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OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

JANE M. AZIA
BUREAU CHIEF
CONSUMER FRAUDS & PROTECTION BUREAU

February 11, 2019

VIA ELECTRONIC SUBMISSION

Kathy Kraninger
Director
Consumer Financial Protection Bureau
1700 G Street N.W.
Washington, D.C. 20552

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

Dear Director Kraninger:

On behalf of the 22 undersigned State Attorneys General, we write in response to the Consumer Financial Protection Bureau's (the "CFPB") request for comments on its proposal to revise its policy concerning no-action letters (the "Proposed NAL Policy") and establish a so-called regulatory sandbox (the "Proposed Sandbox Policy" and, together with the Proposed NAL Policy, the "Proposed Policies").[1]

As the chief consumer protection officers of our states, we understand the importance of encouraging responsible innovation in the consumer financial marketplace. Developments in technology have the potential to provide consumers with more choices, convenience, and lower costs, and to expand access to credit, particularly for the millions of Americans who have traditionally been denied, or had limited opportunities to gain, such access.[2]

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[1] *See* Proposed Policy on No-Action Letters and the BCFP Product Sandbox, 83 Fed. Reg. 64,036 (proposed Dec. 13, 2018).

[2] *See* Fed. Deposit Ins. Corp., *FDIC National Survey of Unbanked and Underbanked Households*, Oct. 2018, at 1, *available at* https://www.fdic.gov/householdsurvey/2017/2017report.pdf?mod=article_inline (last visited Feb. 11, 2019). The unavailability of credit to so many Americans is particularly troubling in light of a trend among some businesses to stop accepting cash. *See* Ginia Bellafante, *How the Cashless Economy Shuts Out the Poor*, N.Y. Times, Dec. 6, 2018, *available at* https://nyti.ms/2E4g7YZ (last visited Feb. 11, 2019).

But our experience has taught us that not all innovation is created equal, and many risks posed by emerging technologies can be difficult, if not impossible, to foresee.[3] We are also acutely aware that irresponsible banking practices and lax regulation pose significant risks not only to consumers, but to the entire U.S. financial system, as Americans painfully learned during the financial crisis.[4] In our view, these facts counsel in favor of a cautious and deliberative regulatory approach to new consumer financial products and services.

The Proposed Policies do not reflect such an approach. Instead, they would permit the CFPB to exempt – in some cases indefinitely – companies and even entire industries from certain consumer protection laws and regulations through a process designed to value speed over careful decision-making. Additionally, despite the CFPB's claims that the Proposed Policies are consistent with the CFPB's statutory obligation to coordinate the regulatory treatment of consumer financial products and services with state regulators,[5] the Proposed Policies completely fail to consider our interest in protecting our states' consumers from abuse in the name of innovation. Beyond our objections to the merits of the Proposed Policies, because they revise and create substantive CFPB policy, they are subject to the formal rulemaking procedures required by the Administrative Procedure Act.

On behalf of the millions of American consumers we collectively represent, we reject the notion – embodied in the Proposed Policies – that innovation can only be fostered by permitting companies to evade the law, and urge you to reconsider and rescind the Proposed Policies.

I. The Proposed NAL Policy Would Significantly Expand NAL Relief While Simultaneously Restricting the CFPB's Ability to Make Informed Decisions

A. The Current NAL Policy

Enacted in the wake of and in response to the global financial crisis of 2007 to 2009, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111–203, 124 Stat. 1376 (2010) ("Dodd-Frank"), established the CFPB "for the purpose of ensuring that all 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."[6] To that end, Dodd-Frank set forth six "primary functions" of the CFPB, including ensuring that "markets for consumer financial products and services operate transparently and efficiently to

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[3] Indeed, "no-doc" mortgages, payment option adjustable rate mortgages, teaser rate mortgages, and collateralized debt obligations were once hailed as innovations with the potential to transform the mortgage industry – which they certainly did, though undoubtedly not in the way their proponents intended.

