Federal Banking Agencies Issue Interagency Lending Principles for Offering Responsible Small-Dollar Loans

May 21, 2020, Covington Alert

On May 20, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency (collectively, the “agencies”) issued interagency principles (the “Lending Principles”) to encourage supervised banks, savings associations, and credit unions (collectively, “depository institutions”) to offer responsible small-dollar loans to customers for both consumer and small business purposes. In doing so, the agencies stated that they recognize that a well-designed small-dollar lending program can both help customers meet their ongoing needs, and, by generating successful repayment outcomes, facilitate customers’ ability to demonstrate positive credit behavior and transition into additional financial products. The Lending Principles emphasize that depository institutions are “well-suited to meet these credit needs and some already offer these products, consistent with safe and sound principles and subject to applicable laws and regulations.”

The Lending Principles cover a broad range of small-dollar credit products, including open-end lines of credit with applicable minimum payments and closed-end loans with shorter-term single payment or longer-term installment payment structures. Importantly, the Lending Principles also note that depository institutions may, but are not required to, discuss plans for small-dollar loan products with the relevant agency before implementation, particularly where they might involve “substantial deviations” from existing business plans.

Characteristics of Responsible Small-Dollar Loan Programs

The Lending Principles identify the following three characteristics of “[r]esponsible” small-dollar loan programs, all of which focus on repayment terms and outcomes:

- A high percentage of customers successfully repaying their small-dollar loans in accordance with original loan terms, which the agencies note is “a key indicator of affordability, eligibility, and appropriate underwriting”;
- Repayment terms and features that “minimize adverse customer outcomes, including cycles of debt due to rollovers or reborrowing”; and
- Repayment outcomes and program structures that enhance a borrower’s financial capabilities.

The Lending Principles contemplate a range of different approaches to developing a responsible small-dollar lending program. For example, the agencies note that such products may involve “effectively managed deployment of innovative technology or processes for customers who may not meet a financial institution’s traditional underwriting standards.” The agencies also note that such programs may be implemented either by the depository institution directly or through third-party relationships—though the Lending Principles emphasize at multiple points the importance of managing and overseeing the risks posed by such relationships.

The Core Lending Principles
The agencies identify the following “core” lending principles for depository institutions that offer small-dollar loan products:

- Loan products should be consistent with safe and sound banking, treat customers fairly, and comply with applicable laws and regulations;
- Depository institutions should effectively manage the credit, operational, compliance, and other risks associated with the products they offer; and
- Loan products should be underwritten based on prudent policies and practices governing the amounts borrowed, frequency of borrowing, and repayment requirements.

The agencies emphasize the importance of policies and risk management practices that permit a depository institution to identify, monitor, manage, and control the risks posed by responsible small-dollar lending programs. The agencies specifically highlight the need for product development protocols that address a range of identified issues, including the clear disclosure of terms, the risk profile of customers using the products, the use of new technologies, the use of alternative underwriting information, and the use of third-party arrangements.

The Lending Principles also identify five specific areas that loan policies and risk management practices and controls for small-dollar lending should address:

- **Loan structures.** The agencies emphasize that loan amounts and repayment terms should both align with eligibility and underwriting criteria and support borrower affordability and successful repayment of principal and interest/fees, rather than “reborrowing, rollovers, or immediate collectability in the event of default.” In this regard, the agencies acknowledge that such product structures may include single payment structures that are “shorter-term” (which they do not define).
- **Loan pricing.** The agencies note that loan pricing should not only comply with applicable laws, but also reflect "overall returns reasonably related to the financial institution’s product risks and costs." The Lending Principles do not include any specific limits or caps on interest rates, fees, or other pricing elements.
- **Loan underwriting.** The agencies note that depository institutions may underwrite small-dollar loans using internal and/or external data sources, and specifically acknowledge deposit account activity—the basis of so-called “cash flow” underwriting—as such a source.
- **Loan marketing and disclosures.** The agencies stress that marketing and customer disclosures should not only comply with applicable consumer protection laws, but also provide information in a “clear, conspicuous, accurate, and customer-friendly manner.” On this point, they also highlight several specific consumer protection laws, including the Equal Credit Opportunity Act, the Truth in Lending Act, Section 5 of the Federal Trade Commission Act, and the Dodd-Frank Wall Street Reform and Consumer Protection Act’s prohibition of unfair, deceptive, or abusive acts and practices.
- **Loan servicing and safeguards.** The agencies draw particular attention to servicing and workout processes, noting that they should avoid “continuous cycles of debt and significant credit costs due to rollover or reborrowing.” They note that, for customers who are experiencing financial difficulty, such processes may include “timely and reasonable workout strategies,” as well as restructuring single payment loans or open-end lines of credit into installment loan structures “in appropriate circumstances.”

**Other Observations**

**Prior Efforts Regarding Small-Dollar Loan Products.** The issuance of the Lending Principles follows upon prior statements by federal banking agency leaders, including those made by [FDIC Chairman Jelena McWilliams](https://www.fdic.gov/) and [OCC Comptroller Joseph Otting](https://www.occ.gov/), regarding the importance of encouraging banks to offer small-dollar loan products.
to customers in need. The Lending Principles also are similar to, and build upon, core lending principles articulated by the OCC several years ago in OCC Bulletin 2018-14 (which is now rescinded and superseded by the Lending Principles)—though the Lending Principles provide more detail than, and differ in meaningful ways from, the prior OCC guidance.

The Role of the CFPB. The issuance of the Lending Principles should provide much-needed clarity regarding how the agencies are likely to view small-dollar lending by depository institutions as a supervisory matter. At least as important are the views of the Consumer Financial Protection Bureau (the “CFPB”), which has sole rulemaking authority over the principal consumer protection laws applicable to small-dollar lending, as well as supervisory authority for purposes of such laws for depository institutions with assets over $10 billion. The CFPB is expected to issue a final rule on small-dollar lending in the near future.

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Covington & Burling LLP’s Financial Services attorneys have deep experience guiding U.S. and non-U.S. financial institutions through the most challenging circumstances, including the 2008–09 financial crisis. Our team, which includes former senior federal regulators, stands ready to advise financial institutions as they navigate the impact of COVID-19 on the economy and the financial markets.

If you have any questions concerning the material discussed in this client alert, please contact the members of our Financial Services practice below.

Related Professionals

<table>
<thead>
<tr>
<th>Name</th>
<th>Phone</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jeremy Newell</td>
<td>+1 202 662 5569</td>
<td><a href="mailto:jnewell@cov.com">jnewell@cov.com</a></td>
</tr>
<tr>
<td>Eric J. Mogilnicki</td>
<td>+1 202 662 5584</td>
<td><a href="mailto:emogilnicki@cov.com">emogilnicki@cov.com</a></td>
</tr>
<tr>
<td>Michael Nonaka</td>
<td>+1 202 662 5727</td>
<td><a href="mailto:mnonaka@cov.com">mnonaka@cov.com</a></td>
</tr>
<tr>
<td>Karen Solomon</td>
<td></td>
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CFPB Issues Innovative No-Action Letter Template to Reduce Regulatory Uncertainty for Banks Offering Small-Dollar Credit Products

May 22, 2020, Covington Alert

Today, May 22, the Consumer Financial Protection Bureau (“CFPB”) issued an important no-action letter template in response to an application by the Bank Policy Institute (“BPI”), which could serve as the basis for no-action letter
The Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency (collectively, “the agencies”) are issuing these principles to encourage supervised banks, savings associations, and credit unions (collectively, “financial institutions”) to offer responsible small-dollar loans to customers for both consumer and small business purposes. The agencies recognize the important role that responsibly offered small-dollar loans can play in helping customers meet their ongoing needs for credit due to temporary cash-flow imbalances, unexpected expenses, or income shortfalls, including during periods of economic stress, national emergencies, or disaster recoveries. Well-designed small-dollar lending programs can result in successful repayment outcomes that facilitate a customer’s ability to demonstrate positive credit behavior and transition into additional financial products. The agencies offer these principles due to the evolving conditions and products in the small-dollar loan markets over the last several years.

The current regulatory framework allows financial institutions to offer responsible small-dollar loans. The agencies recognize that financial institutions are well-suited to meet these credit needs and some already offer these products, consistent with safe and sound principles and subject to applicable laws and regulations. These lending principles cover a variety of small-dollar loan structures that may include open-end lines of credit with applicable minimum payments or closed-end loans with appropriate shorter-term single payment or longer-term installment payment structures.

Responsible small-dollar loan programs generally reflect the following characteristics:

- A high percentage of customers successfully repaying their small dollar loans in accordance with original loan terms, which is a key indicator of affordability, eligibility, and appropriate underwriting;
- Repayment terms, pricing, and safeguards that minimize adverse customer outcomes, including cycles of debt due to rollovers or reborrowing; and

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1 These principles do not apply to financial institution affiliated non-bank lenders or other non-bank lenders. These principles could apply to U.S. branches and agencies of foreign banks.

2 See, e.g., Interagency Guidelines Establishing Standards for Safety and Soundness at 12 CFR 208, Appendix D-1 (Federal Reserve); 12 CFR 364, Appendix A (FDIC); and 12 CFR 30, Appendix A (OCC). Credit unions are subject to safety and soundness requirements under the Federal Credit Union Act and the NCUA’s regulations. See, e.g., 12 U.S.C. 1786(b), (e); 12 CFR 741.3.

3 These principles do not address financial institution overdraft programs or credit cards.
• Repayment outcomes and program structures that enhance a borrower’s financial capabilities.

Financial institutions seeking to develop new programs or expand existing responsible small-dollar lending programs should do so in a manner consistent with sound risk management principles, inclusive of appropriate policies.\(^4\) Well-managed programs will generally align with the financial institution’s overall business plans and strategies. Programs could include effectively managed deployment of innovative technology or processes for customers who may not meet a financial institution’s traditional underwriting standards.\(^5\) Such programs can be implemented in-house or through effectively managed third-party relationships.\(^6\) In all programs, responsible lending products are offered in a manner that ensures fair access to financial services, fair treatment of customers, and compliance with applicable laws and regulations, including fair lending and consumer protection laws.

The agencies encourage financial institutions to refer to the core lending principles below when implementing reasonable policies and risk management practices for responsible small-dollar lending activities. Financial institutions may, but are not required to, discuss plans for small-dollar loan products with their supervisors before implementation, particularly if the offerings constitute substantial deviations from their existing business plans.

**Core Lending Principles**

The agencies believe that financial institutions can offer small-dollar loans safely and responsibly. Some financial institutions already offer a variety of small-dollar loan products on an open-end line of credit or closed-end basis with various minimum payments, installment payments, and maturities.

\(^4\) For Federal Reserve: SR letter 95-51, “Rating the Adequacy of Risk Management Processes and Internal Controls at State Member Banks and Bank Holding Companies,” and SR 16-11, “Supervisory Guidance for Assessing Risk Management at Supervised Institutions with Total Consolidated Assets Less than $50 Billion.” Note as of June 8, 2016: See SR letter 16-11 for supervisory guidance on assessing risk management practices at state member banks, bank holding companies, and savings and loan holding companies (including insurance and commercial savings and loan holding companies) with less than $50 billion in total consolidated assets, and foreign banking organizations with consolidated U.S. assets of less than $50 billion. SR letter 95-51 remains applicable to state member banks and bank holding companies with $50 billion or more in total assets until superseding guidance is issued for these institutions. For FDIC: FDIC’s Risk Management Manual of Examination Policies, Section 3.2 (Loans). For NCUA: Federal credit unions offering PALs small-dollar loans under 12 CFR 701.21(c)(7)(iii) and (iv) must follow the specified regulatory framework for those loan programs. For OCC: OCC Bulletin 2017-43, “New, Modified, or Expanded Bank Products and Services: Risk Management Principles.”

\(^5\) Refer to Interagency Statement on the Use of Alternative Data in Credit Underwriting (December 3, 2019). FIL-82-2019 (December 13, 2019)

The agencies’ core lending principles for financial institutions that offer small-dollar loan products include:

- Loan products are consistent with safe and sound banking, treat customers fairly, and comply with applicable laws and regulations.
- Financial institutions effectively manage the risks associated with the products they offer, including credit, operational, and compliance.
- Loan products are underwritten based on prudent policies and practices governing the amounts borrowed, frequency of borrowing, and repayment requirements.

Prudent lending policies and sound risk management practices together support a financial institution’s ability to identify, monitor, manage, and control the risks inherent in its lending activities, including responsible small-dollar lending programs. As noted above, there are several associated risks to be managed in the offering of loan products. Effective management of such risks may include new product development protocols that address, among other issues, the clear disclosures of terms, the risk profile of customers using the products, the use of new technologies, the use of alternative underwriting information, or the use of third-party arrangements.

Reasonable loan policies and sound risk management practices and controls for responsible small-dollar lending would generally address the following:

- **Loan structures:** Loan amounts and repayment terms that align with eligibility and underwriting criteria and that promote fair treatment and credit access of applicants, and product structures, including shorter-term single payment structures, that support borrower affordability and successful repayment of principal and interest/fees in a reasonable time frame rather than reborrowing, rollovers, or immediate collectability in the event of default.

- **Loan pricing:** Loan pricing that complies with applicable state and federal laws and reflects overall returns reasonably related to the financial institution’s product risks and costs. Any products offered through effectively managed third-party relationships would also reflect the core lending principles, including returns reasonably related to the financial institution’s risks and costs.

- **Loan underwriting:** Analysis that uses internal and/or external data sources, such as deposit account activity, to assess a customer’s creditworthiness and to effectively manage credit risk. Such analysis may facilitate sound underwriting for credit offered to non-mainstream customers or customers temporarily impacted by natural disasters, national emergencies, or economic downturns. Underwriting can also use effectively managed new processes, technologies, and automation to lower the cost of providing responsible small-dollar loans.

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7 Supra, note 5.
• **Loan marketing and disclosures:** Marketing and customer disclosures that comply with consumer protection laws and regulations and provide information in a clear, conspicuous, accurate, and customer-friendly manner. Applicable laws and regulations may include but are not limited to the Equal Credit Opportunity Act, the Truth in Lending Act, Section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive acts and practices, and Section 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which prohibits unfair, deceptive, or abusive acts and practices.

• **Loan servicing and safeguards:** Processes that assist customers in achieving successful repayment while avoiding continuous cycles of debt and significant credit costs due to rollover or reborrowing. For customers who experience distress or unexpected circumstances affecting their ability to repay small-dollar loans, such processes may include timely and reasonable workout strategies. Such processes could also include restructuring single payment loans or open-end lines of credit into installment loan structures in appropriate circumstances.
CFPB Issues Innovative No-Action Letter Template to Reduce Regulatory Uncertainty for Banks Offering Small-Dollar Credit Products

May 22, 2020
Financial Services

Today, May 22, the Consumer Financial Protection Bureau (“CFPB”) issued an important no-action letter template in response to an application by the Bank Policy Institute (“BPI”), which could serve as the basis for no-action letter applications by BPI members and other deposit-taking institutions that wish to offer a standardized, small-dollar credit product as described in the application. The CFPB’s issuance of this no-action letter template (the “Small-Dollar Credit Template”) follows the federal banking agencies’ May 20 release of Interagency Lending Principles for responsible small-dollar loans, and is intended to complement other recent expressions of encouragement for depository institutions to engage in responsible small-dollar lending. The Small-Dollar Credit Template provides a new mechanism by which depository institutions may obtain a no-action letter from the CFPB that addresses the application of the Dodd-Frank Act’s prohibition on unfair, deceptive, and abusive acts and practices (“UDAAP”) to described aspects of their particular small-dollar lending products (the “Applicant’s Product”). The CFPB’s issuance of the Small-Dollar Credit Template should provide depository institutions that wish to offer small-dollar lending products with a new and expedited path to addressing the potential regulatory uncertainty and risks associated with those products.

Covington & Burling LLP represented BPI in its application for the Small-Dollar Credit Template issued today.

The CFPB’s No-Action Letter Framework

The Small-Dollar Credit Template was issued pursuant to the CFPB’s 2019 Policy on No-Action Letters (the “Policy”), which provides a framework for reducing regulatory uncertainty with respect to an innovative product or service through a statement that the CFPB will not make supervisory findings or bring a supervisory or enforcement action against the company for offering the described aspects of the product or service. The Policy not only provides a process for individual financial institutions to seek and obtain no-action letters, but it also permits a service provider or facilitator (e.g., a trade association, consumer group, or other third party) to seek a no-action letter template, pursuant to which the CFPB states its intention to grant subsequent applications for no-action letters in appropriate cases where the applicant provides certain, specified certifications and related supplemental information. Under the Policy, each no-action letter has a limited scope and applies only to “described aspects of the product or service,” requiring applicants to describe both the product or service in question, and the
manner in which it is offered or provided. Although a no-action letter template is not independently binding, it provides a unique mechanism and path for clarifying and expediting the issuance of binding no-action letters to individual institutions that wish to offer products or services consistent with the scope of the no-action letter template.

The BPI Application for the Small-Dollar Credit Template

The CFPB issued the Small-Dollar Credit Template in response to an application that BPI filed with the CFPB (the “BPI Application”) for a non-action letter template that could serve as the basis for subsequent no-action letter applications by BPI members and other deposit-taking institutions subject to the CFPB’s supervisory and enforcement authority1 that intend to offer a standardized, small-dollar credit product as described in the BPI Application (the “Proposed Product”). The BPI Application describes the general structure and features of the Proposed Product, many of which are quite definite and intended to function as “guardrails” that must be included in any version of the Proposed Product for which an individual depository institution might seek its own no-action letter under the Small-Dollar Credit Template. At a high level, the Proposed Product contemplates a loan that is:

- Small-dollar in nature (i.e., $2,500 or less);
- Structured either as an installment loan or as a line of credit;
- Linked to a borrower’s deposit account at the applicant;
- Underwritten based on criteria including the borrower’s transaction activity in his or her accounts with the applicant (i.e., “cash flow” underwriting); and
- Subject to a range of specific protections with respect to repayment structures, mitigating “rollover” risks, and prohibiting late payment and prepayment fees.

The BPI Application explains that applicants for no-action letters under the Small-Dollar Credit Template would design a version of the Proposed Product that includes the guardrails, but also would provide further specific information regarding the precise nature and details of the individual version of the Proposed Product the applicants intend to offer, including the manner in which it would be offered and provided. Such specific details would depend on a variety of factors, including the applicant’s business strategy, risk tolerance, underwriting criteria, and customer needs. Thus, the Small-Dollar Credit Template covers many, but not all, of the key terms and conditions of the Proposed Product. Importantly, neither the BPI Application nor the Small-Dollar Credit Template addresses the potential interest rate or other fees associated with the Proposed Product; these details must be included and addressed on an applicant-specific basis in any underlying request for no-action relief under the Small-Dollar Credit Template.

The Small-Dollar Credit Template

The Small-Dollar Credit Template sets forth a clear framework pursuant to which depository institutions wishing to offer their own versions of the Proposed Product may apply for and obtain their own no-action letter to address the application of UDAAP to described aspects of their

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1 Consistent with the limitations on the Bureau’s supervisory and enforcement jurisdiction set forth in Dodd-Frank Act section 1026, the Small-Dollar Credit Template refers to “DI Applicants” that are insured depository institutions and insured credit unions with total assets of more than $10,000,000,000 and affiliates of such entities that are themselves insured depository institutions or insured credit unions. 12 U.S.C. §§ 5515, 5516.
particular small-dollar lending products. That framework has two key components. First, the application must provide a number of “guardrail” certifications that confirm that the Applicant’s Product is consistent with that described in the BPI Application and the Small-Dollar Credit Template. Second, the application must include additional information about other specific features and practices, which the CFPB will evaluate as part of its review of each application submitted under the Small-Dollar Credit Template.

As noted above, the Small-Dollar Credit Template itself is non-operative and non-binding; only subsequent no-action letters issued under the Small-Dollar Credit Template would be operative and binding on the CFPB.

Guardrail Certifications

Under the Small-Dollar Credit Template, applications for individual no-action letters must include the following certifications, consistent with the BPI Application:

1. **Status.** The applicant must be an insured depository institution or insured credit union with total assets greater than $10,000,000,000, or an insured depository institution or insured credit union affiliated with such an entity (consistent with the scope of the CFPB’s supervisory and enforcement authority).

