

## No-Action Action: Steps Toward A Better CFPB Policy

By **Eric Mogilnicki and Michael Nonaka** (March 8, 2018, 11:58 AM EST)

The new leadership of the Consumer Financial Protection Bureau has committed the bureau to serving consumers and providers of financial services alike. Doing so will require a new approach to using the toolbox given to the bureau by the Dodd-Frank Act. In particular, Director Mick Mulvaney has signaled that enforcement will be a last resort, and that the bureau will instead seek to improve compliance with the law by making clear what the law requires. Clearing pathways to new products and services by recalibrating the bureau's "no-action letter," or NAL, policy is one way the bureau can make good on that promise.[1]

There has long been broad agreement, at least on paper, that the bureau should promote innovation. The Dodd-Frank Act directs the bureau to facilitate "access and innovation" in financial services,[2] and former CFPB Director Richard Cordray repeatedly emphasized the bureau's interest in helping foster and channel new technologies.[3] However, innovators have been leery of the bureau. Not only was the bureau often unable or unwilling to provide advance guidance to resolve legal uncertainty, but it was also prone to announce new legal standards through enforcement actions. These approaches posed unacceptable risks to innovators considering new products and services.

To its credit, the bureau recognized that innovators would benefit from a policy whereby they could obtain, in advance, a letter indicating that the bureau would not take enforcement action against a particular new product or service. However, drafting a NAL policy required that the bureau strike an appropriate balance between its interest in helping innovators and its institutional interest in preserving its own enforcement flexibility. The bureau failed to find that balance, and the resulting policy was one that innovators found more burdensome than beneficial.[4] As a consequence, the bureau has issued only one NAL in two years.[5] In contrast, the U.S. Securities and Exchange Commission issues hundreds of no-action letters each year.

However, some modest changes should make the policy more effective for the bureau, innovators and consumers alike. Indeed, when the bureau finalized its NAL policy, it pledged to "monitor the effectiveness of the policy" and assess whether changes to the policy would "facilitate innovation and otherwise substantially enhance consumer benefits." [6] Two years later, such recalibration is overdue.



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## Reducing the Burden of a No-Action Letter

The bureau's no-action letter policy requires an innovator to file an application with 15 different types of information. Many submission requirements relate to issues unrelated to the merits of the request, such as an affirmation that the requesters are not the subject of any undisclosed adverse supervisory or enforcement action over the past 10 years. Others seek advance commitments, including agreements to share information and data before and after the NAL. Others require detailed showings to justify the request. These include explanations of how the product is likely to "provide substantial benefit to consumers differently from the present marketplace;" "a candid explanation of the potential consumer risks posed by the product;" and a showing of how the law is "substantially uncertain" with regard to the product.[7]

Few companies have agreed to jump through these hoops, and the bureau should reconsider whether all of these requirements are truly necessary. Some of these prerequisites seemed designed to weed out applicants from a process that should instead be welcoming. For example, an applicant with a checkered supervisory or enforcement history is precisely the sort of company that most needs the kind of guidance that they may receive from the NAL policy.

Other requirements seem to needlessly supplement the bureau's robust authority to seek information about, and then analyze, how an innovation is functioning in the marketplace. For example, the bureau need not mandate that applicants demonstrate a "substantial benefit to consumers" and provide "suggested metrics for whether such benefits are realized"[8] — neither of which is required to request an SEC no-action letter or an advisory opinion from the Federal Trade Commission.[9] Instead, the market will measure if consumers find the product useful.

These criteria may have originated in concerns that the bureau would be swamped by applications.[10] We now know that the bureau has the opposite problem; it has created a voluntary process in which no one wants to participate.

Fortunately, there are simple, concrete steps that the bureau could take to reduce the burden of seeking an NAL.

**Reduce the Burden of Showing Regulatory Uncertainty:** The bureau should eliminate — or at least delete "substantial" from — the required showing of regulatory uncertainty. The bureau need not put innovators in the no-win position of being required to establish doubt about the legality of a product they wish to release. The bureau is capable of assessing risks and regulatory uncertainty for itself. Moreover, the fact that an innovator is going to the trouble of seeking an NAL itself suggests genuine uncertainty. And if there is no such uncertainty, then the bureau should find it easy to provide (or refuse) an NAL. See Submission Requirement 6.

**Reduce the Burden of Showing Consumer Benefits:** The bureau should eliminate — or at least delete "substantial" from — the required showing of consumer benefit. The NAL process should facilitate consumer access to products. The bureau should not prejudge what products consumers will find useful. See Submission Requirement 4.

**Eliminate the Affirmation Requirement:** The bureau should no longer require the applicant to affirm that they supplied accurate facts and will not misrepresent the NAL. The bureau already makes clear that any NAL is based on the factual representations made in the request, and is contingent on the correctness of such facts ..."[11] Moreover, the bureau can police misrepresentations about the NAL just

as it polices all other sorts of misrepresentations relating to consumer financial goods and services. See Submission Requirements 7 and 10.

**Eliminate Data-Sharing Demands:** The bureau should no longer seek open-ended commitments to share information and data. Requests for data can be dealt with as needed during and after the NAL process. But an NAL recipient should have no more obligations in this regard than any other entity. See Submission Requirements 8 and 9.