[4] *See* Fin. Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report*, Jan. 2011, at xvii (attributing the global financial crisis and resulting recession to, *inter alia*, the "explosion in risky subprime lending and securitization, an unsustainable rise in housing prices, widespread reports of egregious and predatory lending practices, dramatic increases in household mortgage debt, and exponential growth in financial firms' trading activities, unregulated derivatives, and short-term 'repo' lending markets," all of which were ignored by regulators), *available at* http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf (last visited Feb. 11, 2019) (the "Financial Crisis Inquiry Report").

[5] *See* Proposed Policies, 83 Fed. Reg. at 64,044 (citing 12 U.S.C. §§ 5495, 5552(c)).

[6] *See* 12 U.S.C. § 5511(a).

facilitate access and innovation."[7] Dodd-Frank authorized the CFPB to carry out these functions in a number of ways, including by issuing rules, orders, and guidance.[8]

In an effort to ensure that the complexity of federal consumer law would not hinder the development of new products and services that could benefit consumers, in 2016 the CFPB established a process pursuant to which entities regulated by the CFPB could apply for non-binding guidance – in the form of a no-action letter ("NAL") – stating that the CFPB does not intend to bring an enforcement action vis-à-vis a particular product or service (the "Current NAL Policy").[9] Under the Current NAL Policy, NAL relief is only available where three criteria are met: the application "involv[es] [1] innovative financial products or services that [2] promise substantial consumer benefit [3] where there is substantial uncertainty whether or how specific provisions of statutes implemented or regulations issued by the Bureau would be applied."[10]

The Current NAL Policy reflects the CFPB's prior judgment that its limited resources are most efficiently allocated providing regulatory clarity in other ways, for example by publishing compliance guides, rule summaries, and toolkits, providing oral staff guidance, and through regular meetings with industry stakeholders.[11] Moreover, the Current NAL Policy recognizes that NALs are generally not appropriate for addressing potential violations of the CFPB's authority to prohibit unfair, deceptive, or abusive acts or practices ("UDAAP"), as opposed to potential violations of the other enumerated statutes enforced by the CFPB.[12] As the CFPB explained in the Current NAL Policy, making UDAAP determinations "is typically an intensively factual question that requires detailed consideration of a wide range of potentially relevant circumstances" and substantial resources.[13] As a result, the scope of the Current NAL Policy is quite modest: "No-Action Letters will not be routinely available. The Bureau anticipates that No-Action Letters will be provided rarely and on the basis of exceptional circumstances and a thorough and persuasive demonstration of the appropriateness of such treatment."[14]

The Current NAL Policy requires applicants to provide 15 pieces of information, including "[a]n explanation of how the product is likely to provide substantial benefit to consumers differently from the present marketplace, and suggested metrics for evaluating whether such benefits are realized," "[a] candid explanation of potential consumer risks posed by the product," and"[a] showing of why the requested No-Action Letter is necessary and appropriate to remove substantial regulatory uncertainty hindering the development of the

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[7] *See id.* § 5511(b)(5).

[8] *See id.* § 5512(b).

[9] *See* Final Policy Statement on No-Action Letters, 81 Fed. Reg. 8,686 (Feb. 22, 2016).

[10] *See id.* at 8,687.

[11] *See id.* at 8,687-8,688.

[12] The Current NAL Policy does not categorically exclude UDAAP issues from NALs, but makes clear that they will be "particularly uncommon." *See id.* at 8,689.

[13] *See id.* at 8,689.

[14] *See id.* at 8,694.

product."[15] In determining whether to issue a NAL, the CFPB's staff considers 10 factors, including "[t]he extent to which evidence, including the requester's own testing, indicates that the product's aspects in question may provide substantial benefits to consumers" and "[t]he extent to which the substantial regulatory uncertainty identified by the requester may be better addressed through other regulatory means."[16]

Under the Current NAL Policy, NALs are "non-binding staff guidance" stating that the CFPB's staff "has no present intention to recommend initiation of an enforcement or supervisory action" regarding the product or service at issue.[17] This means that NALs are not binding (on the CFPB, other regulators, or private parties), can be limited to a certain period of time or number of transactions, can be modified or revoked at the CFPB's absolute discretion, and require the applicant to commit to sharing certain data with the CFPB.[18]

Since implementation of the Current NAL Policy, the CFPB has only issued one NAL.[19]

B. <u>The Proposed NAL Policy</u>

The Proposed NAL Policy includes a number of ill-considered changes that would dramatically expand the effect and scope of NAL relief while simultaneously depriving the CFPB of the time and information needed to make decisions with significant policy and legal ramifications.

