

CONSUMER FINANCIAL PROTECTION BUREAU

Policy Statement on No-Action Letters

AGENCY: Consumer Financial Protection Bureau.

ACTION: Policy statement.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) is issuing this policy statement on No-Action Letters (Policy), which is intended to further objectives under Section 1021 of the Consumer Financial Protection Act.

DATES: This policy statement is applicable on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: George Karithanom, Regulatory Implementation & Guidance Program Analyst, Office of Regulations, at 202-435-7700 or at: <https://reginquiries.consumerfinance.gov/>. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION:

I. Overview

The CFPB is accepting applications for No-Action Letters (“NALs”), as set forth in the policy statement below and subject to Conditions to Promote Innovation, Competition, Ethics and Transparency (“the Conditions”). The Conditions would be incorporated into individual NALs and serve several purposes.

To summarize the Conditions, they are first designed to ensure that NALs promote innovations that solve unmet needs in markets for consumer financial products and services. Minor adjustments to existing products, or products that are designed to take advantage of gaps in laws rather than bringing new offerings to market, do not confer significant enough benefit on

consumers to warrant the expenditure of government resources necessary to issue and monitor a NAL. Granting Letters in such circumstances misallocates government resources towards advantaging slight variations of what is essentially the same product that is currently available in the market. The Conditions therefore aim to enable innovations that solve real problems that consumers face in financial markets.

Second, the Conditions ensure that NALs do not compromise the competitive process. Innovation is maximized by competitive, open markets and robust rivalry among firms. In seeking to promote innovation, the NAL program must not tilt the competitive playing field by picking winners and losers in markets, or appearing to do so. For this reason, the CFPB will affirmatively reach out to program applicants' competitors and invite them to apply for the same NAL topic. The CFPB will not approve a NAL on a topic for a single firm, to avoid granting a first-mover advantage in the market. The Conditions also prevent firms from advertising the receipt of a NAL, which can create the false appearance of endorsement or favored regulatory status and can distort competition.

Third, the Conditions promote transparency and rigorous ethical standards. The CFPB will post applications for NALs to an open docket on the regulations.gov website and will accept comment for 60 days. To avoid ethical conflicts, the CFPB will not consider applications from former CFPB attorneys representing firms as outside counsel. The CFPB is concerned that former CFPB employees will use their relationships to obtain special treatment for specific firms in procuring NALs, or that there is a risk of the appearance of special treatment by the public or specific firms seeking outside counsel. Because applicants' integrity is also critical for the programs' success, NALs will not be granted to firms that have been prosecuted for prior violations of federal consumer financial law in the last five years. And to prevent bait-and-switch negotiation tactics experience under the prior NAL policy, where firms negotiated terms of NALs with the

CFPB and thereafter materially change the underlying products or services, NALs will automatically be rescinded when recipients change their product or service so that it no longer fits the description provided in the application and described in the NAL, unless the NAL recipient applies for and receives an amended NAL. These safeguards ensure that the programs are facilitating stakeholder participation, government accountability, and integrity on the part of NAL applicants.¹

II. Background

On September 10, 2019, the CFPB issued the “Policy on No-Action Letters.”² The Policy on No-Action Letters set forth how companies should submit No-Action Letter applications and how the CFPB would assess and issue No-Action Letters. Under the policy, the CFPB would grant No-Action Letters to individual companies, advising recipients that the agency would not make supervisory findings or bring a supervisory or enforcement action against the company with respect to certain matters.

After conducting a review in 2022, the CFPB determined that the Policies failed to advance their stated objective of facilitating consumer-beneficial innovation.³ The CFPB also determined that the existing Policies failed to meet appropriate standards for transparency and stakeholder participation. The CFPB rescinded the policies and the CFPB continued to develop new protocols to ensure that such tools were consistent with the objectives of the Consumer Financial Protection Act and did not raise ethical concerns.