2. **Eligibility.** The Applicant’s Product is offered and provided only to consumers who hold a deposit account with the applicant.

3. **Product Structure.** The Applicant’s Product is structured as either (i) a fixed-term, amortizing small-dollar installment loan, which the customer would pay back in fixed minimum payment amounts over the term of the loan; or (ii) an open-end line of credit, which would be linked to a customer’s associated deposit account with the DI Applicant, and amounts drawn under the line would have a fixed repayment period, to be repaid by the customer in fixed minimum payment amounts over that period.\(^2\)

4. **Dollar Amount.** The Applicant’s Product does not exceed $2,500.

5. **Repayment Term and Structure.**
   a. Where the Applicant’s Product is structured as an installment loan: (i) the repayment term is more than forty-five days and less than one year; and (ii) payments are amortized on a straight-line basis across more than one payment.
   b. Where the Applicant’s Product is structured as a line of credit: (i) the repayment term for each draw is more than forty-five days and less than one year; and (ii) payments for each draw are amortized on a straight-line basis across more than one payment, except in the case of any single-payment loans as described in the next sentence. If a repayment structure includes a repayment term of forty-five days or less and a single payment is utilized, it will be limited to cases where a draw is no more than ten percent of the maximum dollar amount established for the Applicant’s Product.

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\(^2\) Depository institutions would not offer the line of credit version of the proposed product by means of a credit card.
6. **No Balloon Payments.** None of the required payments under the Applicant’s Product are more than twice as large as any other required payment.

7. **Rollovers.** Rollovers (i.e., the extension or renewal of a loan or draw on which a scheduled payment has not been made, for an additional fee) are prohibited. Nor would a borrower be eligible to receive a new loan or draw to repay an outstanding balance associated with a prior loan or draw. Furthermore, a borrower with an existing loan or draw is not eligible to receive a new loan or draw until the existing loan or draw is fully repaid.

8. **Underwriting.** Underwriting for the Applicant’s Product includes the consumer’s transaction activity in their accounts with the applicant, also known as “cash flow” underwriting.

9. **Collateral.** Borrowers are not required to provide collateral or any other security to take out the Applicant’s Product. (The applicant may retain a right to set-off to the extent doing so is consistent with applicable law and regulation.)

10. **Costs and Fees.** No late payment fees or prepayment penalties are charged with respect to the Applicant’s Product.

11. **Disbursement.** Funds (whether in the form of an installment loan or draw on a line of credit) are disbursed into the borrower’s deposit account with the applicant within three to five business days after the borrower is approved for the Applicant’s Product.

12. **Disclosures.** Consumer disclosures and marketing materials associated with the Applicant’s Product are designed to meet the requirements of all applicable state and federal consumer financial protection and other laws, and, where appropriate, are shortened and modified for consumers’ ease of use and readability for online and mobile channels.

13. **Servicing.** The Applicant’s Product is serviced by the applicant, not a third party.

The Small-Dollar Credit Template expressly notes that some of these guardrails may extend beyond the requirements of applicable laws and regulations, and that the inclusion of any particular guardrail should not be interpreted as a statement by the CFPB that small-dollar credit products must contain such guardrails to avoid violating the law.

**Additional Information About Features and Practices**

Under the Small-Dollar Credit Template, applications for individual no-action letters must also include the following additional information about certain features and practices, which are not specified in the BPI Application:

1. **APR.** The anticipated Annual Percentage Rate (“APR”) range of the Applicant’s Product, as well as a description of how that range is calculated, including any and all fees and costs included in the calculation. A description of how the anticipated APR range, combined with other terms and conditions, would improve the options available to consumers within the market for the Applicant’s Product.

2. **Other Fees.** A description of any fees other than the fees included in the calculation of the APR range. A description of how such fees, combined with other terms and conditions, would improve the options available to consumers within the market for the Applicant’s Product.
3. **Repayment Term and Structure.** A description of any aspect of the repayment term and structure for the Applicant’s Product more specific than the repayment term and structure specified in the guardrail certification regarding repayment term and structure above.

4. **Reborrowing Risk Mitigation.** A description of how the applicant intends to mitigate reborrowing risk (in addition to underwriting and the prohibition on rollovers, etc., described above), such as through using mechanisms such as “cooling off” periods, periodic borrowing limits, “off ramps,” and/or similar measures.

5. **Underwriting.** A description of the underwriting criteria used for the Applicant’s Product, including eligibility and credit decisioning criteria, including the extent to which the underwriting is streamlined relative to other identified underwriting processes.

6. **Marketing.** A description of how the applicant intends to market the Applicant’s Product.

7. **Application Process.** A description of the process for applying for the Applicant’s Product, including the extent to which the process is streamlined relative to other application processes.

8. **Credit Reporting.** A description of any information the applicant intends to provide to credit reporting agencies, such as information about payment and non-payment.

9. **Other Features and/or Practices.** A description of (i) any features of the Applicant’s Product and the manner in which it is offered or provided (in addition to those listed above), and/or (ii) any acts or practices associated with offering or providing the Applicant’s Product (in addition to those listed above) that the applicant wishes to be included within the scope of a potential no-action letter.

**Potential Applications Under the Small-Dollar Credit Template**

The Small-Dollar Credit Template should provide an important and appealing path to greater regulatory certainty for depository institutions or credit unions wishing to offer small-dollar credit products. Particularly important is the fact that the Small-Dollar Credit Template specifically addresses the application to small-dollar credit products of the Dodd-Frank Act’s UDAAP prohibition, regulatory uncertainty around which has served as a major disincentive to deposit-taking institutions that might otherwise consider offering such products. To avail themselves of the greater regulatory certainty provided under the Small-Dollar Credit Template, however, individual depository institutions wishing to offer such products must take additional steps to apply for and receive individual, binding no-action letters that specifically address the Applicant’s Product. For further details on the no-action letter application process, please see Covington’s *Model No-Action Letter Application toolkit*, which provides detailed instructions and models for required documents.

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Covington & Burling LLP’s Financial Services attorneys have deep experience guiding U.S. and non-U.S. financial institutions through the most challenging circumstances, including the 2008–09 financial crisis. Our team, which includes former senior federal regulators, stands ready to advise financial institutions as they navigate the impact of COVID-19 on the economy and the financial markets.

If you have any questions concerning the material discussed in this client alert, please contact the members of our Financial Services practice below.
This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

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May 22, 2020

Bank Policy Institute
600 13th Street NW, Suite 400
Washington, D.C. 20005

This letter is in response to an application for a No-Action Letter Template (Application), filed with the Consumer Financial Protection Bureau (Bureau) by the Bank Policy Institute (BPI) that could serve as the basis for No-Action Letter applications by BPI members and other deposit-taking institutions subject to the Bureau’s supervisory and enforcement authority (DI Applicants)\(^1\) that intend to offer a standardized, small-dollar credit product as described in the Application (Proposed Product). The Application describes the general structure and features of the Proposed Product. Some of the features are quite definite, functioning as guardrails\(^2\) that should be included in all versions of the Proposed Product. The Application explains that DI Applicants would design a version of the Proposed Product that includes the guardrails, but also would provide further specific information regarding the precise nature and details of the individual version of the Proposed Product they intend to offer, including the manner in which it would be offered and provided. Such specific details would depend on a variety of factors, including the financial institution’s business strategy, risk tolerance, underwriting criteria, and customer needs.

\(^1\) In light of the limitations on the Bureau’s supervisory and enforcement jurisdiction set forth in Dodd-Frank Act section 1026, the term “DI Applicant” is limited to insured depository institutions and insured credit unions with total assets of more than $10,000,000,000 and affiliates of such entities that are themselves insured depository institutions or insured credit unions. 12 U.S.C. 5515, 5516.

\(^2\) Some of these guardrails may extend beyond the requirements of applicable laws and regulations. The inclusion of any particular guardrail should not be interpreted as a statement by the Bureau that small-dollar credit products must contain such guardrails to avoid violating the law.
The Bureau has considered and grants the Application, and accordingly issues this No-Action Letter Template pursuant to the Bureau’s Policy on No-Action Letters (Policy). The Bureau intends to grant applications from DI Applicants for a No-Action Letter based on this No-Action Letter Template under section E.1.b of the Policy, in appropriate cases. In general, such applications should include the information specified in section A of the Policy. An application should also include the certifications relating to the Proposed Product guardrails and the information about features and practices specified below.3 Under the Policy, each No-Action Letter has a limited scope. The Policy uses the term “described aspects of the product or service” to capture this scope, allowing applicants to describe both the product or service in question, and the manner in which it is offered or provided.4 Accordingly, in determining the scope of a potential No-Action Letter issued in response to an application based on this No-Action Letter Template, the Bureau will evaluate the adequacy of the description of the DI Applicant’s product (Applicant’s Product) contained in the application.5

The Application documents that, at least as early as 2008, Federal financial regulators have been encouraging depository institutions to engage in responsible small-dollar lending through various statements and guidance documents. The Bureau’s issuance of this No-Action Letter Template is intended to complement these expressions of encouragement by providing a mechanism through which DI Applicants may obtain a No-Action Letter from the Bureau that addresses the application of the prohibition on unfair, deceptive, and abusive acts and practices6 to described aspects of their particular small-dollar lending products. The Bureau will review each application submitted under this No-Action Letter Template. Granting this No-Action Letter Template does not obligate the Bureau to issue any No-Action Letter that the Bureau believes would not improve the options available to consumers within the market for small-dollar credit products.

3 Applications can address intended products or products already in market.
4 See section C.2 of the Policy.
5 For example, as noted below, if a DI Applicant wished to have particular marketing materials included within the subject matter scope of a potential No-Action Letter, the DI Applicant would need to include those materials in its application.
Guardrail Certifications

Applications should include the following certifications:

1. **Status.** The DI Applicant is an insured depository institution or insured credit union with total assets greater than $10,000,000,000, or is an insured depository institution or insured credit union affiliated with such an entity.

2. **Eligibility.** The Applicant’s Product is offered and provided only to consumers who hold a deposit account with the DI Applicant.

3. **Product Structure.** The Applicant’s Product is structured as either (i) a fixed-term, amortizing small-dollar installment loan, which the customer would pay back in fixed minimum payment amounts over the term of the loan; or (ii) an open-end line of credit, which would be linked to a customer’s associated deposit account with the DI Applicant, and amounts drawn under the line would have a fixed repayment period, to be repaid by the customer in fixed minimum payment amounts over that period.\(^7\)

4. **Dollar Amount.** The Applicant’s Product does not exceed $2,500.

5. **Repayment Term and Structure.**
   
   a. Where the Applicant’s Product is structured as an installment loan, (i) the repayment term is more than 45 days and less than one year; and (ii) payments are amortized on a straight-line basis across more than one payment.

   b. Where the Applicant’s Product is structured as a line of credit, (i) the repayment term for each draw is more than 45 days and less than one year; and (ii) payments for each draw are amortized on a straight-line basis across more than one payment, except in the case of any single-payment loans as described in the next sentence. If a repayment structure includes a repayment term of 45 days or less and a single payment is utilized, it will be limited to cases where a draw is no more than 10 percent of the maximum dollar amount established for the Applicant’s Product.

6. **No Balloon Payments.** None of the required payments under the Applicant’s Product are more than twice as large as any other required payment.

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\(^7\) Depository institutions would not offer the line of credit version of the Proposed Product by means of a credit card.
7. **Rollovers.** Rollovers (i.e., the extension or renewal of a loan or draw on which a scheduled payment has not been made, for an additional fee) are prohibited. Nor would a borrower be eligible to receive a new loan or draw to repay an outstanding balance associated with a prior loan or draw. Furthermore, a borrower with an existing loan or draw is not eligible to receive a new loan or draw until the existing loan or draw is fully repaid.

8. **Underwriting.** Underwriting for the Applicant’s Product includes the consumer’s transaction activity in their accounts with the DI Applicant, also known as “cash flow” underwriting.

9. **Collateral.** Borrowers are not required to provide collateral or any other security to take out the Applicant’s Product.\(^8\)

10. **Costs and fees.** No late payment fees or prepayment penalties are charged with respect to the Applicant’s Product.

11. **Disbursement.** Funds (whether in the form of an installment loan or draw on a line of credit) are disbursed into the borrower’s deposit account with the DI Applicant within three to five business days after the borrower is approved for the Applicant’s Product.

12. **Disclosures.** Consumer disclosures and marketing materials associated with the Applicant’s Product are designed to meet the requirements of all applicable state and federal consumer financial protection and other laws, and, where appropriate, are shortened and modified for consumers’ ease of use and readability for online and mobile channels.\(^9\)

13. **Servicing.** The Applicant’s Product is serviced by the DI Applicant, not a third party.

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\(^8\) The DI Applicant may retain a right to setoff to the extent doing so is consistent with applicable law and regulation.

Information about Features and Practices

Applications should include the following information:

1. **APR.** The anticipated APR range of the Applicant’s Product, as well as a description of how that range is calculated, including any and all fees and costs included in the calculation. A description of how the anticipated APR range, combined with other terms and conditions, would improve the options available to consumers within the market for small-dollar credit products.

2. **Other Fees.** A description of any fees other than the fees included in the calculation of the APR range. A description of how such fees, combined with other terms and conditions, would improve the options available to consumers within the market for small-dollar credit products.

3. **Repayment Term and Structure.** A description of any aspect of the repayment term and structure for the Applicant’s Product more specific than the repayment term and structure specified in the guardrail certification regarding repayment term and structure above.

4. **Reborrowing Risk Mitigation.** A description of how the DI Applicant intends to mitigate reborrowing risk (in addition to underwriting and the prohibition on rollovers, etc. described above), such as through utilization of mechanisms such as “cooling off” periods, periodic borrowing limits, “off ramps,” and/or similar measures.

5. **Underwriting.** A description of the underwriting criteria used for the Applicant’s Product, including eligibility and credit decisioning criteria, including the extent to which the underwriting is streamlined relative to other identified underwriting processes.

6. **Marketing.** A description of how the DI Applicant intends to market the Applicant’s Product.¹⁰

7. **Application Process.** A description of the process for applying for the Applicant’s Product, including the extent to which the process is streamlined relative to other application processes.

¹⁰ To the extent the DI Applicant wishes particular marketing materials or disclosures to be included within the scope of a potential No-Action Letter, such as the disclosure of APR or other fees, the DI Applicant should include those materials in its application.
8. **Credit Reporting.** A description of any information the DI Applicant intends to provide to credit reporting agencies, such as information about payment and non-payment.

9. **Other Features and/or Practices.** A description of (i) any features of the Applicant’s Product and the manner in which it is offered or provided (in addition to those listed above), and/or (ii) any acts or practices associated with offering or providing the Applicant’s Product (in addition to those listed above), that the DI Applicant wishes to be included within the scope of a potential No-Action Letter.\(^{11}\)

This No-Action Letter Template is based on the factual representations made in BPI’s No-Action Letter Template application.

This No-Action Letter Template is non-operative and non-binding on the Bureau.\(^{12}\)

This No-Action Letter Template and a copy of the application will be published on the Bureau’s website.

The Bureau anticipates that a No-Action Letter issued to a DI Applicant in response to an application based on the No-Action Letter Template would include the following elements:

- A statement that the letter
  - is limited to the DI Applicant, and does not apply to any other persons or entities;
  - is limited to the described aspects of the Applicant’s Product set forth in the application;
  - does not apply to (i) the DI Applicant’s offering or providing different aspects of the Applicant’s Product, nor to (ii) the DI Applicant’s offering or providing any other product or service;

\(^{11}\) For example, if a DI Applicant wishes to include particular debt collection practices within the scope of a potential No-Action Letter, the DI Applicant should include a description of such practices within its application. In such a case, the DI Applicant could also request a No-Action Letter under applicable laws and regulations other than sections 1031 and 1036 of the Dodd-Frank Act. For example, an application that included descriptions of particular debt collection practices could also identify one or more provisions of the Fair Debt Collection Practices Act. 15 U.S.C. 1692 et seq.

\(^{12}\) In particular, the Bureau may modify this No-Action Letter Template in light of the additional information provided in an application for a No-Action Letter based on this No-Action Letter Template, under section E.1.b of the Policy.
- is based on the factual representations made in the DI Applicant’s application;
- does not purport to express any legal conclusions regarding the meaning or application of sections 1031 and 1036 of the Dodd-Frank Act (12 U.S.C. 5531, 5536); and
- does not constitute the Bureau’s endorsement of the product that is described in the DI Applicant’s application and is the subject of the letter, or any other product or service offered or provided by the DI Applicant.13

- A requirement that the DI Applicant apprise the Bureau of (a) material changes to information included in its application; and (b) material information indicating that the product described in its application is not performing as anticipated in the application.14
- A statement that unless or until terminated by the Bureau (as described in section C.7 of the Policy), the Bureau will not make supervisory findings or bring a supervisory or enforcement action against the DI Applicant under its authority to prevent unfair, deceptive, or abusive acts or practices15 predicated on the DI Applicant’s offering or providing the described aspects of the Applicant’s Product set forth in the application.16
- A statement that the DI Applicant may reasonably rely on any Bureau commitments made in the letter.17
- A statement that the Bureau may terminate the letter if it determines that it is necessary or appropriate to do so to advance the primary purposes of the Policy, such as where the recipient fails to substantially comply in good faith with the terms and conditions of the letter; the described aspects of the product or service do not perform as anticipated in the application; or controlling law changes as a result of a statutory change or a Supreme Court decision that clearly permits or clearly prohibits conduct covered by the letter.18

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13 See section C.3 of the Policy.
14 See section C.4 of the Policy.
16 See section C.6 of the Policy.
17 See section C.7(i) of the Policy.
18 See section C.7(ii) of the Policy.
• A statement that upon termination, the Bureau will not bring an action to impose retroactive liability with respect to conduct covered by the letter, except where a failure to substantially comply in good faith with the terms and conditions of the letter caused Dodd-Frank Act actionable substantial injury.\textsuperscript{19}

• A statement that the letter and a copy of the DI Applicant’s application will be published on the Bureau’s website.

Sincerely,

\[\begin{center}
\text{Paul Watkins}
\text{Assistant Director, Office of Innovation}
\text{Consumer Financial Protection Bureau}
\end{center}\]

\textsuperscript{19} See section C.7(iii) of the Policy.
APPLICATION FOR A NO-ACTION LETTER TEMPLATE FROM THE CONSUMER FINANCIAL PROTECTION BUREAU

SUBMITTED BY

BANK POLICY INSTITUTE

600 13TH STREET NW
SUITE 400
WASHINGTON, D.C. 20005
A. NO-ACTION LETTER TEMPLATE APPLICATION INFORMATION

1. The identity of the entity applying for the No-Action Letter Template.

The Bank Policy Institute (“BPI”) submits this Application to request the Consumer Financial Protection Bureau’s (“CFPB’s” or “Bureau’s”) issuance of a No-Action Letter Template under section E.1.a of the Policy on No-Action Letters, 84. Fed. Reg. 48229 (Sept. 13, 2019) (the “Policy”). BPI is requesting this No-Action Letter Template to serve as the basis for No-Action Letter applications by BPI members (“BPI Members”) and other deposit-taking institutions that intend to offer certain small-dollar credit products, as discussed in section A.2 of this Application. This Application is not intended to preclude existing small-dollar lending products that differ from the product described in this Application, or to imply that financial institutions must first seek a No-Action Letter from the CFPB before offering small-dollar lending products. BPI is a nonpartisan public policy, research and advocacy group, representing the nation’s leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation’s small business loans, and are an engine for financial innovation and economic growth. BPI’s address is 600 13th Street NW, Suite 400, Washington, D.C. 20005.

2. A description of the consumer financial product or service in question, including (a) how the product or service functions; (b) the terms on which it will be offered; and (c) the manner in which it is offered or provided, including any consumer disclosures.

BPI submits this Application for a No-Action Letter Template covering a standardized small-dollar credit product (the “Proposed Product”) that may be offered by an insured deposit-taking institution to customers who hold deposit accounts at the institution (collectively, “Depository Institutions”).1 This Application describes the general structure and features of the Proposed Product. Some of the features are quite definite, functioning as guardrails that should be included in all versions of the Proposed Product. Others are less definite. As indicated in the No-Action Letter Policy, Depository Institutions submitting an application for a No-Action Letter based on a No-Action Letter Template issued in response to this Application would design a version of the Proposed Product that includes the guardrails, but that also would provide further specific information regarding the precise nature and details of the individual version of the Proposed Product they intend to offer, including the manner in which it would be offered and provided. Such specific details would depend on a variety of factors, including the Depository Institution’s business strategy, risk tolerance, underwriting criteria, and customer needs.

