

**Brooklyn Law School**

---

**From the Selected Works of David J Reiss**

---

December 15, 2014

## Comment on the CFPB's Policy on No-Action Letters

David J Reiss, *Brooklyn Law School*

K. Sabeel Rahman, *Brooklyn Law School*

Jeffrey Lederman, *Brooklyn Law School*



Available at: [https://works.bepress.com/david\\_reiss/77/](https://works.bepress.com/david_reiss/77/)



December 15, 2014

Director Richard Cordray  
Consumer Financial Protection Bureau  
Office of the Executive Secretary  
1700 G Street NW.  
Washington DC 20552

**Re: CFPB Policy on No-Action Letters, CFPB-2014-0025**

Dear Director Cordray:

We are writing to comment on the Consumer Financial Protection Bureau's (the "Bureau") proposed Policy on No-Action Letters (the "Policy"). We believe that the Policy is a step in the right direction, but that a more robust Policy could better help the Bureau achieve its statutory purposes.

The Bureau recognizes that there are situations in which consumer financial service businesses ("Businesses") are uncertain as to the applicability of laws and rules related to new financial products ("Products"); how regulatory provisions might be applied to their Products; and what potential enforcement actions could be brought against them by regulatory agencies for noncompliance. Businesses could therefore benefit from the issuance of a No-Action Letter to reduce that uncertainty.

There is very little scholarly literature on the use of No-Action Letters by administrative agencies.<sup>1</sup> That being said,

Informal advice and guidance is given by administrative agencies in quantities difficult to imagine. The magnitude of this material dwarfs statutes and agency legislative regulations. The forms of advice and guidance are numerous, but include memos, bulletins, staff manuals, letters, and oral responses to questions. This magnitude suggests the importance of

---

<sup>1</sup> For a broader discussion of informal modes of regulation, see Todd D. Rakoff, *The Choice between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 157 (2000). See also M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHICAGO L. REV. 1383 (2004) (contrasting legislative rules, administrative enforcement actions, judicial enforcement actions and guidance as categories of administrative actions).

informal advice and guidance in the day-to-day operation of the administrative process. In turn, it cautions that any legal principles we adopt to regulate the process must not make giving advice difficult, time consuming, or expensive.<sup>2</sup>

In the absence of comprehensive studies, it is hard to precisely determine how to allocate agency resources to informal guidance as opposed to other types of regulatory action. Notwithstanding this, an agency should attempt to determine the optimal amount of its resources that should be devoted to informal guidance as opposed to the alternatives and then refine that initial estimate as experience dictates.

It is our view that a rapidly changing field like consumer finance can benefit from the availability of quick and informal feedback for Businesses so long as the process is properly designed. Because the Policy would use a relatively small amount of Bureau resources compared to other types of regulatory action, a well-designed No-Action Letter Policy would be a win-win-win for Businesses, for the Bureau and for consumers.<sup>3</sup>

### **Value of a No-Action Letter**

The Policy has strong potential to benefit Businesses and consumers. A No-Action Letter reduces uncertainty for Businesses that are attempting to bring legitimate and innovative Products to market. Businesses will rely on these letters and shape their behavior based on them.

At the same time, issuing a No-Action Letter risks encouraging the development of abusive Products if granted with insufficient analysis. Perhaps as importantly, but not as obviously, failing to issue a No-Action Letter at all can also damage consumers by failing to incentivize the development of innovative Products that help consumers. The goal of the Policy should be to balance the promotion of innovation with consumer protection.

In order to achieve that balance, we make three recommendations:

1. improve the analysis for evaluation of whether a Product merits a No-Action Letter;
2. create a parallel and easier No-Action Letter process to incentivize innovation that supports the Bureau's core mission; and
3. review the Policy on an ongoing basis to assess its impact after implementation.

---

<sup>2</sup> William R. Andersen, *Informal Agency Advice – Graphing the Critical Analysis*, 54 ADMIN. L. REV. 595, 596 (2002).

<sup>3</sup> As Rakoff noted nearly 15 years ago, “Promulgating a major rule often takes years and represents a substantial commitment of an agency’s resources.” See Rakoff, *supra* note 1, at 165. This remains true today, with many major Dodd-Frank rulemakings still ongoing.

## Cost-Benefit Analysis

The Bureau should focus its analysis on the net social benefit of the Product that is the subject of the No-Action Letter request. The Policy requires that Businesses describe the benefit of the Product and to identify its “potential consumer risks.”<sup>4</sup> In its own analysis, the Bureau should seek to measure the net benefits and costs of the Product. Cost-benefit analysis has evolved considerably in recent years to encompass both qualitative and quantitative elements, from a range of perspectives.<sup>5</sup>

We recommend that cost-benefit analysis in this context address elements such as the following:

4. costs and benefits of the Product from the standpoint of Businesses;
5. costs and benefits of the Product from the standpoint of consumers; and
6. costs and benefits of the Product from a societal perspective, *e.g.*, evaluating the impact of wide adoption of the Product.<sup>6</sup>

In a consumer finance context, a number of scholars have suggested that cost-benefit analysis can help distinguish socially beneficial products that mitigate risk from harmful forms of financial innovation that increase speculation instead.<sup>7</sup> Costs and benefits can be evaluated in part by utilizing a “counterfactual” approach to analysis.<sup>8</sup> Thus, the social benefits and costs of the Product can be assessed relative to the baseline of current financial products on the market, identifying what services and benefits the Product makes cheaper or more accessible.