¹ See, e.g., Letter to Dave Girouard, CEO, Upstart Network, Inc. (Feb. 13, 2023) (expressing “concern about a recent report that found lenders’ use of educational data to make credit determinations could have a disparate impact on borrowers of color”), <https://www.brown.senate.gov/imo/media/doc/2020-02-13%20Senate%20letter%20to%20Upstart.pdf>; Fair Lending Monitorship of Upstart Network’s Lending Model (Mar. 27, 2023) (identifying “approval disparities for Black applicants”), <https://www.relmaw.com/assets/htmldocuments/Upstart%20Final%20Report.pdf>.

² 84 FR 48229 (Sept. 13, 2019).

³ Statement on Competition and Innovation, 87 Fed. Reg. 58439 (Sept. 27, 2022).

As noted above, the CFPB experienced a number of potential abuses and challenges with the NAL policy that led to the decision to allow the prior policy to expire. For example, the CFPB granted Upstart Network a NAL in 2017,⁴ committing to not enforce the Equal Credit Opportunity Act (ECOA) against the company for their use of “artificial intelligence” in credit underwriting on behalf of bank partners. Despite the fact that other companies had similar models, Upstart became a leader in this market after receiving the NAL, and outside observers appear to have interpreted the NAL as an endorsement that Upstart’s model did not violate the ECOA.⁵ The CFPB extended that NAL in November 2020.⁶ Immediately after the extension, Upstart closed its initial public offering and began trading its stock on the Nasdaq Global Select Market on December 16, 2020,⁷ with an initial market capitalization of \$1.88 billion.⁸ In 2021, Upstart originated 1.3 million loans, totaling \$11.8 billion, on behalf of bank partners.

Around the same time as the IPO, several nonprofit organizations raised concerns about Upstart’s use of educational criteria (e.g. educational history, which university the applicant attended) in its lending model. Upstart agreed to appoint an independent monitor to determine whether Upstart’s model complied with the ECOA.⁹ Ultimately, the independent monitor ended the relationship after coming to an impasse with Upstart about how to assess compliance with ECOA.¹⁰

⁴ *Id.*

⁵ MARCO DI MAGGIO, DIMUTHU RATNADIWAKARA, & DON CARMICHAEL, INVISIBLE PRIMES: FINTECH LENDING WITH ALTERNATIVE DATA, 3 (HARVARD BUSINESS SCHOOL, 2021), https://www.hbs.edu/ris/Publication%20Files/22-024_80dc9115-69cc-4564-99c6-3a937f275d31.pdf.

⁶ <https://www.consumerfinance.gov/rules-policy/competition-innovation/granted-applications/>.

⁷ <https://ir.upstart.com/news-releases/news-release-details/upstart-announces-closing-initial-public-offering-and-full>.

⁸ <https://www.reuters.com/technology/lending-platform-upstarts-shares-jump-nasdaq-debut-2020-12-16/>.

⁹ Relman Colfax PLLC, Fair Lending Monitorship of Upstart Network’s Lending Model: Initial Report of the Independent Monitor, April 14, 2021,

https://www.relmanlaw.com/media/cases/1088_Upstart%20Initial%20Report%20-%20Final.pdf.

¹⁰ Relman Colfax PLLC, Fair Lending Monitorship of Upstart Network’s Lending Model: Fourth and Final Report of the Independent Monitor, March 27, 2024, available at

<https://www.relmanlaw.com/assets/html/documents/Upstart%20Final%20Report.pdf>.

Notably, the monitor detected that the model caused “statistically and practically significant” adverse approval/denial disparities for Black applicants.”¹¹

When Upstart wanted to substantially change its model, under the terms of the NAL, Upstart was supposed to apply for a modification of the NAL. Upstart applied for a modification, but the CFPB did not have enough time to review the implications of the significant changes. Upstart thus requested a termination of the NAL in order to be able to make the changes more quickly. The request was granted.¹²

The CFPB experienced similar challenges with its Sandbox Approval policy, which is being reissued simultaneously with this NAL policy. For example, the CFPB issued a Sandbox Approval Order for Payactiv, Inc., a paycheck advance lender. It did not grant an Approval to any other paycheck advance lender. The CFPB discovered evidence suggesting that Payactiv was using the approval in marketing materials to misrepresent that the CFPB endorsed Payactiv’s product. On June 3, 2022, the CFPB informed Payactiv that, for this reason, it was considering terminating the approval order.¹³ Payactiv requested termination of the order, and the CFPB approved that termination request.¹⁴

To correct these shortcomings, the CFPB developed the Conditions to Promote Innovation, Competition, Ethics and Transparency that must be met for a Letter or Approval to be issued. They are incorporated in part A of the Policy on No-Action Letters that follows.

