

**United States Senate**  
WASHINGTON, DC 20510

December 05, 2019

Kathleen Kraninger  
Director  
Consumer Financial Protection Bureau  
1700 G St. NW  
Washington, D.C 20552

Dear Director Kraninger:

We are writing to seek information regarding the Consumer Financial Protection Bureau's (CFPB or the Bureau) plans for a program to issue formal advisory opinions. According to news reports, these opinions would set forth how the CFPB would "apply fair lending, disclosures, and other laws to a company's specific facts and circumstances."<sup>1</sup> We have serious concerns that issuing advisory opinions tailored to companies' specific circumstances is not appropriate, especially if companies could use these opinions to circumvent consumer financial laws or as a defense in litigation by the Bureau or other parties.

On April 2, 2018, the CFPB issued a Request for Information (RFI) on Bureau Guidance and Implementation Support. The RFI indicated, among other things, that the Bureau was "exploring the use of advisory opinions and similar types of focused guidance to assist industry in better understanding its legal and regulatory obligations."<sup>2</sup> In September 2019, the Bureau finalized its Compliance Assistance Sandbox (CAS) and No-Action Letter (NAL) Policies, which have a stated purpose of promoting regulatory certainty and innovation, but also could be used to exempt companies from complying with consumer protection laws.<sup>3</sup> More recently, in the CAS policy guidance and procedural rule issued on September 13, 2019, the Bureau reiterated its interest in establishing an "interpretive letter" advisory opinion program, stating that it intended to propose such a program for public notice and comment "as soon as practicable."<sup>4</sup> On November 7, 2019, CFPB Deputy Director Brian Johnson also indicated that the Bureau was considering creating a formal advisory opinion process.<sup>5</sup>

While agency guidance may be appropriate in certain situations, that guidance should be broadly applicable to industry, rather than tailored to specific companies. The process for requesting or providing guidance should also be transparent, not an opaque process that would conceal companies' efforts to push for interpretations of rules that could weaken critical consumer protections. In addition, an advisory opinion process should not give political appointees authority to overrule or unduly influence longstanding Bureau policies or practices or the determinations of Bureau career staff. Nor should advisory opinions contravene the will of Congress by providing companies' with prospective immunity from consumer protection or anti-discrimination laws. Any program that

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<sup>1</sup> Bloomberg Law, "CFPB Exploring Advisory Opinions for Consumer Finance Companies," Lydia Beyoud, November 8, 2019, <https://news.bloomberglaw.com/banking-law/cfpb-exploring-advisory-opinions-for-consumer-finance-companies>

<sup>2</sup> Consumer Financial Protection Bureau, Federal Register Notice, "Request for Information Regarding Bureau Guidance and Implementation Support," April 2, 2018, [https://files.consumerfinance.gov/f/documents/cfpb\\_rfi\\_guidance-and-implementation\\_032018.pdf](https://files.consumerfinance.gov/f/documents/cfpb_rfi_guidance-and-implementation_032018.pdf)

<sup>3</sup> Consumer Financial Protection Bureau, "CFPB Issues Policies to Facilitate Compliance and Promote Innovation," September 10, 2019, <https://www.consumerfinance.gov/about-us/newsroom/bureau-issues-policies-facilitate-compliance-promote-innovation/>


<sup>4</sup> Consumer Financial Protection Bureau, Federal Register Notice, "Policy on the Compliance Assistance Sandbox," September 9, 2013, <https://www.federalregister.gov/documents/2019/09/13/2019-19762/policy-on-the-compliance-assistance-sandbox>

<sup>5</sup> Bloomberg Law, "CFPB Exploring Advisory Opinions for Consumer Finance Companies," Lydia Beyoud, November 8, 2019, <https://news.bloomberglaw.com/banking-law/cfpb-exploring-advisory-opinions-for-consumer-finance-companies>

would allow political employees to unduly influence and restrict the application of consumer laws deserves strict scrutiny—especially if, as appears to be proposed, these opinions are not subject to the notice-and-comment process of traditional rulemakings. Finally, providing individual advisory opinions to companies would result in inconsistent application of federal consumer financial law and is contrary to the Bureau’s mission to protect all consumers in the financial marketplace. To gain a better understanding of the CFPB’s plans for advisory opinions and how these opinions could potentially interact with the Bureau’s rulemakings, we request that the CFPB respond to the following questions by December 19, 2019.

1. Does the Bureau still intend to propose an advisory opinion program for public notice and comment?
  - a. If so, when does the Bureau expect to release that proposal, will there be a comment period, and if so, how long will the comment period last?
2. What entities or individuals will be eligible to request advisory opinions?
  - a. Will the Bureau make all requests for advisory opinions public?
  - b. Will all requests need to be made in writing?
3. How will the Bureau prioritize responding to requests for advisory opinions?
  - a. Will the Bureau respond based on the order in which the requests are made, by the size of the business, or some other metric?
  - b. Will every request receive a response?
4. Please describe how political appointees will be involved at each stage of the advisory opinion process, including the selection of which advisory opinions to respond to, the drafting, review, and approval of the advisory opinion, and any subsequent publication of the opinions.
5. Describe the process by which the Bureau will respond to requests for advisory opinions.
  - a. Will the Bureau investigate to verify the facts and circumstances leading to the request for the opinion? Or will factual statements made in the requests be accepted as accurate?
  - b. What type of analysis will the Bureau use to support the conclusions reached in the opinion? Will career staff be conducting full cost-benefit analyses as to how an advisory opinion would impact consumers and the industry as a whole?
  - c. Will the opinions be drafted to apply exclusively to the particular entity that requests them? Or will they be binding on all industry participants to which the issue applies?
  - d. For how long will the advisory opinions be binding?
  - e. How will the advisory opinion process interact with current and future rulemakings?
  - f. Will all advisory opinions be issued in writing? Will all the opinions be made public?

Sincerely,



Elizabeth Warren  
United States Senator



Sherrod Brown  
United States Senator