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National Association of Federally-Insured Credit Unions

February 11, 2019

Mr. Paul Watkins
Director, Office of Innovation
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

RE: Policy on No-Action Letters and the BCFP Product Sandbox
(Docket No. CFPB-2018-0042)

Dear Mr. Watkins:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in response to the Bureau of Consumer Financial Protection's (Bureau) proposed Policy on No-Action Letters and the Product Sandbox. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 115 million consumers with personal and small business financial service products.

NAFCU supports the Bureau's efforts to promote innovation by advancing policies that would accommodate new financial products or services and help identify burdensome rules and regulations. As the consumer financial marketplace continues to evolve and pioneering technologies are introduced, NAFCU believes that the Bureau must be willing to accept alternative modes of compliance that encourage experimentation. In addition, the Bureau should recognize that No-Action Letters and the Product Sandbox might serve as vehicles for improving traditional products and services, whose full potential may be held back by outdated or ineffective regulations. More generally, the dual policies advanced in the proposal could support more permanent changes to the existing regulatory landscape, with successful participation in the Product Sandbox or No-Action Letter environment opening the door to broader industry relief.

General Comments:

Section 1021 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act) lists among the Bureau's objectives two goals that are most relevant to this proposal: (1) ensuring that federal consumer law is not outdated, unnecessary, or unduly burdensome; and (2) ensuring that the markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation. NAFCU agrees that this statutory mandate vests the Bureau with the authority to grant exemptions and safe harbors for certain activities, including those that propose alternative means of complying with federal consumer financial law. In general, NAFCU supports the proposal's improvements to No-Action Letters and introduction of new relief through the Product Sandbox, but asks for additional clarity concerning appeals, disclosure of

application information, and the Bureau's procedures for assessing compliance with the terms and conditions of No-Action Letters or Product Sandbox agreements.

NAFCU would also like to emphasize that the preferred mechanism for regulatory relief would be for the Bureau to directly amend its rules and regulations when burdens are identified. While No-Action Letters and the Product Sandbox may permit the Bureau to accelerate regulatory transformation in connection with discrete product or service offerings, it should not operate to slow general reform efforts by premising future change on the successful demonstration of pilot programs. For credit unions, participation in the Product Sandbox or compliance with the terms and conditions of a No-Action Letter would entail a significant resource commitment. As a consequence, many credit unions will depend on traditional rulemakings to alleviate regulatory burden, as the cost of obtaining counsel and additional staff to monitor experimental programs, products or services would, in many cases, be prohibitive.

No-Action Letter Policy

Under the proposed policy, No-Action Letters will serve the same function they do currently but recipients will benefit from a more streamlined application process, reduced data collection burdens, and greater assurances that the Bureau will not take supervisory or enforcement action with respect to a specified product or service offering. Perhaps most importantly, the revised policy indicates that a No-Action Letter will include a statement that, subject to good faith, substantial compliance by the recipient, and in the exercise of its discretion, the Bureau will not make supervisory findings or bring a supervisory or enforcement action under its authority to prevent unfair, deceptive, or abusive acts or practices (UDAAP), or any other identified statutory or regulatory authority within the Bureau's jurisdiction.

NAFCU supports the Bureau's changes to its No-Action Letter policy and believes that a faster application process and more definite promise of relief from supervisory and enforcement action (under agreed upon conditions) will encourage broader interest. NAFCU agrees that no-action relief should not be bound by any temporal limitation, as the costs associated with participation in the Bureau's program would typically demand a long term commitment to the product or service offering in question. Credit unions that may be interested in no-action relief must have some assurance that their investments in innovative products, services or compliance programs can be recovered over a reasonable timeframe. Accordingly, NAFCU expects that the elimination of artificial limits on the no-action period will facilitate longer-term—and more meaningful—experimentation.