III. Regulatory Requirements

¹¹ *Id.*

¹² In re November 30, 2020 No-Action Letter, Order to Terminate No-Action Letter (June 8, 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_upstart-no-action-letter-termination_order_2022-06.pdf.

¹³ In re December 30, 2020 Sandbox Approval Order, Order to Terminate Sandbox Approval Order (June 30, 2022), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-rescinds-special-regulatory-treatment-for-payactiv/>.

¹⁴ *Id.*

This Policy on No-Action Letters constitutes an agency general statement of policy and/or a rule of agency organization, procedure, or practice exempt from the notice and comment rulemaking requirements under the Administrative Procedure Act, pursuant to 5 U.S.C. 553(b). Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.¹⁵ The CFPB has also determined that the issuance of the Bulletin does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.

IV. Policy Statement

The text of the Policy is as follows:

POLICY ON NO-ACTION LETTERS

In section 1021(a) of the Consumer Financial Protection Act (CFPA), Congress established the Consumer Financial Protection Bureau's (CFPB'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.¹⁶ Relatedly, the CFPB'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 facilitate innovation.¹⁷

Congress has given the CFPB a variety of authorities under the CFPA and the enumerated consumer laws¹⁸ that it can exercise to promote this purpose and these objectives. These authorities

¹⁵ 5 U.S.C. 603(a), 604(a).

¹⁶ 12 U.S.C. 5511(a).

¹⁷ 12 U.S.C. 5511(b)(3), (5).

¹⁸ 12 U.S.C. 5481(12).

include supervision and enforcement authority, and the authority to issue orders and guidance.¹⁹

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 CFPB may more effectively carry out its statutory purpose and objectives and to facilitate compliance with applicable Federal consumer financial laws.

The Policy is not intended to, nor should it be construed to:

- a. restrict or limit in any way the CFPB's discretion in exercising its authorities, including the provision of no-action or similar compliance assistance other than pursuant to the Policy;
- b. constitute an interpretation of law; or
- c. 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 CFPB's exercise of its supervision and enforcement discretion in a particular manner. It cannot bind, and never could bind, state plaintiffs or plaintiffs in private actions, including but not limited to states prosecuting violations of federal consumer financial law under Section 1042 of the CFPA.

The Policy consists of seven sections:

- Section A describes the Conditions to Promote Innovation, Competition, Ethics and Transparency.

¹⁹ See 12 U.S.C. 5561 *et seq.* (enforcement authority); 12 U.S.C. 5531(a) (Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) enforcement authority); 12 U.S.C. 5514, 5515 (supervision authority); 12 U.S.C. 5511(a) ("The Bureau shall seek to implement and, *where applicable*, enforce Federal consumer financial law . . .") (emphasis added); 12 U.S.C. 5512(b)(1).

- Section B describes the factors the CFPB intends to consider in assessing applications for a No-Action Letter.
- Section C describes the standard procedures the CFPB intends to use in issuing No-Action Letters.
- Section D describes the procedures the CFPB intends to use for modification and termination of No-Action Letters.
- Section E describes how the CFPB intends to coordinate with other regulators with respect to No-Action Letters.
- Section F describes the CFPB’s intentions relating to disclosure of information relating to No-Action Letters.

A. Conditions to Promote Innovation, Competition, Ethics, and Transparency

The following conditions apply to the No-Action Letter program:

1. Applicants for No-Action Letters must establish a market problem, in the form of an unmet consumer need, that the new financial product or service solves.
 - a. Applicants must articulate the benefit to consumers that flows from the CFPB permitting the product or service to be sold at market without compliance with the law at issue.
 - b. A claim that a No-Action Letter would increase access to the applicant’s product or service is insufficient to establish a market problem. To satisfy this requirement, the applicant must prove that their product or service is meeting an untapped consumer need.
2. The CFPB will not approve a No-Action Letter on a topic for a single firm.