**Allow Applications from All Parties:** The bureau should be willing to provide NALs when appropriate, regardless of the identity or history of the party requesting the letter. Accordingly, the bureau can eliminate the required disclosures and affirmations regarding the requester's enforcement and litigation history. Instead, the bureau should welcome efforts by such persons and entities to obtain its guidance. See Submission Requirements 11 and 12.

### **Increasing the Benefit of a No-Action Letter**

The bureau can also increase requests for NALs by increasing their value. Here too, there are concrete steps that the bureau could take to make an NAL worthwhile.

**Broaden the Range of Products that May be Submitted for NALs:** The no-action letter policy states that the bureau will not consider products that are "well-established," nor those that are still in early stages of development.[12] However, if a financial institution believes it would benefit from an NAL under these circumstances, the bureau should hear out their request. The bureau routinely analyzes established products as part of their supervisory and enforcement regimes, and so should be willing to perform the same analysis upon request.

**Address UDAAP Issues:** The bureau states that it will be "particularly uncommon" for an NAL to address whether a product violates the prohibition on unfair, deceptive and abusive acts and practices (UDAAP).[13] This limitation significantly diminishes the value of an NAL. Most of the bureau's enforcement actions involve UDAAP claims, and so a promise of no action that does not include claims is of limited value. In justifying this limitation, the bureau explained that UDAAP analysis "is typically an intensively factual question that requires detailed consideration of a wide range of potentially relevant circumstances." [14] However, the bureau routinely engages in that very analysis as part of its supervisory and enforcement actions. A bureau that is willing to work through these complex questions in order to enforce UDAAP should be willing to perform the same analysis to help an innovator avoid violating UDAAP.

**Set a Timetable:** The value of an NAL would also be enhanced if an applicant could be certain of obtaining a letter — or even a rejection of their request — within an established timetable. In resisting such a timetable initially, the bureau explained that it could not commit to a schedule because it "does not yet have concrete experience in processing NAL applications." [15] The bureau may not get such experience until it can promise timely results.

**Explain its Decisions:** While NALs will be public, the bureau is unwilling to explain when it declines a requested NAL. Accordingly, it is impossible for potential applicants to know whether to proceed. The bureau has in the past expressed concerns about the resources that such disclosures might entail. However, it is difficult to see how the burden of a brief summary of the bureau's decision-making process outweighs the value of the bureau being transparent about its NAL decisions.

**Stand By its Word:** Finally, the bureau could increase the value of NALs by standing by them. At present, an NAL does not “[r]estrict or limit in any way the bureau’s discretion,” nor “create or confer ... any substantive or procedural rights or defenses.”[16] The bureau makes clear that it may revoke the NAL at any time, and that NALs are “not intended to be honored or deferred to in any way by any court or any other government agency or person,”[17] notwithstanding the deference that the bureau expects from courts when it participates in litigation. The bureau’s unwillingness to speak authoritatively in NALs — particularly when combined with the requirement that the applicant publicly admit there is regulatory uncertainty[18] — means that the NAL process offers relatively little security to an innovator.

The bureau has announced that it will be issuing a series of requests for information to help it reassess its policies and procedures. The NAL policy is a sterling candidate for such a reappraisal. As the 10 proposals above illustrate, some modest changes to that policy could unleash the bureau’s power to make positive contributions to innovation in financial products and services. The NAL process must always rigorously assess whether a new product or service will comply with the law. However, opening the door wider to potential applicants, and giving appropriate applicants the assurance that they can safely innovate, is certain to benefit consumers.

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[1] The no-action letter policy is an important component of the bureau’s broader “Project Catalyst” for supporting innovation in consumer financial services. See Consumer Financial Protection Bureau, CFPB Releases First-Ever Project Catalyst Innovation Highlights Report (Oct. 24, 2016), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-releases-first-ever-project-catalyst-innovation-highlights-report/>.

[2] See 12 U.S.C. §5511(b)(5).

[3] See, e.g., Prepared Remarks of CFPB Director Richard Cordray at the LendIt USA Conference (March 6, 2017), <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-lendit-usa-conference/>.

[4] See The Uncertain Utility Of A CFPB No-Action Letter, by Eric Mogilnicki and Eamonn Moran, Law360 (Oct. 20, 2014).

[5] To be fair, the policy states that the bureau expects to issue NALs “rarely and on the basis of exceptional circumstances,” 81 Fed. Reg. 8686, 8694 (Feb. 22, 2016), and expects to receive “one to three actionable applications per year,” *id.* at 8691. However, this too should be revisited, as a more frequent use of NALs is more consistent with the bureau’s goal of facilitating innovation.

[6] *Id.* at 8687.

[7] *Id.* at 8693.

[8] *Id.*

[9] The SEC, in contrast, requires the writer merely to “indicate why he [sic] thinks a problem exists, his own opinion in the matter and the basis for such opinion.” Release No. 33-6269, Procedures Applicable to Requests for No-Action and Interpretive Letters (Dec. 5, 1980). Likewise, the Federal Trade Commission asks only that the requester state the questions, the relevant law and the material facts. See 16 C.F.R. §1.2.

[10] See 81 Fed. Reg. 8686, 8689.

[11] Id. at 8694.

[12] Id. at 8689, 8692, 8693.

[13] Id. at 8689.

[14] Id.

[15] Id.

[16] Id. at 8692 n.6.

[17] Id. at 8695.

[18] Id. at 8693.