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To: Clients and Friends

From: David F. Dulock

Subject: CFPB Issues Procedural Rule Establishing Advisory Opinions Policy

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In the December 3, 2020, issue of the *Federal Register* (85 FR 77987, [click here](#)), the Bureau of Consumer Financial Protection (Bureau) issued its Advisory Opinions Policy, which sets forth procedures to facilitate the submission by interested parties of requests that the Bureau issue advisory opinions, in the form of interpretive rules, to resolve regulatory uncertainty, which encompasses not only uncertainty with respect to regulatory provisions but also, where applicable, uncertainty as to statutory provisions, and the manner in which the Bureau will evaluate and respond to such requests.

The Advisory Opinions Policy was applicable beginning November 30, 2020 and supersedes the pilot Advisory Opinions Program initiated by the Bureau on June 22, 2020 (85 FR 37331). Advisory Opinions issued by the Bureau under the Advisory Opinions Policy will be published by the Bureau in the *Federal Register* and on the Bureau's website at www.consumerfinance.gov.

Text of the Advisory Opinions Policy

A. Overview

The primary purpose of this Advisory Opinions Policy is to establish procedures to facilitate the submission by interested parties of requests that the Bureau issue advisory opinions and the manner in which the Bureau will evaluate and respond to such requests. Advisory opinions will be interpretive rules issued to resolve regulatory uncertainty.

B. Submission and Content of Requests

Requests for advisory opinions should be submitted via email to advisoryopinion@cfpb.gov or through other means designated by the Bureau. The Bureau will not consider a request for an advisory opinion to be complete unless the request includes all of the information specified in the following paragraphs.

1. *Confidential information:* The request must identify information the requestor believes should be treated as confidential. If the requestor would not normally make the information public, the Bureau intends to withhold that information from public disclosure to the extent permitted by the Freedom of Information Act, 5 U.S.C. 552(b), and treat the information as confidential in accordance with the Bureau's regulations on Disclosure of Records and Information. Requests should not include sensitive personal information, such as account numbers or Social Security numbers, or names of individuals.

2. *Identity of person or entity seeking the advisory opinion.* The request must identify the person or entity seeking the advisory opinion, as well as the identity of any person or entity submitting the request on behalf of a third party (*i.e.*, one or more clients or members). Outside counsel, a trade association, or a consumer advocacy group, for example, may submit requests for advisory opinions on behalf of one or more clients or members, and those entities do not need to be identified.

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3. *Statement about the absence of investigation or litigation.* The request must include a statement that the issue on which the advisory opinion is being requested is—or is not—the subject of any known or reasonably knowable active litigation or Federal or State agency investigation. Additionally, if the requestor is submitting a request on behalf of an unidentified third party, the requestor must provide a statement that the unidentified third party is—or is not—the subject of an ongoing public Bureau enforcement action or an ongoing Bureau enforcement investigation.

4. *Specifics about the issue on which the advisory opinion is sought.* The issue raised in the request must be within the Bureau’s purview, and the request must concern actual facts or a course of action that the requestor (or third party) is engaged in, or considering engaging in. The request must set forth as completely as possible, all material facts and circumstances, including detailed specification of the legal question(s) and supporting facts with respect to which the requestor seeks an advisory opinion. The request must also identify the regulatory or statutory provision at issue and the potential uncertainty or ambiguity that the proposed interpretation would address, provide a proposed interpretation of law or regulation, and explain why the proposed interpretation is an appropriate resolution of that uncertainty or ambiguity. Requestors may also choose to offer additional information, including, as applicable, an explanation of the potential consumer benefits and risks associated with resolution of the interpretive question and the proposed interpretation; and an explanation of how the proposed interpretation relates to the Bureau’s statutory objectives.

Alternatively, in some cases the Bureau may decide to issue an advisory opinion based on questions the Bureau receives from the public, through other channels, that are not requests for advisory opinions.

