American Bankers Association
Building Success. Together.

American Bankers Association
American Bankers Insurance Association
an ABA subsidiary

CBA CONSUMER BANKERS ASSOCIATION
The Voice of the Retail Banking Industry

December 15, 2014

Consumer Financial Protection Bureau
Office of the Executive Secretary
1700 G Street NW
Washington, DC 20552

Re: CFPB Policy on No-Action Letters
Docket No. CFPB–2014–0025

Responsible Bureau Staff:

The American Bankers Association[1], the American Bankers Insurance Association[2] and the Consumer Bankers Association[3] (together the Associations) provide these comments in response to the Consumer Financial Protection Bureau's (Bureau) proposal to afford a No-Action Letter process as a means of reducing regulatory uncertainty in limited circumstances. The Associations support the Bureau's efforts to reduce regulatory uncertainty to foster innovation. However, even within this narrow scope, we believe the Bureau's proposal warrants important changes in order to succeed in its objective. These are detailed in connection with each of the sections of the proposal.

Regulatory uncertainty is a particularly acute problem arising in large part from the Bureau being a new regulatory agency with vast new powers that have no established precedent. This "regulatory uncertainty" ultimately affects the ability to serve the needs of consumers overall, and harms the viability of the market for consumer financial products and services.

The Bureau, as it avers in the proposal, has more than one means of mitigating regulatory uncertainty. It may clarify the application of its statutes and regulations to the type of product in question by rulemaking or guidance. Alternatively, "it may provide some form of notification that it does not intend to recommend the initiation of an enforcement or supervisory action against an entity based on the application of specific

[1] The American Bankers Association is the voice of the nation's $15 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $11 trillion in deposits and extend more than $8 trillion in loans.
[2] The American Bankers Insurance Association (ABIA) is the leading trade association for banks selling insurance products and services.
[3] Founded in 1919, the Consumer Bankers Association (CBA) is the trade association for today's leaders in retail banking - banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding well over half of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

identified provisions of statutes or regulations to its offering of a particular product." This is the approach in the instant proposal.

The rulemaking approach has obvious advantages over the No Action Letter approach. It applies generally and consistently to all actors and, for the most part, it is uniformly enforced by all regulatory and enforcement agencies. For legislative rulemaking, it creates a body of regulation or interpretation that can be relied upon in court; and for interpretive rulemaking, it still provides a statement of agency views of uniform applicability. While interpretations do not necessarily have to be issued for notice and comment, the Bureau is free to do so, and benefits from the input obtained by industry and consumers alike. In short, the rulemaking and interpretive approach goes a long way toward ameliorating regulatory uncertainty and should always be the preferred approach.

The No-Action Letter approach lacks many of these benefits. It applies only to a single entity in a single set of circumstances for a limited time. No one else has any input into the decision, and no one else can rely on the results. Nevertheless, it may be a useful device to provide comfort for some in the industry as they develop new products or services, at least until the products or services have become more widely accepted and the CFPB or others have provided interpretations or rules of more general currency that would apply to them. In short, the Bureau's No Action Letter proposal is predicated on its power to facilitate access and innovation in markets for consumer financial products. As such it is designed to address only one form of regulatory uncertainty—that which derives from developing innovative financial products where existing rules did not contemplate such products. This could prove useful in certain cases and we are supportive in principle.

However, by its terms the Bureau's proposed approach is limited in its applicability and yet fraught with perils for the requester. It is hard to imagine how it would serve as a viable approach to alleviating regulatory uncertainty, either for the requester or anyone else. Consequently, the proposed process would be used infrequently if at all and will therefore not serve the intended purpose.

The Associations address salient concerns arising in each of the sections that lay out the proposed approval process.

Part A — Submitting Requests for No-Action Letters

The set of products (and services) to which this proposal may apply is difficult to identify. On the one hand, the proposal requires that the product must not be well established; on the other, it may not cover "hypothetical products that are not close to being able to be offered." At best, this limited scope severely constrains its usefulness.

We caution the Bureau that this limit between well-establish and not hypothetical must be applied in a way that makes it possible for innovators to seek a No-Action Letter during the product design phase. It is simply not feasible for a service provider to incur the considerable expenses of development and marketing costs as well as investment

in time and other opportunity costs through budget cycles, risk and compliance reviews, and board and committee approvals all before they can begin to seek Bureau assurance that their innovative product's features merit no action. The regulatory uncertainty is a barrier to design initiative, not just final launch of an innovative product.

