

CFPB Finalizes Advisory Opinion Program: New Policy Allows Requestors to Seek Regulatory Clarity

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The Consumer Financial Protection Bureau (the “CFPB”) recently finalized a policy describing its process for the issuance of advisory opinions, referred to as the “Advisory Opinions Policy” (“AO Policy”).¹ The new policy describes the process by which entities can request the CFPB to provide clarity regarding interpretive questions. If accepted, requests will prompt the CFPB to provide an advisory opinion specifying the set of facts analyzed and the agency’s legal interpretation.² The advisory opinions may provide a safe harbor or similar protection from CFPB enforcement actions for entities and individuals that have a reasonable basis for reliance on the opinion.

In summary, we believe that the AO Policy is a productive development; that firms should carefully monitor the issuance of advisory opinions, since they may provide a safe harbor from enforcement (and conversely may lead to enforcement if a firm strays from an opinion’s interpretations); that firms should consider whether and under what circumstances to request an opinion; and that other federal financial regulators following the CFPB’s model should help increase meaningfully the clarity of regulatory requirements.

We provide more detail on the background, key features and implications of the AO Policy below.

¹ Advisory Opinions Policy, 85 Fed. Reg. 77987 (Dec. 3, 2020), available [here](#).

² The CFPB issued two advisory opinions under the AO Policy at the same time the policy was finalized. One opinion addresses earned wage access (“EWA”) products and provides guidance on whether certain regulations apply to employers that provide short-term liquidity needs for employees between paychecks. The advisory opinion outlines a “safe harbor” for certain earned wage programs that do not implicate the Truth In Lending Act and its implementing Regulation Z. See CFPB, Truth in Lending (Regulation Z); Earned Wage Access Programs, 85 Fed. Reg. 79404 (Nov. 30, 2020), available [here](#).

The other opinion addresses private education loans and clarifies application of regulatory requirements to certain education loan products. Products that refinance or consolidate a consumer’s pre-existing federal, or federal and private, education loans are considered “private education loans” and therefore subject to disclosure and other requirements of the Truth in Lending Act and Regulation Z. See CFPB, Truth in Lending (Regulation Z); Private Education Loans, 85 Fed. Reg. 79400 (Nov. 30, 2020), available [here](#).

BACKGROUND

The CFPB began its policy of issuing advisory opinions in 2018 in response to requests that the CFPB provide written guidance regarding areas of regulatory ambiguity. The CFPB later launched a pilot advisory opinion program³ and issued a request for comment on a proposal for a new policy on advisory opinions.⁴ The final AO Policy, published on November 30, 2020, supersedes the proposal and pilot and institutes requirements for entities wishing to submit a request for an advisory opinion.

ADVISORY OPINION REQUEST PROCESS

The CFPB's new AO Policy establishes the procedures interested parties must follow to submit requests for advisory opinions from the CFPB.

Required Content of the Requests. The AO Policy specifies information required to be included in a request for an advisory opinion. Specifically, a request must include:

- *Details regarding the issue on which an advisory opinion is sought.* A description of the regulatory or statutory uncertainty, including (1) supporting facts and circumstances, (2) regulations or laws at issue, (3) proposed interpretations and (4) an explanation of why the proposed interpretations would resolve uncertainties.⁵
- *Absence of investigation or litigation.* A confirmation of the absence of active litigation or investigation regarding the issue on which the advisory opinion is sought.
- *Identity of requestor.* The identity of the requestor. Law firms, trade organizations and similar groups are permitted to submit a request on behalf of one or more clients or members without identifying the clients or members.⁶
- *Identification of confidential information.* Identification of all information that should be treated as confidential.⁷

³ Advisory Opinions Pilot, 85 Fed. Reg. 37331 (June 22, 2020) available [here](#).

⁴ Advisory Opinions Proposal, 85 Fed. Reg. 37394 (June 22, 2020), available [here](#).

⁵ A request must also fall within the CFPB's jurisdiction and concern matters in which the requestor is engaged or considering engaging. See Advisory Opinions Policy, 85 Fed. Reg. at 77987, 77988.

