

BILLING CODE: 4810-AM-P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

[Docket No. CFPB-2020-0019]

Advisory Opinions Policy

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Procedural rule.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is issuing its final Advisory Opinions Policy (AO 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, and the manner in which the Bureau will evaluate and respond to such requests.

DATES: The AO Policy is applicable on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: For additional information about the AO Policy, **Andrea Edmonds** at (202) 435-7790. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION: On June 22, 2020, the Bureau published and sought public comment on a proposal (AO Proposal) for a new Bureau policy on advisory opinions (AOs) and simultaneously launched a pilot advisory opinion program (Pilot AO program).¹ This notice finalizes the AO Proposal as the Advisory Opinion Policy (AO Policy). Part I provides some background on the Bureau’s guidance functions and related statutory provisions. Part II sets out the final text of the AO Policy. Part III reviews the comments received on the AO Proposal and describes the changes the Bureau has made in the final AO Policy. Parts IV through VI address some additional regulatory matters.

I. Background

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),² the Bureau’s “primary functions” include issuing guidance implementing Federal consumer financial law.³ Providing clear and useful guidance to regulated entities is an important aspect of facilitating markets that serve consumers.

The Bureau currently issues several types of guidance regarding the statutes that it administers, as well as regarding its regulations and Official Interpretations. For example, the Bureau issues “Compliance Aids” that present legal requirements in a manner that is useful for compliance professionals, other industry stakeholders, and the public, or include practical suggestions for how entities might choose to go about complying with those requirements.⁴ The Bureau also provides individualized “implementation support” to regulated entities through its

¹ See Advisory Opinions Proposal, 85 FR 37394; The Bureau on the same date announced the launch of a pilot AO advisory opinion program. Advisory Opinions Pilot, 85 FR 37331. 85 FR 37331.

² Public Law 111-203, 124 Stat. 2081 (2010).

³ 12 U.S.C. 5511(c)(5).

⁴ See Policy Statement on Compliance Aids, 85 FR 4579 (Jan. 27, 2020).

Regulatory Inquiries Function (RIF).⁵ Neither Compliance Aids nor the RIF are intended to interpret ambiguities in legal requirements. The Bureau also may issue interpretive rules, which provide guidance on Bureau's regulations or governing law, and which in some situations may provide safe harbor to regulated entities that are in compliance with the Bureau's interpretive rule.⁶

The Bureau initiated its policy for issuing AOs in response to feedback received from external stakeholders in the 2018 Guidance RFI, encouraging the Bureau to provide written guidance in cases of regulatory uncertainty. The final AO Policy supersedes the Pilot AO program.⁷ It is intended to facilitate timely guidance by the Bureau that enables compliance by resolving outstanding regulatory uncertainty. The AO Policy supports the Bureau's statutory purpose of ensuring consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.⁸

II. Final Text of the AO Policy

A. Overview

The primary purpose of this AO Policy is to establish procedures to facilitate the submission by interested parties of requests that the Bureau issue advisory opinions, in the form

⁵ See Bureau of Consumer Financial Protection Request for Information Regarding Bureau Guidance and Implementation Support (Guidance RFI), 83 FR 13959, 13961-62 (Apr. 2, 2018).

⁶ *E.g.*, Treatment of Pandemic Relief Payments Under Regulation E and Application of the Compulsory Use Prohibition, 85 FR 23217 (Apr. 27, 2020); Truth in Lending (Regulation Z); Screening and Training Requirements for Mortgage Loan Originators With Temporary Authority, 84 FR 63791 (Nov. 19, 2019).

⁷ Because the AO Policy replaces the pilot, no further requests may be submitted for the pilot as of the date the AO Policy becomes effective. Requests submitted under the pilot that are pending as of that date will continue to be considered by the Bureau.

⁸ See 12 U.S.C. 5511(a)

of interpretive rules, to resolve regulatory uncertainty, and the manner in which the Bureau will evaluate and respond to such requests.⁹

B. Submission and Content of Requests

Requests for AOs 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. *Identification of any 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 treat it as confidential in accordance with the Freedom of Information Act, 5 U.S.C. 552(b), and the Bureau's regulations on Disclosure of Records and Information.¹⁰ 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 or a trade association, for example, could submit requests for AOs on behalf of one or more clients or members, and those entities do not need to be named.

