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To: Clients and Friends
From: David F. Dulock
Subject: CFPB Issues Procedural Rule Establishing a Pilot Advisory Opinion Program

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In the June 22, 2020 issue of the Federal Register (85 FR 37331, click here), the Bureau of Consumer Financial Protection (Bureau) announced the establishment of a pilot advisory opinion program (Pilot AO Program). Under the Pilot AO Program, requestors will be able to request interpretive guidance, in the form of an advisory opinion (AO), to resolve regulatory uncertainty, which encompasses not only uncertainty with respect to regulatory provisions but also, where applicable, uncertainty as to statutory provisions.

For this Pilot AO Program, requests for an AO will be limited to covered persons or service providers that are subject to the Bureau's supervisory authority or subject to the Bureau's enforcement authority (requestors). The Bureau will not accept requests from third parties, such as trade associations or law firms, on behalf of unnamed entities as part of the Pilot AO Program. Requestors may submit requests by email to advisoryopinion@cfpb.gov, or through other means designated by the Bureau.

AOs under the pilot program will be interpretive rules under the Administrative Procedure Act that respond to a specific request for clarity on an interpretive question. The Bureau will publish AOs in the Federal Register and on consumerfinance.gov, including the Bureau's summary of the material facts and the Bureau's legal analysis of the issue. Unless otherwise stated, each AO will be applicable to the requestor and to similarly situated parties to the extent that their situations conform to the Bureau's summary of material facts in the AO.

As part of its consideration of whether to address topics through AOs, the Bureau intends to consider the following factors:

- Initial factors weighing for the appropriateness of an AO include:
- that the interpretive issue has been noted during prior Bureau examinations as one that might benefit from additional regulatory clarity;
- that the issue is one of substantive importance or impact or one whose clarification would provide significant benefit; and/or
- that the issue concerns an ambiguity that the Bureau has not previously addressed through an interpretive rule or other authoritative source.
Additional factors to further evaluate potential topics for AOs include:
- 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.
Conversely, factors weighing strongly for a presumption that an AO is not an appropriate tool include:
- that the interpretive issue is the subject of an ongoing Bureau investigation or enforcement action;
- that the interpretive issue is the subject of an ongoing or planned rulemaking;

- that the issue is better suited for the notice-and-comment process;
- that the issue could be addressed effectively through a Compliance Aid; or
- that there is clear Bureau or court precedent that is already available to the public on the issue.

AO requests need not address the above factors in order to be fully considered by the Bureau.

The Pilot AO Program will focus primarily on clarifying ambiguities in the Bureau's regulations, although AOs may clarify statutory ambiguities. The Bureau will not issue AOs on issues that require notice-and-comment rulemaking under the Administrative Procedure Act, or that are better addressed through that process. Also, where 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 it with a bright-line standard that eliminates all the required analysis.

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