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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Advisory Opinions Pilot

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Procedural rule.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) announces the establishment of a new pilot advisory opinion program (Pilot AO Program).

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

FOR FURTHER INFORMATION CONTACT: For additional information about the Pilot 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*.

SUPPLEMENTARY INFORMATION:

I. Background

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),¹ the Bureau’s “primary functions” include issuing guidance implementing Federal consumer financial law.² 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

¹ Public Law 111-203, 124 Stat. 2081 (2010).

² 12 U.S.C. 5511(c)(5).

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.³ Additionally, the Bureau provides individualized “implementation support” to regulated entities through its Regulatory Inquiries Function (RIF).⁴ Neither Compliance Aids nor the RIF are intended to interpret ambiguities in legal requirements.

The Bureau is establishing the Pilot AO Program in response to feedback received from external stakeholders encouraging the Bureau to provide written guidance in cases of regulatory uncertainty. The Bureau received requests of this nature in comments submitted in response to the Request for Information Regarding Bureau Guidance and Implementation Support (Guidance RFI). The Guidance RFI noted, among other things, current Bureau forms of individualized support to regulated entities—principally the RIF—and asked whether the Bureau should consider an AO program to provide interpretations, including the particular scope and benefits of AOs that would be distinct from generalized frequently asked questions (FAQs), and the types of questions or issues that could or could not be appropriately dealt with by AOs.⁵

In response to the Guidance RFI, several respondents recommended the Bureau issue such AOs. Commenters that supported AOs wrote that a Bureau AO program would reduce

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

⁴ 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).

⁵ Guidance RFI, at 13964.

ambiguity and increase regulatory certainty, support proactive consumer protection, and enhance timeliness of guidance. Several of these commenters suggested that AOs be binding, ultimately be incorporated into a central location (like the Official Interpretations to Bureau regulations), and be accessible and useful to third parties as well as requestors.

Other commenters responded to the Guidance RFI and opposed the issuance of AOs. They had three primary objections: first, that AOs will not provide the public with meaningful additional assistance in understanding legal requirements; second, that AOs could create confusion; and third, that interpretations are better made via notice and comment.

Comments on the Bureau’s Proposed Policy on No-Action Letters and the BCFP Product Sandbox⁶ also addressed whether the Bureau should include an interpretive letter (IL) or AO program to the Compliance Assistance Sandbox (CAS). Commenters supporting the inclusion of an IL or AO program to the CAS said that the Bureau could further compliance and clarify regulatory expectations by issuing interpretive legal opinions in circumstances warranting further legal clarity on a particular practice or activity. They noted that other regulatory agencies provide for opinions of this kind. A commenter opposing the inclusion of an IL or AO program to the CAS reiterated the objections made by commenters on the Guidance RFI that AOs could increase confusion and that interpretations are better made via notice and comment.

After considering these comments, the Bureau is establishing the Pilot AO Program to provide guidance with interpretive content that is: focused on regulatory uncertainty identified by requestors; reliable for the requestor and all similarly situated parties as the Bureau’s authoritative interpretation of the law; and publicly released for the awareness of all affected

⁶ See Bureau of Consumer Financial Protection Policy on No-Action Letters and the BCFP Product Sandbox, 83 FR 64036-64045 (Dec. 13, 2018).

persons. The Bureau appreciates the concerns raised by some commenters on the Guidance RFI and the CAS about an AO program. With respect to concerns that AOs would not provide meaningful assistance to stakeholders regarding the interpretation of legal requirements, the Bureau believes that the comments described above indicate that there is meaningful demand for the resolution of regulatory uncertainty beyond the Bureau's existing tools for issuing guidance. Accordingly, the Pilot AO Program can help enhance compliance. With respect to comments that AOs could create confusion, the Bureau believes that clear communication of the status of AOs issued under the Pilot AO Program as interpretive rules under the Administrative Procedure Act (APA) will minimize potential for confusion as to the significance of different types of guidance. Further, AOs will be signed by the Director, addressing concerns that an AO program could lead to the proliferation of conflicting staff-level opinions.