⁹ For convenience, this document uses the term "regulatory uncertainty" to encompass uncertainty with respect to regulatory or, where applicable, statutory provisions.

¹⁰ 12 CFR 1070.

3. *Statement about the absence of investigation or litigation.* The request must include a statement that the issue on which the AO 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 conducted by the Bureau’s Office of Enforcement.
4. *Specifics about the matter about which the advisory opinion is sought.* The issue raised in the request must be within the Bureau’s purview,¹¹ and the request must concern actual facts or a course of action that the requestor (or third party) is 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 AO. The request must also provide a proposed interpretation, identification of the regulatory or statutory provision at issue and the potential uncertainty or ambiguity that such interpretation would address, and an explanation of why the requested interpretation is an appropriate resolution of that uncertainty or ambiguity.¹² 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

¹¹ Under title X of the Dodd-Frank Act (the Consumer Financial Protection Act of 2010), the Bureau was created to regulate the offering and provision of consumer financial products and services under federal consumer financial laws. 12 U.S.C. 5881. The Act enumerates several consumer laws under the Bureau’s jurisdiction (in part or whole). 12 U.S.C. 5841(12). Note that the Bureau’s Regulation J provides a separate procedure for advisory opinions regarding certain issues under the Interstate Land Sales Full Disclosure Act. See 12 CFR 1010.17.

¹² The responsive AO will not necessarily adopt the requestor’s proposed interpretation. The Bureau retains discretion to answer requests with its own interpretation regardless of the requestor’s proposed interpretation.

question and the proposed interpretation; and an explanation of how the proposed interpretation relates to the Bureau's statutory objectives.¹³

Alternatively, in some cases the Bureau may decide to issue an AO based on questions the Bureau receives from the public, through other channels, that are not requests for AOs.¹⁴

C. Characteristics of AOs

AOs issued by the Bureau under the AO Policy will be interpretive rules under the Administrative Procedure Act (APA)¹⁵ that respond to a specific need for clarity on an interpretive question. The Bureau intends to 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. Note that the initial request drafted by the requestor is not necessarily a reliable guide to the scope or terms of an AO. The AO may deviate from the requested response to the interpretive question presented in the submission. Moreover, the Bureau will not normally investigate the underlying facts of the requestor's situation, and as a result, an AO may not be applicable to the requestor if the underlying facts of the requestor's situation do not conform to the Bureau's summary of material facts.

¹³ Requestors should describe relevant legal provisions and arguments with as much specificity as practicable. The Bureau recognizes that in some cases, the requestor may lack the legal resources to provide a detailed and complete showing. In such circumstances, the requestor should provide the maximum specification practicable under the circumstances and explain the limits on further specification.

¹⁴ In that situation, references in this AO Policy to the requestor or request are inapplicable. Note that the Bureau may also issue interpretive rules outside the framework of the AO Policy.

¹⁵ 5 U.S.C. 553(b).

Where a statutory safe harbor is applicable to an AO, the AO 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.¹⁶ The Fair Debt Collection Practices Act (FDCPA) contains similar protections, specifically using the term “advisory opinion.”¹⁷

D. Factors in Bureau Selection of Topics for AOs

The Bureau intends to consider the following factors as part of its consideration of whether to address requests for AOs.¹⁸

The Bureau will prioritize open questions within the Bureau’s purview that can legally be addressed through an interpretive rule, where an AO is an appropriate tool relative to other Bureau tools for resolving the identified uncertainty. Initial factors weighing for the appropriateness of an AO include: (1) that the interpretive issue has been noted during prior Bureau examinations as one that might benefit from additional regulatory clarity; (2) that the issue is one of significant importance or one whose clarification would provide significant benefit; and/or (3) that 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 AO is not an appropriate tool include: (1) that the interpretive issue is the subject of an ongoing Bureau investigation or enforcement action; (2) that the interpretive issue is the subject of an ongoing or planned rulemaking; (3) that the issue is better suited for notice-

¹⁶ See 15 U.S.C. 1640(f) (TILA); 15 U.S.C. 1691e(e) (ECOA); 15 U.S.C. 1693m(d) (EFTA); 12 U.S.C. 2617, 12 CFR 1024.4 (RESPA).