Depository Institutions would design their specific versions of the Proposed Product to provide customer protections and features specifically intended to address the potential risks associated with certain small-dollar credit products, including (i) “cycles of debt” facilitated by the rollover of increasingly costly borrowing; (ii) high costs associated with numerous, difficult to understand fees; and

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1 BPI acknowledges the limitations on the CFPB’s supervisory and enforcement jurisdiction under section 1026 of the Dodd-Frank Act as it relates to insured depository institutions and insured credit unions with total assets of $10,000,000,000 or less. See 12 U.S.C. § 5516.
(iii) the risk of default. See section A.3 and A.4 of this Application for more information about how the Proposed Product would mitigate these risks.

a. **Structure**

The Proposed Product would be structured in one of two ways: (i) as an installment loan; or (ii) as a line of credit.

i. **Installment Loan:** The Proposed Product could be structured as a fixed-term, amortizing small-dollar installment loan, which the customer would pay back in fixed minimum payments over the term of the loan. The installment loan generally would have a longer term and higher dollar amount than the line of credit structure, so as to enable Depository Institutions to meet larger, unanticipated small-dollar credit needs of their customers.

ii. **Line of Credit:** The Proposed Product could be structured as an open-end line of credit, which would be linked to a customer’s associated deposit account.\(^2\) Amounts drawn under the line would have a fixed repayment period, to be repaid by the customer in fixed minimum payment amounts over that period. Multiple draws would be permitted so long as the customer repays the full amount of the prior draw before drawing on the line of credit again. For example, a Depository Institution might provide a customer with a $500 line of credit, with each successive draw repayable in minimum fixed installments over the course of three months. The customer might initially draw $200 on the line of credit, repayable over three months from the date of the draw. After repaying that draw in full, the customer might thereafter make another draw of up to $500, which would be repayable over a three-month borrowing period beginning on the date of that additional draw.\(^3\) The line of credit structure generally would have a shorter term (i.e., draw period) and a smaller dollar amount than the installment loan structure, so as to meet the occasional short-term liquidity and small-dollar credit needs of customers.

b. **Annualized Percentage Rate (“APR”)**

Depository Institutions offering their specific versions of the Proposed Product would determine the annualized percentage rate (“APR”) based on a range of factors, such as credit risk, funding costs, and the precise terms of the loan, subject to all applicable laws and regulations (e.g., any interest rate limitations imposed under the Military Lending Act or other relevant laws, where applicable). Specific information regarding the APR, as well as how the APR (when combined with other terms) would improve the options available to consumers within the market for small-dollar credit products, would be detailed in the Depository Institution’s application for a No-Action Letter based on the Template. BPI

\(^2\) Depository Institutions would not offer the line of credit version of the Proposed Product by means of a credit card.

\(^3\) This example is provided purely for purposes of illustrating the basic mechanics of multiple draws, and not to indicate any specific repayment period, amount, etc.
notes that, according to Pew Research Center, payday loans typically carry APRs of 300% to 500%, whereas lower-cost credit from banks and credit unions could cost six times less.\(^4\)

c. **Other Fees**

Depository Institutions offering a version of the Proposed Product would not charge a late payment fee or impose a prepayment penalty. Any other fee charged to consumers would be clearly disclosed in advance and in compliance with all applicable laws and regulations. Specific information regarding any fees charged in connection with a Depository Institution’s version of the Proposed Product, as well as how these fees (when combined with other terms) would improve the options available to consumers within the market for small-dollar credit products, would be detailed in the Depository Institution’s application for a No-Action Letter based on the Template.

d. **Dollar Amount**

The Proposed Product would not exceed $2,500, consistent with existing industry practices and regulatory expectations of a “typical” small-dollar loan. The specific dollar amount itself would vary depending on the structure and the term of a Depository Institution’s version of the Proposed Product (e.g., line of credit versus installment loan).

e. **Disbursement of Funds**

Depository Institutions would disburse the amount borrowed (whether in the form of an installment loan or a draw on a line of credit) into the borrower’s deposit account at the Depository Institution within three to five business days after the borrower is approved.\(^5\)

f. **Repayment Term and Payment Structure**

The repayment term of the Proposed Product would generally not exceed a specified term, consistent with existing industry practices and regulatory expectations of a “typical” small-dollar credit product. The repayment structure would depend on the dollar amount and term of the loan, with larger loans being subject to repayment over longer terms.

For the installment loan structure, the repayment term would be more than 45 days and less than one year. (BPI anticipates that, in most cases, it would be between 46 days and three months.) Loans would be amortized on a straight-line basis across more than one payment, with no balloon or similar payment (i.e., the loan would not have any payment that is more than twice as large as any other payment).

For the line of credit structure, draws under the line of credit would have a term of more than 45 days and less than one year, with draws amortized on a straight-line basis across more than one payment.

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\(^5\) The Proposed Product would be serviced by the Depository Institution providing the Proposed Product, not a third party.
payment, with no balloon or similar payment (i.e., the draw would not have any payment that is more than twice as large as any other payment), with one potential exception: If the dollar amount advanced is of a small sum (e.g., the dollar amount requested may be 10 percent of the maximum dollar amount established by the Depository Institution for the Proposed Product), the draw may come due in less than 45 days in a single repayment.

Specific information regarding account terms and conditions, such as related account closure terms, would be addressed in the Depository Institution’s application for a No-Action Letter based on the Template.

g. **Collateral**

The borrower would not be required to provide collateral or other security for borrowing under the Proposed Product. The Depository Institution may, however, maintain a right to setoff funds in the customer’s existing deposit account, to the extent authorized by applicable laws and regulations.

h. **Rollovers and Reborrowing**

The Proposed Product would not permit rollovers (i.e., the extension or renewal of a loan or draw on which a scheduled payment has not been made, for an additional fee), nor would the Depository Institution make a new loan or provide a new draw under the Proposed Product the proceeds of which are to be used to repay an outstanding balance associated with a prior loan or draw under the Proposed Product. Similarly, the borrower would not be able to receive a new loan or draw where he or she has not repaid a prior or existing loan or draw, regardless of the use of proceeds of the new loan or draw. Depository Institutions offering a version of the Proposed Product would use underwriting and other terms and conditions to limit reborrowing risk, including, for example, through the use of “cooling off” periods, periodic borrowing limits, “off ramps,” and/or similar measures. The specific mechanisms a Depository Institution chooses to employ to mitigate reborrowing risk would be detailed in its application for a No-Action Letter based on the Template.

i. **Underwriting**

Depository Institutions would establish the specific underwriting criteria for their respective versions of the Proposed Product, including eligibility and credit decisioning criteria. Depending on the Depository Institution’s individual criteria, eligibility factors might include length of time the customer has held an account at the Depository Institution; frequency of deposits; average minimum balance; average draw amount; any charge-offs, delinquencies, or insufficient funds; and other account history. Credit decisioning criteria might include the consumer’s deposit account history, including substantiation of recurring income payments into the consumer’s deposit account, and/or prior instances of the borrower applying for the Depository Institution’s version of the Proposed Product (where applicable). In each case, these underwriting criteria would focus on the consumer’s transaction activity in their accounts at the Depository Institution, also known as “cash flow” underwriting. Specific information regarding the above types of underwriting criteria, and any additional criteria, to be used in connection with the Depository Institution’s version of the Proposed Product, would be detailed in the Depository Institution’s application for a No-Action Letter based on the Template.
j. **Eligibility and Delivery Channels**

Depository Institutions applying for a No-Action Letter based on the Template would offer their respective versions of the Proposed Product solely to customers who hold a deposit account at the Depository Institution. The Depository Institution’s version of the Proposed Product would be marketed through one or more of its existing delivery channels. In some cases, the Depository Institution may choose to limit offering its product to only certain channels (e.g., online and mobile devices) to limit costs for all parties.

k. **Credit Reporting**

Depository Institutions offering a version of the Proposed Product may report payments and non-payments to credit reporting agencies, which would provide an opportunity for borrowers to increase their credit scores and further the ability for borrowers to receive other products based on repayments. Depository Institutions would provide information about any such credit reporting in their application for a No-Action Letter based on this Template.

l. **Disclosures**

Consumer disclosures and marketing materials associated with the Depository Institution’s version of the Proposed Product would be designed to meet the applicable requirements under all applicable Federal consumer financial protection and other laws and regulations. Such institutions would shorten and modify disclosures for consumers’ ease of use and readability for online and mobile channels.

3. **An explanation of the potential consumer benefits associated with the product or service.**

BPI believes that a No-Action Letter Template from the CFPB would incentivize Depository Institutions to re-enter the small-dollar credit products space, which would lead to a number of consumer benefits, including by (i) addressing consumers’ significant needs for short-term credit; (ii) expanding access to credit; (iii) serving the financial needs of underbanked populations; (iv) increasing the regulation of small-dollar loans and access to Depository Institution services; (v) facilitating clear, simple, and transparent terms and disclosures to consumers; (vi) offering a streamlined application and underwriting process for small-dollar products; and (vii) meeting consumer demands for online and mobile banking options.

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a. Addressing Consumers’ Significant Needs for Short-Term Credit

Consumers rely on small-dollar credit products to meet their needs for short-term liquidity and to pay for larger, unanticipated expenses. While some Depository Institutions currently offer small-dollar credit products, additional opportunities for Depository Institutions to address unmet demand for consumer credit in their communities would be facilitated by addressing the regulatory uncertainty associated with these products. BPI is submitting this Application as a step toward providing regulatory certainty to Depository Institutions that wish to meet consumers’ need for short-term credit.

There is significant demand for short-term credit. According to the OCC, “[e]ach year, millions of Americans rely on nearly $90 billion in small-dollar loans, typically between $300 and $5,000.” According to a Federal Reserve study released in May 2019, about 40 percent of U.S. adults said they would not be able to cover a $400 unexpected expense or would cover it by selling something or borrowing money. Seventeen percent of adults are not able to pay all of their current month’s bills in full, and another 12 percent would be unable to if they had a $400 unexpected expense.

In addition, FDIC research suggests that, in 2017, nearly 13% of U.S. households (approximately 14.8 million) “may have had unmet demand for small-dollar credit from banks,” and that “[a] majority of these households reported staying current on bills in the prior year.” FDIC research also found that, “[a]lthough the vast majority (nearly 9 in 10) of these households had a bank account, fewer than one in three applied for credit from a bank.”

Notwithstanding the demand for short-term credit, few banks have entered the small-dollar lending market over the past decade. For example, in 2008, the FDIC launched a Small-Dollar Loan Pilot Program, which was designed to illustrate how banks can profitably offer affordable small-dollar loans. The program’s low participation rates only highlighted the challenges associated with this market for banks. Loans were capped at $1,000, and origination and other upfront fees plus interest charges were capped at a 36 percent APR. A year into the program, the FDIC increased the maximum loan

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10 Id.


12 See id.

13 For example, in its response to the FDIC’s Request for Information on Small-Dollar Lending, the ABA stated: “Although 73% of banks that responded to the 2015 ABA survey made small dollar loans in 2014, only 35% of responding banks made small dollar loans as part of an established program.” See American Banker Association, re: Request for Information on Small-Dollar Lending, 83 Fed. Reg. 58,566 (Nov. 20, 2018) [RIN 3064-ZA04], at 4 (Jan. 22, 2019). In addition, Pew Research Center has stated that, “[t]o date, most banks have not offered small installment loans in part because of concerns that without explicit approval, they could be subject to future regulatory action.” Pew Research Center, Prospects Rising for Lower-Cost Small-Dollar Loans (Oct. 9, 2019), https://www.pewtrusts.org/en/research-and-analysis/articles/2019/10/09/prospects-rising-for-lower-cost-small-dollar-loans.
amount to $2,500 following requests from the participating banks. After the pilot program ended in December 2009, the FDIC concluded that “banks can offer alternatives to high-cost, emergency credit products, such as payday loans or overdrafts,” and released a Safe, Affordable, and Feasible Small-Dollar Loan Template for other banks to replicate. Notwithstanding these conclusions and efforts, as noted above, banks have generally not significantly increased small-dollar product offerings.

As a result of the significant demand for short-term credit, and the challenges facing banks that wish to meet this demand, it has been reported that the FDIC, Federal Reserve, and OCC are currently engaging in a joint agency effort to offer clearer guidelines to banks regarding small-dollar credit products. FDIC Chairman Jelena McWilliams has stated that “[t]he reason banks have not gotten back into [the small-dollar credit space] is because [the regulators] have not come up with an interagency position.” McWilliams also stated that she does not believe that banks would have enough certainty to move forward in this space “without some kind of a steady document.” According to the FDIC, “[g]iven the unique role banks play in the communities they serve and the benefits to consumers of having a relationship with an insured financial institution, banks are well-positioned to address the credit needs of their customers in a responsible manner.”

More recently, the OCC, FRB, FDIC, NCUA, and CFPB jointly issued a statement encouraging financial institutions to offer responsible small-dollar loans in the face of the COVID-19 crisis. The last sentence of that statement noted that “[t]he agencies are working on future guidance and lending principles for responsible small-dollar loans to facilitate the ability of financial institutions to more effectively meet the ongoing credit needs of their communities and customers.”

b. Expanding Access to Credit

As discussed above, Depository Institutions offering a version of the Proposed Product would employ underwriting processes designed to expand access to credit through the use of “cash flow” underwriting methods. In an interagency statement, the CFPB acknowledged that “[i]mproving the measurement of income and expenses through cash flow evaluation may be particularly beneficial” for

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15 See id. at 37.


17 Id.

18 Id.


21 Id.
c. Serving the Financial Needs of Underbanked Populations

Given the regulatory uncertainty associated with bank small-dollar credit, the Bureau’s issuance of the requested No-Action Letter Template could enable Depository Institutions to serve the financial needs of underbanked consumers who may not have other options to pay for unexpected or emergency expenses, or would otherwise have to seek a loan with a prohibitively high interest rate from a payday lender. Depository Institutions offering a version of the Proposed Product would be able to provide borrowers of lesser credit quality (e.g., with a thin or no credit history) access to needed small-dollar credit from supervised institutions.

By providing greater legal certainty regarding offering particular versions of the Proposed Product (i.e., by issuing No-Action Letters in response to applications from particular Depository Institutions based on the Template), the Bureau could help ensure that such versions are broadly accessible to consumers in a full range of geographic locations, including individuals in low- and moderate-income geographies where there are fewer bank branches, and where borrowers may be difficult to reach through traditional banking channels.

d. Increased Regulation of Small-Dollar Loans and Access to Bank Services

The small-dollar lending market has traditionally been dominated by payday lenders and other non-traditional lenders, rather than by banking organizations that are subject to heightened regulatory supervision. For example, non-traditional lenders are not subject to numerous regulations that apply to banks, ranging from Community Reinvestment Act requirements to prudential standards, such as capital and liquidity requirements, deposit insurance requirements and assessments, resolution-planning requirements, and prompt corrective action requirements.

Lending activity in connection with the Proposed Product would, in contrast, occur within the highly regulated and supervised framework in which Depository Institutions operate. In addition, by obtaining small-dollar credit products from such institutions, consumers may also be able to benefit from the wide range of other services that Depository Institutions provide, including financial monitoring and education tools and long-term savings products. Improving financial skills would also help consumers reduce reliance on the high-cost, short-term credit products that currently dominate this market.

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e. **Clear, Simple, and Transparent Terms and Conditions**

Consistent with the No-Action Letter Template for the Proposed Product, key terms and conditions of the particular version of the Proposed Product offered by Depository Institutions would be clear, simple, and transparent. Marketing and customer disclosures in connection with the Proposed Product would comply with all consumer protection laws and regulations and be shortened and modified for consumers’ ease of use and readability for online and mobile channels.\(^{25}\)

f. **Streamlined Underwriting and Application Process**

Depository Institutions offering a version of the Proposed Product would streamline the application and underwriting process, which would result in lower underwriting costs, and, ultimately, lower costs for consumers.

g. **Expanded Delivery Channels**

The Proposed Product may help meet consumer demands for online and mobile banking options.\(^{26}\) In some cases, a Depository Institution may choose to offer its version of the Proposed Product through only certain channels (e.g., online and mobile devices) to limit costs for all parties. A No-Action Letter Template for the Proposed Product would reduce regulatory risk and uncertainty for Depository Institutions that would like to offer a version of the Proposed Product, enabling these Depository Institutions to go to market more quickly.

4. **An explanation of the potential consumer risks associated with the product or service, and how the applicant intends to mitigate such risks.**

There are three primary risks associated with small-dollar credit products if appropriate guardrails are not put in place: (i) cycle of debt; (ii) high cost; and (iii) risk of default. However, as discussed in more detail below, BPI believes that the Proposed Product includes mitigants to sufficiently address each of these concerns.

a. **Cycle of Debt**

One of the most serious risks associated with some small-dollar credit products is the potential that borrowers may fall into a “cycle of debt,” whereby a borrower who defaults on a higher-cost loan product may obtain another higher-cost loan product to pay off the first loan. This risk is especially pronounced where the loan product is “rolled over” into a new loan that triggers an entirely new round of related fees and interest costs. The Proposed Product would clearly and unequivocally mitigate this risk by prohibiting rollovers and not allowing borrowers to receive a new loan or draw where they have not repaid a prior or existing loan or draw, regardless of the use of proceeds of the new loan or draw. In addition, Depository Institutions offering a version of the Proposed Product would use underwriting and

\(^{25}\) See supra note 6.

\(^{26}\) FEDS Notes, *Mobile Banking: A Closer Look at Survey Measures* (Mar. 27, 2018), [https://www.federalreserve.gov/econres/notes/feds-notes/mobile-banking-a-closer-look-at-survey-measures-20180327.htm](https://www.federalreserve.gov/econres/notes/feds-notes/mobile-banking-a-closer-look-at-survey-measures-20180327.htm) (“While mobile phones have been prevalent in the U.S. for the past decade, smartphone adoption has grown rapidly in recent years. The uses for smartphone technology have expanded, including the use of mobile phones for banking. In 2017, about half of U.S. adults with bank accounts had used a mobile phone to access a bank account in the past year.”).
other terms and conditions to establish mechanisms to limit reborrowing risk, including, for example, through the use of “cooling off” periods, periodic borrowing limits, “off-ramps,” and/or similar measures. The specific additional mechanisms a Depository Institution chooses to employ to mitigate reborrowing risk would be identified in the Depository Institution’s application for a No-Action Letter based on the Template.

b. **High Cost**

The high transaction costs and the higher risk of default typically associated with small-dollar loan products may result in a higher cost of credit, which may be more expensive than other traditional loan products (e.g., high-dollar loans or secured loans). These higher costs can be particularly exacerbated where the loan product is rolled over (triggering another series of related fees and interest costs) and/or subject to prepayment penalties or late fees.

The structure and terms of the Proposed Product would reflect the cost of extending small-dollar credit and associated risks, but would avoid the product features typically associated with nonbank small-dollar credit that are most likely to increase potential costs to consumers. In addition, disclosures provided by the Depository Institutions would reflect the costs associated with their respective versions of the Proposed Product, so as to allow for consumers to appropriately evaluate the product before submitting an application. In the absence of small-dollar credit products offered by Depository Institutions, consumers are limited to loan products from alternative lenders with higher rates and fees, less favorable terms, and that are subject to less regulatory scrutiny and supervision. According to Pew Research Center, “[t]he average payday loan customer borrows $375 over five months of the year and pays $520 in fees, while banks and credit unions could profitably offer that same $375 over five months for less than $100.”

