

**BUREAU OF CONSUMER FINANCIAL PROTECTION**

**12 CFR Chapter X**

**[Docket No. CFPB-2020-0019]**

**Advisory Opinions Proposal**

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Proposed procedural rule; proposed information collection; request for comment.

**SUMMARY:** The Bureau of Consumer Financial Protection (Bureau) invites the public to comment on a new advisory opinion program (Proposed AO Program), and a proposed information collection associated with requests submitted by persons requesting advisory opinions under the Proposed AO Program, as required by the Paperwork Reduction Act of 1995.

**DATES:** Written comments on the Proposed AO Program are encouraged and must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments on the Proposed AO Program, identified by Docket No. [CFPB-2020-0019], by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* 2020-RFC-AdvisoryOpinions@cfpb.gov. Include Docket No. [CFPB-2020-0019] in the subject line of the email.
- *Mail/Hand Delivery/Courier:* Comment Intake, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552. Please note that due to

circumstances associated with the COVID-19 pandemic, the Bureau discourages the submission of comments by hand delivery, mail, or courier.

*Instructions:* All submissions should include the agency name and docket number. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, and in light of difficulties associated with mail and hand deliveries during the COVID-19 pandemic, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to <http://www.regulations.gov>. In addition, once the Bureau's headquarters reopens, comments will be available for public inspection and copying at 1700 G Street NW, Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Standard Time. You can make an appointment to inspect the documents by telephoning (202) 435-9169. All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments generally will not be edited to remove any identifying or contact information.

**FOR FURTHER INFORMATION CONTACT:** For additional information about the Proposed AO Program, contact Marianne Roth, Chief Risk Officer, Office of Strategy, at 202-435-7684. If you require this document in an alternative electronic format, please contact [CFPB\\_Accessibility@cfpb.gov](mailto:CFPB_Accessibility@cfpb.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),<sup>1</sup> the Bureau’s “primary functions” include issuing guidance implementing Federal consumer financial law.<sup>2</sup> The Bureau believes that providing clear and useful guidance to regulated entities is an important aspect of facilitating markets that serve consumers.

The Bureau currently issues several types of guidance regarding the statutes that it administers and regarding the regulations and Official Interpretations that it normally issues through the notice-and-comment process. On occasion, the Bureau provides guidance in interpretive rules or general statements of policy. The Bureau also routinely issues Compliance Aids that present legal requirements in a manner that is useful for compliance professionals, other industry stakeholders, and the public, or include practical suggestions for how entities might choose to go about complying with those requirements.<sup>3</sup> The Bureau also provides individualized “implementation support” to regulated entities through its Regulatory Inquiries Function (RIF).<sup>4</sup> Neither Compliance Aids nor the RIF are intended to interpret ambiguities in legal requirements.

The Bureau is presenting the Proposed AO Program in response to feedback received from external stakeholders encouraging the Bureau to provide written guidance in cases of regulatory uncertainty. This feedback is summarized in the Background section of the Advisory Opinions Pilot (AO Pilot) *Federal Register* document published elsewhere in today’s edition of

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<sup>1</sup> Public Law 111-203, 124 Stat. 2081 (2010).

<sup>2</sup> 12 U.S.C. 5511(c)(5).

<sup>3</sup> See Policy Statement on Compliance Aids, 85 FR 4579 (Jan. 27, 2020).

<sup>4</sup> See Bureau of Consumer Financial Protection Request for Information Regarding Bureau Guidance and Implementation Support (Guidance RFI), 83 FR 13959, 13961-62 (Apr. 2, 2018).

the *Federal Register*. The Bureau issues this request for public comment on the Proposed AO Program and associated information collection concurrent with the establishment of the Pilot AO Program. The Proposed AO Program represents the next phase in full implementation of the Bureau’s AO capability, with the intent of replacing the AO Pilot, and allowing the Bureau to further provide timely guidance that enables compliance by resolving outstanding regulatory uncertainty, thereby supporting the Bureau’s statutory purpose of ensuring 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.