¹⁷ See 15 U.S.C. 1692(k)(e).

¹⁸ The following are factors that the Bureau intends to weigh when deciding which topics to prioritize in the AO policy, based on all of the information available to the Bureau. AO requests need not address these factors in order to be fully considered by the Bureau.

and-comment rulemaking; (4) that the issue could be addressed effectively through a Compliance Aid or the RIF function; or (5) that there is clear Bureau or court precedent that is available to the public on the issue.

The Bureau intends to further evaluate requests for AOs based on additional 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) that consumers are provided with timely and understandable information to make responsible decisions about financial transactions; (2) that outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens; (3) that 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) that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.¹⁹

The Bureau will focus primarily on clarifying ambiguities in its regulations, although AOs may clarify statutory ambiguities. The Bureau will not issue AOs on issues that require a legislative rulemaking under the APA,²⁰ or that are better addressed through that process. For example, the Bureau does not intend to issue an advisory opinion that would change regulation text or commentary. Similarly, 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

¹⁹ See 12 U.S.C. 5511(b)(1), (3)-(5). The Bureau has a further statutory objective, that consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination. 12 U.S.C. 5511(b)(2). The Bureau considers this objective to be at least as important as its other objectives, and it does not plan to issue an AO that is in conflict with this objective. But because other regulatory tools are often more suitable for addressing UDAAPs and discrimination, the Bureau has chosen not to highlight this objective as a primary focus when selecting issues under the AO Policy.

²⁰ 5 U.S.C. 553(b).

it with a bright-line standard that eliminates all of the required analysis. Highly fact-intensive applications of general standards, such as of the statutory prohibition on unfair, deceptive, or abusive acts or practices, pose particular challenges for issuing AOs, although there may be times when the Bureau is able to offer AOs that provide additional clarity on the meaning of such standards.

E. Public Input

Advisory opinions will be 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 on whether an advisory opinion would benefit from clarification or reconsideration, including the factual or legal basis for such clarification or reconsideration.

III. Discussion of Comments and Changes in the Final AO Policy

A. Overview

The Bureau solicited comments on the AO Proposal. The Bureau received 16 unique comments, 13 of which were submitted by industry trade associations. A consortium of 7 consumer advocacy groups submitted a joint comment letter. The remaining comments were provided by staff of the Administrative Conference of the United States (ACUS) and one anonymous submitter. The Bureau has made certain changes to the AO Policy based on the comments, as discussed below, as well as other changes to the AO Policy for clarity.

B. General Comments

Industry commenters uniformly supported the AO Proposal, as did the anonymous commenter. These comments generally stated that the issuance by the Bureau of advisory opinions could aid in compliance in situations where there are legal and regulatory uncertainties.

Conversely, the joint comment letter by certain consumer advocacy groups generally opposed the AO Proposal and argued that the Bureau should abandon it. The Bureau has carefully considered this comment letter, but the contrary to the group's assertions, does not agree that issuing interpretive rules in the form of AOs is in any way inconsistent with the APA or with the Bureau's statutory authorities. The Bureau also does not agree that AOs are not an appropriate use of Bureau resources. AOs represent an investment by the Bureau that will help entities better understand their obligations under Federal consumer financial law, which will help prevent consumer harm from violations of law.

C. Legal Basis of AO Policy

The consumer advocacy group comments stated that issuing interpretive rules in the form of advisory opinions is inconsistent with the APA and with the Bureau's statutory authorities. The Bureau disagrees with this assertion. As proposed, the advisory opinions are interpretive rules under the APA. Nevertheless, the Bureau has revised the phrase "substantive importance or impact" in the list of factors that the Bureau intends to consider in Part II.D of the proposed AO Policy so that it reads "significant importance"—based on the comment's concern that the phrase might be read to suggest that the Bureau intends to issue advisory opinions that are substantive rules rather than interpretive rules under the APA.

