February 11, 2019

Comment Intake
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Policy on No-Action Letters and the CFPB Sandbox
Docket No. [CFPB–2018–0042]

To Whom It May Concern:

The American Financial Services Association (AFSA)[1] welcomes this opportunity to comment on the Consumer Financial Protection Bureau's (CFPB) proposed No-Action Letter Policy and CFPB Product Sandbox.

AFSA supports the revision of the No-Action Letter Policy and the creation of the CFPB Product Sandbox. Below are our comments on each.

I. POLICY ON NO-ACTION LETTER

A. Description of No-Action Letters

As the Bureau explains, only one No-Action Letter was issued under the previous 2016 policy. We agree with the Bureau that this strongly suggests that both the process required to obtain a No-Action Letter and the relief available under the 2016 policy have not provided financial institutions with sufficient incentives to seek No-Action Letters from the CFPB.

Of particular importance in ensuring that the process and the No-Action Letter are meaningful is the Bureau's intention for the letter to contain a statement that, subject to good faith, and provided the financial institution substantially complies with the terms and conditions of the letter, the Bureau will not make supervisory findings or bring a supervisory or enforcement action against the financial institution for engaging in the activities described in the letter.

Also important is the Bureau's invitation to trade associations, service providers, and other third-parties to submit applications. Allowing trade associations to submit applications on behalf of their members could greatly increase the use of No-Action Letters.

Furthermore, we fully support the Bureau's intention of including No-Action Letters that are rooted in "unfair, deceptive, or abusive acts or practices" (UDAAP) principles within the purview of the program. The fact that the majority of enforcement actions brought under UDAAP authority makes clear that entities are in need of guidance in a gray area that is principle, not rule-based. Including UDAAP within the purview of the No-Action Letter

[1] Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

Policy is consistent with the position that several interested parties have taken during various comment periods, including when the No-Action Letter Policy was first launched in 2016, and then again in their responses to the Bureau's Request for Information Regarding Bureau Guidance and Implementation Support.

As a part of the No-Action Letter Policy, the CFPB includes proper checks and balances. Specifically, the Bureau reserves the right to obtain information regarding the consumer financial product or service that is the subject of a No-Action Letter under its supervision and enforcement authorities. The CFPB also reserves the right to revoke a No-Action Letter under certain circumstances. Doing so will protect consumers by ensuring that entities continue to operate within the terms of the letter. AFSA supports these important reservations.

Overall, AFSA believes that the safe harbor from enforcement provided by the No-Action Letter Policy will result in more entities coming forward. As a result of the revisions to the policy, financial institutions will be free, subject to the terms and conditions in the letter, to innovate and introduce new products and services to the marketplace. Consumers will also benefit, as more products and services in the marketplace lead to increased competition and more choice.

B. Submitting Applications for No-Action Letters

We appreciate the Bureau's interest in streamlining the process of applying for a No-Action Letter by eliminating several redundant or unduly burdensome elements, such as a commitment to data-sharing. The revised application proposed by the Bureau will likely encourage more companies to come forward with innovative ideas. Reducing the application burden should further the Bureau's goal of improve existing disclosures because a less burdensome process means that financial institutions will be more likely to bring revised disclosure ideas forward.

As it should, the revised application emphasizes on the potential benefits of the product or service in question for consumers, the extent to which the applicant identifies and controls for potential risks to consumers, and the extent to which no-action relief is needed. The emphasis on the benefits to consumers is consistent with the Bureau's purpose of ensuring that all consumers have access to fair, transparent, and competitive markets for consumer financial products and services.[2]

We note that there are provisions in the proposed application that will enable businesses to engage in innovative development, but at the same time protect consumers. One required element of the application is a description 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. Proactive identification of risks and early identification of mitigants to those risks will safeguard against potential consumer harm, resulting in more consumer-friendly products being introduced into the market.