## **II. Parameters of the Proposed AO Program**

### *A. Overview*

The primary purpose of the Proposed AO Program is to provide a mechanism through which the Bureau may more effectively carry out its statutory purposes and objectives by better enabling compliance in the face of regulatory uncertainty. Under the program, parties will be able to request interpretive guidance, in the form of an AO, to resolve such regulatory uncertainty.<sup>5</sup>

### *B. Submission and Content of Requests*

Requests would be submitted through means, such as an email address, designated by the Bureau. Parties requesting AOs will be required to submit certain information in order for a request to be complete; where information submitted to the Bureau is information the requestor would not normally make public, the Bureau intends to treat it as confidential pursuant to its rule, Disclosure of Records and Information,<sup>6</sup> to the extent applicable. The Bureau encourages

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<sup>5</sup> For convenience, this document uses the term “regulatory uncertainty” to encompass uncertainty with respect to regulatory or, where applicable, statutory provisions.

<sup>6</sup> 12 CFR 1070.

requestors to identify any such information to the extent they choose to include it in their submissions.

The requestor must be identified, regardless of whether it is submitting a request on its own behalf or submitting a request on behalf of a third party (i.e., on behalf of one or more clients or members). Outside counsel or a trade association, for example, could submit a request for AOs on behalf of one or more clients or members, and those entities would not need to be named. Additionally, if the requestor is submitting a request on behalf of an unidentified third party, the requestor must provide a statement on whether the unidentified third party is the subject of an ongoing public Bureau enforcement action or an ongoing Bureau enforcement investigation conducted by the Bureau’s Office of Enforcement.

The issue raised in the request must be within the Bureau’s purview,<sup>7</sup> and the request must concern actual facts or a course of action that the requestor is considering engaging in, with the requestor providing a statement of whether the issue on which the AO is being requested is the subject of any known or reasonably knowable active litigation or federal or state agency investigations.

The requestor also must set forth as completely as possible all material facts and circumstances, including detailed specification of the legal question and supporting facts with respect to which the requestor seeks an AO; and a proposed interpretation, identification of the potential uncertainty or ambiguity that such interpretation would address, and explanation of

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<sup>7</sup> Under title X of the Dodd-Frank Act (Consumer Financial Protection Act of 2010), the Bureau was created to regulate the offering and provision of consumer financial products and services under federal consumer financial laws. 12 U.S.C. 5881. The Act enumerates several consumer laws under the Bureau’s jurisdiction (in part or whole). 12 U.S.C. 5841(12).

why the requested interpretation is an appropriate resolution of that uncertainty or ambiguity.<sup>8</sup>

Requestors may also choose to offer additional information, including, as applicable, an explanation of the potential consumer benefits and risks associated with resolution of the interpretive question and the proposed interpretation; and an explanation of how the proposed interpretation relates to the Bureau’s statutory objectives.<sup>9</sup>

### *C. Characteristics of AOs*

AOs under the proposed program will be interpretive rules under the Administrative Procedure Act (APA)<sup>10</sup> that respond to a specific request for clarity on an interpretive question. The Bureau would publish AOs in the *Federal Register* and on consumerfinance.gov, including the Bureau’s summary of the material facts and the Bureau’s legal analysis of the issue. Unless otherwise stated, each AO will be applicable to the requestor and to similarly situated parties to the extent that their situations conform to the Bureau’s summary of material facts in the AO.<sup>11</sup>

Where a statutory safe harbor is applicable to an AO, the AO will explain that fact. The Truth in Lending Act (TILA), Equal Credit Opportunity Act (ECOA), Electronic Fund Transfer Act (EFTA), and Real Estate Settlement Procedures Act (RESPA) provide certain protections from liability for acts or omissions done in good faith in conformity with an interpretation by the

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<sup>8</sup> The responsive AO will not necessarily adopt the requestor’s proposed interpretation. Under the proposed program, the Bureau retains discretion to answer requests with its own interpretation regardless of the requestor’s proposed interpretation.