3. The CFPB will reach out to the applicant's competitors and invite them to apply for a No-Action Letter on the same topic, to ensure that the CFPB does not select a single firm that gains a first-mover advantage in the market as a result.
4. No-Action Letters will state that recipients may not market or promote the fact that their product or service received a Letter. Such marketing is inherently deceptive to consumers, creating the false impression that the CFPB endorses the product.
5. The CFPB will post applications for a No-Action Letter to an open docket on the regulations.gov website and will accept comment for 60 days. In so doing, the CFPB will adhere to the confidentiality protections set forth in section F, below.
6. The CFPB will generally not consider applications from former CFPB attorneys representing companies as outside counsel, to avoid ethical conflict and to maintain the highest integrity in the No-Action Letter program.
7. The CFPB will not consider applications from companies that have been the subject of an enforcement action involving violations of Federal consumer financial law in the last 5 years, or who are subject to a pending enforcement investigation by federal or state authorities.
8. No-Action Letters will automatically be rescinded when recipients materially change their product or service so that it no longer fits the description provided in the application and described in the Letter, unless a modification is approved under Subpart D.
9. Submitting No-Action Letter applications under false pretenses, or with misleading or incomplete information, may be a violation of law and may be referred for potential prosecution.²⁰

²⁰ 18 U.S.C. 1001.

B. Assessment of Applications for No-Action Letters

In deciding whether to grant an application for a No-Action Letter, the CFPB intends to balance a variety of factors, including an assessment of the quality and persuasiveness of the application; information about the applicant and the product or service in question derived through CFPB due diligence processes; the extent to which granting the application would be consistent with CFPB enforcement and supervision priorities; an assessment of litigation risk; and available CFPB resources.²¹

C. Procedures for Issuing No-Action Letters

When the CFPB decides to grant an application for a No-Action Letter, it provides the recipients with a No-Action Letter signed by the Director that sets forth the specific terms and conditions of the No-Action Letter provided.²² The CFPB expects a No-Action Letter will:

1. Identify the recipient;²³
2. Specify the subject matter scope of the letter, *i.e.*, the described aspects of the product or service;²⁴
3. State that the letter:
 - a. 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;
 - b. is based on the factual representations made by the recipient, which may be

²¹ The decision whether to grant an application for a No-Action Letter will be within the CFPB's sole discretion.

²² If the CFPB decides to deny an application, it intends to inform the applicant of its decision. The CFPB 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 before the application is granted.

²³ For convenience, the term "recipient" is used in the Policy to refer both to an individual recipient and joint recipients.

²⁴ 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.

- incorporated by reference;
- c. 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
 - d. does not constitute the CFPB'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;
 - e. expires in 2 years;
4. Require the recipient to consent to the CFPB's supervisory examination authority, if the recipient is not already subject to this authority;
 5. Require the recipient to apprise the CFPB 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;²⁵ Pursuant to A.7, unless an applicant applies for an amendment pursuant to section D, No-Action Letters will automatically be rescinded when recipients change their product or service so that it no longer fits the description provided in the application and described in the Letter.
 6. Specify any other limitations or conditions, and be published on the CFPB's website;²⁶
 7. State that, unless or until the No-Action Letter expires or is terminated by the CFPB, the CFPB 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 the laws identified in the No-Action Letter;

²⁵ "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.

²⁶ If an applicant objects to the disclosure of certain information and the CFPB insists that the information must be publicly disclosed if a No-Action Letter is issued, the applicant may withdraw the application and the CFPB intends to treat all information related to the application as confidential to the full extent permitted by law.

8. State that, (i) the recipient may reasonably rely on any CFPB commitments made in the letter; (ii) the CFPB 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;²⁷ or controlling law changes as a result of a statutory change or a court decision that clearly permits or clearly prohibits conduct covered by the letter; and (iii) upon termination, the CFPB 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 consumer harm or where the CFPB’s initial granting of the No-Action Letter failed to comply with the Administrative Procedure Act or other law.

