LEGAL UPDATES

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CFPB Reboots Policy Statements for No-Action Letters and Compliance Assistance Sandbox Approvals Days Before Administration Change

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CHRISTOPHER K. FRIEDMAN
NASHVILLE:
615.949.2252
CHRIS.FRIEDMAN@HUSCHBLACKWELL.COM

JAKOB SEIDLER
MADISON:
608.258.7391
JAKOB.SEIDLER@HUSCHBLACKWELL.COM

On January 10, 2025, the Consumer Financial Protection Bureau (CFPB) revived its policy statements on No-Action Letters (NALs) and Compliance Assistance Sandbox (CAS) Approvals. These unexpected changes come just days before President-elect Donald Trump returns to the White House and were quietly implemented without public comment or a standalone press release. The CFPB's updated policies aim to address several perceived issues with the previous ones, such as the "revolving door" between government and private practice, dominance by single firms, and the lack of an expiration date. However, as policy statements, these changes can be rescinded or modified immediately, leaving it to the new leadership to decide whether to retain them. And even if the policies remain in place, it is unlikely that either traditional or emerging companies will take advantage of them because of their stringent requirements.

Background

An NAL is a statement from an agency (in this case, the CFPB) indicating that it will not take supervisory or enforcement action against a company for providing a product or service under specific facts and circumstances. A sandbox approval, in turn, grants companies a compliance safe harbor from an existing law for a finite period of time while experimentation takes place—in this case, under the Truth in Lending Act, the Equal Credit Opportunity Act, and the Electronic Fund Transfer Act.

NALs and sandbox approvals when granted can be useful tools to reduce unwarranted regulatory burdens and uncertainty, which can impede the

development of new products and services. By granting safe harbors and relief from supervisory or enforcement actions, these policies allow for innovation, in turn enabling increased access to improved and more affordable products and services for consumers. NALs have long been issued by other federal agencies, such as the Securities and Exchange Commission, and sandboxes are a more nascent tool but have gained traction in the United Kingdom, for example, through the U.K. Financial Conduct Authority.

Section 1021(b) of the Dodd Frank Act states that one statutory objective of the CFPB is to ensure that "markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation." Over the CFPB's 13-year history, it has implemented this objective in shifting ways, and the changing NAL and CAS Approval policies reflect this continued debate. To wit, the CFPB's original NAL policy was finalized in 2016 under Director Richard Cordray. The first iteration of the policy was intended to be used sparingly and, in fact, only one NAL was issued in the first three years of its existence. In 2019, under Director Kathy Kraninger, the NAL policy was expanded to increase accessibility to NALs, and the CFPB introduced its first CAS Approval policy as well as a trial disclosure policy (which remains in effect). These 2019 policies went through a formal notice and comment process, providing an opportunity for public input.

In 2022, however, the CFPB rescinded the NAL and CAS Approval policies without notice and comment, citing concerns at the time that the policies "do not advance their stated objective of facilitating consumer-beneficial innovation." Later communications from bureau leadership indicated more overt criticism or even hostility to the policies and their underlying goals, including describing them as giving "special legal immunities and favors" that companies "could exploit to gain an unfair advantage." Although the 2019 NAL and CAS Approval policies expired, the CFPB noted that it would continue to develop new protocols. Now, the CFPB has re-released the two policies with significant revisions just days before the administration transition, again without any opportunity for public input through the notice and comment process.

The modified policies

The CFPB's new modified policies completely overhaul the previous iterations. By far, the largest revision to the two policies is the addition of a new section titled "Conditions to Promote Innovation, Competition, Ethics, and Transparency." This section introduces several stringent conditions applicable to the NAL and CAS Approval policies. The CFPB's purported aims with imposing these conditions are addressing consumer needs, curbing market dominance, preventing the "revolving door" phenomenon, and other topics. The key implications of these policy changes are outlined below.

Market need requirement

The NAL and CAS Approval policies both require that applicants establish a "market problem, in the form of an unmet consumer need, that the new financial product or service solves." To meet this criterion, the applicant must show a benefit that flows to the consumer from obtaining an NAL or CAS Approval. The applicant must provide evidence that their product or service satisfies "an untapped consumer need." Simply claiming increased access to the applicant's product or service is insufficient.

This requirement is not so much onerous as vague. It does not define the terms "unmet" and "untapped" consumer needs, for example. Would developing a product that can be offered more economically to a consumer that is currently overpaying for a similar product count?

Single firm dominance

Both policies address the CFPB's perceived issues with single firm dominance when obtaining NALs or CAS Approvals. First, the policies stipulate that the CFPB will not grant an NAL or a CAS Approval on a topic for a single firm. Additionally, the CFPB will contact the applicant's competitors and encourage them to apply for an NAL or CAS Approval on the same topic. In implementing these measures, the CFPB states that it is seeking to prevent any single firm from gaining a first-mover advantage in the market. Furthermore, the CFPB will publish all applications for an NAL or CAS to an open docket on the regulations.gov website and will accept comment for 60 days.

