CONFERENCE OF STATE BANK SUPERVISORS

February 11, 2019

Paul Watkins, Assistant Director
Attention: Comment Intake
Consumer Financial Protection Bureau
Office of Innovation
1700 G Street NW
Washington, D.C., 20552

Re: Request for Comment on the Bureau's Proposed Policy Guidance and Procedural Rule on No-Action Letters and Product Sandbox [Docket No. CFPB-2018-0042]

Dear Mr. Watkins,

The Conference of State Bank Supervisors (CSBS) appreciates the opportunity to comment on the Consumer Financial Protection Bureau's (CFPB or Bureau) proposed policy guidance and procedural rule that will revise the Bureau's 2016 No-Action Letter Policy (NAL Policy) and create the "BCFP Product Sandbox" ("Product Sandbox"). State regulators have significant concerns regarding both the proposed revisions to the NAL Policy and the proposed Sandbox, in which the Bureau is attempting to prevent state regulators from enforcing specific federal consumer financial laws against entities that receive relief under these policies. In short, we believe the proposed policy is not consistent with the Bureau's authority under the Dodd-Frank Act.

Under the proposal, the Bureau will allow entities within their jurisdiction to apply for three forms of statutory and/or regulatory relief under two separate programs. Specifically, the proposal significantly expands and streamlines the no-action relief available under the Bureau's 2016 NAL Policy. Additionally, the proposal creates a new Product Sandbox to provide three additional forms of relief: (1) no-action relief similar to that available under the NAL Policy; (2) approvals by order under three statutory provisions (approval relief); and (3) exemptions by order from statutory provisions (statutory exemptions) and regulatory provisions under the Bureau's rulemaking authority (regulatory exemptions).

The approval relief would be provided under one or more of three statutory provisions within the Truth in Lending Act (TILA), Equal Credit Opportunity Act (ECOA), and Electronic Funds Transfer Act (EFTA) which generally provide a statutory defense to liability for acts done or omitted in good faith in conformity with an interpretation or approval issued by an official duly authorized to issue such interpretations or approvals. According to the proposal, recipients of this approval relief would have "a 'safe harbor' from liability under the applicable statute(s) to the fullest extent permitted by these provisions as to any act done or omitted in good faith in conformity with the approval." Due to this purported safe harbor, the proposal asserts "the recipient would be immune from enforcement actions by any Federal <u>or State authorities</u>, as well as from lawsuits brought by private parties."

The statutory exemption relief would be provided under certain "statutory exemption-by-order provisions" within ECOA, the Home Ownership and Equity Protection Act (HOEPA), and the Federal Deposit Insurance Act (FDIA). The regulatory exemption relief would be provided under regulatory provisions that "do not mirror statutory provisions" and, presumably, include or will provide exemption procedures. Recipients of statutory and/or regulatory exemption relief would, like recipients of approval relief to "be immune from enforcement actions by a Federal <u>or State authorities</u>, as well as from lawsuits brought by private parties based on the relevant statutory or regulatory provisions and on the recipient's (or recipients') offering or providing the described aspects of the product or service."

State regulators believe the extent of this relief exceeds the authority of the Bureau under Title X of the Dodd-Frank Act. While the Bureau can choose not to enforce federal consumer financial laws under its purview, the Bureau is not authorized to prevent state officials from enforcing federal consumer financial laws.

After the financial crisis, Congress took several steps to fill critical gaps in the ability of federal and state law enforcement and regulators to protect consumers. Congress created the CFPB as an agency with both the authority and motivation to protect consumers, limited the ability of federal agencies to preempt state law, and empowered the states to enforce any of the eighteen "enumerated consumer laws" as defined by Title X of the Dodd-Frank Act (DFA). Prior to the DFA, states had limited authority to enforce specific federal consumer laws[1], but its passage greatly expanded this authority and positioned state officials with the broadest scope and authority to enforce federal and state consumer protection laws.

With respect to state regulators, Section 1042 of the DFA provides that:

> "A State regulator may bring a civil action or other appropriate proceeding to enforce ***the provisions of this title*** or regulations issued under this title with respect to any entity that is State-chartered, incorporated, licensed, or otherwise authorized to do business under State law (except as provided in paragraph (2)), and to secure remedies under provisions of this title or remedies otherwise provided under other provisions of law with respect to such an entity." 12 U.S.C. 5552 (emphasis added).

[1] In 1983, Congress amended RESPA to give state attorneys general (State AGs) the authority to enforce the statute's anti-kickback provision. Congress amended TILA to require enhanced disclosure and trigger special substantive limitations on certain high-cost mortgages. This amendment (HOEPA 1994) gave State AGs the power to enforce these provisions. In 1996, Congress gave states the power to enforce federal law related to consumer credit reporting, and in 2009 Congress gave State AGs the authority to enforce any rules the FTC prescribed to prevent UDAAP in mortgage lending. States have been active in these areas.

The “provisions of this title” within DFA Section 1042 clearly refers to the whole of federal consumer financial law, including the “enumerated consumer laws” defined in Section 1002(12).[2] Accordingly, state regulators are independently empowered to enforce the statutory provisions of federal consumer financial law within their respective states, regardless of the Bureau’s decision to enforce or not enforce federal consumer financial law. An assertion by the Bureau that it may immunize institutions from state enforcement of federal consumer financial law *ad libitum* is without merit.