C. Characteristics of Advisory Opinions

Advisory Opinions issued by the Bureau under the Advisory Opinions Policy will be interpretive rules under the Administrative Procedure Act (APA) that respond to a specific need for clarity on a statutory or regulatory interpretive question. The Bureau will publish advisory opinions in the **Federal Register** and on consumerfinance.gov, including a summary of the material facts or covered products and the Bureau’s legal analysis of the issue.

Unless otherwise stated, each advisory opinion will be applicable to the requestor and to similarly situated parties to the extent that their situations conform to the summary of material facts or coverage in the advisory opinion. The scope and terms of an advisory opinion will be set out in the advisory opinion itself, and may deviate from the interpretation proposed by the requestor in its submission. Moreover, the Bureau will not normally investigate the underlying facts of the requestor’s situation and, as a result, an advisory opinion may not be applicable to the requestor if the underlying facts of the requestor’s situation do not conform to the summary of material facts.

If a statutory safe harbor is applicable to an advisory opinion, the advisory opinion will explain that fact. The Truth in Lending Act (TILA), Equal Credit Opportunity Act (ECOA), Electronic Fund Transfer Act (EFTA), and Real Estate Settlement Procedures Act (RESPA) provide certain protections from liability for acts or omissions done in good faith in conformity with an interpretation by the Bureau. The Fair Debt Collection Practices Act (FDCPA) contains similar protections, specifically using the term “advisory opinion.”

D. Factors in Bureau Selection of Topics for Advisory Opinions

The Bureau intends to consider the following factors as part of its consideration of whether to address requests for advisory opinions. The Bureau will prioritize open questions if they are within the Bureau’s purview that can legally be addressed through an interpretive rule and if an

advisory opinion is an appropriate tool relative to other Bureau tools for answering the question. Initial factors weighing for the appropriateness of an advisory opinion include: (1) The interpretive issue has been noted during prior Bureau examinations as one that might benefit from additional regulatory clarity; (2) the issue is one of significant importance or one whose clarification would provide significant benefit; and/or (3) the issue concerns an ambiguity that the Bureau has not previously addressed through an interpretive rule or other authoritative source. Factors weighing strongly for presumption that an advisory opinion is not an appropriate tool include: (1) The interpretive issue is the subject of an ongoing Bureau investigation or enforcement action; (2) the interpretive issue is the subject of an ongoing or planned rulemaking; (3) the issue is better suited for notice-and-comment rulemaking; (4) the issue could be addressed more effectively through a Compliance Aid or the RIF function; or (5) there is clear existing Bureau or court precedent that is available to the public on the issue.

The Bureau intends to further evaluate requests for advisory opinions based on secondary factors, including: Alignment with the Bureau's statutory objectives; size of the benefit offered to consumers by resolution of the interpretive issue; known impact on the actions of other regulators; and impact on available Bureau resources. The Bureau will primarily focus on the following statutory objectives: (1) Consumers are provided with timely and understandable information to make responsible decisions about financial transactions; (2) outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens; (3) Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and (4) markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

The Bureau will focus primarily on clarifying ambiguities in its regulations, although Advisory Opinions may clarify statutory ambiguities. The Bureau will not issue advisory opinions on issues that require, or are better addressed through, a legislative rulemaking under the APA. For example, the Bureau does not intend to issue an advisory opinion that would change regulation text or commentary. Similarly, if a regulation or statute establishes a general standard that can only be applied through highly fact-intensive analysis, the Bureau does not intend to replace that analysis with a bright-line standard that eliminates all of the required analysis. Highly fact-intensive applications of general standards, such as the statutory prohibition on unfair, deceptive, or abusive acts or practices, pose particular challenges for issuing advisory opinions, although there may be times when the Bureau is able to offer advisory opinions that provide additional clarity on the meaning of such standards.

E. Public Input

Advisory opinions will be issued and final upon publication in the **Federal Register**. However, interested persons may provide input on published advisory opinions at any time by sending an email to advisoryopinion@cfpb.gov or through other means designated by the Bureau. The Bureau is particularly interested in input that addresses whether an advisory opinion would benefit from clarification or reconsideration, with information about the factual or legal basis for clarification or reconsideration.

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