuance depend on what type of tax question is at issue. |
| Revocability | <ul style="list-style-type: none"> At discretion of Staff and at any time. For material inaccuracies in stated facts. If the product is materially altered, or If the CFPB deems it necessary to protect consumers. | <ul style="list-style-type: none"> Commission is not bound by staff No-Action Letters. However, SEC has not proceeded against a party who has relied on a letter in good faith. | <ul style="list-style-type: none"> Revocable in limited circumstances such as a change in the law, a court case, or change in material facts. Revocation not retroactive if good faith reliance on the Private Letter Ruling. |

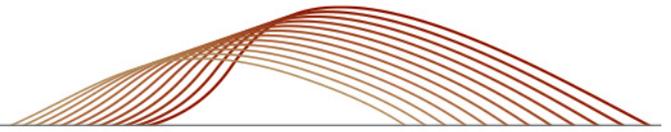
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¹ See 17 C.F.R. § 200.81 (1988).

² See 26 C.F.R. § 601.201 (1967).

³ FinCEN provides an Administrative Ruling to applicants seeking a determination on whether FinCEN's regulations apply to a particular set of facts and circumstances. 31 C.F.R. §§1010.710-717. Similarly, FINRA, a SEC Self-Regulatory Organization, offers interpretive letters providing FINRA's staff's views with respect to the application of its rules to a specific set of facts and circumstances. See *FINRA Office of General Counsel, Regulatory Policy and Oversight Seeking Interpretive Guidance*, FINRA (last accessed Feb. 26, 2016), <http://www.finra.org/industry/finra-office-general-counsel-regulatory-policy-and-oversight-seeking-interpretive-guidance>.

⁴ CFPB's power to revoke a NAL raises the question as to whether this policy could survive scrutiny under the CFPB's own Unfair, Deceptive, or Abusive Acts or Practices analysis.

⁵ SEC staff issues No-Action Letters confirming that the staff of a particular SEC division will not recommend that the Commission take an enforcement action against the party requesting the letter. Although the SEC is not bound by staff No-Action Letters, in practice the SEC has not proceeded against a party who has relied in good faith on their requested No-Action Letter. See Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 943 (1998). See also, *New York City Employee's Retirement System v. S.E.C.*, 45 F.3d 7, 12 (2d. Cir. 1995).

Similarly, the IRS has the power to issue Private Letter Rulings, whereby the IRS will provide to an applicant the tax consequences of a specific factual circumstance. Except in limited circumstances, an applicant can rely on the determination given in a Private Letter Ruling. Additionally, while a Private Letter Ruling can be revoked due to a change in tax laws, a court case, or a material change in the facts, the revocation will not apply retroactively if there was a good faith reliance on the Private Letter Ruling and retroactive application would be detrimental to the applicant. See *generally*, Rev. Proc. 2015-1 §§ 2.01, 11.01-.05.

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