

Clear Skies Ahead? CFPB Launches Pilot Advisory Opinion Program

By **Eric Johnson** - June 24, 2020



On June 22, the CFPB formally launched a pilot advisory opinion (AO) program (Pilot AO Program) that would allow entities seeking to comply with regulatory requirements to submit a request to the Bureau for an opinion where there maybe uncertainty, such as uncertainty with respect to regulatory or statutory requirements. The Bureau would select topics based on the Pilot AO Program’s priorities and make the responses available to the public. The Bureau recognized that the public as a whole would benefit from a process that provides clarifications broadly and not just to the requesting individuals or entities.

If deemed appropriate, the Bureau will issue an AO based on its summary of the facts presented that would be applicable to other entities in situations with similar facts and circumstances. The AOs would be posted on the Bureau’s website and published in the Federal Register.

The Pilot AO Program follows these parameters:

Submission and content of requests:

- Requests can be submitted to the Bureau via email (advisoryopinion@cfpb.gov) or through other means designated by the Bureau.
- The party requesting the AO must be identified in the request.
- Requests for AOs can only be made by “covered persons” or “service providers” subject to the Bureau’s supervisory or enforcement authority.

- The Bureau will not accept requests from third parties, such as trade associations or law firms, on behalf of unnamed entities.

Characteristics of AOs:

- AOs under the AO Pilot Program will be interpretive rules under the Administrative Procedure Act.
- The Bureau will publish AOs in the Federal Register and on its website, including the Bureau's summary of the material facts and its legal analysis of the issue.
- Each AO will be applicable to the requestor and to similarly situated parties to the extent their situations conform to the Bureau's summary of material facts in the AO.

Bureau factors in selection of topics for AOs:

- The Bureau intends to consider the following factors in deciding whether to address topics through AOs:
 - ◊ that the interpretive issue has been noted during prior Bureau examinations as one that might benefit from additional regulatory clarity;
 - ◊ that the issue is one of substantive importance or impact or one whose clarification would provide significant benefit; and/or
 - ◊ that the issue concerns an ambiguity that the Bureau has not previously addressed through an interpretive rule or other authoritative source.

The Bureau also advised that there will be a strong presumption against appropriateness of an AO in certain cases:

- for interpretive issues that are the subject of an ongoing investigation or enforcement action;
- the interpretive issue is the subject of an ongoing or planned rulemaking;
- the interpretive issue is better suited for the notice-and-comment process;
- the interpretive issue could be addressed effectively through a Bureau Compliance Aid; or
- there is clear Bureau or court precedent that is already available to the public on the issue.

The Pilot AO Program will primarily focus on the following statutory objectives of the Bureau: (i) that consumers are provided with timely and understandable information to make responsible decisions about financial transactions; (ii) to identify outdated, unnecessary or unduly burdensome regulations in order to reduce unwarranted regulatory burdens; (iii) that Federal consumer financial law is enforced consistently in order to promote fair competition; and (iv) that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

Finally, where a regulation or statute establishes a general standard that can only be applied through highly fact-intensive analysis, the Bureau does not intend to replace it "with a bright-line standard that eliminates all of the required analysis." The Bureau indicated that highly fact-intensive applications of general standards, such as the statutory prohibition on unfair, deceptive, or abusive acts or practices (UDAAPs), 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.

The Bureau also published a proposed procedural rule in the Federal Register that would establish an AO program (Proposed AO Program) and would eventually replace the Pilot AO Program. Under the Proposed AO Program, requestors of AOs would not be limited to covered persons or service providers subject to the Bureau's supervisory or enforcement authority. A trade association or an entity's outside counsel could submit a request for an AO on behalf of one or more members or clients without identifying the underlying party. The Bureau solicits comments on all aspects of the Proposed AO Program. If you want to comment on the Proposed AO Program, note that comments must be received by the Bureau on or before August 21, 2020.

The NAF Legal Committee will continue to keep you informed about legal and regulatory changes of interest to the sub-prime auto finance industry.

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