First, and most fundamentally, the Proposed NAL Policy would appear to make NALs binding on the CFPB *indefinitely*. Under the Proposed NAL Policy, NALs "would be issued by duly authorized officials of the Bureau to provide recipients greater assurance that *the Bureau itself stands behind* the no-action relief provided by the letters" and the "default assumption" would be that NALs are not limited in duration.[20] And unlike the current policy, which permits modification or revocation of a NAL "at any time at the discretion of the staff for any reason,"[21] the Proposed NAL Policy contemplates revocation of a NAL only under three specified circumstances.[22]

As an initial matter, we question whether the CFPB has the legal authority to issue the type of binding NALs contemplated by the Proposed NAL Policy absent a formal rulemaking

[15] *See id.* at 8,693.

[16] *See id.* at 8,694.

[17] *See id.* at 8,686.

[18] *See id.*

[19] The CFPB cites this fact as evidence that "both the process required to obtain a No-Action Letter and the relief available under the [Current NAL] Policy have not provided firms with sufficient incentives" to seek NALs. *See* Proposed Policies, 83 Fed. Reg. at 64,036. This conclusion is debatable, given that the CFPB has not revealed how many applications it has *received*.

[20] *See id.* at 64,037 (emphasis added).

[21] *See* Current NAL Policy, 81 Fed. Reg. at 8,695.

[22] *See* Proposed Policies, 83 Fed. Reg. at 64,040.

process.[23] Even if it did, we see no sound basis for the CFPB tying its hands in this way, particularly when it comes to the type of sophisticated technologies increasingly employed in the consumer financial sector. By way of example, many marketplace lenders today rely on machine-learning or other types of artificial intelligence to make underwriting decisions. This technology does not simply automate a process previously performed by humans; instead, it teaches a computer to *learn*, to determine on its own what data is relevant to a creditworthiness evaluation and how each piece of data should be weighted.[24] As a result, lenders may be unable to determine *why* a particular decision was made, including whether the decision was based on factors lenders are prohibited from considering (such as a borrower's race).[25] Unless and until these technologies – and their implications for consumers – can be better understood, it would be irresponsible to give companies employing them what may effectively be a permanent get-out-of-jail-free card.

Second, the Proposed NAL Policy would increase the scope of NAL relief by expanding the statutory issues covered in NALs and those allowed to submit a NAL application. Under the Proposed NAL Policy, UDAAP issues are expected to be covered regularly in NALs.[26] This change ignores the fact that advance testing and good-faith assessment of consumer risks are not necessarily indicative of how consumers will actually use and perceive the product and service, and the type of real-life harm that could result, which are critical factors in making UDAAP determinations.[27] Similarly, the Proposed NAL Policy would expand NALs to cover not only the entity requesting the relief, but third parties such as trade associations, which could seek blanket relief on behalf of an entire industry.[28] The Proposed NAL Policy does not address how it could ensure the accuracy and veracity of an application submitted by a party other than the one seeking relief, or how the CFPB could enforce any conditions specified in a NAL, such as

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[23] *See, e.g., Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987) (*per curiam*) (holding that agency guidance that binds the agency is substantive and therefore requires formal rulemaking).

[24] *See* Matthew Adam Bruckner, *The Promise and Perils of Algorithmic Lenders' Use of Big Data*, 93 Chi.-Kent L. Rev. 3, 15-17 (2018).

[25] Merely instructing a computer program to not consider race is unlikely to prevent this problem, as it may conclude – on its own – to instead consider proxies for race (for example, if a borrower majored in African-American studies in college, or lives in a predominately African-American neighborhood). *See Examining Opportunities and Challenges in the Financial Technology ("Fintech") Marketplace: Hearing Before the H. Comm. on Fin. Servs.*, 115 Cong. 6 (2018) (testimony by Georgetown University Law Professor Adam J. Levitin), *available at* https://www.creditslips.org/files/levitin-1-30-18-hfs-testimony.pdf (last visited Feb. 11, 2019).