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;
- 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

²⁷ Such ground includes the materialization of consumer risks identified in the application, and the materialization of other consumer risks not identified in the application.

application.

In deciding whether to grant an application for modification of a No-Action Letter, the CFPB intends to balance a variety of factors, including the quality and persuasiveness of the application. The CFPB expects to grant or deny such applications within 30 days of notifying the applicant that the CFPB has deemed the application to be complete. When the CFPB 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 CFPB intends that the recipient of a No-Action Letter should be able to reasonably rely on any CFPB commitments made in the letter.

Before terminating a No-Action Letter, the CFPB may, in the appropriate cases, notify the recipient of the possible grounds for termination and permit an opportunity to respond within a reasonable period of time. In its discretion, the CFPB may offer the recipient an opportunity to modify its conduct to avoid termination. The CFPB may 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 injury to consumers, and a wind-down period would permit such injury to continue. If the CFPB terminates a No-Action Letter, it will do so in writing and specify the reasons for its decision. The CFPB will publish termination decisions on its website.

E. Regulatory Coordination

Section 1015 of the CFPA instructs the CFPB to coordinate with Federal agencies and State regulators, as appropriate, to promote consistent regulatory treatment of consumer financial and investment products and services.²⁸ Similarly, section 1042(c) of the CFPA instructs the CFPB to

²⁸ 12 U.S.C. 5495.

provide guidance in order to further coordinate actions with the State attorneys general and other regulators.²⁹ Such coordination includes coordinating in circumstances where other regulators have chosen to limit their enforcement or other regulatory authority. The CFPB 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 CFPB, *i.e.*, alternative to the process described in sections A through D.

Furthermore, the CFPB is interested in coordinating with other regulators more generally. To this end, the CFPB 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.

F. CFPB Disclosure of Information Regarding No-Action Letters

Public disclosure of information regarding No-Action Letters is governed by applicable law, including the CFPA,³⁰ the Freedom of Information Act (FOIA),³¹ and the CFPB’s Rule on Disclosure of Records and Information (Disclosure Rule).³² The Disclosure Rule generally prohibits the CFPB from disclosing confidential information,³³ and defines confidential information to include information that may be exempt from disclosure under the FOIA³⁴ – including FOIA Exemption 4 regarding trade secrets and confidential commercial or financial information that is privileged or confidential.³⁵ Relatedly, the Disclosure Rule defines business information as commercial or financial information obtained by the CFPB from a submitter that may be protected from disclosure under FOIA Exemption 4, and generally provides that such

²⁹ 12 U.S.C. 5552(c).

³⁰ See, e.g., 12 U.S.C. 5512(c)(8).

³¹ 5 U.S.C. 552.

³² 12 CFR part 1070.

³³ 12 CFR 1070.41.

³⁴ 12 CFR 1070.2(f).

³⁵ 5 U.S.C. 552(b)(4).

business information shall not be disclosed pursuant to a FOIA request except in accordance with section 1070.20 of the rule.³⁶

Consistent with applicable law, the CFPB will publish No-Action Letters on its website, as well as the application previously published on regulations.gov. The CFPB 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.³⁷

Where information submitted to the CFPB is both customarily and actually treated as private by the submitter, the CFPB intends to treat it as confidential in accordance with the Disclosure Rule.³⁸ The CFPB 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.³⁹

Disclosure of information or data provided to the CFPB under the Policy to other Federal and State agencies is governed by applicable law, including the CFPA⁴⁰ and the Disclosure Rule.

To the extent the CFPB wishes to publicly disclose non-confidential information regarding a No-Action Letter, the CFPB intends to include the terms of such disclosure in the letter. The CFPB 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 CFPB does not intend to publicly disclose any information that would conflict with consumers' privacy interests.

Rohit Chopra,

³⁶ 12 CFR 1070.20(a), (b).

³⁷ The CFPB 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 CFPB does not intend to release identifying information from published denials, and to instead redact such information from denials published on its website.

³⁸ See *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (June 24, 2019).

³⁹ 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.

⁴⁰ See, e.g., 12 U.S.C. 5512(c)(8).

Director, Consumer Financial Protection Bureau.