D. Role of Public Input

The Bureau received a number of comments from stakeholders expressing interest in a mechanism for soliciting public input on AOs, either before or after issuance. Some commenters advocated that the Bureau obtain such input from the public before issuing AOs. The Bureau notes that there is nothing in the AO Policy that would prevent the Bureau from soliciting input on a draft AO before finalizing it, if the Bureau believed that course would be appropriate in an individual case. However, the Bureau declines to adopt this as a uniform requirement for AOs. Such a process is not typical of the advisory opinion policies of peer financial regulators. It could potentially delay the process of granting or denying of requests, and thus inhibit the purpose of the policy, which is to promptly provide clarity about the Bureau's understanding of its own regulations and the statutes that it administers in order to facilitate compliance.

However, the Bureau does agree that providing a mechanism for the public to provide feedback after an AO is issued in final could be useful. Accordingly, the Bureau has added new Part II.E to the AO Policy to provide that any person may comment on an AO via email to advisoryopinion@cfpb.gov or through other means designated by the Bureau. The Bureau encourages any stakeholder, including but not limited to industry representatives and consumer advocates, to submit such feedback in an instance where the stakeholder believes the Bureau should clarify or reconsider an AO.

E. Accuracy of Requests

Certain consumer advocacy group commenters expressed concern that the requestor's presentation of the issues might be inaccurate or misleading. However, the Bureau emphasizes that it expects requestors to provide truthful submissions to the Bureau. Moreover, presenting misleading facts would not be in the interests of the submitting party because the AO Policy explains that "an AO is not applicable to the requestor if the underlying facts of the requestor's situation do not conform to the Bureau's summary of material facts" in the AO. For the same reason, the Bureau does not believe it is necessary to require requestors to include an affirmation that the information provided is accurate, as some commenters suggested.

F. Follow-up by Requestors

Some commenters asked the Bureau to provide a mechanism for requestors to modify or rescind pending AO requests. The Bureau notes that it would be consistent with the AO Policy for a requestor to amend or withdraw a pending request.

When the Bureau informs a requestor that it has not chosen to issue an AO based on the request, some commenters advocated that the Bureau create a specific procedure for the requestor to appeal or request reconsideration of that decision. The Bureau does not believe

adding a specific procedure to address that possibility is necessary, because the AO Policy would allow a requestor to renew its request a second time—for example, if it wants to bring new facts to the Bureau’s attention.

G. Third-Party Requests

Part II.B of the AO Proposal stated that the Bureau would accept AO requests from trade associations, service providers, and other third-parties; however, the AO Proposal noted that 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.²¹ This statement was in addition to the general requirement that any requestor provide 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.

Trade association commenters generally supported the Bureau's proposal to allow third parties to request AOs. These commenters stated that allowing third parties to facilitate requests would increase access to AOs, in particular for smaller entities that might otherwise lack the resources to obtain AOs.

Certain consumer advocacy groups opposed the proposal to allow requests on behalf of third parties. These commenters argued that the Bureau would have insufficient detail about the underlying facts of the third party’s situation. The Bureau agrees that it is possible for this type of request, like any type of request, to include insufficient facts for the Bureau to reach a legal

²¹ 85 FR 37394.

conclusion. However, that would be a potential reason for denying an individual request, not entirely closing off this potential source of requests for AOs.

These commenters also asserted that the Bureau must know the identity of the third party in order to avoid interference with litigation or enforcement-related proceedings. However, the Bureau believes that the categorical, express representations that the requestor would need to make under the AO Proposal are sufficient to alert the Bureau to those proceedings of which the Bureau would not otherwise be aware that are likely to be relevant to a potential AO. The Bureau is finalizing the required statements, with non-substantive wording changes in Part II.B of the AO Policy.²²

H. Rescission of AOs

It is, of course, possible that the Bureau may find it appropriate to rescind an AO. One commenter emphasized that, if an AO is rescinded, no action should be taken against those institutions who acted in good faith in accordance with the AO. The Bureau notes that several statutes provide protections from liability for acts or omissions done in good faith in conformity with an interpretation by the Bureau, as detailed in the text of the AO Policy. And of course, in addition to any applicable safe harbors, for the Bureau to seek to impose retroactive penalties on persons who conformed their conduct in good faith with an approach endorsed in an AO, before the AO was rescinded, would raise serious concerns under the Due Process Clause, and the Bureau would not expect to do so.