⁶ If the request is submitted on behalf of an unidentified client or other third party, the request also must state that the third party is not the subject of an ongoing public CFPB enforcement action or an ongoing CFPB enforcement investigation. See *id.*

Form of the Advisory Opinion. Under the AO Policy, each advisory opinion will:

- be considered an “interpretive rule” under the Administrative Procedure Act (“APA”);⁸
- address specific issues of regulatory uncertainty by noting the scope and terms, a summary of material facts or covered products, and a legal analysis of the issues;
- apply to all parties with circumstances similar to those described; and
- be published in the *Federal Register* and on the CFPB website.

CFPB’s Decision to Respond. The AO Policy provides factors for determining whether the CFPB will issue an advisory opinion in response to a request. The CFPB appears likely to respond to a request that (1) is within the CFPB’s purview; (2) can be addressed through a legal interpretation; and (3) is an appropriate form of response when compared to other types of CFPB issuances (e.g., notice and comment rulemaking, summaries of existing law). For example, the CFPB might determine that an interpretation of a statute (as opposed to an interpretation of a regulation) is better addressed through a notice-and-comment rulemaking or that it is not appropriate to issue an opinion establishing a bright-line standard for a law that requires a fact-intensive inquiry.

Factors that weigh in favor of issuing an advisory opinion include:

- the significance of the issue;
- the size of the benefit for clarifying the issue;
- the lack of precedent or previous consideration by the CFPB;
- alignment with the CFPB’s statutory objectives;
- impact on actions of other regulators; and
- impact on available CFPB resources.

⁷ The CFPB will withhold information as permitted by the Freedom of Information Act and comply with regulations on Disclosure of Records and Information. See 12 C.F.R. part 1070 and *infra* “[Confidentiality, Safe Harbors and Other Protections]”. See Advisory Opinions Policy, 85 Fed. Reg. at 77987.

⁸ See 5 U.S.C. § 553(b).

Factors that weigh against issuing an advisory opinion include that the relevant issue is:

- subject to investigation or enforcement actions;
- subject to, or better suited to, notice-and-comment rulemaking;
- addressed more effectively through Compliance Aid⁹ or RIF function;¹⁰ and
- addressed by CFPB or court precedent.

CONFIDENTIALITY, SAFE HARBORS AND OTHER PROTECTIONS

The AO Policy also addresses perceived tensions between the maintenance of confidential business information under the CFPB's Disclosure of Records and Information rule¹¹ and accessibility of federal agency records under the Freedom of Information Act ("FOIA"). Specifically, the AO Policy provides the CFPB's assurance of confidential treatment of information to the extent permitted under FOIA, which appears intended to address a potential requirement under recent Supreme Court precedent.¹²

The AO Policy also suggests that advisory opinions may provide useful protections from CFPB enforcement actions in two important respects. First, the AO Policy states that an advisory opinion will clearly define the scope and application of any applicable statutory safe harbor, as several statutes provide protections from liability for acts or omissions done in good faith in conformity with an interpretation by the CFPB.¹³ Second, the AO policy states that it "would not expect to retroactively impose punishments on persons

⁹ See Policy Statement on Compliance Aids, 85 Fed. Reg. 4579 (Jan. 27, 2020).

¹⁰ See Bureau of Consumer Financial Protection Request for Information Regarding Bureau Guidance and Implementation Support (Guidance RFI), 83 Fed. Reg. at 13959, 13961-62 (Apr. 2, 2018), available [here](#).

¹¹ 12 C.F.R. pt. 1070.

¹² The Supreme Court in *Food Marketing Institute v. Argus Leader Media* held that commercial or financial information shared with a government agency by an entity with an understanding of continued privacy will be considered "confidential" within the meaning of FOIA Exemption 4. 139 S. Ct. 2356 (2019). If information provided is actually and customarily kept private, and a federal government agency provides assurances that the confidentiality of the information will be maintained, then the information is exempt from disclosure requests. *Id.*; see also 5 U.S.C. § 552(b)(4).

¹³ Several statutes, including the Truth in Lending Act, Equal Credit Opportunity Act, Electronic Fund Transfer Act, Real Estate Settlement Procedures Act, and Fair Debt Collection Practices Act provide certain protections from liability for acts or omissions done in good faith in conformity with a CFPB interpretation. 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 C.F.R. 1024.4 (RESPA).

who conformed their conduct in good faith to an advisory opinion before the advisory opinion was rescinded.”