With respect to the application procedures for No-Action Letters, NAFCU supports the Bureau's decision to permit third parties—such as trade associations—to receive a provisional letter on behalf of its members. The proposal acknowledges that a third-party applicant may have difficulty submitting a complete application without specific knowledge of the business practices of every entity interested in no-action relief, and NAFCU recommends that in such circumstances the Bureau should liberally grant provisional No-Action Letters. While the proposal suggests that a provisional No-Action Letter would be subject to submission of additional information and the Bureau's subsequent issuance of a non-provisional letter, it would be helpful to know whether the

Bureau envisions provisional letters lasting for a limited period of time before re-application is necessary. In addition, NAFCU believes that the Bureau should not make summary disclosures of provisional No-Action Letters, and should generally treat information contained within provisional applications as confidential information.

NAFCU also recommends that the Bureau make the application process accessible to smaller entities with limited legal compliance resources by allowing applications to reference previously approved No-Action Letters. This would be most helpful in regard to the requirement that applicants identify specific statutory and/or regulatory provisions from which relief is sought and the uncertainty, ambiguity or obstacle such relief would address.

To assist smaller entities, the Bureau should seek to publish summaries of the general legal reasoning that is used to support a No-Action Letter, but not in such detail as to reveal sensitive business information, trade secrets, or confidential supervisory information. Ideally, citations to previously approved No-Action Letters (similar in scope to the application) would be sufficient to meet the policy's requirement in I.B.5. Permitting applicants to model their own No-Action Letter applications off of successful predecessors would make the program more attractive for credit unions that are interested in providing innovative products or services but may not be able to assume the burden of an exploratory application, which may entail an upfront investment in compliance resources or the involvement of a law firm.

NAFCU also supports the Bureau's decision to clarify that retroactive liability will not be imposed if a No-Action Letter is revoked for a reason other than the recipient's (or recipients') failure to substantially comply in good faith with the terms and conditions of the letter. NAFCU supports the general framework for minimizing operational disruption in such a circumstance, but believes that additional clarity would be beneficial. The revised policy states that the Bureau will notify recipients of the grounds for revocation and permit an opportunity to respond and cure within a "reasonable period of time" before formally revoking a No-Action Letter. The Bureau also intends to allow a recipient to "wind-down" its product or service offering during an appropriate period after revocation, unless the revocation was based upon the product or service causing material, tangible harm to consumers and a wind-down period would increase such harm.

NAFCU recommends that the Bureau explain in greater detail what it means by an opportunity to respond within a reasonable period of time. For example, how will a recipient's contest of a proposed revocation be adjudicated at the Bureau? What aspects of a recipient's product or service offering will inform the length of a reasonable cure period—or the measurement of harm? Is a recipient's time to respond different from its time to cure? While NAFCU understands that the Bureau may wish to preserve a degree of flexibility when it proposes to revoke a No-Action Letter, it should not adopt a procedure that is so vague that legal risks are difficult to determine.

UDAAP Relief

NAFCU and its member credit unions agree that UDAAP violations can cause extensive injury to consumers, erode consumer confidence, and undermine the financial marketplace; however, credit unions must have a clear understanding of the rules and prohibited behaviors from the start,

particularly if they are looking to embrace innovation-focused strategies through No-Action Letters or participation in the Product Sandbox. In general, NAFCU believes the Bureau should seek to minimize legal risks to both No-Action Letter recipients and Product Sandbox participants to the greatest extent practicable in order to encourage meaningful utilization of the two programs.

NAFCU is supportive of the Bureau's decision to limit application of the agency's UDAAP authority under the proposed policies. While credit unions strive to ensure that they are compliant with all federal consumer financial law, the historical use of enforcement actions to articulate the legal contours of unfair, deceptive, and abusive practices has made it difficult to predict with certainty how the Bureau will react to novel product or service offerings. From the standpoint of promoting innovation, such relief is necessary to ensure that credit unions interested in testing new programs, products or services do not face the unintended consequence of supervisory or enforcement action, and are not so discouraged by the prospect of future liability that they avoid experimentation that might otherwise benefit their members.