I. Confidentiality of Material in AO Requests

²² One commenter suggested that the Bureau provide sample language that requestors can use when making these required statements. The Bureau has instead made non-substantive edits to how the required statements are set out in Part II.B of the AO Policy, so that requestors can choose to comply by using the applicable language in the AO Policy verbatim.

Part II.B of the AO Proposal explained that where information submitted to the Bureau is information the requestor would not normally make public, the Bureau intends to treat it as confidential pursuant to its rule, Disclosure of Records and Information,²³ to the extent applicable.

Industry commenters were broadly supportive of this approach. However, certain consumer advocacy groups asserted that this statement is in tension with the Freedom of Information Act (FOIA). To be clear, the Bureau will treat information that it receives in accordance with the FOIA, including the FOIA exemption at 5 U.S.C. 552(b)(4) that applies to confidential business information. Information that is subject to a FOIA exemption also will be treated as confidential in accordance with the Bureau's rule on Disclosure of Records and Information, 12 CFR part 1070. The confidentiality assurance in the proposed policy reflects the standard for determining applicability of the exemption at 5 U.S.C. 552(b)(4), established by the United States Supreme Court in *Food Marketing Institute v. Argus Leader Media dba Argus Leader*, 139 S. Ct. 2356 (2019). To make this clearer, the Bureau revises the policy to state explicitly that the information will be treated in accordance with the FOIA.

J. Other Comments on Specific Implementation Issues

The Bureau received comments on a number of other subjects. This includes comments on the structure of the Bureau's internal deliberative process for considering AO requests; timelines for deciding AO requests; details of how the Bureau should communicate with requestors after the Bureau receives their requests, such as what the Bureau should say in the letters that it sends denying requests; general outreach that commenters recommend that the

²³ 12 CFR 1070.

Bureau conduct with outside bodies or groups; recommendations regarding the types of requests the Bureau should prioritize; and details of how the Bureau should post AOs on its website.

The Bureau appreciates receiving commenters' views on all aspects of the program. However, the Bureau has decided not to expand the scope of the AO Policy, which is intended to establish the general procedures of the program, to cover these specific implementation issues at this time. Instead, the Bureau will consider these comments as it proceeds with implementation of the AO Policy.

IV. Regulatory Requirements

This AO Policy is a rule of agency organization, procedure, or practice, and it is therefore exempt from the notice-and-comment rulemaking requirements of the APA.²⁴ For the same reason, it is not subject to the 30-day delayed effective date for substantive rules under the APA.²⁵ Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.²⁶

V. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C 3501 et seq.) requires that federal agencies may not conduct or sponsor, and notwithstanding any other provision of law, a person is not required to respond to a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The information collection requirements as contained in this final Policy and identified below have been approved by OMB and assigned the OMB control number [REDACTED] OMB's approval will expire on [REDACTED].

²⁴ 5 U.S.C. 553(b)

²⁵ 5 U.S.C. 553(d).

²⁶ 5 U.S.C. 603(a), 604(a).

The Bureau's AO Proposal, published June 22, 2020, sought comment on these information collection requirements. While the Bureau received numerous comments on the AO Proposal, which are addressed above, the Bureau received no comments specifically regarding the burden estimates for these information collections, utility or appropriateness. Additional details on comments received can be found in the Supporting Statement for the related 30-day notice published as required under the PRA.²⁷

A complete description of the information collection requirements, including the burden estimate methods, is provided in the information collection request (ICR) that the Bureau submitted to OMB under the requirements of the PRA. The ICR submitted to OMB requesting approval under the PRA for the information collection requirements contained herein is available at OMB's public-facing docket at <https://www.reginfo.gov/public/>.

VI. **Signing Authority**

The Director of the Bureau, having reviewed and approved this document, is delegating the authority to electronically sign this document to Laura Galban, a Bureau Federal Register Liaison, for purposes of publication in the *Federal Register*.

Dated: **Month __**, 2020.

²⁷ See <https://beta.regulations.gov/docket/CFPB-2020-0019>.