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CFPB's NEW NO ACTION LETTER POLICY: HIGH RISK, NO REWARD

The Consumer Financial Protection Bureau (CFPB) has issued its final policy regarding "no action letters" (NALs). The CFPB published its proposed policy in October 2014 (see our ALERT dated October 23, 2014). Under the policy, the CFPB will, in its discretion, issue NALs to specific requesters in instances involving "innovative financial products or services that promise substantial consumer benefit" where there is substantial regulatory uncertainty.

A NAL would advise its recipient that subject to its stated limitations, the CFPB has no present intention to recommend initiation of an enforcement or supervisory action against the requester with respect to a specific matter.

The proposed policy was met with criticism from industry groups, yet the final policy is very similar to the proposed policy. The proposed changes the CFPB declined to make include the following:

- The CFPB declined to make the NAL process binding on other agencies/regulators;
- The CFPB declined to include any specific timetable for the issuance of NALs;
- The CFPB declined to alter the information requirements of the application process to make the application process less burdensome;
- The CFPB declined to expand the NAL process beyond instances of emerging products where there is substantial regulatory uncertainty; and
- The CFPB declined to require staff to elaborate on specific reasons when denying an application for a NAL, rather, staff will not be required to give any specific reasons for denying a NAL request.

Regarding publication issues, denials of requests for NALs generally would not be published, but the CFPB does not categorically rule out the possibility. Additionally, issued NALs would generally be publically disclosed. The CFPB did state that they could confer with requesters regarding concerns of the public release of particular information, but an innovative and competitive advantage probably would become public with the NAL disclosure.

The CFPB does not expect the issuance of NALs to be common

and estimates that it will on average receive one to three actionable applications per year. The CFPB's statement on the likely rarity of approval should dissuade use of the NAL process.

We don't see any upside to using this NAL process. NALs are revocable and not binding on any party, including the CFPB, state attorneys general or other regulators, and thus expose the requesting parties to excessive risk while not providing much, if any, benefit. The NAL process can educate regulators and draw regulatory attention to nascent technology and creative thinking, stopping innovation before it has had an opportunity to fully develop. The requester will be required to reveal an innovative idea to public view, thus losing a competitive advantage. The process will probably take months to get a response, thus losing the competitive head start. The CFPB will be critical and ask follow-up questions, thus costing the requester legal fees and effort. The CFPB will be much more inclined to disapprove rather than approve an innovative idea, thus following in the shoes of all regulators (see our ALERT, "LET'S NOT CALL THE REGULATOR" dated September 16, 2015). If the CFPB disapproves an idea, it is killed. But if the requester gets a legal favorable opinion from its own attorneys or a reasonable risk analysis, the requester can choose to proceed with testing the idea and probably get months or years of usage before the courts and regulators catch up with the new development, if they ever do. We believe this NAL process is actually designed to discourage innovative programs and keep the CFPB from "falling behind" the ever evolving development of financial services products. □

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