Congress’ rationale for conferring upon state attorneys general (State AGs) and state regulators this expanded authority to act as co-enforcers of federal law, protecting consumers in tandem with the Bureau, is well-founded. As a co-enforcer of federal law, states serve as force-multipliers who can act based on local knowledge that federal regulators may lack. Under this concurrent-enforcement framework, there are multiple examples of State AGs and financial regulators leveraging federal law to protect consumers in their states.[3] In recent years, states have also partnered with the CFPB on multiple actions related to violations of federal law by entities under shared supervisory jurisdiction. These coordinated efforts have yielded positive benefits for consumers.[4] The proposed Policy and attempt to limit state enforcement powers therein represent a shift away from this valuable, cooperative partnership that fosters a more efficient and effective regulatory system.

State AGs and state financial regulators reserve the right to use the authority Congress provided them under the statute to protect their consumers, regardless of an entity's status as a participant within the Bureau’s Product Sandbox or other actions taken (or stayed) by the Bureau[5]. State regulators fear the broad language detailing the scope of relief could lead entities to mistakenly believe they are exempt from laws with which compliance will continue to be required. If the CFPB proceeds with the proposed policy, it must be amended to clarify that participation in the Bureau’s Product Sandbox does not provide a safe harbor from state

[2] That Congress intended to confer such broad authority to state regulators is made abundantly clear in Title X itself through the prohibition in Section 1036 on offering or providing any financial product or service not in conformity with federal consumer financial law or otherwise committing any act or omission in violation of federal consumer financial law. 12 U.S.C. 5536(a)(1).

[3] See e.g., MA DOB 2016 action against Freedom Mortgage Corporation for violations of state and federal laws; CA DBO action 2016 action against Flurish, Inc (LendUp) for violations of state and federal law.

[4] See CFPB/state actions against Ocwen Financial Corp and Ocwen Loan Servicing in 2013 and 2017. Also see 2016 joint state-federal settlement with DOJ, HUD, CFPB, and 49 state AGs and DC against HSBC in relation to mortgage origination, servicing, and foreclosure abuses. Also see description of close collaboration between MA DOB and CFPB on 2013 action against Mortgage Master Inc and Washington Federal related to HMDA violations.

[5] Following the announcement that the Bureau will reevaluate the requirements of the Equal Credit Opportunity Act, 14 state AGs wrote to the Bureau noting that “Attorneys General will not hesitate to uphold the law if CFPB acts in a manner contrary to law with respect to interpreting ECOA or to fulfilling its Congressional charge to ensure nondiscriminatory lending to the residents of our states.”

enforcement of federal consumer law just as it does not exempt an entity from state consumer protection laws.

The No-Action Letter section of the proposal creates similar concerns by omitting language in the 2016 Policy that notes No-Action Letters "would not bind courts or other actors who might challenge a NAL recipient's product or service, such as other regulators or parties in litigation."[6] The omission of this language creates unrealistic expectations regarding the benefits of NAL relief for supervised entities. Similar language was omitted from the Bureau's Trial Disclosure Policy in the proposed revisions that CSBS commented on in October 2018.[7]

Additional concerns regarding the proposed revisions to the NAL policy include:

- the revised Policy no longer includes the statement that the Bureau will consult and communicate with the appropriate state regulators in evaluating issuance of a NAL,
- the significant reduction of information requested within the application,
- the shift from limited duration to open-ended NAL relief,
- the removal of the requirement to share data with the Bureau
- the assertion that NAL applications will be reviewed and approved within 60 days.

The Bureau does not provide adequate reasoning for these changes other than noting that the Bureau failed to provide more than one NAL throughout the duration of the program. Taken together, state regulators oppose these significant changes to the NAL Policy.

Conclusion

State regulators share the Bureau's goal of fostering a regulatory environment that allows for innovation in financial products and services to the benefit of consumers. However, we believe the approach taken by the Bureau is not lawful nor necessary. The current framework of shared federal and state supervision can be efficient and effective without being an impediment to innovation. Further, meaningful state-federal coordination helps ensure fair, transparent, and competitive markets.

States intend to continue working with the Bureau to enforce federal law while also ensuring the regulatory and supervisory approach does not prevent responsible innovation in financial products and services. The proposal notes the Bureau's interest in entering agreements with states that have chosen to create sandboxes as a strategy to promote innovation. To foster consumer-beneficial innovation in financial services, the Bureau should look to coordinate with state regulators in a way that respects the ability of states to enforce federal consumer laws as intended by Congress.

State regulators strongly oppose the attempt to preempt state enforcement authority via the creation of the Product Sandbox and also oppose the proposed revisions to the Bureau's 2016

[6] See Federal Register Docket No. CFPB-2014-0025, Final Policy Statement: Policy on No-Action Letters. Page 2.
[7] See October 2018 CSBS letter to CFPB on Policy to Encourage Trial Disclosure Programs.

NAL Policy. We look forward to further engagement on this topic and hope we can continue to coordinate to protect consumers while fostering responsible innovation in financial products and services through our existing concurrent-enforcement regime.

Sincerely,

John Ryan
President & CEO