[26] *See* Proposed Policies, 83 Fed. Reg. at 64,037.

[27] We are also concerned by the Proposed NAL Policy's lack of safeguards to ensure that NAL relief does not extend beyond the relief authorized. For example, the Proposed NAL Policy states that, if a particular NAL covered only written disclosures, then disclosures made by telephone could still be subject to supervisory or enforcement actions. *See id.* at 64,039 n.30. In practice, however, not all situations will be so straightforward, and absent robust safeguards we are concerned that unregulated products or services could be offered to consumers without any protections from legal violations that stem from marketing, product structure, disclosures, or lending outcomes.

[28] *See id.* at 64,039.

requiring the recipient to inform the CFPB of changes to the information included in the application that would "materially increase the risk of material, tangible harm to consumers."[29]

Third, the Proposed NAL Policy would impose unnecessary burdens on the CFPB that would hinder its decision-making process. The Proposed NAL Policy eliminates many of the factors the CFPB considers in evaluating NAL applications,[30] contemplates issuing NALs within 60 days of receipt, eliminates the requirement that applicants commit to share data with the CFPB, and reduces the information required to be submitted in an application.[31] These changes all but ensure that the CFPB will render decisions hastily and without access to data – such as loan default or demographic data – necessary to make an informed decision.

Finally, while the CFPB states that the Proposed NAL Policy is designed to "more closely align" the CFPB's practices with those of other federal agencies,[32] its proposal is a significant departure from the policies of other agencies. NALs issued by the Securities and Exchange Commission (the "SEC"), for example, "do not constitute an official expression of the [SEC's] views,"[33] and are not binding on the SEC, courts, other agencies, or private litigants.[34] And while the Proposed NAL Policy would address fact-specific UDAAP issues, the SEC will decline to state its position in response to a NAL request involving fact-intensive inquiries.[35]

II. The CFPB Lacks Authority to Grant the Sweeping and Absolute Immunity Contemplated by the Proposed Sandbox Policy

The CFPB has also proposed the creation of a so-called "sandbox" which would permit it to shield a particular entity or industry from liability for a specified period of time. The application process for the sandbox is substantially similar to the process under the Proposed NAL Policy, requiring limited information and a response within 60 days. The Proposed Sandbox Policy would permit the CFPB to provide "substantially the same" type of relief available under the Proposed NAL Policy,[36] as well as what it characterizes as "approval relief"

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[29] *See id.* at 64,040.

[30] For example, while the Current NAL Policy is principally focused with addressing regulatory uncertainty, the Proposed NAL Policy suggests that NAL relief may be available to address the financial and administrative costs of complying with regulations. While it may be appropriate to consider financial and administrative burdens, these factors should not, without more, be sufficient to warrant NAL relief.

[31] *See id.* at 64,037. The CFPB has proposed reducing by more than half the pieces of information required to be submitted in an application, *see id.* at 64,039, including the Current NAL Policy's requirement that applicants provide a "candid explanation of potential consumer risks posed by the product." *See* Current NAL Policy, 81 Fed. Reg. at 8,693.

[32] *See* Proposed Policies, 83 Fed. Reg. at 64,037 n.12.

[33] 17 C.F.R. § 202.1.

[34] *See N.Y.C. Employees' Ret. Sys. v. S.E.C.*, 45 F.3d 7, 12-13 (2d Cir. 1995); Thomas P. Lemke, *The SEC No-Action Letter Process*, 42 Bus. Law. 1019, 1042 (1987) (article by former Chief Counsel of the SEC's Division of Investment Management).

[35] *See* Procedures Utilized by the Division of Corporate Finance for Rendering Informal Advice, Securities Act of 1933 Release No. 6253, 45 Fed. Reg. 72,644, 72,645 (Oct. 28, 1980).