27 Specific information regarding the APR of the Proposed Product, as well as how the APR (when combined with other terms) would improve the options available to consumers within the market for small-dollar credit products, would be detailed in the Depository Institution’s application for a No-Action Letter based on the Template.

c. **Risk of Default**

Because of the typical risk profile of many borrowers seeking access to small-dollar credit, there may be a risk of default or failure to repay the loan in the specified time-frame. Although some risk of default is, of course, inherent in any credit product, the Proposed Product would seek to limit default risk in several ways. First, the repayment and other terms of the Proposed Product would be simple and transparent, allowing borrowers to more fully understand their repayment obligations and any costs associated with the product. Second, as described elsewhere, the Proposed Product would avoid the product features typically associated with nonbank small-dollar credit that are most likely to increase potential costs to consumers (e.g., rollovers and late fees). Additional mitigation of default risk would be provided via each Depository Institution’s own underwriting criteria and practices, and by requiring borrowers to have an existing relationship with the Depository Institution. The Depository Institution would be able to take into account the borrower’s history with the Depository Institution, in addition to other internal and external data sources, when evaluating a consumer’s creditworthiness. Finally, the

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Proposed Product would also encourage repayment by expressly not imposing any penalty on borrowers who wish to prepay.

5. An identification of the statutory and/or regulatory provisions as to which the applicant seeks a No-Action Letter Template and an explanation of why a No-Action Letter Template is needed, such as uncertainty or ambiguity regarding the application of the identified statutory and/or regulatory provisions to the product or service in question.

BPI is seeking compliance assistance with respect to the CFPB’s authority under sections 1031 and 1036 of the Dodd-Frank Act to prohibit unfair, deceptive, or abusive acts or practices (“UDAAP”).

Although BPI appreciates the CFPB’s January 24, 2020, Statement of Policy Regarding Prohibition on Abusive Acts or Practices, which is helpful in providing greater clarity regarding the scope of UDAAP, the CFPB itself acknowledged that “[u]ncertainty remains as to the scope and meaning of abusiveness.”

The standards for unfair or deceptive acts or practices also create uncertainty. The CFPB has acknowledged that “the particular facts in a case are crucial to a determination of unfairness [and deception],” and that changes in facts could change the appropriate determination.

In addition, although federal financial regulators have issued guidance regarding small-dollar lending by Depository Institutions (as detailed above), the fact that relatively few such institutions have entered this market to date indicates that uncertainty remains.

Notwithstanding this lingering uncertainty, BPI believes that, in light of the multiple benefits and mitigated risks, as described above, the act or practice of offering or providing the Proposed Product would not be unfair, deceptive, or abusive to the extent that the product that would be offered or provided has the structure and features described in section A.2 above. In addition, although NAL applications by particular Depository Institutions based on the Template will provide greater detail about some of these features, the same should be generally true of those particular products. Further, this Application is not intended to preclude existing small-dollar lending products that differ from the Proposed Product, or to imply that financial institutions must first seek a No-Action Letter from the CFPB before offering small-dollar lending products.

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28 See Dodd-Frank Act, Title X, Subtitle C, §§ 1031, 1036; PL 111-203 (July 21, 2010).
31 That said, BPI acknowledges that the Bureau’s assessment of an application for a No-Action Letter based on the Template will depend, in part, on the Bureau’s assessment of the version of the Proposed Product described in the application, including the description of the manner in which it will be offered and provided. BPI also acknowledges that such a No-Action Letter would be limited to the described aspects of the product, and thus would not provide “blanket” no-action protection under sections 1031 and 1036 of the Dodd-Frank Act. For example, even if the disclosures provided in connection with a particular version of the Proposed Product were compliant with all applicable disclosure requirements, if the recipient’s employees orally provided deceptive information about the product to consumers, the No-Action Letter would not shield the recipient from a supervisory or enforcement deception action based on sections 1031 and 1036 of the Dodd-Frank Act.
BPI is not seeking in this Application any relief under the Payday, Vehicle Title, and Certain High-Cost Installment Loans Rule (the “Payday Lending Rule”). In cases where the Payday Lending Rule would apply, once effective, the Proposed Product would comply with all applicable requirements, unless and to the extent that a Depository Institution wished to submit a separate request for a No-Action Letter request focused on the applicable provisions of the Payday Lending Rule.

6. If the applicant wishes to request confidential treatment under the Freedom of Information Act (FOIA), the Bureau’s rule on Disclosure of Records and Information (Disclosure Rule), or other applicable law, this request and the basis therefor should be in a separate letter and submitted with the application. The applicant should specifically identify the information for which confidential treatment is requested, and may reference the Bureau’s intentions regarding confidentiality under section G of the Policy.

Confidential treatment has been requested by separate letter.

7. If the applicant wishes the Bureau to coordinate with other regulators, the applicant should identify those regulators, including but not limited to those the applicant has contacted about offering or providing the product or service in question.

BPI respectfully requests that the Bureau coordinate with the OCC, FDIC, and FRB in reviewing this Application and provide greater clarity and certainty regarding the regulation of bank-provided small dollar credit. Regulatory coordination with these agencies would ensure a consistent approach to the Proposed Product, particularly in light of the potential guidance that the OCC, FDIC, and FRB may issue on small-dollar credit products offered by Depository Institutions.

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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

[Docket No. CFPB-2018-0042]

Policy on No-Action Letters

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Policy guidance.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is issuing its revised Policy on No-Action Letters (Policy), which is intended to carry out certain of the Bureau’s authorities under Federal consumer financial law.

DATES: This Policy is applicable on September 10, 2019.

FOR FURTHER INFORMATION CONTACT: For additional information about the Policy, contact Paul Watkins, Assistant Director; Edward Blatnik, Deputy Counsel; Albert Chang, Counsel; Thomas L. Devlin, Senior Counsel; Will Wade-Gery, Senior Advisor; Office of Innovation, at officeofinnovation@cfpb.gov or 202-435-7000. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION:

I. Background

In section 1021(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Congress established the Bureau’s statutory purpose as ensuring that all consumers have access to markets for consumer financial products and services and that markets
for consumer financial products and services are fair, transparent, and competitive.\textsuperscript{1} Relatedly, the Bureau’s objectives include exercising its authorities under Federal consumer financial law\textsuperscript{2} for the purposes of ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation, and that outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens.\textsuperscript{3}

As these provisions make clear, the Bureau’s statutory mission of protecting consumers is not limited to vigorously enforcing the law. It includes facilitating innovation in markets for consumer financial products and services, as innovation drives competition, which in turn lowers prices and promotes access to more and better products and services. Innovation holds the promise of benefitting consumers in numerous ways, including by creating or expanding access to products and services; increasing the range of products and services; improving the functionality of existing products and services; reducing prices; increasing consumer understanding and control; and enhancing safety and security.\textsuperscript{4}

A primary means of facilitating innovation is removing barriers to innovation. This can be accomplished in a variety of ways. As noted, Congress expressly identified one of these: reducing unwarranted regulatory burdens. Another consists in reducing uncertainty regarding the meaning or application of statutory and regulatory provisions. Faced with such regulatory

\textsuperscript{1} 12 U.S.C. 5511(a).
\textsuperscript{2} 12 U.S.C. 5481(14).
\textsuperscript{3} 12 U.S.C. 5511(b)(3), (5).
\textsuperscript{4} See, e.g., United Nations Secretary-General’s Special Advocate for Inclusive Finance for Development and Cambridge Centre for Alternative Finance, Early Lessons on Regulatory Innovations to Enable Inclusive FinTech: Innovation Offices, Regulatory Sandboxes, and RegTech (2019), available at https://www.unsgsa.org/resources/publications (“Innovation offices decrease barriers to entry by reducing regulatory uncertainty, which promotes the entry, capitalization, and growth of new firms in financial services markets. New entrants, in turn, promote innovation and competition. Increased competition can result in lower prices for consumers, a greater range of products, and better services, all of which promote financial inclusion.”) (citation omitted).
uncertainty, some companies may hesitate to develop and offer potentially beneficial products and services, not wishing to run the risk of supervisory findings, enforcement actions, or private lawsuits. Reducing this uncertainty may encourage these companies to offer these products and thereby benefit consumers.

Such regulatory uncertainty may be particularly acute in the case of innovative products and services, as such products and services may not have existed, or even been contemplated, at the time potentially applicable statutes and regulations were promulgated. In such circumstances, companies with innovative financial products or services may find it difficult to attract sufficient investment, business partners, or other support, and bring innovative ideas to market in a timely fashion.

Given that there are a variety of different impediments to innovation, a variety of different regulatory tools are needed to reduce such impediments. Congress has given the Bureau a variety of authorities under title X of the Dodd-Frank Act and the enumerated consumer laws\(^5\) that it can exercise to promote its purpose and objectives, including facilitating innovation. These authorities include supervision and enforcement authority, and the authority to issue orders and guidance.\(^6\) These authorities provide the basis for the Policy on No-Action Letters (Policy) and the No-Action Letters issued pursuant to the Policy. Issuing such No-Action Letters is also a means through which the Bureau can further its understanding of the legal and

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policy implications of innovative products and services to help support official interpretations and rulemakings.

The Bureau proposed the original version of its Policy on No-Action Letters in October 2014\(^7\) and finalized it in February 2016 (2016 Policy).\(^8\) In the preamble of the 2016 Policy, the Bureau anticipated that No-Action Letters would be provided rarely and on the basis of exceptional circumstances, and estimated that the Bureau would on average receive one to three actionable applications per year. This estimate was based on the features built into the 2016 Policy; i.e., the 2016 Policy was designed to result in no more than three No-Action Letters per year. The Bureau issued only one No-Action Letter under the 2016 Policy in the nearly three-year period between its issuance and publication of the proposed Policy in December 2018.\(^9\)

The Bureau has determined that the approach to facilitating consumer-beneficial innovation through No-Action Letters built into the 2016 Policy is not an adequate response to the extent of innovation occurring in markets for consumer financial products and services. Given that the 2016 Policy was designed to result in a small number of No-Action Letters per year, the Bureau determined that the 2016 Policy required modification. Accordingly, in December 2018, the Bureau proposed to revise the 2016 Policy in order to more effectively carry out the Bureau’s statutory purpose and objectives.\(^{10}\)

II. Overview of Comments

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\(^7\) 79 FR 62118 (Oct. 16, 2014).
\(^8\) 81 FR 8686 (Feb. 22, 2016).
\(^{10}\) Policy on No-Action Letters and the BCFP Product Sandbox, 83 FR 64036 (Dec. 13, 2018). As indicated by the title of that proposal, it consisted of two parts. The first part, concerning No-Action Letters exclusively, is being finalized in the instant document. The second part, concerning the creation of the Product Sandbox, is being finalized simultaneously in a separate document as the Compliance Assistance Sandbox Policy. The Bureau has determined that finalizing the two policies in separate documents will be less confusing for potential applicants, and better serve the public interest.
The Bureau received 31 unique comments in response to the December 2018 proposal. Industry trade associations and other industry groups submitted 12 comments. Individual financial services providers submitted three comments. Four comments were submitted by consumer groups and civil rights organizations. There were six comments from research and advocacy organizations, two from groups of State Attorneys General, one from a group of State regulators, one from an academic, one from a law firm, and one from an individual.\footnote{One of the four consumer group and civil rights organization comment letters was a lengthy, detailed letter by a consortium of nine consumer groups. Many of the comments in that letter were echoed in four shorter letters: one from a consortium of 80 other consumer groups and civil rights organizations; one from an individual consumer group; one from an individual civil rights organization; and one from a law firm. In light of this overlap, and for the sake of brevity, the term “consumer groups” is used in the discussion of comments in section III to refer to comments included in the lengthy letter, as well as the same comments included in the four shorter letters.
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Industry commenters uniformly supported the proposed Policy, and stated that it is more likely to incent companies to apply for a No-Action Letter than the 2016 Policy. One of the two groups of State Attorneys General likewise supported the proposed Policy. Although generally supportive of the proposed Policy, industry commenters recommended discrete changes to certain provisions of the proposed Policy.

In contrast, all but one of the consumer group commenters opposed the proposed Policy on numerous grounds, and stated that it marks a step backwards vis-à-vis the 2016 Policy. The second group of State Attorneys General were of the same opinion. One consumer group stated that provision of compliance assistance\footnote{As did the 2016 Policy, the proposed Policy used the concept of statutory/regulatory “relief” as a generic term for describing agency mechanisms for addressing regulatory uncertainty and barriers. The CFTC uses the same term for this purpose in its procedures governing various such mechanisms. \textit{See} 17 CFR 140.99. However, a number of commenters that generally opposed the proposed Policy read the term “relief” as signaling an intention by the Bureau to assist applicants in evading the law. That was not the Bureau’s intention. Rather, the relief intended was relief from statutory/regulatory uncertainty, not relief from statutory or regulatory requirements. To clarify this point, the final Policy uses “compliance assistance” as the generic term for such mechanisms.
} by the Bureau is not really needed because (i) few technologies lead to products where the application of a well-established law or regulation is in
question, and (ii) the vast majority of fintech innovation falls within known product categories and rarely raises novel questions of law and policy. The Bureau disagrees with this assessment.

The other consumer groups and the group of State Attorneys General appear to agree with the Bureau’s view that innovative products and services face regulatory uncertainty, but disagreed with the Bureau’s approach in the proposed Policy to address it. Instead, these commenters generally supported the approach taken in the 2016 Policy, and thus opposed virtually every revision of the 2016 Policy proposed by the Bureau.

This disagreement between the Bureau and these commenters regarding the optimal level of facilitation of consumer-beneficial innovation may be based, in turn, on a disagreement about the Bureau’s consumer protection mission under title X of the Dodd-Frank Act. As these commenters emphasized, Congress gave the Bureau supervisory and enforcement authority to protect consumers from unfair, deceptive, and abusive acts and practices, as well as other violations of Federal consumer financial law. As noted above, however, the Bureau reads the purpose and objectives Congress set for the Bureau as clearly signaling that the Bureau should also exercise its numerous authorities to facilitate access and innovation in markets for consumer financial products and services. These commenters, in contrast, appear to diminish this aspect of the Bureau’s consumer protection mission. For example, one consumer group letter states that facilitating consumer-beneficial innovation falls outside the Bureau’s “core mission.”

Many comments from stakeholders across the spectrum requested greater specificity or detail regarding various provisions of the proposed Policy. The Bureau notes in this regard that the Securities and Exchange Commission’s (SEC) procedures regarding no-action letters are

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12 U.S.C. 5511(b)(2); 5536(a).
significantly shorter and less detailed than the proposed Policy.\textsuperscript{14} Nonetheless, the SEC has managed to provide scores of no-action letters per year over the course of many decades in a manner that is widely viewed as promoting the interests of regulated entities, shareholders, and the public more generally.\textsuperscript{15} Indeed, a number of the streamlining revisions in the proposed Policy were designed to move the Policy in the direction of the SEC model.

The Policy is designed to apprise potential applicants and other stakeholders of one way in which the Bureau plans to exercise its supervision and enforcement discretion, namely, through the issuance of No-Action Letters under the Policy. The Policy is necessarily relatively general as compared to particular No-Action Letters issued under it. Moreover, given that the Policy is being issued based on relatively little practical experience in issuing No-Action Letters, the Bureau is concerned that an attempt to provide significantly more detail and specificity at this time would be counterproductive. Nevertheless, the Bureau has provided additional specificity and detail in a number of instances, as explained below. As the Bureau gains experience implementing the Policy and engages in additional stakeholder outreach, it will consider the extent to which additional clarifications or adjustments are necessary or appropriate.

Finally, the Bureau voluntarily sought public comment on the proposed Policy because it recognizes that facilitating consumer-beneficial innovation is a topic in which many stakeholders have a keen interest, and because it anticipated receiving comments that would enable it to improve the proposed Policy. The Bureau appreciates all of the comments received and has given each of them careful consideration. In the proposal, the Bureau strove to facilitate consumer-beneficial innovation, while minimizing the risk of consumer harm. Based on the


many constructive, and instructive, comments received, the Bureau has further revised the Final Policy in line with these goals.

III. Summary of Comments, Bureau Responses, and Resulting Policy Changes

This section provides a summary of the significant comments received by subject matter. It also summarizes the Bureau’s assessment of such comments by subject matter and, where applicable, describes the resulting changes that the Bureau is making in the final Policy.16

A. Compliance with Administrative Law

The Bureau received a number of comments claiming that the proposed Policy violates applicable rulemaking requirements as well as other requirements of administrative law. Relatedly, some commenters argued that individual No-Action Letters could violate applicable rulemaking requirements.

1. Legal Status of the Policy

In section III of the document published in the Federal Register on December 13, 2018, the Bureau stated that, if finalized, the two-part proposed Policy would constitute an agency general statement of policy and a rule of agency organization, procedure, or practice exempt from the notice and comment rulemaking requirements under the Administrative Procedure Act (APA). Due to the types of compliance assistance that would be available under Part II of the two-part proposed Policy, the Bureau deemed it appropriate to treat Part II as both a general statement of policy and a procedural rule. It was largely for this reason that section III stated that the entire proposal (i.e., both parts), if finalized, would constitute a general statement of policy and a procedural rule. Now that the Bureau is separately finalizing the No-Action Letter Policy,

16 The Bureau has also made a number of technical changes to the final Policy to accommodate the revisions described below and to increase clarity.
it has determined that the Policy is more appropriately characterized solely as a general statement of policy.

Consumer groups disagreed with the Bureau’s characterization of the proposed Policy as a general statement of policy, arguing that the proposed Policy, if finalized, would be a *de facto* legislative rule because (i) it would limit the Bureau’s discretion to take a supervision or enforcement action once it issues a No-Action Letter; and (ii) it would replace staff-issued No-Action Letters with Bureau-issued No-Action Letters. Each of these claims concerns the binding nature of particular No-Action Letters, rather than the proposed Policy – a topic addressed in section III.A.2 below.

As finalized, the Policy is a non-binding general statement of policy under applicable law. As stated in section IV below, the Policy is intended to provide information to interested parties regarding the Bureau’s plans to exercise its enforcement and supervisory discretion to provide No-Action Letters. The Bureau retains the discretion to change these plans as it gains experience in operating the Policy – just as it had done in the 2016 Policy.

2. Legal Status of No-Action Letters

As noted above, and in the proposal, a particular No-Action Letter would constitute an exercise of the Bureau’s supervisory and enforcement discretion. Consumer groups appeared to

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17 The same commenters also took issue with the Bureau’s characterization of the proposed Policy as a procedural rule. In light of the Bureau’s determination that it is more appropriate to characterize the Policy as a general statement of policy only – and not also a procedural rule – the Bureau is not responding to this line of comment in the instant document. Rather, the Bureau is responding to this line of comment in the document finalizing Part II of the proposed Policy as the Compliance Assistance Sandbox Policy.

18 See, e.g., *Syncor Int’l v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (“By issuing a policy statement, an agency simply lets the public know its current . . . approach. The agency retains the discretion and the authority to change its position—even abruptly—in any specific case because a change in its policy does not affect the legal norm.”).

19 See, e.g., Attorney General’s Manual on the Administrative Procedure Act 30 n.3 (1947) (providing that policy statements are issued “to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”)

20 81 FR 8686, 8687 (Feb. 22, 2016).
accept this characterization as to some No-Action Letters, but argued that other No-Action Letters could be *de facto* legislative rules issued in contravention of applicable law because they could change, in a binding manner, and broadly, whether and how consumer protection laws apply in the future. The claim that such No-Action Letters would be binding and have future effect is based on their claim that No-Action Letters would restrict the Bureau’s ability to take enforcement or supervision action in the future. That claim was based, in turn, on two features of the proposal: (1) the Bureau’s statement that, whereas a No-Action Letter under the 2016 Policy was a staff recommendation of no-action, a No-Action Letter under the proposed Policy would be issued by duly authorized officials of the Bureau in order to provide recipients greater assurance that the Bureau itself stands behind the No-Action Letters; and (2) the Bureau’s proposal to omit from No-Action Letters a statement that the letter is subject to modification or revocation at any time at the discretion of the staff for any reason.

As regards the first feature, the shift from staff-issued No-Action Letters to Bureau-issued No-Action Letters was proposed to address concerns that a no-action recommendation by some Bureau staff would be reversed sometime later by other Bureau staff with a different view of the matter, and to provide applicants with a reasonable basis for believing that this “whiplash” scenario would not occur under the proposed Policy. The commenters’ apparent argument that a no-action position issued by an agency, as opposed to a staff recommendation of no-action, transforms an exercise of enforcement discretion into a legislative rule is without basis. It is well-settled that agency-level exercise of enforcement discretion, even if stated in binding terms, does not constitute legislative rulemaking.  