Both the No-Action Letter policy and the Product Sandbox policy provide that for approved applications, the Bureau will affirm that it will not make supervisory findings or bring a supervisory or enforcement action against a letter recipient or sandbox participant under its UDAAP authority, subject to good faith compliance with the terms and conditions of the agreement—in the exercise of its discretion. As an initial matter, NAFCU asks the Bureau to clarify whether the phrase "in the exercise of its discretion" is intended to qualify the proposed UDAAP relief as non-binding, or merely indicates the legal basis for the Bureau's ability to grant such relief. NAFCU believes that a promise not to bring UDAAP-related supervisory or enforcement action in connection with a pre-approved activity should only be predicated upon the applicant's good faith compliance with the terms and conditions of the agreement.

In addition, NAFCU encourages the Bureau to coordinate in advance with state regulatory authorities, including state attorneys general, to assess the extent to which UDAAP relief will translate across jurisdictions. While the Bureau may state as a matter of policy that it will not pursue UDAAP violations against a recipient of a No-Action Letter or participant in the Product Sandbox, such a policy does not prevent a state attorney general from bringing a similar action pursuant to section 1042 of the Dodd-Frank Act. To achieve a desirable level of jurisdictional certainty, NAFCU supports the Bureau's emphasis on coordination with state regulatory agencies and attorneys general to extend policy protections through state-level agreements, which would—in ideal circumstances—honor the terms and conditions of No-Action Letters or Product Sandbox agreements.

Disclosure of Application Information

The proposed policies for No-Action Letters and the Product Sandbox both require applicants to submit a separate request if they wish to designate certain application information as confidential and protected from disclosure under the *Freedom of Information Act* (FOIA) and/or the Bureau's rule on Disclosure of Records. The proposal explains in a footnote that such a request should describe the legal bases for confidentiality with as much specificity as practicable, and for applicants with limited legal resources, explain the limits on further specification. NAFCU

appreciates the Bureau's recognition that not every institution will have the ability to address in detail the basis for seeking confidential treatment of information. However, to ensure that sensitive information is not disclosed inadvertently, the Bureau should apprise entities of its intention to disclose information in a No-Action Letter or Product Sandbox application prior to doing so.

NAFCU believes that entities seeking the benefit of either policy should have the opportunity to amend their original request for confidential treatment of information if they disagree with the Bureau's decision to publish or otherwise disclose such information, whether or not such a decision is based on a FOIA request. In addition, NAFCU recommends that the Bureau extend the protections described in 12 CFR § 1070.20 to No-Action Letter recipients and Product Sandbox participants whenever the Bureau contemplates any disclosure of business information.

NAFCU agrees with the Bureau's own assessment that much of the information submitted by applicants in their applications will qualify as confidential information, which may include confidential supervisory information and/or business information under the Disclosure Rule. Nevertheless, NAFCU urges the Bureau to construe the scope of non-privileged and non-confidential information narrowly in order to protect strategic business information or trade secrets from disclosure.

Product Sandbox Policy

NAFCU supports the Bureau's decision to introduce a formal program to grant safe harbor approvals and exemptions under specific statutory and regulatory provisions. While the proposed policy represents one way to effectuate the relief contemplated in exemption-by-order provisions, or safe harbors, it should not be treated as the only mechanism for advancing reform efforts. NAFCU encourages the Bureau to broadly utilize its approval and exemption authorities through general rulemakings, and possibly through more general application of Section 1022(b)(3) of the Dodd-Frank Act, as it identifies outdated, ineffective or unduly burdensome regulations, without waiting for Sandbox participants to prove the case for regulatory relief.

In general, NAFCU believes the proposed Product Sandbox is well intentioned and that the goal of affording participants immunity from liability and enforcement actions brought by Federal and State authorities, as well as private parties, is necessary to encourage meaningful experimentation in the consumer financial marketplace. In addition, NAFCU agrees with the Bureau's approach to weighing risks to consumers more carefully within the Sandbox; however, NAFCU urges the Bureau to moderate data collection requirements in proportion to an entity's overall risk profile, a process that should include consideration of whether the entity is subject to the same degree of supervision as credit unions and banks.