Although not binding on the CFPB, this statement strongly suggests that industry players should take note of issued advisory opinions and ensure compliance. Advisory opinions will provide notice of impermissible conduct, and may become the basis of enforcement actions. On the other hand, actions taken in good faith reliance on an advisory opinion during the life of the opinion should not be subject to CFPB enforcement action, even if the CFPB later rescinds or otherwise changes its interpretation.¹⁴

CONSTRUCTING A PERSUASIVE REQUEST

The CFPB may—and very likely will—deny requests for advisory opinions. Requestors should consider:

- *Providing a detailed analysis.* The AO Policy encourages requestors to describe relevant legal provisions and arguments with as much specificity as practicable. This should not only help to make the arguments for the proposed interpretation as persuasive as possible but also may reduce the CFPB’s burden associated with considering and issuing the advisory opinion, itself something the CFPB will consider when deciding whether to issue an opinion.
- *Carefully describing the material facts and circumstances.* The CFPB will not normally investigate the underlying facts and circumstances described. Therefore, requestors’ ability to rely on advisory opinions issued in response to their request will depend on whether the request accurately and fully describes the relevant facts and circumstances.¹⁵
- *Explaining why the CFPB should issue the opinion.* In addition to carefully describing and facts and providing a detailed legal analysis, requests generally should explain why the CFPB should use its resources to issue the requested opinion. Drafters should consider describing (1) why an advisory opinion is the right form of the issuance (as opposed to other types of CFPB issuances); (2) potential consumer

¹⁴ The CFPB adds that taking enforcement actions based on such good faith reliance “would raise serious concerns under the Due Process Clause” of the U.S. Constitution, essentially bolstering the Due Process argument that persons may use against the CFPB if the CFPB later seeks to impose a penalty based on actions taken in reliance on a subsequently-rescinded advisory opinion. See Advisory Opinions Policy, 85 Fed. Reg. at 77987, 77990.

¹⁵ The AO Policy also allows the “scope and terms of an advisory opinion [to] deviate from the interpretation proposed by the requestor in the submission.” See Advisory Opinions Policy, 85 Fed. Reg. at 77987, 77988.

benefits of the opinion; (3) any risks associated with issuance of the opinion and how they may be mitigated; and (4) how the opinion helps the CFPB effect its statutory objectives.¹⁶

- *Whether to submit through a law firm or trade organization.* Submission through a law firm or trade organization, which does not require identification of parties other than the requesting law firm or organization, may provide advantages in certain circumstances. For example, clients may wish to pool resources with similarly situated persons or limit the chances of CFPB inquiries into particular business practices.

IMPLICATIONS OF THE AO POLICY

The AO Policy could yield meaningful benefits to financial institutions and others affected by CFPB interpretations. As discussed above, each advisory opinion may publicly clarify matters of legal uncertainty and provide a basis for interested parties to help ensure their compliance with relevant law.

Moreover, a number of features of the AO Policy may encourage development of a larger body of CFPB advisory opinions. Not only does the AO Policy have features that should encourage requests (such as establishing a relatively clear process for reviewing and deciding requests, providing additional comfort regarding confidential treatment of information, and allowing client identities to be kept confidential) but it also appears to include features that encourage agency responses. For example, allowing advisory opinions to be initially issued in final form, without going through a notice and comment process requested by some commenters, should enable the CFPB to issue opinions more quickly and efficiently.

We believe other financial regulators, such as the federal banking agencies, should follow suit. Although the APA provides a legal right for any interested party to request such an opinion of an agency,¹⁷ detailed procedures such as those of the AO Policy could similarly encourage other banking agencies to issue more interpretive letters and

¹⁶ The CFPB lists the statutory objectives that it intends to be its primary focus for advisory opinions. See Advisory Opinions Policy, 85 Fed. Reg. at 77987, 77989.

¹⁷ See 5 U.S.C. § 553(e) (requiring agencies to give “an interested person the right to petition for the issuance, amendment, or repeal of a rule”). “Rule” in this context includes “interpretive rules,” such as the advisory opinions to be issued in the AO Policy. See *id.* § 551(4), see also *id.* § 553(b)(A) (excluding “interpretive rules” from notice and comment requirements). If an agency denies such a request for an interpretive rule, it is required to provide “prompt notice” of the denial and, in general, an explanation of the grounds for the denial. See *id.* § 555(e).

therefore meaningfully increase the clarity of bank regulatory requirements through the development of precedent in the common law tradition.

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