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As regards the second feature, the Bureau proposed omitting the “any time/any reason” statement because it was concerned that this statement may create a false impression about the Bureau’s intent regarding revocation, and thus may deter entities with potentially beneficial products and services from applying for a No-Action Letter. It could mistakenly be understood to suggest that the Bureau plans to modify or revoke No-Action Letters *ad libitum*. As the Bureau noted in the proposal, other Federal agencies with no-action letter programs have terminated no-action letters very rarely. The Bureau anticipates that revocations would be equally rare under the Policy. Accordingly, section C.7 of the final Policy replaces the “any time/any reason” statement with the more accurate statement that the Bureau may terminate a No-Action Letter if it determines that doing so is necessary or appropriate to promote the primary purposes of the Policy as stated therein, and gives three examples of such circumstances.

As noted, the consumer groups also identified effecting a change in existing law or regulations as an element of No-Action Letters that could be legislative rules. *Prima facie*, an exercise of discretion not to enforce a particular statutory or regulatory provision against a particular entity does not effect a change in the agency’s substantive interpretation or implementation of the provision. The provision remains unchanged, and the agency may decide to bring an enforcement action against another entity based on a violation of the provision.

Finally, as noted, the consumer groups also identified breadth or generality as a feature of No-Action Letters that could be legislative rules. They identified several types of generality: (i) No-Action Letters that would apply generally to all consumers that might use a given company’s product or service; (ii) No-Action Letters that would apply to all members of an industry association; and (iii) No-Action Letters that would apply to all customers of a software provider.

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22 As explained below, the Bureau is replacing the term “revocation,” which was used in the proposed Policy, with the term “termination” in the final Policy.
These commenters indicated that No-Action Letters of the second two types could result from the proposed alternative process for applications by third parties, under which an industry association or service provider could apply for a provisional No-Action Letter on behalf of their member or customers, and additional members or customers could be added to the letter over time.

The Bureau proposed this alternative process to address circumstances in which the standard process of applying for a No-Action Letter might not work for one reason or another. As explained in section III.F below, the Bureau is finalizing this aspect of the proposal by adding a new section E to the Policy, which provides greater detail and clarity regarding alternative application, assessment, and issuance procedures. Like the standard process described in sections A through C, these alternative procedures are necessarily somewhat general and open-ended. Not only is the Policy a general statement of policy, but, as noted in section II above, the Bureau has relatively little experience in implementing this type of policy. And this is a fortiori the case as regards the alternative application procedures, which were not a feature of the 2016 Policy. The Bureau is mindful of the concerns raised by commenters and intends to implement these procedures in a manner consistent with the APA’s procedural and substantive requirements.

3. Arbitrary and Capricious

The proposed Policy stated that its main purpose is to provide a mechanism through which the Bureau may more effectively carry out its statutory purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive; and its statutory objectives, which include exercising its authorities under Federal consumer financial
law for the purposes of ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation. In the preamble of the proposed Policy, the Bureau described various changes it was proposing to make to the 2016 Policy and explained that those changes were designed, *inter alia*, to streamline the application and review process and to bring the Policy more in line with certain aspects of no-action letter programs operated by other Federal agencies.

Consumer groups claimed that the proposed Policy, if finalized, would be arbitrary and capricious for several reasons. The Bureau notes that a determination of whether the Policy is arbitrary or capricious would be based on the content of the final Policy, not the proposed Policy. Accordingly, the discussion below references the final Policy as well as the proposed Policy.

First, consumer groups contended that the proposed Policy entirely fails to consider an important aspect of the problem the proposed Policy was intended to address by making no mention of its impact on consumers. The Bureau disagrees. As noted in the proposed Policy and in section II above, the main purpose of the Policy is to more effectively carry out the Bureau’s consumer-focused purpose and objectives. In addition, the Bureau expects that (i) applications for a No-Action Letter under the Policy will include a discussion of both consumer benefit and consumer risk, and (ii) the Bureau’s assessment of applications will place particular emphasis on these aspects of the application.

Second, consumer groups claimed that the Bureau failed to give adequate reasons for the proposed revisions of the 2016 Policy. More specifically, they stated that the only rationale the Bureau provided was that more incentives need to be provided to companies to apply for a No-Action Letter in light of the fact that the Bureau issued only one No-Action Letter under the 2016 Policy. As noted above, however, the Bureau provided other rationales, including
streamlining the application and review processes and bringing the Policy more in line with
certain features of no-action letter programs operated by other Federal agencies.

Third, these commenters asserted that the proposed Policy offers “virtually no
explanation” of the proposed revisions to the 2016 Policy. As noted above, however, such
explanations were provided in the proposed Policy. Moreover, additional explanations of the
revisions are provided throughout the instant preamble.

B. Scope of the Proposed Policy

A number of comments from stakeholders across the spectrum addressed the subject
matter scope of the proposed Policy, i.e., the types of products or services that could be included
in an application. Section A.3 of the 2016 Policy provided that No-Action Letters were not
intended for either well-established products or purely hypothetical products that are not close to
being able to be offered. And in response to comments on the proposed 2016 Policy regarding
the types of products or services within its scope, the Bureau noted that the 2016 Policy was
limited to emerging products. The proposed Policy omitted the statement regarding well-
established products and hypothetical products, and likewise did not state that No-Action Letters
would be limited to emerging products and services.

Consumer groups opposed these proposed changes, and interpreted them as signaling the
Bureau’s intention to provide No-Action Letters for well-established products that do not need a
No-Action Letter, and to give companies a “back-door channel” to obtain outcomes they failed
to obtain through the notice-and-comment process. This was not the Bureau’s intent in
proposing these changes. As noted above, one of the primary bases of the Policy is to more
effectively implement the Bureau’s statutory objective of facilitating innovation. Innovation is a
broad concept, and not limited to new or emerging products and services. As regards the
concern that the Bureau intends to grant No-Action Letters in cases where they are not needed, it is unclear why an entity would take the trouble to apply for a No-Action Letter in such a case. In any event, the Bureau has no intention to issue No-Action Letters in such circumstances.

The Bureau proposed to omit the statement about hypothetical products because it was concerned that the statement might discourage applications regarding products and services under development that could benefit consumers. Indeed, it is for this reason that the Bureau proposed accepting applications from service providers and is including a process for such applications in section E.1 of the final Policy (as discussed in section III.F below).

Industry commenters generally understood the Bureau’s intent in proposing to omit the above statements, but asked the Bureau to state more expressly in the final Policy that the Policy is not intended to be limited to new or emerging products. That is indeed the case, and the text of the final Policy is consistent with that position.

C. Application Elements

In finalizing the 2016 Policy, the Bureau addressed two types of comments on the application section of the proposed 2016 Policy: (i) comments that the proposal would have required applicants to submit an unduly burdensome volume of information; and (ii) comments that the information requirements be minimized specifically for smaller organizations that may have relatively fewer resources to devote to the No-Action Letter process. The Bureau declined to reduce the volume of information to be included in applications for a No-Action Letter based on its belief that the volume was not unduly burdensome. The Bureau’s main rationale in this regard was its expectation that any conscientious firm intending to launch a consumer financial product or service that would raise substantial regulatory questions would compile the same information on its own, apart from an application for a No-Action Letter.
In addition, the Bureau stated that it planned to monitor the effectiveness of the 2016 Policy and to assess periodically whether changes to the Policy would better effectuate the purposes of facilitating innovation and otherwise substantially enhancing consumer benefit. In the proposed Policy, the Bureau explained that it was proposing to revise the 2016 Policy in various respects for a number of reasons. Most generally, the Bureau explained the proposed changes were designed to increase utilization of the Policy, thereby enabling the Bureau to more effectively carry out its statutory purpose and objectives. More specifically, the Bureau explained that certain proposed changes were designed to (i) streamline the application and review process by eliminating redundant and unduly burdensome elements; and (ii) more closely align the Policy with certain elements of no-action letter programs operated by other Federal agencies.

The Bureau believes that the low level of interest in applying for a No-Action Letter under the 2016 Policy indicates that the application elements included in the 2016 Policy were in fact unduly burdensome, particularly when viewed as a total package. In addition, the Bureau believes that a more streamlined set of application elements will ensure that smaller entities are not disadvantaged relative to larger entities in being able to take advantage of the Policy. The Bureau also believes that the rationale provided in the 2016 Policy for why the package of application information was not unduly burdensome is inapplicable or overstated as regards certain application elements in the 2016 Policy, as explained below.

Industry commenters generally supported the proposed revisions of the application section of the 2016 Policy. Consumer groups opposed each proposed revision, and in some cases urged the Bureau to request more information from applicants than is specified in the 2016 Policy.
1. Explanation of Consumer Risk

Section A.5 of the 2016 Policy instructed applicants to include a candid explanation of potential consumer risks posed by the product – particularly as compared to other products available in the marketplace – and undertakings by the applicant to address and minimize such risks. Section A.14 of the 2016 Policy instructed applicants to include a description of any particular consumer safeguards the applicant will employ, although they may not be required by law, if a No-Action Letter is issued, including any mitigation of potential for or consequences of consumer injury. It went on to say that the description should specify the requester’s basis for asserting and considering that such safeguards are effective, and should also address any future study the requester will undertake to further evaluate the effectiveness of such safeguards.

The Bureau proposed replacing section A.5 with a similar instruction to include an explanation of the potential consumer risks posed by the product or service and/or the manner in which it is offered or provided, and how the applicant(s) intends to mitigate such risks. The Bureau proposed omitting section A.14 altogether. Consumer groups asserted that these proposed revisions would lead to the Bureau granting No-Action Letters without any reliable assessment of risks to consumers, and urged the Bureau not to finalize the proposed revisions. The Bureau believes that proposed revisions to section A.5, as finalized, retain the core information needed for the Bureau to assess consumer risk. The information to be provided in applications for no-action letters provided by other Federal agencies typically does not include a comparison to risks posed by competitors’ offerings.23 Nor does the Bureau believe that

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potential applicants typically have such information ready to hand, including especially smaller entities. The same is true of the “future study” portion of section A.14. The Bureau thus remains of the view that these elements of the 2016 Policy are unduly burdensome.

The Bureau likewise continues to believe that the remainder of section A.14 of the 2016 Policy is largely redundant vis-à-vis section A.5. A description of any particular consumer safeguards the requester will employ, including any mitigation of potential for or consequences of consumer injury, and a specification of the requester’s basis for asserting and considering that such safeguards are effective (per section A.14) is substantially similar to a candid explanation of potential consumer risks posed by the product and undertakings by the requester to address and minimize such risks (per section A.5).

More generally, section B of the final Policy specifies that the Bureau intends to base its assessment of applications, inter alia, on the quality and persuasiveness of the application, with particular emphasis on the consumer risk element. This should incent applicants to ensure that the information they submit regarding consumer risk is of high quality and persuasive.

2. Substantial Consumer Benefit and Substantial Legal Uncertainty

The 2016 Policy instructed applicants to explain how the product in question is likely to provide “substantial” consumer benefit to consumers, and to identify the “substantial” regulatory uncertainty on which the request for a No-Action Letter is based. These were key features of a policy designed to result in one to three actionable No-Action Letter applications per year. The Bureau thus proposed to eliminate these limitations as part of its general policy shift toward increasing the level of support for consumer-beneficial innovation. Industry commenters and advisory/research organizations supported these proposed changes. Consumer groups opposed them.
Regarding the proposed elimination of “substantial” as to consumer benefit, consumer groups’ opposition appears to be based on their general support of the approach to innovation-facilitation taken in the 2016 Policy. The Bureau is finalizing the revised application element as proposed, *i.e.*, as instructing applicants to include an explanation of the potential consumer benefits of the product or service and/or the manner in which it is offered or provided, because it continues to believe this change vis-à-vis the 2016 Policy is needed to increase use of the Policy.

The Bureau is finalizing the proposed elimination of “substantial” as to legal uncertainty for the same reason. Consumer groups noted that the proposed Policy instructs applicants instead to identify “potential” uncertainty for which a No-Action Letter is needed. The Bureau acknowledges that use of the term “potential” in this context can be improved. The Bureau’s use of this term was driven by its recognition that the full extent of uncertainty may not be apparent at the time an application is submitted. To allow for this circumstance, the proposed Policy includes a footnote explaining that the Bureau recognizes that in some cases it may be difficult to determine precisely which provisions would apply, in the normal course, to the product or service in question; that, in other cases, the applicant may lack the legal resources to make a fully precise determination; and that, in such circumstances, the applicant should provide the maximum specification practicable under the circumstances and explain the limits on further specification. It is thus unnecessary to attempt to make the same point using the term “potential,” and that term is not included in section A.5 of the final Policy.

**3. Compliance with Other Law**

The Bureau proposed eliminating three elements of section A of the 2016 Policy that concerned compliance with other law in some manner. Section A.6.c required a showing of the product’s compliance with other relevant Federal and State regulatory requirements. Section
A.10 required an affirmation that, to the requester’s knowledge (except as specifically disclosed in the request), neither the requester nor any other party with substantial ties to transactions involving the product is the subject of an ongoing, imminent, or threatened governmental investigation, supervisory review, enforcement action, or private civil action respecting the product, or any related or similar product. Section A.11 required an affirmation that (except as specifically disclosed in the request) the principals of the requester have not been subject to license discipline, adverse supervisory action, or enforcement action with respect to any financial product, license, or transaction within the past ten years. Relatedly, section C.7 of the 2016 Policy – which the Bureau also proposed eliminating – provided that one of the considerations Bureau staff would use in assessing applications was whether the applicant is demonstrably in compliance with other relevant Federal and State regulatory requirements.

Industry commenters were generally supportive of these proposed revisions. Consumer groups worried that these proposed revisions signaled the Bureau’s intent to short-circuit enforcement of the law by other government agencies or consumers and to interfere in ongoing disputes, and urged the Bureau to reinstate them. The Bureau declines to do so for a number of reasons. First, the Bureau is concerned that these elements of section A of the 2016 Policy, in combination with section C.7 of the 2016 Policy, unnecessarily discouraged viable applications. Potential applicants could have interpreted these provisions to mean that No-Action Letters would only be provided to entities, individuals, and products/services that had never been so much as threatened with some type of governmental action or private lawsuit. Indeed, potential applicants could have interpreted section A.10 to mean that there would be no point in submitting an application for a No-Action Letter if other entities with “substantial ties” to
transactions involving the product or service, or even “related or similar” products or services, had been threatened with such action or suits.

Second, the Bureau is concerned that these provisions are unduly burdensome – as suggested by commenters on the proposed 2016 Policy. An applicant would have to “show” or “demonstrate” that the product or service was compliant with all relevant law. An applicant would have to list not only ongoing investigations or lawsuits, but also “threatened” investigations and suits. And the list would have to contain not only actions and suits targeted at the applicant, but also those targeted at any entity with “substantial ties” to “related or similar” products or services. An application would have to list all types of adverse actions against the principals of the applicant during the prior ten years. Finally, the applicant effectively would have to attest that these lists are full and complete. 24

Third, the Bureau believes that the more effective and efficient means of handling the concerns raised by consumer groups is to clarify that the Bureau expects its assessment of applications (described in section B of the final Policy) to include due diligence regarding the applicant, its principals, and the product or service in question. Despite not including sections A.7, A.10, and A.11 of the 2016 Policy in the final Policy for the reasons set forth above, the Bureau does not intend to allow the Policy to be used – or rather abused – by entities seeking to evade investigations or actions by other regulators. On the contrary, the Bureau intends to conduct necessary and appropriate due diligence on applicants – including consulting with other regulators – to ensure that the Policy is used for its intended purposes.

4. Duration and Data Sharing

24 The Bureau notes that procedures governing applications for no-action letters issued by other Federal regulators typically do not include this type of listing of ongoing or threatened actions by other regulators and private litigants. See n.22, supra.
The 2016 Policy did not expressly provide that No-Action Letters would be of limited duration. But section A.13 instructed applicants to specify whether the request is limited to a particular time period. And section C.8 provided that the Bureau would base its assessment of applications, in part, on the extent to which the application is sufficiently limited in time, volume of transactions, or otherwise, to allow the Bureau to learn about the product and the aspects in question while minimizing any consumer risk. There was thus a suggestion that applications for No-Action Letters of unlimited duration might be disfavored.

Section A.9 of the 2016 Policy instructed applicants to include an undertaking, if the request is granted, to share appropriate data regarding the product with the Bureau, including data regarding the impact of the product on consumers, and its plans for development of additional data. Section C.9 provided that the Bureau’s assessment of applications would be based, in part, on the extent to which any data that the entity has provided and agrees to provide to the Bureau regarding the operation of the product’s aspects in question will be expected to further consumer protection.

In the proposed Policy, the Bureau stated that the default assumption under the proposed Policy would be that No-Action Letters would be of unlimited duration and that there would be no expectation of data sharing. The Bureau explained that it was proposing these changes in order to bring the Policy more in line with certain elements of the no-action letter programs of other agencies.

Industry commenters generally supported these proposed shifts, while consumer groups opposed them. In consumer groups’ view, the duration of No-Action Letters should be determined on a case-by-case basis. If a No-Action Letter addresses a narrow technical issue there may be no reason for an end date. But UDAAP-focused No-Action Letters, for example,
should be of short duration. Similarly, consumer groups advised the Bureau to at least require No-Action Letter recipients to submit data on the consumer impact of the products or services in question.

The Bureau believes there is some merit to the consumer groups’ point that a one-size-fits-all approach to the duration of No-Action Letters is inadvisable. In certain cases, it may be appropriate to limit the duration of a No-Action Letter. Indeed, in some cases an applicant itself might wish the No-Action Letter to be of limited duration. However, the Bureau believes that, to account for such variation, it is not necessary to change the Policy as proposed. Nothing in the final Policy prevents No-Action Letters of limited duration. In a given case, if the Bureau and/or the applicant believes that a temporal limitation is appropriate, such a limitation can be included in the No-Action Letter.

The Bureau declines the specific request to require recipients of a No-Action Letter under the Policy to routinely submit data regarding consumer impact. However, the Bureau agrees with the general concern behind this specific request: if the product or service covered by a No-Action Letter is not performing as anticipated in the application – including especially by injuring consumers – it is important for the Bureau to become aware of that fact as soon as reasonably possible. To address this general concern, a No-Action Letters under the proposed Policy would have required recipients to inform the Bureau of material changes to information included in the application that would materially increase the risk of material, tangible harm to consumers. As noted below in section III.H.1, commenters found this “material, tangible harm” standard to be vague and subjective. To address this issue, and to increase the likelihood that the Bureau will learn of any consumer injury caused by the product or service covered by a No-Action Letter in a timely manner, the Bureau is revising this provision (section C.4 in the final
Policy) to include the Bureau’s expectation that a No-Action Letter will require recipients “to apprise the Bureau of (a) material changes to information included in the application and (b) material information indicating that the described aspects of the product or service are not performing as anticipated in the application.” In addition, the Bureau is adding a footnote to section C.4 explaining that “not performing as anticipated” includes the materialization of consumer risks identified in the application, and the materialization of other consumer risks not identified in the application.

5. Non-Endorsement

Section A.10 of the 2016 Policy advised applicants to include a commitment that, if the application is granted, the recipient will not represent that the Bureau or its staff has licensed, authorized or endorsed the product, or its permissibility or appropriateness, in any way. In the proposed Policy, the Bureau proposed deleting this element as part of its general streamlining effort.

Consumer groups urged the Bureau to retain this element. The Bureau declines to do so, but agrees with the commenters’ more general point that receipt of a No-Action Letter should not be misconstrued to be the Bureau’s endorsement of the product or service in question – which could potentially give the recipient an unfair advantage over its competitors or mislead consumers. Accordingly, the Bureau is adding to the list of statements that would be included in a No-Action Letter a statement that the No-Action Letter does not constitute an endorsement of the product or service that is the subject of the letter, or of any other product or service offered or provided by the recipient(s).25

D. Bureau Assessment of Applications

25 See section C.3(e) of the final Policy.
1. Assessment Factors

Consistent with the Bureau’s proposed streamlining of the application elements of the 2016 Policy, the Bureau proposed streamlining section C of the 2016 Policy to focus the Bureau’s assessment on the core application elements: the potential benefits of the product or service, its potential consumer risks, and the need for a No-Action Letter. Industry commenters generally supported these proposed changes. Consumer groups opposed these proposed changes, and asserted that they would result in vague assessment criteria and demand no accountability to the Bureau or to the public. They accordingly urged the Bureau to retain all of the assessment criteria in the 2016 Policy.