Another required element of the application is a description of the consumer financial product or service in question, including: (a) how the product or service functions and the terms on which it will be offered; and (b) the manner in which it is offered or provided, including any consumer disclosures. Such a robust description of the product or service being offered will force businesses to be thoughtful about their offering, leading to heightened due diligence and a more "fully-baked" offering will safeguard consumers against "sloppy" offerings. This in turn will lead to a more stable, viable product.

[2] *See* 12 U.S.C. § 5511 (Dodd-Frank Act Title X § 1021).

C. Assessment of Application for No-Action Letter

We support the Bureau's intention to focus on the quality and persuasiveness of the application in deciding whether to grant a No-Action Letter. Of particular interest to the Bureau are the following aspects of the application: (a) explanation of potential consumer benefits; (b) explanation of potential consumer risk and how the applicant intends to mitigate the risk; and (c) identification of the statutory/regulatory provisions that the applicant seeks no-action relief from, along with the potential uncertainty, ambiguity or barrier that such relief would address.

It is clear that, in line with its statutory mission, the Bureau is focused on consumer benefits. The Bureau's mission is to ensure that consumers have access to fair, transparent, and competitive markets for consumer financial products and services[3] and to safeguard consumers from harm. The attention in this assessment section to risk and mitigation will help to ensure that only products and services that have been fully-vetted will make it to the marketplace.

D. Procedures for Issuing No-Action Letters

AFSA appreciates the clarity that the CFPB proposes to offer in No-Action Letters. Clear procedures will lead to a consistent understanding of the terms of the letter and provide unambiguous requirements, thus eliminating any possibility of inadvertently conducting business outside of the terms of the waiver.

Most significantly in this section, we reiterate our support of, and the importance of, a statement of safe harbor in the No-Action Letter.

We also appreciate the Bureau's inclusion of a statement that unless the No Action Letter is revoked for failure to substantially comply with the terms and conditions of the letter, the Bureau would not pursue an action to impose retroactive liability. This statement will eliminate fear of action once the trial period has ended, providing even more incentive for entities to use the program. It will also incentivize financial institutions to operate in accordance with the terms and conditions. Moreover, such a guarantee will protect consumers because, if a financial institution fails to substantially comply with the terms and conditions of the letter, the institution could be subject to business practice changes, restitution and penalties.

In addition, the requirement that the recipient inform the CFPB of material changes to information included in the application is positive because it will provide for ongoing review of the offering by both the financial institution and Bureau. This provides a mechanism to modify the offering on an on-going basis based on near real-time performance data.

One important, but perhaps small suggestion—the CFPB should consider defining or otherwise benchmarking the meaning of "material, adverse, impact on consumer understanding" relative to evaluating an entity's trial disclosure when operating pursuant to a waiver.

[3] *See* 12 U.S.C. § 5511 (Dodd-Frank Act Title X § 1021).

E. Regulatory Coordination

AFSA commends the Bureau's willingness to deem a financial institution's trial disclosure, to the extent that it is used in accordance with the terms and conditions permitted by the Bureau, to be in compliance with, or exempted from, applicable federal disclosure requirements.

However, we emphasize that coordination with other federal and state regulatory authorities is paramount to ensuring a successful trial disclosure program. In the absence of assurances from other regulatory authorities that the financial institutions will be immune from liability, these institutions will be discouraged from participating in the program because of the risk of enforcement from other regulators. We appreciate the Bureau's willingness to coordinate with other federal and state government officials identified in an application whose requirements may also be implicated by a proposed disclosure.

In addition to coordination with other regulators, intervention in the event of private litigation is paramount to ensure a successful trial disclosure program. Intervention can come in amicus form to state that the Bureau, in interpreting a statute that it is charged with enforcing, has found the disclosure in question to be in compliance with that law.

F. Disclosure of Information Regarding No-Action Letters

We applaud the CFPB's understanding that much of the information submitted by financial institutions in their No-Action Letter applications and subsequent communications will qualify as confidential information, which may include confidential supervisory information and/or business information.