Transparency through publishing applications on the public docket may be a worthy goal. Moreover, this requirement could in theory create a multiplier effect by encouraging groups of similarly situated companies to get off the sidelines.

However, the more likely outcome would be a sort of prisoner's dilemma: rather than encourage cooperation among similar firms to amplify the positive outcome, the policy could chill applicants from seeking relief on the fear that doing so would tip off their competitors as to their market entry or business model. CFPB leadership may be using the "first-mover problem" rationale as a pretext to perpetuate its preexisting view (dating back to 2022) that it is inappropriate for the government to engage with companies to provide regulatory relief on a one-off basis.

Marketing of NALs and CAS Approvals

The policies prohibit companies from marketing or promoting the receipt of an NAL or CAS Approval. The CFPB implemented this condition due to a concern that such marketing could be misleading to consumers, potentially creating the impression that the CFPB endorses the product.

The revolving door

The policies provide that the CFPB will "generally not" consider NAL or CAS Approval applications from former CFPB attorneys acting as outside counsel. (The preamble to the policy omits the word

"generally.") The CFPB maintains that the purpose of this provision is "to avoid ethical conflict and to maintain the highest integrity in the [NAL] program." However, no attempt is made either on legal or policy grounds to justify the premise for this perceived ethical quandary or the draconian nature of the restriction (a lifetime ban).

The language also raises many rather obvious questions about line-drawing. For example, why are only outside counsel prohibited rather than ex-CFPB employees acting as in house counsel to applicants? Are former agency leaders who are lawyers but who served in a non-legal capacity at the bureau, such as Kathy Kraninger and Richard Cordray, banned? Why are ex-CFPB lawyers not prohibited from submitting rulemaking petitions or comment letters, including those working at consumer advocacy organizations? The revolving door concern seems to flow only one way.

Enforcement actions

Both policies prohibit companies from obtaining an NAL or CAS Approval where that company has been the subject of an enforcement action for violations of federal consumer financial law in the last five years, or where that company is under active investigation at the federal or state level. Given the length of the lookback period and the fact that even companies under investigation (not necessary found to be in violation) would be swept in, this could severely limit the pool of applicants.

Expiration/termination

Both NALs and CAS Approvals will automatically expire in two years. The prior NAL and CAS Approval policies did not have a durational limit. Further, the CFPB will automatically terminate any NAL or CAS Approval where the recipients change their product or service so that it no longer fits the description provided in the application. A short durational period is another disincentive to applying, because it may not result in enough time to develop and implement even a minimum viable product, and also in view of the tradeoffs discussed above.

Supervision examination authority

Finally, an applicant must consent to the CFPB's supervisory examination authority to obtain an NAL or CAS Approval. This is a significant legal and practical concession that a recipient would be asked to make, particularly an emerging company that doesn't have the resources to prepare for regular exams. It also seems like an end-run around the CFPB using its previously "dormant" supervisory designation authority under Dodd-Frank Act section 1024(a)(1)(C), which is something that new leadership may relax after the transition.

Takeaways

The CFPB's decision to implement new NAL and CAS policies so soon before the change in administration is quite perplexing, to say the least. Given that these policies can be immediately rescinded or modified, it is likely, if not almost certain, that the incoming administration will jettison some or all of these changes.

Nonetheless, as the policy currently stands, several provisions may significantly deter applicants from seeking an NAL or CAS Approval. The two-year duration and the requirement to consent to supervision examination authority constitute large disincentives. Additionally, the CFPB's concern with the "revolving door" may prevent firms from being represented by specialized outside counsel, particularly those intimately familiar with the baroque processes the CFPB has set up to handle the applications. Moreover, this policy seems to implicate the same type of problem that animates state bar prohibitions on non-compete agreements involving lawyers: prohibiting clients from choosing the counsel of their choice. It is also ironic that the CFPB director, himself not a lawyer, would not be subject to the policy.

Furthermore, the CFPB's refusal to grant NALs and CAS Approvals to companies who have been the subject of an enforcement action, or those who are under active investigation, may violate due process. The policies deny applications from those accused of wrongdoing, not just those found guilty of violating federal consumer financial law.

With all of these considerations in mind, the new policy, hastily released just days before the new administration, appears to be more of a messaging document than an actual policy that is expected to endure. The collective conditions, and even some individual ones, are really nonstarters, and we would not encourage clients to utilize this process given the many substantive impediments and the likelihood that the policy will not survive the new administration.

Contact us

If you have any questions about this policy change or other consumer financial issues, contact Chris Friedman, Mike G. Silver, Jakob Seidler, or your local Husch Blackwell attorney.