For credit unions already subject to regular examination, the Bureau should reconsider the need for additional supervisory requirements (i.e., data collection) as a condition of Sandbox participation, particularly when there are less burdensome alternatives, such as improved coordination with the National Credit Union Administration. Furthermore, given that the No-Action Letter policy does not require an express commitment to data sharing but affords relief that

is very similar to the kind provided through the Product Sandbox, the Bureau should be open to minimization of data collection requirements for supervised institutions.

Addressing Risks to Consumers

To evaluate risks to consumers that may arise in the Product Sandbox, the Bureau intends to consider an applicant's plan for sharing data with the Bureau while they are Sandbox participants. The Bureau expects this data to include, among other things, changes in complaint patterns, default rates, or other information that should be investigated to determine if a product or service offering is causing material, tangible harm to consumers. In general, NAFCU agrees that monitoring for consumer harm within the Product Sandbox constitutes prudent supervision, but believes that the Bureau should seek to leverage existing sources of supervisory information to minimize compliance burdens.

The Bureau should also clarify how it will evaluate consumer complaint metrics and what methods it will use to normalize complaint data during the participation period. Additionally, the Bureau should specify at the application approval stage what types of data it intends to review in order to give credit unions sufficient time to prepare internal reporting systems. The Bureau should avoid data collections that are only marginally useful for assessing the proposed product or service offering, and should seek to reduce data collections throughout the participation period if it is determined that they are not needed to assess the presence of material, tangible harm.

With respect to how the Bureau intends to address situations where a product or service offering causes "material, tangible harm" to consumers, NAFCU believes that greater clarity is needed to advise prospective applicants of how such a determination will be made. Such clarity is of particular importance if the Bureau requires a commitment to compensate consumers for material, quantifiable, economic harm. For example, does such a commitment operate as a waiver of defenses in a future enforcement action or in lawsuit? Adding to this uncertainty, the policy does not reveal how economic harm will be measured or assessed, or whether such a determination is appealable. At a minimum, these are essential questions that the Bureau must address in its policy; however, a better outcome would be for the Bureau to avoid creating additional legal risks for participants.

NAFCU believes that while findings of material, tangible harm arising from a participant's product or service offering will be extremely rare, the potential for unavoidable liability will discourage meaningful utilization of the Product Sandbox as a platform for innovation. Furthermore, because applicable statutory exemption-by-order provisions and regulatory safe harbors do not condition relief upon the commitment expressed in II.D.6 of the proposed policy, it would seem counterintuitive for the Bureau to institute such a requirement, particularly when the Bureau has already established that it may impose retroactive liability when a participant fails to act in good faith—the circumstance that would most likely give rise to material and tangible harm.

When the Bureau determines that it must revoke a participant's agreement, many of the concerns raised in connection with the No-Action Letters apply. NAFCU recommends that the Bureau

explain in greater detail how it will adjudicate a participant's response to a proposed revocation, and what factors the Bureau will consider when determining an appropriate cure period.

Conclusion

NAFCU appreciates the opportunity to provide comments on the Bureau's revised No-Action Letter policy and proposed Product Sandbox. NAFCU believes that to properly promote innovation in consumer financial services, the Bureau must take steps to reduce regulatory burdens that stand in the way of efforts to improve credit union member experiences. At the same time, innovation-centric initiatives should not take the place of traditional mechanisms for regulatory reform, and NAFCU urges the Bureau to pursue separate rulemakings to address the burdens that credit unions continue to face. If you have any questions or concerns, please do not hesitate to contact me at amorris@nafcu.org or 703-842-2266.

Sincerely,

A handwritten signature in black ink that reads "Andrew Morris". The signature is written in a cursive, flowing style.

Andrew Morris
Senior Counsel for Research and Policy