

THE  
NATIONAL LAW REVIEW

---

## BCPF Proposes Revision To No-action Letter Policy And Creation Of New Product Sandbox

---

Tuesday, December 11, 2018

The BCPF has issued [proposed revisions to its 2016 final policy on issuing “no-action” letters \(NAL\), together with a proposal to create a new “BCPF Product Sandbox.”](#)

Comments will be due no later than 60 days after the date the proposals are published in the Federal Register.

Proposed NAL policy revisions. The revisions are intended to address the 2016 policy’s many shortcomings. The Bureau observes that the fact that the Bureau has provided [only one NAL under the 2016 policy](#) “strongly suggests that both the process required to obtain [NALs] and the relief available under the 2016 Policy have not provided firms with sufficient incentives to seek [NALs] from Bureau staff.” Through the proposal, the Bureau seeks to “bring certain aspects of the Bureau’s [NAL] policy more into alignment with [NAL] programs offered by other Federal regulators.”

Key proposed changes to the 2016 policy include the following:

- The 2016 policy states that “it was intended to facilitate consumer access to innovative financial products” and that NALs would not be routinely available and were anticipated to be “provided rarely and on the basis of exceptional circumstances.” The proposal would remove such statements.
- The 2016 policy stated that NALs were not binding on the Bureau and indicated that UDAAP-focused NALs were expected to be uncommon. The proposal would revise the policy to state that the Bureau “intends that [an NAL] will include a statement that, subject to good faith, substantial compliance with the terms and conditions of the letter, and in the exercise of its discretion, the Bureau will not make supervisory findings or bring a supervisory or enforcement action against the recipient’s offering or providing the described aspects of the product or service under (a) its authority to prevent unfair, deceptive, or abusive acts or practices; or (b) any other identified statutory or regulatory authority within the Bureau’s jurisdiction.”
- The 2016 policy requires an NAL applicant to provide up to 15 items of information. In contrast, the proposal would reduce such items to up to 7.
- The 2016 policy was accompanied by the Bureau’s statement that it did not intend to issue NALs to trade groups on behalf of their members or to a company that was not identified in an application. The revised policy would “invite applications from trade associations, service providers, and other third-parties.”
- The 2016 policy contains no discussion of the Bureau’s coordination with other regulators in connection with an NAL. The proposal would add a section on “Regulatory Coordination” that discusses the Bureau’s interest in coordinating with state regulators that issue similar NALs “that would provide for an alternative means of receiving an [NAL] from the Bureau” and in coordinating more generally with other regulators by “enter[ing] into agreements whenever possible to coordinate relief [under Bureau NALs] with similar forms of relief offered by State, Federal, or international regulators.”
- The 2016 policy anticipates that an NAL will have a limited duration. The revised policy would assume no temporal limitation.
- The 2016 policy requires the recipient of an NAL to commit to share data with the Bureau if requested to do so. The proposal would remove that requirement.

**Ballard Spahr**  
LLP

Article By [James Kim](#)  
[Alan S. Kaplinsky](#) [Ballard Spahr LLP](#)  
[Consumer Finance Monitor](#)

[Financial Institutions & Banking](#)  
[All Federal](#)

- The 2016 policy states that in addition to granting or denying a request for an NAL, the Bureau can decline to grant or deny the request, with or without an explanation. It also lists 10 items for the Bureau to consider when deciding whether to issue an NAL. The proposal would eliminate the 10 items and revise the policy to provide that in deciding whether to issue an NAL, the Bureau “intends to consider the quality and persuasiveness of the application, with particular emphasis on [certain designated information included in the application].” The revised policy would state only that the Bureau “intends to grant or deny” an application within 60 days of when it is complete (which is the same timetable as the 2016 policy).

The proposal would continue the practice of publishing NALs on the Bureau’s website and would also allow the Bureau to publish denials after an applicant is given an opportunity to request reconsideration of the denial. (The proposal would add that the Bureau might publish a version or summary of the application “in appropriate cases” and its reasons for denying an NAL application “particularly if it determines that doing so would be in the public interest.”) However, the proposal would revise the 2016 policy to add a detailed discussion of the legal limits on the Bureau’s ability to disclose confidential commercial or financial information, including supervisory information, and to state that the Bureau “intends to draft [an NAL] in a manner such that confidential information is not disclosed.”

The proposal would also require the Bureau to specify in an NAL “the extent to which [it] intends to publicly disclose information about the [NAL].” It would further provide that if an applicant objects to the Bureau’s disclosure of certain information and the Bureau insists such information must be publicly disclosed if an NAL is issued, the applicant can withdraw the application.

BCPF Product Sandbox proposal. Neither the Bureau’s background discussion nor its proposal clearly explain when an applicant would seek to participate in the sandbox program rather than seek a “standard” NAL. Presumably, the sandbox program is intended to allow participants to test innovative financial products or services without the need to comply with otherwise applicable or potentially applicable statutory or regulatory requirements. However, there is no indication that the sandbox program is limited to innovative products or services, such as those typically labeled “fintech.”

Key features of the sandbox proposal that differ from the NAL policy include the following:

- An applicant admitted to the sandbox program, in addition to receiving no-action relief that is substantially the same as that provided in an NAL 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), will receive two other forms of relief:
  - Approvals, as applicable, under the provisions of the TILA, ECOA, and 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
  - Exemptions granted by Bureau order (i) from statutory or regulatory provisions as to which the Bureau has statutory authority to issue exemptions by order (such as provisions of the ECOA, HOEPA, and FDIA), or (ii) from regulatory provisions as to which the Bureau has general authority to issue exemptions. Such an exemption would provide immunity from federal or state enforcement actions and private lawsuits.
- Sandbox program admission will generally be for a two-year term and participants can apply for extensions.
- The information that applicants must provide includes a description of the data the applicant possesses and/or intends to develop regarding the impact of the product or service on consumers to be shared with the Bureau if the application is granted and a proposed schedule for such sharing.
- A 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.”
- 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.
- In addition to publishing specified information about participants on its website, the Bureau intends to publish information about denials of applications, including its reasons for denying an application, after the applicant is given an opportunity to request reconsideration of the denial.

In September 2018, the Bureau [proposed significant revisions](#) to its “Policy to Encourage Trial Disclosure

Programs” (TDP Policy), which sets forth the Bureau’s standards and procedures for exempting individual companies, on a case-by-case basis, from applicable federal disclosure requirements to allow those companies to test trial disclosures. That proposal is not referenced in the NAL policy and sandbox proposals.

Copyright © by Ballard Spahr LLP

**Source URL:** <https://www.natlawreview.com/article/bcpf-proposes-revision-to-no-action-letter-policy-and-creation-new-product-sandbox>