While we appreciate the transparency that the CFPB introduces by publishing No-Action Letters on its website, we support the Bureau's acknowledgment that reasonably limiting public disclosure of confidential information is critical in drafting a meaningful No-Action Letter process. For the benefit of other financial institutions and to further innovation from different companies, the CFPB should make the waiver and attendant information public only after the applying institution has introduced its product or feature to the market. Doing so will encourage other financial institutions to use the No-Action Letter process without risk of proprietary information being shared.

II. CFPB PRODUCT SANDBOX

AFSA strongly supports the Bureau's willingness to collaborate with financial institutions for purposes of encouraging innovation.

In large part, the CFPB Product Sandbox provides similar relief as does the proposed No-Action Letter policy. Both the CFPB Product Sandbox and the No-Action Letter Policy include: (a) a safe harbor from enforcement, provided the financial institution acts in good faith and substantially complies with the terms and conditions of the No-Action Letter; (b) well-thought application requirements that include risks and mitigants; (c) an allowance for trade associations and other third-parties to apply; (d) a commitment to review applications for their quality and persuasiveness focusing on consumers; (e) the clarity and unambiguity that the Bureau will provide in letters approving financial institutions for participation; and (f) the Bureau's willingness to understand that some information provided may be confidential and proprietary, and its openness to treating it as such. However, there

are some aspects of the CFPB Product Sandbox that differ from the No-Action Letter Policy. Below, we focus on those different aspects.

The CFPB proposes that an applicant admitted to the sandbox program will receive two other forms of relief, in addition to receiving no-action relief that is substantially the same as that provided in an No-Action Letter (*i.e.*, a statement that the Bureau will not make adverse supervisory findings or bring a supervisory or enforcement action under its UDAAP authority or otherwise):

- Approvals, as applicable, under the provisions of the Truth in Lending Act (TILA), Equal Credit Opportunity Act (ECOA), and Electronic Funds Transition Act (EFTA) that provide a safe harbor from liability in federal or state enforcement actions and private lawsuits for actions taken or omitted in good faith in conformity with Bureau approvals; and

- Exemptions granted by Bureau order (a) from statutory or regulatory provisions as to which the Bureau has statutory authority to issue exemptions by order (such as provisions of the ECOA, Home Ownership and Equal Protection Act or HOEPA, and Federal Deposit Insurance Act or FDIA), or (b) from regulatory provisions as to which the Bureau has general authority to issue exemptions.

We support these exemptions. Such exemptions would provide immunity from federal or state enforcement actions and private lawsuits. Immunity from federal, state and private enforcement is critical in fostering trust among participating entities and the Bureau and is further critical in encouraging entities to participate. Without the exemptions, it is highly unlikely that any financial institutions would even apply.

In addition to the exemptions, the CFPB Product Sandbox would include admission for a two-year term and allow participants to apply for extensions. AFSA supports both the timeframe and the opportunity for an extension. Adequate time to innovate within the CFPB Product Sandbox in close partnership with the Bureau will enable entities to truly test their new products and services and gather sufficient data to determine whether the product is viable and beneficial to consumers.

During the time that an financial institution is using the CFPB Product Sandbox, the participant must report information about how the offering or providing of the product or service affects, "complaint patterns, default rates, or similar metrics that will enable the Bureau to determine if doing so is causing material, tangible harm to consumers." We respectfully request that the Bureau consider further defining, "material, tangible harm."

We support the collection of the data because such collection will ensure that only products and services that are beneficial to consumers and do not result in material, tangible harm to consumers are innovated through the Sandbox. In addition to collecting data, a participant must commit to compensate consumers "for material, quantifiable, economic harm" caused by the participant's offering or providing the product or service within the sandbox program and must commit to sharing data with the Bureau regarding such product or service. We support the Bureau's intention to require restitution upon a finding of material, quantifiable, financial harm, but ask that the CFPB consider adopting a threshold for when remediation is required and defining the scope of data that might be subject to sharing.

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In conclusion, AFSA thanks the CFPB for revising the No-Action Letter Policy and introducing the CFPB Product Sandbox. We look forward to working with the Bureau on the proposals. If you have any questions, please do not hesitate to contact me by phone at 202-776-7300 or e-mail at cwinslow@afsamail.org.

Sincerely,

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