The Bureau emphasizes that it did not propose a wholesale replacement of the assessment elements of the 2016 Policy. Rather, as noted, the Bureau proposed retaining what it viewed as the core assessment elements, and discarding only those falling outside the core. More specifically, the proposal would have largely retained sections C.2 (consumer benefit); C.4 (consumer risk); and C.5 (regulatory uncertainty). The Bureau believes that section C.1, regarding consumer understanding, was largely redundant vis-à-vis sections C.2 and C.4; that section C.3, regarding the availability of benefits in the existing marketplace, was largely redundant vis-à-vis section C.2; and that section C.6, regarding whether the identified regulatory uncertainty may be better addressed by other means, was largely redundant vis-à-vis section C.5. As for section C.7, regarding compliance with other law, it is addressed above in section III.C.3. Similarly, sections C.8 and C.9, regarding temporal duration and data sharing, are addressed above in section III.C.4. The same is true to some extent of section C.10, regarding the applicant’s amenability to public disclosure of relevant data. Since the default assumption under
the final Policy is that no data sharing will be required, the applicant’s amenability to public disclosure of shared data is generally not a relevant assessment element.

More generally, the Bureau acknowledges that the assessment section of the proposal may have sketched an incomplete picture of the Bureau’s intended assessment of applications. The Bureau intended to apprise potential applicants and other interested stakeholders that its assessment of applications would focus on the quality and persuasiveness of the applications, particularly the elements concerning consumer benefit, consumer risk, and regulatory uncertainty. The Bureau did not intend to suggest that other factors will not play a role in its decisions. To remove any such misimpression, the Bureau is revising section C of the final Policy to clarify that it expects its assessment of applications to involve a complicated balancing of many factors, including an assessment of the quality and persuasiveness of the application, with particular emphasis on the information specified in sections A.3, A.4, and A.5; as well as information about the applicant and the product or service in question derived through Bureau due diligence processes; the extent to which granting the application would be consistent with Bureau enforcement and supervision priorities; an assessment of litigation risk; and available Bureau resources.

2. Assessment Timeframe

The proposed Policy stated the Bureau’s intention to grant or deny an application within 60 days of notifying the applicant that the Bureau has deemed the application to be complete. The Bureau received a range of comments on this new provision. Consumer groups stated that a 60-day review period is unreasonably short and will encourage hasty and flawed reviews of applications, resulting in harm to consumers. They recommended that the Bureau not make any assurances regarding the time it will take to review an application, and that any specific time
period should be much longer and more flexible than 60 days. A trade association stated that 60
days is too long, and encouraged the Bureau to commit to completing its assessment of
applications within 30 days. An advisory/research organization opined that while 60 days should
generally be sufficient, the Bureau should afford itself the option of taking an additional 30 days,
provided notice is given to the applicant.

The Bureau is finalizing the 60-day provision as proposed because it believes that this
period strikes the optimal balance between permitting sufficient time for a thorough review of
applications and encouraging entities to submit applications. Consumer groups’ concerns may
be based somewhat on a misunderstanding of the provision. Their comments appear to envision
a scenario in which no more than 60 days will elapse between the Bureau first setting eyes on a
potential application and the Bureau granting or denying a formal application. The proposed
Policy encouraged potential applicants to contact the Bureau for informal, preliminary discussion
of a proposal before submitting a formal application. The final Policy strongly encourages such
informal, preliminary discussion. Thus, in a typical case, the Bureau’s review of a proposal
likely would take place over a period longer than 60 days. The new 60-day provision is designed
to give an applicant reasonable assurance that, once an application is deemed to be complete, the
Bureau intends to grant or deny it within 60 days. That said, the final Policy indicates that
certain circumstances may lead to a longer processing time, such as a request that the Bureau
coordinate with other regulators prior to granting or denying an application.

More generally, the Bureau has no intention of permitting the 60-day review goal to
trump its goal of thoroughly assessing applications before granting them, as the latter is more
integral to the long-term success of the Policy and the consumer benefit the Bureau expects the
Policy to yield. Moreover, if experience operating the Policy indicates that the 60-day review period is not working as intended, the Bureau intends to adjust it in an appropriate manner.

E. Issuance and Content of No-Action Letters

The Bureau proposed a number of revisions to section D of the 2016 Policy, which concerned the Bureau’s intended procedures for issuing No-Action Letters, including the expected content of such letters. Industry commenters generally supported these proposed revisions. Consumer groups opposed each proposed revision.

1. UDAAP

As noted, in the preamble of the 2016 Policy, the Bureau estimated that only one to three actionable No-Action Letter applications would be received each year. The Bureau also stated that No-Action Letters focused on the UDAAP prohibition in the Dodd-Frank Act\(^\text{26}\) are expected to be particularly uncommon. In the proposed Policy, the Bureau stated that there would be no such expectation under the proposed Policy.

Industry commenters uniformly supported this policy shift. For example, a group of trade associations stated that a No-Action Letter that does not include assurance against UDAAP liability has limited value due to the subjectivity of such claims. Similarly, a trade association commented that the fact that the majority of enforcement actions are brought under UDAAP authority makes clear that entities are in need of guidance in a gray area that is principle based rather than rule based.

In contrast, consumer groups opposed this policy shift. The consumer groups stated that, under the proposed Policy, the Bureau would give a stamp of approval that a company is not committing UDAAPs. This is not correct. Rather, the proposal provided that a No-Action letter

\(^{26}\) 12 U.S.C. 5531, 5536.
would include a statement that, subject to good faith, substantial compliance with the terms and
conditions of the letter, and in the exercise of its discretion, the Bureau will not make supervisory
findings or bring a supervisory or enforcement action against the recipient predicated on the
recipient’s offering or providing the described aspects of the product or service under its
authority to prevent unfair, deceptive, or abusive acts or practices. The proposal noted that this
statement implies that the Bureau has not determined that the acts or practices in question are
unfair, deceptive, or abusive. A statement that the Bureau has not made a UDAAP determination
is different than a statement that the Bureau has determined that the acts or practices in question
do not constitute a UDAAP. The final Policy retains this “implication” statement.

The consumer groups also opposed this policy shift on the more general ground that
many aspects of the way a product or service works in practice or is implemented could be
poorly understood or could change from the time an application is granted, and unfair, deceptive
or abusive aspects of a product or service “might only become apparent in the future.” A group
of State Attorneys General made essentially the same point.

The Bureau is not persuaded that such considerations warrant placing a categorical
limitation on UDAAP-focused No-Action Letters. The proposed Policy stated that No-Action
Letters would be based on particular facts and circumstances and be limited to the recipient’s
offering or providing the “described aspects of the product or service.” The proposal explained
that the term “described aspects of the product or service” is a short-hand term used in the
proposed Policy to encompass the subject matter scope of a No-Action Letter, including both the
particular aspects of the product or service in question, and the particular manner in which it is
offered or provided. These aspects of the proposal are being finalized as proposed. The Bureau
intends that a particular No-Action Letter issued under the Policy will include a description of
this subject matter scope. Indeed, it is in the interest of both the Bureau and the recipient that the subject matter scope is described with as much precision as possible. To the extent the recipient significantly changes the “described aspects of the product or service” without seeking a modification of the No-Action Letter under section D.1 of the Policy, the recipient would risk exceeding the subject matter scope of the letter, and thus would expose itself to a potential Bureau supervisory or enforcement action. Relatedly, to the extent the recipient fails to apprise the Bureau of material changes to information included in the application, as required by section C.4 of the Policy, the recipient would risk failing to substantially comply in good faith with one of the terms of the letter – which could be a ground for termination or even a retroactive enforcement action under section D.2 of the Policy.

As regards consumer groups’ speculative scenario in which the recipient does not significantly change the described aspects of the product or service but a UDAAP “becomes apparent in the future,” the Bureau could terminate the No-Action Letter on the ground that the described aspects of the product or service failed to perform as anticipated in the Policy, as specified in sections C.7 and D.2 of the Policy.

2. Interpretations

Under section D.4 of the 2016 Policy, No-Action Letters were expected to include a lengthy disclaimer that the letter does not constitute an interpretation, exception, waiver, or safe harbor. As part of the Bureau’s general streamlining effort, the proposed Policy would not have included this statement in No-Action Letters. Commenters interpreted the proposed omission of this statement to mean that the Bureau now intends to provide interpretations in No-Action Letters.
More specifically, consumer groups stated that the deletion suggests that the Bureau may include legal interpretations in No-Action Letters in the hope that they will be viewed as official interpretations to which courts will defer, and strongly opposed such a shift. In contrast, a group of trade associations urged the Bureau to include in a No-Action Letter an affirmation that its issuance represents the Bureau’s conclusion that the product or service in question, implemented consistently with the terms and conditions of the letter, does not violate applicable Federal consumer financial law, including the prohibition on UDAAP. Relatedly, these commenters requested that the final Policy emphasize the deference assigned by Congress to the Bureau’s interpretation of Federal consumer financial law in order to encourage courts, other regulators, and private litigants to defer to Bureau No-Action Letters. Similarly, an advisory/research organization recommended that No-Action Letters include an explanation of the Bureau’s rationale for granting the application, and provide assurances that the Bureau views the conduct in question as being consistent with relevant statutory or regulatory requirements.

The proposed deletion of the “no interpretation” disclaimer was not intended to signal a shift to including official interpretations in No-Action Letters, or any lesser types of interpretation for that matter. To clarify this point, the Bureau is adding to the list of statements expected to be included in a No-Action Letter, a statement that the letter does not purport to express any legal conclusions regarding the meaning or application of the laws and/or regulations within the scope of the letter.

While the Bureau appreciates the desire for liability protection greater than that provided by No-Action Letters, it believes that the better means to this end is making available forms of compliance assistance that provide a high-degree of such protection. This is one reason why the Bureau proposed the Product Sandbox Policy and is finalizing certain aspects of it, as the
Compliance Assistance Sandbox Policy (CASP), contemporaneously with the finalization of the Policy. The Bureau also appreciates the need and desire for the type of compliance assistance provided by interpretations. Accordingly, the Bureau intends to separately propose an interpretive letter program as soon as practicable.

3. Limitation to the Application Information

Section D.3 of the 2016 Policy provided that the expected contents of a No-Action Letter include a statement that the letter is based on the facts stated and factual representations made in the request, and is contingent on the correctness of such facts and factual representations. As part of its general effort to streamline the Policy, the Bureau did not include this statement in the proposed Policy. However, section I.A of the proposed Policy, which provided a general description of No-Action Letters, stated that such letters are based on particular facts and circumstances. To clarify this point, section C.3(c) of the final Policy provides that a No-Action Letter is expected to include a statement that the No-Action Letter is based on the factual representations made in the application, which may be incorporated by reference.

F. Alternative Procedures

The proposed Policy would have permitted No-Action Letter applications from trade associations, service providers, and other third parties. The proposal recognized that third parties, which generally do not themselves provide consumer financial products or services, may face challenges when attempting to submit an application pursuant to the standard process contemplated in the proposal. Accordingly, the Bureau proposed an alternative process for third parties: the Bureau would issue a provisional No-Action Letter based on the information available to the third party at the time of application and then issue a non-provisional letter once
necessary information became available about the entities intending to use the product or service in question and how they intended to offer or provide it.

Comments from trade associations were generally supportive of the proposed third-party application procedures. Some of these comments noted that group applications by trade associations would equalize access to No-Action Letters and allow smaller financial institutions to participate in the program. Other trade association commenters explained that third-party applications would increase use of the Policy and thereby provide the Bureau with greater evidence of unnecessary regulatory barriers and potential methods to address those barriers. Another trade association stated that third-party applications would correctly focus on the product or service at issue rather than the entity or entities involved in the provision of the product or service. While supportive of the overall process, some trade associations sought greater clarity regarding the specific steps of the application and issuance process, including those related to provisional No-Action Letters.

Comments from consumer groups and a law firm expressed significant concerns about allowing trade associations and service providers to apply for No-Action Letters. These commenters stated that permitting such applications would mean that a No-Action Letter could cover entire markets or thousands of clients and potentially affect millions of consumers. These types of applications would also, according to the same commenters, afford the Bureau no ability to evaluate the practices of the company that provides the product or service in question. These commenters further asserted that allowing parties other than the applicant to come forward later and automatically join a No-Action Letter, without additional review or approval by the Bureau, would shirk the Bureau’s duty to protect consumers.

Some of the same commenters contended that such broad No-Action Letters would be legislative rules. These comments are addressed in section III.A.2, supra.
A comment from a group of State Attorneys General likewise raised the possibility that third-party applications could lead to blanket coverage of entire industries while making it difficult for the Bureau to enforce No-Action Letter conditions. The comment also questioned how the Bureau could ensure the veracity and accuracy of an application submitted by a party other than the party that would ultimately be the recipient of a No-Action Letter.

Finally, an academic commenter noted that, while No-Action Letter applications should not be granted without particularized analysis, trade association applications could help ensure that similarly situated competitors receive consistent treatment and that no single No-Action Letter recipient receives an undue competitive advantage. Comments by some trade associations also encouraged the Bureau to implement application processes that would help ensure consistent treatment of competitors providing a product or service similar to one that is already the subject of a No-Action Letter.

As regards the proposed procedures for third-party applications, the Bureau was not proposing to issue a No-Action Letter to a company without knowing who is requesting it and without conducting a particularized analysis of how the company intends to offer or provide the product or service. This is the reason why the proposed Policy limited third-party applicants to provisional No-Action Letters until information necessary for a complete application is submitted. Nor would there be an “automatic” process under the proposed Policy that would allow a non-applicant to subsequently join a No-Action Letter without additional individualized assessment by the Bureau.

The final Policy seeks to clarify the alternative application process that service providers, trade associations, consumer groups, and other third parties may use. This clarification includes adding a separate section to the Policy on this topic and providing greater detail and specificity
regarding the various steps of the process. In particular, under new section E.1 of the final Policy, a service provider or facilitator (e.g., a trade association, consumer group, or other third party) could provide the application information specified in section A with appropriate adjustments given that the applicant itself will not be offering or providing the consumer financial product or service in question. The section also describes the manner in which the Bureau intends to assess the application information provided and the type of document successful applicants should expect to receive from the Bureau. The final Policy refers to this type of document as a “No-Action Letter Template” instead of a “provisional” No-Action Letter in order to more accurately describe the intended purpose of this document and clarify that it would be non-operative and non-binding on the Bureau. New section E.1 also describes the Bureau’s anticipated application, assessment, and issuance procedures for applications for a standard No-Action Letter based on a No-Action Template.

New section E.2 addresses comments regarding applications involving products or services that are substantially similar to those that are the subject of an existing No-Action Letter. The Bureau believes applications involving a product or service that is substantially similar to the product or service that is the subject of an existing No-Action Letter warrant an alternative application procedure that focuses on similarities in the product or service itself and the manner in which it is offered or provided. While the Bureau intends to assess this applicant-specific information in a particularized manner, it anticipates being able to process such applications in a timeframe shorter than that specified in section B given that the underlying No-Action Letter has already been granted.

Finally, consistent with the fact that the Policy is a general statement of policy under the APA, new section E includes a final footnote explaining that, in circumstances where neither the
Standard Process nor the alternative procedures described in section E (Alternative Process) are appropriate, the Bureau may utilize other procedures that diverge in one or more respects from the Standard Process or the Alternative Process, consistent with the purposes of the Policy.

G. Compliance with No-Action Letter Terms and Conditions

Section D.1 of the 2016 Policy provided that the no-action statement included in a No-Action Letter does not mean that the Bureau will not conduct supervisory activities or engage in enforcement investigation to evaluate the requester’s compliance with the terms of the No-Action Letter or to evaluate other matters. Consumer groups opposed this change, arguing that the Policy should include, at the very least, a statement that the Bureau retains this investigation and supervision authority. It appears that these commenters did not notice that the proposed Policy included a proviso that the Bureau maintains the right to obtain information relating to the consumer financial product or service subject to a No-Action Letter under its applicable supervision and enforcement authorities. The final Policy modifies this proviso somewhat, as explained below.

Several industry commenters expressed concern that the Bureau’s reliance on its supervisory authority to evaluate compliance with a No-Action Letter would create an unlevel playing field between recipients that are supervised by the Bureau and recipients that are not. To address this circumstance, an industry policy organization suggested that No-Action Letters issued to firms not subject to the Bureau’s supervisory authority include a term requiring affirmative consent to the submission of data to and review by the Bureau with respect to compliance with the other terms and conditions of the letter.

The Bureau declines to make the recommended change to the Policy. Although the Bureau maintains the right to obtain information about the product or service subject to a No-
Action Letter using its supervisory authority, it does not follow that the Bureau intends to routinely do so. Moreover, the Bureau has authorities other than supervisory authority that can be used for this purpose. To clarify this issue, the Bureau is amending the proviso that was included in the proposal to state that the Bureau maintains the authority to obtain information relating to the consumer financial product or service subject to a No-Action Letter under its applicable supervision, enforcement, and other authorities in the same manner and frequency that it obtains information relating to consumer financial products or services not subject to a No-Action Letter.

Furthermore, under section C.4 of the final Policy, all recipients of a No-Action Letter – regardless of their supervisory status – are required to apprise the Bureau of (a) material changes to information included in the application and (b) material information indicating that the described aspects of the product or service are not performing as anticipated in the application.

**H. Modification and Termination**

The 2016 Policy provided that a No-Action Letter would include a statement that the letter is subject to modification or revocation at any time at the discretion of Bureau staff for any reason. The 2016 Policy also stated that a No-Action Letter would include a statement that, to the extent that the facts and representations in the request are materially inaccurate, or the requester fails to satisfy conditions or violates limitations specified in the No-Action Letter, and in other similar circumstances, the No-Action Letter is by its own terms inapplicable (even without modification or revocation); and the staff may recommend initiating a retrospective enforcement or supervisory action if appropriate. The 2016 Policy also anticipated that No-Action Letter recipients would be given the grounds for a potential modification or revocation and an opportunity to respond.
The Bureau proposed revising this aspect of the 2016 Policy in various respects. The proposed Policy stated that the Bureau might revoke a No-Action Letter in whole or in part, in certain circumstances – but that the Bureau expected revocation to be quite rare. The proposal also stated that the Bureau expects a No-Action Letter to specify the grounds for revocation, and that the Bureau anticipates specifying three such grounds. A No-Action Letter under the proposed Policy would also include a statement that, if the letter is revoked for a reason other than the recipient’s (or recipients’) failure to substantially comply in good faith with the terms and conditions of the letter, the revocation is prospective only; i.e., that the Bureau would not pursue an action to impose retroactive liability in such circumstances. In addition, the proposed Policy described the steps the Bureau intended to take prior to revoking a No-Action Letter. These steps included providing recipients with notice of the ground(s) for revocation, an opportunity to respond (including an opportunity to cure a failure to substantially comply in good-faith with the terms and conditions of the No-Action Letter), and a period for winding down the offering or providing of the product or service in question in most circumstances.

While generally supportive of these proposed changes, trade association commenters and a research/advisory organization requested greater clarity on the anticipated grounds for revocation and certain portions of the proposed revocation procedures. Consumer group commenters urged the Bureau to provide additional grounds for revocation and retroactive liability, and had concerns about certain steps of the proposed revocation procedures.

1. Grounds for Termination and Retroactive Liability

The Bureau received a number of comments regarding the three anticipated grounds for revocation identified in the proposal. The first such ground was failure to substantially comply in good faith with the terms and conditions of the No-Action Letter. A research/advisory
organization urged the Bureau to clarify this standard, particularly regarding its application to technical deficiencies, harmless compliance failures, and the like. The same commenter also requested more clarity on the second ground for revocation identified in the proposal: a determination by the Bureau that the recipient’s offering or providing the described aspects of the product or service is causing material, tangible, harm to consumers. A group of trade associations asserted that the second ground is undefined and subjective, and expressed concern that revocation based on this ground would constitute a finding of fault against the recipient. These commenters recommended that the second ground be replaced with a determination by the Bureau that the product or service did not perform as intended.

