



WASHINGTON, D.C.

99 M Street SE  
Suite 300  
Washington, D.C. 20003-3799

Phone: 202-638-5777

Fax: 202-638-7734

August 21, 2020

Comment Intake  
Consumer Financial Protection Bureau  
1700 G Street, N.W.  
Washington, DC 20552

Re: Advisory Opinions Proposal; Docket No. CFPB-2020-0019.

Dear Sir or Madam:

The Credit Union National Association (CUNA) represents America's credit unions and their 115 million members. On behalf of our members, we are writing regarding the Consumer Financial Protection Bureau's (CFPB or Bureau) proposed advisory opinion program (AO Program) and associated information collection, as required by the Paperwork Reduction Act of 1995.<sup>1</sup>

## Background

In practice, the Bureau issues several types of guidance ranging from interpretive rules to general statements of policy. The Bureau also routinely issues compliance resources that present legal requirements in a manner that are useful for stakeholders and the public or include practical suggestions for how entities might choose to go about complying with those requirements. The proposed AO Program would provide another mechanism through which the Bureau may better enable regulatory compliance. Under the program, parties will be able to request interpretive guidance, in the form of an AO, to resolve questions regarding regulatory uncertainty.

Parties requesting AOs would be required to submit to the Bureau certain information for a request to be completed. Outside counsel or a trade association may submit an AO request on behalf of one or more clients or members. The request must concern actual facts or a course of action that the requestor is considering and state all material facts and circumstances, including a specific legal question, a proposed interpretation, identification of the potential uncertainty or ambiguity to be addressed, and explanation of why the requested interpretation is an appropriate resolution of that uncertainty or ambiguity.

The AO Program would focus primarily on clarifying ambiguities in the Bureau's regulations. The Bureau will not issue AOs on issues that require notice-and-comment rulemaking under the Administrative Procedure Act (APA), or that are better addressed through that process. For example, the Bureau does not intend to issue an advisory opinion that would change a regulation. In instances 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 that analysis.

AOs issued under the program will be considered interpretive rules under the APA and published to Federal Register. 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 summary of material facts in the AO.

## General Comments

The past several years has seen a massive increase in consumer financial services regulations. This increase in regulations is particularly burdensome for credit unions which, unlike big banks, do not have dozens of

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<sup>1</sup> Advisory Opinions Proposal, 85 Fed. Reg. 37394 (June 22, 2020).

legal experts in house to assist with compliance questions. In response to this situation, CUNA has strongly supported the Bureau's efforts to continue providing helpful compliance resources to the industry. These resources have often taken the form of non-binding Frequently Asked Questions (FAQs) or Small Entity Compliance Guides. As a result, credit unions generally support the establishment of an AO Program that would add another tool to the Bureau's toolkit for clarifying and expanding upon its compliance expectations for covered entities.

While the implementation of a pilot AO Program and the issuance of this proposed rule to establish a permanent program are positive developments, we urge the Bureau to avoid issuing AOs that could ultimately stifle innovation or paint covered entities into a corner. We also recommend the Bureau provide an opportunity for covered entities to comment on potential AOs to be addressed and a mechanism to request necessary modifications or rescissions. In addition, we strongly encourage the Bureau to limit the permitted AO requestors to covered entities and their representatives or agents, such as outside counsel or a trade association.

**The CFPB should consider its mission to encourage innovation within financial services when evaluating whether to respond to a specific request for an AO and should avoid issuing AOs that could ultimately stifle credit unions' ability to innovate.**

The Bureau has a statutory mission to "ensure that all consumers have access to markets for consumer financial products and services and that markets for consumers financial products and services are fair, transparent, and competitive."<sup>2</sup> As part of this mission, the CFPB has taken several steps to revitalize its approach to innovation as a key policy priority. As we have stated in response to other proposed programs, CUNA supports the Bureau's use of its authority to encourage innovation in financial services.