[36] One exception is data-sharing, which would be required under the Proposed Sandbox Policy. *See* Proposed Policies, 83 Fed. Reg. at 64,042 & n.67.

and "exemption relief."[37] Both approval relief and exemption relief would be of limited duration; the CFPB "expects that two years will be an appropriate duration in most cases."[38]

Our concerns regarding the Proposed NAL Policy apply with equal force to the Proposed Sandbox Policy. In one significant respect, however, the Proposed Sandbox Policy is even more troubling. Under the Proposed Sandbox Policy, approvals or exemptions granted by the CFPB would purportedly confer on the recipient immunity not only from a CFPB enforcement action, but also from "enforcement actions by any Federal or State authorities, as well as from lawsuits brought by private parties."[39] The CFPB has no authority to issue such sweeping immunity absent formal rulemaking,[40] and, in fact, the CFPB's statutory authority for the approval and exemption relief described in the Proposed Sandbox Policy is quite narrow.

The authorities cited for approval relief are the safe harbor provisions of the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* ("TILA"), the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 *et seq.* ("ECOA"), and the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693 *et seq.* The safe harbor provision in TILA reads, in relevant part, as follows:

> No provision of this section . . . imposing any liability shall apply to any act done or omitted in good faith . . . in conformity with any . . . approval by an official or employee of the Federal Reserve System duly authorized by the [CFPB] to issue such . . . approvals under such procedures as the [CFPB] may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[41]

The language of the other two statutory safe harbors is substantially similar.[42] These safe harbor provisions do not authorize the CFPB to grant the approval relief contemplated by the Proposed Sandbox Policy. Rather, they provide companies an affirmative defense to liability when relying on regulatory guidance implementing or interpreting provisions of the statutes, even if such guidance is subsequently determined invalid.[43] Importantly, this affirmative defense is only available when companies can demonstrate they acted in good faith and in conformity with the

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[37] *See id.* at 64,041-64,042.

[38] *See id.* at 64,042 n.68.

[39] *See id.* at 64,042.

[40] *See, e.g., Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 382 (D.C. Cir. 2002). We do not believe the Proposed Sandbox Policy contemplates the preemption of state-law claims, but to the extent it does, we would note the law is crystal clear that the CFPB lacks the authority to do so. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-86 (1996).

[41] 15 U.S.C. § 1640(f).

[42] *See id.* §§ 1691e(e), 1693m(d).

[43] *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566-67 (1980) ("Because creditors need sure guidance through the highly technical [TILA] . . . The explicit purpose of [TILA's safe harbor provision] was to relieve the creditor of the burden of choosing between the [Federal Reserve Board's] construction of the Act and the creditor's own assessment of how a court may interpret the Act.") (internal citations and quotation marks omitted).

CFPB's *official* guidance.[44] In the decades since they were enacted these safe harbor provisions have never been construed or interpreted as broadly as the CFPB suggests. Neither Dodd-Frank nor any other statute the CFPB enforces authorizes the CFPB to confer anything approximating the absolute immunity of the type proposed by the CFPB,[45] and "[i]t is well settled that an agency may only act within the authority granted to it by statute."[46]

The authority for the exemption relief the CFPB cites in the Proposed Sandbox Policy is similarly narrow, and only exempts a company from specified requirements of three statutes enforced by the CFPB. The relevant provision of ECOA authorizes the CFPB to exempt a company from the statute's record-keeping requirements.[47] The relevant provision of the Home Ownership and Equity Protection Act, 15 U.S.C. § 1639, authorizes the CFPB to exempt a company from specified provisions of the statute, if the CFPB concludes that the exemption "is in the interest of the borrowing public; and [] will apply only to products that maintain and strengthen home ownership and equity protection."[48] The relevant provision of the Federal Deposit Insurance Act, 12 U.S.C. §§ 1811 *et seq.*, authorizes the CFPB to exempt from the statute's disclosure requirements "any depository institution that, within the United States, does not receive initial deposits of less than an amount equal to the standard maximum deposit insurance amount from individuals who are citizens or residents of the United States, other than money received in connection with any draft or similar instrument issued to transmit money."[49] None of these provisions authorizes the CFPB to exempt a company from the entire scope of a statute.[50]

Even if the CFPB could grant broader immunity, doing so in this context would be ill-advised. As discussed above, the use of sophisticated technologies in the consumer financial