If the Bureau were to adopt this approach, it would influence the types of information that they Bureau would require applicants to provide in their requests for No-Action Letters.

---

<sup>4</sup> 79 F.R. 62120.

<sup>5</sup> See *e.g.*, Cass Sunstein, *Financial Regulation and Cost-Benefit Analysis: A Comment* (Harvard Public Law Working Paper No. 14-17 (2014)), available at [http://papers.ssrn.com/ezip-prod1.hul.harvard.edu/sol3/papers.cfm?abstract\\_id=2429340](http://papers.ssrn.com/ezip-prod1.hul.harvard.edu/sol3/papers.cfm?abstract_id=2429340)); Cass Sunstein, *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (And Almost As Many Answers)*, 114 COLUMBIA L. REV. 167 (2014).

<sup>6</sup> It might make sense to limit the third of these three analyses to No-Action Letters that are “economically significant guidance documents” as that term is defined in Office of Management and Budget, *Final Bulletin for Agency Good Guidance Practices* 19-20 (Bull. No. 07-02) (defining an “economically significant guidance document” as one that “may reasonably be anticipated to lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy or a sector of the economy”).

<sup>7</sup> See Eric Posner & E. Glen Weyl, *An FDA for Financial Innovation: Applying the Insurable Interest Doctrine to 21<sup>st</sup> Century Financial Markets*, 107 NORTHWESTERN U. L. REV. 1307 (2013).

<sup>8</sup> See, *e.g.*, Josh Lerner & Peter Tufano, *The Consequences of Financial Innovation: A Counterfactual Research Agenda*, (NBER Working Paper No. 16780 (February 2011)), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1981825](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1981825).

## **Mission-Advancing No-Action Letters**

A challenge for regulating financial innovation is that while some products are developed with potential negative repercussions for consumers, there may also be innovations that can improve consumer access to fair and equitable financial resources. A No-Action Letter can be especially useful for creating regulatory certainty for innovators. But the Policy as it currently stands, with its 15-step procedure application creates a significant barrier for a Business to receive this No-Action Letter. As a result, the Bureau may be unintentionally inhibiting innovative Products that promote its own mission.

We therefore recommend that the Bureau create a parallel No-Action Letter Policy with a lower barrier for consumer financial industry disruptors, entrepreneurs and innovators who are actively developing Products that directly advance Bureau regulatory and policy priorities.

For these smaller-scale innovators, regulatory burden is a major problem. This is particularly true relative to established players with greater resources. If a Business develops a Product that goes to the heart of the Bureau's stated goals, it should be fast-tracked in this parallel No-Action Letter Policy. As the Bureau is tailoring its approach "to financial decision-making circumstances, challenges, and opportunities for specific populations, including service members and veterans, students and young adults, older Americans, and lower-income and other economically vulnerable Americans," Products that service such groups deserve this special attention.<sup>9</sup>

This parallel No-Action Letter Policy should be less onerous. For instance, it should provide faster consideration by and responsiveness from the Bureau, streamlined submission requirements, and dedicated staffing. In return, those on this fast track would be expected to provide the Bureau with additional information even after receiving a No-Action Letter in order to determine whether the Product is indeed promoting the Bureau's mission.

## **Ongoing Review of No-Action Letter Policy**

Regardless of the form No-Action Letters take, the Policy should include a method to evaluate its own success. Such a review could be included, for example, in the Bureau's semi-annual report. The review should cover the following topics, among others: (1) what Products received No-Action Letters; (2) have those Products come to market more quickly or fared better in practice?; (3) have those Products changed the marketplace in any material way; (4) is the Policy continuing to be a cost-effective means of achieving the Bureau's mission; and (4) how should the Policy be modified to best further the Bureau's mission going forward?

---

<sup>9</sup> CONSUMER FINANCIAL PROTECTION BUREAU, SEMI-ANNUAL REPORT 11 (Fall 2014), *available at* [http://files.consumerfinance.gov/f/201412\\_cfpb\\_semi-annual-report-fall-2014.pdf](http://files.consumerfinance.gov/f/201412_cfpb_semi-annual-report-fall-2014.pdf).

## Conclusion

William R. Andersen asks,

What explains the magnitude and ubiquity of informal advice and guidance? The benefits to the agency are real. Advice can encourage regulated parties to comply with agency preferences. . . . Informal advice can test reactions to new ideas before substantial time is invested in them. And informal advice can be very flexible – easy and quick to change in response to new conditions or new agency needs . . . . Similarly, informal advice is of enormous value to the regulated parties. With good advice they know better how to plan their own affairs in light of regulatory requirements.<sup>10</sup>

We would add that informal guidance policies can be designed with the needs of the public front and center as well.

The Policy shows promise, but a more robust version could increase socially beneficial innovation at the same time that it decreases abusive practices in the consumer financial services industry.

Sincerely,

/s/ Jeffrey Lederman

Jeffrey Lederman  
Post-graduate Fellow  
Community Dev. Clinic  
BLS Legal Services Corp.

/s/ K. Sabeel Rahman

K. Sabeel Rahman  
Fellow  
Four Freedoms Center  
Roosevelt Institute

/s/ David Reiss

David Reiss  
Professor of Law  
Research Director, Center for Urban  
Business Entrepreneurship (CUBE)

---

<sup>10</sup> Andersen, supra note 2, at 596.