



July 13, 2020

To: Clients and Friends
From: David F. Dulock
Subject: CFPB Issues Proposed Procedural Rule for Advisory Opinion Program

8584 Katy Freeway, Suite 420

Houston, TX 77024

Phone: 713-871-0005

Fax: 713-871-1358

Partners

Thomas E. Black, Jr.1

Gregory S. Graham2

Shawn P. Black3

Managing Attorney Houston

Ryan Black4

Senior Lawyers

David F. Dulock

Diane M. Gleason

Daniel S. Engle5

Margaret Noles

Associates

Nick Stevens

Sydney Davis

Brandon Pieratt

Of Counsel

David M. Tritter

Calvin C. Mann, Jr.

Retired Partner(s)

Calvin C. Mann, Jr.

1 Also Licensed in Iowa, New York, and Washington

2 Also Licensed in Georgia

3 Also Licensed in Kentucky and New York

4 Also Licensed in Washington D.C.

5 Also Licensed in New York

In the June 22, 2020 issue of the Federal Register (85 FR 37394, click here), the Bureau of Consumer Financial Protection (Bureau) requests the public to comment on a new advisory opinion program (Proposed AO Program), and a proposed information collection associated with requests submitted by persons requesting advisory opinions under the Proposed AO Program. This Proposed AO Program is separate from the Bureau's Pilot AO Program the subject of our July 10, 2020, memorandum posted on the firm's website.

Written comments on the Proposed AO Program must be received on or before August 21, 2020. The comments must be identified by Docket No. [CFPB-2020-0019] and submitted by any of the following methods:

- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.
Email: 2020-RFCAdvisoryOpinions@cfpb.gov. Include Docket No. [CFPB-2020-0019] in the subject line of the email.
Mail/Hand Delivery/Courier: Comment Intake, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552.

The primary purpose of the Proposed AO Program is to provide a mechanism through which the Bureau may more effectively carry out its statutory purposes and objectives by better enabling compliance in the face of regulatory uncertainty. Under the Proposed AO Program, parties will be able to request interpretive guidance, in the form of an advisory opinion (AO), to resolve such regulatory uncertainty, which encompasses not only uncertainty with respect to regulatory provisions but also, where applicable, uncertainty as to statutory provisions.

Requests would be submitted through means, such as an email address, designated by the Bureau. Parties requesting AOs will be required to submit certain information for a request to be complete. The requestor must be identified, regardless of whether the requestor is submitting a request on its own behalf or submitting a request on behalf of a third party (i.e., on behalf of one or more clients or members). Outside counsel or a trade association, for example, could submit requests for AOs on behalf of one or more clients or members, and those entities would not need to be named. Additionally, if the requestor is submitting a request on behalf of an unidentified third party, the requestor must provide a statement on whether the unidentified third party is the subject of an ongoing public Bureau enforcement action or an ongoing Bureau enforcement investigation conducted by the Bureau's Office of Enforcement.

In addition, the issue raised in the request must be within the Bureau's responsibility (i.e., federal consumer financial laws under the Bureau's jurisdiction) and the request must concern actual facts or a course of action that the requestor is considering engaging in, with the requestor providing a statement of whether the issue on which the AO is being requested is the subject of any known or reasonably knowable active litigation or federal or state agency investigations.

The requestor also must set forth as completely as possible all material facts and circumstances, including detailed specification of the legal question and supporting facts with respect to which the requestor seeks an AO; and a proposed interpretation, identification of the potential uncertainty or ambiguity that such interpretation would address, and explanation of why the requested interpretation is an appropriate resolution of that uncertainty or ambiguity (*notwithstanding, the Bureau retains discretion to answer the request with its own interpretation*). 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.

AOs under the proposed 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 Proposed AO Program would 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.

The Bureau is seeking comments on all aspects of the Proposed AO Program. In particular, the Bureau solicits comment on the following:

- application elements the Bureau should require from parties requesting AOs, and accommodations that should be made for requestors with limited legal resources;
- how the Bureau should prioritize requests for AO guidance;
- how the Bureau should quantify benefit to consumers when evaluating AO requests;
- improvements that could be made to the Proposed AO Program to further enhance compliance;
- how the Bureau should handle sensitive information submitted by requestors; and
- how the Bureau can make AO guidance that has not been incorporated into the Official Interpretations codified in the Code of Federal Regulations (or Commentary) available to the public in a useful format.

The Bureau has concluded that, if finalized, the Proposed AO Program would constitute a rule of agency organization, procedure, or practice, and that it would therefore be exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act. For the same reason, it would not be subject to the 30-day delayed effective date for substantive rules under the Administrative Procedure Act.

**This Memorandum is provided as general information regarding the subject matter covered, but no representations or warranty of the accuracy or reliability of the content of this information are made or implied. Opinions expressed in this memorandum are those of the author alone. In publishing this information, neither the author nor the law firm of Black, Mann & Graham L.L.P. is engaged in rendering legal services. While this information concerns legal and regulatory matters, it is not legal advice and its use creates no attorney-client relationship or any other basis for reliance on the information. Readers should not place reliance on this information alone but should seek independent legal advice regarding the law applicable to matters of interest or concern to them. The law firm of Black, Mann & Graham L.L.P. expressly disclaims any obligation to keep the content of this information current or free of errors.**