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[44] As the Supreme Court has observed, "[u]nofficial interpretations have no special status under" the TILA safe harbor. *See id.* at 567 n.10; *see also Brothers v. First Leasing*, 724 F.2d 789, 795 n.15 (9th Cir. 1984) ("On remand, First Leasing may attempt to assert an affirmative defense to Brothers' claim under 15 U.S.C. § 1691e(e) [the ECOA safe harbor] by alleging that it relied upon the unofficial staff interpretation. The words of § 1691e(e), however, suggest that the defense is available only when a party relies upon an official agency interpretation. . . . Thus, ordinarily, reliance on an unofficial staff interpretation would be unreasonable and could not be the basis for an affirmative defense under 15 U.S.C. § 1691e(e).").

[45] Dodd-Frank does contain a safe harbor provision, but it applies only to disclosures. *See* 12 U.S.C. § 5532(e).

[46] *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 108 (2d Cir. 2018); *cf. Pennsylvania v. Trump*, --- F. Supp. 3d ----, Case No. 17-Civ.-4540, 2019 WL 190324, at *17 (E.D. Pa. Jan. 14, 2019) ("Because administrative agencies may act only pursuant to authority delegated to them by Congress, an agency must point to something in a statute that gives it the authority to take the specific action at issue.") (internal citation and quotation marks omitted).

[47] *See* 15 U.S.C. § 1691c-2(g)(2).

[48] *See id.* § 1639(p)(1).

[49] *See* 12 U.S.C. § 1831t(d).

[50] The CFPB does have broad exemption authority under Dodd-Frank, but this authority can only be exercised by formal rulemaking, and requires the CFPB to consider specific factors. *See id.* § 5512(b)(3).

market is not well understood, even by the creators of such technologies. A prudent and balanced approach to regulation would reflect this uncertainty and proceed cautiously. Instead, the Proposed Sandbox Policy offers to confer immunity on any company or industry that claims a product or service will "disrupt" the status quo. We remind the CFPB that the global financial crisis – from which millions of Americans are still reeling[51] – was caused by "widespread failures in financial regulation and supervision [that] proved devastating to the stability of the nation's financial markets" and that regulators had "ample power" to prevent the crisis but "chose not to use it."[52] Congress created the CFPB in large measure to fill in these regulatory and supervisory gaps, and the CFPB has proven itself to be a remarkably effective consumer watchdog.[53] We strongly caution the CFPB against abandoning its critical role in monitoring the risk that new and emerging technologies pose to consumers in the financial marketplace.

III. The Proposed Policies Require Formal Rulemaking

The CFPB asserts that the Proposed Policies are exempt from the notice and comment rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. §§ 550 *et seq.* (the "APA"), under an exemption applicable to "general statements of policy, or rules of agency organization, procedure, or practice."[54] That is not so.

The Proposed Policies expressly state that their purpose is to "revise" the Current NAL Policy through "substantive revisions" and that the sandbox is being created because the CFPB "was urged to provide types of relief that are *legally binding* on the [CFPB] as well as other parties."[55] Courts have consistently held that agency rules altering the substantive standards the agency applies in determining whether to take discretionary actions are subject to the APA's rulemaking procedures.[56] The Proposed Policies undeniably change the substantive standards by

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[51] *See, e.g.*, Editorial, *Blacks Still Face a Red Line on Housing*, N.Y. Times, Apr. 14, 2018, *available at* https://nyti.ms/2JKxSwX (last visited Feb. 11, 2019).

[52] *See Financial Crisis Inquiry Report* at xviii.

[53] The CFPB's record speaks for itself: As of June 4, 2018 it has obtained $12.4 billion in relief on behalf of more than 31 million consumers. *See* CFPB, *Standing Up For You*, https://www.consumerfinance.gov/ (last updated June 4, 2018).

[54] *See* 5 U.S.C. § 553(b)(A). The CFPB does not appear to assert that the Proposed Policies constitute an "interpretative rule," another exemption contained in the APA. *See* Proposed Policies at 64,038.

[55] *See* Proposed Policies, 83 Fed. Reg. at 64,036, 64,037 & n.14 (emphasis added).