Innovation through technology and other creative solutions has the potential to enhance the delivery and quality of financial products and services to consumers. Credit unions have been at the vanguard of innovation as a byproduct of their cooperative nature, member-driven focus, and relatively small size. Consumers could benefit from financial institutions being provided more opportunities, under the careful oversight of regulators, to pursue fresh answers to traditional questions. For this reason, CUNA strongly recommends the Bureau consider the potential impact on innovation when selecting topics for AOs. The Bureau should refrain from taking an overzealous approach to AOs that could stifle the ability of community-based financial service providers to innovate or that would place such entities at an unjustified disadvantage.

**The CFPB should provide an opportunity for stakeholder comment or feedback during the AO selection process, and a mechanism for stakeholders to request modifications to or the rescission of a published AO.**

Pursuant to the proposal, AOs issued by the Bureau will be considered interpretive rules under the APA. As interpretive rules, the CFPB will not be *required* to undergo a formal notice-and-comment process. Regardless, CUNA recommends the Bureau voluntarily provide an opportunity for covered entities to give comments, feedback, or ask for clarification on the requests the Bureau intends to respond to with an AO. The Bureau should also permit stakeholder feedback to be provided in conjunction with the publication of an AO to the Federal Register.

CUNA is concerned the proposed AO process could lack transparency and, given the binding nature of official interpretations issued through an interpretive rule, we believe some form of public input from covered stakeholders is warranted. In general, while credit unions acknowledge that AOs can be a tool for additional regulatory clarity, there are also concerns arising out of the fact that AOs would bind requestors and non-requestors alike to the Bureau's conclusions. The CFPB could mitigate those concerns by allowing some form of public input in the AO process.

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<sup>2</sup> 12 U.S.C. 5511(a).

In addition, CUNA recommends the Bureau provide a mechanism for stakeholders to request modification to, additional clarifications for, or a rescission of AOs issued and published. Permitting stakeholders an opportunity to expand upon the original requestors' proposed interpretation and potentially argue for a different approach or analysis would ensure the Bureau has heard from a broad range of perspectives prior to issuing its official interpretation of the facts and circumstances. For example, the Bureau could periodically publish a list of legal questions it plans to address with an AO, based on the AO requests received, and permit public comment or requests for information. This preliminary process would put interested stakeholders on notice that the Bureau intends to weigh in on a specific issue and allow those stakeholders to provide their own interpretations or expand upon how the AO could impact their credit union and its membership.

**The CFPB should expressly limit the permissible requestors for AOs to covered entities and their representatives or agents, including outside counsel or a trade association, as those parties have a direct interest in the requested AO.**

Under the proposed AO Program, both outside counsel or a trade association may submit a request for AOs on behalf of one or more clients or members, and those third-party entities would not need to be named. The Bureau does not expressly limit these "third-party" AO requests to representatives or agents of covered institutions. We are concerned that an open-ended approach could encourage third parties without a *direct* compliance interest in an AO to use the AO Program as a means to advocate for restrictive interpretations of compliance obligations and limit available services for consumers.

CUNA recommends the CFPB specify that requests for AOs, as a guidance resource intended to aid compliance *with* the Bureau's rules, are limited to covered entities and their representatives or agents. The AO request process already requires a requestor to provide a statement whether an unidentified third party is the subject of an ongoing enforcement action or investigation. The Bureau should also require the requestor, as part of their official submission, to provide a statement that all unidentified third parties the request is being made on behalf of are *subject to* the Bureau's regulations and its interpretations of law.

## **Conclusion**

We look forward to working with the Bureau to ensure credit unions have resources and clear guidance regarding compliance with consumer financial protection laws and regulations. On behalf of America's credit unions and their 115 million members, thank you for your consideration. If you have questions or require additional information related to our feedback, please do not hesitate to contact me at (202) 508-3629 or amonterrubio@cuna.coop.

Sincerely,



Alexander Monterrubio  
Senior Director of Advocacy & Counsel