The Bureau also received a comment on the third ground for revocation identified in the proposal: a change in the legal context within which the letter was granted as a result of statutory amendments or Supreme Court opinions. Consumer groups asserted that this ground is too narrow because the Supreme Court weighs in on fewer than 100 cases a year – most of which do not involve consumer financial products or services, and lower courts create binding law that should guide the Bureau’s revocation decisions.

More generally, consumer groups found the three anticipated grounds for revocation to be too narrow individually and, taken together, too limiting on the Bureau. These groups contended that the inclusion of these anticipated grounds in the Policy would place a high burden on the Bureau to revoke a No-Action Letter in order to protect consumers.

Finally, comments were submitted on the statement regarding retroactive liability in the proposed Policy. Industry commenters generally supported this statement. Consumer groups urged the Bureau to retain material inaccuracy of facts and representations in an application as an additional ground for retroactive liability. A research/advisory group recommended that the
Bureau list consumer harm caused by the product or service in question as an additional basis for retroactive liability.

Based on these comments and other considerations, the Bureau is revising the discussion of revocation in the final Policy in certain respects (and locating these changes in a new section (section D) concerning Modification and Termination). First, in the proposal, the Bureau stated that it expected revocation of a No-Action Letter to be quite rare. To clarify this point, the Bureau is adding an express statement that the Bureau intends that the recipient of a No-Action Letter should be able to reasonably rely on the No-Action Letter, including especially the no-action statement.

Second, the Bureau agrees that the proposed “material, tangible harm” ground may not be sufficiently clear and objective and accordingly is replacing it with the ground recommended by commenters: failure to perform as anticipated in the application. The Bureau is also adding a footnote explaining that this ground includes the materialization of consumer risks identified in the application, or the materialization of other consumer risks not identified in the application.

Third, as noted, the proposed Policy simply identified three anticipated grounds for revocation, but failed to identify a more general standard or principle underlying them. To clarify this point, the final Policy states that a No-Action Letter will include a statement that the Bureau may terminate the letter if it determines that it is necessary or appropriate to do so to advance the primary purposes of the Policy, such as where the recipient fails to substantially comply in good faith with the terms and conditions of the letter; the described aspects of the product or service do not perform as anticipated in the application; or controlling law changes as a result of a statutory change or a Supreme Court decision that clearly permits or clearly prohibits conduct covered by the letter.
Fourth, as recommended by a group of trade associations, the Bureau is replacing the term “revocation” with the term “termination” because it is concerned that “revocation” misleadingly suggests that any termination would involve a Bureau determination of wrongdoing on the part of the recipient.

Fifth, the Bureau is revising the retroactive liability statement to provide that a failure to substantially comply in good faith with the terms and conditions of the No-Action Letter that causes “Dodd-Frank Act actionable substantial injury,” under 12 U.S.C. 5531(c), would provide the basis for termination and an action to impose retroactive liability.\(^{28}\)

The Bureau declines to adopt the recommendation to identify material inaccuracy of facts and representations in an application as a separate potential basis for a retroactive action because it believes doing so is unnecessary. As noted above, the Bureau expects that a No-Action Letter issued under the final Policy will include a statement that the letter is based on factual representations made in the application. Relatedly, pursuant to section C.4 of the Policy, a No-Action Letter is expected to include a requirement to apprise the Bureau of material (a) changes to information included in the application and (b) information indicating that the described aspects of the product or service are not performing as anticipated in the application. A recipient’s failure to substantially comply in good faith with this requirement would provide a necessary condition for retroactive liability under the Policy.

\(^{28}\) The Bureau expects that termination on this ground will be especially rare. The Bureau believes that bad actors intent on evading the law, and the terms and conditions of a No-Action Letter, are the least likely type of entity to apply for a letter. To the extent such entities express interest in a No-Action Letter or apply for one, they are likely to be weeded out through the Bureau’s anticipated due diligence process and thus not receive a letter in the first place.
The Bureau also declines to provide additional clarity regarding the “good-faith substantial compliance” standard because it believes these terms have a sufficiently established meaning in the law.

2. Termination Procedures

The Bureau received a number of comments about the revocation procedures described in the proposed Policy. Consumer groups raised concerns about the statement that, if the Bureau determines that the recipient failed to substantially comply in good faith with the terms and conditions of the No-Action Letter, it will offer the recipient an opportunity to cure the failure within a reasonable period of time before revoking the No-Action Letter. In their view, companies that act in bad faith or violate the terms of a No-Action Letter should have no second chance at complying with those terms. The Bureau is persuaded by this comment. Although the Bureau anticipates that there will be few, if any, cases in which a recipient fails to comply in good-faith with the terms and conditions of the No-Action Letter, in such cases an opportunity to cure would be inappropriate. However, there may be cases in which an opportunity to cure may be appropriate, such as when the recipient attempts to comply in good faith, but fails to comply with relatively technical terms and conditions. Accordingly, in the final Policy, this statement has been revised to provide that the Bureau intends to offer an opportunity to cure in appropriate circumstances. In addition, the Bureau notes that a request for modification under section D.1 of the final Policy may be more appropriate in some cases than providing an opportunity to cure.

The proposed Policy also stated that, in most cases, the Bureau expects to allow the recipient of a No-Action Letter to wind-down the offering or providing of the described aspects of the product or service during an appropriate period after revocation. Consumer groups contended that the proposed Policy provided the Bureau too little flexibility to revoke a No-
Action Letter *without* a wind-down period. The Bureau disagrees. While the Bureau expects a wind-down period to be afforded in the rare instance that a No-Action Letter is terminated, the proposed Policy does not *guarantee* a wind-down period. Thus, in appropriate cases, the Bureau has the flexibility to terminate without providing a wind-down period.

A group of trade associations noted that the proposed Policy’s provision regarding a wind-down period, which stated that the wind-down period would be an appropriate period after revocation, differed from the parallel provision in the proposed Product Sandbox Policy, which stated that the wind-down period would be six months. A nonpartisan public policy organization likewise identified this discrepancy. This discrepancy was inadvertent. The Bureau believes that a six-month period is equally appropriate for No-Action Letters and has accordingly specified such a six month period in the final Policy.

A research/advisory group urged the Bureau to provide greater detail and a more formalized process respecting how the Bureau will (i) determine a reasonable time frame for a recipient to cure a failure to comply with the terms of a No-Action Letter, (ii) offer an opportunity to respond to a revocation, as well as the period of time provided for a response, and (iii) issue a revocation and whether such a revocation would be made public. The Bureau generally declines to provide additional detail regarding the termination process for the reasons set forth in section II above. However, the Bureau is including in the final Policy a statement that termination information will be published on the Bureau’s website.

3. Modification

As indicated above, the “any time/any reason” statement in the 2016 Policy covered modification of a No-Action Letter as well as revocation. The Bureau proposed omitting this statement, and did not propose alternative language concerning modification. Consumer groups
noted this silence about modification, and suggested that the final Policy should provide for modification. A trade association suggested that modification procedures should be included in the final Policy because some innovative consumer financial products and services depend on machine learning and artificial intelligence and will therefore evolve through continuous “learning” and routine re-evaluation of data and models. The commenter recommended that the Bureau develop a framework that allows for slight and graduated deviations from the product or service described in the application, rather than require the recipient to submit an entirely new application each time there is a change.

The Bureau generally agrees that the Policy should include anticipated procedures for modifying No-Action Letters. Accordingly, the final Policy includes a new section (D.1) that specifies the Bureau’s anticipated procedures regarding requests for modification of a No-Action Letter.

I. Coordination with Other Regulators

Section G of the proposed Policy stated that the Bureau is interested in entering into agreements with State authorities that issue similar forms of no-action relief that would provide for an alternative means of receiving a No-Action Letter from the Bureau. Consumer groups read this statement as implying that a company that obtained a no-action letter from a State would “automatically” receive one from the Bureau. That is not the Bureau’s intent. Rather, the Bureau anticipates that such agreements would include provisions designed to ensure that the Bureau’s issuance of a No-Action Letter in such circumstances would be consistent with its statutory authority and duties, as well as applicable law more generally. The Bureau has no intention of issuing a No-Action Letter though this type of alternative means if it believes that consumers would be injured.
The proposed Policy also would have permitted applicants to request that the Bureau coordinate with other regulators with respect to the application. A group of trade associations commented that the Bureau should not put the onus on the applicant to identify other governmental authorities with which the Bureau may coordinate. Rather, the Bureau should lead the coordination effort among Federal and State regulators, as it is better positioned to do so than the applicant. More broadly, these commenters urged the Bureau to ensure that other regulators understand the Policy and to request that other regulators defer to the Bureau’s No-Action Letters. These comments were seconded by an industry policy organization.

As evidenced by the inclusion in the Policy of a separate section headed Regulatory Coordination, the Bureau very much appreciates the need for coordination with other regulators for purposes of operating the Policy. However, such coordination must be balanced against other considerations. For example, as the Policy notes, if an applicant wishes the Bureau to coordinate with other regulators, the Bureau may need more time to process the application, depending on the degree of coordination requested. Moreover, the degree of coordination needed likely will vary from case to case. The Bureau intends to use its best efforts to find the optimal balance between coordination and other considerations for each No-Action Letter issued under the Policy. For the reasons discussed above, the Bureau is finalizing the section on regulatory coordination largely as proposed.

**J. Confidentiality and Disclosure**

Section E of the 2016 Policy, headed Bureau Disclosure of Entity Data, was quite brief. The primary statement made was that the Bureau’s disclosure of a version or summary of the application and any data received from the applicant in connection with a request for a No-Action Letter is governed by the Bureau’s Rule on Disclosure of Records and Information
(Disclosure Rule). The Bureau subsequently received requests that the Bureau provide a more detailed explanation of its plans relating to disclosure of information received from applicants for and recipients of No-Action Letters. In response, the Bureau proposed expanding this section to include the Bureau’s expectations regarding which types of data and information submitted by applicants and recipients would qualify as business information and confidential supervisory information under the Disclosure Rule.

Industry commenters generally supported the proposed expansion. Consumer groups stated that the revised section is in tension with the requirements of the Freedom of Information Act (FOIA), and questioned how the Bureau can forecast that certain aspects of applications will satisfy applicable FOIA exemption requirements. The Bureau is basing its expectations, in part, on the nature of the information requested from applicants and recipients, and the final Policy notes that information submitted that is not actually responsive to a particular request may not be protected from disclosure.

The Bureau is not finalizing the proposed language regarding confidential supervisory information because it has determined it to be unnecessary. The Bureau believes that potential applicants’ main concern is that trade secrets and proprietary business information submitted to the Bureau by applicants and recipients not be publicly disclosed. This concern can be adequately addressed by the statements in section G of the final Policy that the Bureau anticipates that much of this information will qualify as confidential information, and, more specifically, business information exempt from public disclosure.

In addition, in light of a recent Supreme Court opinion concerning FOIA Exemption 4,29 the Bureau is adding to section G a statement making clear that where information submitted to

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29 See Food Mktg. Inst. v. Argus Leader Media, 139 S.Ct. 2356 (June 24, 2019).
The Bureau is both customarily and actually treated as private by the submitter, the Bureau intends to treat it as confidential in accordance with the Disclosure Rule.

The proposed Policy stated that the Bureau may publish denials of applications for a No-Action Letter on its website, including an explanation of why the application was denied, particularly if it determined that doing so would be in the public interest. The Bureau received divergent comments on this aspect of the proposal. A group of trade associations supported the publication of denials on the ground that such transparency will inform market participants about the types of proposals that are more or less likely to receive approval, and the accompanying reasons for approval or denial will promote agency accountability for the No-Action Letter Policy. In contrast, a trade association stated that it sees no utility in publishing denials. The Bureau is finalizing the statement about denials as proposed. The Bureau notes that the final Policy, as did the proposal, includes two related statements about denials: (1) the Bureau intends to publish denials only after the applicant is given an opportunity to request reconsideration of the denial, and (2) upon request, and if disclosure is not required by 5 U.S.C. 552(a)(2) or other applicable law, the Bureau does not intend to release identifying information from published denials, and intends to redact such information from the denials published on its website.

More generally, the Bureau expects denials to be quite rare, for at least two reasons. First, the Policy strongly encourages potential applicants to contact the Office of Innovation for informal, preliminary discussion of a contemplated proposal prior to submitting a formal application. If it appears during such discussions that an application is not likely to be granted, the potential applicant may choose not to submit an application in the first place. Second, the Policy provides that an application may be withdrawn at any time. If the applicant has reason to believe its application may not be granted, it can withdraw the application prior to a denial.
K. Relation to Other Bureau Innovation Policies

A group of trade associations requested clarity on which of the Bureau’s three proposed innovation policies to apply under in a given case. The same commenter requested that, during the preliminary, informal discussions, which the proposed Policy would have encouraged potential applicants to have with the Bureau, the Bureau discuss with the potential applicant which process will be best suited for the product or service in question. Given the necessarily general nature of the three policies and the necessarily particular nature of a given proposal, the answer to the first request is provided by a positive answer to the second request. That is, the Bureau does intend to discuss with potential applicants during the preliminary, informal discussion phase which of the policies is best suited for the product or service in question.

L. Public Input

In comments on the proposed 2016 Policy, certain consumer group commenters requested that the Bureau modify the proposed 2016 Policy to provide that any No-Action Letter would be subject to a 30-day notice-and-comment period, preferably in advance of No-Action Letter issuance. These commenters asserted that such a process is advisable to balance an applicant’s self-interested submissions by bringing to bear other viewpoints through a public process. The Bureau declined to adopt the comment period suggestion because (i) comment periods are not typical of other agencies’ no-action letter programs; and (ii) the Bureau believed that imposing such a comment period requirement in advance of issuance would unnecessarily discourage No-Action Letter applications, delay the process of granting or denying applications, and thus inhibit the intended benefits of the proposed 2016 Policy.

The comments on the proposed Policy did not include such an express comment for a notice-and-comment process for No-Action Letters issued under the proposed Policy.
consumer groups noted the lack of public input on particular No-Action Letters in the course of expressing other concerns about the proposed Policy. In response to this implied request for public input, the Bureau reiterates the points it made in its response to the express request for public input in the comments on the proposed 2016 Policy.

IV. Regulatory Requirements

The Bureau has concluded that this Policy Guidance constitutes an agency general statement of policy exempt from the notice and comment rulemaking requirements under the Administrative Procedure Act, pursuant to 5 U.S.C. 553(b). The Policy is intended to provide information regarding the Bureau’s plans to exercise its enforcement and supervisory discretion to provide No-Action Letters. The Policy does not impose any legal requirements on external parties, nor does it create or confer any substantive rights on external parties that could be enforceable in any administrative or civil proceeding. Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.30

V. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Bureau plans to submit a report containing this Policy and other required information to each House of Congress and the Comptroller General prior to the Policy’s applicability date. The Office of Information and Regulatory Affairs has designated this Policy as not a “major rule” as defined by 5 U.S.C. 804(2).

VI. Paperwork Reduction Act

30 5 U.S.C. 603(a), 604(a).
The Paperwork Reduction Act of 1995 (PRA)(44 U.S.C 3501 et seq.) requires that federal agencies may not conduct or sponsor, and notwithstanding any other provision of law, a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The information collection requirements as contained in this final Policy and identified below have been approved by OMB and assigned the OMB control number 3170-0059 OMB’s approval will expire on September 30, 2022.

The information collections contained in this Policy include Application for a No Action Letter.

The Bureau’s proposed Policy, published December 13, 2018, 83 FR 64036, sought comment on these information collection requirements. While the Bureau received numerous comments on the Proposed Policy, which are addressed above, the Bureau received no comments specifically regarding the burden estimates for these information collections, utility or appropriateness. Additional details on comments received can be found in the Supporting Statement for the related 30-day notice published as required under the PRA. 31

A complete description of the information collection requirements, including the burden estimate methods, is provided in the information collection request (ICR) that the Bureau submitted to OMB under the requirements of the PRA. The ICR submitted to OMB requesting approval under the PRA for the information collection requirements contained herein is available at OMB’s public-facing docket at www.reginfo.gov.

VII. Final Policy

The text of the final Policy is as follows:

POLICY ON NO-ACTION LETTERS

In section 1021(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Congress established the Bureau of Consumer Financial Protection’s (Bureau’s) statutory purpose as ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.\(^{32}\) Relatedly, the Bureau’s objectives include exercising its authorities under Federal consumer financial law for the purposes of ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation, and that outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens.\(^{33}\)

Congress has given the Bureau a variety of authorities under title X of the Dodd-Frank Act and the enumerated consumer laws\(^{34}\) that it can exercise to promote this purpose and these objectives. These authorities include supervision and enforcement authority, and the authority to issue orders and guidance.\(^{35}\) These authorities provide the basis for the Policy on No-Action Letters (Policy) and the No-Action Letters issued pursuant to the Policy.

The primary purposes of the Policy are to provide a mechanism through which the Bureau may more effectively carry out its statutory purpose and objectives and to facilitate compliance with applicable Federal consumer financial laws. The Bureau believes that the No-Action Letters issued pursuant to the Policy will benefit consumers, entities that offer or provide consumer financial products and services, and the public interest more generally. The Bureau

\(^{32}\) 12 U.S.C. 5511(a).

\(^{33}\) 12 U.S.C. 5511(b)(3), (5).

\(^{34}\) 12 U.S.C. 5481(12).

expects that implementation of the Policy will also inform the exercise of its other authorities, including rulemaking.36

The Policy consists of seven sections:

- Section A describes information to be included in an application for a No-Action Letter.
- Section B describes the factors the Bureau intends to consider in assessing applications for a No-Action Letter.
- Section C describes the standard procedures the Bureau intends to use in issuing No-Action Letters.
- Section D describes the procedures the Bureau intends to use for modification and termination of No-Action Letters.
- Section E describes alternative application, assessment, and issuing procedures that the Bureau may use for certain circumstances.
- Section F describes how the Bureau intends to coordinate with other regulators with respect to No-Action Letters.
- Section G describes the Bureau’s intentions relating to disclosure of information relating to No-Action Letters.

A. Submitting Applications for No-Action Letters

Potential applicants are strongly encouraged to contact the Office of Innovation at officeofinnovation@cfpb.gov for informal, preliminary discussion of a contemplated proposal prior to submitting a formal application.37

Applications for a No-Action Letter should include the following:

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36 The Policy is not intended to, nor should it be construed to: (1) restrict or limit in any way the Bureau’s discretion in exercising its authorities, including the provision of no-action or similar compliance assistance other than pursuant to the Policy; (2) constitute an interpretation of law; or (3) create or confer upon any covered person, consumer, or other external party any substantive or procedural rights, obligations, or defenses that are enforceable in any manner. In contrast, a particular No-Action Letter involves the Bureau’s exercise of its supervision and enforcement discretion in a particular manner.

37 The email subject line should include: “No-Action Letter.”
1. The identity of the applicant;³⁸

2. A description of the consumer financial product or service in question, including (a) how the product or service functions; (b) the terms on which it will be offered; and (c) the manner in which it is offered or provided, including any consumer disclosures;

3. An explanation of the potential consumer benefits associated with the product or service;

4. An explanation of the potential consumer risks associated with the product or service, and how the applicant intends to mitigate such risks;

5. An identification of the statutory and/or regulatory provisions as to which the applicant seeks a No-Action Letter and an explanation of why a No-Action Letter is needed, such as uncertainty or ambiguity regarding the application of the identified statutory and/or regulatory provisions to the product or service in question;³⁹

6. If the applicant wishes to request confidential treatment under the Freedom of Information Act (FOIA),⁴⁰ the Bureau’s rule on Disclosure of Records and Information (Disclosure Rule),⁴¹ or other applicable law, this request and the basis therefor should be included in a separate letter and submitted with the application.⁴²

The applicant should specifically identify the information for which confidential

³⁸ For convenience, the term “applicant” is used in the Policy to refer both to single applicants and joint applicants.
³⁹ Applicants should describe the relevant provisions with as much specificity as practicable, in part to enable the Bureau to respond expeditiously to the application. The Bureau recognizes that in some cases it may be difficult to determine precisely which provisions would apply, in the normal course, to the product or service in question. In other cases, the applicant may lack the legal resources to make a fully precise determination. In such circumstances, the applicant should provide the maximum specification practicable under the circumstances and explain the limits on further specification.
⁴⁰ 5 U.S.C. 552.
⁴¹ 12 CFR part 1070.
⁴² Applicants should describe the relevant legal bases for confidentiality with as much specificity as practicable. The Bureau recognizes that some applicants may lack the legal resources to provide a detailed and complete showing. In such circumstances, the applicant should provide the maximum specification practicable under the circumstances and explain the limits on further specification.
treatment is requested, and may reference the Bureau’s intentions regarding confidentiality under section G of the Policy; and

7. If the applicant wishes the Bureau to coordinate with other regulators, the applicant should identify those regulators, including but not limited to those the applicant has contacted about offering or providing the product or service in question.43

Applications may be submitted via email to: officeofinnovation@cfpb.gov or through other means designated by the Office of Innovation.44 Submitted applications may be withdrawn at any time.