[56] *See, e.g., Nat'l Sec. Counselors v. C.I.A.*, 931 F. Supp. 2d 77, 107 (D.D.C. 2013) ("[R]ules are generally considered procedural [and therefore exempt from the APA] so long as they do not change the *substantive* standards by which the [agency] evaluates applications which seek a benefit that the agency has the power to provide.") (internal citation and quotation marks omitted) (emphasis in original).

which the CFPB will consider applications for NALs or participation in the sandbox, and are therefore subject to the rulemaking process required by the APA.[57]

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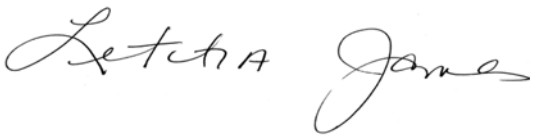
While we share the CFPB's goal of fostering innovation in the consumer financial sector, we respectfully submit that innovation should not come at the expense of consumers or the stability of the U.S. financial system. If the financial crisis taught us anything, it is that regulators should be wary of innovations in the financial sector until they can comprehensively evaluate their risks. Moreover, events in the recent past do not inspire confidence that companies in the financial and technology industries are capable of policing themselves.[58] Unfortunately, the Proposed Policies embody precisely the type of blind faith in industry and regulatory diffidence that the CFPB was created to correct, and we urge you to rescind them.

Respectfully submitted,

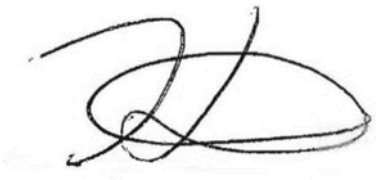


LETITIA JAMES
New York Attorney General

XAVIER BECERRA
California Attorney General

WILLIAM TONG
Connecticut Attorney General

KATHLEEN JENNINGS
Delaware Attorney General

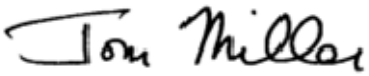


KARL A. RACINE
District of Columbia Attorney General

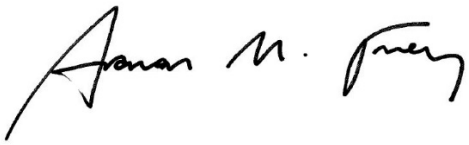
[57] Additionally, as discussed above, absent formal rulemaking the CFPB lacks authority to bind third parties to its guidance.

[58] *See, e.g.*, Issie Lapowsky, *The 21 (And Counting) Biggest Facebook Scandals of 2018*, Wired, Dec. 20, 2018, *available at* https://www.wired.com/story/facebook-scandals-2018/ (last visited Feb. 11, 2019); Jackie Wattles *et al.*, *Wells Fargo's 20-Month Nightmare*, CNN, Apr. 24, 2018, *available at* https://money.cnn.com/2018/04/24/news/companies/wells-fargo-timeline-shareholders/index.html (last visited Feb. 11, 2019).

KWAME RAOUL
Illinois Attorney General



TOM MILLER
Iowa Attorney General



AARON M. FREY
Maine Attorney General

BRIAN E. FROSH
Maryland Attorney General

MAURA HEALEY
Massachusetts Attorney General

DANA NESSEL
Michigan Attorney General

KEITH ELLISON
Minnesota Attorney General

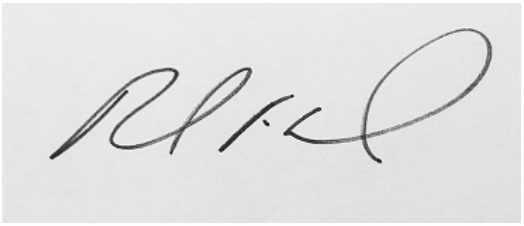
AARON D. FORD
Nevada Attorney General

GURBIR S. GREWAL
New Jersey Attorney General

JOSHUA H. STEIN
North Carolina Attorney General

ELLEN F. ROSENBLUM
Oregon Attorney General

JOSH SHAPIRO
Pennsylvania Attorney General



PETER F. NERONHA
Rhode Island Attorney General

THOMAS J. DONOVAN, JR.
Vermont Attorney General

MARK R. HERRING
Virginia Attorney General

BOB FERGUSON
Washington State Attorney General

JOSHUA L. KAUL
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