The litany of expected detail to be supplied with the application calls on the requester to describe any creative liability that might attach to its innovation (e.g. "a candid explanation of the potential consumer risks posed by the product") and articulate its rebuttal to all such theories (e.g. "an explanation of how the product is likely to provide substantial benefit to consumers") — being careful to demonstrate in the end why the outcome of such analysis remains sufficiently uncertain as to merit the No-Action letter. A series of other undertakings and warranties follows. By the time the self-incriminating process of Part A is completed, the applicant has earned consideration under Part B of the proposal, but at the risk of providing a roadmap for inventive legal attack against the proposed product.

The Associations believe that the application process should be re-cast to emphasize how the new product's features vary from products described by the existing rules and why the new product's features (and the expected manner of delivery) achieve the consumer protections being pursued by the existing rules (e.g., informed consent, timely notice, etc.). The goal of the No-Action Letter process should be to leverage product innovation as an integral part of consumer protection innovation. As currently described the application process is fundamentally discouraging when it should be encouraging. We appreciate the Bureau's concern about proliferating unwarranted No-Action Letter requests. However, that concern is more constructively achieved by having the application emphasize how its innovation in product features also provides consumer protection, rather than spend time hypothecating a series of imagined theories of liability.

Part B — Staff Response to Requests for No-Action Letters

Part B of the process begins with the admission that staff has sole discretion whether to even respond to a request for a No-Action Letter and, if it does, it will hardly ever grant one. According to the proposal, "The Bureau anticipates that No-Action Letters will be provided only rarely and on the basis of exceptional circumstances and a thorough and persuasive demonstration of the appropriateness of such treatment." Part B discourages application by warning those who may wish to begin the process that it will "rarely" succeed. Included among the staff's bases for refusing to respond to a request is its plenary ability to decide "that the request does not warrant investment of the Bureau resources that are likely necessary to address the request adequately." In other words, the Bureau may deny – or "specifically decline to grant or deny, without explanation" – a good faith request for any reason, including resource constraints.

The Associations oppose Part B in its entirety. Instead, the Bureau's staff should pledge to respond to all requests, with reasons for their action to grant or deny the request, and in a timely manner. This does not presume that all requests must be treated on their merits if there exist procedural flaws that warrant the request's summary

dismissal. Given the requirement that the product needs to be near-market ready, a quick response — even if it is a summary dismissal — is important when preparing to launch an innovative product. The countdown cannot be put on hold indefinitely. True transparency affords petitioners a response to their efforts and the accompanying reasons enable agency accountability for its No-Action Letter process. The Bureau's Ombudsman provides the appropriate review to assure that the Bureau is faithfully adhering to its process. It would frustrate that avenue of redress if an applicant was refused any response to its request for a No-Action Letter.

Part C — Staff Assessment of Request for No-Action Letters

Part C gives the factors the staff would consider in determining its response (or lack of response) to a request. Our concerns with this section mirror our concerns raised above with Part A.

The Associations recommend that Part C be similarly revised to capture the reformation we recommend to Part A. We do not suggest that the Bureau cannot be selective in the approval process. However, requests that demonstrate merit and promote pro-protection innovation should be recognized for such first mover (not best practice) efforts. If the Bureau determines that such innovation can be better advanced by alternatives like generally applicable guidance or updated rule-makings, then it should proceed along those lines. This would reduce regulatory uncertainty and promote innovation across the market by more providers for the benefit of more consumers. There are plenty of examples of agencies issuing enforcement orders accompanied by guidance documents that more carefully explain the applicability of the enforcement lessons to the broader market. In this context a No-Action Letter Approval could be accompanied by parallel guidance — subject to public notice and comment — that would translate the lessons learned by the No-Action Letter circumstances and analysis for more market-wide applicability.

Given the narrow window allotted for near-market ready product application, one is hard pressed to think of a situation where rulemaking or other formal interpretation is feasible in the time contemplated for this proposed process; even though those alternatives might more expansively resolve regulatory uncertainty for a wider group of service providers than a No-Action Letter of the type described here. For this reason, this factor should not be included among the criteria to be addressed in an application. In the alternative, where staff identifies value in a more open market guidance piece, it should consider the suggestion we made earlier — follow a No-Action Letter with the issuance of a parallel public guidance for notice and comment or perhaps issue an Advanced Notice of Proposed Rulemaking to gauge interest in pursuing the regulatory or compliance alternatives presented in the No-Action Letter in a more formal action available to the market at large.