<sup>9</sup> Requestors should describe relevant legal provisions and arguments with as much specificity as practicable. The Bureau recognizes that in some cases, the requestor may lack the legal resources to provide a detailed and complete showing. In such circumstances, the requestor should provide the maximum specification practicable under the circumstances and explain the limits on further specification.

<sup>10</sup> 5 U.S.C. 553(b).

<sup>11</sup> Accordingly, the initial request drafted by the requestor is not necessarily a reliable guide to the scope or terms of an AO; the scope and terms of an AO will be set out in the AO itself. Moreover, the Bureau will not normally investigate the underlying facts of the requestor’s situation, and an AO is not applicable to the requestor if the underlying facts of the requestor’s situation do not conform to the Bureau’s summary of material facts.

Bureau.<sup>12</sup> The Fair Debt Collection Practices Act (FDCPA) contains similar protections, specifically using the term “advisory opinion.”<sup>13</sup>

#### *D. Factors in Bureau Selection of Topics for AOs*

The Bureau intends to consider the following factors as part of its consideration of whether to address topics through AOs.<sup>14</sup> The Bureau will prioritize open questions within the Bureau’s purview that can legally be addressed through an interpretive rule, where an AO is an appropriate tool relative to other Bureau tools for resolving the identified uncertainty. Initial factors weighing for the appropriateness of an AO include: that the interpretive issue has been noted during prior Bureau examinations as one that might benefit from additional regulatory clarity; that the issue is one of substantive importance or impact or one whose clarification would provide significant benefit; and/or that the issue concerns an ambiguity that the Bureau has not previously addressed through an interpretive rule or other authoritative source. Factors weighing strongly for presumption that an AO is not an appropriate tool include that the interpretive issue is the subject of an ongoing Bureau investigation or enforcement action; that the interpretive issue is the subject of an ongoing or planned rulemaking; that the issue is better suited for the notice-and-comment process; that the issue could be addressed effectively through a Compliance Aid; or that there is clear Bureau or court precedent that is available to the public on the issue.

The Bureau intends to further evaluate potential topics for AOs based on additional factors, including: alignment with the Bureau’s statutory objectives; size of the benefit offered to

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<sup>12</sup> See 15 U.S.C. 1640(f) (TILA); 15 U.S.C. 1691e(e) (ECOA); 15 U.S.C. 1693m(d) (EFTA); 12 U.S.C. 2617, 12 CFR 1024.4 (RESPA).

<sup>13</sup> See 15 U.S.C. 1692(k)(e).

<sup>14</sup> The following are factors that the Bureau intends to weigh when deciding which topics to prioritize in the advisory opinion program, based on all of the information available to the Bureau. Advisory opinion requests need not address these factors in order to be fully considered by the Bureau.

consumers by resolution of the interpretive issue; known impact on the actions of other regulators; and impact on available Bureau resources. The Proposed AO Program will primarily focus on the following statutory objectives of the Bureau: (1) that consumers are provided with timely and understandable information to make responsible decisions about financial transactions; (2) that outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens; (3) that Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and (4) that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.<sup>15</sup>

The Proposed AO Program would focus primarily on clarifying ambiguities in the Bureau’s regulations, although AOs may clarify statutory ambiguities. The Bureau will not issue AOs on issues that require notice-and-comment rulemaking under the APA,<sup>16</sup> or that are better addressed through that process. For example, the Bureau does not intend to issue an advisory opinion that would change a regulation. Similarly, where a regulation or statute establishes a general standard that can only be applied through highly fact-intensive analysis, the Bureau does not intend to replace it with a bright-line standard that eliminates all of the required analysis. Highly fact-intensive applications of general standards, such as of the statutory prohibition on unfair, deceptive, or abusive acts or practices, pose particular challenges for issuing advisory

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<sup>15</sup> See 12 U.S.C. 5511(b)(1), (3)-(5). The Bureau has a further statutory objective, that consumers are protected from unfair, deceptive, or abusive acts and practices (UDAAPs) and from discrimination. 12 U.S.C. 5511(b)(2). The Bureau considers this objective to be at least as important as its other objectives, and it does not plan to issue an AO that is in conflict with this objective. But because other regulatory tools are often more suitable for addressing UDAAPs and discrimination, the Bureau has chosen not to highlight this objective as a primary focus when selecting issues for the Proposed AO Program.