B. Bureau Assessment of Applications for No-Action Letters

In deciding whether to grant an application for a No-Action Letter, the Bureau intends to balance a variety of factors, including an assessment of the quality and persuasiveness of the application, with particular emphasis on the information specified in sections A.3, A.4, and A.5; information about the applicant and the product or service in question derived through Bureau due diligence processes; the extent to which granting the application would be consistent with Bureau enforcement and supervision priorities; an assessment of litigation risk; and available Bureau resources.45

The Bureau intends to grant or deny an application within 60 days of notifying the applicant that the Bureau deems the application to be complete.

C. Bureau Procedures for Issuing No-Action Letters

43 When requested by an applicant, the Bureau intends to coordinate with other Federal and State regulators identified by the applicant, as appropriate. However, depending on the extent of coordination requested, the Bureau may not be able to respond to the application within the time frame specified in section B.

44 Except as provided in section A.1 and A.7, applications should not include any personally identifiable information (PII).

45 The decision whether to grant an application for a No-Action Letter will be within the Bureau’s sole discretion.
When the Bureau decides to grant an application for a No-Action Letter, it intends to provide the recipient(s) with a No-Action Letter signed by the Assistant Director of the Office of Innovation (pursuant to authority delegated by the Director of the Bureau) that sets forth the specific terms and conditions of the No-Action Letter provided. The Bureau expects a No-Action Letter will:

1. Identify the recipient;

2. Specify the subject matter scope of the letter, i.e., the described aspects of the product or service;

3. State that the letter:
   (a) is limited to the recipient, and does not apply to any other persons or entities;
   (b) is limited to the recipient’s offering or providing the described aspects of the product or service, and does not apply to the recipient’s offering or providing different aspects of the product or service;
   (c) is based on the factual representations made in the application, which may be incorporated by reference;
   (d) does not purport to express any legal conclusions regarding the meaning or application of the laws and/or regulations within the scope of the letter; and

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46 If the Bureau decides to deny an application, it intends to inform the applicant of its decision. The Bureau intends to respond to reasonable requests to reconsider its denial of an application within 30 days of such requests. Applicants may also withdraw, modify, and/or re-submit applications at any time.

47 For convenience, the term “recipient” is used in the Policy to refer both to an individual recipient and joint recipients.

48 For convenience, “described aspects of the product or service” is used in the Policy to capture the subject matter scope of a No-Action Letter, including both the particular aspects of the product or service in question, and the particular manner in which it is offered or provided.
(e) does not constitute the Bureau’s endorsement of the product or service that is the subject of the letter, or any other product or service offered or provided by the recipient;

4. Require the recipient to apprise the Bureau of (a) material changes to information included in the application and (b) material information indicating that the described aspects of the product or service are not performing as anticipated in the application;⁴⁹

5. Specify any other limitations or conditions, and the extent to which the Bureau intends to publicly disclose information about the No-Action Letter;⁵⁰

6. State that, unless or until terminated by the Bureau as described in section C.7, the Bureau will not make supervisory findings or bring a supervisory or enforcement action against the recipient predicated on the recipient’s offering or providing the described aspects of the product or service under (a) its authority to prevent unfair, deceptive, or abusive acts or practices;⁵¹ or (b) any other described statutory or regulatory authority within the Bureau’s jurisdiction.⁵²

7. State that, (i) the recipient may reasonably rely on any Bureau commitments made in the letter; (ii) the Bureau may terminate the letter if it determines that it is necessary

⁴⁹ “Not performing as anticipated” includes the materialization of consumer risks identified in the application, and the materialization of other consumer risks not identified in the application.
⁵⁰ If an applicant objects to the disclosure of certain information and the Bureau insists that the information must be publicly disclosed if a No-Action Letter is issued, the applicant may withdraw the application and the Bureau intends to treat all information related to the application as confidential to the full extent permitted by law.
⁵¹ Implicit in the statement under clause (a) is that the Bureau has not determined that the acts or practices in question are unfair, deceptive, or abusive.
⁵² The Bureau maintains the authority to obtain information relating to the consumer financial product or service subject to a No-Action Letter under its applicable supervision, enforcement, and other authorities in the same manner and frequency that it obtains information relating to consumer financial products or services not subject to a No-Action Letter.
or appropriate to do so to advance the primary purposes of the Policy, such as where the recipient fails to substantially comply in good faith with the terms and conditions of the letter; the described aspects of the product or service do not perform as anticipated in the application; or controlling law changes as a result of a statutory change or a Supreme Court decision that clearly permits or clearly prohibits conduct covered by the letter; and (iii) upon termination, the Bureau will not bring an action to impose retroactive liability with respect to conduct covered by the letter, except where a failure to substantially comply in good faith with the terms and conditions of the letter caused Dodd-Frank Act actionable substantial injury.

D. Procedures for Modification and Termination of No-Action Letters

1. Modification Procedures

A recipient of a No-Action Letter may apply for a modification of the letter. The recipient may seek modification to address an anticipated or unanticipated change in circumstances, such as iterations of the underlying product or service or changes to the information included in the No-Action Letter application. Applications for a modification should include the following:

a. Any material changes to the information included in the original application;

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53 Such ground includes the materialization of consumer risks identified in the application, and the materialization of other consumer risks not identified in the application.
54 If a Circuit Court of Appeals decision clearly prohibits conduct covered by the letter, the Bureau may consider modifying the letter so that it is inoperative within that Circuit.
55 “Dodd-Frank Act actionable substantial injury” means substantial injury that is not reasonably avoidable by the consumer, where such substantial injury is not outweighed by countervailing benefits to consumers or to competition. See 12 U.S.C. 5531(c); see also 12 U.S.C. 5536(a)(1)(B). Such a retroactive action would be particularly likely where conduct covered by the letter caused Dodd-Frank Act actionable substantial injury without the Bureau’s knowledge due to the recipient’s failure to substantially comply in good faith with the requirement under section C.4 to apprise the Bureau of (a) material changes to information included in the application and (b) material information indicating that the described aspects of the product or service are not performing as anticipated in the application.
b. The specific requested modification(s) to the No-Action Letter;

c. The ground(s) for modifying the No-Action Letter; and

d. Any other information the recipient wishes to provide in support of the modification application.

In deciding whether to grant an application for modification of a No-Action Letter, the Bureau intends to balance a variety of factors, including the quality and persuasiveness of the application. The Bureau expects to grant or deny such applications within 30 days of notifying the applicant that the Bureau has deemed the application to be complete. When the Bureau grants an application for modification, it intends to provide the recipient with a modified No-Action Letter in accordance with the procedures specified in section C.

2. Termination Procedures

The Bureau intends that the recipient of a No-Action Letter should be able to reasonably rely on any Bureau commitments made in the letter. The Bureau expects termination of a No-Action Letter to be quite rare based, in part, on its knowledge of no-action letter programs operated by other Federal agencies. Such agencies appear to terminate no-action letters very infrequently.56 The Bureau expects that its practice with respect to termination will be in line with the practices of these agencies.

The Bureau expects a No-Action Letter will state that, (i) the recipient may reasonably rely on any Bureau commitments made in the letter; (ii) the Bureau may terminate the letter if it

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56 The SEC’s website indicates that SEC staff has issued over 2,500 no-action letters since 1971. See https://www.sec.gov/corpfin/corpfin-no-action-letters#chron; https://www.sec.gov/divisions/investment/im-noaction.shtml; https://www.sec.gov/divisions/marketreg/mr-noaction.shtml. It appears that less than 1% of these letters have been terminated, withdrawn, or revoked. The CFTC’s website indicates that CFTC staff has issued over 1,500 no-action letters since 1975. See https://www.cftc.gov/LawRegulation/CFTCStaffLetters/letters.htm; https://www.cftc.gov/LawRegulation/CFTCStaffLetters/archive.htm. It appears that less than 1% of these letters have been terminated, withdrawn, or revoked.
determines that it is necessary or appropriate to do so to advance the primary purposes of the Policy, such as where the recipient fails to substantially comply in good faith with the terms and conditions of the letter; the described aspects of the product or service do not perform as anticipated in the application;\(^57\) or controlling law changes as a result of a statutory change or a Supreme Court decision that clearly permits or clearly prohibits conduct covered by the letter;\(^58\) and (iii) upon termination, the Bureau will not bring an action to impose retroactive liability with respect to conduct covered by the letter, except where a failure to substantially comply in good faith with the terms and conditions of the letter caused Dodd-Frank Act actionable substantial injury.\(^59\)

The Bureau anticipates that such retroactive actions will be exceedingly rare based, in part, on its knowledge of the practices of other Federal agencies that operate no-action letters programs. It appears that, in the very small percentage of cases in which such agencies have terminated no-action letters, they have not initiated actions to impose retroactive liability.\(^60\) The Bureau expects its practice regarding such retroactive actions to be in line with the practices of these agencies.

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\(^57\) Such ground includes the materialization of consumer risks identified in the application, or the materialization of other consumer risks not identified in the application.

\(^58\) If a Circuit Court of Appeals decision clearly prohibits conduct covered by the letter, the Bureau may consider modifying the letter so that it is inoperative within that Circuit.

\(^59\) “Dodd-Frank Act actionable substantial injury” means substantial injury that is not reasonably avoidable by the consumer, where such substantial injury is not outweighed by countervailing benefits to consumers or to competition. See 12 U.S.C. 5531(c); see also 12 U.S.C. 5536(a)(1)(B). Such a retroactive action would be particularly likely where conduct covered by the letter caused Dodd-Frank Act actionable substantial injury without the Bureau’s knowledge due to the recipient’s failure to substantially comply in good faith with the requirement under section C.4 to apprise the Bureau of (a) material changes to information included in the application and (b) material information indicating that the described aspects of the product or service are not performing as anticipated in the application.

In accordance with principles of fair notice, before terminating a No-Action Letter, the
Bureau intends to notify the recipient of the possible grounds for termination, and permit an
opportunity to respond within a reasonable period of time. In appropriate cases, the Bureau
intends to offer the recipient an opportunity to modify its conduct to avoid termination. The
Bureau intends to allow the recipient to wind-down the offering or providing of the described
aspects of the product or service during a period of six months before termination, unless the
described aspects of the product or service are causing Dodd-Frank Act actionable substantial
injury to consumers, and a wind-down period would permit such injury to continue. If the
Bureau terminates a No-Action Letter, it intends to do so in writing and specify the reasons for
its decision. The Bureau intends to publish termination decisions on its website.

E. Alternative Application, Assessment, and Issuing Procedures

The Bureau recognizes that the process described in sections A, B, and C (Standard
Process) may not be appropriate in certain circumstances. These include applications by service
providers that develop products or services for use by covered persons that offer or provide
consumer financial products or services; applications facilitated by trade associations, consumer
groups, or other third parties that are not themselves covered persons that offer or provide
consumer financial products or services; and applications involving a consumer financial product
or service that is substantially similar to one that is the subject of an existing No-Action Letter.

1. Service Provider and Facilitator Applications

Service providers that develop products or services for use by covered persons that offer
or provide consumer financial products or services may use the Standard Process if they have
secured an applicant that intends to use the service provider’s product or service in connection
with offering or providing a consumer financial product or service. Similarly, No-Action Letter
applications facilitated by trade associations, consumer groups, or other third parties that are not covered persons that offer or provide consumer financial products or services may use the Standard Process if the third party has secured an applicant that intends to offer or provide the consumer financial product or service in question.

a. No-Action Letter Template. As an alternative to using the Standard Process, a service provider or facilitator may apply for a No-Action Letter Template. A No-Action Letter Template is (i) non-operative, i.e., it itself is not a No-Action Letter, and (ii) non-binding on the Bureau.61

i. Application Information. Such applications should include the information specified in section A, as applicable and with appropriate adjustments given that the applicant itself will not be offering or providing the consumer financial product or service in question. In particular, a service provider applicant should describe how it anticipates its product or service will be used by a provider of consumer financial products or services.

ii. Assessment. In deciding whether to grant an application for a No-Action Letter Template, the Bureau intends to balance a variety of factors, as described in section B, with appropriate adjustments given the alternative nature of the application. The Bureau intends to grant or deny an application within 60 days of notifying the applicant that the Bureau has deemed the application to be complete.

iii. Issuance. The Bureau expects that a No-Action Letter Template will include many of the elements specified in section C, with appropriate adjustments based, in part, on the non-operative, non-binding nature of a No-Action Letter Template. In addition, a No-Action Letter

61 In particular, the Bureau may modify a No-Action Letter Template in light of the additional information provided in an application for a No-Action Letter under section E.1.b of the final Policy based on a No-Action Letter Template.
b. No-Action Letter Based on a No-Action Letter Template. A covered person that intends to offer or provide a consumer financial product or service covered by a No-Action Letter Template (whether using a service provider product or service, or otherwise) may apply for a No-Action Letter based on the No-Action Letter Template.

   i. Application Information. Such applications should include the information specified in section A, with appropriate adjustments. In particular, the applicant should include (i) a statement that the application is based on a No-Action Letter Template and an identification of the No-Action Letter Template on which it is based; and (ii) a statement describing how the applicant’s offering or providing its product or service is consistent with the framework described in the No-Action Letter Template. The application may cross reference any relevant information contained in the application for the No-Action Letter Template or the No-Action Letter Template itself.

   ii. Assessment. In deciding whether to grant an application for a No-Action Letter under section E.1.b, the Bureau intends to balance a variety of factors, as described in section B, with appropriate adjustments. In particular, the Bureau intends to include in its assessment the additional factor of the degree to which the applicant’s offering or providing its product or service is consistent with the framework described in the No-Action Letter Template. The Bureau anticipates being able to process such applications in a timeframe shorter than that specified in section B given that the underlying No-Action Letter Template has already been granted.
iii. Issuance. When the Bureau grants an application for a No-Action Letter under section E.1.b, it intends to provide the recipient with a No-Action Letter in accordance with the procedures specified in section C.

2. Applications for Substantially Similar Products or Services

If an applicant offers or provides a consumer financial product or service that it believes is substantially similar to the consumer financial product or service that is the subject of an existing No-Action Letter, it may apply for a No-Action Letter based on the existing No-Action Letter.

a. Application Information. Such applications should include the information specified in section A, with appropriate adjustments. In particular, the applicant should include (i) a statement that the application is based on an existing No-Action Letter and an identification of the No-Action Letter on which it is based; and (ii) a statement describing how the consumer financial product or service in question and the manner in which it is offered or provided is substantially similar to the consumer financial product or service that is the subject of the existing No-Action Letter and the manner in which it is offered or provided. The application may cross reference any relevant information contained in the application for the existing No-Action Letter or the existing No-Action Letter itself.

b. Assessment. In deciding whether to grant an application for such a No-Action Letter, the Bureau intends to balance a variety of factors, as described in section B, with appropriate adjustments. In particular, the Bureau intends to include in its assessment the additional factor of the degree to which the consumer financial product or service in question, and the manner in which it is offered or provided, is substantially similar to these aspects of the existing No-Action Letter. The Bureau anticipates being able to process such applications in a timeframe shorter
than that specified in section B given that the underlying No-Action Letter has already been granted.

c. Issuance. When the Bureau grants an application for such a No-Action Letter, it intends to provide the recipient with a No-Action Letter in accordance with the procedures specified in section C.  

F. Regulatory Coordination

Section 1015 of the Dodd-Frank Act instructs the Bureau to coordinate with Federal agencies and State regulators, as appropriate, to promote consistent regulatory treatment of consumer financial and investment products and services. Similarly, section 1042(c) of the Dodd-Frank Act instructs the Bureau to provide guidance in order to further coordinate actions with the State attorneys general and other regulators. Such coordination includes coordinating in circumstances where other regulators have chosen to limit their enforcement or other regulatory authority. The Bureau is interested in entering into agreements with State authorities that issue similar forms of no-action compliance assistance that would provide for an alternative means of receiving a No-Action Letter from the Bureau, i.e., alternative to the process described in sections A through D.

Furthermore, the Bureau is interested in coordinating with other regulators more generally. To this end, the Bureau intends to enter into agreements whenever practicable to coordinate No-Action Letters issued under the Policy with similar forms of compliance assistance offered by State, Federal, or international regulators.

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62 In circumstances where neither the Standard Process nor the alternative procedures described in section E (Alternative Process) are appropriate, the Bureau may utilize other procedures that diverge in one or more respects from the Standard Process or the Alternative Process, consistent with the purposes of the Policy.
64 12 U.S.C. 5552(c).
G. Bureau Disclosure of Information Regarding No-Action Letters

Public disclosure of information regarding No-Action Letters is governed by applicable law, including the Dodd-Frank Act, the FOIA, and the Disclosure Rule. The Disclosure Rule generally prohibits the Bureau from disclosing confidential information, and defines confidential information to include information that may be exempt from disclosure under the FOIA – including FOIA Exemption 4 regarding trade secrets and confidential commercial or financial information that is privileged or confidential. Relatedly, the Disclosure Rule defines business information as commercial or financial information obtained by the Bureau from a submitter that may be protected from disclosure under FOIA Exemption 4, and generally provides that such business information shall not be disclosed pursuant to a FOIA request except in accordance with section 1070.20 of the rule.

Consistent with applicable law, the Bureau intends to publish No-Action Letters and No-Action Letter Templates on its website, as well as a version or summary of the application. The Bureau also may publish denials of applications on its website, including an explanation of why the application was denied, particularly if it determines that doing so would be in the public interest.

Where information submitted to the Bureau is both customarily and actually treated as private by the submitter, the Bureau intends to treat it as confidential in accordance with the

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65 See, e.g., 12 U.S.C. 5512(c)(8).
66 12 CFR 1070.41.
67 12 CFR 1070.2(f).
69 12 CFR 1070.20(a), (b).
70 The Bureau intends to publish denials only after the applicant is given an opportunity to request reconsideration of the denial. Upon request, and if disclosure is not required by 5 U.S.C. 552(a)(2) or other applicable law, the Bureau does not intend to release identifying information from published denials, and to instead redact such information from denials published on its website.
Disclosure Rule. The Bureau anticipates that much of the information submitted by applicants in their applications, and by recipients during the pendency of the No-Action Letter, will qualify as confidential information under the Disclosure Rule. In particular, the Bureau expects that information submitted that is responsive to sections A.2, A.3, A.4, C.4, and parallel information under sections E.1.a and E.2.a, will qualify as business information under the Disclosure Rule. Other information submitted by applicants or recipients may also qualify as confidential information.

Disclosure of information or data provided to the Bureau under the Policy to other Federal and State agencies is governed by applicable law, including the Dodd-Frank Act and the Disclosure Rule.

To the extent the Bureau wishes to publicly disclose non-confidential information regarding a No-Action Letter, the Bureau intends to include the terms of such disclosure in the letter. The Bureau intends to draft the No-Action Letter in a manner such that confidential information is not disclosed. Consistent with applicable law and its own rules, the Bureau does not intend to publicly disclose any information that would conflict with consumers’ privacy interests.

71 See Food Mktg. Inst. v. Argus Leader Media, 139 S.Ct. 2356 (June 24, 2019).
72 To the extent associated communications include the same information, that information would have the same status. But other information in associated communications may be subject to disclosure.
73 To the extent an applicant or recipient submits information in connection with any of the identified sections that is not actually responsive to these sections, such information may be subject to disclosure.
74 See, e.g., 12 U.S.C. 5512(c)(8).
Dated: September 6, 2019.

Kathleen L. Kraninger

Director, Bureau of Consumer Financial Protection.