Part D — Staff Provision of No-Action Letters

As currently proposed, this section describes the circumscribed protections ultimately bestowed by the No-Action Letter. Remarkably, paragraph 4 disclaims any interpretation or official expression of Bureau views of the rules implicated by the

application and “that staff are not necessarily in agreement with any legal or policy analysis, any interpretation of data, or any other matter, set forth in the request.” The proposal also states (in fn. 3) the No-Action Letter does not limit the bureau in any way, does not constitute an interpretation of law, and does not confer or create a defense (even for the requester apparently) in a court. In short, this is nonbinding, even upon the Bureau. But the footnote makes an even more telling point. Even assuming the CFPB would honor the terms of the No-Action Letter in regard to the requester (as one hopes it would, even if it is not obligated to do so), the CFPB does not view the No-Action Letter as an interpretation of law. Therefore, no one else can use it in court as a defense or *even rely upon it as a basis for their own compliance*. If they are market competitors with the requester, they cannot adopt a product or service to compete without getting their own No-Action Letter, which the Bureau has clearly stated is an extremely rare occurrence.

Thus, the No-Action Letter expresses at best no present intention to recommend enforcement action. It applies to no other agency (such as the Department of Justice) that may choose to enforce one of the CFPB’s statutes or regulations, nor to courts ruling on private litigation (“[S]o far as the Bureau is concerned, no other government agency or person, and no court, has any obligation to honor or defer to [a No-Action Letter] in any way.”). When coupled with the reservation in paragraph 6 of Part D that the letter “is subject to modification or revocation at any time at the discretion of the staff for any reason…,”it becomes clear that the letter affords no reliable reduction of the regulatory uncertainty that was the ostensible motivation for the proposal.

The Associations believe that the extremely limited No-Action Letter scope creates virtually no incentive for innovators to undertake the request process, because it provides no real benefit commensurate with the uncertainty sought to be reduced. This is contrary to the professed purpose of the proposal itself and to the detriment of the Bureau’s mission to promote innovation. The changes we recommend to this part include an expansion of the No-Action scope to assure against not only Bureau enforcement or supervisory criticism, but to preclude enforcement or supervisory criticism by any agency authorized to conduct such activities under the DFA with respect to institutions in its respective jurisdiction. We believe all actions derivative of the federal consumer financial protection laws should be covered by the scope of the No-Action Letter so that it is given deference by all other agencies and courts. In addition, the assurance of No-Action should preclude any rescission with retroactive effect.

Part E – Bureau Disclosure of Entity Data

The proposal states the rule generally requires the Bureau to make available records requested by the public unless they are subject to a FOIA exemption or exclusion. The Associations believe that how the proposal treats application information needs to be strengthened to better assure confidentiality. Disclosure by the Bureau of the extensive amount of product detail and legal analysis required by the current proposal — whether the request was granted or denied—could enable competitors to exploit the idea or otherwise add compliance or litigation risks should the applicant proceed along slightly

different lines without No-Action Letter protection. Without improved assurances of confidentiality, the proposal will not induce the innovation sought.

Paperwork Reduction Act

Not surprisingly, in forecasting the paperwork estimates attributable to this process, the Bureau concedes that 1 – 3 respondents annually can be expected to incur the costs of the process. In view of the discouragement that we have identified in the proposal, the Associations believe this may even exaggerate the number of requests the Bureau receives should the process be finalized in its current form.

Conclusion

In summary, the Associations believe that Bureau staff is working at cross purposes with the mission of innovation that it professes. Director Cordray often remarks on the importance of consumer protections keeping pace with financial product innovation to achieve the unalloyed market benefits of technological advancement. Such aspirations warrant a more constructive approach than represented by this proposal. The Associations and our members offer to engage in continued dialogue to improve the No-Action Letter option so that it provides a worthwhile accompaniment to the innovative spirit that the banking industry has a history of pursuing.

Sincerely,

Richard R. Riese
Senior Vice President, Center for Regulatory Compliance
American Bankers Association

Steven I. Zeisel
Executive Vice President & General Counsel
Consumer Bankers Association

Deanne Marino
Executive Director
American Bankers Insurance Association