<sup>16</sup> 5 U.S.C. 553(b).

opinions, although there may be times when the Bureau is able to offer advisory opinions that provide additional clarity on the meaning of such standards.

The Bureau solicits comment on all aspects of the Proposed AO Program. In particular, the Bureau solicits comment on: (a) application elements the Bureau should require from parties requesting AOs, and accommodations that should be made for requestors with limited legal resources; (b) how the Bureau should prioritize requests for AO guidance; (c) how the Bureau should quantify benefit to consumers when evaluating AO requests; (d) improvements that could be made to the Proposed AO Program to further enhance compliance; (e) how the Bureau should handle sensitive information submitted by requestors; and (f) how the Bureau can make AO guidance that has not been incorporated into the Official Interpretations codified in the Code of Federal Regulations (or Commentary) available to the public in a useful format.

### **III. Regulatory Requirements**

The Bureau has concluded that, if finalized, the Proposed AO Program would constitute a rule of agency organization, procedure, or practice, and that it would therefore be exempt from the notice-and-comment rulemaking requirements of the APA.<sup>17</sup> For the same reason, it would not be subject to the 30-day delayed effective date for substantive rules under the APA.<sup>18</sup> Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.<sup>19</sup>

### **IV. Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA), Federal agencies are generally required to seek approval from the Office of Management and Budget (OMB) for information

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<sup>17</sup> 5 U.S.C. 553(b).

<sup>18</sup> 5 U.S.C. 553(d).

<sup>19</sup> 5 U.S.C. 603(a), 604(a).

collection requirements prior to implementation. Under the PRA, the Bureau may not conduct or sponsor, and, notwithstanding any other provision of law, a person is not required to respond to, an information collection unless the information collection displays a valid control number assigned by OMB.

As part of its continuing effort to reduce paperwork and respondent burden, the Bureau conducts a preclearance consultation program to provide the general public and affected government agencies with an opportunity to comment on the new information collection requirements in accordance with the PRA (See 44 U.S.C. 3506(c)(2)(A)). This helps ensure that: the public understands the Bureau's requirements or instructions, respondents can provide the requested data in the desired format without unnecessary burden.

The proposal would require a new information collection requirement to submit an application to the Bureau to obtain an advisory opinion from the Bureau. This information collection is voluntary. The likely respondents would be for-profit businesses that are CFPB regulated entities.

Title of Collection: Request for an Advisory Opinion.

OMB Control Number: 3170-00NEW.

Type of Review: Request for a new OMB Control Number.

Affected Public: Private Sector.

Estimated Number of Respondents: 100.

Estimated Total Annual Burden Hours: 6,000.

Abstract: The Bureau of Consumer Financial Protection ("CFPB" or "Bureau") is proposing to establish an Advisory Opinion (AO) program. AOs issued under the proposed

program would be interpretive rules under the Administrative Procedure Act (APA) that respond to a specific request for clarity on an interpretive question regarding a CFPB-administered regulation or statute. Under the program, parties would be able to request interpretive guidance, in the form of an AO, to resolve regulatory uncertainty. The Bureau would have discretion to decide which AOs to respond to and would publish those with a description of the incoming request for the public to review. The information will be collected from persons, primarily business or other for-profit entities, who request AOs from the Bureau. The information will be used by the Bureau to determine whether to pursue the issuance of an AO responsive to the request.

Documentation prepared in support of this information collection request is available at [www.regulations.gov](http://www.regulations.gov).

Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) the accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Please submit your comments in accordance with the procedure outlined in the Addresses section of this notice above.

## **V. Signing Authority**

The Director of the Bureau, having reviewed and approved this document, is delegating the authority to electronically sign this document to Laura Galban, a Bureau Federal Register Liaison, for purposes of publication in the *Federal Register*.

Dated: June 16, 2020.

/s/ Laura Galban

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**Laura Galban,**

*Federal Register Liaison, Bureau of Consumer Financial Protection.*