With respect to comments regarding the importance of notice and comment, the Bureau agrees that broad stakeholder input is valuable in many contexts. As explained below, the Bureau does not intend to issue advisory opinions on issues that are better addressed through the notice-and-comment process. However, as the APA contemplates by exempting interpretive rules from notice-and-comment requirements, the Bureau also believes that there are contexts where it is appropriate to interpret the applicable law through timely guidance without needing to engage in a sometimes-lengthy notice-and-comment process.

The Bureau is initiating its program for AOs in the form of a pilot, which will allow the Bureau to gain additional experience with AOs. Public comments on the Bureau's concurrent proposal, together with the Bureau's experience with the pilot, will inform how the Bureau uses AOs in the future.

II. Parameters of the Pilot AO Program

A. Overview

The primary purpose of the Pilot 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.⁷

B. Submission and Content of Requests

Requests may be submitted via email to advisoryopinion@cfpb.gov, or through other means designated by the Bureau.⁸ Requests must identify the requestor.⁹ 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,¹⁰ to the extent applicable. The Bureau encourages requestors to identify any such information to the extent they choose to include it in their submissions. For the pilot program, requestors will be limited to covered persons or service providers that are subject to the Bureau's supervisory authority under sections 1024, 1025, or 1026(e) of the Dodd-Frank Act or subject to the Bureau's enforcement authority under subtitle E of the Dodd-Frank Act.¹¹ The Bureau will

⁷ For convenience, this document uses the term “regulatory uncertainty” to encompass uncertainty with respect to regulatory or, where applicable, statutory provisions.

⁸ Applications should not include sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals.

⁹ The Bureau notes that during the Pilot AO Program, requestors are not required to include the additional information set out in the Bureau's separate *Federal Register* document regarding the Proposed AO Program.

¹⁰ 12 CFR 1070.

¹¹ 12 U.S.C. 5514, 5515, 5516(e), 5561-5567.

not accept requests from third parties, such as trade associations or law firms, on behalf of unnamed entities as part of the pilot program.

C. Characteristics of AOs

AOs under the pilot program will be interpretive rules under the APA¹² that respond to a specific request for clarity on an interpretive question. The Bureau will 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.¹³ 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.¹⁴

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 Bureau.¹⁵ The Fair Debt Collection Practices Act (FDCPA) contains similar protections, specifically using the term “advisory opinion.”¹⁶

D. Factors in Bureau Selection of Topics for AOs

¹² 5 U.S.C. 553(b).

¹³ An AO will not necessarily adopt any proposed interpretation offered by the requestor. The Bureau retains the discretion to answer requests with its own interpretation regardless of the proposed interpretation of the requestor.

¹⁴ 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.

¹⁵ 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).

¹⁶ See 15 U.S.C. 1692(k)(e) (FDCPA).

The Bureau intends to consider the following factors as part of its consideration of whether to address topics through AOs.¹⁷ 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 that question. 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 a 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 already 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 consumers by resolution of the interpretive issue; known impact on the actions of other regulators; and impact on available Bureau resources. The Pilot 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

¹⁷ The following are factors that the Bureau intends to weigh when deciding which topics to prioritize in the AO program, based on all of the information available to the Bureau. AO requests need not address these factors in order to be fully considered by the Bureau.

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.¹⁸

The Pilot AO Program will 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,¹⁹ 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 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.

¹⁸ 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 Pilot AO Program.

¹⁹ 5 U.S.C. 553(b).

III. Regulatory Requirements

The Bureau has concluded that the Pilot AO Program constitutes a rule of agency organization, procedure, or practice, and that it is, therefore, exempt from the notice-and-comment rulemaking requirements of the APA.²⁰ For the same reason, it is not subject to the 30-day delayed effective date for substantive rules under section 553(d) of the APA.²¹ Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.²²

IV. 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 18, 2020.

Laura Galban,

Federal Register Liaison, Bureau of Consumer Financial Protection.

²⁰ 5 U.S.C. 553(b).

²¹ 5 U.S.C. 553(d).

²² 5 U.S.C. 603(a), 604(a).

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